DOES LIBERALISM NEED NATURAL RIGHTS?

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1.

A conspicuous aspect of mainline "liberal" political theory is anti-perfectionism. Although liberal theorists like Ronald Dworkin, Bruce Ackerman, and John Rawls have articulated different versions of anti-perfectionism, Joseph Raz has given the clearest summary of what the principle entails:

> Excluding conceptions of the good from politics means, at its simplest and most comprehensive, that the fact that some conception of the good is true or valid or sound or reasonable, etc., should never serve as a reason for any political action. Nor should the fact that a conception of the good is false, invalid, unsound, unreasonable, etc., be allowed to be a reason for a political action. Notice that the exclusion is of the valid as well as of the invalid. Again, there is no need for a principle instructing the government or anyone else to base their actions on valid conceptions of the good and to disregard invalid ones. It is the exclusion of both valid and invalid, the prescription that political action should be value-blind, which gives the principle its distinctive flavour. It makes it a principle of restraint.[1]

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Raz notes that "when anti-perfectionist principles are used to provide the foundation of a political theory they can be regarded as attempts to capture the core sense of the liberal ethos."[2]

The question for liberals is whether such a severe principle of restraint is needed either (i) to explain the grounds of limited government, or (ii) to make sense of the "core sense of the liberal ethos." Raz thinks not. Sound principles of limited government, the ideal of individual autonomy, and morally pluralistic political culture, he argues, are compatible with perfectionism in political and legal theory.[3] Other liberal theorists, including William Galston and Charles Taylor, have also argued that anti-perfectionism is unnecessary to a defense of the liberal polity.[4]

In *Liberty and Nature*,[5] Douglas Rasmussen and Douglas Den Uyl stake their own claim in this disputed issue. They argue that a teleological conception of the human good is compatible with, and indeed required by, "liberal" and "libertarian" understandings of political institutions. "Thick" theories of the human good, they conclude, do not necessarily entail "thick" theories of the political common good (*LN*, 224). Despite the almost phobic antipathy of mainline liberal theorists to perfectionism in matters legal and political, Rasmussen and Den Uyl set out to demonstrate that individual liberty, natural rights, and limited government are defensible in terms of a perfectionist analysis of the human good. The authors' effort to provide an ontologically grounded account of the human good, and their adaptation of Aristotelian principles to this end, represent a fresh and potentially useful approach to the problem of articulating a perfectionist liberalism.

Of particular note is their effort throughout *Liberty and Nature* to tame the rhetoric of "autonomy." For Rasmussen and Den Uyl, the ideal of autonomy is to be wrested from the self-creation thesis of existentialists, as well as from the notion that free choice is valuable even while prescinding from any understanding of what is being perfected in and through choices. Their effort to align autonomy with the Aristotelian conception of eudaimonia, while at the same time retaining the distinctively modern notion that individuals have a "right" to autonomy, is noteworthy. Joseph Raz, for instance, has argued that autonomy is the architectonic ideal of a liberal polity, but he denies that individuals have a right to autonomy.[6]

There is no way here to do justice to the detail and complexity of the arguments in *Liberty and Nature*. The careful reader must attend to the global thesis of the book concerning an Aristotelian defense of individual rights and of limited government, as well as to the many strands of argumentation which are mounted in defense of the overall thesis. In some places, one is arrested by the premise of an argument. For example, I remain to be convinced that "[t]here is no higher moral purpose, no other end to be served than the well-being, the flourishing, of the individual human being" (*LN*, 72). In other places, one might question the conclusion

2.

Let us begin with some of the key premises of the argument. Rasmussen and Den Uyl hold that self-directive liberty is a necessary condition of the perfections of a person qua agent. In this sense, liberty can be said to be a basic and inherent good. One who conceives the good, but who has no liberty to deliberate and choose, is someone who, for all intents and purposes, is not an agent. Moreover, within the Aristotelian tradition, we can say that the agent is under an obligation to perfect himself. All action is conceived and pursued under the *ratio boni* of human flourishing. Because liberty is a necessary condition of the good of action, a government that subverts liberty subverts the moral good by making it impossible to accomplish. Insofar as the goods achieved through agency are rendered impossible (or very difficult) to accomplish, government violates not only an ontological perfection (the natural capacity to act freely) but also a moral perfection (brought about by the individual's obligation to perfect himself through self-directive agency).

Rasmussen and Den Uyl then go on to explain the nature of negative rights:

> [T]he negative rights for which we will argue are basic in the sense that they are a type of *moral principle* which is used to create a legal system which protects the social and political conditions necessary for the possibility of human flourishing. Negative rights seek to protect the self-directedness or autonomy of every individual human being in the political community and thereby protect the condition under which human flourishing can occur. (*LN*, 82; emphasis added)

At least some negative rights are natural rights, existing prior to convention or agreement. Natural rights are justified by reference to a human being's natural end, rather than those ends determined by positive law.[9] They are also said to be "absolute," in the sense that they override or "trump" all other moral considerations when a polity decides what matters of morality shall be matters of legality (*LN*, 83-85). The primary political good is liberty, as defined by the natural right(s) to the condition(s) of self-directed agency.

My chief question is whether the natural right of liberty has been described under sufficient ontological and moral specifications to be of any use to political theory. What kind of "moral principle"—to use Rasmussen and Den Uyl's term—is the right to liberty? Once again, we can agree that liberty is a natural *facultas*, an ontological perfection as it were. Yet, it is an ontological perfection whether self-directed choices prove telic or dystelic, and whether they are morally good or wicked. From the fact that a person has the capacity for agency, nothing specific can be drawn for showing the moral ground of an individual's duty. Rasmussen and Den Uyl contend that there is no higher moral purpose than the flourishing of an individual. "Nothing else is needed," they say, "to morally justify the existence and actions of the individual human being" (*LN*, p. 72). But to hold that human flourishing is an "ultimate moral purpose," and to observe that liberty is "central to the process" and "important for morality," (*LN*, 73) are not sufficient for making any determinate judgment that an act is morally good or bad. That free, self-directive acts make human flourishing "a moral good," (*LN*, 93) or that such acts constitute a "right activity in itself," (*LN*, 94, 115) only suggest that free acts are to be placed in the species of acts having moral significance.[10] Morality does not require us to justify the fact that humans act freely, but rather whether such and such an act has moral rectitude. Until the specifically moral issue is joined, we have not given a complete ontological picture of agency, much less have we reached specifically moral norms. A prospective agent who grasps that a particular good or end is basic to his perfection, but who has given no consideration to the rectitude of the means to be chosen, is not yet engaged in practical reasoning.

The same standard must apply to a government. Can a government have moral duties simply on the basis of knowing that freedom is a necessary condition of human action? I think not. Of course, it can be admitted that from the ontological fact that a person has the *facultas* of liberty we can derive the duty of government to treat such persons as agents. We can justifiably hold that it would be morally wrong for government to treat self-directive entities as mere objects. That is to say, entities with the *facultas* of liberty ought to be treated as players in the moral ballgame; they are persons to whom reasons and justifications are due when political power is distributed and employed. But, as Raz has argued, this duty to respect persons only suggests that persons ought to be treated according to sound moral considerations:

> Is one treating another with respect if one treats him in accordance with sound moral principles, or does respect for persons require ignoring morality (or parts of it) in our relations with others? There can be little doubt that stated in this way the question admits of only one answer.[11]

This, however, is at best a very general right. Without additional premises and arguments, it will not suffice to show the particular nature of the "sound" moral considerations, much less to justify the notion of a "trump" against government.[12]

I fail to see how any individual or government is duty-bound to respect the trumping right of another person simply on the basis of the general truth that liberty is a pervasive condition of human flourishing, along with its corollary that self-directive entities should be treated as persons rather than as things. We also need to know (among other things) whether the action protected by the purported right is morally good. Otherwise, we would find ourselves morally bound to respect actions that are not only teleologically valueless, but morally wicked. This "respect" is good neither for the rights claimant nor for those he would bind by his claim. Government would become as unlimited as the rights themselves. Even on a libertarian view of government, the state must adjudicate and enforce the juridical order of rights. How can the juridical office of the state weigh conflicts of rights among citizens when the rights are drawn so generously, not to mention when parties to a suit each fancy their rights to be "trumps"?

In our polity, citizens deliberate in democratic assemblies, legislating and conducting public business on issues they deem important to their lives and well-being. Why, then, should citizens respect a rights claim that purports to "trump" their common business? If they prescind from the question of whether there is any positive law commanding them to recognize a putative "trump," the citizens justifiably will want to know (i) whether the action covered by the right is truly perfective of human beings, (ii) whether it has moral rectitude, and (iii) whether it is sufficiently important to warrant a "trump" on their common business. Surely an "Aristotelian" defense of liberalism would not overlook the force of these questions.

As a token of the problem of rights abstractly formulated, consider the recent judicial dictum in *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[13] Even if this grandiose notion of liberty is accepted as containing a roughly hewn truth, it tells us nothing whatsoever about the moral ground of a government's duty. All positive laws take some free choices out of the category of being merely optional. Do all positive laws implicate the government in personicide against human agents? To say that self-directive and self-constitutive liberty is an irreducibly important feature of a very generally conceived obligation of individuals to pursue human perfection is not an adequate answer. It is not adequate because it leaves government without a clue as to how it must use its powers responsibly.[14]

Rasmussen and Den Uyl too quickly brush off Henry Veatch's concern about whether one has a right to "deviate from the path of virtue" (*LN*, 109). At stake here is the important question of whether anyone can have a natural right to do moral wrong. Rasmussen and Den Uyl insist that we must distinguish between the normative principles pertaining to personal conduct and the meta-normative principles of rights (*LN*, 113). The authors contend that Veatch fails to see that "a right has broader extension than doing (or being in pursuit of) what is right" (*LN*, 109). Whatever good sense there is to this distinction, I fail to see how it is relevant to the issue of whether one has a right to do moral wrong. However we divide the public and private aspects of morality, and however we distinguish between actions and conditions of actions, the upshot of a rights claim is that someone else is morally bound to do or to refrain from doing something with respect to the claimant. The question remains, what are the grounds of the duty? While I might misunderstand Rasmussen and Den Uyl's argument, I do not see that they have provided enough information in either the ontological or the moral orders to guide morally responsible action on the part of government.

Of course, it can be granted that someone might enjoy a right to do wrong *per accidens*. For example, as Rasmussen and Den Uyl note, it would be impossible to assess whether each and every exercise of a right to something either generically good or indifferent turns out to be truly good (*LN*, 113). If a multitude of people are to be governed, the laws will need to achieve an adequate level of generality. Neither statutes nor statements of rights can ensure that every protected act is good. We recognize rights to probate a will, or to get married, without supposing that these liberties will always be used to the end of the agent's ontological or moral perfection. Yet, abstractly considered, there is no absolute reason why access to these conditions of liberty forbid government from considering the moral rectitude of such acts, and then restricting or regulating them accordingly. Just because it is neither prudent nor feasible for government to supervise every act that falls under the rubric of a generically good action-type does not mean that government forfeits authority to restrict or regulate some acts falling under said description. In short, the general character of laws need not imply that anyone has a specific right to do wrong.

It can also be the case that one has a rights claim as the implication of a governmental duty, where the duty is grounded independent of the moral merit or demerit of the individual's action. For example, looters might claim a right against government not to have excessive force used against them. This does not imply that they have a right to loot.[15] Moreover, it might be the case that for sound prudential reasons, we do not delegate to government certain powers; in which case, one would have a right that government not act *ultra vires* (beyond its delegated powers). If, for example, the government was not delegated a power to prosecute its own officers for treason, the traitors would not have a right to commit treason, but rather a right not to be prosecuted. Should the government be delegated the power to prosecute the traitors, no natural right would be violated. In short, there can be many ways of speaking of rights against government without supposing that they are species of a natural right to liberty, much less a right to do moral wrong.

Arguments showing that if a government systematically roots out freedom, it subverts the conditions of teleologically valuable and morally good choices, do not avail to the end of showing why an action of government disrespects human autonomy in some particular field of choice. We can agree that government would disrespect human autonomy if it so drastically curtailed freedom that the ontological and moral perfections of human action were made either impossible or very difficult to achieve. This kind of argument might be necessary in the case of a totalitarian regime that perpetrates crimes against humanity.

But that is not the question of liberty and nature in a liberal regime. Our question concerns the moral authority of government to discourage or prohibit some choices, and to encourage others. The argument proceeding from an alleged natural right to liberty, where the right is conceived as a negative right to the conditions which persist through any and all choices, regardless of further ontological and moral specifications, is an argument that will necessarily remain too clumsy to handle the question before us. It contains no safeguards against the right to do wrong. And it provides no useful guidance to the government.

Would Rasmussen and Den Uyl agree with Raz, who argues: "Since autonomy is valuable only if it is directed at the good it supplies no reason to provide, nor any reason to protect, worthless let alone bad options"?[16] If so, then they should abandon the notion of a natural right to autonomy, and speak rather of the duties of government to respect the very specific conditions under which valuable and good choices are made by individuals for the purpose of achieving autonomy. There is plenty enough for agents to do without having to claim rights to bad choices. I don't see how this can be gainsaid without supposing that the good of liberty requires being able to choose anything one pleases.

3.

It is characteristic of liberal polities to defer as much as possible to individual liberty, even when such liberty is misused. This, I submit, can be explained and justified in the light of political prudence working within the context of historical experience. We might argue that the specifically moral values of human flourishing are best achieved through constitutionally limited, decentralized government. The strongest case for liberal order, especially a case informed by an Aristotelian conception of eudaimonia, is that individuals are better situated than the state for making and executing choices about human perfection.

This case does not require the dubious notion that "there is no higher value than the individual human being," nor the vulnerable argument that there exists a natural right to liberty sufficient for distinguishing the rightful and wrongful spheres of governmental power. In summary, there is a case to be made for "thick" accounts of the human good and "thin" conceptions of governmental authority. But the idea of a natural right to liberty will prove to be a very clumsy instrument for dealing with the moral and institutional issues of limited government.

1. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 136.
2. *Ibid.*, p. 108.
3. For an overview of Raz's criticism of anti-perfectionism, see Robert P. George, "The Unorthodox Liberalism of Joseph Raz," *Review of Politics*, Fall 1991, pp. 652-71.
4. William A. Galston, *Justice and the Human Good* (Chicago: University of Chicago Press, 1980); Charles Taylor, *Sources of the Self* (Cambridge: Harvard University Press, 1989).
5. Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle: Open Court, 1991), hereafter *LN*; page references will be given parenthetically in the text.
6. Raz, *The Morality of Freedom* , p. 247: "A right to autonomy can be had only if the interest of the right-holder justifies holding members of the society at large to be duty-bound to him to provide him with the social environment necessary to give him a chance to have an autonomous life. Assuming that the interest of one person cannot justify holding so many to be subject to potentially burdensome duties, regarding such fundamental aspects of their lives, it follows that there is no right to personal autonomy."
7. *LN*, p. 85. The Dworkinian idea of rights as "trumps" had its proximate home in Constitutional interpretation, but then gradually seeped into moral and political theory generally. While there might be some point to speaking of certain legal rights as "trumps," I do not see how the idea is necessarily entailed by the logic of moral rights; except, perhaps, in conjunction with the premise of individualism: viz., that the well-being of the individual(s) is the only intrinsically valuable state of affairs. However, the individualist doctrine needs to be argued, and I do not find serious argument for it in Liberty and Nature. It can be noted that one of the earliest textual sources for the metaphor of rights as "trumps" is Hobbes's Leviathan, Part 1, ch. 5. There, Hobbes invokes the metaphor in order to ridicule the notion of justiciable natural rights.
8. On the late-medieval origin of *iura* (rights) as so many *dominia* (rights of sovereignty or leadership) rooted in the natural *facultas* (power) of liberty, see Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979), p. 27.
9. Whether or not natural law (or reason in accord with nature) requires us to believe that there is "no higher value than the individual human being" (*ibid.*, p. 77) is disputable. An argument that aims to show the incompetence of the political state still permits the libertarian to acknowledge the fact that individuals pursue a myriad of social ends having intrinsic value. Indeed, a libertarian can argue that there are superordinate social values which are crucial to human flourishing, and still consistently argue that the political state ought to be limited in its supervision of these values. The fact that an individual, qua citizen, claims a right against the state meddling in this area does not entail, nor is it entailed by, the strong ontological premise that there is a natural-right credential for individualism. Hence, the individualist premise is not necessary to the libertarian case for limited, even drastically limited, government.
10. In the scholastic parlance, we are speaking of the *actus humanus* rather than the *actus hominis*.
11. Raz, *The Morality of Freedom*, p. 157.
12. Raz is correct, then, when he goes on to note: "Being a very abstract right, nothing very concrete about how people should be treated follows from it without additional premises.

This explains why it is invoked not as a claim for any specific benefit, but as an assertion of status. To say 'I have a right to have my interest taken into account' is like saying 'I too am a person.' This may perhaps explain its deontological flavour" (*ibid*., p. 190).
13. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2807 (1992).
14. Of course, the directives ordinarily come from the positive law. But this is not the level at which Rasmussen and Den Uyl treat the problem.
15. A point made by William A. Galston in "On the Alleged Right to Do Wrong: A Response to Waldron," *Ethics*, vol. 93 (January 1983), pp. 320-24.
16. Raz, *The Morality of Freedom*, p. 411.