

# CHAPTER

## 3

# Moral Constraints and the State

### THE MINIMAL STATE AND THE ULTRAMINIMAL STATE

THE night-watchman state of classical liberal theory, limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts, and so on, appears to be redistributive.<sup>1</sup> We can imagine at least one social arrangement intermediate between the scheme of private protective associations and the night-watchman state. Since the night-watchman state is often called a minimal state, we shall call this other arrangement the *ultraminimal state*. An ultraminimal state maintains a monopoly over all use of force except that necessary in immediate self-defense, and so excludes private (or agency) retaliation for wrong and exaction of compensation; but it provides protection and enforcement services *only* to those who purchase its protection and enforcement policies. People who don't buy a protection contract from the monopoly don't get protected. The minimal (night-watchman) state is equivalent to the ultraminimal state conjoined with a (clearly redistributive) Friedmanesque voucher

plan, financed from tax revenues.\* Under this plan all people, or some (for example, those in need), are given tax-funded vouchers that can be used only for their purchase of a protection policy from the ultraminimal state.

Since the night-watchman state appears redistributive to the extent that it compels some people to pay for the protection of others, its proponents must explain why this redistributive function of the state is unique. If some redistribution is legitimate in order to protect everyone, why is redistribution not legitimate for other attractive and desirable purposes as well? What rationale specifically selects protective services as the sole subject of legitimate redistributive activities? A rationale, once found, may show that this provision of protective services is *not* redistributive. More precisely, the term "redistributive" applies to types of *reasons* for an arrangement, rather than to an arrangement itself. We might elliptically call an arrangement "redistributive" if its major (only possible) supporting reasons are themselves redistributive. ("Paternalistic" functions similarly.) Finding compelling nonredistributive reasons would cause us to drop this label. Whether we say an institution that takes money from some and gives it to others is redistributive will depend upon *why* we think it does so. Returning stolen money or compensating for violations of rights are *not* redistributive reasons. I have spoken until now of the night-watchman state's *appearing* to be redistributive, to leave open the possibility that nonredistributive types of reasons might be found to justify the provision of protective services for some by others (I explore some such reasons in Chapters 4 and 5 of Part I.)

A proponent of the ultraminimal state may seem to occupy an inconsistent position, even though he avoids the question of what makes protection uniquely suitable for redistributive provision. Greatly concerned to protect rights against violation, he makes this the sole legitimate function of the state; and he protests that all other functions are illegitimate because they themselves involve the violation of rights. Since he accords paramount place to the

\* Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), chap. 6. Friedman's school vouchers, of course, allow a choice about who is to supply the product, and so differ from the protection vouchers imagined here.

protection and nonviolation of rights, how can he support the ultraminimal state, which would seem to leave some persons' rights unprotected or illprotected? How can he support this *in the name of* the nonviolation of rights?

#### MORAL CONSTRAINTS AND MORAL GOALS

This question assumes that a moral concern can function only as a moral *goal*, as an end state for some activities to achieve as their result. It may, indeed, seem to be a necessary truth that "right," "ought," "should," and so on, are to be explained in terms of what is, or is intended to be, productive of the greatest good, with all goals built into the good.<sup>2</sup> Thus it is often thought that what is wrong with utilitarianism (which *is* of this form) is its too narrow conception of good. Utilitarianism doesn't, it is said, properly take rights and their nonviolation into account; it instead leaves them a derivative status. Many of the counterexample cases to utilitarianism fit under this objection, for example, punishing an innocent man to save a neighborhood from a vengeful rampage. But a theory may include in a primary way the nonviolation of rights, yet include it in the wrong place and the wrong manner. For suppose some condition about minimizing the total (weighted) amount of violations of rights is built into the desirable end state to be achieved. We then would have something like a "utilitarianism of rights"; violations of rights (to be *minimized*) merely would replace the total happiness as the relevant end state in the utilitarian structure. (Note that we do not hold the nonviolation of our rights as our sole greatest good or even rank it first lexicographically to exclude trade-offs, if there is some desirable society we would choose to inhabit even though in it some rights of ours sometimes are violated, rather than move to a desert island where we could survive alone.) This still would require us to violate someone's rights when doing so minimizes the total (weighted) amount of the violation of rights in the society. For example, violating someone's rights might deflect others from *their* intended action of gravely violating rights, or might remove their motive for doing so, or might divert their attention, and so on. A

mob rampaging through a part of town killing and burning *will* violate the rights of those living there. Therefore, someone might try to justify his punishing another *he* knows to be innocent of a crime that enraged a mob, on the grounds that punishing this innocent person would help to avoid even greater violations of rights by others, and so would lead to a minimum weighted score for rights violations in the society.

In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don't violate constraints *C*. The rights of others determine the constraints upon your actions. (A *goal-directed* view with constraints added would be: among those acts available to you that don't violate constraints *C*, act so as to maximize goal *G*. Here, the rights of others would constrain your goal-directed behavior. I do not mean to imply that the correct moral view includes mandatory goals that must be pursued, even within the constraints.) This view differs from one that tries to build the side constraints *C* into the goal *G*. The side-constraint view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society.\*

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\* Unfortunately, too few models of the structure of moral views have been specified heretofore, though there are surely other interesting structures. Hence an argument for a side-constraint structure that consists largely in arguing against an end-state maximization structure is inconclusive, for these alternatives are not exhaustive. (On page 46 we describe a view which fits neither structure happily.) An array of structures must be precisely formulated and investigated; perhaps some novel structure then will seem most appropriate.

The issue of whether a side-constraint view can be put in the form of the goal-without-side-constraint view is a tricky one. One might think, for example, that each person could distinguish in his goal between *his* violating rights and someone else's doing it. Give the former infinite (negative) weight in his goal, and no amount of stopping others from violating rights can outweigh his violating someone's rights. In addition to a component of a goal receiving infinite weight, indexical expressions also appear, for example, "*my* doing something." A careful statement delimiting "constraint views" would exclude these gimmicky ways of transforming side constraints into the form of an end-state view as sufficient to constitute a view as end state. Mathematical methods of transforming a constrained minimization problem into a sequence of unconstrained minimizations of an auxiliary function are presented in Anthony Fiacco and Garth McCormick, *Nonlinear Programming: Sequential Unconstrained Minimi-*

The claim that the proponent of the ultraminimal state is inconsistent, we now can see, assumes that he is a "utilitarian of rights." It assumes that his goal is, for example, to minimize the weighted amount of the violation of rights in the society, and that he should pursue this goal even through means that themselves violate people's rights. Instead, he may place the nonviolation of rights as a constraint upon action, rather than (or in addition to) building it into the end state to be realized. The position held by this proponent of the ultraminimal state will be a consistent one if his conception of rights holds that your being *forced* to contribute to another's welfare violates your rights, whereas someone else's not providing you with things you need greatly, including things essential to the protection of your rights, does not *itself* violate your rights, even though it avoids making it more difficult for someone else to violate them. (That conception will be consistent provided it does not construe the monopoly element of the ultraminimal state as itself a violation of rights.) That it is a consistent position does not, of course, show that it is an acceptable one.

#### WHY SIDE CONSTRAINTS?

Isn't it *irrational* to accept a side constraint *C*, rather than a view that directs minimizing the violations of *C*? (The latter view treats *C* as a condition rather than a constraint.) If nonviolation of *C* is so important, shouldn't that be the goal? How can a concern for the nonviolation of *C* lead to the refusal to violate *C* even when this would prevent other more extensive violations of *C*? What is the rationale for placing the nonviolation of rights as a side constraint upon action instead of including it solely as a goal of one's actions?

Side constraints upon action reflect the underlying Kantian

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*zation Techniques* (New York: Wiley, 1968). The book is interesting both for its methods and for their limitations in illuminating our area of concern; note the way in which the penalty functions include the constraints, the variation in weights of penalty functions (sec. 7.1), and so on.

The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.

principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable. More should be said to illuminate this talk of ends and means. Consider a prime example of a means, a tool. There is no side constraint on how we may use a tool, other than the moral constraints on how we may use it upon others. There are procedures to be followed to preserve it for future use ("don't leave it out in the rain"), and there are more and less efficient ways of using it. But there is no limit on what we may do to it to best achieve our goals. Now imagine that there was an overrideable constraint *C* on some tool's use. For example, the tool might have been lent to you only on the condition that *C* not be violated unless the gain from doing so was above a certain specified amount, or unless it was necessary to achieve a certain specified goal. Here the object is not *completely* your tool, for use according to your wish or whim. But it is a tool nevertheless, even with regard to the overrideable constraint. If we add constraints on its use that may not be overridden, then the object may not be used as a tool *in those ways*. *In those respects*, it is not a tool at all. Can one add enough constraints so that an object cannot be used as a tool at all, in *any* respect?

Can behavior toward a person be constrained so that he is not to be used for any end except as he chooses? This is an impossibly stringent condition if it requires everyone who provides us with a good to approve positively of every use to which we wish to put it. Even the requirement that he merely should not object to any use we plan would seriously curtail bilateral exchange, not to mention sequences of such exchanges. It is sufficient that the other party stands to gain enough from the exchange so that he is willing to go through with it, even though he objects to one or more of the uses to which you shall put the good. Under such conditions, the other party is not being used solely as a means, in that respect. Another party, however, who would not choose to interact with you if he knew of the uses to which you *intend* to put his actions or good, *is* being used as a means, even if he receives enough to choose (in his ignorance) to interact with you. ("All along, you were just *using* me" can be said by someone who chose to interact only because he was ignorant of another's goals and of the uses to which he himself would be put.) Is it morally incumbent upon

someone to reveal his intended uses of an interaction if he has good reason to believe the other would refuse to interact if he knew? Is he *using* the other person, if he does not reveal this? And what of the cases where the other does not choose to be of use at all? In getting pleasure from seeing an attractive person go by, does one use the other solely as a means? <sup>3</sup> Does someone so use an object of sexual fantasies? These and related questions raise very interesting issues for moral philosophy; but not, I think, for political philosophy.

Political philosophy is concerned only with *certain* ways that persons may not use others; primarily, physically aggressing against them. A specific side constraint upon action toward others expresses the fact that others may not be used in the specific ways the side constraint excludes. Side constraints express the inviolability of others, in the ways they specify. These modes of inviolability are expressed by the following injunction: "Don't use people in specified ways." An end-state view, on the other hand, would express the view that people are ends and not merely means (if it chooses to express this view at all), by a different injunction: "Minimize the use in specified ways of persons as means." Following this precept itself may involve using someone as a means in one of the ways specified. Had Kant held this view, he would have given the second formula of the categorical imperative as, "So act as to minimize the use of humanity simply as a means," rather than the one he actually used: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end." <sup>4</sup>

Side constraints express the inviolability of other persons. But why may not one violate persons for the greater social good? Individually, we each sometimes choose to undergo some pain or sacrifice for a greater benefit or to avoid a greater harm: we go to the dentist to avoid worse suffering later; we do some unpleasant work for its results; some persons diet to improve their health or looks; some save money to support themselves when they are older. In each case, some cost is borne for the sake of the greater overall good. Why not, *similarly*, hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no *social entity* with a good that

undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person,<sup>5</sup> that his is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him—least of all a state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be *neutral* between its citizens.

#### LIBERTARIAN CONSTRAINTS

The moral side constraints upon what we may do, I claim, reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall *social* good. There is no justified sacrifice of some of us for others. This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints, but it also, I believe, leads to a libertarian side constraint that prohibits aggression against another.

The stronger the force of an end-state maximizing view, the more powerful must be the root idea capable of resisting it that underlies the existence of moral side constraints. Hence the more seriously must be taken the existence of distinct individuals who are not resources for others. An underlying notion sufficiently powerful to support moral side constraints against the powerful intuitive force of the end-state maximizing view will suffice to derive a libertarian constraint on aggression against another. Anyone who rejects *that particular* side constraint has three alternatives: (1) he must reject *all* side constraints; (2) he must produce a different explanation of why there are moral side constraints rather than simply a goal-directed maximizing structure, an explanation