

## Negative and Positive Rights in Gewirth's *Reason and Morality*

Jan Narveson

IN THE MINDS OF MANY thinkers about social principles, the distinction between positive and negative rights looms large. This distinction has been brought to our attention only fairly recently, and still tends to be assimilated to or confused with some others, such as the distinction between action rights and welfare rights, or a supposed distinction of 'freedom from' and 'freedom to.' We shall therefore begin by attempting to clarify the distinction itself, before proceeding to the question of whether it is rational to attach very much weight to it. To think that we should is, really, to think that negative rights have a dominant role in social philosophy, and thus our question is whether there is any good reason for thinking that it should have such a role. In the consideration of this question, we can usefully consider major aspects of Professor Gewirth's theory, which is more than ordinarily instructive on these matters: for Gewirth attempts to build, starting with very slim foundations which one might well think will get us little if anything besides negative rights, the entire edifice of the contemporary liberal welfare state with its proclaimed rights to equality of opportunity, including Affirmative Action, and to substantial levels of income protection, education, health care, and so forth. Since, it seems to me, we must applaud the effort to build our moral theory from meager—and thus more defensible—foundations, it is clearly a matter of enormous importance whether that enterprise is successful, and whether any comparable effort could be. This last is a large matter, and I have no intention of attempting to settle it here. But some close scrutiny of Gewirth's reasoning, and of the basics of the issue itself, would seem a good way to start, and that is what I shall undertake in this short essay.

### 1. THE POSITIVE/NEGATIVE DISTINCTION

All rights are rights of some person or persons, the rightholder(s), and are rights against some person or persons, those on whom the duty or

Jan Narveson is Professor of Philosophy, University of Waterloo, Ontario.

obligation engendered by the right in question falls. Call the rightholder A, the obligated persons B, and let X range over anything one can have a right to. We can then make out the distinction we are considering as follows. Where X signifies an action,

- (1) To say that A has a *negative* right to do X is to say that B has the duty not to prevent, or interfere with, A's doing X if and as A pleases;
- (2) To say that A has a *positive* right to do X is to say that B has the duty to supply A with (some degree—to be specified—of) the means which enable A to do X if and as (also to be specified) A pleases.

Where X is a condition or object,

- (1) To say that A has the negative right to X is to say that B may not deprive A of X, or interfere with A's use of X as A pleases (within the limits imposed by others' rights);
- (2) To say that A has the positive right to X is to say that B must supply A with (some degree—to be specified—of) X, and/or with the means to use X if and as (also to be specified) A pleases.

We can, I think, generalize over the two cases by talking of A's right *that* p; then a negative right that p, is a right that B not bring it about that not-p, whereas a positive right is a right that B assist (to some degree, to be specified) in bringing it about that p, if A cannot bring this about by unaided action or via the purely voluntary help of others. In brief: the distinction between negative and positive rights is the distinction between the right to *nonhindrance* and the right to *help*.

It will at once be evident that there is ample prospect of incompatibility between negative and positive rights. Indeed, if we assert full negative rights, then on the face of it we can assert no positive rights at all. For if someone has a positive right against B, then this means that B is required, whether he wants to or not, to perform certain actions that he might very well not wish to do: save someone from drowning when B prefers to lounge on the beach, or give \$2,000 to the municipal government to spend on the local school system when B would prefer to spend it on a new piece of hi-fi equipment or on a nonpublic school of B's choice, for instance. As Hobbes observed, obligation and liberty with respect to the same act are inconsistent. And, of course, positive rights may give rise to conflicting duties: my duty to help the poor can conflict with my duty to heal the sick; for that matter, my duty to help poor person C may conflict with my duty to help person D. Any theory of positive rights needs to supply us with procedures for sorting out such conflicts, if it is to be consistent.

What about a pure theory of negative rights? Could it too give rise to conflicts of the same kind? Not obviously. For in general, at least, negative rights impose duties which can be fulfilled by doing nothing whatever: thus in fulfilling my duty not to murder A, B can at the very same time discharge an obligation not to steal from C, lie to D, assault E, or extort from F.<sup>1</sup> A "pure theory of negative rights" is not, of course, a pure theory of unlimited liberty. All rights impose duties, and all duties are restrictions of liberty: if A has negative rights against B, there are acts which B may not perform. If we wish to assert as a generalization that people may do as they please—a "pure theory of liberty"—it will have to be hedged in some such way as with the clause "(within the limits of others' rights)." And of course a similar clause could be inserted after any general statement of positive rights as well; but there remains the important difference that with respect to an agent, A, the duties imposed by pure negative rights of others will not be inconsistent with each other, whereas the duties imposed by positive rights of others are quite likely to be so in practice, and thus to require sifting, balancing, and adjusting.

## 2. SOME LEVELS OF POSITIVE RIGHTS

Classical liberalism is generally thought of as attempting to justify the state on the basis of negative rights: the state is to *protect* these rights. Here is the first level of positive rights, and the point at which it is perhaps most likely that negative and positive rights will be confused. The positive right in question is:

(P1) The right that others assist one in defending one's negative rights against threatened violation.

Of course if people had only negative duties, they would not *thereby* have the positive duty to go out and help A ward off aggressors. That

one. Thus Mill, notoriously, argues that "a person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury."<sup>2</sup> Likewise Gewirth: "An event . . . may be caused by a person's inaction . . . as well as by his positive action. A train wreck may be caused by a signalman's omitting to move a switch. . . . If the signalman's pulling the switch is expected and required in the normal operation of the railroad line . . . then his failure to pull it is the cause of the ensuing wreck" (222).

But with all such arguments there is a fatal flaw. The signalman has an antecedent, professional (in this case) duty to pull switches at crucial times. His inaction is a cause because there is an antecedent basis for the positive duty, and thus for positive expectations for action on the part of affected persons. But whether there is such a duty is precisely what is at issue when the question is whether there is a general duty of aid. To argue that our negative duty to refrain from harming entails a positive duty to help when needed on the ground that not helping is in effect a kind of harming is to beg the question.<sup>3</sup>

(P3) The right to be supplied with the minimal conditions of agency or of "normal" agency.

Here again there is a tendency to reason from premises having at least the spirit of negative rights to them, to conclusions involving strong positive rights. Gewirth is, again, an example. "Many persons may lack adequate food, housing, necessary medical care, and other basic goods. . . . Insofar as persons who labor under such economic and other handicaps and privations cannot remedy these lacks through their own efforts and are not provided with the means of remedy by others, they do not have effective rights to well-being." In reply to those who would hold that "voluntary exchanges and autonomous effort provide sufficient justifications for all distributions of wealth," Gewirth says that their view "ignores the extent to which unfavorable familial and social backgrounds

one's own conditions. I suspect that they are maintaining, simply, that people just do not have the right to have these lacks made good by others. Why should Gewirth accuse them of "ignoring" these factors? I suspect that it is because of the strong—and in many cases irresistible—temptation to read into the initially granted right to do what one pleases the right to be provided with the conditions which enable one to do as one pleases. Or, at least, to do much of anything at all. For as Gewirth says, the rational agent is one with purposes he wants to fulfill; and if one is on the verge of starving to death, one isn't going to be able to do much of anything in the way of fulfilling them. True. But what follows? Life is tough, especially for the unfortunate. Nevertheless, the right not to have others interfering in one's pursuit of those purposes simply does not entail a right that others supply you with what you need to be in the way of fulfilling them.

The point here is that the positive/negative distinction is not equivalent to the action/welfare distinction. We can define negative rights to act, and also positive rights to act, and these are not the same: the right not to be tripped up as one runs and the right to be equipped with super-fantastic artificial limbs are simply not the same right, just as the right not to have one's lungs punctured by assassins is a different right from the right to an iron lung.<sup>4</sup>

It may be noted that in the case of all three of these types of rights, there is a crucial question of "how much"? How much police protection? How greatly must one be in need, for how much assistance? And what is the "normal" level of agential competence to which one is to be entitled? What, for instance, constitutes the equalization of opportunity that is to enable one to be a successful agent in one's society? In principle, a libertarian theory would say that one is not, as such, entitled to any level of any of these things. Instead, one is entitled to whatever level of these things one has been able to attain by the methods of voluntary cooperation with others. Undoubtedly the result in some cases will be that one enjoys little or none of any of them, and that is what exercises liberals and socialists. Gewirth believes, however, that he has answers to these questions—that his basic theory can generate satisfactory answers to them. Moreover, the answers involve a pretty generous helping of positive rights. Let us see.

### 3. GEWIRTH'S DERIVATION OF POSITIVE RIGHTS

Gewirth's program in *Reason and Morality* is to show that morality is rational in a very strong sense: no less than that it would be self-con-

<sup>4</sup> This point is pressed in my "Human Rights: Which, if Any, Are There?," in J. R. Pennock & J. W. Chapman, eds., *Human Rights: NOMOS XXIII* (New York: New York University Press 1981), p. 177.

tradictory for a rational agent to deny its leading principles (presumably there is room for rational disagreement on details): To have any hope of success in such a project, we need to identify initial premises which any agent, just by virtue of being one, must rationally affirm. Then we extract, by purely deductive reasoning, the leading principles of morality from those premises. Now morality reaches, we are supposing, to all rational agents; so in order to get the necessary generality, the initial premises in question must, at bottom, be the same for all. But if the very idea of rational agency carries with it certain evaluative commitments, we would seem to be on the track: if they are evaluative, then we don't have to worry about "is-ought" fallacies, and if they are the same for all, then whatever followed from them would have to be accepted by everyone. All very ingenious, if we can find the right starting points. What are they? Here Gewirth is again ingenious. An active agent is one who has purposes he wishes to pursue. These purposes he must suppose to be good. If so, however, he must likewise regard as good the essential conditions for the realization of those purposes or, more generally, for the realization of whatever purposes he may ever wish to pursue. These turn out to be broadly of two kinds: (1) freedom—"the voluntariness or freedom that is an essential feature of his action, for without this he would not be able to act for any purpose or good at all" (52); and (2) three kinds of goods, stemming from the "generic purposiveness" of the rational agent: namely (a) basic well-being—"those basic aspects of his well-being that are the proximate necessary preconditions of his performance of any and all of his actions," (b) the "nonsubtractive" goods—"that his level of purpose-fulfillment not be lowered by his losing something that seems to him to be good," and (c) the "additive" goods—"that his level of purpose-fulfillment be raised by his gaining something that seems to him to be good" (53-54). Of these three, however, it seems quite clear that (b) and (c) will in fact vary among people, for they seem clearly to be attached to the particular sets of purposes people are pursuing. An agent who changes his purposes will at time  $t_0$  regard the nonlowering or raising of his level of fulfillment of  $E_0$  as good, but at  $t_1$  regard those conditions as evil. Still, at any given time there will, of course, be things in categories (b) and (c) which the agent must then and there regard as good. And as to category (a), we may accept that such things as "life and physical integrity (including such of their means as food, clothing, and shelter)" and possibly also "mental equilibrium and a feeling of confidence as to the general possibility of attaining one's goals" (54) are standing goods. Even here, though, we should be careful to appreciate that there is ample room for variation about specifics—one man's meat, as they say, being another man's poison.

Just where are we, so far? It seems to me that Gewirth has added a very modest amount of detail to the general characterization of a rational

agent as one who has a scheme of ends, varying from one to another, and that he makes his decisions on the basis of what will maximally fulfill that ensemble of ends: in short, the rational agent maximizes his utility. If his characterization is meant to differ from this in the sense of being inconsistent with it, one would like to know why; but I doubt that it is.

Now we get to the controversial part. Gewirth next wants to argue that the rational agent will necessarily claim the *right*, as against his fellows, to freedom and well-being. He will do so because he values those—though Gewirth seems to think that it isn't just because he does so, but because he values them "essentially," as "necessary" goods and not just contingent ones. Why might he think this? No doubt because the claim to these rights will look less plausible if the things insisted upon are variable from one person to another. The importance of this point will come out shortly.

Right-claims are universalizable and entail correlative duties. If A claims a right to X in virtue of being an agent, then A must allow the right to X to all agents. And if A allows that agent B has the right to X, then agent A acknowledges a duty on his part to—well, to what? The trouble is, it is going to be either a negative or a positive right: either, minimally, to refrain from depriving B of X, if B already has X, or a duty to supply B with X if B doesn't already have it. But which is it to be, and how do we decide?

I have previously argued<sup>5</sup> that the major fallacy in Gewirth's derivation of rights is his failure to appreciate that from the standpoint of a rational agent, right-claims are not something to be made simply because the agent would very much like to have those rights. They are, rather, the objects of cost-benefit analysis. A would, of course, claim the fullest possible panoply of rights—rights to absolutely everything he could ever want, and positive rights at that—if such claims entailed no costs to A. But of course they do: since they are universalizable and entail duties, and duties are, by their very nature, requirements to do what one may be disinclined to do, or refrain from what one may be strongly inclined to do, and since what *makes* the agent rational *is* his range of wants, he obviously cannot cavalierly make just any old claims that it would be nice to enjoy the benefits of. He must instead weigh the cost, the duties to himself entailed by any proposed right, against the benefit, which is the advantage to himself from others' respecting his rights. And here the questions begin. It is by no means obvious that it will be a good deal on my part to have you be disposed to give me an X if I should

<sup>5</sup> "Gewirth's Reason and Morality: A Study in the Hazards of Universalizability in Ethics," *Dialogue*, December 1980, 651-74.

happen to need one, if the price is that I should in turn be disposed to give you an X if you should happen to need one. It is not even absolutely obvious that the benefit to me of your being disposed to refrain from depriving me of my X if I do have one outweighs the cost to me of my being disposed to refrain from depriving you of your X if I don't have one and need it. But a rational agent—rational in Gewirth's sense, not just some arbitrary idea of rationality that he might be free to reject—clearly will not claim any rights whose costs to him outweigh the benefits (more precisely, whose probable overall long-run costs outweigh the probable overall long-run benefits). Or if Gewirth thinks that is not so, then his claim to be extracting his entire theory from the sheer concept of a rational agent just won't wash, or else involves a far more dubious concept of rationality than it seemed at the outset.

To be fair to Gewirth, I should mention here my recognition that Gewirth's duty to aid people is always a duty to do so when one can do so at "no comparable cost to oneself" (217, e.g.; but frequently reiterated). And most of us, I think, would accept that there is a duty of aid under some such condition. But (1) Gewirth introduces this in a context of attempting to show that not helping is actually harming, an argument I have already rejected above; and (2) this is obviously a fairly vague requirement; but no matter how vague it is, one must wonder whether taxation of incomes at rates of, say, 40-50 percent is going to be justified by it; and most important, (3) the question is whether any such cost at all will pass muster at the very enormous level of generality Gewirth is hoping to achieve.

The dust has not settled entirely as yet. For although it is clearly a necessary condition of a rational agent's claiming a given right that it (or better, it, taken in context with the whole package of rights to be claimed) promise more benefit than cost overall, it is by no means a sufficient condition of that claims' *being accepted by others*. Now, why should we worry about the acceptance of such claims by others? My own answer to this is simply that if they aren't accepted by others, then it will not be rational to expect others to supply the benefits desired; and if they don't, then it is certainly silly for the rational agent himself to respect those putative rights on the part of others. A rational agent *must* worry about the acceptability to others of his right-claims.

But if we are going to make right-claims against *everybody* else—and this is what Gewirth wants—then apparently we're going to have to make only such claims as we know it will be rational for everybody else to accept, as well as for us to make. And this, I suggest, is why Gewirth is properly worried about claims to relatively arbitrary and variable things. If they are such, then there will be others for whom it would not be rational to accept the claims, and if they don't, then the jig is up. In

order to meet this very strong requirement, therefore, we need right-claims such that it is certain that *everybody* would benefit from making and accepting them.

How tall an order that is isn't entirely clear; but on the face of it, one would think, it is very tall indeed. For one thing is very clear: the proposed package of rights, in being acceptable to everyone, must be acceptable to those who stand to benefit *least*. It seems that universal rights will also have to be *minimal* rights. And here we come to one of the standing questions for contractarian theorists: where do we start? Rawls proposes that we start behind the veil of ignorance, which deprives us of all knowledge of our particular situations. In so doing, he hoped to present a plausible alternative to the classical idea of the State of Nature. But Rawls's idea is fraught with difficulties, prominent among them being that it is mysterious why a rational individual should settle on those principles which he (in some sense of 'he') would accept if he had no idea what his particular situation was, since it seems of the essence of rationality that one does the best one can given one's values as they are and one's situation as it is. But if we attempt to do the latter, we have the problem of reconciling the favorably situated, who may opt for one set of principles, with the very unfavorably situated who may opt for another. In particular, we may surmise, those with such gifts of fortune as ingenuity, drive, energy, intellect, good looks, talent, and physical strength will be inclined to opt for liberty and only liberty: just let us do our thing, they will say, and forget about guarantees of welfare and the like should we do badly—for if we are allowed to do as we please, we in all likelihood will *not* do badly. On the other hand, paraplegics may be expected to be strong proponents of the welfare state, the duty to maintain the badly off in as favorable condition as can be managed. How are we to find a common denominator *here*?<sup>6</sup>

#### 4. WHY LIBERTY HAS THE ADVANTAGE

At this point, I wish to argue that if there is any solution at all to this problem, it would seem to lie in the direction of liberty rather than welfare. It will scarcely be possible to develop the case here in the kind of detail that might have any hope of persuading what is currently the

<sup>6</sup> On these matters, see for instance Robert Nozick's powerful criticism of Rawls in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), esp. 195; David Gauthier, "Justice and Natural Endowment: A Critique of Rawls' Ideological Framework," *Social Theory and Practice* 3, no. 1 (Winter 1974); and John Marshall, "The Failure of Contract as Justification," *Social Theory and Practice* 4, no. 4 (Fall 1975). Gewirth, of course, is not supposed to put people behind a veil of ignorance. Instead, he is attempting to work from their most fundamental and general values as rational beings.

vast majority of philosophers, but the following sketch may be enough to show where the questions are to be asked—and in particular why. If we suppose that the Gewirthian project is even roughly correct, then programs of rights as elaborate as Gewirth's are in for very heavy weather.

I begin with a small observation that may stimulate thought on this matter. To wit: it is interesting how quickly 'everybody' tends to become 'one's fellow countrymen,' when enthusiastic proponents of positive rights present their ideas. Consider, for example, the matter of equal opportunity. For whom, we may innocently ask? Interestingly enough, it seems that Equal Opportunity is to stop very abruptly at the border. In my own country at present, for example, the government requires all employers of consequence to hire a native unless they can establish that no native is sufficiently qualified. Equally qualified foreigners do *not* have an equal chance at the job. But aren't they human, too? If equality of opportunity is a human right, then why is it that only *some* humans are to get it? It seems we have a natural right to discriminate against foreigners! It is easy enough to see why people shrink from the full implications of extending substantial positive rights—rights whose implementation will cost a lot of people a lot of money, effort, and in general a lot in the way of Gewirth's "nonsubtractive goods."

Next, let us consider a possibly important problem in the contractarian program: viz, that constituted by the possible presence of persons who would frankly prefer, or so they claim, the perils of the Hobbesian State of Nature to the alleged blessings of civilization and morality. If there are such persons, we clearly have no prospect of a universal rational agreement on such elementary moral principles as that we are to refrain from doing violence to our fellows so long as they do not molest us. If such principles are not on the list, though, what in the name of Thomas Hobbes is? Luckily, it seems that there is an answer to this, however. The answer is that we shall simply remain in the State of Nature with such persons, if there are any, and carry on with the rest of mankind as best we can. For if our principle is as stated that we are all to refrain from doing violence to our fellows so long as they do not molest us, then we shall simply do violence to those who do. And note that there is no difference here between those who profess to reject this principle and those who accept it! Those who allegedly do not accept it do not, after all, expect the rest of us to treat them gently—or, at any rate, not if they are rational. They do accept it in the very relevant sense that they agree that they have no complaint coming if we treat them as badly as they treat us. The rest of us, of course, accept it in the more full-blooded sense that we agree not to be aggressors in the first place.

Now consider the case for positive rights. Suppose that I should like to be helped when in desperation. Why must the entirety of mankind

be party to my claim for such a right? It is, of course, often not easy to identify in advance those who cannot be expected to reciprocate our good offices: I help change his tire, and next winter when I need a lift to the nearest garage at  $-10^{\circ}$  F., the so-and-so drives right by. If I could know in advance that he would be like that, he wouldn't be in for much help from me and anybody I know. But do I also get to kick him in the teeth every time I see him? It would seem not. He has, after all, refrained from kicking me in mine all these years.

The principle of liberty, I shall assume, entails a principle of keeping one's agreements. Just how this is so is not something we need sort out here, so long as it is agreed to be plausible. But if we have this, then why can we not have all the positive rights we wish—against whatever of our fellows we can get to agree on them? Where is the case for forcing the rest to go along as well?

Now, it might seem as though Gewirth not only should, but actually does, accept this conclusion. For has he not laid it down that "an agent should be free to perform any action, to engage in any transaction, if and only if his recipients are left free, through their voluntary consent, to participate or not participate in that transaction if and only if he does not inflict basic or specific harm on them" (271)? The only exceptions, after all, are where harm and coercion are required for prevention of harm and violation of freedom, and "to prevent them from inflicting basic harm on themselves" (271). But no: it seems that here we run up against Gewirth's claim that we can harm others by refraining from helping them. And through that loophole, it seems, troops the whole mighty parade of the modern welfare state. Great oaks from little acorns grow, it seems. But how implausible to justify all this from the minuscule basic premises we seem to be allowed at the outset!

In all this I am assuming, to be sure, that taxation, the primary mechanism by which positive rights are promoted in the modern state, is in fact coercive. And doubtless some will argue—probably including Gewirth—that it isn't really, because (a) it is democratically imposed, and (b) in the complex modern economy, or perhaps any, it is impossible to identify salaries or parcels of property as genuinely belonging to the people we ordinarily think of as their "owners." The former presumably enables the theorist to distinguish between the state and ordinary bandits whose redistributive proclivities lack the imprimatur of The People, while the latter enables him to argue that it isn't really *your* money the taxman is taking from you anyway. We can hardly discuss either of these large and murky claims here.<sup>7</sup> Suffice it to say that such premises insert

<sup>7</sup> For a recent relevant example, see Jeffrey H. Reiman, "The Fallacy of Libertarian Capitalism," *Ethics* 92, no. 1 (October 1981). It is interesting that central to Reiman's argument is the thesis that "property accumulation has threshold effects on liberty, such

a sizable amount of empirical assumption into the gap between our premises and our conclusions. It is difficult to classify the sizable retinue of positive duties in Gewirth's later pages as "necessary" if all of that is required to support his conclusions.

The advantage of liberty, in sum, is as follows. We want, as Gewirth says, to do what we want, and therefore we want not to be prevented from doing it. To be sure, we would also like it if our fellows were to help to enable us to do things when we can't of our own accord. But we can expect them to be ready to do so only if it is on the whole to their advantage to agree with us on a principle calling for mutual assistance. And when such a principle is involuntary, falling upon all and sundry as a matter of basic duty, it is impossible to see how we could get universal agreement on it. The bottom line is the liberty principle. Failing that, we are in the State of Nature, whose perils need not be documented here. But given that, the way is open to any number of agreements about specific positive rights and duties, binding on all (and only) those who *in fact* agree. And given the manifold variety of our interests, tastes, and needs, we will surely do better not to insist on a uniform positive requirement for all. At very least, therefore, we have to say of such relatively grandiose arguments as Gewirth's: case not proved.

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that small appropriations might nurture it while large doses can be fatal" (*ibid.*, 91). But if we don't conflate what we might call negative liberty with positive liberty, on analogy with the distinction of negative and positive rights, then it is a little difficult to see how this would be so. Large accumulations of property by others will, of course, reduce my range of options. But then, since when do you have the duty to increase or maintain my range of options?