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Economic Exceptionalism? Justice and the Liberal Conception of Rights

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Abstract: Are political and economic rights equally basic? This is one of the main issues liberal egalitarians and classical liberals disagree about. The former think political rights should be more strongly protected than economic ones; classical liberals thus accuse them of an unjustified and politically biased ‘economic exceptionalism’. Recently, John Tomasi has developed a special version of this challenge, which is targeted against Murphy and Nagel’s account of the relationship between property rights and just taxation. In this paper, I analyze this challenge, and provide an account of its limitations. Tomasi’s strategy to drive Murphy and Nagel’s account into an overgeneralization problem brings to light that liberals weren’t guilty of any kind of economic exceptionalism in the first place. However, this also shows that classical liberalism and libertarians do not disagree as much as it might seem.

Keywords: liberalism, libertarianism, justice, economic exceptionalism, John Tomasi

1 Introduction

What is the normative status of people’s individual rights? Liberals hold that political rights, such as freedom of speech, conscience or religion, enjoy strong moral protections against infringements by other individuals or the state – for whatever reason such an infringement may be proposed. In principle, this protection can be overridden, and infringements can be justified. But it takes especially weighty reasons to do so.

Libertarians and classical liberals agree with this, but want to extend such strong protections to economic rights (such as private property and the right to own productive capital) as well. This agreement about the strength of some of people’s rights in conjunction with a disagreement about the scope of that protection has led some to accuse liberal egalitarians of an unwarranted form of ‘economic exceptionalism’ (Tomasi 2012, p. 42). Such liberals are keen to

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single out, presumably for tendentious political reasons and/or to justify extensive redistribution in the name of social justice, economic rights as somehow less important than other civil and political liberties. In this paper, I show why this charge is unwarranted. In fact, classical liberals and liberal egalitarians agree on the fact that the scope and weight of all rights is determined, at least in part, by legal conventions which are responsive to normative trade-offs as well as regulatory considerations. Or so I will argue.

My paper has five sections. In the second Section (2), I explain the general dialectic of the discussion between classical liberals and liberal egalitarians and the charge of economic exceptionalism in more detail. The third Section (3) explains Murphy and Nagel's (2001; 2002) 'legal convention' argument against the possibility of treating people's pre-social property rights as a morally significant baseline for the assessment of just taxation. It is this argument, Tomasi claims, which is supposed to establish the egalitarian double standard of economic exceptionalism. Tomasi's challenge to this argument, which I discuss in Section (4) relies on a generalization strategy which aims to show that Murphy and Nagel's argument cannot establish economic exceptionalism – the view that economic rights such as the right to private property deserve to be singled out for special normative treatment. He argues that, if sound, their argument would show that *all* rights are mere legal conventions, which means that no purportedly pre-conventional rights (such as freedom of speech or religion) can be used to assess the legitimacy of interference in that right by the state or other citizens. Tomasi suggests that this constitutes a fatal blow to liberals' positive account of justice and participation as well as their anti-libertarian agenda. Liberals must, on pain of inconsistency, either join the classical liberal camp with regard to *all* rights, including economic ones, or give up the idea that any rights, not even the right to free speech or conscience, have a status as robust side constraints. Tomasi suggests this is a cost too high for liberals to bear. My main aim is to show that Tomasi's strategy succeeds *except* in showing that this is a bullet liberal egalitarians cannot bite.

In the fifth Section (5), I draw on an argument previously developed against libertarians (Sobel 2012) which is supposed to challenge the normative attractiveness of strong property rights to show that liberals have no reason to become classical liberals even after they have given up their doctrine of economic exceptionalism. In fact, they have good reason to acknowledge the implausibility of the idea that there are some rights (such as non-economic, political rights), which enjoy the absolute status Tomasi (falsely) holds liberals must attribute to them. Strong deontological protections of people's political liberties have egregiously counterintuitive normative implications, just as strong deontological protections of property rights do. Many limitations of these liberties can

therefore easily be justified. In Section (6), I anticipate and respond to an important objection which may be raised against the argument of this paper. If my reasoning is sound, and the liberal is not committed to the claim that there are any rights which have moral significance independent of the moral acceptability of the whole system of laws and social rules which constitute them, one might think that it would become unacceptably difficult to protect these rights against thoroughly arbitrary limitations. I suggest that this worry is unfounded.

2 Economic rights and everyday libertarianism

Liberal egalitarians and libertarians agree that many private and political rights ought to be very robust in the sense that they cannot be breached for consequentialist reasons (such as the greater good) alone. They disagree, however, on which rights to afford this status of basicness. In particular, there is disagreement on how to conceive of the strength of *economic* rights such as property rights in productive capital or other assets. This issue lies at the heart of controversies about the extent to which the redistribution of such property can be justified.

Many libertarians say we should conceive of (property) rights in the strongest possible form that is still plausible (such that there are some cases where property rights may be infringed, such as to prevent catastrophe and if compensation is offered). Some (though not Tomasi) even hold that matters of distributive are settled by whatever distribution of goods results from fair acquisitions and transactions.[1] In particular, they hold that there is no substantive standard of equality that can be brought to bear on the distributive patterns free markets may yield, and that there are no *further* considerations of social justice over and above market exchanges in the light of which such distributions could be rectified.

When applied to real-life policy options, this rather abstract idea is often taken to entail that people have a full prima facie right to virtually all of their pre-tax income. Taxation, then, is considered theft whenever it goes beyond the provision of a minimal state suitable to enforce people's property rights. The institutions of this state may include a police, institutions of justice and national defense, but little else.

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1 I restrict my discussion here to broadly 'Lockean' versions of libertarianism such as Nozick's. There are many modern forms of libertarianism which do not rely on self-ownership to justify their conclusions, e. g. Huemer (2013).

The libertarian case for the incompatibility of strong property rights and redistributive taxation has been famously challenged by Liam Murphy and Thomas Nagel (2002). They argue that the libertarian claim that the justification of taxation of people's property has to meet extremely steep justificatory standards is incoherent, as private property is a legal institution that is constituted by a system of legal rules of which taxes are an integral part. If this challenge goes through, then the libertarian appeal to a prima facie entitlement to all the fruits of one's labor is not just politically unacceptable, but does not even make sense, as what one *really* is entitled to can only be assessed *after* legitimate taxes have been levied. Taxes do not take anything away from what people own. Rather, individuals only genuinely own whatever is left after they have paid their taxes.

Recently, however, John Tomasi (2012) has argued that this challenge faces a difficult problem, and that Murphy and Nagel's argument can ultimately be shown to backfire at liberal egalitarians.

Let me emphasize that Tomasi himself does *not* subscribe to an 'absolutist' libertarian position regarding property rights. Rather, he puts a classically liberal twist on an otherwise Rawlsian/prioritarian concern for the worst off: free markets and fairly robust economic rights happen to be part of the institutional framework that, as a matter of empirical fact, is most beneficial for the poorest. In general, according to Tomasi, the scope and precise content of all rights has to be informed by considerations regarding how to weigh those rights against each other, but also empirical, 'PPE-style' (Brennan, Schmidtz, and van der Vossen 2017) institutional analysis.

In particular, Tomasi recommends a consistent application of non-ideal theory to both the market and government. Regulation and interventions in the market and property rights can be justified for the standard economic reasons: to internalize externalities, promote healthy competition, counteract information asymmetries, and so on (Tomasi 2012, p. 204). At the same time, we cannot trust that the government is populated by omniscient, omnipotent and omnibenevolent angels. Calls for regulation must be compatible with behavioral symmetry regarding how people are like, what motivates them, and how they respond to incentives (Freiman 2017).

3 The legal convention argument

Tomasi takes Murphy and Nagel's *legal convention argument* (as I will refer to it) to be an attempt to establish what he refers to as 'economic exceptionalism'

(Tomasi 2012, p. 42). Their argument, Tomasi claims, is supposed to single out economic rights for special treatment in order to make them less strong and, presumably, open up the route to their illicit and inefficient redistributive infringement. Rawls, for instance, only includes two rather modest types of economic rights in his list of fundamental liberties: a right to own private – but, importantly, non-productive – capital and freedom of occupational choice. This is supposed to be insufficient and unjustified. This exception seems problematically *ad hoc*.

Tomasi wishes to show that the legal convention argument generalizes to other rights the robustness of which liberals do *not* want to undermine in this way (such as political rights), which is why liberals should not endorse the legal convention argument at all, not even about property rights. This would move their political commitments closer to the classical liberals'.

It is this response to Murphy and Nagel's challenge I am interested in in this paper. I will argue that although Tomasi's criticism of the argument sketched above has merit, it doesn't have the implications Tomasi thinks it has. The legal convention argument *does* generalize; but this poses no problem for liberals, because they have accepted the malleability of all rights all along. Liberals never wanted to use the legal convention argument to establish anything like economic exceptionalism in the first place.

Murphy and Nagel suggest that the everyday libertarian understanding of the scope of people's property rights is an illusion: property is a legal convention, defined by a holistic set of rules and laws. What people legitimately own is in part defined by how much taxes they owe (Murphy and Nagel 2002, pp. 37ff.). It is therefore impossible to assess the legitimacy of taxation for redistributive purposes by using pre-tax income as a baseline, because it makes no sense to judge a system of rules on the basis of something that is a consequence of those rules. Call this the

Legal Convention Argument

(1) Property rights and pre-tax income are legal conventions which are constituted by a set of laws and other social rules that facilitate it.
(2) Taxes are a part of this set of rules.
(3) The legitimacy of a part of a set of laws and social rules cannot be judged on the basis of the legal conventions that are constituted by it.
Therefore,
(4) The legitimacy of taxes cannot be judged on the basis of independent property rights and pre-tax income.

How are we to assess the merits of this argument? One possible objection is this: wasn't there property before there were states to create and regulate it? Maybe there was, if only in primitive form; or maybe there was not, and there was only something akin to control over resources. It seems clear, however, that property as a *legal institution* did not exist. At any rate, the kind of property and wealth that exists today (think about Bill Gates or Mark Zuckerberg) would not be possible without an intricate set of social rules and legal conventions that facilitate the provision of education, health care, the enforcement of contracts etc. and which make the acquisition of such wealth possible.

It is worth noting that an argument similar to the one developed by Murphy and Nagel has been developed by Christman (1994), and it helps better understand what the claim that there is a pre-conventional right to property would involve:

> Under the liberal [which resembles what I refer to as libertarian in this paper, H.S.] conception, there exist owners whose rights to fully control and gain income from their holdings can be independently delineated, and in opposition to this set of concerns there is the state, bearing down on these owners and constraining their prerogatives. In such a picture, application of the principles of economic justice *are imposed* by the state upon the individual citizen, tightening the circle that her *prima facie* property rights would have carved out. (p. 9)

He argues, further

> that this picture involves several confusions. For example, the rights, liberties, powers, and the like that ownership confers on individuals in a society are not determinable separately from the general principles of distributive justice that apply in that society. If the correct principles of economic justice say that you do not have a certain right (to gain untaxed income from the sale of an asset, say), then there *does not exist a prima facie* right that has been ignored, counterbalanced, or outweighed. What one owns is what one owns justly. (p. 10)

The Christman/Murphy/Nagel strategy needs to be carefully distinguished from Buchanan's (1976) famous argument that taxing people's pre-tax income is justified, because people are paying for the services provided by the government. This last argument rests on the idea that people do have a prima facie entitlement to their pre-tax income, but that taking away some of this income in exchange for roads and schools is justified.[2] Nagel and Murphy's view is far more radical, as it holds that people do not use part of their pre-tax income to 'pay' for governmental services, but that what people really own is literally constituted by a whole system of property rights of which tax legislation is

2 Relatedly, Huemer (2017) has recently argued that it is possible to hold that taxation is theft and yet that such theft can, in principle, overall be justified.

only a part. The extent to which people benefit from the institutions of the government is thus not at all necessary to justify a particular regime of taxation.

Three more things about Murphy and Nagel's argument should be noted. First, their argument does not, and is not intended to, show that taxation by the government is exempt from criticism. Their point is, rather, that this criticism cannot coherently be grounded in treating pre-tax income as a baseline for the evaluation of how high taxes should be, or who should pay what.

Murphy and Nagel claim that the everyday libertarian's view about the moral relevance of pre-tax ownership is not only unfeasible, but conceptually incoherent. A second possible challenge is that this claim may be too strong. It does not seem conceptually inconceivable for there to be at least some kind of property without government constituting it. Moreover, their claim seems to be that the logical order of priority between property rights and taxes is the reverse of what libertarians think, because it is not true that people own property which is then taxed, but that the acquisition of goods and their (market) transaction which generate private property would be impossible without government, and that government would be impossible without taxes. And although the last claim seems to be overstated (because there have been imperial regimes that were able to support themselves through taxation of their colonies, for instance, see Frajman and Oppenheimer 2003), the order of priority Murphy and Nagel are talking about here does not seem to be of a *logical* but a *causal* kind. Taxes are a *causal* precondition for the existence of a functioning government, and this does not make it conceptually incoherent to assess taxes in terms of tax-independent property rights. However, this would not entail that Murphy and Nagel's claim that private property has no independent moral significance is undermined, because one could well argue that causal, rather than logical, dependence achieves the same: whoever wills the end (property) also will the means (taxation); therefore, issuing a moral claim to property might well entail the recognition of taxation as just.

A third challenge has been issued by Geoffrey Brennan (2005), who argues that Murphy and Nagel conflate normatively conclusive with normatively relevant considerations. Pre-tax income might be a legal convention. But one could argue that conventions have a least some prima facie normative authority, even if this authority is not, or need not always be, conclusive. Conventions are typically established, tried-and-true rules. This, Brennan suggests, should give them a kind of default validity. I doubt, however, that this argument is an attractive one for libertarians to endorse against the legal convention argument, because the former generally do not place much weight on the political authority of contingent conventions.[3]

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3 A notable exception can be found in Mack (1990).

Tomasi uses two arguments against economic exceptionalism (von Platz 2013): the first is an intuition pump involving Amy, a small business owner who extracts enormous pride and value from her, however modest, economic success ('Amy's Pup-in-the-Tub').[4] The second is fueled by the suspicion that the exclusion of economic rights from the scope of basicness reflects liberal political biases rather than principled philosophical reasons. His generalization strategy, then, is supposed to be a systematic articulation of the main thrust of this second suspicion.

4 The generalization strategy

What would it mean to regard a right as basic? How should we understand this metaphor?

There are essentially two ways of cashing out this idea:

(1) Basic rights are lexically prior (Rawls 1971). We cannot move on to the next type of lexically less prior claims before we have fully satisfied the demands created by the lexically prior ones.

(2) Basic rights are protected by strong deontological constraints (Nozick 1974). Some rights cannot be legitimately breached even if the greater good is at stake.

I will not take a stand on which account of basicness ought to be preferred. For the purposes of this paper, they amount to the same thing: a right is properly basic if, and only if, it can justifiably be infringed upon for only for the sake of suitably weighty normative considerations.

More precisely, the limitation of a basic right can almost never (except, perhaps, in order to avoid catastrophe) be justified on consequentialist grounds, and can only be justified in terms of the strengthening of other, at least equally basic, rights. The debate on economic exceptionalism is about whether only political rights are basic in this sense (as liberal egalitarians would have it), or whether the status of basicness should be afforded to economic rights as well

4 In his reply to an argument similar to the one advanced by Murphy and Nagel made by Timothy Fowler (2015), Tomasi (2015) makes clear that how to think about the normative status of economic economic and non-economic rights is a substantive, moral question. It would be question-begging to skip over these substantive issues by simply assuming that some rights are conventional and some aren't, which is precisely what is at issue in this debate. My focus here lies on agreeing with Tomasi about the fact that economic and other rights should be afforded equal normative treatement, whilst denying that this constitutes a problem for liberal egalitarians.

(the classical liberal and libertarian stance). Tomasi wants to show that economic exceptionalism about basicness is unjustified.

For liberals civil and political rights such as freedom of speech or the right to bodily integrity, Tomasi argues, supposedly have the basic status which liberals deny to economic rights. Economic exceptionalism is the view that economic rights such as property rights have a comparatively less robust claim to special protection from infringements by the state, for example.

Tomasi wants to show that the legal convention argument generalizes to *all* rights. Call this the generalization strategy (Tomasi 2012, pp. 70f.). This schematic argument uses the placeholder C for the respective legal convention at issue:

Generalization Strategy (Schema)

(1) C is a legal convention which is defined by a set of laws and other social rules S that facilitate it.
(2) S includes a set of limitations L to C.
(3) The legitimacy of S cannot be judged on the basis of the legal conventions S defines. Therefore,
(4) The legitimacy of L cannot be judged on the basis of C.

If we substitute 'property rights' for C and 'taxes' for L we get Murphy and Nagel's legal convention argument. But the schema can be extended to other rights as well. Take bodily integrity as an example. According to the generalization strategy, how much of a right to bodily integrity citizens actually have in a society is limited by the laws and conventions of state and society in the same way as economic rights are.

The Generalization Strategy (Example)

(1) The right to bodily integrity is a legal convention the content of which is defined by a set of laws and other social rules that facilitate it.
(2) The precise content of this right is determined by this set of laws and rules.
(3) The legitimacy of such a set of laws and rules cannot be judged on the basis of the legal conventions it defines.
Therefore,
(4) The legitimacy of any infringements upon the right to bodily integrity cannot be judged on the basis of an independent right to bodily integrity.

If the generalization strategy can be applied in this way, then there is no convention-independent right to bodily integrity whose content we could understand independently of a particular set of laws and rules. In analogy to taxes, one could say that subjects do not enjoy a full, unlimited right to bodily integrity, which is

then somehow watered down by societal rules and regulations. How much of their body they own, this argument has it, is determined by the whole system of laws and rules of which the legally defined right to bodily integrity is itself part.

Tomasi's generalization strategy is supposed to show that there is no relevant moral difference between economic rights and others: 'the observation that 'property is a legal convention' does no normative work specific to issues of property' (2012, p. 71). This is supposed to show that liberal egalitarians are inadvertently committed to the idea that economic rights should have the same robust status that other rights enjoy (which would essentially turn them into classical liberal) or that no rights have this status, which is allegedly too upsetting for their liberal convictions.

But this strategy fails. Liberals are committed, the generalization strategy successfully shows, not to treat various rights differently. But accepting that in fact no rights are convention-independent in the sense envisioned by the classical liberal is not as undesirable for their position as Tomasi wishes to suggest.

To see why, consider the structure of Tomasi's objection. Tomasi uses a companionship-in-guilt argument (CIG) as the basis of his generalization strategy (Lillehammer 2007). CIG arguments attempt to vindicate or undermine a set of philosophically (un)problematic claims on the basis of similarities it shares with another set of (un)problematic claims. There are CIG arguments from *entailment* and from *analogy*, but Tomasi clearly has the former, stronger version in mind in developing his generalization strategy. His argument draws on the idea that economic exceptionalism – the idea that property rights somehow ought to be singled out for special, that is: weaker, normative treatment – does not hold up, because the argument that is supposed to justify this exceptionalism generalizes to other rights as well, thereby rendering economic rights unexceptional again (either by making all rights equally strong or equally weak). The transition from claims about the status of economic rights is achieved by pointing out that these claims entail that other rights – political ones, for instance – have the same status. But obviously, CIG arguments only mandate moving to one side of the companionship rather than the other if moving to the other side is considered unacceptable. One person's companion in guilt is another person's companion in innocence.

Is it really unacceptable for the liberal egalitarian to accept the generalization strategy and deny that there are any convention-independent rights whatsoever and that all rights, even freedom of speech and the like, are holistically shaped? Tomasi thinks that this is a too big a bullet to bite for liberals. I want to show that it is not, because according to the liberal, the exact scope of rights to freedom of speech and others is also legitimately limited by the laws and conventions of state and society. A pre-social, supra-conventional right to

freedom of speech cannot, and should not, be used as a baseline departures from which require special justification.

Actually, it is hard to see why Murphy and Nagel's legal convention-argument is supposed to be an argument for economic exceptionalism at all. Nothing in their rendition of the argument suggests that they take it to be *restricted* to the issue of property and taxation. Nevertheless, Tomasi seems to assume that it must be intended to be such an argument, because he mistakenly thinks that there is no way for liberals to accept his generalization strategy.

5 How basic are liberal rights?

In this section, I wish to argue that liberals never had a reason to consider civil and political to be more robust than economic rights – which is why it is no problem for them to reject economic exceptionalism while accepting Tomasi's generalization strategy at the same time.

The key thing to realize at this point is that the non-conventional status of rights is supposed to play a particular political role, namely that of specifying a baseline against which departures must be justified. This may seem puzzling, because the question of whether a right is *conventional* or not and the question of how *strict* the right is are arguably separate issues. Here, it is important to keep in mind that the main point of contention is about the preconventionality of rights rather than how stringent they are, or how easily they can be overridden by competing normative considerations. Tomasi accuses Murphy and Nagel of wanting to open up certain economic rights (such as the right to property) for government interference (in the form of taxation) by attempting to show that these rights cannot, due to their essentially conventional character, thereby impose any constraints on legitimate government action, whilst allegedly not wanting to open up other rights (such as civil rights) to the same degree of malleability. This is thus where the issue lies: even a fairly non-strict right could, as long as its validity is preconventional, impose definitive limits on what a government may do to shape its content.

I argue that liberals should resist the idea that there are any rights that perform this 'absolute' function, regardless of whether these rights are supposed to be economic, political, or civil. Rights are never absolute, neither in general nor in virtue of their alleged preconventionality; therefore, liberal egalitarians have nothing to fear from an argument purporting to show that their view is committed to the conventionality of liberal (civil or political) rights.

Consider the example of bodily integrity again. Tomasi argues that the legal convention argument applies here as well, rendering ‘everyday libertarianism’ about rights to bodily integrity incoherent. But liberals can be perfectly happy to accept this, because they never wanted to claim that everybody has a pre-social right to full bodily integrity anyway. They are happy to accept that how much of one’s body one owns, so to speak, is just as holistically determined as how much of one’s income one genuinely owns. An *absolute* right to bodily integrity would entail, after all, that it is impermissible to breathe in an elevator when other people are around, because this would affect other people’s bodies in illegitimate ways, and thus breach their rights. It would also entail by the same token, that I could demand from others that they not breathe iny my presence, since this would undermine my right to full bodily integrity.

Here, it is useful to draw on a structurally analogous recently developed internal critique of libertarianism’s basic normative commitments (Sobel 2012). This argument shows that how undesirable it is to conceive of any rights as pre-conventionally robust. It is therefore unproblematic for liberals to agree with Tomasi’s generalization strategy and accept that all rights are legal conventions. For liberal egalitarians, there is no full entitlement to the largest possible amount of religious liberty or freedom of speech or, for that matter, pre-tax income.[5]

According to Sobel’s argument, strong property rights of the kind supported by traditional libertarianism are incoherent, because they lead to unfreedom for everyone (Sobel 2012; see also Railton 1985).[6] If I have a strong property right in my land, then even a minor infringement of this right will be morally impermissible. This means that nobody can partake, for instance, in any activity that leads to a very small risk of causing a very small pollution of my land, because this would violate my absolute rights. This is implausible, because virtually all of our actions are of this sort and too many things would be reciprocally forbidden for everyone by everyone else’s property rights. Libertarianism is

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5 The idea that people have no prima facie entitlement whatsoever in what they earn must seem ludicrous to some. This can be explained, I think, by pumping our libertarian intuitions using Nozick’s (1974, pp. 160ff.) Wilt Chamberlain example or something very much like it. What possible reason could one have to think that Chamberlain is not fully entitled to the $250.000 he makes from the quarters? But, far from proving the libertarians point, the example actually nicely illustrates the mythical (or, as Marx would have put it, fetishistic) character of pre-tax income. It is precisely because of the conventional character of money and currency, the various legal relations that allowed the audience members to acquire their quarters in the first place, Wilt Chamberlain’s contract with the team, the role taxation might have played in the building of the stadium and the roads making it accessible, and so forth, that shows that Wilt’s earnings would have been entirely impossible without the surrounding system of legal conventions.

6 Other informative criticisms of the idea of absolute rights include Sen (1982; 2000).

supposed to facilitate, rather than undermine, individual liberty. Absolute rights create paralysis, not freedom.

This style of argument, though originally targeting libertarianism about property rights and distributive justice, can be used to show why liberals would be ill-advised to stick to the kind of absolutism about *non*-economic rights which Tomasi (falsely) attributes to them. A strong understanding of non-economic, political rights has the same paralyzing effect. Suppose I had an absolute right to bodily integrity, conscience or freedom of speech. This would seem to entail that no one could ever limit or infringe upon my rights, not even in cases of emergency, when the benefits of doing so would be overwhelming, the costs negligible, or the negative impact tiny or unlikely or both.

This is clearly implausible, because, as Tomasi (2012, p. xvii) acknowledges himself (following Mill), everybody accepts – or ought to accept – that no one can have a right to yell 'Fire!' in a crowded movie theatre. It's just too dangerous. Therefore, this limitation of my freedom of speech is of course justified, which liberals have no problem accepting. And an argument of the type Sobel and Railton have developed against libertarianism property rights shows that any form of absolutism about freedom of speech, so conceived, would lead to the same kind of obstruction as would be the result of economic libertarianism, leading to a society in which everybody's absolute liberal-political rights to property, freedom of speech etc. make everybody else unable to act in any way at all (at least without explicit consent by all affected parties, which is often difficult or impossible to obtain).[7]

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7 What is a pre-conventional right? One could introduce these rights in terms of the entitlements people would have in a state of nature, but it is highly unclear to me what this could mean. Therefore, I will use this concept in the sense of rights the scope and content of which are not determined by more or less contingent legal specifications. The right not to be murdered would, for instance, have such a status, because it is an antecedent moral right that particular legal codes ought to respect. On this definition, it is clear that (currently existing) property rights are not pre-conventional in any interesting sense of the term. On the other hand, one could say that people are *morally* entitled to their property. But this last point seems to be begging the question: the rejection of the conventionality-thesis, which is a crucial premise in the legal convention-argument, was based on the idea that property is indeed a pre-conventional right. Under the definition introduced above, it is not. The anticipated response to this is that regardless of whether there is a natural right in the above sense, people surely have a moral right to their property. This must mean that they are entitled to their property in a sense that is independent from governments and legal conventions. But whether this is so is precisely what is at issue. The main issue at hand is thus not the 'metaphysical' one of where individuals' rights originate – are they natural or conventional? – but how robust and difficult to justifiably infringe they ought to be. That is to say that the focus of the disagreement lies on how strongly different types of rights ought to be protected.

One may get the impression that the argument just sketched scores no points against Tomasi, who is emphatically not a Lockean libertarian, and instead merely endorses the basicness of economic rights from within a Rawlsian framework. This impression is correct; however, it misunderstands the role Sobel's strategy is supposed to play in my argument. What the 'paralysis' argument is supposed to show isn't that Tomasi's own substantive account doesn't work, but that Tomasi's accusation against liberal egalitarians doesn't work. Sobel's argument against absolute rights shows that, in general, it is a bad idea to assign the amount of weight (some) libertarians assign to property rights to any rights whatsoever. And because this is so, liberal egalitarians don't have to be intimidated by Tomasi's generalization strategy, because it simply ins't a threat to liberal egalitarians to point out to them that their treatment of economic rights as holistic conventions commits them to treating other eights in a similar fashion.

6 Does my argument prove too much?

Let me sum up the story for far. What is at issue in the debate between liberal egalitarians and classical liberals is how strongly economic rights, especially those to private property in productive capital, ought to be protected, and on which moral grounds this protection ought to be based.

Now, my concession that liberals do and should not understand any rights whatsoever to be as basic as libertarians would like property rights to be seems to be a dangerous one. One could think that the generalization strategy entails that just about any arbitrary limitation even to political rights can be justified, because there are no morally privileged, absolute rights. This is precisely why libertarians feel threatened by Murphy and Nagel's original legal convention argument: if pre-social property rights cannot serve as a baseline for assessing the legitimacy of redistributive taxation, on what grounds could one object to arbitrary, and arbitrarily high, forms of taxation any more?

To see how this problem could be responded to, consider the following two options. Note that I am not endorsing either. These options are merely supposed to show that conceding the generalization strategy, and with it the conventionality of economic as well as civil and political rights, does not entail that the scope ad strength of these rights can be *arbitrarily* limited.

(1) Democracy. Under modern conditions in democratic societies, the government is supposed to be representative of the will of the people. This means that collectively binding decisions such as those regarding what and how to

tax need to be justifiable to the electorate. *Arbitrarily* high taxes and arbitrary restrictions of free speech fail this test.

(2) The legal convention argument shows that economic rights are not supra-conventional rights. The generalization strategy shows that the same holds for all rights. But the two arguments taken together do not show that people's rights can be *arbitrarily* limited. It's just that the exact extent to which people enjoy their rights – for instance, the exact amount of income they own or the exact extent of free speech they are permitted to enjoy – is not determined by any kind of pre-conventional right to their income or free speech.

This doesn't mean, however, that they should not enjoy the as many rights as possible, to the fullest extent possible. In principle, it would be acceptable for the state to limit people's freedom of speech in very much the same way as it is permissible to levy taxes. But unless there is a reason to do so (which could be the fact that a particular statement is dangerous and likely to harm other people, or, in the case of taxes, that the concentration of wealth structurally undermines democratic procedures or disenfranchises the majority of citizens) people should enjoy maximal rights.

In addition to this point, Nagel and Murphy suggest a broadly 'consequentialist' solution to the problem of how to evaluate the extent to which government can legitimately limit any of people's rights, including how much they ought to receive after tax:

> There is a distinguished economics literature on optimal tax and transfer rates, dating back to an article by James Mirrlees in 1971. This literature is extremely important for the study of justice in taxation. Most significantly, it approaches the topic in the right way, investigating outcomes rather than the distribution of burdens. The normative parameters of optimal tax analysis, which are those of welfare economics, are in our opinion too narrow to allow it to produce a full account of tax justice, but its results nevertheless provide information essential for the implementation of any nonlibertarian conception of justice. Its central question is what level of taxation would best promote welfare (either weighted in favor of the worse off or not), given the welfare losses caused by the behavioral effects of an income tax. Any theory of justice concerned about levels of welfare, including a theory that gives intrinsic weight to greater equality (though such theories are not usually considered in the optimal tax literature), must confront the fact that while taxes enable redistribution from richer to poorer, they may also depress work effort and thus reduce overall welfare. (2002, p. 136)

It is precisely because of the mythical nature of tax-independent property rights that in evaluating how much people ought to get, we need to focus on the system of property rights and taxation that will produce the best outcome,

taking into consideration the welfare effects which are are caused by the incentive structure provided by our proposed regulatory measures. Similarly, the content of people's right to bodily integrity, freedom of speech, etc., cannot coherently be measured with an appeal to independently conceived pre-social rights in those things, but by finding out which system of overall rights best enhances general welfare. This argument is suitable to show that the worry that a non-robust conception of rights might leave no possibility to reject totalitarian regimes which impose idiosyncratic legal conventions of their own is misguided. Socially established property and other rights are subject to criticism in terms of the outcomes of which system of rights is best.

If rights in general, and not just property rights, are legal conventions, it seems to follow that the right not to be killed is a legal convention as well. Therefore, whether one has or does not have a right to life cannot be established on its own – simply by appealing to one's right to life, period – but by looking at the whole system of rights that constitute the right to life as one of its parts. Isn't this absurd? I think it is not. Consider the death penalty, the duty to kill while on a military mission or the permission to kill in self-defense: all of these show that what exactly one's 'after tax' right to life encompasses depends on a whole system of rights and legal regulations in just the same way as all other rights do. Consequently, it is not arbitrary, nor is it a form of economic exceptionalism, to treat economic rights in exactly the same way.

7 Conclusion

Most of the literature critical of Tomasi's market democracy has tried to show that the economic liberties are not as basic as he thinks. In this paper, I argue that we should focus first and foremost on Tomasi's generalization strategy, that is, his claim that whatever the status of economic rights, their status must be equal, on the basicness metric, to other liberal rights. He then claims liberals must conceive of non-economic rights as basic, which gives him the conclusion that liberals are committed, on pain of an unjustified economic exceptionalism, to treat economic liberties as basic as well. But the generalization strategy goes both ways: if it can be shown that liberals never had any reason to treat any rights as basic, then Tomasi's generalization strategy backfires. In the end, then, the suggestion that I wish to make is that Tomasi and Murphy/Nagel disagree much less strongly than it may seem at first. Both can accept the symmetrical treatment of civil, political and economic rights. Their disagreement lies elsewhere.

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