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Elbow Room for Rights

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1. INTRODUCTION

Robert Nozick's first sentence in *Anarchy, State and Utopia* is the ringing affirmation that “Individuals have rights, and there are things that no person or group may do to them (without violating their rights).” Nozick immediately adds that these rights may be even more restrictive than one might anticipate. “So strong and far-reaching are these rights that they raise the question of what, if anything the state and its officials may do. How much room do individual rights leave for the state?” (1974, p. ix).

In this chapter, I address questions about whether core rights affirmed by Nozick, viz., persons' rights over themselves and over their legitimately acquired extra-personal holdings, are considerably more deeply restrictive than Nozick himself anticipates when he wonders whether these rights would morally hog-tie aspiring statesmen and state officials. Indeed, I address questions about whether those rights are so constraining that they deeply restrict their own exercise. These questions have been forcefully pressed in two important critical discussions of rights-oriented libertarian thought, Peter Railton’s “Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk” (1985) and David Sobel’s “Backing Away from Libertarian Self-Ownership” (2012).

Both of these papers maintain that the rights of self-ownership and of private property in extra-personal holdings—which for convenience I will refer to as the “libertarian rights” or the “Lockean rights”¹—are much more restrictive than their advocates generally recognize. The key thought is that libertarian rights demand that all agents desist from even the most minor unprovoked and non-consensual physical intrusions upon right-holders; in

¹ Although I employ these terms to refer to rights of self-ownership and individual entitlements to extra-personal objects, I do not mean to say that these are the only moral rights libertarians should affirm or that self-ownership is the only natural moral right.
addition, these rights at least seem to demand that all agents desist from imposing on others even modest risks of such intrusions. Yet, compliance with these demands requires that individuals forego all or almost all of the ordinary exercises of rights by which individuals maintain their lives and achieve their ends. As legal theorist Richard Epstein puts it, “If any smell, noise, or discharge counted as a nuisance [and, thus, a rights infringement], no one could barbecue in the backyard, talk on his front patio, or farm” (2009, pp. 15–16).

The distinctive complaint that Railton and Sobel bring against stringent libertarian rights is that such rights morally hog-tie their possessors. The purported difficulty is that these rights systematically make their exercise morally impermissible. Railton signs on to this complaint when he says,

I will argue that when one attempts to apply such [Lockean rights] theories to moral questions about pollution, they present a different face, one set so firmly against laissez faire – or laissez polluter – as to countenance serious restriction of what Lockeans have traditionally taken to be the proper sphere of individual freedom. (1985, p. 89)

Sobel signs on to this complaint when he says,

The ubiquity of difficult to avoid, minor infringements on other people’s bodies makes the simple argument [from libertarian rights to standard libertarian conclusions] unattractive. Strong moral constraints against all such infringements would make too many things impermissible. The thought that, quite generally, my self-ownership creates very powerful moral constraints on any and all involuntary infringements on my body would unacceptably interfere with your liberty as Nozick saw. (2012, p. 35)

Could the philosophical theory named for liberty actually turn out to be unacceptably restrictive of our liberty? (2012, p. 37)

The hog-tying complaint is not that the domains of some individuals may be too small; i.e., that they may include too little in the way of personal or extra-personal resources. Rather, the complaint is that much of whatever is within one’s domain in the sense that others may not destroy or seize or control it without one’s permission will, nevertheless, not be within one’s sovereign domain in the sense that one’s chosen use of that material is morally allowed and protected. Note that this complaint can be directed against any doctrine that broadly ascribes rights to individuals over persons or extra-personal objects that others are morally forbidden to infringe. For example, if rights to extra-personal objects are ascribed to individuals on the basis of a strongly egalitarian-leaning end-state principle and these rights are taken to be infringed by any unconsented to physical intrusion, those rights will be subject to the hog-tying complaint.

In this chapter, I focus on what the friend of libertarian rights or any other advocate of similarly potent rights should say about “minor intrusions,” i.e.,
impositions of very low-level physical effects upon another person or her property. I shall bypass the more complex companion issue of what should be said about the creation of pure risks of intrusions; i.e., the generation of risks of intrusions that do not eventuate in actual intrusions \(^2\) although the expected intrusiveness is comparable to the actual intrusiveness of minor intrusions. I take it that any sensible friend of libertarian rights will want to say that minor intrusions are morally permissible. \(\text{Ceteris paribus}\) it is permissible for me to drive my car up my driveway even though this causes a slight vibration in my neighbor’s eardrums to which he has not consented. The difficulty is to provide an explanation for this permissibility that does not render rights less morally imposing or less contra-consequentialist than libertarian rights theorists want them to be.

Railton and Sobel maintain that a natural move for the friend of libertarian rights involves a general shift to a more attenuated, less demanding, understanding of rights. More specifically, this is a shift from an understanding of claim-rights as moral claims that are protected by property rules to an understanding of claim-rights as moral claims that are protected by liability rules. If a moral boundary is protected by a property rule, others are simply morally required not to cross that boundary without the consent of the right-holder. On the other hand, if a boundary is protected by a liability rule, others may cross that boundary without the consent of the right-holder as long as due compensation is paid. A property rule says “do not cross this line” while a liability rule says “crossing this line makes you liable for paying due compensation.”\(^3\) If one is drawn to both \(B\) having a right that seems to exclude \(A\) from sending smoke from his barbecue on to her property or into her eyes and to \(A\) having the right to barbecue in his backyard, the shift to the liability rule construal of rights may seem attractive. For this approach neatly splits the difference. \(A\) gets to barbecue as long as he offers \(B\) a compensating half-slab of ribs.

Indeed, Railton and especially Sobel take Nozick himself to shift to a liability rule construal of rights in his chapter on “Prohibition, Compensation, and Risk” (1974, pp. 54–87) at least in part to secure the permissibility of minor intrusions (and the generation of moderate pure risk).\(^4\) Railton and Sobel correctly see this liability rule attenuation of rights as an abandonment of or “backing away” from the robust and strongly anti-consequentialist

\(^2\) On pure risks, see Railton, p. 95.

\(^3\) The now common “property rule” and “liability rule” terminology is introduced in Calabresi and Melamed.

\(^4\) Sobel (p. 38) says that Nozick’s “main response [to the apparent impermissibility of minor intrusions] is to claim that our property rights do not create boundaries that it is generally impermissible to cross. Rather, others may permissibly cross our boundaries provided that they adequately compensate us for doing so…”
understanding of rights that is expressed in that opening sentence of *Anarchy, State and Utopia*. They welcome this attenuation of rights partially because they see it as weakening the Lockean’s resistance against socially beneficial infringements of rights that are not accompanied by compensation to the subject of the infringement. So, e.g., Sobel says,

\[\ldots\text{seemingly a wide range of actions that involve taking from those who will little feel the loss and giving to those seriously and nonculpably in need would be permissible for the same reason some pollution and trivial risk is permissible – namely because the infringement harms are trivial and the social benefits great.}\] (2012, p. 60, emphasis added)

I agree that a general liability rule attenuation of rights explains the permissibility of minor intrusions in a way that undermines the robustness of the rights that the libertarian theorist endorses. Hence, the need for the friend of libertarian rights to offer an alternative explanation for the permissibility of minor intrusions. Still, I do not think that liability rule attenuation explanation readily leads to *uncompensated* boundary-crossings being permissible as long as the “harms are trivial and the social benefits great.” Moreover, the liability rule attenuation of rights does not introduce a “utilitarianism of rights” (Nozick 1974, p. 28). A still may be required not to infringe upon B’s rights without duly compensating B even if this infringement without compensation is necessary to prevent the infringement without due compensation of the comparable rights of C and D. The friend of libertarian rights need not resist liability rule attenuation in order to avoid these further depreciations of the stringency of rights.

I offer an alternative “elbow room for rights” explanation for the permissibility of minor intrusions. The key idea is that, when one thinks about how to articulate or delineate the character or the boundaries of the rights one ascribes to persons, one crucial guide is the moral elbow room postulate.\(^5\) According to this postulate, a reasonable delineation of basic moral rights must be such that the claim-rights that are ascribed to individuals do not systematically preclude people from exercising the liberty-rights that the claim-rights are supposed to protect. When Railton and Sobel point out that the impermissibility of minor intrusions would be hog-tying, they are pointing out that this impermissibility would systematically morally preclude individuals from exercising the liberty-rights that are ascribed to them—the exercise of which is supposed to be protected by the claim-rights ascribed to them. The elbow room postulate tells us that, since the impermissibility of minor intrusions would be hog-tying, a reasonable delineation of rights does not construe minor intrusions as boundary-crossings. Since minor intrusions are not to

\(^5\) I have previously labeled this “the anti-paralysis postulate.” See Mack (2012), pp. 112–14.
count as boundary-crossings, no liability rule attenuation of rights is needed to render those actions permissible. The permissibility of minor intrusions is explained on the basis of a refinement in the location of boundaries rather than a general attenuation of rights.

One might, of course, affirm the permissibility of minor intrusions on the basis of some sort of calculus of overall social costs and benefits or on the basis of everyone on net being better off if minor intrusions are permissible—perhaps through explicit compensation being paid to those intruded upon or (as we shall see) through what Epstein calls “implicit in-kind compensation.” However, unless there is an explanation within rights theory for that permissibility, any such affirmation will mark the general subordination of rights theory to or its displacement by such a social calculus or such an appeal to mutual advantage. That is why it is important for me to show that the proposed refinement in boundaries is a matter of working out the implications of the underlying rationale for ascribing moral rights to individuals. Then the overall social benefits or the mutual benefits of the permissibility of minor intrusions can be seen as the not merely accidental by-products of their independently established permissibility.

Furthermore, I argue that the moral elbow room postulate is not an ad hoc stipulation dreamed up solely to deal with the difficulties that Railton and Sobel explore. Rather, the postulate is well anchored in the underlying reasons for affirming Lockean rights. The rationale for the deployment of the postulate in the delineation of people’s basic rights emerges from the rationale for ascribing people rights in the first place. Moreover, the postulate (or something close to it) has been put to work or can appropriately be put to work by Lockean theorists to deal with a range of over-restrictiveness issues that are not considered by Railton or Sobel.

As I view it, the most basic organizing principle for Lockean rights theory is the moral principle that each individual is to be allowed to live his own life in his own chosen way.

Lockean rights theory needs both to provide philosophical support for this organizing principle and to articulate it in terms of the ascription to persons of an array of abstract moral rights. Each abstract moral right provides individuals with moral protection against one of the diverse ways in which they can be prevented (by others) from living their own lives in their own chosen ways (Mack 2010). For example, people can be prevented from living their own lives in their own chosen ways by being deprived of discretionary control over their own bodies and faculties. For this reason, the abstract right of self-ownership is a crucial and salient dimension of the proper codification of the primordial libertarian principle. Also, people can be prevented from living their own lives in their own chosen way by being deprived of the opportunity to acquire and exercise discretionary control
over extra-personal objects. For this reason, the abstract right of property—a right to make things one's own and to exercise discrecolional control over what one has made one's own—is also a crucial and salient dimension of the proper articulation of the libertarian organizing principle.\(^6\)

Is an individual who needs a kidney disallowed from living her own life in her own chosen way by another individual declining to supply her with his spare kidney or by his evading her attempts to extract that needed kidney?\(^7\) Is an individual who desires to engage in certain sexual acts precluded from living his own life in his own chosen way by the sole object of his sexual desires declining to participate in those acts or by her evasion of his advances? The organizing principle for Lockean rights answers these questions in the negative. Agents who are not enabled to live as they choose because another party declines to supply one of his kidneys or declines to participate in desired sexual interactions are not thereby made unable—or precluded from—living their own lives in their own chosen ways. “Failing to help another cannot be construed as interfering with his right to use himself as he wishes…” (Cohen 1995, p. 215). Absent this understanding, ordinary exercises of rights by one party will regularly also count as ordinary violations of other parties’ rights and the moral claims of individuals to live their own lives in their own chosen ways will systematically conflict. Any resolution of that conflict would require the demotion of rights into moral commodities that are to be traded off against one another.

I need to emphasize that it is not the role of armchair philosophy—even natural rights philosophy—to discover and disclose the precise contours of persons’ nitty-gritty rights. Those precise contours do not exist out there in the nature of things or as theorems that are deducible from Lockean axioms. So, it is not the business of a Lockean theory of rights to determine whether or not the owner/operator of a well-established water mill has a right against individuals living upstream that they not significantly diminish the flow of water that turns his mill. It is not the business of this or any other philosophical theory to determine exactly how loud the noise has to be that emanates from A’s property in order for B to have a right to enjoin A’s drum-playing.

The relatively concrete rights that are reasonably ascribed to individuals in a given society—e.g., the right not to be subjected to noise over a certain decibel level—provide a structure of reasonably expected liberties and immunities that facilitate peaceful coexistence and voluntary cooperative

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\(^6\) A right against deceptive manipulation would be a third element within the abstract framework of libertarian rights. For deceptive manipulation is yet another way in which one can be precluded from living one’s own life in one’s own chosen way.

\(^7\) I thank Sobel for pressing this question.
interaction among those individuals. A theory of rights can only provide an abstract framework for that relatively concrete structure.

There are two phases in the articulation of that abstract framework. The first of these is the articulation of abstract rights, each of which constitutes a moral barrier against one of the basic ways in which persons’ underlying moral claim to be allowed to live his own life in his own chosen way can be infringed. The second phase involves further investigation about where the boundaries that define those rights may lie and what sort of stringency those rights must have or must usually have. This chapter operates within that second phase by focusing on whether or not minor intrusions are to be construed as boundary-crossings within a reasonable delineation of Lockean rights. Beyond the philosophical articulation of that abstract framework is the actual concrete instantiation of abstract rights in people's judgments and in the rules and practices that people are disposed to follow at least in part because they expect others to follow them. While the articulation of abstract Lockean rights rules out many particular judgments, rules, and practices, it does not single out one set of particular judgments, rules, and practices—one particular set of concrete rights—as that which is required by these abstract rights. This is why it is a mistake to expect Lockean rights theory to disclose precisely what procedures are needed to acquire or transfer a property right or to spin out the details of justifiable riparian or nuisance law. From the point of view of Lockean theory it is enough for existing judgments, rules, and practices to be within the range of the acceptable and for them to guide conduct in accordance with the function of rights.

I proceed as follows: in section 2, I focus on how unattractive general liability rule attenuation is for the Lockean theorist and, hence, how eager that theorist should be to find a different explanation of the permissibility of minor intrusions. In section 3, I explore the explanation for the permissibility of minor intrusions advocated by the Locke-leaning legal theorist Richard Epstein. Epstein’s scheme allows minor intrusions on individuals on the basis of those individuals being implicitly compensated in-kind by being allowed themselves to engage in minor intrusions on others. Epstein’s scheme is of interest for three reasons. First, if the Lockean cannot persuasively argue that minor intrusions are permissible because they are not boundary-crossings, Epstein’s version of liability rule attenuation seems like the best fall-back position. Second, contrasting Epstein’s in-kind compensation

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8 This sort of layered articulation of rights is suggested by Loren Lomasky’s distinction between basic rights, moral rights, and legal rights (Lomasky 1987) and Gerald Gaus’ distinction between abstract moral principles and more concrete moral rules (Gaus 2012).


10 See Epstein (1979) and (2009).
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proposal with my elbow room proposal serves to clarify the character of the latter stance. Third, developing this contrast also points to the greater plausibility of the elbow room proposal.

Epstein draws our attention to Baron Bramwell’s invocation in Bamford v. Turnley (Bamford 1862) of a live-and-let-live maxim in support of the permissibility of minor intrusions. I examine Bramwell’s stance in section 4 and contend that it is at least as readily interpreted as an elbow room argument as an implicit in-kind compensation argument. Bramwell also maintains that minor intrusions—what he calls “annoyances”—that are wanton or malicious may be enjoined even though those minor intrusions are to be allowed if they are performed non-wantonly and non-maliciously. In section 5, I sketch how implicit in-kind compensation reasoning and elbow room reasoning can each underwrite this distinction. This distinction enables the Lockean rights advocate to hold—as Nozick held (1974, p. 75)—that stealing a penny is impermissible without also holding that incidentally causing a penny’s worth of damage to another’s property is a boundary-crossing. In section 6, I expand on my claims that elbow room delineation of rights is well rooted within Lockean natural rights theory and I explain why elbow room reasoning is not, contrary to appearances, a species of implicit in-kind compensation reasoning. In section 7, I conclude with an observation or two about the relationship between armchair philosophical delineation of abstract rights and the assessment of actual concrete legal rights.

One final note about my use of “minor intrusions” may be helpful. Some intrusions may be so minor that their permissibility does not really require any refinement of the rights of those subject to those intrusions. These are the intrusions that have no discernible effect on the discretionary control that persons have over the objects of their respective rights. So, if persons C and E communicate with one another by means of certain radio waves that pass through D’s home or person yet those waves have no physical effect on D’s home or person, we may say either that their communication activities are not “intrusive” or that they are “intrusive” in a sense that does not raise any question about their permissibility. Recognizing this may ease the way to accepting that minor intrusions that are not quite so de minimis—e.g., causing a few smoke particles to land on one’s neighbor’s lawn—may also not be rights infringements.

2. ASSESSING LIABILITY RULE ATTENUATION

For the advocate of libertarian rights, the construal of persons’ most fundamental moral rights as claims protected by liability rules fails to
capture much of what makes those rights attractive. For central to the appeal of rights is that they provide individuals with moral protection for their *choices* with respect to a range of alternatives. If one has rights over oneself and over one's holdings, one may dispose of oneself or one's holdings *as one sees fit*; one may do as *one wills*—subject, of course, to the standard requirement that one is not violating others' rights. As Locke held, each person's fundamental claim against others is to "...a Liberty to dispose, and order as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is, and therein not to be subject to the arbitrary Will of another, but freely follow his own" (1689, *Second Treatise*, §57).

All the standard vocabulary of individual sovereignty, moral inviolability, moral space, individual spheres of authority, and domains of personal freedom reflect the really basic idea that rights are about the protection of choice. Persons may be harmed in certain ways when their rights are violated and that harm may be counterbalanced by simultaneous or subsequent due compensation; but such compensation does not counterbalance the *wrong* that is done to the right-holder by depriving him of the choice of whether he will be subject to that counterbalanced harm. The slate is not wiped clean by due compensation because compensation deals with the harm and not the wrong.

What if there is some *extra* compensation for being deprived of the *choice* about whether one will be subjected to the counterbalanced harm? This question suggests that having choice in the matter is itself just another interest of the right-holder that is not to be set back without due compensation. But even if we *say* that having choice in the matter is an interest of the right-holder, it remains a very special sort of interest. For the claim to having the choice about whether to be subjected to counterbalanced harm cannot be honored by depriving the claimant of *that* choice and throwing in a bit of extra payment. David Schmidtz rightly emphasizes that at the core of a property right—indeed, at the core of any moral claim protected by a property rule—is "a right to say no to proposed terms of exchange" (2010, p. 79). One's right to say no is not honored by others infringing upon that right while providing one with the payment one would have accepted if one had not said no. One's right to say no is not honored if the treatment one objects to is imposed upon one—even if it is true that, had one deliberated well, one would have waived one's right against the treatment in exchange for the payment that is now offered as compensation.

A general liability rule attenuation of rights does not comport with Nozickian invocations of moral inviolability (1974, pp. 31–2). One salient dimension of belief in the moral inviolability of persons is subscription to principled anti-paternalism. According to principled anti-paternalism, at
least some interventions that aim at the recipient’s good and on balance do advance the recipient’s good are still impermissible infringements of the recipient’s rights. However, liability rule attenuation undermines principled anti-paternalism. For, given that attenuation, if an intervention bestows an over-balancing good on its recipient, there will be no infringement of rights.

Nozick seeks to elucidate moral inviolability by contrasting beings who possess inviolability with tools (1974, p. 31). But, how much less of a tool is one if one has rights that are protected by liability rules rather than having no rights? Suppose that there were a moral norm according to which anyone who uses a particular unowned hammer is morally required to repair any damage done to it or even to shine the hammer up a bit. It does not seem that such a norm would make the hammer any less of a tool than it would be without protection by that liability norm. What more is present when everyone else is required to duly compensate you—to repair any damage to you or even shine you up a bit—after making use of you? The only thing more that is present is that you—unlike the hammer—have a claim to that compensation. Not only is there a price for using you; the payment of that price is owed to you. So, your having a right against being used in certain ways that is protected by a liability rule is a little bit more than there being a moral norm that says that whoever makes use of you in an intrusive way must repair you or even shine you up a bit. Nevertheless, it is very difficult to see that this little bit more makes you significantly less of a tool than that unowned hammer.

In *Anarchy, State and Utopia*, Nozick devotes several trenchant pages to his rejection of H. L. A. Hart’s principle of fairness (1974, pp. 90–5). According to this principle, individuals who have taken on certain burdens in the course of some benefit-conferring activity have a right against all beneficiaries of that activity that they share in those burdens. So, if you have benefited from all your neighbors taking time to tell funny stories on the neighborhood public address system, you are bound yourself to spend some time telling funny stories (or the like). Nozick rejects this saying, “One cannot whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payments” (1974, p. 95). Yet, if one accepts the liability rule attenuation of rights, why shouldn’t this be allowed? Why isn’t the benefit already conferred by those who now demand (or seize) payment simply advance compensation for the boundary-crossing they subsequently engage in? If one may seize as long as one makes due compensation afterwards, why may one not make due compensation for a future seizure?

As one would expect, a general liability rule attenuation of rights renders many actions morally permissible that the friend of libertarian rights plausibly
takes to be violations of rights.11 Ceteris paribus all forced exchanges that leave their subjects at least as well off as they would be were they not subject to the forced exchange are rendered permissible—whatever the absolute magnitude of the imposed costs and compensating benefits. Consider just two fairly extreme examples. The first is forced participation in eyeball (or kidney) redistribution pools. All members of the pool start with two healthy eyeballs (or kidneys). If a member loses both eyeballs (or both kidneys), some other member of the pool is required to donate an eyeball (or kidney) for that first member. The details for membership in a given pool are set so that, for each individual who is required to enter that pool, the expected loss from being a member is comfortably less than the expected gain. So, the pool is one that rational individual cost-benefit calculators would freely enter. But imagine further that many people simply do not voluntarily sign up for their designated pools. Liability rule attenuation seems to allow forcing people into such pools on the simple grounds that the (expected) cost of participation is more than duly compensated for by the (expected) gain. The second example takes advantage of the fact that liability rule compensation need not be direct or intended. Imagine that a number of individuals are captured by slave raiders, transported to another continent, and held in pretty bad slavery for the rest of their lives; but, had they not been captured, they would have almost immediately been wiped out by an unanticipated and horrendous disease. Even though we may blame the slave raiders for crossing boundaries without anticipating the accompanying due compensation, under liability rule attenuation no rights of the enslaved turn out to be violated. The enslaved would have no claims to any (further) compensation from the raiders; and, of course, there would be no rights-violation basis for punishing the raiders.12

3. EPSTEIN ON IMPLICIT IN-KIND COMPENSATION

In this section, I present Richard Epstein’s implicit in-kind compensation account of the permissibility of minor intrusions. According to Epstein (2009, p. 16), “To head off those results [of barbecuing, talking, or farming

11 A thorough discussion of Nozick’s view would examine the ways in which, according to Nozick, difficulties in determining subsequent due compensation for boundary-crossings may lead to the conclusion that many boundaries ought to be treated as though they are protected by property rules. For a condensed discussion, see Mack (2012), pp. 100–3.

12 Railton (1985, p. 115) and Sobel (2012, pp. 46–7) also criticize liability rule attenuation for not sanctifying the choice of the right-holder even though they themselves would allow overriding the choices of right-holders without compensation when this is sufficiently socially beneficial.
being prohibited], a strong live-and-let live principle allows all low-level nuisances to continue without [explicit] compensation, and this creates universal Pareto improvements that should be welcomed on all sides.” I examine Epstein’s stance because it seems to be the best case for the permissibility of minor intrusions that is based upon (something like) a liability rule attenuation of rights and because consideration of Epstein’s stance allows me to develop the contrast between this implicit in-kind compensation view and the elbow room rationale for the permissibility of minor intrusions.

We should notice, however, that Epstein’s stance does not quite amount to a liability rule attenuation of rights. Epstein holds that there are very substantial “utilitarian” gains associated with allowing minor intrusions; yet, he holds these gains do not themselves vindicate (even) minor intrusions. For these intrusions are affronts to personal autonomy; and our rights—including our private property rights—are supposed to protect autonomy.

. . . one of the essential functions of private property [is] that of specifying for each person a domain of action in which he is not accountable to the whims or the demands of any other group. Property is an external manifestation of the principle of personal autonomy. (1979, p. 63)

Nevertheless, Epstein concludes that the wrongfulness of subjecting an individual to such intrusions is sufficiently tempered by that individual’s enjoyment of in-kind compensation; i.e., compensation in the form of that individual’s own opportunity to engage in minor intrusions.

[C]ompensation from beneficiary to victim should in general be required, because forced exchanges represent less of an affront to corrective justice principles than do outright takings.” (1979, p. 77, emphasis added)

This forced rearrangement of rights does compromise individual autonomy, because it abridges the right of all to decide whether to retain or to dispose of what they own. But its improper effect is softened because it [i.e., the general policy of allowing non-consensual crossings] is aimed at all for the benefit of all, and not at A alone for the sole benefit of others. (1979, p. 78, emphasis added)

Minor intrusions are to be allowed primarily because the general allowance of such intrusions provides each individual who is subject of these intrusions with in-kind compensation; they are to be allowed even though these compensated for intrusions seem to remain somewhat morally tainted. Presumably more extensive intrusions are also to be allowed if those subject to them receive the due in-kind or out-of-kind compensation as that would be required under a general liability rule attenuation of rights.

Whereas Railton points to difficulties in a policy of case-by-case monetary compensation of individuals for particular minor intrusions (1985, p. 108), Epstein’s distinctive claim is that no such program of monetary compensation
is needed because (at least typically) each individual gains more in welfare from being allowed to engage in minor intrusions than she loses in welfare by being subject to them.\footnote{Epstein could further fortify this position by pointing out that (typically) individuals gain enormously from \textit{others} being allowed to impose minor intrusions \textit{on one another}. A gains knowledge about these things called fireplaces that can keep one from freezing to death from \textit{B} is allowed to build and use a fireplace even though that deposits some ash onto \textit{C}'s property. \textit{A} is enabled to trade with \textit{B} because \textit{B} is allowed to drive her wagon past \textit{C} even though doing so vibrates \textit{C}'s eardrums. And so on.}

\textit{A} is worse off to the extent that he cannot do with his land what he could have done before [minor intrusions were allowed] . . . Yet by the same token he is better off to the extent that the same regulation binds all others (\textit{B} through \textit{Z}) [to allow \textit{A}'s intrusions] for his benefit. The parallel restrictions upon others become implicit in-kind compensation for \textit{A}, and likewise for all others in the group. With compensation thus assured there is no need to undergo the expensive and pointless process of making explicit offsetting payments, whose sole effect is to dissipate the welfare gains generated by the change in legal rules [from those that forbid minor intrusions]. (1979, p. 78)

Epstein's implicit in-kind compensation position is one version of a common response to the restrictiveness of prohibitions on minor intrusions, viz., that surely we are all willing to be subject to a whole host of minor intrusions in order ourselves not be required to avoid engaging in such intrusive activities. However, it is crucial to distinguish between Epstein's in-kind compensation version and the elbow room version of this response. According to the implicit in-kind compensation version, what makes minor intrusions upon \textit{B} permissible is that the actions that will be performed by \textit{B} and by others if minor intrusions are permissible will render \textit{B} better off than (or at least as well off as) \textit{B} would be rendered by the actions that would be performed by \textit{B} and others if minor intrusions are forbidden. What matters is the actual outcome for \textit{B}'s utility or welfare of the introduction of the permissibility of minor intrusions. Thus, Epstein declares that “... the acid test is whether the overall scheme provides implicit in-kind compensation by allowing each landowner \textit{an appropriate fraction of the resulting gain}” (2009, p. 28, emphasis added). In contrast, according to the moral elbow room version, what makes minor intrusions upon \textit{B} permissible is that only if such intrusions are permissible will individuals (including \textit{B}) systematically have discretionary control over the domains that are ascribed to them as a matter of right. What matters is that people's rights be delineated in a way that systematically \textit{allows} individuals to dispose of their persons and property as they respectively see fit. Thus, the permissibility of \textit{A}'s engaging in minor intrusions upon \textit{B} is not hostage to \textit{B} actually employing his moral liberty to engage in minor
intrusions in ways that render B better off than (or at least as well off as) B would be were minor intrusions forbidden.

Indeed, Epstein’s own statement of his position straddles the fence between the in-kind (utility or welfare) compensation and the elbow room versions. In the first three sentences of the passage cited immediately above, Epstein seems to say that, although A has to allow minor intrusions on his land (e.g., the depositing of some smoke particles), others in turn have to allow his minor intrusions upon them. The general restriction against prohibiting minor intrusions leaves each better off with respect to their liberty to do as they see fit with their property. While a recalibration of rights that construes minor intrusions to be permissible involves a minor contraction of the boundaries of A’s rightful domain, the associated permissibility of A’s minor intrusions secures A’s discretionary sovereignty over that slightly retrenched domain. Only in the final sentence in this passage does Epstein clearly express the implicit in-kind (utility or welfare) compensation stance. Only in that sentence is he clearly thinking about how individuals will actually act given the recalibration of rights and is he vindicating the recalibration on the grounds that the anticipated actions will on net advance the utility or welfare of each of the parties.

We can see a similar fence-straddling when Epstein argues that the rights of landowner A should not be understood as rendering it impermissible for neighbor B, to make changes on her property that will diminish A’s view. Beyond arguing that B’s disturbing A’s vista does not even satisfy the “Physical Invasion Test” (1979, p. 60) for being a boundary-crossing, Epstein offers the following consideration. A’s claim to an unobstructed view is attractive only because it is considered in vacuo. Yet the uniform protection of all views commits us to a set of entitlements that make it impossible for anyone to use the land from which he might choose to look. (1979, p. 61)

Although Epstein certainly thinks of this as an implicit in-kind compensation argument, its focus is not on each party actually gaining (utility or welfare) from the actions that will ensue if vista alteration is allowed. Rather, the focal point seems to be the elbow room consideration that, only if vista alteration is allowed, will individuals have the discretionary control over their persons and property that we expect them to have when their ownership rights are affirmed.

Suppose that, even if vista alteration is allowed, landowner B will never do anything on her land that will diminish neighbor A’s existing vista; but A will engage in activities on his land that will diminish B’s view. Under these circumstances, implicit in-kind compensation reasoning does not yield the permissibility of vista alteration while elbow room reason does.
4. BRAMWELL AND THE LIVE-AND-LET-LIVE RULE

In support of his implicit in-kind compensation stance, Epstein cites Baron Bramwell’s famous opinion in *Bamford v. Turnley*. The operation of Turnley’s brick kiln introduced noxious fumes into neighbor Bamford’s home. Bamford appealed a lower court’s finding that Turnley need not compensate Bamford for the damaging fumes. In the Court of Exchequer Chamber, the lower court’s decision was overturned by a vote of five to one. Turnley was found liable to pay compensation to Bamford. The majority relied upon the general doctrine that, “No man may use his right so as to damage another; though, on the other hand, every one has a right reasonably to use his property, even if he should thereby annoy his neighbor” (Bamford 1862, p. 29). The majority believed that, on a proper understanding of people’s rights, they could hold Turnley liable for the damage he had done while still upholding the permissibility of annoying (i.e., engaging in minor intrusions upon) one’s neighbors. However, the one dissenting judge, Pollock, argued that, if Turnley was liable for the harm done by his noxious fumes, “anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance” (Bamford 1862, p. 31). In effect, Pollock argued that the majority had no basis for drawing a line between damaging and annoying conduct; if they found Turnley liable for his damaging action, they were committed to the hog-tying conclusion that all annoyances were actionable nuisances.

Bramwell’s separate opinion in support of the majority was largely devoted to meeting Pollock’s challenge. Bramwell maintained that there is a class of actions like “burning leaves, emptying cess-pools, and making noises during repairs” that “may be lawfully done” even though they “would be nuisances if done wantonly or maliciously” (Bamford 1862, p. 32). He recognized that, in order to draw a line between non-wanton/non-malicious burning of leaves, emptying cess-pools, and making noises during repairs and damaging actions, he had to identify “some principle on which [the former] cases must be excepted.” Bramwell then argued,

It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without submitting those who do them to an action…It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbor’s land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character.

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14 We will consider shortly why wanton or malicious annoyances may be disallowed.
The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live… (Bamford 1862, pp. 32–3)

Epstein takes this passage to be an enunciation of the implicit in-kind compensation stance. I think it is more ambiguous than that.

The majority of the justices—with whom Bramwell concurred—went out of their way to say that A’s common and ordinary use and occupation of his land and houses is “conveniently done” when that use or occupation is no more than “an annoyance” to other parties (Bamford 1862, p. 30). Given this understanding of “conveniently done,” the first sentence in the passage from Bramwell seems to say that rights to land and houses must include rights to dispose of those holdings even if one’s chosen action makes the residence of another “less delectable or agreeable” (Bamford 1862, p. 30). We seem to have a claim about the moral elbow room that must accompany one’s rights to those holdings as one sees fit even if one’s exercise of that liberty makes others’ holdings less delectable or agreeable. In contrast, the latter part of the passage seems to compare the utility or welfare gains and losses for individuals from their actually engaging in (non-malicious, non-wanton) annoying conduct and being subject to such conduct. Since the losses from being subject to the annoying conduct will be trifling and the gains from engaging in the conduct will be more than trifling, a rule that allows each to engage in annoying conduct is advantageous to all.

Bramwell provides a “live and let live” and a “give and take” synopsis of his stance. The live-and-let-live synopsis fits nicely with the moral elbow room reading. Each party has a right to live and more concretely to live by way of discretionary control over his own person and possessions. Yet, each person’s right of discretionary control over her person and possessions would come to (almost) nothing if each person’s right included a right against imposed annoyances. If each of us is to live, we each have to let everyone else live; and this requires everyone having the moral liberty to annoy; i.e., the moral liberty to engage in minor intrusions. This reading of the “live and let live” synopsis fits especially very nicely with the general principle that the majority relied in Bamford v. Turnley, viz., “No man may use his right so as to damage another; though, on the other hand, every one has a right reasonably to use his property, even if he should thereby annoy his neighbor”15 (Bamford 1862, p. 29). In contrast, the “give and take” synopsis fits better with

15 None of the judges who found for Bamford would allow Turnley to proceed with his damaging fumes if he compensates Bamford. Bramwell says that a party who is damaged has a claim to an injunction against the damaging activity. According to the other judges who found against Turnley, if A’s operation of a tanning facility is damaging to B, “it may be pulled down” (Bamford, p. 30).
Epstein's implicit in-kind compensation reading of Bramwell. Each gives annoyance but, in turn, has to take it. Since it is better to give than it is bad to receive, everyone in fact ends up better off.

What matters for the elbow room argument is that one attributes to people the moral liberties that must be attributed to them in order for them to possess the discretionary control over their lives and holdings that Lockean rights is supposed to provide. This attribution is part of the reasonable articulation of persons' Lockean rights given the near impossibility of exercising rights over oneself or one's possessions without physically affecting to some extent other persons or their holdings. What matters for the in-kind compensation argument is that, if people are at liberty to engage in minor intrusions, they will exercise that liberty in ways that will render everyone on net better off. It is crucial for the compensation argument that the actual outcome of the minor intrusions that will be performed will be Pareto superior to the outcome that would obtain were actions forbidden. Due to these differences we can imagine circumstances in which people are morally at liberty to engage in minor intrusions according to the elbow room argument but not according to the compensation argument.

Over-conscientious B would abstain from all actions on her property that would convey noises, odors, or so on onto neighbor A or his property even where minor intrusions are permissible. In contrast, A would engage in convenient uses of his land that would involve minor intrusions upon B. So the actual outcome of minor intrusions being permissible within the mini-society of A and B would be a net gain for A and a net loss for B. Hence, implicit in-kind compensation reasoning would not allow minor intrusions in that mini-society. However, elbow room reasoning would allow minor intrusions on the now familiar ground that to construe the rights of person and property as forbidding such intrusions would be to deny people the range of protected liberty that their rights are supposed to secure.

In a somewhat different sort of case the net loss for B derives primarily from her own chosen action. Suppose that B will burn herself alive if and only if the minor intrusion that would consist of some of her ashes landing on A or on A's land were permissible. Our still very conscientious B would forego that self-harming self-immolation if and only if sending those few ashes onto A or onto A's property were to count as a boundary-crossing. If minor intrusions are permissible within the mini-society of A and B, even if A abstains from minor intrusions upon B, B will be a net loser of utility or welfare.\(^\text{16}\) So, under these circumstances also, the in-kind compensation

\(^{16}\) I assume that burning herself alive would be worse for B than starving—as B might if B were too morally hog-tied to fertilize her fields or raise smelly pigs.
argument for \( A \) and \( B \) being at liberty to engage in minor intrusions will not go through. In contrast, the moral elbow room argument for this liberty, viz., self-ownership would be rendered nugatory if persons were forbidden to dispose of themselves in ways that were annoying to others, will still go through.

It seems to me pretty clear that it is permissible for \( A \) to motor up his driveway even if some noise carries over to neighbor \( B \) who never herself in fact engages in minor intrusions upon \( A \). Similarly, it seems to me pretty clear that \( B \) may permissibly cause some of her ashes to land on \( A \) or his property in the course of her self-immolation even though it is contrary to her interest for this pollution to be permissible. Also, it is permissible for \( A \) to motor up his driveway even if \( B \) would self-immolate were minor intrusions permissible. If one shares these judgments, one should prefer the elbow room account of the permissibility of minor intrusions over the implicit in-kind compensation argument. The elbow room argument better accords with “...a picture of a free society as one embodying a presumption in favor of liberty, under which people permissibly could perform actions as long as they didn’t harm others in specified ways” (Nozick 1974, p. 78).

5. WANTON AND MALICIOUS INTRUSIONS

Bramwell maintains that the proper delineation of mine and thine leaves room for actions that convey low-level odors or noises or vibrations to non-consenting others; nevertheless, the conveyance of the same odors or noises or vibrations will count as unlawful nuisances if “wantonly or maliciously” done (Bamford 1862, p. 32). This, I think, is probably the stance that the friend of Lockean rights needs to take. For it allows the Lockean to hold that “stealing a penny or a pin or anything from someone violates his rights” (Nozick 1974, p. 75, emphasis added) without having to hold that an action that incidentally does a penny’s worth of damage to someone’s property (or incidentally creates a 0.1 probability of ten penny’s worth of damage) is a rights violation. However, as Railton argues, it seems that the wanton or malicious performance of an act of a given type will count as a boundary-crossing only if the non-wanton and non-malicious performance of that act counts as a (presumably less blameworthy) boundary-crossing (1985, p. 102). The boundary-crossing character of my maliciously depositing some ash on your backyard seems to depend upon the boundary-crossing character of my non-malicious (and non-wanton) production of that outcome. Thus, if the malicious minor intrusion is a boundary-crossing, so too must be the non-malicious (and non-wanton) intrusion.
Nevertheless, we can readily envision both implicit in-kind compensation and elbow room reasoning for affirming the permissibility of non-malicious minor intrusions while denying the permissibility of malicious minor intrusions. In each case, we get an explanation for why, when rights are more finely calibrated, malicious minor intrusions count as boundary-crossings even though non-malicious intrusions do not. The in-kind compensation reasoning is that adding the permissibility of malicious minor intrusions to a structure that already extends to all a liberty to engage in non-malicious minor intrusions will not be on net advantageous to all. For (the reasoning goes) at least some people will be net losers if malicious minor intrusions are generally allowed—viz., those for whom there is little value in maliciously intruding upon others or high disvalue in being subject to malicious intrusion by others. The moral elbow room reasoning is that, while individuals must be at liberty to engage in non-malicious (and non-wanton) minor intrusions if they are to be at liberty to dispose of their own persons and possessions as they see fit, this liberty need not extend to malicious (or wanton) minor intrusions. It suffices to solve the hog-tying problem that non-malicious and non-wanton minor intrusions be permissible. As long as the minor intrusions on others are incidental to the agent’s decisions about how to deploy his person or property we reasonably view these deployments as fundamentally exercises of that agent’s rights. However, if those intrusions are wanton or malicious—done for or verging on being done for their intrusiveness—they are more reasonably seen as the agent doing as he sees fit with others or their property and, hence, as boundary-crossing.

6. ELBOW ROOM REASONING

Given our vulnerability to interferences by others, in order for people to possess the moral liberty to do as they see fit with their persons and property, they must have rights-claims over themselves and their property that require others to leave them in discretionary control of themselves and their rightful holdings. Persons’ moral liberty to do as they see fit with their persons and property would come to nothing (or almost nothing) were that liberty not protectively clothed by such claim-rights. When Locke insists that there are natural moral constraints on how one individual may treat another—not just Hobbesian liberties to act as one desires—his argument is that only if such constraints exist will each individual genuinely enjoy “a Liberty to dispose, and order as he lists, his Person, Actions, Possessions, and his whole Property…” “For who could be free, when every other Man’s humour might domineer over him?” (1689, Second Treatise, §57).
At the same time, the lesson to be drawn from the hog-tying challenge is that, in order for people to possess the moral liberty to do as they see fit with their own persons and property, they must not be morally precluded from engaging in minor intrusions that are integral to their discretionary control over and disposition of their own persons and property. The generation of some negative spillover effect cannot be a basis for shutting down persons’ chosen use of what is their own. If rights were delineated in such a way that such negative spillover effects provide a moral basis for shutting down persons’ chosen actions, rights would not serve their (deontic) purpose of defining spheres of freedom within which individuals may act as they see fit. If each person’s protected sphere were confined to conduct “which affects only himself” (Mill 1859, p. 11), that sphere would be vanishingly small. The rights that we ascribe to individuals to provide them with moral protection for the exercise of their liberties must leave persons morally vulnerable to minor intrusions if those rights are not to shrink those spheres into (at most) pinpoints of protected freedom.

The elbow room postulate or something close to it plays a systematic role within rights theory by guiding the reasonable delineation of rights. Here I will cite two examples of such guidance. The first example is Locke’s argument against there being an original joint-ownership of nature. Locke accepts Robert Filmer’s claim that, if the earth were originally the joint property of all of mankind, the establishment of any private property—indeed, any permissible individual use of any portion of the earth—would require a compact among all the joint-owners that has never taken place and will never take place (Filmer 1652, p. 234). Locke, however, takes this to be a premise in an elbow room argument against the original joint-ownership of the earth. For, if the earth were the joint property of all and Filmer’s claim is correct, there would be no elbow room for individuals to exercise their most fundamental natural right, viz., “the right everyone had to take care of, and provide for their Subsistence” (Locke 1689, *First Treatise*, §87). For (almost) any exercise of this fundamental right requires that individuals be at liberty to acquire private property or, at the very least, to make use of portions of the earth.17

In addition, according to Locke, private property rights themselves must not on net diminish the opportunity of individuals “to take care of, and provide for their Subsistence” (1689, *First Treatise*, §87). Moral elbow room for this right of individuals to preserve themselves by bringing their self-owned powers to bear on their extra-personal environment requires that, for

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17 Thus, when Locke says that the earth originally “belong[s] to Mankind in common” he simply means that “no body has originally a private Dominion, exclusive of the rest of Mankind” (1689, *Second Treatise*, §26).
each individual, others’ acquisition private property rights and the exercise of those rights on net leave “enough, and as good” (1689, Second Treatise, §27) for the use of that individual. It requires that the acquisition and disposition of property rights not on net make the extra-personal world less susceptible to any individual’s efforts to exercise his powers in ways that serve his ends. So, on this reading of Locke, Locke’s “enough, and as good” proviso itself arises as a further application of elbow room reasoning. This contrasts with the Lockean proviso that Nozick endorses which seems to allow acquisitions or deployments of property rights that on net diminish the economic opportunities of individuals as long as those individuals receive (implicit or explicit) compensation along some utility or welfare dimension.18

The other example of elbow room reasoning concerns the right of self-defense. Why is the use of harmful force against another agent morally permissible when it is employed in order to block that other agent from violating one’s rights? Why doesn’t the attacker’s right of self-ownership morally preclude the defender from striking the attacker in order to ward off the attack? One natural line of argument goes from the prospective victim’s self-ownership to her possession of a moral liberty to defend herself against violations of that right and from that moral liberty to harm-inflicting defensive acts not being boundary-crossings. If individuals are morally at liberty to defend themselves through the use of harmful force, there must be moral elbow room for the exercise of that liberty.19 That elbow room can exist only if agents do not have rights against being subject to such defensive acts. The elbow room account avoids reliance upon the idea that the attacker forfeits in part or in whole an original blanket right against being subjected to any harmful force. This avoidance is a good thing if one holds—as one should—that self-defensive force may be used against blameless attackers. For forfeiture can do no real work in explaining the permissibility of those self-defensive acts. Invocation of forfeiture turns out to be just a back-handed way of saying that a plausible delineation of rights does not ascribe to (blameworthy or blameless) attackers a right against being subjected to defensive force.20

In these cases, as in the elbow room argument for minor intrusions not counting as boundary-crossings, I have moved from individuals possessing moral liberties to act in certain ways to there being no boundaries that stand as moral barriers to these actions. However, it might be objected that such a bold move to the no-boundaries conclusion ignores the possibility

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18 On Lockean and/or Nozickian provisos, see Mack (1995).
19 And an individual who is morally at liberty to forcefully defend herself may deputize another to exercise that liberty on her behalf.
20 Jonathan Quong helpfully pressed me on this issue.
of a more modest conclusion, viz., that there are boundaries that are only protected by liability rules. I would like there to be a nice, simple, and yet totally persuasive reason to believe that *ceteris paribus* an elbow room argument anchored in A’s moral liberty vis-à-vis B to do x yields the bold conclusion that action x crosses no boundary of B rather than the modest conclusion that B has a right against A doing x albeit a right that is merely protected by a liability rule. Perhaps that reason is this: to think that A’s moral liberty is a matter of B having a claim protected by a liability rule against A’s exercise of that liberty is to make A’s moral liberty too conditional. For, it is to think that A’s moral liberty to x consists in her having that liberty if and only if she pays a certain price for x-ing.

It is clear in the self-defense case that one gets to the bolder no-boundary conclusion. The defender does not infringe upon any right of the attacker that requires compensation on the part of the defender. The defender does not have to purchase the moral liberty of self-defense from the aggressor. The same seems true in the case of the moral liberty to use or appropriate portions of nature. Admittedly, Locke’s argument against the original joint-ownership of the earth presumes that this ownership would be protected by property rules—hence, any of the joint-owners may forbid any use or appropriation of any portion of the earth. Locke does not see the possibility of and does not refute joint-ownership protected by liability rules. Nevertheless, as I have suggested, if the moral liberty of preserving oneself is not itself something one has to pay for, then it seems that elbow room reasoning that begins with that moral liberty does cut against joint-ownership whether that ownership be construed as protected by property or by liability rules.

Still, it is reasonable to ask why moral elbow room reasoning in the minor intrusion cases bypasses the modest conclusion that those intrusions do cross boundaries and yet are acceptable if they are accompanied by due compensation. Why in these cases is it reasonable to go directly to the conclusion that there is no boundary there to be crossed? I’ve argued that the libertarian theorist must reject the general liability rule attenuation of rights and, hence, must reject the general attenuation route to the permissibility of minor intrusions with compensation. However, what is now on the table is the possibility of basing the conclusion that minor intrusions are permissible on the need for minor intrusions to be permissible if hog-tying is to be avoided.

From the need for elbow room for minor intrusions, why not draw the conclusion that, although such intrusions do cross boundaries, these crossings are permissible with compensation because these boundaries are merely protected by liability rules?

I think that even in the case of an agent’s moral liberty to do as he sees fit with his person and property in ways that (non-maliciously and non-wantonly)
involve minor intrusions upon others the consideration that the agent need not purchase the liberty at issue from those others has force. Consider again the first case involving $A$ and the over-conscientious $B$. $A$’s doing as he sees fit with his person and property sometimes mildly intrudes upon $B$. Some smoke from $A$’s barbeque lands on $B$’s acreage and some noise from his motoring up his driveway vibrates $B$’s eardrums. However, in contrast to almost anyone else we might envision, by her choice $B$ never disposes of her person or property in ways that are even mildly intrusive upon $A$. Since $B$ does not even mildly intrude upon $A$, $B$ does not receive any implicit in-kind compensation in the form of gains from such intrusions. So, if $A$’s minor intrusions require compensation to $B$, it must be that $B$ can morally require that $A$ desist from use of his smoker and his driveway unless $A$ makes sufficient explicit payments to $B$. That is, it must be that $A$ has to purchase from $B$ his liberty to use his smoker and driveway.

However, $A$ seems to have a strong elbow room response to $B$’s demand that $A$ purchase those liberties from $B$. The response is that, absent special circumstances, to have a right over one’s person and property includes having the moral liberty to dispose of one’s person and property as one chooses and that appreciation for the hog-tying problem calls for a recognition that this moral liberty includes one’s discretionary disposition of one’s person and property even if that disposition involves minor intrusions on others. $A$ points out that, in light of what rights are supposed to do—he might say, in light of the telos of rights—a sensible delineation of rights will not count minor intrusions as boundary-crossings.

$A$ can further point out that this delineation of rights does not unilaterally favor him; $B$ also is credited with the moral liberty to dispose of her person and property as she sees fit even if her chosen dispositions involve minor intrusions upon $A$. Both parties’ rights are construed in a way that best articulates persons’ underlying moral claim against being precluded from living their own lives in their own chosen ways. There is, therefore, a sense—nicely expressed in Bramwell’s live-and-let-live rule—in which $B$ is implicitly in-kind compensated for $A$ being credited with the moral liberty to engage in minor intrusions. For $B$ too is credited with that liberty. Note, however, that under elbow room “compensation,” each individual’s compensation takes the form of the moral liberty to do as he or she sees fit with his or her person and property without paying compensation even if the exercise of that liberty involves minor intrusions upon others.21

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21 Similarly, one could say that each agent is “compensated” for being subject to self-defensive force by being herself at liberty to engage in such force. However, this is not to be confused with self-defensive force being permissible only if the attacker is provided with compensating utility or welfare.
Still, I have left open the possibility that, under special circumstances, libertarian rights may take the less stringent form of claims that are protected merely by liability rules. Two quite different sorts of case readily come to mind. First, there are cases of “soft paternalism.” Suppose \( B \) is subjected without her consent to an interference that would normally count as a rights violation. It is commonly argued that such interference may be permissible if \( B \) would agree to it in light of the disvalue for \( B \) of the outcome that the interference would prevent. For example, \( B \) is unknowingly about to step in front of a speeding bus. Because of the disvalue for \( B \) of being squashed like a bug, \( B \) would waive her right not to be yanked out of the bus’s path. However, time constraints make it impossible for \( A \) to elicit that waiver from \( B \). Due to those constraints, \( B \) cannot exercise choice over whether she will be yanked back or not. Under such circumstances, it seems pointless to say that \( B \)’s right against such intervention includes a right to determine by her choice whether \( A \)’s interference will be permissible or not. So it seems that, under such circumstances, \( B \)’s right against such interference amounts to a right not to be subject to it unless she would agree to it were such agreement possible. If this is correct, then under these special circumstances, \( B \)’s right amounts to a right to her being by her own lights duly compensated for being subject to that interference—and being saved from being squashed like a bug duly compensates \( B \).22

In a second sort of case, what \( A \) has a right to and what \( B \) has a right to are so closely connected that neither party can engage in a core exercise of his or her right without precluding the other from engaging in a core exercise of his or her right. For example, \( A \) cannot extract his natural gas (which lies below his plot of land) without precluding \( B \) from retaining her natural gas (which lies below her neighboring land) and vice versa because the gas is part of a single pool. In situations of this sort the closest we can get to preserving the right of each to extract his or her own gas and not be subject to the unchosen extraction of his or her gas is to ascribe to each a moral liberty to extract gas from the pool subject to a requirement that the extractor compensate the other party for the unavoidable extraction of the other party’s natural gas; \( A \) may extract \( B \)’s gas but must pay \( B \) the value of \( B \)’s extracted gas minus the costs to \( A \) of the extraction (and sale) of \( B \)’s gas.23

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22 See Steven Wall’s “Self-Ownership and Paternalism,” *The Journal of Political Philosophy*, vol. 17, no. 4 (2009), 399–417. Wall argues that advocates of libertarian self-ownership have no satisfactory explanation for the permissibility of yanking \( B \) out of the path of the bus.

23 The detailed law governing these matters differs from state to state. In Colorado, \( B \) has the option of sharing from the start in the financial risks of the extraction project or not sharing in that risk and later paying a higher percentage of the costs if the project is successful.
ABSTRACT RIGHTS VS. CONCRETE RULES

There is no philosophical deduction of a bright line between minor and non-minor intrusions. Even if philosophy could identify something like a physical scale of intrusiveness; e.g., number of cigarette smoke particles per cubic foot of air conveyed toward one’s nose or lungs, no point on that scale would mark the natural boundary between minor and non-minor smoke intrusion. One reason for this is that whether an act is a minor intrusion or a non-minor intrusion also depends upon expectations about what one will and what one will not be subject to. Introducing some cigarette smoke into a non-consenting person’s lungs went from being a minor intrusion to an impermissible intrusion partially because more was learned about the dangerousness of cigarette smoke but also partially because smokers and non-smokers came more to expect its prohibition. Also, even if there were a philosophically detectible bright natural line between minor and non-minor cigarette smoke intrusions, detection of that line would not provide a great deal of guidance about where the bright line might be between minor and non-minor noise or odor intrusions. It is enough for armchair philosophy to say that any concrete realization of basic rights that is supposed to define for each individual a domain within which she may do as she sees fit must deem an array of intrusions to be minor and, hence, permissible.

Still, it is necessary to have some picture of how processes that are not a matter of armchair philosophizing can give rise to a body of concrete rights (with respect to intrusions on persons and their just holdings) that would be acceptable from the perspective of abstract Lockean rights theory. Imagine an array of judges who each at least implicitly take individuals to have claims over their persons and their holdings and accept the Bamford v. Turnley damage vs. annoyance distinction. And imagine that, over decades or even generations, such judges make conscientious decisions in many different sorts of nuisance and trespass cases. They consider cases involving noises, odors, fumes, vibrations, light transmissions and blockages, and so on. An important element in many of these decisions is whether or not the actual conduct of the defendant should be construed as a boundary-crossing damage or a

24 Judicial decisions are more apt to track Lockean thinking than legislative decisions because judges are supposed to focus on the rights of the parties who come before them while legislators are apt to advance policies the rationale for which has little or nothing to do with rights.
non-crossing annoyance. In forming many of their decisions these judges ask question like these: Do we have here a degree of smoke (or noise or vibration) intrusiveness, which, if forbidden, would deprive the defendant of his right reasonably to use his property? Or do we have here a degree of smoke (or noise or vibration) intrusiveness which is reasonably construed as damaging to the complainant and, hence, as not within the moral liberty of the defendant? And, as a result of their deliberations, these judges issue not unreasonable judgments like these: A’s barbecuing in his backyard and A’s nailing down a new roof for his house are no more than minor (and not boundary-crossing) intrusions upon neighbor B; but A’s conducting a (hide) tanning operation or A’s using his backyard as a pile-driving demonstration site are damaging boundary-crossings for B.

Individuals adjust their expectations and conduct to these not unreasonable judgments about which actions are damaging and which are (at most) annoyances because they anticipate other judges reaching similar decisions in similar subsequent cases; and that anticipation is to some degree self-fulfilling since judges are likely to reach similar decisions in similar subsequent cases because people have adjusted their expectations and conduct on the basis of that anticipation. If a judge now is confronted with a case not about the transmission of odor or noise but, rather, vibration, his deliberations will be more complex. For he will not deliberate simply about the first-order issue of whether the degree of vibration at hand is damaging or only annoying but also about what judgment in this vibration case is reasonable in light of the lines that have been drawn in prior decisions in odor and noise cases and in light of the reasonable expectations that individuals have formed with respect to vibration on the basis of those prior decisions. And new cases may force judges to rethink and reformulate the principles that judges previously thought to be embodied in proper decisions; and that rethinking and reformulation will affect the precedential significance of past decisions and people’s future expectations.

The result of such processes will be a much more determinate delineation of certain of persons’ rights than rights theorizing can deliver. Of course, there is nothing pre-ordained about the resulting (but not permanently fixed) structure of concrete rights. Many other different structures could have emerged that would be equally acceptable from the point of view of

25 Other issues would include: (i) whether an apparent trespasser does not intrude at all because he possesses an easement; (ii) whether the complainant cannot enjoin an already established activity that damages her when she comes to the neighborhood; and (iii) whether the dire straits of the defendant provides him with a dispensation to engage in conduct that would otherwise be boundary-crossing.
abstract rights theory. However, I believe that, if an acceptable structure actually emerges among us by way of, e.g., the judicial decision-making processes I have invoked, it (rather than any of the other abstractly equally acceptable structures) properly governs our interactions. I do not have an account of why precisely the actually emergent and abstractly acceptable structure of rights has moral traction for us while the other unrealized structures do not. However, I think that these sketchy remarks about a body of articulated rights emerging from the successive not unreasonable decisions of (at least implicitly) Lockean-minded judges is enough to shift the responsibility for more fine-tuned articulation of persons’ Lockean rights away from the armchair Lockean.

I conclude, therefore, that Lockean rights theory can do as much as it has to do to provide an explanation for why minor incursions are permissible—an explanation that, because it turns on moral elbow room reasoning, does not open the door to consequentialist reasoning that would be unwelcome to the advocate of Lockean rights.

**Bibliography**

Elbow Room for Rights