INDIVIDUAL SOVEREIGNTY AND POLITICAL LEGITIMACY

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Natural rights liberalism configures individuals’ areas of moral freedom in terms of both ownership and enforcement rights. These rights are taken to entail not only liberties or permissions to act in particular ways, but also obligations on the part of others not to interfere with such liberties. The state, however, threatens its subjects with the infliction of harm should they decide to exercise the full range of their enforcement rights. The state also taxes its subjects in order to fund the costs involved in the collective provision of enforcement services. Thus, within natural rights liberalism, the problem of political legitimacy amounts to the problem of explaining why the state’s characteristic infringements upon individuals’ rights could be morally permissible. The theoretical challenge lies in the fact that, according to natural rights liberalism, the areas of moral freedom defined by individuals’ natural rights are taken to have especially stringent borders. Those borders are immune, in particular, to consequentialist and paternalistic rationales of infringement. This dissertation argues that this challenge is best met by an appeal to individuals’ “samaritan” rights. The holders of these particular rights are individuals who, by no fault of their own, face a perilous situation, and they hold their rights against those who have the capacity to place them out of peril at a reasonable cost. Christopher Wellman has already noted the implications of individuals’ samaritan rights for the problem of political legitimacy. The purpose of this dissertation is to further develop Wellman’s insights, and argue that the resulting moral framework is a promising
approach for dealing with the problem of political legitimacy, particularly within the tradition of natural rights liberalism.
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INTRODUCTION

The defining feature of liberalism is the idea of limited government, that is, the idea that there is a well-defined area of private concern within which the government should not interfere. But there are two clearly distinctive strands of liberalism. One establishes the limits of the state on the greater aggregation of individual benefits that is supposed to follow from such a limitation. The other one establishes those limits on the moral respect that individual persons allegedly deserve. It is for this latter strand of liberalism, and in particular, for an understanding of it grounded on the notion of individuals’ natural rights, that the very possibility of a legitimate state would seem to pose an explanatory challenge. If individuals have natural rights to their persons and property, rights which are taken to constrain the legitimate activities of government, should they not be free to decide whether their rights are protected, if at all, by somebody else rather than by the state? How could it be morally permissible to threaten an individual with the infliction of harm should he decide not to have his own rights secured by the state?

This dissertation argues that the challenge the legitimate state poses for natural rights liberalism is best met by an appeal to individuals’ “samaritan” rights. The holders of these particular rights are individuals who, by no fault of their own, face a perilous situation, and they hold their rights against those who have the capacity to place them out of peril at a reasonable cost. We tend to recognize the existence of samaritan rights under certain circumstances of an extraordinary type. Only recently, Christopher Wellman has noted the implications of individuals’ samaritan rights for the problem of political legitimacy. The

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purpose of this dissertation is to further develop Wellman’s insights, and argue that the resulting moral framework is a promising approach for dealing with the problem of political legitimacy, particularly within the tradition of natural rights liberalism.

Chapter 1 provides an account of the major elements involved in a natural rights liberal perspective. Liberal theories of natural rights might differ in terms of the precise justification offered for individual rights. In general, however, the rationale rests on the recognition that individuals have their own lives to lead, and on the value of those individuals having the ability to do so free from interference. Thus, within natural rights liberalism, individual rights can be understood as establishing areas of moral freedom over certain ranges of actions, over which the individual is taken to be fully sovereign. The control an individual is entitled to exercise over the corresponding range of actions is not contingent on the approval of anybody else.

Initially, much of the appeal of natural rights liberalism lies in the simple and principled manner in which the activities of the state are both constrained and justified. Not being contingent upon the state’s decision to ignore or respect them by means of legislation, individuals’ protected areas constrain the actions of the state in the same way they constrain the actions of other individuals. The state may do to its subjects exactly what those very same subjects would be allowed to do to each other should the state not exist. Initially, however, there would seem to be a theoretical tension between this attractive manner of conceiving the relationship between the individual and the state, and the very moral possibility of the state itself.

735-759; and “Samaritanism and the Duty to Obey the Law,” in Christopher Heath Wellman and A. John Simmons, Is There a Duty to Obey the Law? (Cambridge: Cambridge University Press, 2005), pp. 3-89.
Chapter 2 explains what precisely that tension is. Traditionally, it has been claimed that it is the use of coercion that renders the state morally problematic. Nevertheless, for those who configure the area of legitimate state actions in terms of individuals' natural rights, the use of coercion, in the form of threats or actual violence, is taken to be perfectly permissible as a means for securing individuals' areas of moral freedom. Thus, it will be from some particular uses of coercion that the state typically employs, rather than from the mere use of coercion, where the call for a justification more clearly arises within natural rights liberalism.

Natural rights liberalism configures individual areas of moral freedom in terms of both ownership and enforcement rights. These rights entail not only liberties or permissions to act in particular ways, but also obligations on the part of others not to interfere, also in particular ways, with such liberties. Moreover, the areas of moral freedom defined by individuals' ownership and enforcement rights are taken to have especially stringent borders. Those borders are immune, in particular, to consequentialist and paternalistic rationales of infringement. The state, however, threatens its subjects with the infliction of harm should they decide to exercise the full range of their enforcement rights. The state also taxes its subjects in order to fund the costs involved in the collective provision of those enforcement services that it does not allow individuals to provide privately. But if a liberal state should not coerce people in choosing one form of life rather than any other, when those other forms of life do not involve the violation of anybody else’s rights, why should it force people to choose a life where the protection of their own rights must be guaranteed by the state? Why should they not be free to allocate whatever amount of their own resources, if any, for purposes of protection?

Traditional liberal theories of political legitimacy can be understood as addressing this prima facie incompatibility of natural rights liberalism and the idea of a legitimate state.
The most simplistic understanding of the social contract theory establishes the legitimacy of the state, on the individual’s normative power to transfer their enforcement rights and a certain portion of their ownership rights to the state. In this way, the state would legitimately hold both a monopoly over the provision of justice (individuals would no longer have the enforcement rights that they have transferred), and the power to tax its subjects with the purpose of financing the corresponding services. But the inadequacy of this answer is evident. States are not, and they never have been, involved in the business of securing the consent of its subjects. The problematic nature of the state seems to arise, precisely, from the fact that it does not infringe upon the ownership and enforcement rights only of those who explicitly consent to the corresponding actions. Individuals who explicitly dissent from what the state does to them are still regarded as the proper subjects of its coercive actions.2

Chapter 3 will explore the plausibility of more sophisticated liberal answers, such as those based on implicit consent, hypothetical agreement, and the principle of fairness. These theories might be understood as instances of a more general project: the project of political preferentialism. According to political preferentialism, the justification provided for the state’s infringement on an individual’s rights must ultimately be grounded on the

2 None of the claims that are made here regarding the nature of the state, or regarding what the state does, purports to establish a conceptual truth. In dealing with the problem of political legitimacy, we are interested in addressing the morality of the actions states typically perform, and not of the actions states might conceivably perform while not ceasing to be the proper reference of the term “state.” Robert Nozick famously claimed that the state could arise without violating anyone’s rights. See Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974). Yet, as Chapter 2 will argue, his answer ultimately amounts to a terminological claim. Nozick does not argue that what states typically do is morally permissible. He argues that a state that would act differently than the typical state could still be properly referred to as a state.
preferences of that very same individual. While an appeal to implicit consent is fundamentally inadequate for other reasons, the most revealing objection against contractarian and fairness theories might be traced back to that fundamental feature that they share. Political preferentialism fails insofar as it does not take into account how the political preferences of some individuals could affect the lives of other individuals. The greater importance assigned to this possibility is what distinguishes the samaritan approach from its counterparts within the liberal tradition.

Chapter 4 explores the moral foundation upon which a samaritan approach to political legitimacy is built: the idea of samaritan rights. Samaritan rights might be understood as providing their holders a special prerogative to infringe upon the more basic rights of others when certain conditions are met. Alternatively, samaritan rights might be understood as constraints on the exercise of our more basic rights. Within the sphere of freedom defined by our ownership and enforcement rights, we might do as we wish as long as our not doing so is necessary for others to overcome a perilous situation for which they are not responsible, and as long as our refraining from doing so is not unreasonable burdensome to us. Chapter 4 argues that samaritan rights are not only intuitive and formally adequate, but also entirely consistent with natural rights liberalism. In fact, the claim is stronger. The claim is that samaritan rights would seem to be required by the same sort of considerations that support the assignment of ownership and enforcement rights in the first place.

Chapter 5 explains how exactly it is that samaritan rights provide a criterion of political legitimacy. Roughly, the idea is that if the existence of samaritan rights must be acknowledged in certain familiar extraordinary circumstances, and if not infringing on individuals’ ownership and enforcement rights in the way the state does will bring about the same sorts of circumstances, we should also acknowledge the existence of samaritan rights
in that situation as well. A samaritan approach to political legitimacy would then conceive the legitimate state as a mere enforcer of individuals’ samaritan rights. Although in general Chapter 5 follows Wellman’s major line of argument, it provides a reformulation of the samaritan approach in terms of a moral criterion for decision making under conditions of uncertainty. This reformulation enables us to see with greater clarity the fundamental virtue of this approach: its greater responsiveness to the findings of the social sciences.

For a samaritan approach, it will matter greatly, and in a very direct manner, what the likelihood is that the state produces some important social benefits that were otherwise unavailable. Within preferentialist theories, those sorts of considerations have only a subsidiary role. They are appealed to with the purpose of showing, for example, that individuals would agree to the existence of the state, or that it would be unfair not to contribute to the state’s production of such benefits. However, as Chapter 3 will have attempted to show, there are clear difficulties in fully capturing the significance of such empirical considerations by this indirect route. For those who are committed to a deontological conception of morality, a conception that is characteristic of natural rights liberalism, it is equally important that a samaritan approach allow us to capture those empirical considerations without having to endorse a consequentialist pattern of moral reasoning. It should also be clear how a samaritan approach avoids the charge of paternalism. The principle of samaritanism would not make the permissibility of the state rest upon the benefits the state confers upon the subject himself, but rather upon the perils from which the state saves others.

The endorsement of a samaritan approach in Chapters 4 and 5 is not, however, an endorsement of the permissibility of the state. The claim is merely that, should the state indeed be necessary to overcome what standard liberal accounts take the state to be necessary for, that is, the avoidance of the problems and inconveniences of anarchy, the
state would be allowed to act as it typically does. So the claim is merely that there are
certain conceivable conditions under which it is morally permissible for public officials to
infringe upon individuals’ ownership and enforcement rights. This is an issue of great
importance. For we tend to believe that a plausible political philosophy would justify the
state if the consequences of its absence were particularly severe. But it remains to be seen
whether those conditions are not only conceivable, but also the actual conditions that
individuals would face in the absence of the state’s characteristic infringements. Is it really
the case that those infringements are necessary to overcome the unchosen perils of at least
some individuals without imposing unreasonable costs on others? The last two chapters of
this dissertation deal with this issue. They provide an examination of certain traditional
discussions regarding the nature of anarchy and the state, in the light of recent
developments in the economics of cooperation, conflict, and governance.³

According to the received wisdom, the fact that each individual tends to have, in
most instances, a greater regard for his own interests than for the interests of others, entails
that where those come in opposition, individuals are ready to sacrifice the interests of others
to their own. Hence, as John C. Calhoun puts it in his *Disquisition of Government*, “the
tendency to a universal state of conflict…accompanied by the connected passions of
suspicion, jealousy, anger, and revenge…and, if not prevented by some controlling power,

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³ As defined by Avinash Dixit, the economics of governance studies the processes carried out by
“institutions and organizations that underpin economic transaction by protecting property rights, enforcing
contracts, and organizing collection action to provide the infrastructure of rules, regulations, and
information that are needed to lend feasibility or workability to the interactions among different economic
ending in a state of universal discord and confusion.\textsuperscript{4} But, perhaps, the time has come to reconsider this received wisdom. Adam Smith argued that it is not from the benevolence of the butcher or the baker that we expect our dinner, but from their regard to their self-interest. Smith also showed why, in those spheres, the existence of such motives is not a matter of concern. But why then should it be the case that things are different when it comes to the private administration of justice? Could it not be the case that, in matters of order and security, individuals might also be led by an invisible hand to promote an end that was no part of their intention?

Chapter 6 explores the major grounds for doubting that a private market would be able to take care of individuals' governance needs, as well as it takes care of their other needs. Hobbes' worry is that rational individuals will have no reason to keep their word, and thus will be unable to enter into agreements involving non-simultaneous performance in the absence of a mechanism of coercion that, for those very same reasons, cannot possibly be arranged contractually. Locke's worry is that in the absence of the state, “self-love”, ill nature, and passion will make men partial to themselves and blind to justice. Thus, in Locke, the need for the state mainly arises from the more fundamental need of an "indifferent judge," an agent capable of surpassing individuals' bias towards their own interests, which would establish the standard of right action, determine violations to that standard, and execute sentences against offenders.\textsuperscript{5}


Locke thought that in the absence of such an indifferent judge, “nothing but confusion and disorder will follow.” Hobbess drew even more pessimistic conclusions from the absence of the contract enforcer that he took the state to represent. If Hobbes’ and Locke’s analyses of the main political alternatives are correct, individuals might be seen as acquiring the set of samaritan rights that would enable them to infringe on the enforcement rights of others, in the characteristic ways in which the state infringes upon the rights of its subjects. Given the public characteristic of this enterprise, that is, given the fact that all those individuals would benefit from such an infringement, they might lack the incentives to contribute to the corresponding infringement effort. This is why individuals might also be justified in infringing upon the ownership rights of others through the implementation of a mechanism of taxation. Neither of these actions could be seen as unreasonably costly if indeed their performance remedies the perilous conditions of anarchy.

Hobbes’ radical skepticism, however, seems to have been discredited in recent times. It is now generally believed that the iterative nature of human interactions provides the foundation upon which spontaneous cooperation emerges. Although most contemporary theorists acknowledge the validity of this line of argumentation against Hobbes’ radical skepticism, few acknowledge that it will provide the tools for discrediting more moderate forms of skepticism as well, like that of Locke’s. We might think that the fact that individual persons are biased when judging their own cases entails that the involvement of a private third party will be futile to the peaceful resolution of a dispute. For such a third party will be

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7 In fact, Hobbes himself might have anticipated the major line of objection against his argument from the impossibility of self-enforcing contracts. This claim would seem to be supported by Hobbes remarks in his answer to the fool in Chapter 15 of Leviathan. For a discussion on this issue, see Jean Hampton, Hobbes and the Social Contract Tradition (Cambridge: Cambridge University Press, 1986), Chapters 2 and 3.
equally biased. Under iterative settings, however, a third party’s “self-love” could provide the very ground upon which an impartial resolution is reached and the costs of violence avoided. At a first level of analysis, obstacles might remain in individuals’ pursuits of cooperation; such as lack of information and uncertainty about potential partners’ future plans and intentions. Yet, at a second level of analysis, the removal of those obstacles is seen as a mere source of profits for the entrepreneurial mind.

Chapter 6 addresses the issue of, roughly, whether a market of governance could develop without assuming the existence of the sort of “ultimate guarantee” that the state is usually taken to provide in other markets. The worry of Chapter 7 is that, if such market could indeed develop, it would present an inevitable tendency towards monopoly, a tendency that, given the particular services involved, might be regarded as especially risky. The most plausible argument to support this worry characterizes a market for protection as a market with strong “network effects,” that is, effects that arise because the value of the good to potential consumers heavily depends on the number of people already consuming the good.\(^8\) Under those conditions, once a firm has acquired some market dominance, the greater number of users will make its product more valuable to its potential customers, and the competing firms will suffer the opposite effect. A competitor with the larger share might then have an ever-widening advantage over smaller firms.

Chapter 7 argues, however, that the connection between network effects and monopolistic exploitation might not be as straightforward as the argument assumes, and

\(^8\) See Nozick, *Anarchy, State, and Utopia*, p. 17; and Tyler Cowen, “Law as a Public Good. The Economics of Anarchy,” *Economics and Philosophy* 10 (1994): 249-267. Neither Nozick nor Cowen appeal to the notion of network effects, but their arguments can be easily restated in those terms. Cowen does use the notion of a ‘network’, but he understands it in a related, but slightly different sense from the standard usage within the literature on network effects.
that despite the importance of network effects in certain particular areas of a market for protection, there are other areas in which such effects are hardly significant. Chapter 7 also argues that, contrary to much liberal political theory, there is no basis for understanding liberal institutional arrangements as genuine constraints on the predatory actions of public officials. Therefore, it is not clear how the state’s infringement on individuals’ rights could be necessary to bring into existence a sort of safeguard that was otherwise unavailable in the scenario in which a private monopoly indeed arises.

Chapters 6 and 7 conclude that we might lack reasons to believe that the expected perils of anarchy, where anarchy is understood merely as a state of affairs in which individuals are free from the state’s infringements on their ownership and enforcement rights, are as general and severe as the standard view takes them to be. These chapters also conclude, that we might lack reasons to believe that those infringements could be taken as a necessary condition for remedying the perils that indeed we could expect individuals to face, in a manner in which it is allowed by an appeal to samaritanism. Surely, particular individuals might be spared from particular perils by the existence of the state. Yet it is unclear how, given the specific nature of such perils, this would amount to anything more than a mere reallocation of some individuals’ perils onto others, imposing unreasonable costs on the latter.

Within natural rights liberalism, a more serious consideration of anarchy would seem to be in order. One might ask whether, in the light of this conclusion, the samaritan criterion itself should not be regarded as seriously flawed. One of the central ideas underlying this dissertation is, however, that there is an important distinction to be made between two questions. The first question is concerned with the existence of certain type of conceivable conditions under which the actions of the state could be rightly performed. We might refer to this question as the question of the possibility in principle of the legitimate state. The second
question is whether such conditions are actually instantiated in the relevant scenarios. We might refer to this question as the question of the *possibility in practice* of the legitimate state.

This dissertation is largely motivated by the belief in the implausibility of any view yielding a negative answer to the first question, and thus is motivated by the hope of rescuing natural rights liberalism from such an implication. But the plausibility of a view holding a negative answer to the second question is a completely different matter. If theoretical developments in the social sciences were to suggest that the traditional conception of anarchy as a state of constant war is seriously misguided, for example, we would expect that a liberal account of the legitimacy of the state would be responsive to such developments. This dissertation argues that the demand for a more serious consideration of anarchy arises, precisely, from the conjunction between the existence of such developments, and the samaritan approach’s greater responsiveness to that type of matter.
CHAPTER 1

INDIVIDUAL RIGHTS: GUARANTORS OF SOVEREIGNTY

Understood in a broad sense, the doctrine of natural rights liberalism might be characterized by the fundamental importance it assigns to individuals’ capacity to lead their own lives, where this capacity is taken to require an allocation of rather stringent and extensive areas of moral freedom. This chapter provides a fuller and more concrete characterization of this normative perspective. Although the purpose of this dissertation is not to provide a defense of natural rights liberalism—the purpose is rather to explore what room, if any, this doctrine leaves for the moral legitimacy of the state—certain concerns regarding its initial plausibility will be addressed throughout this chapter.

The first section presents a basic analysis of the core commitments of natural rights liberalism. Such commitments involve the rejection of certain patterns of moral reasoning that would subordinate the individuals’ capacity to lead their own lives to the will of other individuals, to the promotion of social benefits, or even to the promotion of the very same individual’s self-interest and moral good. This section also briefly explores the question of the theoretical adequacy of deontological theories of rights.

The second section explains why an assignment of ownership rights both over our bodies and over external objects plays a fundamental role in the concrete representation of natural rights liberalism’s central commitments. The basic thought is that an individual’s capacity to lead his own live would be seriously truncated should others have a right either to move or block the movements of his body, or to interfere with the use of the external resources with which an individual would need to interact in order to achieve virtually any of his purposes. This section also introduces the major debates within natural rights liberalism regarding the proper distribution and scope of such ownership rights.
Finally, the third section explains why the assignment of enforcement rights, which might be seen as second-order rights, are required by the same fundamental concerns upon which ownership rights are grounded. Individuals’ very capacity for agency would be seriously truncated if other individuals could interfere with the areas of freedom defined by their ownership rights. Why should individuals not then be allowed to raise the expected costs of others interfering in such areas of freedom, as a means of deterring the acts of interference by making them less profitable than they would otherwise be? It is argued that the plausibility of all forms of enforcement rights, including a right to punish, would seem to arise from this suggestion.

1.1 ESCAPE FROM MORAL ANARCHY

In order to understand certain central features of the doctrine of natural rights liberalism, we might think about a situation of “moral anarchy,” that is, a situation where individuals do not observe any sort of moral constraint on their self-interested behavior. In moral anarchy, every individual, under all circumstances, does whatever he wants to do without any sort of moral concern for the consequences his behavior imposes on others. In moral anarchy, individuals treat others as mere resources for the satisfaction of their own personal goals.9

At least initially, it seems that moral anarchy could result in a state of affairs in which most individuals are powerless to arrange their lives in the way they want. Having different goals and preferences regarding how best to achieve those goals, and having a natural tendency to care more strongly about the satisfaction of their own goals than the goals of others, individuals might tend to interfere with one another in their corresponding pursuits.

In this state of affairs of virtually universal mutual frustration, the scarcity of external resources could play a major role. If resources were superabundant, most individuals might not find any reason for interfering with other individuals’ pursuits.

Moral theories tell us when and how we must constrain our self-interest. So a natural way of characterizing moral theories is by considering them as providing alternative blueprints to escape from the potential consequences of moral anarchy. Basically, these blueprints state what each person should do, and why it makes sense for everybody taken collectively, and perhaps even for each person taken individually, to follow those instructions.\(^\text{10}\) To be sure, the state of mutual frustration in which moral anarchy could result might generate its own corrective mechanisms. Self-interested individuals might see the benefits, under certain conditions, of restraining their own self-interested behavior in order to gain the trust of others. Also, as James Buchanan notes, assuming that each person has an economic interest in the ethical behavior of others, and assuming that such a behavior is not regarded as wholly beyond the possibility of change, individuals might find it in their own self-interest to invest some resources in efforts to modify the behavior of others.\(^\text{11}\) For this reason, the blueprints provided by moral theories might not be actually necessary, in the sense that individuals may be able to escape from moral anarchy even if there were no moral theories that tell them how. However, the blueprints provided by moral theories can still serve as standards of evaluation.

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\(^{10}\) Admittedly, this metaphor pictures morality as essentially practical, in the sense of picturing it as having a point. Certain theorists of Kantian leanings might perhaps object to this characterization of morality.

The blueprint provided by classical forms of utilitarianism would state that, facing moral anarchy, it makes more sense for everybody to adopt the same overall goal: the maximization of total happiness. Some classical utilitarians will argue, rather, that individuals should adopt whatever goal has the maximization of total happiness as a consequence. For it might be the case that by directly aiming at that goal individuals would fail to achieve it. But either way, if individuals would follow the classical utilitarian blueprint, the conflict that we fear to be ubiquitous in moral anarchy would just dissolve.

Yet we might wonder whether classical utilitarianism would fail to address an aspect of the conflict of moral anarchy that is particularly worrisome. For when it comes to individuals being able to lead their own lives, things do not look that much better under the utilitarian plan than they might in moral anarchy. The all-consuming conflict we might expect in such a setting is replaced by the all-consuming demands of the greatest happiness. While in the former, individuals might be used as resources for the satisfaction of the desires of those who are stronger, in the latter individuals might be used as resources for the satisfaction of the desires of whoever are those who happen to bring more happiness into the world. Either way, factors that would seem to be completely beyond individuals’ control would determine whether they would be able to lead their own lives. It is in response to this intuitive failure of classical utilitarianism that rights theories in general, and natural rights liberalism in particular, might be best understood.

In contrast to classical versions of utilitarianism, rights theories do not propose to escape from moral anarchy by means of providing a unique goal that all must serve. Instead, they propose to protect individuals’ pursuits of their own personal goals. In order to accomplish this, rights theories assign control to each individual over a specific set or range of actions. These allocations of control allow the individual to perform or refrain from performing the corresponding actions, and impose on others the obligations not to
Those ranges of actions might then be understood as configuring areas of freedom. Within those areas, the individual is taken to be fully sovereign in terms of what may be done.

While all theories of rights might be thought of as proposing to parcel out the moral space as a way of escaping from moral anarchy, liberal theories of rights might be thought of as proposing that such parcels be maximally extensive. Those parcels would be maximally extensive when each individual has access to the most extensive area of freedom that is compatible with each other individual having access to the same extension. This criterion of maximal equal liberty might be quite indeterminate regarding many alternative schemes of liberties. But it is certainly not empty: it rules out the permissibility of all sorts of paternalist and “moralist” forms of interference with the individuals’ pursuing of their goals. For individuals could be given a “protected” liberty to perform the actions that such forms of interference typically interfere with, without anyone having to be deprived of a

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12 This characterization of rights theories is not supposed to exclude so-called “positive” rights. In the case of positive rights, the relevant actions that others should not interfere with might be thought of as those compromising the enjoyment, or use, of whatever resources it is claimed that individuals have a positive right to. If positive rights are thought to entail the duty on the part of others to create such resources as well, they might be understood as granting rights over the use of other individuals’ bodies. The question of the justifiability of those particular rights is, of course, a different matter from the question of whether they could be understood as imposing obligations of non-interference, that is, obligations that are structurally similar to those imposed by so-called “negative” rights.

13 The claim is not that rights are justified merely because the actions that would count as infringing those rights upset individuals’ capacities to lead their own lives. For the actions that those rights themselves authorize can be seen as upsetting the same capacity in other individuals. The claim is, rather, that rights are justified in terms of how alternative equal distributions of ranges of action would affect individuals’ capacities to lead their own lives.
similar liberty. The concern for individuals’ capacity to lead their own lives that might lead us to reject classical form of utilitarianism, might also lead us to reject non-liberal theories of rights as well. Why should individuals have restrictions on their capacity to lead their lives if it is acknowledged that the lack of such restrictions does not preclude any other individual from having a similar capacity?

Here it is important to note, however, that liberal theories of rights are best understood as configuring an escape from moral anarchy only in terms of how the use and threat of violence should be used. Liberal theories of rights do not necessarily purport to imply that their recommendations are all that could be said about how to improve on the situation of moral anarchy. Perhaps, for example, people should not engage in certain practices despite the fact that no other individual would see his capacity to lead his own life negatively affected. But, if that is indeed the case, the moral demands in question would be taken to have the status of a personal prerogative, in the sense that its compliance should not be secured by means of threatening individuals with the infliction of some form of harm, should they perform or fail to perform the corresponding actions. The permissibility of this particular technique of influencing others’ behavior, which dismisses the capacity of the person to determine and choose for himself, is what liberal theories primarily address.

Theories of natural rights, on the other hand, have been usually understood by reference both to the specific sort of rationale upon which individuals’ areas of freedom are assigned, and by reference to the normative status of those reasons in relation to the presence of certain contingent social facts.

In the first sense, theories of natural rights claim that the reason why individuals should be assigned areas under which they are free from interference is somehow derivable from the idea of human nature. This claim has been taken to be controversial. But it is certainly not controversial that individuals’ characteristics, that is, their “nature,” is of
fundamental importance in establishing precisely what actions individuals must have a right to perform. Perhaps then, the controversial claim is the idea that individuals’ rights are directly deduced from such characteristics. This would be controversial in the sense in which it is controversial that an ought can follow from an is.

In the second sense, theories of natural rights claim that the assignment of areas of moral freedom proposed as the means to escape from moral anarchy is not made contingent on the existence of certain social conventions, cultural beliefs, or the state’s decision to ignore them or protect them by means of legislation. Here, it is only in this second sense in which the notion of natural rights will be understood as being characteristic of natural rights liberalism. An individual’s natural rights are natural in the sense of not being contingent on any sort of recognition by other individuals, which means that an individual is morally free from performing a certain range of actions regardless of whether he has the approval of other individuals, including government officials.

Natural rights liberalism is then clearly incompatible with the idea that the mere fact that a legal system is in force in a certain society is a reason for considering it morally justified, and for concluding that individuals have a moral obligation to comply with it regardless of its content. Sometimes this idea is taken to characterize the doctrine of legal positivism. But no predominant legal positivist might have held such a view.14 After all, if we do not believe that there is any moral, natural hierarchy between rulers and subjects, such that the latter’s capacity to lead their own lives would need to be subordinated to the will of former, the view is extremely implausible. In a situation of moral anarchy, there are reasons, having to do with the ability of individuals to lead their own lives, for why we should let individuals have exclusive control over certain ranges of actions. Those reasons have to do

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with the state of virtually universal, mutual frustration that could arise from the unconstrained pursuing of individuals’ personal goals. But whether or not there is a state enforcing those areas of exclusive control, which will depend on the will of certain individuals, does not seem to be a necessary condition for there being those reasons.

Later in this dissertation, however, we will assess, although indirectly, what would seem to constitute a different sort of skepticism regarding the notion of natural rights. This skepticism is based not on the denial of an external standard of moral evaluation, but rather on the empirical claim that in the absence of the state the costs of compliance with such a standard will be unreasonably high. This would seem the type of reasoning, rather than the mere denial of morality’s political independence, which leads Hobbes to claim that “nothing can be unjust” in the absence of the state.\(^{15}\) It will be argued that this worry is better captured by the sort of samaritan approach that will be endorsed in Chapters 4 and 5.

Before discussing at a more concrete level how exactly individuals’ areas of freedom should be taken to be configured according to natural rights liberalism, another important feature of this perspective must be noted. Within theories of rights, a major difference exists between consequentialist and deontological theories. Natural rights liberalism is here understood as endorsing a deontological, rather than consequentialist, conception of rights.

Consequentialist theories of rights, although not dictating an all-encompassing goal to individuals, maintain that the reason why individuals should be free from interference is deduced from the greater efficiency in pursing some sort of impersonal goal, such as, again, the maximization of happiness. But other goals are possible here, such as the very same goal of promoting the value of individual autonomy that is behind appeals to the ability of individuals to lead their own lives. On the other hand, deontological theories of rights hold

that the reason why it is claimed that individuals should be assigned certain areas of moral freedom is not derived from the efficiency in pursuing any sort of interpersonal goal, or not at least in the aggregative manner in which such a goal is conceived by consequentialist theories.

Intuitively, the problem with consequentialist theories is that the possibility of violating the originally assigned rights will always arise as a means for better achieving the impersonal goal that rights are supposed to serve. In those cases, it is unclear how the theory could deny the permissibility of the corresponding sacrifice, a sacrifice that in many cases we would find to be intuitively unacceptable. Under certain conditions, slavery could bring about a state of affairs in which the impersonal goal of individual autonomy is best promoted. This might be true despite the fact that those who are enslaved would be deprived of its enjoyment. Yet we tend to think that there are things that cannot be done to people no matter how good the consequences are from the point of view of those who would benefit or, for that matter, from the “interpersonal” point of view. Individuals and their morally innocent ends are simply not proper objects of sacrifice, even when it is entirely clear that others would benefit greatly from such sacrifices.

But the more intuitive character of the demands of deontological theories of rights comes at the price of the less intuitive character of their rationale. To hold that the rights people have could not permissibly be violated even for the sake of a better protection of those rights, or for the protection of a greater number of rights, has been claimed to be paradoxical.\(^{16}\) Certainly, there must be a reason for giving rights such a central importance in our moral thinking. But why is it that this very same reason does not constitute the

justification for committing some violations of rights, if by doing so a greater number of
violations could be prevented? Slavery might indeed be repugnant. But how could it be that
it is impermissible to enslave an innocent small group of individuals, if by doing so we
prevent an equally innocent but greater group of individual from being enslaved by others?
What possible rational basis is there for not minimizing what, according to our own
standards, we take to be objectionable conduct?

According to Philip Pettit, for example, the key to the main argument for
consequentialism is “that every moral theory invokes values such that it can make sense to
recommend in consequentialist fashion that they be promoted or in non-consequentialist
fashion that they be honored.” 17 And since “the non-consequentialist has the
embarrassment of having to defend a position on what certain values require which is
without the analogue in the non-moral area of practical rationality,” consequentialism ought
to be preferred. 18 Two major alternative lines of response seem to be available here.

The first alternative might acknowledge that the conception of rationality that
deontological theories seem to clash with is quite central in certain areas. But it is also true
that the idea that there are certain things that we should not do to people, even if by doing
so we minimize the occurrence of those things, is extremely central to a familiar
understanding of morality. The reason why slavery is repugnant is not the mere contingent
and improbable fact that violating a minority of the population’s right to their liberty would
never have a significant effect on other people’s satisfaction or enjoyment of some
important values, such as individual autonomy. The reason why slavery is repugnant seems

18 Ibid, p. 18.
to be the lack of respect shown to those who are enslaved, irrespective of the benefits that others might or might not receive. So, according to this first answer, in the same way in which the Achilles paradox should not be understood as proving the conclusion that motion is illusionary, but rather as demanding a revision of the conception of space and time upon which that conclusion is reached, the so called “paradox of deontology” should be understood not as a case for rejecting the plausibility of deontological theories, but as a case for revising the belief in the universal application of a maximizing conception of practical rationality instead.\textsuperscript{19}

The second line of response would deny that deontological theories must contradict a plausible conception of practical rationality. According to this response, what would characterize a deontological theory is not its commitment to a particular conception of the right as being independent of the good, as it is usually put, but rather its particular conception of the good. In certain cases, it is initially unclear that this is a proper response. For the objection might be easily reformulated in terms of the plausibility of the offered conception of value. A particularly interesting alternative is the one elaborated by F. M. Kamm.\textsuperscript{20}

Kamm claims that there is a value for which the existence of deontological constraints is necessary.\textsuperscript{21} The value in question is taken to consist in the status of inviolability of human beings. The nature of this particular value, argues Kamm, is such that we would fail


\textsuperscript{21} Ibid.
to realize it if we attempt to maximize it in the way that consequentialists typically propose. If we think again about moral anarchy, we could imagine that we might choose to escape either to a scenario governed by the consequentialism of rights, in which the enslaving or killing of innocent individuals is allowed only in order to save a greater number of individuals from similar fates, or to a scenario governed by deontological rights, where those forms of sacrifices are not allowed. Kamm’s claim is that in the latter scenario individuals enjoy a status that they do not enjoy under the former. It is in this sense in which a deontological theory of rights could be understood as promoting or maximizing a value, and why it should not be seen as contradicting any plausible conception of practical rationality.

Thus, contrary to what some critics seem to believe, the tension between a deontological conception of rights and a familiar conception of practical rationality is not definitive in settling the issue in favor of consequentialism. It might be hard to understand how, in some circumstances, it is morally objectionable to produce what we tend to regard as a better state of affairs. But it seems harder to accept that we should enslave or kill certain individuals as a way of achieving those desirable states of affairs if no other option is available. The thought that we must always bring about the best state of affairs is certainly intuitive, but the common sense idea that the ends do not justify the means is no less intuitive. For this reason, the possibility that there is a non-trivial sense in which we could comply with both intuitions, as Kamm’s line of argumentation suggests, is highly attractive.

The obstacles that a situation of moral anarchy creates for individuals’ ability to lead their own lives is a central reason for why, according to natural rights liberalism, individuals should have exclusive control over an extensive range of actions within which others should not interfere. For natural rights liberalism, neither reasons dealing with the individuals’ own moral or self-interested good, nor reasons dealing with some form of social good, are seen as having any sort of overriding authority over the individual’s choices within the area
defined by such a range of actions. The state’s commands, being the mere expression of other individuals’ wills, are seen as being equally impotent when it comes to the sovereignty over that area. But what is precisely that from which, according to natural rights liberalism, individuals should be free from interference? What are exactly the boundaries of those individual areas of moral freedom that natural rights liberalism proposes as a blueprint to escape from moral anarchy?

1.2 OWNERSHIP RIGHTS

Within natural rights liberalism, individuals’ areas of moral freedom have been generally specified in terms of ownership rights, that is, in terms of the material objects that those individuals are entitled to control. It is not hard to see why ownership rights have been given this fundamental role. Some form of access over material objects is a necessary condition of virtually all forms of human agency. No matter what action we perform, it would surely involve the use either of our body or of some sort of external resource.

That the use and control of our own body is a necessary condition for our agency would seem to be indisputable. We are, after all, embodied beings. If there is a clear case in which we are not able to lead our own lives, that is when we are deprived of control over the bodies in which we are actually embodied. So according to natural rights liberalism, there is not much room for discussing who should be in control of the body individuals are embodied in; the answer is those individuals themselves. No other individual, nor any group of individuals, should coerce individuals not to use their bodies in ways that do not impose any restriction on the way in which other individuals could use their own bodies. This is the
fundamental and uncontroversial sense in which natural rights liberalism sees individuals as self-owners.\textsuperscript{22}

The previous line of thought seems to suggest that a body is an indivisible part, such that one cannot interfere with an aspect of it without interfering with the whole. But this is certainly not the case. While individuals’ capacity to lead their own lives require individuals’ having control over many uses of their bodies, it might not require control over some particular parts of it, such as, for example, the total amount of blood that the body has at any given time. In this way, some authors argue that coerced distribution of body parts is compatible with a liberal concern for individual autonomy.\textsuperscript{23} This alleged consistency, of course, does not show that indeed such transfers are permissible. But it does seem to show the indeterminacy of the central concern underlying natural rights liberalism. This indeterminacy will be manifest in discussions regarding ownership rights over external resources.

That individuals’ capacity to lead their own lives requires some form of control over objects beyond individuals’ own bodies would seem as clear as that it requires significant control over those bodies. Some theorists seem to believe, however, that while access to external objects is essential for individual sovereignty, this does not entail that such access must be thought of in terms of individual ownership rights, as natural rights liberalism would propose.

Some theorists have argued that individual ownership over external resources is actually incompatible with a genuine concern for individual autonomy. James Grunebaum\textsuperscript{22} A more controversial sense is the one in which individuals own themselves in such a way that they could transfer the ownership rights over their body to other individuals in an irrevocable manner.\textsuperscript{23} See, for example, Cecile Fabre, \textit{Whose Body Is It Anyway?: Justice and the Integrity of the Person} (Oxford: Oxford University Press, 2006).
argues, for example, that private ownership places individuals “in a position of conflict where each has no right to any say in what the other does with his [external resources].”

Intuitively, one might think that individuals’ lacking a right to say what others do with their external resources is essential for individuals to be able to make decisions about how to live their own lives. Grunebaum complains, however, that private ownership avoids this problem by vesting in individuals “the right to ignore each other,” and argues that “autonomy requires a way of really resolving the conflict by allowing [individuals] to participate in such decisions.”

It is unclear, however, why we must be concerned with resolving the conflict in the particular way in which Grunebaum proposes, that is, by somehow dissolving the individual differences involved. What ultimately matters about resolving a conflict is the state of affairs that the resolution brings about, and there are reasons to doubt that Grunebaum’s suggestion might have anything of value to offer in that regard. If individuals were given joint-ownership over external resources, each individual would be assigned a claim right against every other, against the use and possessions of those resources. So no individual would have the liberty to use or possess such resources without the approval of everybody else. As it is the case with classical utilitarianism when dealing with moral anarchy, we might then wonder whether joint-ownership addresses the conflict that will be generated by a situation of open access to external resources, without addressing an aspect of that conflict that is especially worrisome. If the rules of joint-ownership were respected, no actual conflict would ever arise. But we might question whether such a situation would be that

25 Ibid.
26 Ibid.
much better. Since everyone has a power to veto another’s use of external resources, everyone would have the power to preclude the agency of every other individual. Again, whether individuals are capable of leading their own lives will depend on factors that are completely beyond their control.

Under circumstances of collective ownership of external resources, self-ownership becomes purely formal. If we are genuinely concerned with individuals leading their own lives, there must be room both for making all sorts of decisions regarding how to use our bodies, and for appropriating external resources without having to secure the approval of anybody. Magnus Jedenheim-Edling argues that joint-ownership of external resources and “effective” self-ownership are compatible in the sense that negotiators may reach an agreement where everybody enjoys self-ownership; and that this is highly likely once we assume, among other things, rationality and mutual disinterest that excludes, for example, individuals’ desires to control other individuals’ destiny. But what is troublesome about joint-ownership is that it gives other people the normative power to control an individual’s life. The reply that individuals might not have too much incentive to do so if they were rational and disinterested seems to be beside the point in this context. The objection is that they would not be doing anything morally objectionable if they were not to pay attention to such incentives, or if they were not mutually disinterested.

So, according to natural rights liberalism, individuals should be entitled to acquire external resources in a unilateral manner. Individuals should also be entitled to exclusive control over the use of those resources. Neither the appropriation nor the control over the


use of external resources should depend on the decision of any other individual or group of individuals. In the same way that the individual must be taken as fully sovereign when it comes to how to utilize his own body, natural rights liberalism claims that individuals should be equally sovereign when it comes to a certain portion of external resources. But what exactly is that portion of external resources upon which individuals should have that measure of sovereignty?

According to libertarian theorists, individuals should have exclusive control over those previously unowned natural resources that they had first appropriated, and over those external resources that they have created from such natural resources. This right of exclusive control will include the right to transfer those resources to anyone willing to accept whatever terms the owner proposes. Following Locke, however, libertarian theorists would tend to argue that appropriations of natural resources are illegitimate if they do not leave “enough and as good” for others. This is an initially plausible thought. The reason why individual ownership rights are favored over joint-ownership is the idea that an individual’s capacity to control external resources should not depend on the approval of others. But then, some form of guarantee must exist against the possibility that the appropriating activities of others would put an individual into a similar situation, that is, a situation in which the very possibility of interacting with the external world would be contingent on the approval of others.

But not all theorists agree about the particular sense in which we should formulate that guarantee. Quite plausibly, Nozick suggest we do not understand the “Lockean proviso” as requiring that others be left an opportunity to acquire unowned natural resources.\(^{29}\) Nozick claims that we should understand it as requiring that others not be made worse off

from the act of appropriation when compared to the situation of open access. Understood as such, the Lockean proviso does not significantly constrain individuals’ power to appropriate natural resources. For, given the so-called tragedy of the commons, as Locke himself claims, “he who appropriates land to himself…does not lessen, but increases the common stock of mankind.”

So called “left-libertarian” theorists, however, tend to argue that individuals are not entitled to whatever resources they could first appropriate, even if such appropriations do not worsen the situation of others when compared with a situation of common access. For many individuals would be made worse off compared to a situation in which those very same individuals, rather than the actual possessors, could have appropriated those resources. Why should the actual possessors have a legitimate claim when they have not created the natural resources, and when they themselves would not have been made worse off by the appropriation of others compared to the situation of open access? So left-libertarians would tend to argue that all individuals are entitled to some sort of equal share of natural resources. In general, it is through means of taxation and subsidy policies that the constraints on appropriation are proposed to be realized.

As implied in the left-libertarian response to Nozick’s interpretation of the Lockean proviso, the most intuitive reason behind a call for an egalitarian distribution of natural

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31 Some might argue that those equal shares amount to the per capita share of the total market value of such resources. Others might claim that they amount to shares that would yield equal gains in terms of welfare. And yet others might argue that they are equivalent to shares that would equalize the absolute levels of individual welfare. For more on left-libertarianism, see Peter Vallentyne and Hillel Steiner (eds.), *Left Libertarianism and Its Critics: The Contemporary Debate* (New York: Palgrave Publishers Ltd. 2002); and Michael Otsuka, *Libertarianism without Inequality* (Oxford: Clarendon Press, 2003).
resources is the idea that no individual is responsible for the existence of those resources.\textsuperscript{32} While individuals might be responsible for the improvement of natural resources, individuals are clearly not responsible for the existence of any raw material by means of which those improvements are made. Yet, if this is indeed the reason for which the egalitarian distribution of natural resources is proposed, it is not initially clear how one could coherently deny the permissibility of coercing individuals to relinquish possession of that value resulting from the improvement of natural resources, when such an improvement is due either to a superior genetic endowment or a privileged social upbringing for which individuals cannot possibly be said to be responsible either.\textsuperscript{33} But it is also unclear why individuals could not be coerced to give up exclusive control over all income deriving from such undeserved factors, irrespective of the existence of any contribution of natural resources.

The redistribution of the income resulting from individuals’ superior “circumstances,” rather than from their choices, is indeed what many egalitarian theorists propose. In general, egalitarian theorists will claim that such income may be coercively redistributed to compensate for the misfortune of others, when this misfortune is similarly undeserved.

\textsuperscript{32} We might think that the reason is rather that the earth is commonly owned. Yet to claim that the earth is commonly owned would seem to amount to claim that individuals should not unilaterally appropriate external resources, that individuals should not do so without paying some form of compensation, or something of this sort. But that is precisely what is under discussion. The world’s “original ownership status” cannot work then as a premise in this context.

Richard Arneson’s words, “Distributive justice stipulates that the lucky should transfer some or all of their gains due to luck to the unlucky.” 34

Some egalitarian theorists might argue that all sorts of misfortunes call for compensation, or at least all sorts of misfortunes that are serious enough, and not only those that are due to individuals’ circumstances. Yet this type of radical egalitarianism clearly falls beyond the scope of liberalism. For if the misfortunes that are due to the risky gambles of individuals are taken to provide a ground for a right to compensation, individuals would be given a right to control the lives of those who choose to lead their lives with greater care. A liberal view will deny that an individual should be coercively restrained from taking risky gambles. But it will also deny that other individuals should be made to bear the costs of those who decide to take them, which surely includes those who endure unchosen misfortunes against which they could have insured themselves.

So in so far as a theoretical position allows for all sorts of inequalities arising from individuals’ choices or “option” luck, such a position might be thought to be consistent with the liberal commitment to individual sovereignty. There might be room for discussing, however, whether the common ownership over the income generated from the use of individuals’ superior genetic endowment and personal circumstances is compatible with granting individuals an exclusive right to decide how to use those advantages, a right that it does seem to be required by any genuine concern for individual sovereignty. If there are reasons for why it makes sense to coercively expropriate the talented’s income that stems from the use of his natural talents, for example, why is it that those same reasons would not

support coercing the talented against any attempt of his to stop producing the value over which others have ownership rights?

Individual sovereignty certainly requires an extensive right to control the uses of our body, and for such control to be more than merely formal, it is necessary for individuals to be able to have unilateral access and control over external resources. Since virtually no external resource could exist without the aid of natural resources, individuals must have unilateral access and control to such resources as well. But “real,” rather than formal, self-ownership only requires exclusive access and control over enough external resources. This is why the commitment to individual sovereignty might not be determinate enough to adjudicate disputes regarding the limits of individuals’ ownership rights over external resources. Other types of considerations might have to enter into the discussion as a way of justifying any particular allocation of those limits. In this regard, the liberal egalitarian theorist will claim, roughly, that the distribution of external resources should not depend on morally arbitrary factors, such as an individual’s superior genetic endowment or the fact that someone got somewhere sooner than others. In this same regard, the non-egalitarian theorist might argue that the fact that an individual has a superior genetic endowment, or that someone got somewhere sooner than others, might be morally arbitrary in the sense that there is no moral reason why those facts ought to be that way. But this might not mean that those facts being that way are of no moral significance in deciding, for example, whether that particular individual or somebody else should have exclusive control over the income stemming from the use of his talents.35

The discussion regarding the limits of ownership rights, both over our bodies and over external resources, is a discussion of crucial importance for matters of political morality. This section has only attempted to provide a sketch of the major debates regarding the limits of individuals’ ownership rights in order to draw attention to two major points. The first point is that while the liberal commitment to individual sovereignty might be indeterminate when it comes to adjudicating some of those major debates, it is certainly determinate when it comes to the need to recognize some form of individuals’ ownership rights over their own bodies and external resources. The second point is that the central liberal commitment might be equally determinate when it comes to guaranteeing individuals some sort of effective capacity to lead their own lives that is not contingent upon the approval of others. If a system of individual ownership rights is preferred on the grounds that alternative arrangements leave individuals at the mercy of other’s wills, we must recognize that even within a system of ownership rights situations might arise in which individuals could end up, by no fault of their own, in a similar position. Some form of normative guarantee might then be needed for when individuals indeed face such situations.

The first of these previous two points will be of importance in understanding the problem the very existence of the state poses for natural rights liberalism. The second point will be of importance in understanding why the answer offered in this dissertation to that problem is not only consistent with the central tenets of natural rights liberalism, but also grounded on the same sorts of fundamental concerns.

1.3 ENFORCEMENT RIGHTS

If there are reasons why individuals should be assigned certain areas of moral freedom that others should not interfere with, areas that are best understood in terms of ownership rights, there would certainly be reasons why the corresponding interfering actions should not be given an immunity against obstruction equal to those actions that do not infringe on such areas. In particular, it would seem that if the assignment of those areas of moral freedom is as important as natural right liberalism takes it to be, there would seem to be reasons why such an immunity that the infringing actions would lack is more than a mere immunity against being subject to the power of peaceful persuasion. Depriving the infringing actions only of that immunity would fail to provide individuals with an adequate protection against those for whom their self-interest always comes first. That is why liberal theories of rights will tend to agree that the immunity the infringing actions must lack is the immunity against the use of coercion.

All liberal theories of rights might be understood as equally granting an approval to the use of coercion as a technique of influencing individuals’ behavior when it comes to protecting their rights. A characteristic feature of natural rights liberalism is the particular manner in which such an approval is granted. Natural right liberalism holds that in the same way in which individuals should be given exclusive control over certain material resources, they should be given exclusive control over the coercive means that are necessary to secure the control over those resources. Thus, in addition to being assigned ownership rights, individuals should be assigned enforcement rights, that is, rights of control over a range of actions, the purpose of which is to deter the infringing actions of others, and over which the individual is as sovereign as he is over the area defined by his ownership rights. Those actions included in an individual’s enforcement rights can be performed without the individual having to secure the approval of anybody else, and with everybody else having a
duty not to interfere with their performance, so long as they violate nobody else’s rights. This particular way of understanding the permissibility of the use of coercion is certainly consistent with the core commitments of natural rights liberalism. If individuals’ capacities to lead their own lives should not be made contingent on the wills of any other individuals, including public officials, the existence of some sort of effective guarantee against the violation of other individuals should not be made equally contingent.

Before explaining what exactly natural rights liberalism takes individuals’ enforcement rights to include, it must be noted that individuals are certainly entitled to arrange their external resources in such a way as to increase the costs of others’ infringements, thus making them less profitable that they would otherwise be. For example, individuals are able to install all sort of devices and mechanisms of protection, from mere walls and razor wires to guard dogs and electrified fences. Certainly, none of those devices and mechanisms would make it impossible for individuals to violate the ownership right of others. But what matters is that such mechanisms and devices make the corresponding actions more costly, and for such an increase in costs to have a deterrent effect, it is not necessary that the costs fully offset the expected benefits. All that matters is that such acts of trespass are rendered less profitable than other alternatives.

Enforcement rights are taken to encompass manners in which individuals are entitled to deter those actions that would interfere with individuals’ ownership rights that go beyond actions included in those ownership rights themselves. We might distinguish three basic sorts of enforcement rights in terms of whether their exercise is supposed to precede, accompany, or follow the commission of the offense.

The first sort of enforcement right is the right to issue retaliatory threats. Retaliatory threats are threats of harm that are made conditional on the violation of individuals’
ownership rights. Thus, the exercise of this enforcement right is supposed to precede the commission of the offense.

The initial plausibility of a right to issue retaliatory threats is clear once we have acknowledged that individuals should be free to create, by the mere arrangement of their external resources, a real risk of harm for those who decide to violate their ownership rights. Why should those very same individuals lack a right to warn other individuals that they will inflict similar harm should their bodies or external resources be invaded? Furthermore, if electrified fences might demand the deviation of fewer resources from productive uses than equally effective solid tall walls, for example, threats of violence would seem to demand even less resources. And if the reasons why individuals should have exclusive control over their bodies and external resources are grounded on the fact that such control enables them to lead their own lives, they should certainly be entitled to economize on the resources that they need to allocate for defensive purposes. This economization will increase the resources available for productive purposes, which is what ultimately matters. The desirability of this economization is especially clear when it does not curtail anyone’s legitimate areas of freedom. By individuals’ issuing retaliatory threats against actions that would violate their ownership rights, they do not deprive anyone of an action that they have a right to perform.

The second basic enforcement right, the exercise of which is taken to accompany the commission of the offense, is the right to self-defense. The right to self-defense is the right to use violence as a way of repelling an actual act of trespass over individuals’ ownership rights. The plausibility of a private right to self-defense is generally not taken to be controversial. But further support for the right to self-defense arises once we realize that it only makes sense to invest in means of prevention, including the issuing of retaliatory threats, up to the point in which further increase in spending does not yield an equally
valuable output in terms of security. In other words, there is a level of vulnerability that it does not make sense to get rid of. The costs of doing so would not be worth the benefits once we take into account the disvalue of having one’s ownership rights violated and the probability of such an occurrence. But this rational vulnerability enables us to see why the right to self-defense is morally necessary. Individuals should have the liberty to live their lives in a rational way, without having to accept the costs imposed by those for whom the protective arrangements, that it makes sense for us to invest in, are not costly enough to find them less profitable than other alternatives.

The third basic enforcement right is the right to seek restitution, the exercise of which is supposed to follow the commission of the offense. The right to seek restitution involves the right to be compensated for all the damages committed by the offense. As it is the case with the previous enforcement rights, the initial plausibility of this right is quite uncontroversial. If individuals were not assigned a right to seek restitution, those individuals for whom one’s means of deterrence are insufficiently costly will be given the opportunity to seize and retain possession of resources to which they do not have ownership rights. But why should they be given this opportunity when there were reasons for assigning such ownership rights to other individuals in the first place?

If it would make sense to deny a right to seek restitution, it would also make sense to assign ownership rights based on the physical strength or superior predatory capacities of individuals, and thus avoid the waste involved in the coercive takings of the powerful over the weak. But an assignment of ownership rights based on the predatory capacities of individuals is not a feature of a liberal theory, or for that matter of any plausible theory.

If it would seem to be uncontroversial that individuals should be assigned these three basic enforcement rights, it would seem to be equally uncontroversial that this assignment should not be contingent on the state’s decision to enforce it by means of
legislation. Just as it is not the case that individuals should be free to appropriate and use at least a certain amount of resources, including their bodies, only if there is a state sanctioning such an appropriation, it is also not the case that individuals should be free to arrange those resources as to deter others from interfering with their control, only if it is the case that there is a state sanctioning such arrangements. According to natural rights liberalism, it is not necessary for the state to sanction the freedom of individuals to threaten others with harms if they attempt to violate their ownership rights, stop them if they actually attempt it, and seek restitution for all the losses that results from the violation.

In addition to those three basic enforcement rights, the classic theorists of natural rights liberalism, such as Grotius and Locke, also include a right to punish, which they take to be as “natural” as a right to self-defense. In their understanding, in contrast with the more basic enforcement rights, the right to punish is not an exclusive right of the victim. While individuals may always choose not to exercise self-defense, issue retaliatory threats, or seek restitution, they argue that the right to punish was not a right held exclusively by the victim, such that he would have a claim against others not to exercise it against his approval. Grotius argued that the right to punish is a right vested in every inhabitant of the state of nature, not only in the injured person himself, because “an injury inflicted even upon

\[36\] See Hugo Grotius, *On the Law of War and Peace* (1625), Translated by A. C. Campbell (New York and London: M. Walter Dunne, 1901), Chapter 20; and Locke, Second Treatise on Government, 2:7-12. In the same way that the fact that the right of self-defense is a right held by individuals does not entail that individuals can do anything they want as means of self-defense, the fact that a right to punishment is also exercisable by individuals does not entail that they have a right to use any procedure or to apply any punishment of their choice.
one individual is the concern of all.” Similar to Locke, he also thought that since the criminal “becomes dangerous to mankind” any individual could punish him to deter him and others.

That individuals have a natural right to punish in the sense defended by Grotius and Locke is perhaps the most controversial tenet within natural right liberalism. Even Nozick, who can be regarded as the most important contemporary exponent of natural rights liberalism, finds the plausibility of this view very unclear. Nozick seems to agree with Grotius and Locke that the right to punish is the concern of all. Contrary to the right to seek reparation, which Locke claims “belongs only to the injured party,” Nozick thinks that this is not plausible to assume in the case of the right to punish. For while in the case of the right to seek reparation, “the victim is the one to whom compensation is owed, not only in the sense that the money goes to him, but also in that the other is under an obligation to him to pay it,” and so, “the victim seems the appropriate party to determine precisely how it is to be enforced,” things are different when it comes to punishment. According to Nozick, punishment is due to the offender, not to the victim. But this is precisely why Nozick suggests that the right to punishment might be at most the right of each to participate in the decisions regarding the conditions under which punishment will be inflicted.

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37 Grotius, *On the Law of War and Peace*, 2, fol. 8'.


40 Ibid.

41 This is mainly because important considerations would seem to count against the plausibility of a system of “open punishment,” such that it will face severe difficulties when it comes to “keeping the punishers from exceeding the bounds of the deserved punishment” p. 138. Similarly, Gerald Postema claims that under such a system an offender “might be battered endlessly for a single wrong far beyond
According to a different line of thought, however, a private right to punish, understood along the same line that we understand basic enforcement rights, is completely intelligible and plausible. For the justification of punishment does not need to be grounded on an impersonal meritocratic concern that no single individual could claim an exclusive entitlement to enforce; a concern perhaps expressed by Nozick when he claims that the punishment is due to the offender, and not to the victim. Nor must it be made to rest on a social concern for the governance of society as a whole, such as, again, no single individual could be thought of as having an exclusive right to administer, as Grotius and Locke might have thought. The right to punish could be justified on the same protective grounds upon which the more basic enforcement rights are justified. Under this understanding, the power individuals have over the right to punish is undistinguishable from the power they have over other forms of enforcement rights.

According to this line of thought, the standard theories of punishment err in assuming that the right to threaten punishment derives from the anticipation of an independently intelligible right to punish. The right to punish should be derived, rather, from a right of the potential victim to threaten the aggressor before his rights are violated, which we have found to be initially plausible.\textsuperscript{42} Let us imagine, for example, that for some reason an individual decide to install spiky fences where the spikes points inward rather than outward, such as they would injure the aggressor on the way out, that is, after he has

commit the act of trespass rather than in his attempt to commit it. There seems to be no reason why individuals should not be able to do that. But if it is morally permissible to install those types of spikes, should it not be morally permissible to threaten individuals with a harm that will be committed after their attacks have taken place? As Warren Quinn asks: “What morally relevant difference could it make to a would-be wrongdoer that the injury whose prospect is designed to discourage him will come earlier or later?” Thus, in the same way that one is not morally culpable for the actual harm that the spiky fences inflict on the offender when he actually decides to go ahead with his offense, individuals should not be culpable for the actual harm that the act of punishment inflicts on the offender. In both cases, the individual knew what would happen to him should he perform an action that we agreed he had no right to perform. If individuals have a right to build what we might see as “automatic” devices of punishment, that is, protective devices that inflict harm after the offense has taken place, individuals should surely have a right to inflict such punishment “manually.”

But we might be unconvinced that just because we could have avoided the possibility of punishing an individual by building an “automatic” device of punishment, there is no justification that we have to offer for performing the corresponding action “manually,” when such a possibility was in fact not avoided. We can imagine that the circumstances of the case have dramatically changed, such that at the moment of inflicting punishment the offender genuinely repents what he has done, and there is absolute certainty that no benefit whatsoever will be derived from the act of punishment. It is debatable whether it is permissible to punish such an individual. But few would think that the consideration that

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matters for that debate is the fact that we had a right to threaten that individual with punishment in order to deter him from doing what he did. There is no question about that. That was morally permissible. But this hardly seems to settle the issue here, contrary to what the previous perspective seems to suggest. What seems to matter is that we have a further action to perform. Why should we not have to justify this action just because we could have done something differently, which we had a right to do, that would have entailed that the present action would not have to be performed? The fact is that we have not acted in that way.

But why is it, precisely, that lacking the means of committing ourselves to punishing those who transgress our rights, we must have a burden of justification to carry out such threats that we do not have to meet if we are able to find a way of making both decisions at once? Suppose that we were able to install in our brains some form of controller that will force us to harm the aggressor after any harm is inflicted on us. If we are justified in installing spiky fences, where the spikes point inwards rather than outwards, why should we not be justified in installing that device in our brains? Either way, we will be deciding to give up our control over whether the offender gets hurt or not, should he decide to violate our ownership rights. But why is it that if we do not have the capacity to install those devices in our brains, we should justify our actions in a way in which we should not do if we had such devices?

How plausible we take this line of reasoning to be could ultimately depend on whether we think that there are moral limitations on the harm that is permissible to inflict by the use of “automatic” devices, such that those limits will also apply to the threats individuals can issue against the offenses of others. For if there were no such limits, it is not clear why there would be any limitations on the amount of punishment that individuals can inflict on offenders, which runs against some firmly held, shared beliefs. Initially, however, it
is not clear that there are such moral limitations on the harm that it is permissible to inflict by automatic devices, nor that there are limitations to the type of things individuals can threaten others with when they have a right to issue such threats in the first place. Why should it be impermissible to threaten you with a disproportionate harm in order to deter you from doing something that you have no right to do, as long as such disproportionate harm does not involve any innocent individual, and the deterrent effect does not affect the actions that you have a right to perform?45

Regardless what one thinks about the ultimate value of this line of thought as a justification for a right to punish, something of extreme importance has been brought to our attention. The right to issue retaliatory threats, which we have found to be important in enabling individuals to economize resources for protection, would be deprived of much of its value if individuals were not entitled to actually enforce those threats. As Daniel Farrell notes, “this would leave anyone who was willing to do only what she was morally justified in doing in an extremely vulnerable position, strategically, so far as deterring unjust aggression is concerned.”46 Farrell thinks that when it comes to self-defense, a plausible principle of distributive justice will hold that “When someone knowingly brings it about, through his own

45 Quinn seems to believe that there are limits, similar to those that apply to self-defense, to the things one can threaten other individuals with. He claims that it would be “seriously wrong” to erect a very dangerous electric fence around a vacant piece of land (p. 346, n. 27). It is difficult to understand how that is the case. Is it morally wrong to keep our waterproof watch in a shark tank in order to keep it safe from thieves? This question is raised by Larry Alexander in his “Consent, Punishment, and Proportionality,” Philosophy and Public Affairs 15 (1986): 178-182, p. 181, n.8.

wrongful conduct, that someone else must choose either to harm him or to be harmed herself, justice allows the latter to choose that the former shall be harmed, rather than that she shall be harmed.” But accepting this extremely plausible principle in the case of self-defense, Farrell argues, will seem to force us to accept a similar principle in the case of punishment. Why should individuals not be allowed to choose to retaliate against those that have already harmed them, when not doing so increases the vulnerability of being harmed again? Why should the victim, rather than the offender, be the one that suffers this harm when the offender has been the one who brought about this very same state of affairs?

Under this form of justification, the claim is not that inflicting punishment is justified merely because we are justified in issuing retaliatory threats in the first place. The claim is rather that we are justified in punishing offenders because it is not plausible to believe that victims must suffer the increased vulnerability that they would present to others, should they follow a rule that prohibits their retaliation for the offenses that are committed against them. Certainly, critics of the right to punish do not really believe that if individuals were to face a situation in which no political entity exists, those individuals should not threaten others with the infliction of harm as a means of protecting their lives and properties. But if critics do indeed believe that, could they plausibly claim that if offenders ignore such threats, victims should now refrain from making them effective? This would clearly put victims in greater danger. Others would not take their threats seriously, and they will become more attractive prey. Could they really be doing anything wrong in actually caring out the retaliatory threats that they have a right to issue? Is the claim that the offender has a right to issue a retaliatory threat against the victim, and to defend himself by coercive means should the victim decide to punish him?

Within deontological theories, deterrence theories of punishment have been resisted on the idea that they take offenders as the useful objects of lessons for others. What we might take as the fundamental normative fact, that such offenders did something that they should not have done, is given a merely contingent role. But to justify an act of punishment on the grounds that the act will decrease the probability that the victim will be the target of future attacks does not entail that it is permissible to punish anyone as long as it has such a deterrent effect, something that would seem to follow from utilitarian theories of punishment. One can punish the actual offender, and not others, because he has put the victim into this particular situation of vulnerability.

It might still be taken as controversial whether the victim has a right to enforce the retaliatory threat to the same degree that he had a right to make. It should not be controversial, however, that the victim has a right to enforce it to the degree in which it is necessary to keep the credibility of his retaliatory threats constant. This is, after all, a permission already contained in the right to seek restitution. The original position of the victim would not be fully restored if we do not take into account the increased vulnerability that the victim would present by having his retaliatory threat ignored by the offender, without the threat ever being realized.

Critics of natural rights liberalism have tended to reject the plausibility of including a private right to punish among individuals’ natural enforcement rights. This skepticism seems to arise, however, from seeing punishment as having an inherent social role. Yet there is an alternative conception of punishment that conceives of it as a purely protective measure.

48 This degree might be taken to be equivalent to the costs incurred by the allocation of extra external resources for protective purposes, in order to achieve the same level of vulnerability the victim would have enjoyed had the offense not taken place.
This alternative conception of punishment is not only entirely consistent with the individualistic underpinning of natural rights liberalism, but it might also provide a better account in its own right, of why inflicting harm upon those who harm others is a rightful practice, and not merely the product of a vengeful appetite or an exercise in social engineering.49

1.4 CONCLUSION

To stress individuals’ natural rights amounts to stressing the moral equality of individuals. Natural rights liberalism denies the existence of a natural moral hierarchy between individuals, such that anyone among them, including government officials, should have a right to lead the lives of others. Not being contingent upon the state’s decision to ignore or respect them by means of legislation, individuals’ protected areas of action constrain the actions of the state in the same way they do with everyone else’s. Individual rights work as limits on the type of coercive constraints that the state can permissibly impose.

49 Nozick suggests that individuals’ rights to punish might be best understood as the right of each to participate in the decisions regarding the conditions under which punishment will be inflicted. But what does this mean? Does it mean that how much punishment an individual should receive, if at all, for committing a violation of another individual’s rights should be determined by a majority vote? Or does it mean that every individual has a power to veto any other individuals’ proposal in that regard? If individuals’ right to punish is the right of each to participate in this type of decision, does this mean that whatever punishment individuals decide to inflict to an offender is justified? Does it mean that when it comes to punishment there is no right answer independent of whatever decisions individuals actually reach? This latter suggestion would seem to be extremely implausible. But if there is a right answer independent of whatever decision individuals actually reach, why is it that a right to punish should be understood as held in some sort of collective manner?
We might think that natural rights liberalism offers not only an attractive picture of the state’s moral foundations but also, at the same time, of its legitimate scope. Given that, as John Rawls puts it, “political power is always coercive power,”50 the scope of what the state can permissibly do is taken to be coextensive with the area under which individuals can exercise their enforcement rights, which in turn is configured in terms of individuals’ ownership rights. The underlying thought is that whether a particular policy, program, or law of the state is morally permissible will depend on whether the underlying coercive arrangement corresponds with the structure of threats that private individuals may issue against one another as a means of protecting their ownership rights.

As Chapter 2 will argue, however, the previous picture of the legitimate state as a mere enforcer of individuals’ ownership rights is not as clear once we understand how exactly the state typically behaves. The picture of the legitimate state as a mere enforcer of individuals’ ownership rights would make perfect sense if individuals would have a fundamental freedom that they simply lack: the freedom to retain control over the enforcement of those every same rights. The proposed answer that natural rights liberalism offers to escape from moral anarchy is the assignment both of ownership and of enforcement rights over which the individual is taken to be fully sovereign. At least initially, it is not clear how such an answer is compatible with the one offered as an escape from political anarchy: the establishment of a state that deprives individual of that sovereign control.

CHAPTER 2
THE PROBLEM OF POLITICAL LEGITIMACY

By what right am I thrust into the alternative of recognizing the machinery of the State as the only chance left me of rescuing my life, liberty, and possessions from invasion?

Benjamin R. Tucker

We might wonder about the permissibility of particular policies, programs, or laws of the state in terms of a given normative conception. But, in terms of the same normative conception, we might also wonder whether the state itself is morally permissible. Could the very existence of the state be compatible with what we take to be moral demands? The purpose of this chapter is to provide a more precise account of what, precisely, is involved in this question when moral demands are taken to include the central commitments of natural rights liberalism.

According to natural rights liberalism, individuals have certain pre-political ownership and enforcement rights that are taken to operate, in general, as overriding considerations, and not simply as considerations to be weighed or played off against other considerations in determining the morality of our actions. Furthermore, both ownership and enforcement rights are taken to entail not only liberties or mere permissions to act in particular ways, but also obligations on part of others not to interfere, also in particular ways, with such liberties or permissions. This is why we may represent those rights as establishing areas of individual sovereignty; areas in which the individual is taken to be fully in control of what may be done. The question is whether the legitimacy of the very existence of the state could

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be compatible with such a particular way of conceiving individuals’ sovereignty over their own lives.

The first section of this chapter offers a rather formal account of that in which the legitimacy of the state is taken to consist, where the legitimacy of the state is understood as the state’s most fundamental normative property. This section draws attention to the mere peripheral significance for our purposes of the doctrine of “philosophical anarchism” as defended by Robert Paul Wolff and A. John Simmons.\(^2\) The second section explains where exactly the initial theoretical tension lies between the legitimacy of the state and the idea that individuals have ownership and enforcement rights of the sort that natural rights liberalism establishes. For natural rights liberalism, the problem the state poses is not that of justifying the mere use of coercion, but rather that of justifying those uses of coercion that involve an infringement upon individuals’ ownership and enforcement rights. The third section draws attention to the drawbacks of a not uncommon tendency within philosophical reflection: the tendency of turning a substantive question into a mere terminological issue. It is claimed that Nozick’s argument for the justification of the state is a clear example of such a tendency that has not yet been adequately noted.

2.1 POLITICAL LEGITIMACY AND POLITICAL OBLIGATION

Typically, the state threatens its subjects with the infliction of some form of harm should they perform or refrain from performing certain actions, regardless of whether those subjects have explicitly consented to such mode of treatment. By issuing its characteristic threats, the state raises the expected costs of certain actions in the eyes of its subjects. The purpose of doing this is, clearly, to make those actions less desirable than the alternative,

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that is, than compliance with the state’s commands. In certain cases, the coercive threat imposed by the state is not very significant. But the failure to comply with these small penalties is usually accompanied by the credible threat of more severe penalties.

Thus, for our purposes, the state could be understood as a group of individuals, who are acting in a political capacity, that perform a particular set of coercive actions against other individuals, who are acting in a private capacity. As understood here, the problem of political legitimacy is the problem of the morality of the performance of a certain set of actions. The question is: under what conditions, if any, can individuals permissibly threaten others with the infliction of harm in the ways in which public officials threaten their subjects? Most of the recent literature dealing with the legitimacy of the state, however, understands the notion of legitimacy in terms of whether its subjects have, or could have, political obligations.53 It is not worth discussing what notion of political legitimacy best captures some form of pre-theoretical or ordinary understanding of it. But it is worth discussing what the relationship is between the question of the morality of the state’s actions and the obligations of the state’s subjects.

Discussions of political obligation do not always share the same understanding regarding the nature of such an obligation. Sometimes, the problem of political obligation is conceived as the problem of whether the state could have a power to put people under a duty to do something simply by enacting a law that requires them to do that thing. The idea

is whether the state’s subjects have an obligation to comply with the state’s commands even if, apart from this obligation, there would be no moral obligation to do so. We may refer to such obligations as “duties of obedience.”

As Robert Paul Wolff puts it: “Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do because he tells you to do it.” ⁵⁴ To obey the state, in this sense, would not then be equivalent to complying with it. When we obey the state, we do not merely comply with it. We comply for the special reason that what is commanded is commanded by the state. ⁵⁵ Theorists who understand the concept of political obligation in these terms, usually use the notion of “authority” to refer to the correlate of a duty of obedience. To have authority is to have a right to be obeyed, that is, to have a right to demand compliance with P based on the mere fact that P has been commanded. Thus, a duty of obedience to the state entails that the subjects must comply with its commands, where this duty is conceived as arising from a so-called “content-independent reason.” ⁵⁶

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⁵⁵ This is why the existence of political obligations is usually understood as involving the existence of a general duty to obey. The question is not whether the state’s subjects have an obligation to obey particular laws, but rather whether those subjects have an obligation to comply with the law merely because they are required to do so.

⁵⁶ Usually, the concept of authority is understood as the correlative of a prima facie duty to obey. A prima facie duty, contrary to an absolute duty, may be overridden, but its object must always count as a relevant factor in our moral deliberations. One might also claim, however, that to recognize an authority is not to accept that, whatever reasons there may be for a certain actions, its being required by the authority is merely an additional reason for its performance. According to this understanding, the fact that an authority requires performance of an action is content-independent and pre-emptive, that is, a reason that
Wolff claims that anarchism is the “only reasonable political belief for an enlightened man.”57 According to Wolff, the primary obligation of man is to take responsibility for his actions, and one can only do so by making the final decisions about what one should do. So the authority of the state cannot be made compatible with the moral autonomy of the individual.58 Although for different reasons, many other authors have also concluded that there are no duties of obedience to the state.59 But it is important to understand that such a form of anarchism would not then entail the moral impermissibility of the state.60 This is because the question of whether there is a duty to obey the state is the question of whether there is a duty to do what the state requires, besides the one that might arise from the morality of its actions. But when we deal with the problem of the moral permissibility of the state, we are precisely interested in the morality of the state’s commands.


58 Ibid, p. 15.
The fact that our neighbor does not have authority over us, in the sense of having a right to be obeyed, does not imply that he has no right to coerce us not to do certain things; for example, not to violate the rights of others. It is morally permissible for him to coerce us not to violate the rights of others even if his requesting us not to violate the rights of others is not a morally relevant reason in favor of not doing so. So since it is possible to be morally entitled to coerce others to do certain things, without having to claim that those others must have a duty of obedience regarding those things, the moral permissibility of the state will not depend on whether its subjects have such a type of duty.

Some theorists claim that in order to show the existence of political obligations, such obligations have to be shown to be obligations in the strict sense. In the strict sense, an obligation is a moral requirement that is owed to someone in particular. According to this understanding, political obligations are owed to the state to which the individual belongs. Thus, A. John Simmons argues that an account of political obligation should meet a "particularity" requirement. This means that the moral requirements such an account postulates must "bind an individual to one particular community." In Ronald Dworkin’s words, an account of political obligation fails as such when "it does not show why Britons have any special duty to support the institutions of Britain." According to this perspective, the particularity requirement that a theory of political obligation should account for is met when it is explained how the individual has entered into a special relationship with a particular state.

It is also clear, however, why the question of political legitimacy, understood as the question of the moral permissibility of the state, does not amount to the question of whether

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61 See Simmons, Moral Principles and Political, pp. 30-35.
the subjects of a particular state have a special duty to that state. The former question is the
question of whether state officials could permissibly coerce its subjects to do certain things. 
Our neighbor could permissibly stop us from violating the rights of others. The fact that he 
could do so, however, seems to be completely independent of the existence of any special 
relationship between him and us. Anyone could force us not to behave in certain ways. So 
arguments purporting to show the non-existence of this particular type of political obligation 
will not necessarily show that the state is not justified in behaving in the way it does. 
Considerations that fail to establish the existence of such political obligations might still be 
able to show why the state could permissibly act in certain ways.

There is a third understanding of the notion of political obligation. According to this 
understanding the problem of political obligation is, simply, the problem of what a subject of 
the state is morally obligated to do. We might say that under this perspective, the question 
is whether there is merely a duty to comply, rather than to obey, with the state’s commands. 
We have a “duty of compliance” when the reason that we must do what the state 
commands is not the mere fact that it has been commanded, but rather the particular 
content of what it is commanded.

We might think that while it is clear why the existence of political obligations and the 
moral permissibility of the state are not logical correlates when the former is understood as 
a duty of obedience, it is not equally clear how such a relation could not hold if we 
understand the notion of political obligation as a mere duty of compliance. Our neighbor 
may coerce us not to violate the rights of others. But that is the case simply because we 
have a duty not to violate the rights of others. Should we not then conclude that a state 
could be morally permissible only if its subjects have a duty to comply with its commands?
Would not the problem of political legitimacy as it is understood here amount to this third 
understanding of the problem of political obligation?
Despite what we might initially think, it is important to note that the existence of a moral obligation to comply with the state and the permissibility of the state’s commands are not logical correlates. It is not true that an individual, or a group of individuals, can rightly coerce others to do certain things only if those other individuals have an obligation to do those things. If B is having trouble stopping smoking, B could waive his right not to be coerced with respect to smoking; and A would then have the right to knock the cigarette out of B’s hand whenever B tried to light up. But this does not mean that B has an obligation not to light up. 63 So it should be acknowledged that the legitimacy of the state, when it is understood as the moral permissibility of its existence, might not imply any sort of political obligations. Based on Hohfeld’s analysis of legal rights64, we may then claim that the moral permissibility of the state would not depend on the state having a claim-right to command, that is, on a right that implies a correlative duty on the part of its subjects. We may claim that the legitimacy of the state would depend on whether it could have a mere liberty (or liberty-right) to issue its characteristic commands, where such a liberty is understood only as entailing that its subjects do not have a claim-right against being coerced in those ways.

One might wonder, however, whether the concept of a liberty could capture what we really care about when we ask the question of political legitimacy. For if there were no type of correlative obligations whatsoever to the moral permissibility of the state’s actions, we might wonder what the significance will be of such a judgment. Let us imagine that someone holds that the state is morally permissible, and by this, he means that its characteristic actions are morally right. At the same time, however, he denies that its


64 In Hohfeldian terms, having a liberty to do P only implies the absence of a duty not to do P.
subjects must not threaten its existence at least in certain ways. He believes both that the state is morally allowed to force an individual A to do P, and that A is morally allowed to resist being forced to do P by the state. When we ask whether the state is morally permissible, are we not asking whether its existence should be at least somehow tolerated? If we think again about the smoking example, we also might want to object that to lack an obligation not to light up does not seem to imply that one also lacks an obligation not to interfere with the right to knock the cigarette out of one’s hand. In the same way, we might not be so sure about the non-correlativity between the moral permissibility of the state’s actions and at least a certain obligation of non-interference with those actions. So the objection would be that while the problem of political legitimacy might not amount to the problem of political obligation as traditionally understood, it surely must amount to the problem of whether the subjects of the state have certain duties of non-interference.

It is important to remind ourselves, however, that when it comes to the moral evaluation of the state, there are simply different questions to ask. There is the question of whether the state has a mere liberty to perform its characteristic actions. There is the question of whether its subjects have at least a duty of non-interference with such actions. There is the question of whether those same subjects have more robust obligations than that minimal duty. Nothing of importance depends upon whether we reserve the term “legitimacy” for discussions about only one of those questions. What matters, again, is not whether our understanding of political legitimacy captures some pre-theoretical or ordinary meaning of the concept. What matters is how significant the questions themselves are. And contrary to the previous worry, it is not true that if we claim that the state is morally permissible, and if by this all what we mean is that the state has at least a Hohfeldian liberty to act as one, nothing of importance follows. That is not true because what will follow is that it is not the case that the state should stop acting as one. It will follow that the state is not
doing anything that it should not do. This is, clearly, something morally significant regardless of what else we claim about the obligations the subjects of a legitimate state have. It is, in a sense, the most fundamental of all questions dealing with the normative power of the state. If the state has no liberty right to perform its characteristic coercive actions, the rights of its subjects would be violated by such a performance. It is hard to imagine that such an immoral state would have much of a moral claim regarding the obligations of those subjects.

In any case, it might be surprising if the reasons that are offered to ground the state’s liberty to perform its characteristic actions would not also ground at least some obligations of compliance on part of its subjects. In other words, it is quite likely that an attempt to answer the question about whether the state could have the most minimal normative power that is necessary for its permissible existence would also answer the question of whether the state could have more than such a minimal power. But whether or not that is the case will certainly be a matter of substantive argumentation, something with which this dissertation will not be ultimately concerned. The central question that we will pose ourselves is whether the state could have that minimal normative power, once we accept the commitments underlying natural rights liberalism. Could the state have at least a Hohfeldian liberty to perform its characteristic actions if individuals indeed have the sort of ownership and enforcement rights described in Chapter 1?

2.2 THE STATE: INFRINGER OF RIGHTS

Traditionally, it has been claimed that the morally problematic nature of the very existence of the state arises from the use of coercion. G. E. M. Anscombe, for example, says “There
is the question what renders it just to exercise force in, say, requiring what is just."\textsuperscript{65} She believes that this is the fundamental question of political philosophy. Jean Hampton understands the "anarchist challenge" in the very same terms. She claims that anarchists believe that "the only morally defensible form of human association is one in which there are no persons or institutions issuing commands that they back up through the use of force."\textsuperscript{66} And certainly, many anarchists may have thought so. Kropotkin believed that any law inflicting penalties was an abomination that should cease to exit. Bakunin argued that even when the state commands the good, it undoes it by commanding it.\textsuperscript{67}

The classical anarchist belief that coercion, by being an obstacle to moral self-direction, is virtually always morally impermissible is, however, extremely implausible. Whatever value we see in letting individuals discover by themselves the virtues of respecting individuals’ areas of sovereignty, it is doubtful that it could be greater than protecting the potential victims of those who do not recognize those virtues. This line of thought is explicitly endorsed by natural rights liberalism’s granting to individuals the set of enforcement rights explored in Chapter 1.

Certain theorists will agree that it is not coercion itself that renders the state morally problematic, but rather the fact that the state initiates its use. Actually, some theorists believe that the initiation of the use of force by the state is what renders it illegitimate. Murray Rothbard says, for example, that his anarchist creed rests upon one basic idea:


“that no man or group of men may aggress against the person or property of anyone else.”

Rothbard refers to this thesis as the “nonaggression axiom.” And he explains that

“‘Aggression’ is defined as the initiation of the use or threat of physical violence against the
person or property of anyone else.”

The nonaggression axiom, however, seems to be inadequate as a way of capturing a valid concern for the morality of what the state does. For it would seem to entail that individuals do not have a right to issue retaliatory threats against those who might initiate the use or threat of physical violence against the person or property of anyone else. But as Chapter 1 has argued, there are perfectly good reasons for why individuals should have such a right. Indeed, it is clear that Rothbard himself would not like to rule out the permissibility of such threats. One could always limit the application of the nonaggression axiom to the actual use of force. But then, according to this interpretation, a state could be perfectly permissible if it relies on threats of such a severity that no individual would ever dare to ignore its commands.

For natural rights liberalism, the explanatory challenge posed by the notion of a legitimate state, that is, a state that has a least a liberty-right to behave as states typically do, arise neither from a challenge to the permissibility of the mere use of coercion as such, nor from a challenge to the permissibility of its initiation. That explanatory challenge arises, rather, from a challenge to the permissibility of what the state coercively requires. In other words, in justifying the state, what might call for an explanation is the morality of some particular uses of coercion that are characteristic of the state.

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69 Ibid, p. 23.
The morality of the state’s actions belonging to the set that is coextensive with the exercise of the enforcement rights of individuals might not always give rise to an explanatory challenge. This is not because individuals’ enforcement rights should be conceived as mere liberty-rights, however. As Chapter 1 has argued, enforcement rights are more plausibly conceived exactly along the same lines ownership rights are conceived. Does this mean that the state must require the consent of the victim in order to punish an offender, for example? A demand for justification does not seem to arise from the mere exercise of others’ enforcement rights. There is little sense in demanding justification from an individual who decides to exercise the enforcement right of a stranger, by interfering with the efforts of a gang who is unjustly beating him. It would seem as if the enforcement rights of individuals could be exercised by others without those others having to secure the approval of the right holders. This is why it is not always the case that the state’s actions belonging to the set that is coextensive with the enforcement rights of individuals give rise to an explanatory challenge.

Yet it is one thing to hold that in order to exercise the enforcement rights of others, it is not morally required to secure the approval of those individuals. It is another thing to hold that it is permissible to exercise the enforcement rights of other individuals against their will. It is in this sense that individuals have exclusive control over their enforcement rights. Exercising such rights against an individual’s will amounts to depriving him of the sort of control over his capacity to lead his own life that the very assignment of rights is supposed to secure. It is initially unclear what, besides a purely paternalistic motivation, could support that deprivation of control. Thus, one problematic aspect of the state is that it infringes upon individuals’ rights by not allowing them to renounce the exercise of at least some of their enforcement rights.
That might not be, however, the most significant aspect of the state’s infringement of individuals’ enforcement rights. According to natural rights liberalism, there are certain things that individuals are not entitled to do. Those things are the ones that can be characterized as intrusions in the areas of moral freedom defined by the ownership and enforcement rights of others. Yet the state does not only threaten its subjects with the infliction of harm should they intrude in others’ spaces of moral freedom. The state also inflicts harms upon those subjects should they decide to exercise their enforcement rights as a means of protecting themselves from such intrusions. The state tends to recognize that its subjects have a right to self-defense. Nevertheless, the state does not allow its subjects either to seek restitution or to punish a person who has violated their rights. The state does not allow individuals to set up an alternative system of justice administration. But according to natural rights liberalism, anyone would have a right to perform these actions in the absence of the state.

So the most significant aspect of the state’s infringement on individuals’ enforcement rights is the coercion that individuals are subjected to as a means of deterring them from deciding how best to exercise their enforcement rights. If individuals have enforcement rights, if such enforcement rights explain why the state could coerce some individuals not to do certain things to others, why is it that the state could threaten individuals with the infliction of harm, should they decide to exercise their enforcement rights by their own private means? Why is it, as Tucker complains, that no alternative is open to individuals when it comes to protecting their own rights?

Here it is important to note that anyone has a right to prohibit individuals from imposing unnecessary, significant risks on others. No one has a right to aim a gun at an individual and shoot. But no one has a right to aim inches away from an individual and shoot either. The initial complaint about the state’s prohibition on individual enforcement is
not a complaint based on a right to exercise our enforcement rights in any way we like. Individuals simply do not have such a right.

In the case of self-defense, for example, the state does not prohibit individuals from exercising the corresponding right. The state prohibits individuals from exercising it in any way they like. In defending ourselves from the offenses of others, we are not legally allowed to impose significant risks on other innocent people. There are also limits on the type of things we can do to the offender himself. The state could then be seen merely as protecting the ownership rights of those individuals who would be put under those risks. Assuming that in doing so it would not be acting against their will, the state would seem to be perfectly entitled to do so. But when it comes to the exercise of a right to seek restitution or inflict punishment, the state prohibits their exercise regardless of how just or reliable such exercise might be. The state will punish those subjects who attempt to provide justice for themselves, and it will do so even if they follow the same procedures and impose the same rectification that the state would follow and impose. But why is that permissible? What is it that justifies precluding individuals from having the freedom to set up a reliable system of enforcement? Why should the protection of their ownership rights be administered by those whom they might not want to have as administrators?

Typically, the state not only coerces its subjects not to exercise their full set of enforcement rights, it also raises taxes in order to fund both the prohibition on private justice, and the administration of the resulting system of collective justice. So, ultimately, the state forces its members to pay for the protection of their own rights; rights that they are not allowed to protect by their private means. But if individuals are taken to have ownership rights both over their own bodies and over a certain portion of external resources, under what grounds could the state threaten individuals with harm, should they not transfer part of their own external resources to the state? If in the absence of the state individuals would be
free to allocate any portion of the resources they own for protective purposes, how could the state permissibly threaten them with the infliction of harm should they decide not to allocate the portion that the state demands? As Tucker puts it, is it not “in itself an invasion of the individual to compel him to pay for or suffer a protection against invasion that he has not asked for and does not desire”?

As it was explained in Chapter I, our understanding of natural rights liberalism is compatible with certain alternative theories of distributive justice. Here it is important to note that although the underlying discussions between such alternatives theories would have some relation to the problematic nature of taxation, the relation is not as straightforward as we might think.

The anarchist challenge that Robert Nozick famously presented in *Anarchy, State, and Utopia*, for example, was partially based on a libertarian theory. According to Nozick, one of the reasons for holding the belief that the state is intrinsically immoral is that “It does not constitute a violation of someone’s rights to refrain from purchasing something for him (that you have not entered specifically into an obligation to buy).” But the state, according to Nozick, forces some to buy protection for others. Thus, Nozick believes that according to the “individualist’ anarchist” not only is monopolizing the use of force itself immoral, but so is


71 Nozick, *Anarchy, State, and Utopia*, p. 52. The other reason is that the state cannot arrogate to itself the right to forbid private exaction of justice by non-aggressive individuals whose rights have been violated. For the “state grants that under some circumstances it is legitimate to punish persons who violate the rights of others, for it itself does so.” Ibid, p. 51.

72 Ibid.
“redistribution through the compulsory tax apparatus of the state.” For if it does not constitute a violation of someone’s right to refrain from purchasing something for him, then the state violates someone’s rights if it threatens him with punishment when he does not contribute to the protection of another.

But while it is clear how any form of taxation is highly problematic under a libertarian theory of distributive justice, we must note that even if Nozick were wrong and one could indeed violate someone’s rights by refraining from purchasing something for him, there is still the question of whose rights one violates by refraining from purchasing something for oneself. Thus, contrary to what Nozick seems to suggest, not only the libertarian might face the anarchist’s complaints regarding the morality of taxation. Even if individuals were entitled to redistribution, what the anarchist would object to is forcing him to pay for the protection of his own rights. He may very well grant that he may be coerced to transfer part of his income to others, or that others may be coerced to transfer part of their income to him. In the first scenario, he might complain that when it comes to his own protection, he should be free to decide how to allocate those resources upon which he is recognized to have ownership rights. In the second scenario, he might complain on the same terms. Why is it that what is claimed to be his justly coercively transferred resources, he has no say on the way that they should be allocated?

As it was discussed in Chapter I, some theorists could believe that contrary to Nozickian forms of libertarianism, natural resources belong to everyone in some egalitarian manner, in the sense that those who claim rights over natural resources must make some sort of payment to others for the value of those rights. Yet there is nothing in the central

73 Ibid.

74 Ibid.
thesis of this perspective that would explain why it is legitimate to coerce individuals to pay for the protection of their own rights, or why the state could decide how to allocate the redistributable value of the egalitarian shares of external resources to which individuals are entitled.

A justification of redistribution that rejects the permissibility of the differential gains arising from individuals’ different natural endowments or circumstances does not provide an explanation in that regard either. It might be that the aim of justice is to eliminate so far as it is possible the impact on people’s lives of bad luck that falls upon them through no fault or choice of their own, and therefore, that the lucky should transfer some or all of their gains due to luck to the unlucky. But why would a compensatory transfer from the lucky to the unlucky take the form of a payment for protection? Should not the unlucky decide how to allocate the resources to which he is taken to be entitled? And upon what grounds could the lucky be coerced to transfer to the state more than what would be equivalent to a compensatory payment to the unlucky? That is, upon what grounds could the lucky be coerced to pay for his own protection?75

When it comes to addressing the challenge the very existence of the state poses for natural rights liberalism, the most natural answer will refer to the benefits that are allegedly secured when the state’s characteristic infringements are performed. Within the normative perspective of natural rights liberalism, however, it is not initially clear how we could account for the normative significance of those alleged benefits while respecting, at the same time, the immunity that individuals’ rights enjoy against both paternalistic and consequentialist

75 It is important to note that here it is not claimed that all logically consistent assignments of pre-political ownership and enforcement rights must face the previous explanatory challenges. The claim is, rather, that ownership and enforcement rights assignments that we have found plausible on independent grounds do seem to be incompatible with the permissibility of the state’s characteristic actions.
rationales for infringement. So the justification of the state’s infringements upon its subjects' rights cannot rest merely on the grounds that receiving some of the resulting goods, such as security and protection, constitute a benefit for those subjects. Neither can it rest merely on the grounds that those infringements might be necessary for achieving a desirable social goal, as the protection of a greater number of rights could be. For if indeed an individual has natural or pre-political rights to his property and life, and to protect those rights by just means, those rights will "trump" those types of considerations.

Thus, contrary to classical anarchism, natural rights liberalism acknowledges that the rights of individuals may be protected by the use or threat of physical violence. So, in the case of the latter perspective, the challenge the notion of a legitimate state poses does not arise from the mere use of coercion. The challenge arises from the fact that the permissible use of coercion is taken to reside in the individuals themselves in the form of enforcement rights. So while the state might not do anything objectionable by threatening or punishing an individual who might want to violate others’ rights, it is not initially clear what rights an individual violates by making sure, by just means, that his own rights are not violated. Neither is it initially clear what rights an individual violates when he refuses to pay for the protection of his own rights.

2.3 CONCEPTUAL MATTERS

We have claimed that the morally problematic feature of the state is that it coerces its subjects to act or to refrain from acting in certain particular ways. Along similar lines, Max Weber defines the state as a “compulsory association with a territorial basis.” In such a territory, “the use of force is regarded as legitimate only so far as it is either permitted by the
More recently, John Rawls claims that “political power is always coercive power backed up by the government’s use of sanctions.” Christopher Morris argues, however, that since “states without coercion or force are conceivable…state and coercion and force cannot be conceptually connected." Morris asks us to imagine a state that does not need to use force or coercion because its subjects are always motivated to comply with its laws. Is not this possibility, “admittedly fantastic and utopian,” perfectly coherent? Morris then concludes that it does not seem to be a conceptual truth that states are coercive.

Initially, one could perhaps believe that these conceptual matters will have important implications for our discussion. If it is not true that the state must be coercive, then it might not be true that the state is even prima facie incompatible with natural rights liberalism. It is exactly along these lines that Tibor Machan suggests that we could reject anarchism by rejecting the premise that government requires coercion. Similarly, Gregory Kavka claims that for an organization to be regarded as a state, it “must possess enough power to

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79 Ibid.

enforce its rulings with sufficient regularity to discourage self-help among citizens.”\textsuperscript{81} But then, “if there were enough cooperation,”\textsuperscript{82} a purely voluntary arrangement between individuals involving no infringement upon individuals’ rights might count as a state.\textsuperscript{83} Why, then, would it be the case that the idea of a legitimate state must conflict with natural rights liberalism?

Upon minimal reflection, however, this conceptual response to the question of political legitimacy is seen as obviously inadequate. Defined in particular manners, the state would certainly lose its morally problematic features. But this would hardly be an interesting matter. In dealing with the morality of the state, the question we are interested in is not whether there are other actions the state could perform that would not disqualify it as a proper placeholder for the label “state.” The question we are interested in is whether particular actions that we have previously identified as morally problematic could be rightly performed. The significance of the question does not arise from being a conceptual truth that the state performs such actions. The significance of the question arises rather from the fact that such actions are actually performed by virtually all existing states.

This should not be taken to imply that the study of the availability of alternative actions for the achievement of what we take to be the state’s purposes has no relevance for the moral evaluation of what states typically do. But there is the question of whether what states typically do is morally permissible, and there is the different question of what actions a state must perform to be regarded as such. While the former question is a substantive question, the latter is purely terminological. We simply fail to provide an answer to the first


\textsuperscript{82} Ibid, p. 170.

\textsuperscript{83} Ibid, p. 170.
question by indicating how the state could act differently from the way in which it typically acts, and still be regarded as a state. So it is important to keep these two issues apart, without attempting to argue, as if it were a further substantive matter, that whatever organization that would perform some alternative actions should still be regarded as a genuine state. Nozick’s theory of political legitimacy, although full of insights, is perhaps the best illustration of how misleading our efforts can be if we fail in keeping this in mind.

Nozick argues that acknowledging that individuals have natural or pre-political ownership and enforcement rights does not preclude the legitimacy of the state. The reason is that “a state would arise from anarchy… even though no one intended this or tried to bring it about, by a process which need not violate anyone’s rights.”

Many doubts have been raised about some of the claims that Nozick needs to make to reach this conclusion. Doubts have also been raised about the normative relevance of that conclusion for the moral evaluations of states that did not arise in such a way. But it is important to

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understand that even if the previous doubts were unfounded, Nozick’s argument would fall short of even addressing what would seem to be in need of justification.

For interesting, substantive reasons that will be explored in detail later in this dissertation, Nozick claims that out of anarchy arises a “dominant protective association”: “something very much resembling a minimal state.”\(^{86}\) That something resembling a minimal state arising out of anarchy is not, however, a minimal state. Nozick claims that in order to show that a state could arise from anarchy through permissible means, he must show how the dominant protective association can rightly prohibit its non-members from enforcing their own rights. Nozick calls a state with such a power an “ultraminimal” state. But Nozick claims he must also show how the ultraminimal state can become a minimal state, that is, a state that provides protection and enforcement services to everybody under its territory, and not only to those who voluntarily purchase those services.\(^{87}\)

Roughly, Nozick argues that it is morally permissible to stop someone from doing something that \textit{might} harm others. If the action prevented is something generally done, important in people’s lives, and cannot be forbidden without creating a serious disadvantage, Nozick argues that it will be morally permissible to impose a prohibition, but only if compensation is paid to those who are disadvantaged by it. Thus, Nozick claims that the dominant protective association is justified in prohibiting non-members from privately exacting justice, if their procedures are known to be too risky and dangerous, or if those procedures are \textit{not} known not to be risky and dangerous.\(^{88}\) That prohibition that the

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\(^{86}\) Nozick, \textit{Anarchy, State, and Utopia}, p. 17


\(^{88}\) Ibid, p. 88. Nozick also attempts to establish this conclusion by introducing the notion of “procedural rights.” See pp. 96-108. But Nozick acknowledges that the assumption that procedural rights exist makes
dominant protective association is entitled to impose, however, will make it impossible for the non-members or independents to protect themselves adequately, and thus disadvantages the independents in their daily activities and life.\textsuperscript{89} So Nozick concludes that in those circumstances, “those persons promulgating and benefiting from the prohibition must compensate those disadvantaged by it;”\textsuperscript{90} and that “the least expensive way to compensate the independents would be to \textit{supply} them with protective services to cover those situations of conflict with the paying customers of the protective association.”\textsuperscript{91}

That is how Nozick argues that the dominant protective association may become, without violating anyone’s rights, not only an ultraminimal state, but also a minimal state, that is, a state that not only prohibits people from enforcing their own rights, but also one that provides protection for everyone within its territory. Nozick claims he has discharged the task of explaining how a state could arise from a state of nature without violating anyone’s rights.

One might have thought, however, that the morally significant difference between the ultraminimal state and the minimal state was the fact that, under the former, those who choose \textit{not} to purchase protection and enforcement policies were not coerced into purchasing them. In establishing the legitimacy of the minimal state, however, Nozick seems to be addressing the permissibility of the very act of providing protection and enforcement policies to those who have not chosen to purchase them. Nozick does not address the permissibility of coercing those who choose not to purchase protection into his argument too easy (p. 103). Nozick claims that his argument stands even without making such an assumption (p. 107).

\textsuperscript{89} Ibid, p. 110.

\textsuperscript{90} Ibid.

\textsuperscript{91} Ibid.
purchasing it. In other words, Nozick’s argument does not even address the morality of the manner in which the state typically provides such a protection, that is, by means of taxation. Under an ultraminimal state, no one had a right to coerce people to buy their own protection. No one had that right under a minimal state either.

The members of the dominant association choose to buy the protection that the association provides. The non-members do not choose to do so, and the dominant association does not have a right to extract their resources by coercive means. Those non-members or independents that would need to pay a fee to cover the part of the protective services that would not compensate any disadvantage may also refuse to do so. And the members of the dominant association are free to become non-members, that is, the association may not force them to pay for its services beyond whatever terms they have agreed upon. Nozick argues that only those who choose to be protected against unreliable procedures of justice from the dominant protection association may be requested to compensate those who are disadvantaged. But no one is even required to purchase protection against unreliable procedures of justice. Nozick claims that “since compensation is paid only to those who would be disadvantaged by purchasing protection themselves, and only in the amount that will equal the cost of an unfancy policy when added to the sum of the monetary costs of self-help protection plus whatever amount the person comfortably could pay,” there will not be a powerful incentive to leave the dominant association.⁹² This might be true. If we are serious in our rejection of paternalism, it does not entail that the association may prohibit members from becoming independents if they choose to do so. Nozick does not claim otherwise.

⁹² Ibid, p. 113.
We might still believe that Nozick’s argument could show how natural rights liberalism is compatible, if not with taxation, at least with the most fundamental coercive arrangement characteristic of the state: the prohibition on private enforcement. Nozick explicitly recognizes that a necessary condition for the existence of the state is that it threatens to punish its subjects, if they decide to enforce their own rights. As we have also seen above, Nozick argues that the dominant protective association has a right to prohibit non-members from privately exacting justice using unreliable procedures. But does the dominant protective association have a right to prohibit non-members from privately exacting justice when they do not use such procedures? After all, as it was already suggested, the use of risky procedures might be thought to violate individuals' rights in a quite unproblematic manner.

In discussing the application of the principle of compensation, Nozick says that “[i]t goes without saying that these dealings and prohibitions apply only to those using unreliable or unfair enforcements procedures.”93 Besides, Nozick explains that an individual may empower his protective association to exercise for him his rights to resist the imposition of any procedure which “after all conscientious consideration he finds to be unfair or unreliable.”94 But if “he finds the system within the bounds of reliability and fairness he must submit to it.”95 It is clear that Nozick does not claim that the process of conscientious consideration is a merely subjective process. For that would imply that “a criminal who refuses to approve anyone’s procedure of justice could legitimately punish anyone who

93 Ibid, p. 112.
94 Ibid, p. 102.
95 Ibid.
attempted to punish him." The dominant protective association, therefore, “does not claim that right to prohibit others arbitrarily; it claims only the right to prohibit anyone’s using actually defective procedures on its clients.” Thus, it is not true that the dominant protective association can rightfully prevent independents or other agencies from competing in the market of protection, on the grounds that everyone has a right not to be subject to risky procedures.

Nozick does claim, however, that only the dominant association will be able to exercise the right to ensure that individuals do not use risky procedures on others. Nozick explains that he is not assuming that might makes right. He only claims that “might does make enforced prohibitions, even if no one thinks the mighty has a special entitlement to have realized in the world their own view of which prohibitions are correctly enforced.” Yet it is not clear how this type of consideration will entitle us to conclude that the dominant association may then become an ultraminimal state. The dominant association, given its position of dominance, might be the only one able to exercise the right to ensure that individuals do not use risky procedures on others. But this does not mean that it will have a right to exercise that right wrongfully. It is true that might makes enforced prohibitions. What matters, however, is whether those enforced prohibitions are morally permissible or not;

98 Nozick says that “the nature of the right is such that once a dominant power emerges, it alone will exercise that right. For the right includes the right to stop others from wrongfully exercising the right, and only the dominant power will be able to exercise this right against all others.” Ibid, p. 109.
99 Ibid.
100 Ibid, p. 119.
whether the dominant association should or should not act as a coercive monopolist. The moral principle that Nozick advances to justify the transition to an ultraminimal state holds that the dominant association has a right to defend its members against unreliable or unfair procedures of justice. It does not hold that the dominant association has a right to defend its members against whatever the association claims to be unreliable and unfair procedures of justice.

Nozick acknowledges that those who do not wish to belong to the dominant association cannot be prohibited from solving their conflicts with other non-members of the dominant association by their own private means. For the dominant protective association protects the independents it compensates “only against its own paying clients on whom the independents are forbidden to use self-help enforcement.” However, as long as they make public the procedures of justice they follow, and as long as those procedures are reliable and fair, it has been argued that the dominant association does not have a right to prohibit the application of those procedures against its members.

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101 Nozick claims there will be a strong tendency for the dominant protective association to deem all independents’ procedures unreliable or unfair, even if they are the ‘same’ procedures that the dominant association applies, on the grounds that they are run by others (p. 108.) It might be so, but the question is whether it could act on those grounds without violating the independents’ rights. The fact that “only the dominant protective association will be able, without sanction, to enforce correctness as it sees it,” or that “its power makes it the arbiter of correctness; it determines what, for purposes of punishment, counts as a breach or correctness,” (p. 118) cannot be relevant considerations to explain why the dominant association would not wrongfully exercise the right to prohibit unreliable procedures of justice.


103 Ibid, p. 113.
So Nozick’s argument justifies neither the moral permissibility of coercing people to pay for the protection of their own rights, nor the moral permissibility of prohibiting people from enforcing their rights by following reliable procedures of justice. It justifies the moral permissibility both of providing protection to people who have decided not to buy it (with resources that are voluntarily provided by others), and of prohibiting people from using unfair or unreliable procedures of justice. But certainly, that is not what one would expect the “anarchist challenge” to be about. What one would expect the anarchist to deny is that it is permissible to provide universal protection *in the manner in which the state typically provides it*, that is, both by forcing individuals to pay for it and by prohibiting the use of alternative reliable methods of enforcement.

Nozick himself might not disagree with the previous interpretation of his own argument. As it was mentioned before, Nozick does not claim that the dominant protective association has the right to coerce individuals to purchase its services. And he claims that the monopoly acquired by the dominant protection association is simply a *de facto* monopoly.104 The protective association has no right to prohibit the entry of competitors. But why then does Nozick believe that his arguments show how the state could arise without violating anyone’s rights? Why is it that Nozick claims that he has justified the state? Apparently, this is because based on certain considerations, such as “how closely it fits anthropologists’ notions,”105 an organization that provides protection to everybody within a territory, and has some sort of exclusive control over the administration of justice, “one would call it a state.”106 Yet if Nozick had began his argument claiming that he was going to

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104 Ibid.
105 Ibid, p. 117.
106 Ibid. Emphasis added.
show, how 1) anyone can have a right to provide protection to others without charging them for such a protection, with the resources voluntarily obtained from others, 2) that anyone can have a right to prohibit others from using procedures of justice that impose significant risks on others, and 3) that based on certain linguistic considerations, an organization that performs those actions and enjoys some sort of *de facto* monopoly could be properly referred to by the term “state,” one would have immediately seen the lack of moral significance of such an effort.

Although Nozick provides several substantial arguments and considerations of the greatest interest, his main line of argument is grounded on a mere terminological point. Regardless of whether we agree with it or not, which in turn is not a matter worthy of discussion, there would still be the question of whether certain actions that states typically perform, and that we tend to identify as demanding justification, may or may not be performed.

### 2.4 CONCLUSION

A fundamental question in political philosophy is the question of whether the very existence of the state, that is, the performance of a particular set of actions, is morally permissible. Even acknowledging that the legitimacy of the state could amount to a mere liberty, rather than a claim-right to perform those characteristic actions, it is still not clear how the state could have that liberty if its subjects have the sort of pre-political rights that, according to natural rights liberalism, individuals in fact have.

Typically, the state coerces its subjects by threatening them with the infliction of harm should they perform certain actions. Within natural rights liberalism, this is a legitimate way of treating individuals when the actions to which the expectation of harm is attached are actions that would interfere with individuals’ assigned spaces of moral freedom. Typically, however, the state will coerce individuals to stay away from performing actions
that would seem to be included in the areas of freedoms protected by individuals’ ownership and enforcement rights, such as seeking compensation, inflicting justified punishments to offenders, and allocating any chosen portion of resources for those protective purposes. The question we pose to ourselves is under what conditions, if any, those infringements on individuals’ rights characteristic of the state could be justified within the general normative perspective that characterizes natural rights liberalism, where the rejection both of paternalistic and consequentialist patterns of moral reasoning is predominant.

Chapter 3 will explore the major traditional theories of political legitimacy within the liberal tradition. Such theories could be understood as an attempt to explain away the tension between the natural rights rationale that establishes the limits of government, and the moral possibility of government itself, where this possibility is taken to include both a right to impose coercive barriers to entry in the administration of justice and a right to tax individuals with the purpose of financing that administration.
CHAPTER 3
THE LIMITS OF POLITICAL PREFERENTIALISM

According to natural rights liberalism, individuals have both ownership rights over the use of their persons and external objects, and enforcement rights to prevent, rectify, and punish violations of those rights. One might think that this conception of individual rights would be entirely compatible with a state that acts within the moral space of such rights. Yet as Chapter 2 has attempted to show, there is the problem of showing how, precisely, the state could do so. If, in the absence of the state, individuals would be morally entitled to allocate whatever proportion of their resources they choose to the exercise of their enforcement rights, why could the state have a right to force individuals, by means of taxation, to allocate a particular portion of those resources to such an end? If individuals have ownership and enforcement rights prior to the existence of the state, how could the state acquire a right to impose coercive barriers to entry in the business of providing justice and protection, and thus prohibit both potential providers and buyers from trading within the scope of their moral entitlements?

The predominant type of liberal argument for the state is an argument that links the moral permissibility of infringing upon a subject’s rights with the preferences of that very same subject. The voluntarist element that is taken to justify the nonpolitical interactions among individuals is claimed to be found, somehow, in the coercive arrangement that constitutes a state. It is not difficult to understand theories of political legitimacy based on implicit consent, hypothetical agreement, and fairness as all instances of this type of argumentative strategy. This chapter uncovers the most serious limitations of this argumentative strategy.
3.1 IMPLICIT CONSENT AND THE MORAL CONSEQUENCES OF CHOICE

Under the satisfaction of certain conditions, an act of explicit consent is generally taken as capable of changing the structure of existing moral constraints. If we explicitly agree to be treated in a certain way, others are morally entitled to treat us in that exact same way. The point and effect of an expression of consent is to grant a privilege or liberty to the consentee to perform an action that he previously had a duty to refrain from doing.\(^{107}\) It is clear why a principle of explicit consent does not constitute an adequate ground for the legitimacy of what states typically do. The problematic nature of the state seems to arise precisely from the fact that those individuals who explicitly dissent with the state’s infringement upon their rights are not given any sort of moral immunity. Some would seem to believe, however, that the inadequacy of an appeal to explicit consent does not entail the inadequacy of an appeal to the individuals’ consent. This is because, it is claimed, not every act of consent is an act of explicit consent. Some acts of consent are best understood as acts of *implicit* consent; and those individuals who commit them may forfeit a right not to be treated in a certain way as well.

Let us imagine that A enters into a restaurant. Upon his arrival, B, the restaurant’s owner, does not ask A whether he is willing to pay for his meal. After eating, A is presented with the check. But now A claims that when he ordered his meal he did not have the intention to pay, and that he did not claim otherwise. Therefore, A concludes, he should not have to pay for his meal. A’s argument is not convincing. We will claim that despite the lack of any explicit agreement, B has a right to be paid. After all, A knew that B was going to expect a payment in return for ordering and eating the meal. And since A had the option of not ordering and eating the meal, A must then now pay for the meal. Thus, even though an

individual may never have explicitly expressed his agreement with the rules that we might find enforced in certain social activities, his very participation in such an activity, in conjunction with his knowledge of the existence of such rules, might entitle us to take him as performing an act of implicit consent. In other words, the performance of certain undertaking alone might provide us with a valid reason to enforce such rules upon him.

Yet it is important to note that an act of implicit consent would seem to differ from an act of explicit consent in a significant sense. In performing an act of implicit consent, it is not the case that the agent must have the intention of consenting, that is, of letting others know that one agrees with what is being proposed or done. As in the case of acts of explicit consent, one has to be aware of the normative consequences of the act of implicit consent. But the act itself need not be performed with the purpose of indicating one’s agreement. The fact that one might explicitly deny one’s intentions to consent might then be irrelevant for the commission of an act of implicit consent. This particular feature of implicit consent would seem to justify its status as a possible ground for political legitimacy. And since acts of implicit consent would still be done with the knowledge that what it is done will be taken by others to have certain moral consequences, they would still share with acts of explicit consent the capacity to change the structure of existing moral constraints by the performance of a voluntary action. So we might think that an appeal to implicit consent would be entirely consistent with natural rights liberalism. If we are committed to certain fundamental liberal values, there would seem to be nothing more natural than allowing individuals to alter, by their own voluntary actions, the structure of obligations that others must observe against them.

Traditionally, continued residence within the territory in which the state performs its characteristic actions has been taken as the act of implicit consent upon which the
legitimacy of the state might rest. Indeed, continued residence would seem to constitute the most natural choice. Anything short of that, as for example the enjoyment of particular goods the state provides, such as highways, parks, and libraries, would arguably give the state only a power to coerce its subjects only in what concerns the provision of those goods. Furthermore, such a narrow understanding would give the subjects of the state the possibility of not being treated as such. For they might simply avoid the enjoyment of those goods that the state provides, in the same way that people might avoid the enjoyment of all type of goods provided by voluntary associations. The choice of continued residence as criterion of implicit consent is also a natural choice to make once we realize that the state provides its major goods, such as the protection of lives and property, in an open manner.

So as long as we live under the state, the state might always claim that we enjoy the goods it provides and, therefore, that it is morally permissible to infringe upon individuals’ natural rights in the way it typically does. In the same way that ordering and eating a meal would allow the restaurant’s owner to extract money from the customer, living under a territory upon which the state provides protection would allow the state to impose taxes and monopolize the administration of justice. In the same way in which for the restaurant owner it does not matter whether we explicitly deny our intention or willingness to pay for the food, it does not matter that we explicitly deny our intention and willingness to collaborate with the state. If there is nothing absurd in justifying coercing that restaurant customer to pay for his meal based on a principle of implicit consent, there might be nothing absurd, contrary to what it is usually claimed, in coercing the anarchist based on the same considerations.

108 This idea was first suggested by Plato in the Crito. Later, Hobbes, Locke, and Rousseau would all make some use of the notion of implicit consent. See Hobbes, Leviathan, Ch. 20 and ‘Review, and Conclusion’; Locke, The Second Treatise of Civil Government, section 119; Jean Jacques Rousseau, The Social Contract, Book 4, Ch. 2.
Certainly, it would seem that for an act of consent to count as such there must be something that it is possible to do which counts as refusing to consent. In the case of the restaurant, we believe that B has a right to be paid. But we believe so because A could have not ordered or eaten the food. If he had not done so, B would have no right to be paid for that food. The consent theorist will claim, however, that the open manner in which the state provides its goods does not entail that there is nothing that one can do to avoid consenting. Since the provision of goods is always relative to a particular territory, one could always move out and fail to consent. Would the fact that states are all around us present a problem? Some believe that if it does, it is easily remediable. The solution consists in creating a “dissenters’ territory”, where individuals would be free of the state’s coercion.\footnote{See Harry Beran, \textit{The Consent Theory of Political Obligation} (London: Croom Helm, 1987), p. 109.}

Thus, as long as one is free to leave the territory of the state, the consent theorist would claim that continued residence within that territory might constitute a genuine act of implicit consent, and thus alter the structure of moral prohibitions that would apply when such an act is not performed. In particular, the individual would no be longer be protected by his

\footnote{See Harry Beran, \textit{The Consent Theory of Political Obligation} (London: Croom Helm, 1987), p. 109. Beran does not take himself to be presenting a theory of political legitimacy. Beran explains that he defends consent theory as a theory of political obligation, in the sense in which such an obligation is the logical correlate of the “authority” of the state. See, for example, Harry Beran, “In Defense of the Consent Theory of Political Obligation,” \textit{Ethics} 87 (1977): 260-271, p. 263. Regardless of Beran’s own intentions, however, many of the arguments and considerations he presents seem to apply to the problem of political legitimacy as well, that is, to the problem of the moral justification of coercing people to do particular things.}
ownership and enforcement rights against a particular set of actions of those to whom the implicit consent is given.\textsuperscript{110}

The main objection that critics have advanced against an implicit consent approach is that, although perhaps possible, the option to emigrate will be significantly costly to perform. Due to this fact, it is claimed, continued residence within the state would not meet the required conditions that any act of consent must meet. It would not amount to an action of a genuine voluntary nature. Hume seemed to have argued in these terms. He questioned how realistic it is to consider the option to emigrate as an available alternative for those to whom the prospects of emigrating would be clearly undesirable. Hume asked whether we could seriously say that a poor peasant has a free choice to leave his country.\textsuperscript{111} Simmons has acknowledged that provisions for assisting the poor in emigrating could always be made. But he would argue that no provisions seem to be available to make up for the fact that most valuable “possessions” a man has are often necessarily tied to his country of residence and cannot be taken from it.\textsuperscript{112} Similarly, Ronald Dworkin argues that, “unless it is

\textsuperscript{110} As Hanna Pitkin has noted, it is unclear how a right of revolution against tyrannical governments could be made compatible with a doctrine of implicit consent based on continued residence, or at least when such government have an open emigration policy. See Hanna Pitkin, “Obligation and Consent I,” American Political Science Review 59 (1965): 990-999, p. 995. Perhaps one could here appeal to the inalienability of some fundamental rights of individuals. See, for example, A. John Simmons, On the Edge of Anarchy (Princeton, NJ: Princeton University Press, 1993), p. 209.


\textsuperscript{112} A. John Simmons, Moral Principles and Political Obligations, p. 99. For the importance of family and cultural ties to our own country, see also Anthony D. Woozley, Law and Obedience (Chapel Hill: U. North Carolina Pr. 1979), pp. 106-108.
given more freely, and with more genuine alternate choice, than just by declining to build a life from nothing under a foreign flag,” the alleged consent of the state’s subjects cannot be normatively relevant.

Yet some consent theorists seem to be unmoved by this line of objection. Harry Beran, for example, presents us the following case. A man has an illness that is fatal unless dealt with in a hospital. Hospitals require that patients agree to observe their rules while there. But this man not only dislikes being in hospitals as such but also objects to being bound by rules in the making of which he had no say. Does this man’s agreement to observe the hospital rules not result because the alternative to agreeing is certain death? Should we then conclude that the hospital has no right to make him observe its rules? Or let us imagine that a patient gives his doctor his consent to a blood transfusion. Should the doctor withhold the transfusion on the grounds that the alternative of receiving it was too unpleasant for the patient’s consent to have normative significance?

So the high price involved in not giving our consent to something does not seem to be a defeating condition of consenting, even if the act of consent in question is one which a

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person is reluctant to make. After all, if the severe predicament in which people find themselves prevented them from placing themselves under agreement obligations, they would find it more difficult to get help to overcome their predicament. As long as no duress is involved, agreements motivated by difficult circumstance would seem to be binding. Thus, as long as the state does not coerce its subjects to perform the act of consent that would legitimate its existence, and this would be the case if the subjects are free to leave the territory, the consent theorist might conclude that the state would act as permissibly as hospitals do.

Critics might want to reply that there is some morally relevant difference between the previous type of cases, and cases in which we do believe it is unfair or unconscionable to exploit the vulnerabilities of a person, even when we are not responsible for them. Critics might want to explain why the relevant case for an implicit consent approach to political legitimacy is the latter. Yet if we are tempted to argue in such a manner, we would have failed to appreciate the fundamental flaw of an implicit consent approach.

As it was already suggested, the normative force of implicit consent would seem to arise from an appeal to a more general principle stating, roughly, that people are


118 No duress is involved as long as the consentee does not threaten the consenter with some evil should the act of consent not be performed with the purpose of obtaining the consent. As Raz puts it, “The undesirable aspect of duress is not in the absence of choice but in the fact that it is engineered in order to extract the consent.” Joseph Raz, The Morality of Freedom, p. 89.

responsible for the consequences of their actions.\textsuperscript{120} If we know that a particular outcome will be brought about by others if we act in a particular way, and then we do act in such a way, it will be claimed that there is nothing morally objectionable if that outcome is indeed brought about by others. But clearly, this reasoning would be persuasive only if the agent does not have a prior moral entitlement to do whatever will make others bring about the outcome. If such is not the case, that is, if the agent has a prior moral entitlement to do the thing in question, then the argument that grounds the moral permissibility of the outcome in such an undertaking is clearly fallacious.

An implicit consent approach to political legitimacy would compare the state with the case of us going voluntarily to the restaurant and eating the meal. The analogy, however, is inadequate. In the restaurant case, we can certainly be forced to pay for the meal if we knew that the restaurant's owner will expect a payment and we eat the meal anyway. But certainly, the restaurant's owner cannot force us to pay for a meal that we prepare and eat at home; and he cannot do so regardless of the fact that he could have phoned us earlier to let us know that our cooking was going to be taken as a sign of consent to him charging us a certain amount. He may not force us to pay despite the fact that we might have known that he would be expecting a payment in return. As John Bennett suggests, in general, one cannot make something a sign of implicit consent unless one has the right to prevent anyone from making the sign without agreeing to one's conditions.\textsuperscript{121} Thus, if indeed

\textsuperscript{120} See Raz, \textit{The Morality of Freedom}, p. 94-95.

\textsuperscript{121} Bennett explains that this condition does not apply if the action in question is of no concern to people independently from its possible role as a sign of consent, such as remaining silent or raising one's hands in certain well-defined contexts. No professor has a right to prohibit a student, for example, from remaining silent unless they consent to some proposal. But certainly, it is entirely legitimate for the professor to inform the students that their silence will be understood as a sign of approval with the
individuals have pre-political rights to their persons, properties, and to protect those rights by just means, the case of the state would not be like the case of us going to the restaurant. It will be like the case of the restaurant demanding a payment for the meal we prepare at home. But in the same way that in those cases we cannot appeal to the principle of implicit consent as a justificatory ground, we could not then do so to justify the state’s actions either.

Thus, contrary to what the Humean objection seems to assume, continued residence would not count as a valid act of implicit consent even if emigration were not costly. The problem with making continued residence a sign of consent is more fundamental than that. The problem is that the state would seem to be normatively able to take residence as a valid sign of implicit consent only if individuals would have no prior claim-right to live in the territory free of coercive interference. But, according to natural rights liberalism, individuals do have ownership and enforcement rights that entail precisely that type of moral protection.

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122 Allen Buchanan also claims that for a subject’s continued residence within the state to count as an act of implicit consent, the state would already have to have the right that the principle of implicit consent is supposed to explain. But he argues that the objection is based upon the fact “there is no such thing as a natural act of consent.” Buchanan explains that for any given action to count as an act of consent, there
It is interesting to note that a similar mistake to that found in an implicit consent approach to political legitimacy is sometimes made in discussion regarding either the justification of punishment or the justification of particular forms of it. It is sometimes claimed that by committing the crime, the criminal somehow volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. Therefore, the argument goes, the punishment the criminal suffers is not unjust. This is a clearly inadequate argument. Those who believe that the death penalty is objectionable, for example, believe that people may do certain things without having to be killed as a result. So those types of arguments for the morality of punishment, or for the morality of particular forms of punishments, would seem to be guilty of begging the question. The implicit consent approach to political legitimacy would seem to be guilty of the same charge. A justification of the state based on the principle of implicit consent would need to assume that its subjects lack a right to be free of political coercion. But that is what stands in need of justification.

must be certain complex conventions already in place. Buchanan seems to believe that, given their complexity, these conventions cannot be taken to arise spontaneously but rather need some sort of institutional process: “So before maintaining residence in the state can count as consent, there must be some process by which these conventions are established. But that process itself would have to be legitimate; otherwise, the problem of legitimacy would simply be pushed back to this earlier stage: Who is justified in imposing the convention that such-and-such behavior is to count as consent?” See Buchanan, Justice, Legitimacy, and Self-Determination, p. 244-245. Yet it seems that regardless of whether there are natural acts of consent or not, the state would not be normatively entitled to take such acts as the justificatory ground for its own infringement of individuals’ natural rights. So the fundamental problem is not really the one upon which Buchanan, apparently drawing from Wellman and Simmons, rests his case.

3.2 CONTRACTARIANISM: IN SEARCH OF THE ‘AGREEABLE’ STATE

In the history of political philosophy, many attempts have been made to provide an answer to the problem of political legitimacy making use of a hypothetical, rather than actual, notion of consent. According to this perspective, what matters is not whether the subjects of the state have actually consented to its existence, but rather whether they would consent to it if they had the chance. Appeals to an initial contract among individuals to create the state are certainly best understood not as historical accounts. As such, the theory will rest on a foundation that is both historically inaccurate (when has such a contract taken place?) and normatively unsound (why would the state be authorized to infringe upon the rights of the descendants of the alleged contracting parties?). Appeals to an initial contract are better understood as accounts of what individuals would do, or what would make sense for them to do, if they were in such a position. This is the basic idea behind a contractarian approach to political legitimacy. The idea is that the state is justified insofar as it is ‘agreeable’ to its subjects.

Some have expressed their doubts about the normative force of an appeal to what people would have agreed to when they have not actually done so. Dworkin famously claimed that hypothetical contracts are not merely a pale form of actual contracts. They are not contracts at all.\(^{124}\) Similarly, Joseph Raz had said that one might ask what one would have had to do had one consented. But he denies that this is relevant to what one has to do given that one did not consent.\(^{125}\)


\(^{125}\) Raz, The Morality of Freedom, p. 81n.
There are certain cases in which this skepticism about hypothetical consent as a valid normative ground seems to be completely warranted. Certainly, we are not obligated to buy a broken-down car nor can anyone force us to do so on the grounds that we would have wanted to buy it when we did not know it was broken. Neither does it seem to be true that a gardener has a right to extract a certain amount of money from us on the grounds that we would have agreed, had he asked, to pay him that amount of money to weed our garden, which he has now done without asking. When we actually agree to do something, we raise expectations in others, and those others might then be morally entitled to have their expectations fulfilled. But we cannot be held accountable for expectations that would have been raised if we had acted in a way in which we did not act.

On the other hand, sweeping skepticism against the normative relevance of hypothetical consent would not be entirely plausible. In certain cases, appeals to hypothetical consent do seem to have some normative force. Even Dworkin, whose indictment against hypothetical consent has been quoted repeatedly, would agree to this. Dworkin presents the example of a doctor who thinks there is every reason to think that a man unconscious and bleeding would consent to a transfusion if he were conscious. Dworkin claims that in this case, the fact that the patient would consent to the procedure is extremely relevant to the morality of the doctor’s decision. This is because the patient’s hypothetical consent shows that his will was inclined toward the decision at the time and in the circumstances that the decision was taken.

So it would seem that hypothetical consent does not have any normative force when there is clear evidence that the actual will of the individual would be overridden, but that it does have such force when there is clear evidence to the contrary. It would also seem that

for an appeal to hypothetical consent to be normatively relevant, it must not be possible to secure actual consent because the existence of prohibitly high transaction costs, the urgency of the situation, or an irrevocable incapacity for communication. After all, if an individual could have easily expressed his consent, and has not done so, the reason might be that he is just not willing to do so.

Thus, contrary to what the popular objection against the normative relevance of hypothetical consent might make us think, there are certain cases in which the fact that those who have not actually agreed to something can permissibly be coerced on the grounds that they would have agreed to it. In other words, the principle of hypothetical consent, properly qualified, might constitute a possible normative ground for establishing that individuals lack a right not to be treated in particular ways; in those ways in which they would have agreed to be treated if they had the chance.

In assessing the plausibility of this simple principle of hypothetical consent as a principle of political legitimacy, we might first ask whether it is indeed the case that the condition about the impossibility of securing actual consent is met. After all, the state would seem to be able to communicate with its subjects quite easily. Is there any reason to believe that the state does not exist under those circumstances in which actual consent, but not hypothetical consent, would ground a permission to act in a way that would be otherwise objectionable?

It might be argued that, when it comes to the state, securing actual consent could be impossible for quite different reasons than those that make the patient’s actual consent unavailable. The idea would be that individuals, facing the opportunity to give their consent, would not have an appropriate incentive structure capable of motivating both actual agreement and disagreement. Given the type of open benefits the state will provide, each individual might be tempted to reject the state even when knowing that this might produce
an outcome that is less preferred than having the state. Paradoxically, the very opportunity to consent to a given proposal could make individuals reject the proposal, despite the fact that none of them would like to see the proposal rejected. At least in that sense, it might then be true that genuine actual consent is unavailable in dealing with the morality of the state. If we care about individuals doing what they really want to do, we would stop a person attempting to cross a bridge that had been ascertained unsafe if there were no time to warn the person of the danger. Similarly, it might make sense to restrict the set of actions open to people, and thus, prevent them from falling into collectively irrational outcomes, that is, outcomes in which they cannot do what they really want to do.

But although it might be true that the subjects of the state might face that type of collective action problem, it is completely clear that the central condition stated by the principle of hypothetical consent is not generally met; the central condition being the consistency with the inclination of people’s wills. It is simply not plausible to assume that all individuals who explicitly deny their willingness to be subjects of the state would actually consent to its existence if they were not faced with such a collective action problem. In other words, the refusal of many of them might not arise from any kind of strategic reasoning. Anarchists, after all, oppose the very existence of the state, and thus the provision of open goods upon which the possibility of free riding would seem to rest. Some anarchists might reject the existence of the state based on their moral beliefs alone. They might think, as Kropotkin and Bakunin did, that coercion is virtually always morally impermissible. Others might not take such an implausible moral view. They would rather endorse the central normative elements of natural rights liberalism, and perhaps by holding an optimistic view of the stateless condition, deny their willingness to consent to the state’s infringement upon their rights. Furthermore, individuals with little aversion to risk, or with a preference for the excitement of the alleged perils of anarchy, might reject the state based on purely prudential
reasons. For them, the state, although perhaps acknowledging its necessity for the achievement of some type of states of affairs, might not be worth its costs.

Thus, although an appeal to hypothetical consent might provide a justification for the state’s rights-infringing actions when they are performed against some of its subjects, it would fail when it comes to those who genuinely object to them. But we might think that it is precisely because of the existence of the latter group that a serious demand for justification arises. It is not to those subjects who take themselves to consent to the existence of the state, or to those who see the state as a means for satisfying their own preferences, that an explanation is clearly due regarding the permissibility of what the state does. It is precisely to those subjects who do not take themselves to be consenting in any way to the state, and that who claim to prefer living without it, that those who are committed to the sovereignty of individuals must offer an answer.

The unwilling subject to whom an appeal to hypothetical consent has no justification to offer for what the state does to him, would seem to the subject for which the need of a justification is more pressing. Yet this might not be the fundamental deficiency of the hypothetical consent approach to political legitimacy. After all, a criterion of political legitimacy, such as hypothetical consent, is supposed to tell us under what conditions, if any, it is permissible to act in the way in which the state does. The criterion of hypothetical consent tells us that it is permissible to act in such a way against those who would consent to that mode of treatment if they had the chance. Why must a criterion of political legitimacy be judged according to its ability to justify what the state actually does? The fundamental deficiency of a principle of hypothetical consent might not be constituted by its inherently limited character. Once we appreciate where this inherently limited character stems from, however, we appreciate what such fundamental deficiency is.
The inherently limited character of an appeal to hypothetical consent stems from the inevitable differences in individuals’ preferences and beliefs regarding how best to satisfy those preferences. And here it is important to note that all those subjects who would not be willing to consent to the state if they had the chance, might be actually mistaken in their moral, empirical, or prudential assessment of the situation. Yet a simple appeal to hypothetical consent does not seem to provide a ground upon which we could disqualify the normative relevance of their beliefs. Persons with certain religious beliefs might not be willing to receive a blood transfusion. We might believe that individuals have no good reasons for holding such particular beliefs. But the normativity of an appeal to hypothetical consent seems to be founded, precisely, on a commitment to respecting other persons’ wills regardless of what our assessment is of the merits of their reasons for willing in the way they do. This feature is what makes the reasoning behind appeals to hypothetical consent compatible with the commitment to individual sovereignty underlying natural rights liberalism.

But then, the principle of hypothetical consent does not seem to capture what, intuitively, we think matters greatly for discussions of political legitimacy. We tend to think that a plausible political philosophy would justify at least a minimally costly state if the inconveniences of anarchy are considered particularly severe, and that if such a state would be able to overcome them. The principle of hypothetical consent is not able to capture this intuitive thought adequately. For whether or not the state will be justified in overcoming anarchy’s alleged problems will be contingent on individuals’ preferences being typical and individuals’ beliefs being relatively sound. If the majority of individuals had mistaken beliefs, for example, about the nature of anarchy, such as they would not give their hypothetical consent to the state, the state would not be morally allowed to infringe upon those individuals’ rights, even though this infringement might be necessary to overcome the actual
severe conditions that would ensue in anarchy. This would be the case even if such infringements are not regarded as particularly detrimental to those individuals’ interests that their rights protect, and even if other individuals would suffer the consequences of their political freedom.

Perhaps it is precisely in the face of that previous problem that contemporary contract theory has tended to be *doubly* hypothetical. The question, it is explained, is not whether the subjects of the state would consent to its existence, that is, to the performance of certain actions that, lacking such consent, are taken to constitute mere violations of those subjects’ rights. The question is, rather, whether the subjects of the state would consent were they different in some relevant aspect. The subjects that count are not the real subjects but some type of idealized form of them. As long as the idealized version of the state’s subject would consent to the state, it is normatively irrelevant that the actual subject would not do so.

One possible alternative is to claim that the hypothetical consent that counts is the consent that “reasonable” subjects would give. Thus, the question we should ask is not simply whether the subjects of the state would agree to its existence but whether they would agree if they were reasonable. Thomas Nagel seems to endorse this type of view. He claims that the search for political legitimacy “can be thought of as an attempt to realize some of the values of voluntary participation, in a system of institutions that is unavoidably compulsory.” How could we do that? By showing that “it would be unreasonable [for the

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state’s subjects] to reject the option of living under such a system, even though the choice cannot be offered.\textsuperscript{129}

The fact that it would be unreasonable for the state’s subjects to reject the option of living under the state, however, does not look like a proper answer to the question of political legitimacy. One would think that the proper answer would be constituted by the considerations that determine that such a choice would be unreasonable. In other words, if the types of claims the unwilling subject might make to support his position are unreasonable claims, there must be a reason why that is the case, and that reason must be different from the one stating that a reasonable person would not make those claims. So why is it, precisely, that it would be unreasonable to reject the state? Nagel is not very precise in that regard.\textsuperscript{130} But imagine that we are given a precise answer. Would this answer not constitute, again, the real answer to the problem of political legitimacy, and would no significant role be left for the contractarian idea?\textsuperscript{131} In any case, regardless of

\textsuperscript{129} Ibid.

\textsuperscript{130} Nagel claims that the legitimate system is one that reconciles principles of impartiality and reasonable partiality. Yet Nagel himself acknowledges that he is more interested in explaining what he takes to be the central problem of political theory and why a solution is so difficult to achieve, rather than actually proposing a solution. Nagel also acknowledges that what is reasonable to reject is a moral issue ‘all the way down’ (p. 39). As many have noted, it is not initially clear why if that is the case we could not appeal directly to those moral reasons, avoiding all references to the idea of what a reasonable person would do or would not do. See, for example, Judith Jarvis Thompson, \textit{Realm of Rights} (Cambridge: MA: Harvard University Press, 1990), p. 30; and Philip Pettit, \textit{The Common Mind} (Oxford: Oxford University Press, 1993), p. 302.

whether an appeal to the reasonableness of the individual provides some sort of support for a moral principle capable of providing the moral foundations for the state, there is still the question of what principle that is, and a mere appeal to the reasonableness of agents does not answer that question.

Another possibility within double hypotheticalism is to understand the notion of hypothetical agreement in terms of the agreement given by the \textit{rational} counterparts of the actual subjects, where such rational counterparts are in turn defined as agents who seek to maximize the satisfaction of their personal preferences.\footnote{In Christopher Morris words, "a form of political organization (e.g., a state) is to be justified by being shown to be the outcome of the rational agreement of the individuals." Christopher Morris, \textit{An Essay on the Modern State} (Cambridge: Cambridge University Press, 1998), p. 151. See also Gregory Kavka, \textit{Hobbesian Moral and Political Theory}; Jean Hampton, \textit{Hobbes and the Social Contract Tradition}; and James Buchanan, \textit{The Limits of Liberty. Between Anarchy and Leviathan} (Chicago: University of Chicago Press, 1975).} So the question we should ask is, basically, whether the subjects of the state would agree to its existence if they were concerned with the maximization of their own subjective well-being.

Certainly, a positive answer to that question will be based on a particular conception of the nature of the stateless condition. Yet it would seem that, regardless what such a conception is, a general statement regarding the rationality of consenting to the state is quite implausible. As Gregory Kavka acknowledges, even assuming the standard view of anarchy as a state of war, consenting to the state will not be rational for persons with "extremely atypical personal characteristics, attitudes towards risk, or aversions to peace

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and compromise." 133 In any case, this is not the most fundamental objection a rational idealization of contractarianism must face. If we think about a “historical” understanding of contractarianism, the fundamental implausibility is not that such a historical contract never took place, but rather that even if it had, it would not be a normatively valid ground for justifying the infringement on the rights of those who did not take part of it. Similarly, the most fundamental objection against a rational idealization of the principle of hypothetical consent is not that rational individuals would not necessarily consent to the state, regardless of how bad the alternative is. It is, rather, that even if rational agents would indeed consent to the state, that fact by itself would not be an adequate ground for infringing upon the rights of those who fail to act as rational agents would.

The fact that rational agents would consent to the state implies that those who are unwilling to have their ownership and enforcement rights infringed upon by the state will be regarded as irrational agents. But if we are committed to the value of individual sovereignty, we would certainly deny that irrationality entails the lack of a right not to be treated in certain ways. It might not be rational for an individual to smoke if the disvalue he assigns to the detrimental effect on his health is greater than the value he assigns to the pleasure he derives from smoking. But as long as the agent’s failure to satisfy his own preferences does not constitute the violation of other individuals’ rights, and as long as he actually prefers not to be coerced when it comes to this, his irrationality, by itself, does not seem to allow anyone to prohibit him from smoking.

It might be argued that forcing individuals to be rational, when what is involved is a merely instrumental conception of rationality, does not amount to the worst case of paternalism. For there is no overriding of individual ends, only of their beliefs regarding the

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proper means to achieve such ends. But being able to live our own lives by our own understanding of what we take to be relationships of cause and effect is not a small matter. We can have our ends overridden or we can have the means we choose to achieve those ends overridden. Either way, we would not have much say in the way in which we would like to run our own lives. But the underlying basic rationale behind an assignment of individuals’ rights is, precisely, to provide individuals with discretionary control over how they live their lives.

Sometimes it is claimed that the reference to hypothetical agreement among rational agents must be understood as having merely heuristic or metaphorical value. It is claimed that descriptions about how a rational person would consent to the existence of the state should not be understood as having direct normative relevance, but as an indirect method of expressing what is normatively relevant. It is claimed that a rational individual is supposed to consent to the existence of the state because he would be better off, or at least he would not be worse off, as a result of that decision. We are told that we could simply claim, as Christopher Morris does, that “States are to be justified in terms of how they benefit people; ideally, then, they are to be cooperative ventures for mutual advantage.”¹³⁴ The story about how rational agents will consent to the existence of the state is supposed to suggest that the state cannot be but mutually advantageous, and this is what is normatively relevant. What matters is whether or not the state is mutually advantageous, or as it may also be put, whether the stateless condition is inefficient in terms of Pareto.¹³⁵


¹³⁵ If a change that can make at least one individual better off, without making any other individual worse off is defined as a “Pareto improvement,” a state of affairs will be Pareto efficient when no Pareto improvements can be made. If a state of affairs is not Pareto efficient, then it is the case that some individual can be made better off without anyone being made worse off.
But this metaphorical understanding of contractarianism takes us back to the problems that the idealization by means of rational agents was supposed to solve. If it was not plausible to claim that the anarchist would consent to the state if he had the chance, it would be equally implausible to claim that the existence of the state either benefits him or does not make him worse off according to his own perspective. For the anarchist will claim that facing the option of being coercively provided with protection by the state or being free to provide protection for himself by other means, he prefers the latter. The existence of the state does not let him satisfy his actual preferences, and thus he is made worse off by it.

Moral contractarians, that is, those theorists who appeal to the contractarian idea as a justification procedure for morality itself, seem to be willing to accept that personal differences might be sufficiently great as to make some ‘fall beyond the pale’ of morality.\(^{136}\) Political contractarians must acknowledge that the same applies when it comes to the pale of politics. Buchanan claims, “institutional arrangements that incorporate or allow for the coercive overriding of individual values do not find ready legitimation in the contractarian…framework.”\(^{137}\) Morris says, “States stand condemned to the extent that they satisfy the ends of some at the expense of others.”\(^{138}\) But how then, according to that standard, could any state that would coerce its unwilling subjects avoid condemnation is not a clear matter. By appealing to the notion of rational agreement, we might be able to provide an answer. But we would do so at the expense of what many have found initially


appealing in contractarianism: its compatibility with a serious commitment to individual sovereignty.

3.3 THE UNFAIRNESS OF FREE RIDING

Some theorists believe that an approach based on the so-called “principle of fairness” will represent an alternative to the shortcomings of both consent and contractarian theories.\textsuperscript{139} For while these theories found the permissibility of the state’s infringements upon its subjects rights on the choices—either actual or hypothetical—of those subjects themselves, a fairness approach grounds it on the mere receipt of certain benefits.

When it comes to the assessment of the morality of the state, the idea is that, if people were to organize their protective arrangements in a purely voluntary fashion, the benefits of such arrangements might not be fully excludable. If such would indeed be the case, some individuals will find it profitable to withdraw their contributions. Facing that scenario, coercing everyone might indeed be necessary to avoid an inefficient outcome in terms of Pareto, as the contractarian theorist claims. But that is not the reason why the principle of fairness will approve of the infringement on individuals’ ownership and enforcement rights. The reason will be, rather, that such an infringement is necessary to prevent the unfair appropriation of the fruits of others’ labor, regardless of whether the extent of free riding would threaten the stability of the cooperative scheme or not.

Thus, the central idea behind the principle of fairness is that those who incur costs in the process of producing a good acquire a right to a similar contribution against those who

benefit from it.\textsuperscript{140} The rationale behind this principle would seem to be the basic moral notion that individuals should not confer special privileges to themselves when lacking any basis for doing so.\textsuperscript{141} This is what free riders do. They give themselves unjustified preferential treatment. For in receiving the benefits without having a willingness to pay for them, they confer upon themselves a privilege that relies on others not also having it.

But it is clear that, as stated above, the principle of fairness would be vulnerable to serious objections.\textsuperscript{142} There are two clear types of cases that the principle cannot be plausibly taken to include. First, when others decide to benefit us with no expectation of receiving any sort of contribution in return, we neither acquire an obligation to make such a contribution nor lose a claim right not to be forced to do so. Under the absence of the right type of expectation, the benefits conferred upon us qualify as mere gifts. Second, even in the presence of the required type of expectation, not every person that benefits from the costly endeavors of others may be required to contribute in the production of such benefits. Others might decide to purchase costly presents for us. This results in at most, the

\textsuperscript{140} Hart claims, “When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.” Hart, “Are There Any Natural Rights?” pp. 185-186. As it was later pointed out, it is not clear how essential the reference to the existence of rule-guided behavior is. Nor is it clear what the significance is of the cooperative nature of the enterprise in question. On this point, see Simmons, \textit{Moral Principles and Political Obligation}, pp. 105-106.


\textsuperscript{142} Hart’s more complex formulation was perhaps intended to provide the corresponding qualifications.
obligation to express gratitude, which is a nonenforceable obligation. It does not give them a right to force us to purchase equally costly gifts for them later even if they actually expect us to do so.

So it would seem that in the absence of any previous agreement, if those who have incurred the cost of production could have easily excluded us from the benefits of their efforts, we are still entitled to the resources that are expected to be contributed for the production effort. Thus, as many have noted, any plausible version of the principle of fairness would have to be limited to the governing of only a particular type of goods: non-excludable goods, that is, goods that once they are produced it is not possible, or at least very costly, to prevent their enjoyment by those who have not contributed in their production.\textsuperscript{143} That the principle of fairness should be understood only as applying to the provision of non-excludable goods seems to have a clear intuitive support. After all, again, why should we be coerced to pay for benefits we have not sought, if those who chose to produce them do not bother to incur the corresponding costs of exclusion?\textsuperscript{144}

\textsuperscript{143} In the 1964 paper in which John Rawls develops Hart's original idea, he says that the principle would apply only when “the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part.” John Rawls, “Legal Obligation and the Duty of Fair Play,” p. 10. See, also, Richard Arneson, “The Principle of Fairness and Free-Rider Problems,” \textit{Ethics} 92 (1982): 616-633; Philip Soper, \textit{The Ethics of Deference} (Cambridge University Press, 2002), pp. 142-143; and Klosko, \textit{The Principle of Fairness}, pp. 33-37.

\textsuperscript{144} Cullity, however, has recently argued that a principle of fairness restricted to non-excludable goods will fail to account for very clear instances of unfairness. Although it is not clear whether Cullity understands the principle of fairness as a principle of rights, rather than as a mere source of non-enforceable obligations. See Cullity, “Moral Free Riding,” pp. 12-13.
But as Nozick first pointed out, a further qualification would need to be added. Nozick claims, “At the very least one wants to build into the principle of fairness the condition that the benefits to a person from the actions of the others are greater than the costs to him of doing his share.”\textsuperscript{145} Certainly, it cannot be morally permissible for my neighbors, for example, to force me to contribute to their system of public entertainment if the days of entertainment supplied by them are not worth my giving up one day.\textsuperscript{146} Not doing “our share” would seem to be unfair to others, only if it is indeed the case that we benefit in a strict sense from the cooperative arrangement of others, that is, in the sense by which we regard the outcome of such a scheme worth the cost we would need to pay (including the opportunity cost). It cannot be said, in any meaningful sense, that those who do not regard the benefits received worth their cost are conferring any type of unjustified privilege on themselves. Contrary to free riders, they would be willing to generalize their own non-contribution.

Thus for the principle of fairness to have some sort of initial plausibility, it must hold that those who incur costs in the process of producing a non-excludable good acquire a right to a similar contribution against those who benefit from it. But this will be the case only when the former incur the corresponding production costs with an expectation of reciprocity, and when the beneficiaries of their production efforts regard the benefits received as worth the costs of their required contributions.


\textsuperscript{146} Nozick, \textit{Anarchy, State, and Utopia}, p. 93.
Yet even with all those previous qualifications, the principle of fairness has not been found entirely intuitive. Could we really attain obligations or lose certain claim-rights simply by having benefits “thrust” upon us, even if it is true that the goods in question are non-excludable and that we have nothing better to spend our time or money on?\(^{147}\) More specifically, could this type of perspective be compatible with the commitment to individual sovereignty underlying natural rights liberalism? I might love the music my neighbor plays in the evening. I might be willing to pay him to keep playing those records, which I do not own. But am I really obliged then to pay him for doing so even if I find out that he is expecting me to do so? Could he coerce me to do so by threatening me with the infliction of some form of harm to my person or property?

George Klosko claims that all the examples used to feed this type of skepticism derive their force from the social unimportance of the cooperative schemes and the little value of the benefits produced: a public address system, a street-sweeping association, books that spill over into others’ houses, jokes, music, etc. Klosko thinks that if we substitute examples involving more significant benefits, the argument from fairness will be seen to be more effective.\(^{148}\) Klosko argues that, in addition to the condition stating that the benefits supplied must be worth the recipient’s costs, it must also be the case that those benefits are indispensable for satisfactory lives.\(^{149}\) Furthermore, Klosko argues that individuals must not be able to provide those benefits by other means.\(^{150}\) A cooperative scheme might not have the means of excluding people from an indispensable benefit that they are producing. But if

\(^{147}\) Ibid, p. 95.


\(^{149}\) Ibid. Klosko also claims that the cooperative scheme must have benefits and burdens that are fairly distributed.

\(^{150}\) Ibid, p. 7.
it is the case that non-cooperators would be able to produce that benefit by their own private means, for example, then it is not the case that they would lack a right not to be coerced to contribute in the production of benefits that they have neither sought nor accepted.

It is not initially clear, however, why the importance of the benefits provided should make a difference in assessing the adequacy of the principle of fairness.\textsuperscript{151} If the central idea is that it is unfair to gain from the labor of others without doing one’s share, it might be the case that how objectionable our conduct is depends on the importance of the gains we receive. But why would we only act unfairly, in a manner in which we should not act, when the gains are indispensable for satisfactory lives? How could we justify the limitation of the principle in such a way? It is not initially clear either what the fairness rationale is for the condition regarding the unavailability of other means of production. If the problem is the taking advantage of others’ efforts without doing one’s share, why should it matter that one cannot provide the relevant benefit by other means? Would it not be actually more objectionable to take advantage of others’ efforts when we have the capacity to produce the corresponding goods by alternative means?

Klosko claims that if the benefits are indispensable for satisfactory lives, then we can assume that anyone who receives them benefits from them, even if he does not accept them or otherwise seek them out.\textsuperscript{152} According to Klosko, if a good is indispensable for satisfactory lives, an individual would pursue them and bear the associated cost if this were necessary for their receipt.\textsuperscript{153} It is worth noting, however, that this idea was already implicitly contained in the condition stating that the benefits an individual receive must be worth the


\textsuperscript{152} Klosko, Political Obligations, pp. 6-7.

\textsuperscript{153} Ibid, p. 7.
cost involved in producing them. Since the relevant notion of cost is that of opportunity cost, the claim is that the person in question would be willing to collaborate in the cooperative venture had the good been excludable. So it would seem as if the only possible fairness rationale for this additional qualification relative to the importance of the benefits is to guarantee the satisfaction of the condition that Nozick first demanded, that is, that the individual is in fact strictly benefiting from the cooperative scheme of others. When we are completely sure that this is indeed the case, and we are completely sure about this when the benefits in question are indispensable for satisfactory lives, then it is morally permissible on Klosko’s view to coerce non-cooperators to do their share.¹⁵⁴

Similarly, the only reason for including the requirement that other means of production are unavailable, would seem to be to ensure that individuals are indeed benefiting from the cooperative scheme in question, and thus avoid the possibility of coercing those who genuinely do not want the benefits provided. If it is the case that other alternative means are open to individuals to provide certain indispensable benefits, the fact that they have not pursued such means might constitute serious evidence that, for such individuals, those benefits are not worth the costs of providing them.

Is the principle of fairness, qualified by these further guarantees, a plausible moral principle? Is it true that the principle of fairness would provide a justification for the state’s infringement on individuals’ ownership and enforcement rights?

¹⁵⁴ Thus, according to this understanding of Klosko’s theory, the problem with the examples usually presented against the principle of fairness are that, since they always involve benefits of little value, we can always doubt whether in fact the benefits count as net benefits to all the individuals who receive them. The idea is that in dealing with indispensable benefits, we could not possibly have any doubts in that regard.
It is hard to answer the first of those questions. It might be true, for example, that in cases dealing with what we take to be indispensable benefits, and in cases where those benefits cannot be produced by other means, we tend to accept the normative implications that the principle of fairness establishes. But Klosko does not consider that the reason why we believe so might not be the one provided by the principle of fairness. The next two chapters will attempt to show that the principle of samaritanism is a more natural and straightforward way to account for those intuitions.\textsuperscript{155} What is clear, however, is that once we realize that Klosko’s additional qualifications seem to be justifiable only as further guarantees against the possibility of individuals’ moral rights being modified by the imposition of unwanted benefits, our original impression that the principle of fairness could serve as an alternative to the shortcomings of a simple appeal to hypothetical consent seems to vanish.

The principle of fairness is supposed to apply only when there is clear evidence that the beneficiaries of the non-excludable goods would regard the benefits as worth the cost of doing their share (including the opportunity cost). Yet it was evident that had the benefits been excludable, many of the alleged beneficiaries of the goods provided by the state would not have actually incurred such costs. One need not make the perhaps implausible claim that those individuals do not assign any positive value to the goods provided by the state, such as protection. One may simply deny that those individuals value the state provision of protection as much as they value the things that they would be required to give up in exchange, for example, their liberty to exercise their own enforcement rights. So it is perfectly conceivable that, for some individuals, the benefits that the state confers would not

\textsuperscript{155} On this point, see Carr, “Fairness and Political Obligation,” pp. 13-14, and Simmons, “Fair Play and Political Obligation,” p. 35.
be worth the cost of its existence, even if they were fully excludable.\textsuperscript{156} Klosko says that a rule of thumb for determining if fairness obligations are established in a particular case is to ask if the individual would be willing to generalize his own non-contribution.\textsuperscript{157} The anarchist is willing to do so. No obligations of fairness could then be demanded from him. The principle of fairness does not establish that those who sincerely object to the infringement upon their ownership and enforcement rights by the state are justly treated.

Does it matter if there could be alternative means available for the production of those benefits? Clearly not. That requirement was not a sufficient condition for the application of the principle of fairness, but merely a necessary one. Still, Klosko seems to believe that any negative assessment of the net value of the state’s benefits would be based on the belief that there are indeed alternative means of provisions available. And Klosko claims that we can subject such a belief to certain plausibility constraints.\textsuperscript{158}

Whether it is implausible to believe in the existence of alternative means of provision is something that will be explored in more detail in Chapters 6 and 7. But regardless of what the conclusion of such an analysis is, the principle of fairness does not seem to allow Klosko to subject the anarchist’s beliefs to a plausibility assessment. As Philip Soper notes, where what is at stake is playing fair, sincere beliefs are more important than whether those beliefs are correct.\textsuperscript{159} If indeed one does not regard a given benefit worth its costs, regardless of what others think about how one should regard the matter, one could not become the proper subject of moral condemnation based on the charge of unfairness. So if the anarchist sincerely believes in the feasibility of the non-coercive provision of justice and


\textsuperscript{157} Klosko, \textit{Political Obligations}, p. 8.

\textsuperscript{158} Ibid, p. 63.

\textsuperscript{159} Soper, \textit{The Ethics of Deference}, p. 144.
protection, then he would certainly regard the benefits of the state unworthy of the sacrifices he is required to make. When it comes to this, the fact that others disagree with his prior assessment would seem to be irrelevant under a fairness approach. The claim here is not that there are no grounds upon which to justify coercing the individual not to act on his unsound beliefs. The following two chapters will argue that there are indeed such grounds. The claim here is that the principle of fairness does not provide them.

3.4 CONCLUSION

One could think that the failure of contractarian and fairness based answers to the problem of political legitimacy is merely a problem of scope. The theories cannot show that all subjects of the state may have their ownership and enforcement right infringed upon by the state. But still, one could argue, those theories could show that some subjects of the state can have their rights permissibly infringed upon: those for which, for example, the benefits of the state are worth its costs. Those that fall within that group might amount to a considerable number. They would constitute, perhaps, the great majority of the population. But as it was already suggested, this way of thinking about the limits of political preferentialism does not capture what is especially inadequate about such a perspective.

We tend to think that a plausible political philosophy would justify at least a minimally costly state if the inconveniences of anarchy are considered particularly severe, and that if such a state would be able to overcome them. But for a preferentialist approach, whether the state would be permissible in acting as it does is entirely contingent on whatever preferences individuals happen to have. So in a society where the majority of the population believes that the use of coercion is unnecessary, and that in fact the use of coercion is the source of all sorts of unsocial behavior, as some classical anarchists seems to have thought, the state would not be morally allowed to produce any sort of benefits. The natural impulse is to discount those unsound beliefs, and ground preferentialism in the informed or
rational preferences of individuals. But either the rejection of paternalism or the same logic upon which the principle of fairness operates, precludes us from doing so.

But why do we really think that the implications of political preferentialism are implausible if we indeed want to avoid the endorsement of paternalism? Those implications are implausible not because, for example, the majority of the population will have their own desires frustrated. It is implausible because the ignorance of that majority of the population might make it impossible for others to have adequate lives. What other motivation could preferentialist theorists themselves have for discounting the actual preferences of individuals if they are also committed to the rejection of paternalism? And if that is indeed their motivation, why not abandon the preferentialist approach and recognize that our motivation is to provide protection for the lives of others, and not of those who are coerced against their will?

The purpose of the next two chapters is to present a non-preferentialist approach to the problem of political legitimacy, and to argue that this approach is able to overcome the shortcomings of more traditional theories, without ignoring the constraints arising from a commitment to natural rights liberalism.
CHAPTER 4
SAMARITAN RIGHTS

Within natural rights liberalism, the problem of political legitimacy amounts to the problem of the existence of a particular type of moral principle. Such a principle must establish certain conditions under which the moral demands imposed by individuals’ ownership and enforcement rights can be permissibly ignored. This principle must be consistent with the commitment to individual sovereignty that underlies the original assignment of rights, and the conditions specified by it must be of a nature such that they would indeed permit not merely some sort of infringements, but rather the particular one that is carried out by the performance of the state’s characteristic actions.

Traditional liberal theories of political legitimacy attempt to specify those conditions of infringement, if not directly on the voluntary choices of the state’s subject, at least on the preferences that might or might not be expressed in actual choices. The alleged facts that individuals implicitly consent to the actions of the state, would consent to them if they had the chance, or simply benefit from the state of affairs that those actions bring about, are taken to constitute indirect expressions of individual sovereignty. As Chapter 3 has argued, there are severe limitations on what this perspective can accomplish. For those who share a commitment to certain liberal values, the morally problematic feature of the state is none other than the phenomenon of compulsory subjection upon which its existence rests. The state infringes upon the rights of its subjects regardless of whether those subjects approve it or not. Yet more importantly, the reliance on individuals’ subjective preferences of political preferentialism seems to fail in adequately capturing a possibility that seems to matter: the fact that some individuals’ preferences for political freedom might entail the misery of others.
Christopher Wellman has formulated and defended a theory of political legitimacy based on a principle of samaritanism. The relevant understanding of samaritanism for matters of political legitimacy is one under which the state’s infringements on individuals’ ownership and enforcement rights is taken to be analogous with the coercive actions that individuals might perform against others when facing a perilous situation. We might talk, as Wellman himself does, of the existence of certain considerations, the unchosen perils that some face, with a relative weight that overrides the considerations grounding what are taken to be the rights that others have. Such considerations will establish the conditions for permissible infringement that are necessary for the possibility in principle of the legitimate state. For the mere sake of simplicity, a principle of samaritanism can also be understood as establishing the existence of “samaritan rights,” rights that those considerations of greater relative weight will generate. The holders of such rights would be the individuals who face certain unchosen perils, and they would hold these rights against those who have the capacity to remove them from peril at a reasonable cost to themselves. According to a samaritan approach, the legitimate state would be conceived as a mere enforcer of those rights.

This chapter explores the moral foundation upon which a samaritan approach to political legitimacy is built: the idea of samaritan rights. The following chapter will explain how it is that samaritan rights provide a foundation for political legitimacy. The first section argues that samaritan rights are highly intuitive, that is, that we do seem to acknowledge the existence of such rights in the sort of extraordinary circumstances in which individuals are supposed to acquire them. The second section presents a more explicit account of such

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160 See Wellman, “Liberalism, Samaritanism, and Political Legitimacy”; “Toward a Liberal Theory of Political Obligation”; and “Samaritanism and the Duty to Obey the Law.”
circumstances, and of exactly what actions samaritan rights allow individuals to perform. The third section presents and rejects the validity of certain arguments purporting to show the formal inadequacy of samaritan rights. Finally, the fourth section explains why samaritan rights are not only intuitive and formally adequate, but also required by the same sort of considerations that support the assignment of ownership and enforcement rights in the first place. In other words, the claim is that samaritan rights are not only consistent with the normative commitments of natural rights liberalism. The claim is that samaritan rights are also required by such commitments.

4.1 FROM SAMARITAN DUTIES TO SAMARITAN RIGHTS

As it is the case with individuals’ ownership and enforcement rights, samaritan rights are moral permissions to act in particular ways. But the particular ways in which samaritan rights allow their holders to act involve ways in which, under normal circumstances, we would consider to be blocked by the rights of others. Roughly, samaritan rights allow their holders to infringe on others’ rights in ways that are both necessary for the alleged right holders to overcome a perilous situation and reasonably costly for others. The purpose of this section is merely to draw attention to the apparent intuitive support that such rights have in our ordinary moral thinking.

Let us start by thinking about some familiar examples. Let us imagine that A gets lost on the mountain. The weather is extremely cold and he rightly thinks that he might not be able to live through another night. Suddenly, he sees a cabin. B is the cabin’s owner. But when A asks B if it would be possible for him to spend the night in his cabin, B refuses to let him do so. Let us now imagine a different scenario. A has had a car accident and he is seriously injured on the side of a deserted road. His chances of survival greatly depend on the provision of immediate basic medical attention. B is driving on the same road. But when A asks for his help, B decides not to aid him despite the fact that he could have provided the
needed medical attention. In both of the previous cases, we would tend to claim that B is morally obligated to help A; that by not helping A, B is not doing something that he should do. We would claim that B is morally obligated to help A regardless of the fact that B is not morally responsible for the peril that A faces in either of those scenarios. B, under those particular conditions, seems to have samaritan duties, that is, duties that arise from the simple fact that someone is in extreme need and that he can do something about it at a reasonably low cost to himself. Presumably, only few will deny that there are indeed positive obligations when it comes to the previous sort of emergencies.

The traditional position of Anglo-American law, however, does not regard samaritan duties as having legal significance. According to this position, there is no legal duty to rescue another in danger even when that aid can be rendered without danger or inconvenience to the potential rescuer, such as is the case in the previous examples.\textsuperscript{161} This was also the case under Roman law and in the original codes of most European nations.\textsuperscript{162} Yet the arguments behind the reluctance of this legal tradition to give legal status to samaritan duties are rarely based on a mere denial of the existence of such duties. The

\textsuperscript{161} An exception to this position is generally made when there is a “special relationship” between the potential rescuer and the person in peril. Such a relationship exists when, for example, one party derives an economic advantage from the other. Another exception occurs when a person creates a situation placing another in danger. In some other circumstances, a person is assumed to have a duty to assist merely because of the nature of his job.

\textsuperscript{162} These days, it is a criminal offence not to assist an individual in an emergency in most European legal jurisdictions. Certain jurisdictions in the United State and Canada also have recently passed so-called “Bad Samaritan” laws, that is, laws that penalize failures to rescue other individuals in peril when such aid can be provided at a low cost. Bad Samaritan laws should not be confused with “Good Samaritan” laws, which protect rescuers from liability.
problem, it is usually claimed, is not that people lack samaritan duties. The problem is, rather, that such duties could not be rightly enforced.\textsuperscript{163} We are ultimately interested in this particular issue. The state coerces its subjects through the issuing of threats of punishment. For a samaritan approach to provide an answer to the problem of the permissibility of such characteristic way of acting, any reference to samaritan duties will be insufficient. So the question is: could individuals threaten others with the infliction of harm to supply the aid that we tend to recognize everybody has a duty to provide? Is the traditional Anglo-American legal position regarding samaritan rights justified on matters of principle, and not, for example, merely on practical considerations having to do with the particular demands involved in a legal procedure?

It is true that there is a set of positive obligations that could not plausibly be taken to correlate with valid claims to use coercion. It is unclear, however, that samaritan duties must belong to that set. When certain conditions are met, it is at least intuitive to claim just the opposite. Let us think again about the scenarios that were presented previously. Let us imagine that after B has refused to let A spend the night in his cabin, A decides to coerce B. He does this by issuing a credible threat that he would inflict some damage to the cabin should B indeed decide to go along with his refusal. For example, A might claim that he will throw a stone into the cabin’s window. Let us imagine that the cost for B of A’s performing such action is greater than letting A spend the night in his cabin. B has been coerced in fulfilling his samaritan duty. Should we claim that A has done something wrong in that scenario, in the sense of doing something that, all things considered, he ought not to have done?

\textsuperscript{163} The distinction between enforceable duties and non-enforceable duties is sometimes framed in terms of “duties of charity” and “duties of justice.”
Would it be plausible to claim that, in the other case, if A was equally able to issue a threat against B, and thus make B provide him the needed medical attention, A is doing something that he ought not to do? Is it plausible to claim that in both of those scenarios, A ought not to coerce B in those particular ways should B refuse to help him, and ought instead to respect B’s decision? Should A not act in such a manner, there is a great chance that his very capacity for agency, or some other fundamental interest of his, would be seriously endangered. Should A act in such a way, B would need to endure only an inconvenience. At least initially, it is difficult to see how we could plausibly claim that when B refuses to help A, A’s ignoring B’s decision by forcing B to do something that he does not want to do amounts to something that, all things considered, he should not do. Would we not do the same thing? Would we not believe that we are justified in doing so?

Interestingly enough, while the Anglo-American legal tradition does not recognize the enforceability of samaritan duties, it does recognize the defense of necessity as a means of protecting a rescuer from liability\textsuperscript{164}. If an individual enters another's property or uses others' goods necessary to save lives or protect property, he might not be liable for criminal punishment. For example, an individual can break into a garage and seize an axe to save a stranger trapped in a burning car. We might then take this legal position as acknowledging that under certain circumstances, it is morally permissible to ignore the demands arising out of individual’s ownership rights. But the Anglo-American legal tradition has even recognized that others have a legal duty not to interfere with someone prepared to help in an

\textsuperscript{164} This is also noted by Wellman. See Wellman, “Samaritanism and the Duty to Obey the Law,” p. 22.
emergency; which actually amounts to acknowledging that it is morally permissible to coerce others not to interfere.\textsuperscript{165}

Yet if we may be coerced into not interfering with the use of our property by those rendering aid, why is it that we could not be coerced ourselves to use that property in those exact same manners with which we are coerced not to interfere? Imagine that a thief, instead of pointing a gun to our head and asking us to hand him our wallet, points a gun to our head and ask us not to interfere with him taking our wallet out of our pocket. Is his action somehow less objectionable than it would be should he decide to ask us to hand him our wallet? If that is not the case, why should it be less problematic to coerce people in order to secure their non-interference than it would be to coerce them to secure their positive assistance? Certainly, the latter could be costlier than the former. But this is not always the case. It is less costly to send a check to the IRS than having an IRS’s agent search through our belongings for an equal amount of money. In any case, the issue of cost is simply a different issue. Assuming that assistance is the \textit{less costly} action available, and that such cost were equal to the cost that is permitted in coercing non-interference, why would it not be permissible to secure such assistance by coercion as well?

Contrary to what the traditional Anglo-American legal antagonism to the recognition of the enforceability of samaritan duties might suggest, it is the opposite position that would

\textsuperscript{165} In California, a bartender not only refused to call for help, but denied the use of the phone to a good samaritan who was trying to alert the police than an individual was in danger of being shot across the street. The murder occurred, and the heirs sued the bar’s owner. The court reaffirmed that the defendant owed no legal duty to call the police, but there was a duty not to interfere with the actions of those who were willing to assist the person in peril. See \textit{Soldano v. O’Daniels}, 141 CA3d 443 (1983). See also Rest. 2\textsuperscript{nd} Torts, Section 327, which imposes liability for negligent interference with a third person who the defendant knows is attempting to render aid to a person in peril.
seem to have the greater intuitive appeal. One might still want to argue, however, that while in those previous scenarios A’s behavior might be morally excusable, it would be inadequate to qualify it as a right, as we do here.\textsuperscript{166} Judith Jarvis Thompson seems to believe that there is no way of explaining a requirement of compensation, for example, independently of the fact that, in our scenarios, B has a right against A’s forms of trespass that are permissible according to the principle of samaritanism.\textsuperscript{167} Others might want to argue that, in the same way, there is no way of explaining why one should pay compensation, express gratitude, show remorse, etc., if it is assumed that one had a right to act in the ways in which those responses are required, rather than some other sort of permission.

In this context, however, the merits of this previous point might not be worth considering. The point is about how best to describe or refer to the situation in which A does particular things to B in a legitimate manner. It is not a point about the morality of the situation, that is, about whether A does something objectionable by doing such things to B or not. It is only to the normative claim stating that this is not the case that we refer by the notion of samaritan rights.\textsuperscript{168}


\textsuperscript{168} Thompson claims that if we do not assume that B has a right against A, then it is unintelligible why A has a duty to pay compensation to B. Such a right is the only thing that explains why A has this duty. But
4.2 CIRCUMSTANCES OF SAMARITANISM

What exactly are those circumstances under which individuals seem to acquire samaritan rights? What are those circumstances in which, according to a principle of samaritanism, individuals do not have a right against having their basic rights infringed upon? There seem to be four major conditions.

First, there is the obvious condition relating to the nature of the peril that others face. The perils in question are serious unfortunate circumstances or dire straits that some might encounter. Individuals would not acquire samaritan rights when faced with a mere inconvenience or obstacle in satisfying a personal project. Thus, the notion of peril could be understood as denoting a certain danger of significant proportions; a danger that would place the individual under a utility or well-being threshold. What exactly that threshold is, of course, cannot be established with any degree of accuracy. Difficult questions will surely arise when dealing with borderline cases. But acknowledging this would not seem to entail that we should ignore the clear normative significance between different classes of adversity that people might encounter.

to claim that B has a right against A performing any given action means that there are reasons why A should not perform such actions against B. But how is it that this explains why A should pay compensation to B should A perform such an action? If anything, should it not explain why A should not perform that action in the first place? Presumably, Thompson will claim that, in those particular cases where the infringement is permissible and compensation is due, there are certain considerations that are more stringent that the considerations that apply under normal circumstances against performing the action. But, presumably, this is the same explanation that the theorist claiming that B, under those circumstances, does not have a right against A’s actions will offer. It is then unclear why such theorists must have any special problem in accounting for the compensation that is due to B.
Second, the perilous circumstances the samaritan right bearer faces must not be due to his own fault. One does not acquire a permission to infringe upon the rights of another individual if one intentionally, knowingly, or recklessly placed oneself in a situation in which it was probable that one would have to engage in the proscribed conduct as a means of overcoming the peril in question. One is not allowed to infringe the rights of others if there was a neglected, reasonable opportunity that the agent might have taken to avoid the perilous circumstance.

It is not difficult to see the types of considerations that could be advanced as a rationale for this last condition: from basic claims of desert to insights regarding the social advantages of internalizing the costs of personal decisions. This condition is especially important in dealing with what Buchanan refers to as the “Samaritan’s Dilemma,”169 that is, the alteration of incentives on the part of the aid recipients due to the very expectations of aid. Those who expect to receive aid when reaching a threshold of utility, might let themselves fall to that level as a means of qualifying as recipients of the aid in question. Yet, once we have included this condition, they would not actually succeed in doing so if they had a reasonable opportunity to avoid reaching such a level.

Third, for people to acquire samaritan rights, the aid that is morally demanded and may be coercively secured must be necessary to overcome the peril. This condition implies, first, that the peril in question must be of a remediable nature. When there is nothing an individual can do to place another individual out of peril, there is no coercion that the latter may impose onto the former. It also implies that samaritan rights emerge only when voluntary solutions are unavailable. If we think about the scenarios with which we began

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this discussion, A has no right to coerce B to let him spend the night in B’s cabin if there is a cabin owned by C next to B’s, and C has already agreed that A can spend the night with him. Similarly, in the other scenario, A has no right to coerce B to give him medical attention if A sees an ambulance approaching. Thus, the aid that is morally demanded and that may be coercively secured must count not only as genuine or effective aid, but also as the only available alternative. We might then claim that the sense in which the allowed infringement must be necessary, is the sense in which it could be understood as a necessary condition for the instantiation of a particular state of affairs, in which the alleged samaritan right holder enjoys a utility level that is higher than the threshold of peril.

Finally, there is a condition limiting the costs of the necessary aid that is required from others. This condition implies that the costs of compliance imposed on others must be only as great as they are necessary. But certainly, one has no right to put someone else in a perilous circumstance even if that is necessary to avoid one’s own perilous circumstances. Within the legal defense of necessity, an action that would otherwise constitute an offense is justified if the individual was compelled to engage in it as a reasonable means to avoiding greater injury. But formulated as such, the doctrine would be clearly objectionable from a rights perspective. One has no right to secure coercively aid from others just if it is the case that the costs of such aid are smaller than the costs the peril imposes on others. It is common to regard samaritan duties as limited by the proviso that the aid to others must not be unduly costly to oneself. Samaritan rights would seem to be limited by the same proviso. The aid that may be coercively secured must not impose more than a reasonable cost on others, where this cost is the difference in utility between the state of affairs resulting from the performance of the infringing action and the state of affairs resulting from the non-performance of such an action.
As we previously noted, compensation by the holder of the samaritan right might be due to the individual whose rights have been infringed upon. Yet, for reasons that will be clear in the next chapter, the interesting question is whether an incapacity to pay what otherwise would be due compensation invalidates the permissibility of acting as the principle of samaritanism allows. Initially, it would not seem that this is the case. After all, the principle of samaritanism already contemplates the level of costs imposed on others, and it requires that those costs be as small as possible. The intuitive character of the normative scenarios we discussed at the beginning of the chapter does not seem be radically altered if the lost hiker or the injured traveler, for some reason, do not have any form of paying compensation to the cabin's owner or the fellow traveler. A compensation requirement might then be best understood as a mere corollary of the condition limiting to a minimum the costs that could be permissibly imposed onto others.

How exactly the notion of utility must be understood in the interpretation of the previous conditions would certainly be a controversial matter. It is important to note, however, that the plausibility of alternative understandings should be assessed in terms of the measure that matters for the context in which the principle of samaritanism is supposed to apply. In other words, what seems to matter is not how well the conception of utility serves as an account of well-being, or of the individual good. Rephrasing related discussions within egalitarian theory, we may say that the question is about the samaritan "currency;" and such currency might be different than the currency that is appropriate to use in other contexts.

One possibility is to consider some sort of psychological measure along hedonistic lines. Under this understanding, what matters is whether an individual faces a circumstance under which some psychic magnitude is lower or greater than certain parameters. There might be cases, however, under which people with very calm and collected characters,
when facing danger, might not be allowed to infringe upon other people’s rights in the ways in which a samaritan principle allows, despite the fact that the only difference between those who would be allowed to act in those ways is the latter’s lack of such character virtues. Intuitively, this is implausible. We do not seem to believe that having a collected character would deprive an individual of his capacity to place himself out of danger.

An alternative is to adopt a conception of utility in terms of the degree in which individuals preferences are satisfied, regardless of what psychological state is taken to accompany that degree of satisfaction. Complications might arise, however, when we consider that the individual in peril might have mistaken information regarding the available alternatives. He might think, for example, that there is no solution available. Or others might think that there is no solution that imposes only a reasonable cost on them. But under those cases, it seems plausible to claim that the person in peril still has a samaritan right to infringe upon those people’s rights. If, for example, another individual comes to the scenario with the right information, he would then be able to act as an enforcer of the samaritan right the person in peril has. Similarly, that the cabin owner might believe that allowing the lost hiker to spend the night in his cabin will make him contract cancer does not seem to matter in assessing the costs the hiker imposes on him.

A better option might then rely on the degree of satisfaction of the individual’s preferences that would withstand some form of epistemic idealization. In other words, what would matter is the preferences an individual would have if he had all the relevant information about the available alternatives. But still, there is the issue that even the fully informed preferences of individuals might deal with the satisfaction of other individuals’ preferences in a way that we should find problematic. Imagine that the owner of the axe that a good samaritan needs to seize in order to save a stranger in a burning car, not only is unwilling to let the good samaritan have the axe, but wishes that the stranger in the burning
car would die. This desire is so strong, that the difference in utility between a life under which such a state of affairs does not ensue and a life in which such a state of affairs results is greater than what we take as a reasonable cost. Few will be willing to take the satisfaction of this preference into account when it comes to applying the principle of samaritanism, and thus prevent the good samaritan from taking his axe.

So the conception of utility that informs at least an initially plausible understanding of samaritanism would seem to be the degree of satisfaction of the preferences that are not morally condemnable, that an individual would have if he were fully informed about the relevant issues. Moral preferences might also need to be discounted, however. But the reason why that might be the case is not their tendency to motivate self-sacrificial acts, as is the case in discussions of well-being. The reason is, rather, that individuals who passionately disagree with the principle of samaritanism, for example, might avoid their samaritan responsibilities by raising the costs of their compliance.

Thus, understood as a principle of rights, the principle of samaritanism states that, individuals who face a perilous situation through no fault of their own are allowed to impose a threat of harm to others, in order to secure aid, when this aid is necessary to overcome the peril, and when it does not impose an unreasonable cost on others. But as it was suggested above, samaritan rights are not rightly enforceable only by their holders. If the peril that A faces justifies A’s use of coercion against B, and if A were unable to coerce B, but someone else C were so able to act on his behalf, then C would be equally justified in coercing B in order to remove A from peril. The idea is that those people who are in peril have a samaritan right to be aided by those who are in a position to do so, and that anyone may act on behalf of the holders of such rights. In this regard, samaritan rights would seem to share the status that enforcement rights were claimed to have. One does not need the explicit approval of the alleged bearer of the right to act in the specific manner in which such
rights would make it permissible. An individual can break into a garage and seize an axe to save a stranger trapped in a burning car regardless of whether the stranger has been able to ask for help. Only if the stranger explicitly denies his approval, would the good samaritan not be entitled to infringe upon the rights of other individuals.

4.3 THE FORMAL ADEQUACY OF SAMARITAN RIGHTS

Usually, those against whom samaritan rights are held are morally obligated not merely to refrain from acting in particular ways. They are also obligated to act in particular ways: in those ways that will place the holder of the samaritan right out of peril. In this sense, we might believe that samaritan rights are a form of so-called “positive” rights. A positive right is said to generate, precisely, an obligation to do something, rather than a mere obligation to refrain from doing something; as is the case with the type of obligation that negative rights generate.

To the extent that samaritan rights could be seen as a minimal form of positive rights, we should address the worry that positive rights are theoretical constructions with rather fundamental problems, despite whatever intuitive appeal they might have.

Some theorists seem to think that the acknowledgement of positive rights would precipitate conflicts between rights, as some persons’ positive rights could be fulfilled only by violating other persons’ negative rights. The idea behind these critics’ objection is easy

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170 Tara Smith suggests, for example, that an inescapable barrier to recognition of positive rights is that they could be satisfied only at the expense of other rights. Tara Smith, Moral Rights and Political Freedom (Lanham, Maryland: Rowman and Littlefield Publishers, Inc., 1995), p. 201. David Kelley adds that the conflict is inevitable because any positive rights impose on others unchosen obligations that, when enforced, deprived those others of their liberty or property. David Kelley, A Life of One’s Own (Washington D.C.: Cato Institute, p. 1998), p. 132. Similarly, Tibor Machan claims that a scheme that
to grasp. Most contemporary declarations of human rights, for example, tend to include things like a right to shelter, to education, or to the satisfaction of basic needs. But these critics would object that, since there is no “manna from heaven,” such a type of right can only be fulfilled by violating the rights other people have over the resources that are necessary to provide that shelter, education, or satisfaction of basic needs. Positive rights, no matter how extensive, are bound to conflict with negative rights. Positive rights are rights to be provided with things that people might not actually have. But negative rights put those things under the control of those who have them.

Certainly, the fact that fulfillment of positive rights requires that the necessary resources be taken from others, and that those others might need to work in order to produce those resources are morally significant facts. But when critics of positive rights present their argument as a formal consideration, the argument clearly fails. When critics point out that advocates of positive rights ignore the constraints arising from negative rights, and thus the conflicts that will be generated, they seem to assume that the scope of the negative rights people have do not leave any room for positive rights. But that is precisely what is under discussion.

There are alternative ways of making the same point. We might want to say that, under certain conditions, people are morally entitled to infringe upon other people’s negative rights. When those conditions are met, certain infringements on rights are morally permissible. If we put it like this, and if we agree with what is substantively claimed, there is no conflict that we need to worry about. For it is simply being denied that the “strength” of the prohibitions arising from those negative rights is, under those conditions, the same as it combines negative and positive rights is “theoretically intolerable.” Tibor Machan, *Individuals and Their Rights* (LaSalle, IL: Open Court, 1989) p. 102.
is under normal conditions. The alternative way of making the same point is by claiming that, under those same conditions, people acquire rights to some of those things that negative rights would otherwise protect. Now what is denied is that negative rights have the “scope” that critics of positive rights claim they have. Thus, if those who do not have their basic needs satisfied, for example, have a positive right to the satisfaction of their basic needs, those who have their basic needs satisfied do not have a negative right over whatever the amount of resources, or over the performance of an action, that is needed to satisfy the right that the others have. A conflict between rights could only arise when the rights in question are taken as consisting of contradicting commands of equal strength or scope. But to claim that people have positive rights just means that, in whatever conditions those rights are supposed to apply, people would not enjoy the usual protection provided by negative rights.

A different objection stresses not the conflict between negative and positive rights, but rather the conflict between positive rights themselves.\(^{171}\) Since negative rights require that one not perform certain actions, one can always fulfill all the corresponding duties at the same time by doing nothing. But positive rights require doing something rather than nothing. Therefore, conflicts between rights can easily happen. If in a three-person world, A has a positive right to be fed and B has a positive right to be given medical care, and if C only has the necessary resources to do one but not both of the two things, how could C not possibly violate someone’s rights? In the same three-person world, since the negative right not to be

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\(^{171}\) This objection is also formulated by those theorists who claim that positive rights conflict with negative rights. Kelley claims, “Welfare rights also conflict with each other, and that conflict too, is inevitable.” Kelley, *A Life of One’s Own*, p. 132.
killed that both A and B posses does not require C to do anything, it is hard to imagine how C could not possibly respect both A’s and B’s right at the same type.

Critics of positive rights argue against the existence of what we may call ‘general’ positive rights. Such rights are supposed to bind everyone simply in virtue of belonging to the moral community. In this regard, they are supposed to work in the same way that negative rights work. But critics of positive rights do not reject the existence of what we may call ‘derivative’ or ‘special’ positive rights, that is, positive rights which may derive from the exercise of certain negative rights, for example, from the exercise of the right to enter into a contract. We might not have a general positive right to health care, but for sure we may have a special right to health care by contracting for its provision with anyone willing to provide it. So it might be true that general positive rights may come into conflict with each other. But if this is a reason why we should reject their existence, is there any reason why we should not also reject the existence of derivative or special positive rights?

It would seem to be clear that these previous problems are not intrinsic to positive rights. They are rather a feature of our specification of them. A more detailed specification about the scope the favored positive rights are supposed to have will simply dissolve this problem. For example, one might want to claim that how much welfare people have a positive right to is conditional on whatever surplus that others have. In the three-person world, for example, it would not be the case that A has a positive right to be fed and B has a positive right to be given medical care. It would be the case that, when certain specific needs are unsatisfied, and when C has a certain surplus of resources available, A and B would have a right to use, for example, an equal portion of that surplus to satisfy those specific needs to whatever extent the availability of those resources make it possible. Here, the claim is not that both A and B indeed have such rights. The claim is that if both A and B lack those rights, the reason cannot be the one underlying this particular objection.
In the particular case of samaritan rights, a principled specification of the scope of such rights has already been offered. If in such a three-person world, both A and B are under the samaritan threshold of utility, and C has enough resources to bring only one of them beyond that threshold, we might think of A and B as facing a situation equivalent to the situation faced by individuals in dealing with the appropriation of unowned natural resources, and thus appeal to some sort of principle of first appropriation.

This concern regarding the particular status of positive rights will seem to be traceable to a legitimate concern for the use of rights as a way to settle conflicts between individuals’ interests. In this regard, Hillel Steiner’s insights about the property of “compossibility” that adequate systems of rights must have are especially illuminating. Steiner argues that for a system of rights to be compossible all the rights in the set must be mutually consistent, and that such a set of rights is a property of a plausible principle of justice. Steiner argues that for a set of rights to be mutually consistent, roughly, it must be possible to conceive of it as a system of property rights. This guarantees “that each person’s rights are demarcated in such as way as to be mutually exclusive of every other person’s rights.”

The rejection of the previous objections towards the formal adequacy of positive rights is not a rejection of compossibility. The claim is, rather, than compossibility is not 172

172 According to Smith, genuine rights cannot conflict with one another because “the precise function of rights is to settle conflicts.” In other words, “the reason why rights cannot conflict is that such conflicts would completely undermine the efficacy of rights.” Smith, Moral Rights and Political Freedom, p. 196. Daniel Shapiro argues in a similar manner. See his “Conflicts and Rights,” Philosophical Studies 55 (1989): 263-278.


174 Ibid.
affected by the acknowledgement of samaritan rights. And Steiner himself recognizes this point by claiming that the distinction between duties of forbearance and duties of performance “is a distinction without a relevant difference.”\textsuperscript{175} The idea is that a positive right can always be construed as a property right in whatever resources are involved in performing the alleged “positive” obligation. If such is the case, then all obligations must be thought of in terms of non-interference with the use of the corresponding resources upon which individuals have positive rights. Partisans of strict libertarian rights tend to claim that assigning individuals rights to others’ personal services amount to property rights in the body of others. This is essentially right. But then they cannot argue that positive rights over external resources are somehow formally inadequate because they conflict with other rights. For the assignment of positive rights over those resources may also be understood as an assignment of property rights.

A different formal objection against positive rights is that they would fail to satisfy the requirement of universalizability, a requirement that all genuine moral norms must satisfy. The thought here, first explicitly formulated by Kant, is that one is not entitled, by some principle of reason, to make exceptions that one is not willing or able to grant to everyone else. In these terms, Michael Levin argues that “any conception of rights that exceeds noninterference must play favorites.”\textsuperscript{176} The reason why this is the case is that such rights cannot be shared equally.\textsuperscript{177} For “a system of positive rights to the social product requires that some do not claim these rights.”\textsuperscript{178} That was the case in the three-person world. For anyone to have a positive right in there, at least one of the three must not have it. Someone

\textsuperscript{175} Ibid, p. 94.


\textsuperscript{177} Ibid, p. 91.

\textsuperscript{178} Ibid, p. 90.
else must have or produce the resources those positive rights are rights to. Therefore, the objection goes, the system “presupposes a distinction between recipient grasshoppers and worker ants,”\textsuperscript{179} and thus it is subject to the charge of favoritism. Negative rights do not work in that way. Negative rights, as Levin notes, do not exclusively function when there are not as many rights holders as there are entitled to be.\textsuperscript{180} Negative rights “would remain simultaneously satisfiable were all the galaxies teeming with rational agents.”\textsuperscript{181}

Is it true that positive rights violate a requirement of universalizability? The point of such a requirement seems to be about not making exceptions between cases that do not have morally relevant differences. But it is perfectly acceptable, for example, to claim that children have rights against their parents that adults lack.\textsuperscript{182} Because children have some morally significant properties that adults do not share in the same degree, we do not violate the universalizability requirement if we claim such a thing. But then, why should we violate that requirement if we claim that some adult people, in virtue of possessing certain morally relevant properties, e.g. being in an acknowledged perilous circumstance, have a right to be aided by those who are not in such a circumstance when the cost of doing so in not unreasonable? Someone might want to deny that being in such a circumstance is a morally relevant thing. But then, if such were really the reason why we should reject samaritan rights, this discussion about the universalizability of moral norms will have no independent relevance.

\textsuperscript{179} Ibid.

\textsuperscript{180} Ibid, p. 91.

\textsuperscript{181} Ibid.

When we claim that individuals have a positive right to the provision of health care, for example, given both a shared linguistic practice and a concern for clarity, we might choose to say that what this right entails is that some people must provide certain resources to others. But we might also say that what this right entails is that some people must refrain from enjoying what is not theirs, that is, those resources that another needs for health care purposes. Would we claim that a demand for restituting stolen goods poses a “positive” obligation on the thief? We would claim, rather, that the thief has never had a right over those goods; that when he decided to take those goods he violated the negative rights of others. But if A actually has a right over certain goods against B, could we not also claim that there is no positive obligation imposed on B on those very same grounds; on the grounds that B is not the owner of those goods and that he must refrain from enjoying them? There would seem to be nothing morally significant that arises from the way in which we refer to those obligations. If this is indeed the case, it is not surprising that there is nothing formally inadequate about positive rights.

4.4 COULD WE HAVE SAMARITAN RIGHTS AGAINST SOVEREIGN PERSONS?
Perhaps, samaritan rights are both intuitive and formally adequate. But why should we believe that indeed people have those rights? What reasons can be offered to support those intuitions? In particular, why should we believe that individuals could have samaritan rights if we are committed to the value of individual sovereignty? Some authors will claim, for example, that even the minimal form of positive rights endorsed by the principle of samaritanism, by compelling a form of involuntary servitude, negates the individual’s right to his own life.\(^{183}\) Could we then have samaritan rights against sovereign persons? Would the

\(^{183}\) Kelley, *A Life of One’s Own*, p. 97.
recognition of such rights not clash with the underlying commitments of natural rights liberalism?

One line of argument would try to derive individuals’ samaritan rights from what is taken to be an uncontroversial duty not to harm others. In other words, some authors believe that samaritan rights are a mere implication of the so-called “harm principle.” Mill himself thought that it is our duty to render aid because, by not doing so, we harm another.\textsuperscript{184} Some contemporary authors, although they tend to disagree about the details, claim, roughly, that at least some omissions can be causes. They claim that the failure to aid someone in the situations covered by the samaritan principle amounts to a causal fact in the continuation or aggravation of harm to others.\textsuperscript{185} After all, such an omission is a counterfactual condition of the continuation of the harm; it is true that but for the omission, the harm would not have occurred. We might want to reply that if one had decided to stay at home instead of going to the river, the drowning stranger would have died anyway. How then could one’s omission be a necessary condition of the stranger’s death? But one was there, and one \textit{could} have saved the stranger. Is it not then false that the stranger would have died no matter what one did?

Yet some authors, including Wellman, do not seem to be convinced by this line of argumentation. They deny that the principle of samaritanism can be subsumed under the


harm principle. 186 For they deny that our omission to prevent the stranger’s death is necessary in the sense that really matters for being casually necessary. Besides, by rescuing the stranger we seem to make him better off than he would be otherwise. But is it not implausible to claim that we harm people when we fail to make them better off? How many people would we be harming at any given moment? 187

Do we actually cause harm by failing to aid someone in need, or do we just fail to aid? As Derek Parfit says, there are questions that even if we do not know the answers to, we know everything there is to know. 188 The question about whether failing to aid constitutes harm might be one example. Let us imagine that a baby was drowning and a bystander decided to take no action. Did the bystander harm the baby? We might have doubts about what to say. But perhaps we should not be worried about those doubts. We already know what happened. About what happened, there is no more information that we could possibly have. The bystander took no action to get the baby out of the water. Why would it matter how we refer to this situation? What matters is whether the bystander did something that he should have not done. To argue for or against the claim that failing to aid constitutes harm is to argue about our linguistic practices. But it is hard to see how such practices will be of any relevance in deciding what we should and should not do.


187 Treating omissions as causes have been claimed to lead to causal-transitivity paradoxes.

188 Derek Parfit, Reasons and Persons (Oxford: Oxford University Press, 1984), pp. 213-214. Parfit refers to this type of questions as empty questions. Empty questions are not about different possibilities. They are questions about different possible descriptions of the very same course of events.
The principle of samaritanism states that, in that previous case, the bystander should aid the baby, or that he should not hurt him in the particular sense in which not aiding someone constitutes hurting him. It does not matter the way we put it. The question is, could we claim that any other individual is entitled to force the bystander to aid the baby? And if so, could this answer be compatible with the commitment to individual sovereignty that underlies natural rights liberalism?

A commitment to the value of individual sovereignty would seem to require that individuals be assigned ownership rights over their bodies, and that for such a control to be more than merely formal, it is necessary for individuals to have ownership rights over external resources. But it was also suggested that a commitment to individual sovereignty might require something more. The need for ownership rights arises, after all, from the need to provide a guarantee that individuals have some sort of effective capacity to lead their own lives that is not contingent upon the approval of others. But the assignment of ownership rights might not be sufficient, under certain circumstances, to provide such a guarantee.

As it was claimed in Chapter 1, the reason why a system of individual ownership rights is preferred over a system of common ownership of external resources is that such an alternative arrangement leave individuals at the mercy of other’s wills. As it was noted, the need for some sort of Lockean proviso, that is, for a constraint on the unilateral appropriation of natural resources, might be thought of as arising from this type of concern. Lacking any proviso in that regard, individuals might face a situation that is structurally identical to the situation that they would face under a system of common ownership. But now we must note that by no fault of his own, an individual might face a situation in which, despite having exclusive control over his own body and over certain portion of external resources, he would need the approval of others regarding the performance of certain actions that would be necessary for securing the benefit that such rights typically provide. If
individuals would indeed have to secure other individuals’ approval under those circumstances, individuals’ ownership rights, both over their own bodies and over external resources, could lose their worth under those circumstances in the same way in which a right of self-ownership looses its worth under circumstances of joint-ownership of external resources.

Contrary to what we might think, the recognition of a Lockean proviso along more egalitarian lines, such as it is advocated by so-called left-libertarians, does not provide a guarantee in that regard. This is because ownership over a definitive portion of external resources, no matter how extensive it is, might be insufficient to overcome certain unfortunate circumstances, which we might be able to overcome only by having control over the use of the resources that others own or even over the use of others’ bodies. A meritocratic system of ownership rights that compensates for all inequalities that are not due to individuals’ choices rather than to their circumstances, as many contemporary egalitarians propose, is also inadequate given the possibility that, under certain circumstances, no unchosen good fortunes might be available.

So while individuals’ basic rights are necessary for the protection of individuals’ capacity to lead their own lives, in certain situations those rights themselves might restrict that very same capacity in other individuals, without providing a significant benefit to anybody else. Samaritan rights block this possibility. Samaritan rights might then be best understood as constraints on the exercise of our more basic rights. With our own axe, we might do as we wish, as long as the use of our axe is not necessary for someone to save a stranger from a burning car, and as long we do not have to use it for something relatively significant. Yet by having this form of restriction, samaritan rights provide individuals with an effective access to the benefits that those very same basic rights provide. It is unclear how, if individuals’ rights are seen as providing individuals something of fundamental value, that
is, a sphere of sovereignty in which they do not need to secure the approval of anybody to pursue their ends and projects, we could reject the assignment of some sort of guarantee against the possibility of faultless extinction of such sovereign control. Rights always entail restrictions. The question about the plausibility of any given right is the question of the worth of the restriction it entails.¹⁸⁹ A system of rights that has no room for samaritan rights imposes restrictions that, if we are committed to individual sovereignty, are not worth having.¹⁹⁰

Thus, when circumstances that are beyond the control of individuals place them in a situation in which they cannot help themselves, individuals acquire a permission to act in a way in which they would otherwise be prohibited from acting. Samaritan rights enable individuals to recover their very capacity to lead their own lives, and exactly for this reason, they can be regarded as purely natural rights in the sense that ownership and enforcement rights are also natural rights. For the individual to break into a garage and seize an axe to save a stranger trapped in a burning car, no authorization from the community or any political entity is certainly required.

¹⁸⁹ See Steiner, *An Essay on Rights*, p. 55

¹⁹⁰ In his study of the foundation of rights, Lomasky argues that by establishing boundaries that others must not transgress, rights "accord to each rights holder a measure of sovereignty over his own life." Lomasky, *Persons, Rights, and the Moral Community*, p. 54. But Lomasky rightly claims that respect for the individuality of persons as project pursuers is compatible with the acknowledgment of some minimal welfare rights that arise in extreme situations of need (p. 128). Lomasky notes that one would have reason to value the maintenance of a regime of rights because one values the ability to pursue projects. But why should one value such a regime if it could be the case that those very same rights become an obstacle in the attempt to avoid the extinction of one’s prospect for project pursuit?
The deontological understanding of rights, which is characteristic of the tradition of natural rights liberalism, would also seem to be entirely compatible with the acknowledgement of samaritan rights. As it was explained in Chapter 1, a deontological morality is not a morality of goals but of constraints. Deontological theories do not direct the agent to undertake whatever means are necessary to reach a desirable goal. They claim that the agent may pursue whatever goals he has provided that certain constraints on his actions are respected. Deontological theories do not claim, as consequentialist theories do, that there is a goal the pursuing of which those constraints help us achieve in such a way that it would be permissible to violate the constraints if it were necessary to secure the goal in question. For deontology, moral constraints are genuine constraints. They cannot be violated simply for the sake of what is taken to be a better state of affairs.

According to consequentialist theories of rights, there is in principle nothing that we cannot do to an individual as long as there is no other action available that will increase whatever value such rights are taken to promote. If the enslavement of an individual would somehow produce a more secure enjoyment of other individuals’ rights, the consequentialist theorist will need to endorse the morality of that act of enslavement. This is a radically different position than the one embodied in the acknowledgement of individuals’ samaritan rights.

Samaritan rights do not sanction the permissibility of any infringement of basic rights that yields a greater gain in impersonal value. Samaritan rights only sanction the permissibility of infringements on rights that are necessary to overcome perilous circumstances. But the extent of such an infringement is also limited. The extent in which it is permissible to infringe upon the rights of others is the extent in which is necessary in order to place the alleged samaritan right holder out of peril, as long as such extent is not unreasonably costly to the holders of the infringed rights. Furthermore, acknowledging the
existence of samaritan rights does not commit us to acknowledging the sort of aggregative moral perspective that underlies consequentialist theories, according to which the small grievances of the many could always morally outweigh the great misfortunes of the few.

Before concluding this chapter, it must be noted that there is the question of the compatibility of samaritan rights and the rights to our own bodies. Natural rights liberalism holds that the individual himself is the owner of his body, in the sense in which he is fully sovereign to determine how to utilize it. No one could have a right to coerce an individual not to use his body in ways that do not involve the use of the resources or bodies over which others have ownership rights. No one, for example, could have a right to coerce an individual to have particular occupations rather than others. Yet would not this right to self-ownership clash with the assignment of samaritan rights? Could not individuals be forced to use their bodies in ways in which they might not want to do if that is necessary to place others out of peril?

Certainly, a full or absolute right to self-ownership clashes with the demands of samaritan rights. But the argument of this chapter is, precisely, that a full or absolute right to self-ownership, in the sense of a right which does not admit of any condition of infringement, will be as implausible as a full or absolute right to the ownership of external resources. Peter Vallentyne argues that individuals indeed have an absolute right to self-ownership.\textsuperscript{191} Although he acknowledges how counter-intuitive this position is, he claims that a theory must be evaluated as a whole. But the argument of this chapter is, precisely, that as a whole, any theory that does not include samaritan rights is less plausible than a theory that does include them. The restriction imposed by individuals’ ownership and enforcement

\textsuperscript{191} Peter Vallentyne, “Left-Libertarianism and Liberty,” in Thomas Christiano and John Christman (eds), (Blackwell Publishers, forthcoming).
rights under the conditions that individuals are supposed to acquire samaritan rights are restrictions not worth having.

Yet this particular issue of the relationship between ownership over our own bodies and the demands of samaritan rights brings to our attention a more controversial matter. Could it not be the case, according to the principle of samaritanism, that some people acquire rights over others’ body parts if the former need them badly and the latter might do well without them?

In this context, it is worth remarking, however, that self-ownership certainly requires an individuals’ freedom to sell his body parts in the first place. In any case, it might be true that under very extraordinary circumstances, others might have a right to our body parts. Those circumstances are ones under which extracting or using our body parts is not unreasonably costly, and where there is no other voluntary solution available as a means of overcoming a perilous situation. Yet it is unclear whether this result should be seen as an objection. After all, our intuitions about the repugnancy of the practice of coerced transfers of body parts might be justifiably grounded, precisely, on the usually great costs associated with such transfers. If the extraction of kidneys posed no costs whatsoever to the donor, would have we the same reactions to the morality of this type of transfer? Would we feel outraged by the possibility of forced painless transfers of single hairs, if we discovered that total baldness is extremely dangerous?192

192 The issue of the non-consensual transferability of body parts is an issue that must be faced by several theories of distributive justice. Contemporary egalitarians tend to argue that individual’s talents and abilities should be regarded as common property. What they really mean is that individuals cannot appropriate a differential portion of external resources merely based on their superior abilities. The reason for denying this power to individuals is that they are not responsible for those natural endowments. But if individuals are not entitled to appropriate external resources in that way, why is it that they are entitled to
4.4 CONCLUSION

The central purpose of the assignment of ownership and enforcement rights is to provide individuals a space of moral freedom to lead their own lives. This chapter has attempted to show that while such basic rights are necessary for the protection of individuals’ capacity to lead their own lives, in certain situations, those rights themselves might restrict that very same capacity in other individuals, without providing a significant benefit to anybody else. Under those circumstances, it is unclear how we could coherently reject the existence of samaritan rights. Such rights provide an ultimate guarantee that individuals would not need appropriate their body parts when by doing so they could also accrue a differential gain? Others put emphasis not on the lack of merit individuals have when it comes to their talents and abilities, but only on the lack of merit they have when it comes to natural resources. But if individuals are not responsible for the existence natural resources, in what sense are they responsible for their body parts? How is it that the considerations that are supposed to regulate the appropriation of external resources do not also regulate the appropriation of “internal” resources? Certainly, individuals need to have control over their bodies in order to be able to lead their own lives. But for having such a control, they might not need to have control over all of their body parts. Dworkin claims that we should draw around an individual’s body "a prophylactic line that comes close to making [it] inviolate, that is, making body parts not part of social resources at all." See Ronald Dworkin, “Comment on Narveson: In Defence of Equality,” Social Philosophy and Policy 1 (1983): 24-40, p. 39. Some authors doubt, however, that such a distinction between our bodies and external resources could be seriously grounded. See, for example, Fred Miller, “The Natural Right to Private Property”; Cecile Fabre, Whose Body Is It Anyway?; and Eric Rakowski, Equal Justice (Oxford: Clarendon Press, 1991), Chapter 8. Fabre and Rakowski argue, from egalitarian premises, for the justifiability of certain forced transfers of organs. Miller agrees that no significant distinction between external resources and body parts can be made. But he suggests that this shows the inadequacy of standard egalitarian principles of distribution.
to secure the approval of anybody to lead their own lives, in circumstances in which, by no fault of their own, would otherwise require that approval.

The central idea of this chapter is not especially controversial. Virtually all moral theorists would seem to agree that in certain sorts of emergencies, we are entitled to act in ways in which, had it not been for the extraordinary circumstances, we would not be morally allowed to act. The exact political implications of such a simple idea, however, have not yet been fully appreciated. The following chapter explores such implications.
CHAPTER 5

BEYOND PREFERENTIALISM: THE SAMARITAN APPROACH

Wellman has argued for the fruitfulness of the principle of samaritanism in dealing both with the problem of political legitimacy and with the problem of political obligation. The purpose of this chapter is to develop more fully Wellman’s insights regarding the former problem, and to argue that the resulting moral framework is a promising approach particularly when considered from the perspective of natural rights liberalism.

The first section of the chapter provides an overview of Wellman’s major insights, and explains why a direct appeal to individuals’ samaritan rights provides a clearer formulation of the samaritan criterion. The first section also provides a reformulation of such a criterion for conditions of uncertainty. The second section draws attention to a major virtue of the samaritan approach. This virtue is its greater responsiveness to certain important empirical matters without upsetting any of the central commitments of natural rights liberalism, such as the rejection of both consequentialist and paternalistic patterns of moral reasoning. Finally, the third section deals with two major sorts of worries regarding the adequacy of this appeal to individuals’ samaritan rights as a criterion of political legitimacy.

5.1 SAMARITAN RIGHTS: BASIS OF POLITICAL LEGITIMACY

Wellman claims that the key shared element between slavery and political imposition is nonconsensual coercion. He says, “This feature that makes slavery impermissible is also utilized by all governments and thus places the burden upon any of us who are reluctant to

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label all political states unjust.” Wellman also claims that “Political legitimacy presents a
‘problem’ for liberals because they place a premium upon individual liberty, and states
necessarily employ coercive measures that restrict this personal dominion.” According to
Wellman, “An account of political legitimacy explains why this coercion is permissible.”

Wellman’s formulation of the problem of political legitimacy, the problem for which he
claims samaritanism can provide a solution, is not readily understood as belonging to the
tradition of natural rights liberalism. For natural rights liberals, there is nothing especially
problematic about nonconsensual coercion per se. It is not nonconsensual coercion that
makes slavery impermissible. It is rather the fact that such an imposition infringes upon the
ownership rights of the enslaved individual over his own body. The nonconsensual coercive
restriction that individuals’ retaliatory threats impose on those who want to enslave them do
not restrict the latter’s personal dominions, in a way in which liberals will find problematic. In
the same way, what is problematic about the state from a natural rights liberal perspective is
not nonconsensual coercion per se. It is, rather, the use of coercion involved in the
infringement on individuals’ ownership and enforcement rights. Still, it is clear that the
permissibility of such infringements is what Wellman really seems to have in mind in
appealing to samaritanism. The morality of coercing individuals not to murder other innocent
individuals is not something for which the appeal to samaritanism provides an answer.

Wellman distinguishes between the problem of political obligation and the problem of
political legitimacy. He claims that “political legitimacy is distinct from political obligation; the
former is about what a state is permitted to do, and the latter concerns what a citizen is

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195 Ibid.
197 Ibid.
Wellman explains that the correlative of political legitimacy, that is, the correlative of the state having a right to coerce its subjects, is not an individual's duty to comply with its commands. The correlative of the state's right to coerce its subjects is simply the lack of a right not to be coerced. More precisely, we should say that the correlative of political legitimacy is the lack of a right not to be coerced only in those particular ways that infringe upon individuals' ownership and enforcement rights. Wellman claims that it is not true "that one is free to disobey the law if there are no political obligations because there may be 'content-dependent reasons' to behave as the law instructs." Wellman adds that the lack of political obligations only implies "that the mere fact that X is legally prohibited provides no additional moral reason for compliance." But this understanding of the notion of political obligation seems to be a different issue from the one with which Wellman is ultimately concerned. He suggests the possibility that there are content-dependent reasons for compliance as a way of explaining, for example, why the lack of such obligations does not entail that individuals may harm others. Yet once we understand the problem of political obligation in the sense of what a citizen is obligated to do, we are only concerned with those commands of the state that infringe upon individuals' rights. If there are no political obligations, in this sense, individuals are indeed free to disobey the law when it comes to those particular commands. For the question of political obligation, in this sense, is really the question of the existence of content-dependent reasons to behave as the law instructs.

200 Ibid.
According to Wellman, the common understanding of samaritanism holds that “one has a duty to help a stranger when the latter is sufficiently imperiled and one can rescue her at no unreasonable cost to oneself.” Wellman claims that an appeal to samaritanism explains why individuals could lack a right to be coerced when it comes to the state’s actions that infringe upon individual rights, as well as why individuals have a duty to comply with the corresponding state’s commands. This is because “the presumption in favor of each citizen’s political liberty is outweighed by a samaritan duty to save others from the hazards of the state of nature.” According to Wellman, the samaritan duties we have towards others are what “curtail our own political liberty.” Wellman explains, however, that samaritanism need not be spelled out exclusively in terms of duties. He argues that in the case of political coercion, “the state is at liberty to coerce individuals in a way that would ordinarily violate their rights only because this coercion is necessary to rescue all those within the state’s border from peril.” Wellman adds, “Although each citizen generally enjoys a privileged position of moral sovereignty over her own affairs, samaritanism entails that none has a moral claim-right that the state not coerce her.” Thus, “coercion is permissible because the peril of others generate weightier moral reasons than the presumption in favor of each individual’s dominion over her own affairs.”

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201 Ibid, p. 735.
203 Ibid, p. 216.
205 Ibid.
207 Ibid, p. 746.
Wellman argues that justifying political states for the harmful consequences that they help us avoid is not tantamount to limiting political liberty with the harm principle. This is because “the mere exercise of political liberty does not cause harm in the manner required by the harm principle.”\(^{208}\) We could subsume the samaritan principle under a principle of harm, but such a principle will be one under which omissions can be causes. Wellman, like many others, argues that such a principle “is unacceptable for the inaccuracy with which it assigns harm to the agent.”\(^{209}\) This is why Wellman thinks the principle of samaritanism must be regarded as a benefit to others principle. Yet, as it was suggested in the previous chapter, it is hard to appreciate the moral significance of this discussion. This is especially the case when both parties of the dispute agree with the claim that individuals must do certain things that are necessary to rescue others from perils, when doing so does not impose an unreasonable cost on themselves.

Wellman recognizes that samaritanism could be understood as establishing the existence of certain forms of positive rights. The rights that samaritanism entails might not always be readily seen as positive rights, however. In certain cases, the obligations they would impose could be seen more naturally as purely negative, as it will be the case on the prohibition to seek justice by private means. In any case, as the previous chapter suggested, the distinction itself between positive and negative rights might not have much significance. But the appeal to samaritan rights, regardless of whether we take them as fully belonging to the class of positive rights or not, seems to provide the simplest representation of the samaritan approach to political legitimacy.

\(^{208}\) Wellman, “Liberalism, Samaritanism, and Political Legitimacy,” p. 221

\(^{209}\) Ibid.
Under certain circumstances, when individuals are in peril and there is a solution to the situation which imposes no unreasonable costs on others, they acquire rights to whatever resources or personal services such a solution requires. This means, under normal circumstances, that those other individuals who could provide the solution at a reasonable cost to themselves have a duty to do so. But it also means that the holders of samaritan rights are permitted to threaten those other individuals with the infliction of harm in order to secure the exercise of those duties. Thus, instead of claiming that the legitimate state is a state that has a right to coerce its subjects because, having a duty to save others from perils, those subjects lack a claim right to be coerced, we could simply claim that the legitimate state acts as a mere enforcer of individuals’ samaritan rights. An individual’s samaritan rights authorize another individual to break into a garage and seize an axe to save a stranger trapped in a burning car. Similarly, the state may break into its subjects’ areas of moral freedom if that is required to save other individuals from a comparable peril.

The appeal to individuals’ samaritan rights makes it clearer that for the state to act permissibly, it is not necessary that, under anarchy, all individuals must enjoy a level of well-being below the samaritan threshold of peril. Wellman claims that the samaritan approach “explains that a state has a right to force even those who do not consent because this force is necessary to rescue this person and others.”\textsuperscript{210} Wellman also says, “a legitimate state’s nonconsensual coercion of all those within its territorial limits is justified only because it is both (1) necessary to save everyone in that territory from the perils of a lawless environment and (2) not an unreasonable imposition upon those coerced.”\textsuperscript{211} Yet an individual’s samaritan rights authorize an individual to break into a garage and seize an axe


to save the stranger trapped in a burning car, regardless of the fact that the owner of the axe might not face any peril in the absence of such an infringement. So it is not true that, according to a samaritan approach, for the state to be justified, everyone must be in peril in its absence.

Wellman is not merely interested in defending the samaritan model as a mere criterion of evaluation. He is also interested in claiming that the state is indeed justified according to that criterion. So the claim that the state is necessary to save everyone from peril is an empirical claim, under which Wellman bases his defense of the state. For example, he claims, “it seems unrealistic to think that life without a political state would be anything but a horribly chaotic and perilous environment where one would lack the security necessary to pursue meaningful projects and relationships.” 212 But it is important to keep those two issues apart. In this chapter, we are interested in defending the principle of samaritanism as a mere criterion of political legitimacy. Hobbes famously claimed that life in the absence of the state would be ‘solitary, poor, nasty, brutish, and short.” If that is an adequate description of the situation individuals would face should the state not infringe upon their rights, anyone could have a right to enforce individuals’ samaritan rights that would enable them to overcome their most serious misfortunes. But endorsing a samaritan approach does not entail that we should believe that Hobbes’ description is an adequate description. It only entails that, if such is indeed an adequate description, the state would be justified in infringing upon individuals’ rights; if indeed it is the case that such an infringement is necessary to overcome the perils of anarchy and not unreasonably costly to others.

212 Ibid, p. 6.
The conditions under which the state’s infringements are permissible are the conditions under which individuals acquire samaritan rights. Those conditions include: (1) the gravity of the peril faced by the alleged samaritan right holder, (2) the fact that such a perilous situation is not the fault of the alleged right bearer (in the sense of not being due to a neglected reasonable opportunity for avoiding the situation), 3) the necessary character of the infringement to overcome the peril, and (4) the reasonable cost of compliance imposed on others. When it comes to applying this moral framework to the question of political legitimacy, the problem will then become, roughly, that of determining whether there are reasons to believe that the state’s infringing upon an individuals’ ownership and enforcement rights is necessary to overcome the unchosen perils of at least some individuals, without imposing an unreasonable cost on those against whom the corresponding actions are performed.

Although useful for its simplicity, however, the previous formulation of the samaritan criterion of political legitimacy would seem to be inadequate insofar as it does not taken into account the fact that our actions are rarely performed under conditions of certainty. When it comes to taking into account the role of uncertainty, the problem becomes that of analyzing the choice between two alternative prospects, where the prospect is of seeing the instantiation of an outcome out of a set of possible outcomes, each of them having a certain probability of being the one that is instantiated. Those two prospects will correspond to the performance and non-performance of the rights-infringing actions that are characteristic of the state.

Thus, if the samaritan criterion first requires us to determine whether there are reasons to believe that the state’s infringement upon individuals’ rights is necessary to overcome the unchosen perils of at least some individuals, we must then first determine whether there are reasons to believe that, for at least some individuals, the expected utility
of the prospect corresponding to the non-infringement upon individuals’ rights by the state, once we have discounted for personal responsibility, will be lower than the threshold of peril established by the principle of samaritanism. So we would need to consider individuals’ utility for each of the possible outcomes of the prospect, weighted by the probability of its instantiation conditional on the non-performance of the state’s rights-infringing actions. For each individual, the expected utility of the prospect of non-performance would be determined by the aggregation of those previous values.

The general idea behind a samaritan approach is that the permissibility of the state rests upon its being a remedy to the perils of some individuals. So for this idea to be satisfied, it must be the case that there are at least some individuals for whom the expected utility of the prospect of non-performance, once we have discounted for personal responsibility, is lower than the utility threshold of peril. But it also must be the case that for these very same individuals, the expected utility of the prospect of the state is higher than such a threshold. The first corroboration guarantees that there is a peril for which the state could be seen as a remedy. The second one guarantees that the state could indeed acts as a remedy. Those individuals would have a right to infringe upon the rights of those for whom the difference in expected utility, between the prospect of performance and the prospect of non-performance, is no greater than a certain limit. That limit is the one that the principle of samaritanism establishes as a reasonable cost.

The question of political legitimacy is, basically, the question of the conditions, if any, under which the state could act as it typically does. Under what conditions could a group of individuals prohibit others from exercising their enforcement rights, and coerce them to allocate a portion of their resources to finance the collective provision of enforcement services? A samaritan approach holds that a group of individuals could infringe upon others’ rights in such a way when their actions can be understood as enforcing the samaritan rights
of themselves, or of other individuals. For such to be the case two conditions must be satisfied:

1) There must be at least some individuals for whom it is true that \( EU(\neg P) < T < EU(P) \), where \( EU(\neg P) \) is the expected utility of the non-performance of the rights-infringing actions discounted for personal responsibility, \( EU(P) \) is the expected utility of the performance of such actions, and \( T \) is the samaritan threshold of peril.

2) For those individuals whose rights are infringed upon it is true that \( EU(P) - EU(\neg P) < C \), where \( C \) is the limit on the cost that is permissible to impose on others according to the principle of samaritanism.

Thus, according to a samaritan approach, the problem of political legitimacy is, roughly, the problem of choosing between the prospect of anarchy and the prospect of the state. The prospect of anarchy involves all the possible outcomes that would result from the non-performance of the rights-infringing actions that we have identified in Chapter 2 as characteristic of the state. The prospect of the state involves all the possible outcomes that would result from the performance of such previous actions.

The prospect of anarchy would include outcomes characterized by a Hobbesian war of all against all; a quite “inconvenient” but perhaps not as dreadful Lockean state of nature; an operating free-market on security and protection and under which most conflicts are resolved by peaceful means; and the type of stateless condition under which conflicts between individual rarely arise, an idea for which classical anarchists seem to have genuine hopes. Discussions regarding the nature of anarchy can then be understood as discussions regarding the probability that we should assign to the instantiation of each of those possible outcomes.

Within the prospect of the state, we would certainly have to consider more than the sort of state that we regard as the most desirable one. Anarchists cannot defend their
position simply by arguing that a Hobessian anarchy is not the sort of anarchy with which they intend to have the state replaced. Similarly, we could not justify the state simply by pointing out how the proposed state does not present those features about which state skeptics might be worried. The relevant choice is, again, not between outcomes. The relevant choice is between prospects. So the outcomes corresponding to the prospect of the state will have to include, for example, a limited government that is respectful of individual liberties. But it will also include, with different degrees of probability, less respectful forms of governments that might arise despite the existence of whatever institutional arrangement we judge to be appropriate. Those states will range from populists governments under which the individual rights of minorities tend to be disregarded, to outright criminal and genocidal states such as those of Hitler, Stalin, Mao, and Pol Pot.

As it was noted in Chapter 4, compensation by the holder of the samaritan right might be due to the individual whose rights have been infringed upon. But the state might have no manner of paying such compensations. It might be extremely difficult, or simply impossible, to identify those from whom resources should be transferred (that is, those for whom $\text{EU}(\neg P) < T < \text{EU}(P)$); and it might be equally hard to identify those to whom those resources should be transferred (that is, those for whom $\text{EU}(\neg P) > T$ and $\text{EU}(P) - \text{EU}(\neg P) < C$). But as it was discussed in Chapter 4, an incapacity to pay what otherwise would be due compensation does not seem to invalidate the permissibility of acting as the principle of samaritanism allows. The requirement to pay compensation seems to be best understood as a mere corollary of the requirement of cost minimization, rather than as an independent requirement.
Eric Mack, however, claims that a person’s inability to pay compensation modifies the person’s “moral latitude.” According to Mack, that person would still be at liberty to secure aid, but those from whom the aid may be coercively secured would not have an obligation to refrain from preventing his actions. Mack claims that “When at least one party has to lose, and neither is at fault, a reasonable moral doctrine does not declare that either party is bound to submit to the loss.”

Wellman argues that the peril of others can explain not only why one may permissibly be coerced. It can also explain why one is obligated to assist those who are imperiled. Because our own noncompliance with the state’s commands might not put anyone under peril, Wellman suggests that “we understand our political obligations as our fair share of the communal samaritan choice of rescuing others from the perils of the state of nature.” If Mack is right, contrary to what Wellman claims, the principle of samaritanism might fail as a principle of political obligation, where such a notion is understood as referring to the moral obligations that individuals have towards certain of the state’s commands. Mack himself acknowledges, however, that at least certain duties of non-interference, violent interference for example, with the actions of the samaritan rights holder, or of an individual acting on his behalf, are due even when compensation is not payable. More likely then, the charge will be that the principle of samaritanism could establish only obligations of mere non-interference with the state’s commands that infringe upon individuals’ rights.

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215 Wellman, “Samaritanism and the Duty to Obey the Law,” p. 33
A. John Simmons has also raised certain objections regarding the capacity of a samaritan approach to establish individuals' political obligations. Simmons does not raise the issue of compensation. He is particularly worried about the incapacity to such an approach to establish any definitive set of obligations, rather than a mere general obligation that individuals would have the power to decide how best to fulfill.\footnote{A. John Simmons, “The Duty to Obey and Our Natural Moral Duties,” in Wellman and Simmons, \textit{Is There a Duty to Obey the Law?}, pp. 93-189.} The exact nature and extent of individuals' political obligations is not, however, something with which we are ultimately concerned here. As it was argued in Chapter 2, the most fundamental normative question about the state is whether it has the permission to act as it does. In particular, the question is whether it has the permission to infringe upon individuals’ ownership and enforcement rights in its characteristic way. We take the samaritan criterion to be addressing this question. If individuals have at least a liberty to coerce others in the way the principle of samaritanism establishes, then there are certain conditions under which the state’s infringements upon individuals’ rights are permissible.

5.3 RESPONSIVENESS WITHOUT CONSEQUENTIALISM

If we reflect both on the conditions that give rise to samaritan rights and on the type of issues that we regard as important in discussions of the state, we would appreciate the fundamental virtue of the samaritan approach. This fundamental virtue is its responsiveness to the normative significance of certain empirical issues that, intuitively, we tend to think are quite central to discussions about the legitimacy of the state. These are issues dealing with the properties of those states of affairs that would obtain should the state not act in its characteristic manner, and how such properties compare to those corresponding to the states of affairs resulting from the state’s actions. In order to see how fundamental this
virtue is, we can think about the plausibility of a position that would have no room for those matters.

The most rigorous form of libertarianism establishes the illegitimacy of all compulsory transfers of justly acquired holdings and the permissibility of all voluntary transfers of such holdings. The state requires its subjects both to pay for the protection of their own rights and to refrain from defending their rights by their own means, such as, for example, by contracting protection from other private parties. Since the state does so regardless of the existence of any explicit agreement on the part of those who are coerced, libertarians of this sort claim that their theory is incompatible with the idea of a legitimate state.  

Wellman recommends “dismissing [the most rigorous form of] libertarianism because it precludes political legitimacy in the absence of unanimous consent.” Yet the view is implausible not because it entails the illegitimacy of the state. It is implausible because it entails that the state would be illegitimate regardless of the nature of anarchy. Under this view, the state could never be a morally acceptable remedy for any of the inconveniences of anarchy; it would matter neither how serious such inconveniences are, nor how easily the state would be able to solve them. The problem is not avoided by merely denying the existence or the severity of the many alleged inconveniences that will ensue in the absence of the state. The point is, precisely, that the illegitimacy of the state is established by means that are completely independent of those types of considerations. In other words, the inquiry into the nature of anarchy would not have any moral significance when it comes to the moral evaluation of the state. But it is hard to believe that the findings of such an inquiry,


whatever those are, should be irrelevant in this matter. So, again, the implausibility of radical forms of libertarianism would not arise from the mere fact that the state is regarded as illegitimate. It would arise, rather, from the particular manner in which this is done. 220

It would then seem to be the case that no plausible political philosophy could preclude the possibility in principle of the legitimate state. By this, we mean that some forms of conceivable conditions must be recognized under which the performances of the state’s characteristic actions are morally permissible. 221 Certainly, utilitarianism, as well as other versions of consequentialism, will meet this requirement. The challenge for natural rights

220 We might want to provide a rationale for our concern about the nature of anarchy based on the idea that “ought implies can”. If this were possible, radical libertarianism would not upset the possibility in principle of the legitimate state. For the implied moral restrictions would only apply once we have established the possibility of anarchy. An argument of this kind, however, would rely on the idea that we can make sense of the possibility of social institutions in the same way that we can make sense of the possibility of individual actions. But this is a dubious contention. We might believe that socialism is not a possible system of economic organization. What we really mean, however, is that socialism will produce an undesirable social order. The same is true regarding the possibility of anarchy. If we claim that what is not possible is an ordered anarchy, then we are not making a point in deontic logic but in substantive ethics. But that is precisely what the radical formulation of libertarianism would preclude us from doing.

221 The existence of some conceivable conditions under which the performance of the state’s characteristic actions is morally permissible is not sufficient for establishing the legitimacy of the state. There is still the empirical question of whether those conceivable conditions could actually be satisfied. This would be the question of the possibility in practice of the legitimate state. We may say that for the legitimate state to be possible in practice, the satisfaction of the principle establishing the rightness of the state’s constitutive actions must be compatible with the findings of the social sciences. As it has already been suggested, a plausible political philosophy could not preclude the possibility in principle of the legitimate state. But the issue of the possibility in practice is a very different matter.
liberalism is to provide a principled way of establishing conditions of permissible infringement, without falling back into the sort of interpersonal calculus of advantages characteristic of consequentialism.

Liberal theorists have attempted to provide such conditions by stretching the notion of voluntary agreement. As we have seen in Chapter 3, empirical discussions regarding the nature of anarchy would seem to play an important theoretical role within preferentialist approaches. At the end of the day, however, such theories have a limited degree of responsiveness to those considerations. There is nothing within those theoretical frameworks such that, individuals who genuinely disagree with having their rights infringed upon by the state, even when basing such a disagreement on faulty conceptions of what the relevant alternatives are, could be permissibly denied their right not to be coerced by the state. Within those traditional liberal answers, theorists tend to acknowledge, for example, that consenting to the state will not be rational for persons with atypical personal characteristics, and claim that this is the reason why we should reject a unanimity requirement. The underlying thought is certainly plausible. Why would the success of those willing to make sacrifices to secure the benefits of the state have to depend on those who enjoy warfare and destruction? But if there are other considerations that seem to override the normative significance of certain individual preferences, when such preferences endanger the satisfaction of other individuals’ sorts of preferences, why, again, not appeal directly to those considerations as the most fundamental ground for the legitimacy of the state? That is the route taken by a samaritan approach.

For a samaritan approach, it matters greatly whether or not the state actually produces some important social benefits that are otherwise unavailable. According to a samaritan approach, the state will be morally permissible only if whatever the benefits that the state provides cannot be secured by voluntary cooperation, that is, by not infringing upon
individuals’ natural rights. Endorsing a samaritan approach would entail, therefore, that the inquiry into the properties of a private market for protection and security acquires full moral significance. If it is indeed the case that there is a decentralized solution to the problem of social order, the state would not be morally allowed to perform its characteristic actions.

Furthermore, acknowledging the existence of samaritan rights provides a moral ground upon which comparative judgments between the state and anarchy can be significantly made. According to a samaritan approach, the coercion the state engages in must be a genuine remedy for any of the alleged perils of the stateless condition. Recently, some authors have defended the state on the grounds that a private market for protection would result in a predatory monopoly. But clearly we should favor the state on those grounds only if we have reasons to believe, that there is a significance probability that the state will not act as we fear the private monopoly will. By acknowledging the existence of samaritan rights, we are able to capture fully the normative relevance of this insight.

A samaritan approach to political legitimacy is responsive to these sorts of empirical considerations not only when it comes to discussions regarding the foundations of the state. It is also responsive to such considerations when it comes to discussions regarding the “shape” or “size” of the state. We might think that acknowledging individuals’ samaritan rights amounts to acknowledging the legitimacy of at least some form of welfare program. But this is not the case. An important feature of so-called “lifeboat” situations, mainly due to

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222 According to a samaritan approach, that the state might be more efficient than the alternative arrangement in producing such benefits will be normatively irrelevant beyond a certain minimal level of production.

its extraordinary nature, is the unlikelihood that whatever action is taken under such conditions will have a significant effect in terms of altering people’s future behavior. If B lets A spend the night in his cabin, it is hard to imagine how his action will generate a significant increase in the number of lost hikers in the future. The state’s actions, however, are usually institutionalized in terms of laws and regulations. Individuals can easily form expectations about how the state will act in the future. Most importantly, individuals can act in ways different than they otherwise would because of those expectations. It is the often unfortunate story of the unintended consequences of public policies.

The principle of samaritanism authorizes us to secure aid effectively for some without imposing more than certain costs on others. If the consequence of saving an individual is to put many more under peril, the principle of samaritanism would deny that samaritan duties, or rights, arise in such a situation. In this regard, it might be the case that welfare programs create the wrong type of incentives, and that their institutionalization recreates the conditions that they are supposed to remedy. Also, it might not be true that the recipients of such programs would be unable to overcome their perilous conditions in a non-coercive form. It is true that some among them might not have marketable assets. But it is also true that many individuals dedicate their lives, or a certain portion of their resources, to respond to the misfortunes of others. Acknowledging the existence of samaritan rights, when they are qualified as we have done it, will entail that to the extent that charitable contributions are forthcoming, coercive redistribution is not permissible.\textsuperscript{224}

Thus, the endorsement of a samaritan approach to political legitimacy might not amount to the endorsement even of a “safety net,” hat is, of a minimal program of wealth

redistribution with the purpose of alleviating some unchosen serious misfortunes. Such an endorsement will be contingent on the validity of certain empirical claims. Again, it is a clear virtue of a samaritan approach that moves such empirical claims to the center of the discussion.

As Wellman rightly explains, samaritanism seems to be the overlooked link between the benefits and the justification of the state within the liberal tradition. Samaritanism would take into account the benefits that the state might produce. But the charge of paternalism is not avoided by claiming that those benefits are somehow voluntarily accepted. Within a samaritan approach, it is not claimed that the benefits a subject receives are what make it permissible to coerce that very same subject. It is claimed, rather, that what makes it permissible to coerce that subject are the benefits that others would receive, in the form of avoidance of certain perils, as a result of that coercion. The sincere objections of individuals regarding the subjective value of the benefits provided to them do not present a problem, as they do for preferentialist theories. This is because it is not from the coerced individual’s subjective appreciation of value that the coercive actions acquire their legitimacy.

5.3 TWO SORTS OF OBJECTIONS

A samaritan approach to political legitimacy seems to be grounded on a familiar and intuitive principle. It is surprising that liberal political theorists, in their incessant search for a moral foundation for the state, have not appreciated the political implications of such an uncontroversial moral idea. Are there any reasons to justify this lack of recognition?

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George Klosko has recently objected that the principle of samaritanism is unable to ground the legitimacy of central state functions. Samaritan rights are taken to be limited by the proviso that the aid to others must not be unduly costly to oneself. But the requirements the state imposes, Klosko claims, are often costly. Klosko argues that the principle of samaritanism might not be able to support obligations “to pay burdensome taxes or to obey other costly laws, let alone to undertake military service –to fight, possibly to die– for one’s country.” Similarly, we might claim that the principle of samaritanism is not able to grant a permission to coerce people to do such things.

Presumably, however, the objection is not simply that the principle of samaritanism would not be able to ground the legitimacy of the previous functions. For it is far from clear that coercing individuals to pay burdensome taxes, or to fight or die for others, is something that a correct principle of political legitimacy must show to be morally permissible. The objection might best be formulated as tying samaritanism necessarily to the defense of a minimal state. The point of the objection is not that such a state is an obviously inadequate political arrangement. The point of the objection is, rather, that according to samaritanism a minimal state will be the only sort of political arrangement that could be justified, regardless of how adequately it deals with the alleged perils of anarchy. A plausible political philosophy would justify a minimal state, if the inconveniences of anarchy are serious enough. But should it not also justify more than a minimal state if the inconveniences are still severe enough? Surely, a plausible political philosophy will not justify the slavery of some individuals if that is necessary to overcome the perils of anarchy. Yet burdensome taxes or

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228 Ibid, p. 838.
temporary military service, the objection goes, cannot be seen as, in principle, out of the question, if they are indeed necessary to save individuals from horrific perils. Thus, the objection claims that the limitation on costs that is inherent to a samaritan approach renders it a flawed criterion of political legitimacy.

This objection rests on a misunderstanding. It assumes that certain actions are inherently costly, and thus necessarily out of samaritanism’s reach. But the costs of those actions, as the costs of any action, are given by the benefits their performance makes us forgo. So the samaritan approach is not inherently limited in what it can achieve, as Klosko argues. For not even military service or burdensome taxes are in principle ruled out. Under extreme conditions, military service might not be too costly when compared with the alternatives. Liam Murphy and Thomas Nagel have recently argued that, at least when it comes to the moral assessment of taxation, an appeal to the idea that there are natural or pre-political rights is an appeal to fiction.\(^{229}\) Allegedly, this is because the state itself is responsible for there being anything worth calling property. Their worry seems to be best captured by a samaritan approach, however. If indeed it were the case that there is nothing worth calling property in the absence of the state, then burdensome taxes might not be as burdensome as one might initially think.

Thus, it is not true that a set of actions, which could be essential to overcome the perils of some individuals, are in principle out of samaritanism’s reach. Whether such actions are indeed too costly or not will depend on the property of the state of affairs in which the state does not perform them. And this is in fact what we expect from a plausible political philosophy. Surely, Klosko does not believe that the state may coerce its subjects

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either to pay burdensome taxes or to undertake military services, regardless of the sort of state of affairs that is supposed to obtain should the state not act in such ways.

Wellman does not address the previous issue explicitly. He does claim, however, that “Once one subtracts the benefits from the costs of citizenship, one understands the plausibility of invoking samaritanism to justify political coercion.” In presenting his objection, Klosko argues that an appeal to the benefits that coerced subjects themselves receive is unjustifiable in Wellman’s theory. By appealing to those benefits, according to Klosko, Wellman ignores that “the liberal premium upon individual autonomy entails that one may not justify one’s coercion of another by merely citing the benefits for the coercee.” Thus, Klosko concludes that Wellman’s answer to the problem of the costs of the state raises the problem of paternalism. Yet it does not seem to be the case that any appeal to the benefits the state provides to those who are coerced will raise the problem of paternalism.

Wellman says, “all of us would admit that the benefits of political society far outweigh the costs.” Again, it is important to keep the question about the samaritan criterion’s adequacy independent of the question of what exactly the facts of the matter turn out to be. The samaritan criterion does not hold that, for the state’s infringement upon an individual’s rights to be permissible, the benefits of the infringement for that individual must outweigh its costs. Once we realize this, we immediately realize that the charge of paternalism is not a proper charge. For the samaritan criterion allows that for the state’s infringement to be permissible it is not necessary that the benefits provided to the coerced individual outweigh

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its costs. The samaritan criterion allows that the act of coercion be indeed costly for the individual, in the sense in which that individual would be better off if the corresponding coercion would have not taken place. Yet, perhaps, the fundamental reason why the charge of paternalism is mistaken is that the benefits to the coerced individual, regardless of whether they outweigh their costs or not, are not appealed to as the rationale for the justification of the coercion in question. The rationale is that this coercion will put other individuals out of peril, without causing an unreasonable cost to the individual in question. No one here is interested in coercing an individual against his will, for his own benefit.

That there are no inherently costly actions such that their permissibility would be in principle ruled out by the samaritan approach does not entail that, according to that approach, there are no limits, in principle, to the infringements that the state can impose on its subjects. One might then reformulate the previous objection against the samaritan criterion’s inherent limitations. Instead of focusing on particular types of actions, we might focus on particular types of individuals: those individuals for whom the state’s infringement of rights could indeed be unreasonably costly.

Thus, according to this objection, it is not clear how a samaritan approach would constitute a superior alternative to more traditional preferentialist alternatives. Contractarian and fairness theorists will claim that the state can infringe upon an individual’s rights, when the individual’s benefits of such an infringement are greater than the costs. An anti-paternalist stance precludes the contractarian theorist from understanding such benefits and costs in rationalized terms. The very same logic of a principle of fairness would seem to preclude similar forms of idealizations. Thus, as Chapter 3 has argued, political preferentialism has the implication that the state might not be allowed to infringe upon certain individuals’ rights, regardless of what the consequences are for other individuals.
This was taken to constitute a fundamental deficiency. How is it that samaritanism is not subject to a similar objection?

But the objection against political preferentialism was not based on its incapacity to establish the state’s right to coerce everybody within its territory. The objection was, rather, that the permissibility of the state’s infringement on an individual’s rights was contingent, roughly, on the individuals’ own ideas about the need for such an infringement.

Samaritanism’s grounds for not authorizing an infringement on rights are different from political preferentialism’s. The exception is not granted merely based on an individual’s preferences for not having his rights infringed upon. It is based, rather, on the degree in which his idealized non-objectionable preferences would be unsatisfied.

That means, primarily, that the exception would be granted on an objective assessment of the circumstances. Anarchists might reject the state because they would think that anarchy will bring peaceful cooperation and a harmony of interests. In their eyes, the state is certainly costly. But while preferentialism has no adequate resources to deny those individuals an exception, samaritanism does. If the anarchist’s preference is for universal peaceful cooperation, and if indeed anarchy will not bring about such a state of affairs, then the state might not be too costly for him in the sense that matters for samaritanism. If the cabin’s owner thinks that by allowing the lost hiker to spend the night in his cabin he will be forever cursed, this does not mean that the hiker is indeed prohibited from coercing the owner to let him spend the night in the cabin. There might also be those anarchists who believe that egoism is the fundamental value, such that, any imposition that falls upon them the sole purpose of which is to save others from perils, imposes too much cost on their moral integrity. Yet the satisfaction of this sort of preference is not taken into account by samaritanism. Neither is it taken into account the satisfaction of those
preferences that, due to their moral objectionability, encompass the enjoyment of individuals’ suffering.

Thus, those individuals against whom samaritanism would not authorize infringements on rights fall under a very special class. This is the class of individuals who have radical non-objectionable differences in their conceptions of the good life, such that having their preferences overridden, for example, when it comes to the state’s provision of justice, indeed constitutes an unreasonable cost. So the cases that are excepted from coercion according to the principle of samaritanism might be cases in which we do not find it objectionable or worrisome that an exception be granted. Individuals belonging to special cultural or religious communities might constitute adequate examples. Under such circumstances, the appeal to samaritan rights would seem to provide the differential treatment that we would expect from a plausible theory. We agree that, if justified at all, a policy of mandatory military service might not be justifiable if it applies to children and the handicapped due to the greater costs that such individuals would face, regardless of how useful their efforts could be. The samaritan approach to political legitimacy would endorse those sorts of judgments when it comes to the evaluation of the very foundations of the state.

There is still the possibility, however, that it would not be necessary for the state to infringe upon the rights of everybody for whom the costs of the state’s actions are not unreasonably costly. It might happen that coercing more than a certain number of individuals makes no difference whatsoever when it comes to rescuing others from the alleged perils of anarchy. Wellman seems to concede that a state might not need to coerce every person among those for whom the costs of the state are not unreasonable. Yet he
claims that because “samaritan responsibilities fall equally upon all of us,”\textsuperscript{234} there might be reasons of fairness to do so. Wellman says, “the burden of coercion would be higher for those [individuals] coerced if a fraction of [those individuals] were allowed to ignore their responsibilities.”\textsuperscript{235} Under those circumstances, there seems to be no grounds indeed for any individual to object that the total contribution should be required from others but not from himself.

\textbf{5.5 CONCLUSION}

As it has been presented here, the samaritan criterion of political legitimacy has as its building blocks certain fundamental philosophical notions, such as the notion of responsibility and well-being. It also relies on considerations regarding what a rational choice must take into account under conditions of uncertainty: the weighted average of the values of each possible outcome, where the weights are taken to be measures of the chances those outcomes have of actually following the choice. These are all controversial matters. One could think that each of these issues might admit of different answers, and

\begin{footnote}{\textsuperscript{234} Wellman, “Toward a Liberal Theory of Political Obligation,” p. 754. It must be noted that this reference to fairness is not a reference to the principle of fairness that was discussed in Chapter 3. The samaritan appeal to fairness is not an appeal to the benefits subjects are claimed to receive. It is, rather, an appeal to the unfair distribution of the burden among those who are in a position to aid.}
\textsuperscript{235} Ibid, p. 756. This claim assumes that, facing resource indivisibility issues, there is the possibility of arranging side payments between individuals. Imagine that in the example of the individual in the burning car, one has the ability to choose from whom, of a group of three individuals, one would get the axe. Given the circumstances of the case, no one among the three individuals will find this infringement unreasonably costly. In fact, everyone will find it equally costly. In this type of situation, the claim that fairness requires coercing everybody to give up control of their axes is implausible. If side payments are not possible, fairness might require the use of a random selection procedure under which everyone has equal chances of having their rights infringed upon.}
thus that different versions of samaritanism might be developed and defended. But it was beyond the scope of this chapter to enter into such discussions.

The purpose of this chapter was merely to try to uncover the basis under which an intuitive understanding of the principle of samaritanism seems to operate. Whether some modified version of the principle could be rationally justified, in a way in which that intuitive understanding cannot, is something that we cannot explore here. The hope is that this possibility will not have a fundamental impact on the central thesis of this dissertation: that, within natural rights liberalism, the possibility in principle of the legitimate state is better accounted for in terms of individuals’ samaritan rights.

If the existence of samaritan rights must be granted in certain non-political circumstances, as Chapter 4 has argued, and if not infringing upon individuals’ natural rights in the way in which the state characteristically does will bring about the same sorts of circumstances, this chapter has argued that we should also grant the existence of samaritan rights in that situation as well. Now the question is whether those sorts of circumstances will indeed obtain should the state not infringe upon its subjects’ rights. This is the subject matter of the following two chapters.
CHAPTER 6
THE MARKET FOR GOVERNANCE

The independent actions of many persons can be spontaneously coordinated through market-like institutions so as to produce mutually desirable outcomes without detailed and direct interferences of the state. But [...] this coordination can be effective only if individual actions are limited by laws that cannot themselves spontaneously emerge.

James Buchanan

The previous chapter has argued that if the existence of samaritan rights must be acknowledged in certain familiar circumstances, and if individuals’ freedom to fully exercise their enforcement and ownership rights will bring about the same sorts of circumstances, we should acknowledge the existence of samaritan rights in those circumstances as well. By reference to individuals’ samaritan rights, we could then justify the state’s characteristic infringement on its subjects’ more basic rights. But there is still the question of whether individuals’ freedom to fully exercise their basic rights will indeed bring about these sorts of circumstances.

For many, it will be obvious that indeed this is the case. After all, contrary to what classical anarchists might have thought, we would seem to have no reason to believe that Hume’s circumstances of justice—scarcity, limited generosity, and instability of possessions—are the product of the state’s existence. Most people, under most conditions, tend to pursue their own self-interest, and since there are never enough resources for satisfying everyone’s desires at the same time, we can expect individuals to ignore and

trespass the property divides, when doing so is more profitable than the alternatives. But how could we then believe that in the absence of the enforcement mechanisms provided by the state, self-interested individuals would better enhance their own well-being by production and trade than by predation and warfare?

The first section of this chapter reviews the intuitive and standard characterization of anarchy as a state of war and misery due to a failure of deterrence. This characterization enables us to see how the samaritan approach to political legitimacy would justify the state’s infringement upon its subjects’ rights. But this first section also considers a usually ignored alternative to such a state of war and misery. This alternative is one under which individuals allocate some of their resources for deterrent purposes. The second and third section could be understood as skeptical rejoinders regarding the capacities of anarchy to overcome its alleged perils.

The second section deals with the problem of trust and assurance, a problem that is central in Hobbes’ political theorizing. The third section deals with the problem of conflict resolution in the absence of an impartial party of the sort that the state could be taken to represent. This problem is central in Locke’s political theorizing. Although it seems to be evident that the law, understood as an impartial procedure for the prevention and resolution of disputes, is a prerequisite of social cooperation, this chapter concludes that it is not equally evident, contrary to what Buchanan’s quote suggests, that such procedures could not be privately created and run.

6.1 ANARCHY: FAILURE OF DETERRENCE?
Characterizations of individuals as purely self-interested might not have enough empirical support. Individuals do appear to make genuine sacrifices to their self-interest. Individuals follow moral norms, for example. Under certain conditions, those who follow such norms end up worse off that they could have been had they simply ignored them. Furthermore,
sometimes individuals go beyond what those norms demand, in the sense that they make significant sacrifices to their own well-being for the sake of others.

Yet the fact that we have no reason to believe that individuals are purely self-interested clearly does not mean that we have reasons to believe that they are either purely or predominantly altruistic. In fact, the most accurate characterization of individuals might be one that depicts them as predominantly egoistic. Kavka provides an illuminating explanation of this idea.237

Kavka analyzes the thesis of predominant egoism in terms of four propositions. The first proposition is that for most people in most situations, the altruistic gain/personal loss ratio needed to motivate self-sacrificing action reliably is large. The second proposition claims that the number of people for whom altruism and other non-self-interested motives override self-interested motives is small. The third proposition points towards the number of situations, for the average person, in which non-self-interested motives override personal interest. Again, that number of situations is small rather than large. Finally, the fourth proposition holds that the scope of altruistic motives that are strong enough to override self-interest is, for most people, equally small. This is the sense most naturally associated with Hume’s notion of limited generosity. Individuals’ generosity “is confined to concern for family, close friends, close associates, or particular groups or public projects to which the individual is devoted.”238

Kavka also provides an interesting discussion of the kinds of evidence that support this conception of human nature. They include the belief in the greater reliability of resting our expectation of others’ behavior on discernment of their interest, the explanatory power

237 Kavka, Hobbesian Moral and Political Theory, p. 64-80

238 Ibid, p. 65.
of the corresponding hypotheses in economics and political science, and the widespread use of distrustful practices, such as credit checks, surveillance cameras, and locks. Other kinds of evidence mentioned by Kavka include introspective reports, anthropological studies, and the theoretical reasons provided by certain evolutionary explanations of cooperative behavior, such as those associated with kin selection and reciprocal altruism.

One might still argue that none of this evidence shows that the predominantly egoist nature of individuals is unalterable. It could be that human nature takes those features in response to the existence of certain institutions. So, given the existence of such institutions, one of course could predict the form of behavior that would correspond to that conception of human nature. The objection is that this evidence does not address the issue of what behavior individuals would show should such institutions be radically transformed.

But as Kavka claims, experience shows us that socialist policies of removing private profits have failed, and utopian communities, even when voluntary, have disintegrated. As Kavka also notes, however, even if it were the case that human nature were heavily conditioned by cultural environment, it does not follow that predominant egoism is an inappropriate assumption to use in political theory. This is because such a cultural environment might not be readily alterable. Buchanan provides an alternative justification for using this conception of human nature in making normative institutional judgments. According to Buchanan, “best fit” models in the strictly predictive or descriptive sense may not offer an appropriate basis, because a “deliberately chosen bias towards the ‘worst case’

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239 Ibid, p. 79.
behavioral model may insure against disproportionate losses emergent under potentially realizable worst cases."\(^{240}\)

Adam Smith argued that it is not from the benevolence of the butcher or the baker that we expect our dinner, but, precisely, from their regard to their self-interest. The implications of Smith’s insights are widely accepted. Should the pursuit of the butcher’s and baker’s self-interest be constrained when it comes to producing and selling their products on their own terms, other individuals might end up with no dinner to expect. Thus, in this context, the fact that individuals are predominantly egoistic does not need to entail any sort of conflict of interests among them. Yet it is also widely accepted that self-interest has a “dark side” that does need to be constrained. As it has been recently emphasized by theorists of governance, it is in fact from the constraints upon this dark side of individuals’ self-interest that we might expect the butcher and baker to produce and trade their goods. By changing the corresponding relative payoffs, those constraints reallocate entrepreneurial activities from predation towards production and trade.\(^{241}\)

It is generally believed that those mutual gains from trade that self-interested individuals exploit once their dark sides are constrained, would seem to be available only under the sort of enforcement structure provided by the state. It is believed that should the state not infringe upon individuals’ enforcement and ownership rights in the way it does, the allocation of resources in production will not yield equal returns to those yielded when those infringements take place. This is because, allegedly, the production in question is subject to


the appropriation by others with greater probability. This lowered rate of return of productive activities provides an additional incentive for engaging in predation, which in turn entails a productive effort of mere subsistence. Thus, according to the standard view, individual’s freedom to fully exercise their enforcement and ownership rights entails a scenario in which predation is ubiquitous. This is due to an alleged failure of deterrence.

The standard view of anarchy would give us reason to believe that virtually all individuals would face a level of utility that is below the samaritan threshold of peril. Furthermore, it would give us reasons to believe that most individuals would face such a level through no fault of their own. If the state is able to overcome the alleged failure of deterrence, those individuals might then be seen as acquiring the set of samaritan rights that would enable them to infringe upon the enforcement rights of others. Given the public character of the required enterprise, that is, given the fact that all those individuals would benefit from this infringement, individuals might lack the incentives to contribute in the corresponding effort. This is why the infringement on ownership rights though the establishment of a mechanism of taxation might also be justified. The standard view of anarchy would also give us reasons to believe that for most individuals who would not consent to the existence of the state, neither of those infringements could be seen as unreasonably costly.

This standard view of anarchy and the corresponding samaritan justification of the state is, however, a mere portrayal. Reasons must be offered for why, in fact, individuals’ freedom to exercise their enforcement rights entails a failure of deterrence, such that entrepreneurial activities will be reallocated towards predation, resulting in the dramatic deterioration of the level of general welfare. Certainly, genuinely self-interested individuals would not refrain from engaging in predation, rather than in production and trade, if by doing so they could better enhance their own material well-being. But the question is whether
those same individuals would not allocate some of their resources for their own defense, and thus significantly decrease the profitability of others’ predation. Why is it assumed that only under the state’s provision of protection and justice, individuals would face a credible threat of punishment for actions that would violate other individuals’ rights?

At least initially, one would expect that under a situation where no security arrangement is in place, predominantly egoistic individuals with comparative advantages in production, facing the prospects of being predated upon, would allocate some portion of their resources to reduce the risks in question. Of course, the allocation of resources to defensive purposes diverts resources from productive purposes. But such allocation would increase the individuals’ final wealth by making the outputs of production less vulnerable to predation. This allocation of resources to defensive purposes, in turn, decreases the rate of return on the predatory activities of others. Could individuals simply allocate more resources towards predation, and thus offset the increased resources allocated to defense? They surely could. But there is an opportunity cost in doing so. Individuals might then find it more profitable to allocate their scarce resources to other economic activities.

One might regret the waste of resources involved in this attrition between predatory and defensive purposes. Yet this “waste” is not avoidable if indeed individuals are predominantly egoistic. In a world inhabited by predominantly egoistic individuals, property can be reliably held only by reducing the expected value of predation. Such a reduction in expected value can be achieved by allocating resources to enforcement. So if indeed the state could solve anarchy’s alleged failure of deterrence, its solution cannot but rely on the state’s capacity to allocate resources towards defensive purposes. The question is: Why should we believe that, lacking a state, individuals would not have a similar capacity? Why is it that individuals should not be free from exercising their enforcement rights, when the
very purpose of those rights is to provide them a material guarantee against others’ acts of predation?

Perhaps the most commonly offered argument to support the belief in an alleged failure of deterrence is the argument from public goods. According to the public goods argument, there are certain goods that due to their own characteristic features, the market cannot produce efficiently. Public goods are defined by two characteristic: non-rivalry of consumption and non-excludability of benefits.

A good is non-rival when a unit of the good can be consumed by one individual without detracting from the consumption opportunities still available to others from that same unit. A good is non-excludable when it is difficult, if not impossible, to prevent individuals from enjoying it once it has been produced. Contrary to what is usually suggested, however, the worry regarding the availability of public goods in a pure market economy seems to be grounded only on the dissociation of individual contribution and individual benefit, that is, what has been referred to as non-excludibility. Whether the good is non-rival or not does not seem to be very relevant in providing individuals with incentives to produce it. If the good is excludable but non-rival, charging a profit-maximizing price might indeed entail that certain individuals would be “inefficiently” excluded. Since allowing their consumption entails zero marginal cost, they could be better off without anyone being worst off. But this inefficiency is hardly a matter of concern if we do not share the normative assumptions of welfare economics. 242

242 Moreover, as Harold Demsetz has argued, to have the state supply the goods in question at marginal cost and to finance them through taxation might result in the abandonment of the price system in that sphere of production. In other words, in the absence of perfect information, allowing additional individuals to consume the nonrival good might not entail zero marginal cost. It might entail the sacrifice of valuable information that only market prices can communicate.
It is widely claimed that the state’s provision of “law and order” constitutes an instance of the provision of a non-excludable good. Unfortunately, most theorists simply assert this claim based on the fact that that the protection and security provided by the state police and criminal system are goods from which everyone benefits. This might indeed be the case. But from the fact that state production of a good has public goods characteristics it will not certainly follow that the good in question is nonexcludable. It will simply follow that the exclusion costs are not being incurred.

Sometimes, excludability is a matter of physical impossibility. In other cases, excludability might be physically possible. But it will not be always possible to incur the necessary costs and make a profit at the same time. Where the problem of excludability is a matter of costs, the development of new technologies might decrease those costs and thus turn previous nonexcludable goods into excludable ones. But when the state provides such goods in a coercive manner, there might not be enough incentives to develop technologies of exclusion. In the case of order and security, however, is not that hard to see how such exclusion could be implemented. In fact, it is certainly puzzling why so many theorists believe otherwise.

One might think of the provision of security as the provision of an intangible umbrella. Under the range covered by this umbrella, individuals are secure. But one might then think that if such an umbrella is produced with the intention of covering a particular individual, other individuals might end up being covered as well. So one might wonder why individuals would face an incentive to pay for their umbrella. One could then conclude that no firms would face much of an incentive to enter into the market of security umbrellas either. Yet the provision of security, in certain regards, does not really amount to the provision of an intangible umbrella. The issuing of credible threats of retaliation, for example, might constitute one of the central mechanisms of defense that individuals have.
But a self-interested individual will not incur the costs of retaliation against individuals who harm those that allegedly have incentives to free ride on the security arrangements of others.

We expect individuals to specialize in that in which they have a comparative advantage. Thus, if individuals were free to exercise the full extent of their basic rights, some among them could think that they could provide enforcement services in a more efficient way than others can. Attempting to maximize their own well-being, some of those individuals could then form protection agencies and offer these services to others. For the same reason, those other individuals could buy those services from them. We might expect that the availability of protection services will increase the ability of individuals to reduce the likelihood of predation. But protection agencies would offer their services to particular individuals, and those who do not chose to hire such services will simply not be protected by them.

Certainly, we might always derive some benefit from the security arrangements of others. But the mere presence of positive externalities in the production of a good is not sufficient for concluding the problematic nature of its private provision. Our education may benefit many other people, and their education may benefit us. But the benefits of providing ourselves with an education are far greater than the benefits that we could derive from living around educated people. In that same way, it will certainly be beneficial for us if in the absence of the state, everyone around us hires good protection services. But it does not seem to be a significant factor to take into account if private protection agencies publicize the scope of their services, and individuals know that those who do not hire such services will not be protected by the agencies in question. Potential crime victims who do not hire

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243 Associations of mutual-protection might certainly coexist along with commercial agencies.
protection services might then be able to enjoy some positive externalities from the protection of others. Yet it is clear that the extent of the positive externalities that are supposed to justify a widespread practice of free riding is virtually nonexistent.

6.2 THE HOBBESIAN WORRY

In the absence of the state, one might think that predominantly egoistic individuals would consider predating on the productive activities of others, rather than engaging in those productive efforts themselves. But one might also think that those who could gain more by engaging in production than they can gain by predation, might find it profitable to allocate resources for defensive purposes. The resources allocated for defensive purposes might reduce the profitability of predation to a level under which only some individuals would find it as the most profitable option. Hobbes thought, however, that in a condition in which there is no coercive power of the type the state represents, individuals would live in a state of war of all against all making the life of man “solitary, poor, nasty, brutish, and short.” Hobbes’ reasoning was not based on the alleged public goods characteristic of protection. One of Hobbes’ major arguments for supporting this conception of anarchy was the argument from the impossibility of self-enforcing agreements. Hobbes wrote:

If a covenant be made, wherein neither of the parties perform presently, but trust one another; in the condition of mere nature, upon any reasonable suspicion, it is void… For he that performeth first, has no assurance the other will perform after; because the bonds of words are too weak to bridle men’s ambition, avarice, anger, and other passions, without the fear of some coercive power; which in the condition of mere nature, where all men are equal and judges of the justness of their own fears, cannot possibly be
supposed. And therefore he which performeth first, does but betray himself to his enemy; contrary to the right of defending his life, and means of living.  

The logic of the idea seems to be unquestionable. After an exchange of mutually beneficial promises of which performance is not simultaneous, if the first agent performs his promise it makes sense for the second agent not to do the same, that is, to default. Since the second agent has already secured the benefits from the first agent’s performance, his compliance will only make him lose part of those benefits. Knowing this, the first agent will probably never perform in the first place; and since this is common knowledge the contract will probably never take place. By not being able to enter into contracts, people would only reap the benefits of simultaneous exchange. Yet we might have reasons to believe that such exchanges will yield, again, a level of production of mere subsistence. For individuals would lack the capacity to reap much of the benefits of social cooperation, including those arising from joining others in an effort to minimize their vulnerability to predation.

The problem of contract under sequential conditions of performance has the incentive structure of the well known prisoner’s dilemma. In a prisoner’s dilemma, the payoff for defection when the other party cooperates is the highest payoff, the payoff for cooperating when the other defects is the lowest, and the payoff for mutual cooperation is higher than the payoff for mutual defection. Facing this structure of incentives, each party defects in an attempt to reach the highest possible payoff. But they end up with the payoff for mutual defection, a payoff that is smaller than the one they would receive for mutual cooperation. Here is where the dilemma lies. For such a payoff seems to be unreachable. As soon as the parties agree with one another to cooperate, each of them sees that if the

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244 Hobbes, *Leviathan*, XIV [18], p. 84.

245 Ibid, XIV [18].
other keeps his word he will be better off by not doing so. This is why the ‘bonds of words’ are too weak. In contemporary terms, defection is the “dominant strategy”; it is the best choice regardless of what the other party does.²⁴⁶

That in one single contract default is rational and performance is irrational seems to hold true even if we consider that parties might have the capacity to threaten others with punishment measures. If the expected cost of defaulting is raised high enough by the resources allocated for enforcement, a contract might become binding. The problem is, however, that in the occurrence of one single contract, the payoff for not reciprocating is equal to the value of the contract. So the second party might always resist the enforcement efforts by incurring resistance costs up to the contract value, that is to say, as long as his net payoff from defaulting is not negative. And for the first party, it never makes sense to allocate resources to enforcement beyond that very same level. Any threat of enforcement would then lack credibility.²⁴⁷

Thus, Hobbes worries that, since they do not have any reasons to believe that other individuals would not act opportunistically in non-simultaneous settings, self-interested

²⁴⁶ Contrary to the standard prisoner’s dilemma, however, in the dilemma of contract only the second agent has the opportunity to act opportunistically. The first party does not perform because it is rational for the second partner to become a defaulter. This is why such settings are usually called “one-sided” prisoner’s dilemma, and they are best captured by an extensive representation.

individuals would rationally decide against taking the risks of performing their part on any agreement that they might enter. Furthermore, given that the problem they allegedly face is the impossibility of entering into agreements, there is presumably nothing they can do voluntarily among themselves to solve the problem. For whatever they decide to do, they would face the same incentives towards non-compliance that they face in any agreement of a lower level. There is, therefore, no clear room for making attributions of individual responsibility. This Hobbesian line of argumentation could then be taken to entail the existence of the sorts of conditions under which, according to a samaritan approach, the state might be justified in infringing upon individuals' rights. Roughly, the infringement on individuals' rights is justified because, in a situation in which “all men are equal and judges of the justness of their own fears,” individuals would be precluded from entering into the sort of arrangements that would adequately constrain the dark side of their self-interest.

In its simplest form, most contemporary social theorists would tend to acknowledge that the argument from the impossibility of self-enforcing contracts is unsound. The problem is that the Hobbesian story regarding how self-interested individuals are not able to enter into mutually profitable arrangements in conditions of non-simultaneity seems to be an artificially truncated story. In the occurrence of one single contract, it might be true that default is the dominant strategy under such conditions of non-simultaneity. This, however, seems to be only a special case of a quite marginal significance. In dealing with multiple interactions, is it true that binding contracts require an agent other than the parties themselves; an agent that cannot be bound by contract to the parties as its principals? Could enforcement depend rather than on the will of a programmed enforcer, on the wills and interests of the parties themselves?

As it was explained above, the problem of contract under sequential conditions of performance has the incentive structure of the well known prisoner’s dilemma. It is widely
accepted, however, that many of the situations that are alleged to have the structure of the prisoner’s dilemma are better modeled by a version of the game in which players play it repeatedly. It is also generally believed that cooperation may arise when the game is played repeatedly.

As Robert Axelrod explains, the possibility that players might meet again means that the choices they make today not only determine the outcome of the present move, but also influence the future choices of the players.248 This is because players who defect in one round can be punished by defections in subsequent rounds and those who cooperate can be rewarded by cooperation. So by defecting, an individual will reap the benefits of the current interaction. But he will lose future opportunities for profit. For now the other party, having no guarantee that this individual understands the benefits of continued cooperation will choose to defect. By cooperating, on the other hand, an individual signals his willingness to resist the temptation of the short-term gains of defection for the long terms gains of cooperation. We should then expect that cooperation might arise, as Axelrod puts it, even “in a world of egoists without central authority.”249 For individuals to achieve the cooperative solution, it is not necessary to assume mutually expected rationality. The cooperative equilibrium might be a result of a mere process of learning, that is, of trial-and-error adaptation to success and failure.

A well-known line of argument, however, claims that if it is accepted that the profitability of performing for the second party ceases to be such in the last contract, the parties will see rapidly that their calculations in the first contract are suddenly identical to those they would make in the last contract. And the first contract might never take place. If it

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249 Ibid, p. 3.
does not pay to cooperate in the last contract, given that there is no future to influence, then why is it that individuals should cooperate in the next-to-last contract, when they already know that they will not cooperate in the last contract? But if individuals should not cooperate in the next-to-last contract either, why should they do it in the previous one? As long as the players do not know the exact number of times they will interact, however, it is usually accepted that cooperation might still arise. What matters is how high the probability is of the next contract being the last. If the probability is high enough, the expected value of future acts of cooperation might become small enough to make defection the most profitable strategy. The question then is how significant the threat of the last contract phenomenon is in realistic settings, that is, in settings in which individuals rarely know the exact number of times they will interact, and where such a number is greatly determined by the way in which individuals choose to behave.

Axelrod’s experiment on the consequences of iteration for the arising of cooperation made the players interact an indefinite number of times. This was done in order to focus the analysis precisely on realistic settings. But in order to treat the problem in “its fundamental form” he did not allow for some form of activities that alter the strategic interaction. For his own purposes, this methodological decision might be entirely justified. For our own purposes, however, those mechanisms excluded might become crucial for assessing the realistic significance of the last contract phenomenon, as well as of other concerns regarding the robustness of cooperation in the absence of the state.

Axelrod eliminated the possibility for a player to watch how the other player had interacted with third parties. The only information available to the players about each other was the history of their own interaction. However, if we allow for the existence of this type

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250 Ibid, pp. 11-12.
of monitoring, and the resulting development of reputations, and if there is a significant probability that the best strategy of third parties will be influenced by the strategies adopted in earlier contracts by the other parties, the strategic situation will be significantly affected. Allowing for external monitoring creates the strategic conditions that David Schmidtz has referred to as a “concatenated” prisoner’s dilemma.²⁵¹

A concatenated prisoner’s dilemma is a series of iterated prisoner’s dilemmas that one plays with more than one party. In a standard iterated prisoner’s dilemma, a player’s defection in one move might preclude the possibility of mutual cooperation in the following one. In a concatenated prisoner’s dilemma, that same defection might also limit the payoffs the player can realize in other different games. Under such conditions, it is the “sucker” who performs in the last contract and not the one that free rides on the sucker’s performance, who acquires a valuable reputation as a desirable partner. In other words, in the concatenated prisoner’s dilemma, the alleged conflict between individual and collective rationality is dissolved without having to assume the existence of an exogenous enforcer.

One may still think, however, that while it might make sense to cooperate with others when interacting repeatedly, not everyone would see this point. Hume argued, precisely, that there would be no need for government had every man sufficient sagacity and strength of mind to persevere in a “steady adherence to a general and a distant interest, in opposition to the allurements of present pleasure and advantage.”²⁵² Similarly, Hampton argues that though it may be true that it is rational to cooperate in iterated situations, individuals might fail to appreciate the long terms benefits of cooperation and opt instead for


²⁵² Hume, An Inquiry into the Principles of Morals, Section IV.
the short-term benefits of non-cooperation.²⁵³ And then, “Given the fear that one’s partner is
too shortsighted or the fear that one’s partner will believe that one is shortsighted, it is
rational to take a single-play orientation.”²⁵⁴ This is in fact how Hampton reconstructs
Hobbes’ argument. Kavka offers similar considerations in support of Hobbesian
conclusions.²⁵⁵

So if people might fail to appreciate the long-term benefits of cooperation and opt
instead for the short-term benefits of non-cooperation, would it not make more sense to act
exactly as the shortsighted do and thus avoid being prey to their imprudent behavior?
Contrary to what this argument suggests, however, the reliability of future partners is not a
random variable. As Anthony de Jasay explains, in the type of realistic setting described by
a concatenated version of the prisoner’s dilemma, any single contract acts as a link in a
chain of contracts stretching into an uncertain future. But that future is shaped by the
successive actions and reactions of the parties themselves.²⁵⁶ In realistic settings, whether
a game is repeated is not, therefore, only a matter of exogenous circumstances. It is mainly
a product of the players’ maximizing calculations.

Gordon Tullock asks us to imagine that thirty individuals voluntarily pair themselves to
play a prisoner’s dilemma game in isolation booths.²⁵⁷ In this experiment, however, the
participants are free to communicate the outcome of their games with the other participants.
As Tullock explains, because of the information flow due to gossip, to choose the

²⁵⁴ Ibid.
²⁵⁶ De Jasay, Justice and Its Surroundings, p. 40.
1073-1081.
noncooperative solution would make it harder to find willing partners. Those who choose the noncooperative solution would have to offer some side-payments until something in the way of a reputation is established. So, under these conditions, all it takes for the predominance of cooperation is that people who play the games do so in a voluntarily fashion. For, as Tullock concludes, “If you choose the noncooperative solution, you may find you have no one to noncooperate with.”\textsuperscript{258} Those conditions approach reality. Individuals are not usually stuck with contractual partners. Rather, they choose them.

Thus, the concatenation of the game might entail that the maximum payoff the second party can gain by defaulting is, as it is the case in the Hobessian version, the value of the present contract. Yet now that payoff might not be the greatest payoff available. Since other parties might either not deal with a known defaulter or do so only on worse terms, default by the second party amounts to losing some or all of the expected benefits from future contracts. So if we think again about the scenario in which individuals have certain actions at their disposal to induce or resist performance, the concatenation of the game would reduce the upper bound of the resistance cost that the defaulter will be willing to pay. The upper bound of the enforcement cost, however, would tend to increase. For the performer could now expect that successful enforcement in the present contract would have a positive effect on the payoffs from future contracts. Reduced future enforcement costs are likely to be a major source of those benefits.\textsuperscript{259}

\textsuperscript{258} Ibid, p. 1081.

\textsuperscript{259} This is why police departments might be justified in engaging in high-speed pursuits of criminals. Critics might claim that the costs that those pursuits demand, mainly in terms of the risks imposed to the civilian population, would seem to be almost always greater that the benefits from a successful apprehension. But this is only true under a static analysis. For it might be the case that actually engaging in that type of enforcement effort when the need arises is the best strategy to minimize those very same
So if it pays the first party to incur enforcement costs in excess of the value of a present contract in view of the higher net payoff that this will secure in future contracts, whether or not this is the last contract with a particular party might become quite irrelevant. As long as there is a significant probability of interacting with other parties in the future, it makes sense to incur such costs even in the last contract. Of course, if the payoff for defecting is big enough to make it immune to the expected costs yielded by threat of punishment, self-interested individuals might not be able to reap the benefits of the corresponding interactions. Yet under those conditions, the threat of punishment by the state will presumably be equally ineffective. This is why individuals tend to arrange their businesses in such a way as to avoid situations in which big payoffs for defecting exist. Making visible and irreversible investments that will pay off best if one keeps his word is one way in which firms and entrepreneurs usually win trust, and thus have access to profit from opportunities that would otherwise be unavailable.\(^{260}\)

The previous section argued that in realistic settings, that is, in settings in which we have some information about what others do and in which we are always free to interact or not, the social significance of the last contract phenomenon might be quite marginal. Yet one might wonder whether it is indeed realistic to believe that once we leave the communal life to enter into the large society, individuals would indeed have access to the flow of information upon which the argument relies.\(^{261}\) For performance to be a serious contender enforcement costs in the long run. If criminals know that they will be chased, and thus the probability of their apprehension increased, many individuals might simply not find it profitable to behave as criminals.\(^{260}\) See Benjamin Klein and Keith B. Leffler, “The Role of Market Forces in Assuring Contractual Performance,” *Journal of Political Economy* 89 (1981): 615-641.

\(^{261}\) On the importance of community for cooperation, see Michael Taylor, *Community, Anarchy, and Liberty* (Cambridge University Press, 1982).
in the choice of strategies, it must be the case that the future casts enough shadow onto the present. But it must also be the case that the present casts enough shadow into the future. Default in today’s game remains consistent with maximizing the present value of all future payoffs if it has no considerable effects on future interactions. Why should we believe that our actions indeed would have such an effect in the sort of impersonal societies in which most people live?

It is undeniable that under conditions of strict anonymity the default strategy is restored to dominance. It is important to remember, however, that such a strategy ends up yielding a strict Pareto-suboptimal outcome. There is an alternative state of affairs in which both parties are better off. But then we might think that there would be no clear incentive to remain anonymous. For it is precisely their anonymity what prevents individuals from reaping the benefits of cooperation. This is the reason why Schmidtz suggests that if anonymity poses a threat to cooperation, “that very supposition suggests that the community would not remain so large and impersonal.”262 This should not necessarily have to mean that, in the absence of the state, only small communities would be able to prosper. If unknown potential partners wish that they were known to those who offer a profitable exchange, such a state of affairs itself might constitute a profitable opportunity for those capable of providing a remedy.263

As Daniel Klein notes, the problem with dealing with an anonymous partner in conditions of non-simultaneity is that we do not know what his payoff is for cooperating once

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262 Schmidtz, The Limits of Government, p. 100.

we have trusted him and performed our part. But since this mistrust might amount to the forgoing of a mutually profitable outcome, the parties themselves face incentives to pay someone to report on their likely payoffs. It is not necessary that this third party have a history of which we are aware. After all, people's stake in the future is what makes them ultimately trustworthy, and there might be other ways of signaling a stake in the future than those involving the use of reputations. It was mentioned above that firms gain trust, for example, by making visible and irreversible investments. Upon those grounds, the third party might then grant a 'seal of approval' indicating that our potential partner's payoff for defaulting is not greater than his payoff for cooperating. The third party's direct involvement in our transaction as a 'middleman' would be another form that the supply of assurance might take.

Thus, contrary to what might happen with our direct potential partner, we might have reasons to trust this specialized third party. For a mistake due to a lousy job would decrease the value of its name, and to keep a good name is an essential element in the generation of his profits. If we need to pull off the interstate for sudden repairs, we would probably choose to pull into Midas rather than into Joe's Garage. The local Midas franchise might be run by an equally unknown Peter. But we know that while there will be no future Joe should be concerned with when dealing with us, the situation is not the same for Peter. If Peter cheats

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265 For the many forms that the supply of assurance can take, see Klein, “The Demand for and Supply of Assurance.”
us, he will face the prospect of punishment from the franchisor, who has a clear interest in keeping the value of his brand name.

On the other side of the problem, the local Midas franchise might not know the reputations and future plans of their non-local patrons, and thus might not be willing to accept personal checks from them. However, they are willing to accept credit cards. By doing so, the patron’s personal name and history became completely irrelevant. All that matters is that a known someone, who has a valuable reputation to lose is willing to step up behind the unknown traveler. Thus, it is our understanding of the third party as predominantly self-interested that makes him ultimately trustworthy in our eyes. This is what allows us to enter into a mutually profitable exchange with someone completely unknown to us.

In the problem of contract under non-simultaneous conditions of performance, the non-cooperative solution envisioned by Hobbes might then constitute only a special case with marginal social significance. When the interactions among people take place in real life, they usually take place in a repetitive fashion and before the sight of many; or before the sight of few who have clear incentives to spread the word among those for whom it is profitable to know. In such a type of realistic setting, the resources it pays to spend on enforcement are increased and those it is worth spending on resistance are reduced in comparison to the Hobbesian setting. As long as both parties know that it makes sense for an individual to be willing to allocate resources to enforcement that outweigh those that make sense to allocate to resistance, actual enforcement costs might then be reduced considerably. In other words, contrary to what Hobbes thought, the non-simultaneity of contracts itself does not seem to justify anything close to the claim that in the absence of the state there will be either “no place for industry” or “continual fear, and danger of violent death.”
6.3 THE LOCKEAN WORRY

Stergios Skaperdas claims, “the argument that repeated interactions and high values placed in the future will by themselves solve the fundamental problem of restraining the dark side of self-interest is unsustainable.”

If that were the case, Skaperdas claims, “there would be no need for laws, courts… enforcement agencies, and all the institutions and organizations of governance, for individuals agents could do without them if they just had long enough time horizons.”

Yet that is precisely part of the problem. Not all individual agents have long enough time horizons under all circumstances. But that is only part of the problem. Even in interactions between agents with long enough time horizons, disputes might arise. And, for some individuals, predation could still be the most profitable way of making a living.

It is for dealing with these problems that mechanisms of governance are needed. Locke’s worry is, precisely, the worry that individuals would have no adequate means of dealing with those issues should the state not infringe upon their rights in its characteristic manner.

Locke saw the state primarily as an “indifferent judge,” rather than as a mere contract enforcer. Locke thought that in the absence of the state, “self-love will make men partial to themselves and their friends” and that “ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow.”

For Locke, the need for the state mainly arises from the more fundamental need for counting on there being an agent capable of surpassing individuals’ bias towards their...

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267 Ibid.

own interests. This agent would establish the standard of right action, determine violations to that standard, and execute sentences against offenders.269

In his application of the samaritan criterion of political legitimacy, Wellman restates Locke’s worry. Wellman claims, “Without an authoritative legislative body to establish a definitive set of rules that everyone must follow, there will be conflicts even among well-intentioned people who genuinely seek to treat each other according to the demands of morality.” Furthermore, “without a standing judicial body to impartially adjudicate conflicts and assign criminal punishments, attempts to exact revenge and mete out justice will lead to increasingly bloody conflicts.”270 Under this sort of scenario, the resulting pattern of incentives might be only slightly better for supporting a structure of production than the one that is derivable from the Hobbesian argument. So Wellman thinks that an appeal to samaritanism justifies the way in which the state typically acts. The state would be allowed to infringe upon individuals’ enforcement and ownership rights in the ways required to establish the sort of higher impartial authority that is lacking in anarchy.

One might think, however, of some obvious and often ignored possibilities. The worry is that individuals would be free to decide what justice requires, and that they would be equally free to pursue their own judgment and punish others according to what they consider justified. But in a sense, individuals are also free to do all that under the scenario in which the state infringes upon individuals’ rights. If most individuals do not tend to exact justice according to their own judgments it is, again, because of the resources allocated by public officials to deter such actions. But, why, again, should we assume that private individuals would not allocate resources towards the same end? Why should we believe


that individuals would not hire protective services which will cover the type of unjustified pursuit of private justice that the state’s actions are supposed to deter? The appeal to public goods was found unwarranted. Protection associations can very easily guarantee that only those who pay for their services will be the ones who enjoy them. The appeal to individuals’ incapacities to enter into agreements in which performance is non-simultaneous was also found unwarranted. Why is it then that individuals would lack the means of deterring the attempts to exact revenge and mete out justice that, according to Locke and Wellman, will lead to increasingly bloody conflicts? 271

Political theorists have tended to be skeptical regarding the guarantees that the involvement of protective agencies will bring about. Kavka, for example, believes that protection agencies are “bound to be subject to violent conflicts and feuds brought on by differing judgments concerning disputes among their clients.” Kavka claims, “if agency A finds for its client in his dispute with a client of agency B, while agency B renders an opposite judgment, there is no final settlement of the dispute short of fighting or accepting a compromise that neither side is likely to regard as justified.”272 The reason is simply that “predominantly egoistic clients will hire agencies that they expect will lean over backward to interpret and judge disputes in their own client’s favor. If so, to be successful in recruiting and retaining clients, agencies will have to follow such a pro-client policy.”273 Wellman has similar worries. He says,

because private companies are concerned principally with profits, each would strive maximally to attract and retain clients. Since people would select

271 Ibid.


agencies for self-interested reasons, they would seek agencies that best protect their clients. A problem arises, then, since maximally protecting clients could require a company to disrespect the moral rights of non-clients. Because these non-clients of one agency would likely be customers of another agency that similarly strove to protect its clients, however, there is apt to be constant strife and struggle between competing protective agencies which threatens peace and leaves individual moral rights vulnerable.²⁷⁴

According to this line of argument, the problem in assuming that the self-interest of the protective association provides a guarantee against the excesses of private individuals is that “each agency would be concerned first and foremost with maximizing profits, and as such, its prime objective would be to acquire and retain clients.”²⁷⁵ Therefore, as Wellman puts it, “Jane’s firm and Jennifer’s agency would be liable to conflict in the same ways (and for analogous reasons) that Jane and Jennifer individuals would have.”²⁷⁶ Lacking a unique and final adjudication procedure of the type that the state offers, which it is only available by not letting individuals to exercise their enforcement rights, we are told that there would be no hope for avoiding a constant war of all against all. Upon reflection, however, it will not be entirely obvious why that must be the case.


²⁷⁵ Wellman, “Samaritanism and the Duty to Obey the Law,” p. 16.

²⁷⁶ Ibid, p. 15. Ayn Rand puts Kavka’s and Wellman’s worry in very simple terms: “Suppose Mr. Smith, a customer of A, suspects his next-door neighbor, Mr. Jones, a customer of B, has robbed him; a squad of Police A proceeds to Mr. Jones’s house and is met at the door by a squad of Police B, who declare that they do not accept the validity of Mr. Smith’s complaint and do not recognize the authority of A. What happens then? You take it from there.” Ayn Rand, Capitalism: The Unknown Ideal (New York: New American Liberty, 1967), p. 335.
The idea behind the previous line of thought is initially plausible. Profit maximizers would engage in warfare if the expected benefits of warfare are regarded as greater than the expected costs. This view has been held in classic work on international relations theory. Kenneth Waltz claims that “A state will use force to attain its goals if, after assessing the prospects for success, it values those goals more than it values the pleasures of peace.”\footnote{Kenneth Waltz, \textit{Man, the State, and War: A Theoretical Analysis} (New York: Columbia University Press, 159), p. 60.} If indeed the expected benefits of warfare are greater than its costs, which include the forgone expected benefits of the alternatives, profit maximizers will indeed engage in warfare. It is unclear, however, how that could be possible.

One could think of war as a costly lottery. The contending parties pay the costs of war with the expectation of achieving a particular outcome with certain degree of probability. The outcome of war is never certain. What is certain, however, is that resources allocated for military purposes are resources that are not allocated for productive purposes, and that when allocated in military purposes many of them will be consumed in the attrition of battle. The line of thought exemplified by Kavka and Wellman in the previous section, assumes that a profit maximizer will incur such costs when they are expected to be lower than the expected benefits. Yet the same outcome that warfare is expected to produce could always be brought about by a negotiated settlement, and thus by not incurring the destruction and arming that is involved in warfare. Thus, the gamble of war is, for both parties, a more expensive way of getting what they expect to get than is a bargained settlement within the
range established by the winning probabilities of warfare. Why would profit maximizers choose the more expensive alternative? As James Fearon explains,

As long as both sides suffer some costs for fighting, the war is always inefficient ex post—both sides would have been better off if they could have achieved the same final resolution without suffering the cost (or by paying lower costs). This is true even if the costs of fighting are small, or if one or both sides viewed the potential benefits as greater than the costs, since there are still costs.

It has been suggested that when there is only a finite number of ways in which an issue can be divided, it might be rational to choose warfare over settlement. This is because there could be simply no division of the issue upon which both parties would prefer over the expected outcome of war. Fearon is skeptical about the empirical relevance of this sort of consideration as an explanation of the rationality of war. But as Robert Powell explains, the fundamental deficiency of issue-indivisibility accounts of the rationality of war lies on an ignored possibility. This is the possibility of dividing control over the disputed issue by a mechanism that offers the contending parties the same probability of winning offered by war, but without the costs of fighting.

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278 The more destructive war is expected to be, the lesser expected utility of war for both sides and the greater the bargaining range.


280 Ibid, p. 382.


It has also been suggested that the existence of the bargaining range that makes warfare inefficient assumes that the agents are risk-averse or risk-neutral over the issues.\textsuperscript{283} Skaperdas argues, for example, that if both parties are risk lovers, the set of credible agreements is empty, and when only one party is a risk lover, credible agreements might not exist.\textsuperscript{284} That individuals are indeed risk-averse, at least when dealing with important issues, is certainly a plausible assumption. In any case, it is mistaken to believe that only risk-averse or risk-neutral individuals would face a bargaining range. This is because, once again, the contending parties could agree to the implementation of a mechanism of conflict resolution that gives them the same probabilities of winning in warfare but without the costs of fighting. In terms of risk, both alternatives, warfare and settlement, have the exact same risk.

Skaperdas assumes that settlement involves no risk. But there is no reason why that must be the case. If the parties are risk lovers, they might simply add an element of risk to the settlement by using some uncertain mechanism of allocation. So, among profit maximizers, settlement must be preferable even if the parties were risk-acceptant, rather than risk-averse. But although the contention that the bargaining set for risk-lover parties is empty might be mistaken, the idea that risk-aversion favors settlement over conflict is clearly correct. War is uncertain at many levels. A settlement need not be so if indeed individuals are, as most of them are, risk-averse when it comes to important matters. Thus, the potential certainty of settlement expands the bargaining set of mutually profitable outcomes.

\textsuperscript{283} Fearon, “Rationalistic Explanations for War,” p. 388.

Wellman claims that since private providers of protection would be interested in maximizing profits, “it takes little imagination to see how peace and stability would be undermined.”285 Yet self-interest is not enough for warfare. Neither is it an indivisible contention nor a contention among risk lovers. Genuine self-interested parties have a bargaining range of mutually profitable outcomes to exploit. Self-interested parties that are averse to risk have an even greater bargaining range. Thus, contrary to what Wellman suggests, if anything, it does indeed take some imagination to understand why profit maximizers would choose to waste resources in warfare. Both Kavka and Wellman suggest that private protection agencies would be concerned, primarily, with maximizing profits, and that this will lead such firms to persistent conflicts among themselves. Yet the employees of such firms, for example, would hardly ever have a direct stake in the disputes of their companies’ customers. Those employees, if they are indeed predominantly egoistic, will not be willing to risk their own lives without being paid a wage differential for danger. We then have reasons to believe that a service of the sort that Kavka and Wellman claim that self-interested individuals would seek will be more expensive that a service of protection based on negotiated settlements between parties. By non-violent means, however, similar results can be achieved at lesser costs. Why would self-interested individuals choose the former over the latter? Why would firms enter into such an unprofitable market?

These very same sorts of considerations help us understand why formal state legal institutions and mechanisms for the enforcement of commercial contracts are rarely used.286 Profit maximizers tend to avoid having to incur the costs associated with the use of the state courts, and agree on a solution within the bargaining range specified by each party’s


286 See Dixit, Lawlessness and Economics, pp. 25-58.
expected outcome from the use of state courts. We might believe that these sorts of agreements, outside the court system, are possible precisely because of the existence of the court system. But what makes the agreement possible is, ultimately, the expected costs of using such a system. If the alternative were warfare rather than the use of the state’s courts, and if such alternative were at least as costly as the use of the state’s courts, why should we believe that profit maximizers would now be willing to incur those costs? Why would they be willing to do so if they could also negotiate an agreement within their bargaining range that leaves both parties better off? We might also think that, in the absence of the state’s courts, the parties would not be able to enforce their agreement in the way in which such courts enable them to do. But, again, the enforcement that the mere existence of the courts is taken to provide does not amount to more than the parties’ expectations that, should the agreement not be observed, certain costs will need to be incurred by the use of such courts. Similar expectations will arise when considering the costs of warfare.

The minimum payoff an agent would be willing to accept under settlement is defined by the agent’s expected payoff under warfare, which depends, mainly, on the relative capabilities for violence. The resources invested in capabilities for violence are, however, resources that are not invested in productive activities. Thus, while a bargained settlement avoids the “attrition” costs of war, it does not seem to avoid what we might call the “butter” costs of arming, that is, the forgone benefits of not using those resources for productive activities.

Furthermore, warfare is profitably avoidable when the involved parties are able to communicate and bargain with each other. Yet the very possibility of communicating and bargaining brings its own problems. Sometimes, the parties might be over-optimistic regarding their chances of winning. Sometimes, the parties might be over-optimistic
regarding the chances that the other will not fight when challenged. Under those circumstances, parties might overestimate their bargaining leverage and ask others to concede more than what their reservation values in fact are. That is, parties might attempt to strike a deal outside the existent bargaining range. These sorts of miscalculations would make it more difficult to locate a mutually preferable negotiated settlement over the option of war.

As Fearon notes, the problem is not the mere existence of private information regarding relative power or capacities to fight. For if this were the problem, and if indeed warfare is Pareto inefficient, the parties could decide to make such information public. The fundamental problem is that those parties have incentives to misrepresent such private information in bargaining situations in an attempt to obtain a better deal. Fearon suggests that, in some circumstances, the only way to surmount this barrier to communication is to take actions that produce a real risk of inefficient war.287 This is because such actions could be seen as a costly signal, that is, a signal that only a particular type of party will be willing to send, such as those with a certain willingness or ability to fight.288 So the idea is that a risk-return tradeoff emerges under private information. Some authors go further, and claim that, between rational parties, war itself might be understood a process by which the parties’ beliefs are updated regarding the probabilities of winning. War ends when disagreement is sufficiently reduced to create a mutually perceived bargaining space.289

One would think, however, that the presence of private information, in conjunction with incentives to misrepresent that information, rather than conducing agents to war will

287 See Fearon, “Rationalistic Explanations for War.”
only complicate the process of bargaining. In realistic settings, individuals hardly play ultimatum games.\textsuperscript{290} Certainly, this bargaining process might be significantly costly. But do we have reasons to believe that it is more costly than warfare, such that warfare will be preferred? Moreover, there would seem to be nothing that precludes individuals from engaging in advanced agreements, in order to economize precisely those bargaining costs in the expectation of continuous dealings.\textsuperscript{291} This is a common practice between insurance companies. Insurance companies tend to avoid the costs involved in the use of the state legal institutions, and settle claims directly among themselves. Yet in order to avoid the costs of bargaining for solutions on a case-by-case basis, they enter into advanced agreement regarding procedures of conflict resolution.

Thus, parties might choose bargaining for a settlement over going to war in order to avoid the costs of destruction involved in warfare. But parties might choose to arbitrate their conflict by means of an impartial procedure, rather than bargaining for a settlement, in order to avoid the costs involved in the bargaining process itself. The use of impartial procedures of conflict resolution could also enable the parties to save in arming.

In certain cases, the rules of division of the impartial procedure could offer a party a lower winning probability than a division according to the winning probabilities of warfare. Yet such a difference might not be enough to justify a policy of warfare once we take into

\textsuperscript{290} For a critique of informational accounts of the rationality of war, see Bahar Leventoglu and Ahmer Tarar, “War and Incomplete Information,” unpublished manuscript. Leventoglu and Tarar argue that although the sort of risk-return equilibria informational accounts of the rationality of war are based upon
exist, so do "non-risk" equilibria in which the probability of war is zero. They claim that private information by itself often merely leads to delay in reaching a negotiated settlement, rather than to war.

\textsuperscript{291} This point is emphasized by David Friedman. See his \textit{The Machinery of Freedom: Guide to a Radical Capitalism} (La Salle, Illinois: Open Court, 1989), p. 114-120.
account the costs that the impartial procedure avoids in terms of bargaining and arming. This is particularly true if we consider the characteristics of an impartial procedure governed by rules of justice rather than, for example, by the tossing of a coin. Rules of justice enable parties to form expectations, and to adjust their present behavior to avoid unnecessary costs. Also, parties willing to subject themselves to rules of justice as a means of conflict resolution can also be understood as sending a costly signal to others, and thus as a way of exploiting the profit opportunities that are closed, under iterated settings, to those unable to commit themselves in such a way.

The benefits involved in the use of impartial procedures governed by rules of justice entail that there is a profit to be made for those who could offer the corresponding mechanism, such as arbitration firms. The commercial success of these firms will greatly depend on the impartiality of its past verdicts, or on the expectations that it will produce such types of verdicts. This is because impartial companies are going to be agreed upon more easily by all potential parties of disputes. Arbitration companies with reputations of favoring the higher bidder would simply not be chosen as often, and thus would be driven out of business by impartial companies.

Landes and Posner have argued, however, that private rule formation is an industry with no realistic potential because it is not possible for rule-inventors to charge judges and arbitrators who use their rules. Since a patent system for precedents is not feasible (parties could use precedents without citing them), it is difficult, Landes and Posner argue, to see where the incentive to supply rules and procedures comes from. But it is certainly not that difficult. The incentives would come from having the capacity to resolve disputes in a

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manner for which their potential customers will be willing to pay. Again, the mere presence of positive externalities is not sufficient for concluding the impossibility of private provision.293

It is the idea of the necessity of a final authority, or of a superior unique enforcer, that seems to ground much of the suspicion against a decentralized solution to the problem of social order. Yet this lack of a single authority does not entail the impossibility of resolving conflicts.294 Presumably, protection services would be mainly offered through insurance mechanisms. Individuals would buy protection policies, and submit their claims to their insurance companies. Upon the merits of the claim, insurance companies will pay their customers and then pursue subrogation, that is, reimbursement of all or part of such payments through the other party’s insurance company. In order to settle the issue, and in order to save bargaining costs, both companies might appeal to an arbitrator agreed upon in advance.

Kavka suggests that to be successful in recruiting and retaining clients, protection agencies will lean over backward to interpret and judge disputes in their own client’s favor.295 Yet if indeed such protection agencies care ultimately about their profits, rather

293 This externality problem did not stop whole private legal systems from developing, such as the Law Merchant. On this point, see Brian Caplan, “The Economics of Non-State Legal Systems,” Legal Notes 26 (London: Libertarian Alliance, 1997).
294 According to Wellman, in a situation in which individuals are free to exercise their enforcement rights, there will inevitably be a variety of protective agencies representing those interacting within any given territory. So Wellman concludes, that will be "no single party with the authority to definitely establish a common set of rules, to effectively and uniformly enforce these rules, and to impartially adjudicate potential conflicts under these rules." Wellman, “Samaritanism and the Duty to Obey the Law,” p. 16.
than their clients, they might not actually act as Kavka suggests. For such a policy would make it harder for companies to make future agreements with other protection agencies, and thus to reap the benefits associated with the use of impartial procedures. Furthermore, an agency that ignores arbitration decisions, for example, and defends their customers regardless of their guilt might face serious adverse selection and moral hazard problems. High-risk individuals will tend to purchase their services in a greater proportion, and thus increase the number of conflicts and claims the agency will need to face.

Thus, based upon the arbitrator’s decision, the company of the responsible party might pay the remedies to the other company and bill its own customer. If initial efforts to collect remedies from private individuals are unsuccessful, collection could include the use of specialized parties. Under certain conditions, incentives might exist to detain individuals in similar ways to in which the state does it, in an attempt to exact compensation. Completion of the subrogation work may take different forms depending on the willingness and ability of the responsible party to pay. Yet we can easily conceive all this process without having to assume the existence of any sort of single higher authority.

6.4 CONCLUSION

If we have reasons to believe that individuals do care about their self-interest, and that, for the most part, act in ways in which such self-interest is promoted, it is unclear why we should expect any significant failure of deterrence to ensue in anarchy. It is also unclear why we should expect that those self-interested individuals would be unable to reap the benefits involved in avoiding warfare as a means of solving their disputes. According to the standard view of anarchy, virtually all individuals would enjoy a level of utility that is below the samaritan threshold of peril, and they would enjoy such a level through no fault of their own. Yet we might lack reasons to believe that the expected perils of anarchy will be as general and severe as the standard view suggests. Lacking these reasons, the success of a
samaritan defense of the state’s characteristic infringements on individuals’ rights is highly contestable.

Surely, irrational individuals might choose warfare over settlement. Some individuals might even enjoy warfare for its own sake, and thus be willing to pay its price. Under certain restrictive conditions, individuals might be rationally justified in engaging in warfare even if they do not enjoy it for its own sake. Thus, many individuals might face, in anarchy, through no fault of their own, the sorts of perils that would authorize them, in principle, to infringe upon the basic rights of others. Yet, once we have revised the standard view of anarchy, it is unclear why we should think that the state’s infringement on individuals’ rights is a proper remedy for such perils. If the source of anarchy’s perils is neither individuals’ incapacity to enter into agreements nor the absence of a unique higher authority, why must we think that the state’s infringement upon individuals’ ownership and enforcement rights provides any sort of solution that will be otherwise unavailable? If anything, should we not believe that such an infringement will result into a mere reallocation of some individuals’ unchosen perils onto others, imposing unreasonable costs on the latter?

Undoubtedly, there is no guarantee that protection agencies will not find ways to take advantage either of their own customers or of the customers of other agencies. Neither is there a guarantee that arbitration firms will not decide to take side payments and thus favor some party at the expense of another. Detention companies could also have the capacity to treat their prisoners in ways in which they are not morally entitled. Private individuals might ignore the prohibitions on private retaliation that their own agencies could impose. They might also ignore the threats of retaliation imposed by others’ agencies. The relevant institutional alternative to those situations is not, however, a situation in which public officials prevent those outcomes from being realized. The relevant alternative is a situation in which public officials have the capacity to prevent the realization of those
outcomes, by preventing individuals from developing a market in protection. Yet what guarantees that public officials will not use such power to achieve those very same outcomes they are supposed to stop others from seeking? What guarantees that states will not interact violently with one another or even against their own subjects? What guarantees that public officials and legislators will not favor the higher bidder, and citizens will not decide to seek what they see as justified revenge against others? What guarantees that state correctional facilities will not fail to meet basic standards for the humanitarian treatment of prisoners?

The next chapter, however, presents an argument purporting to show that another relevant possible outcome must be included within the prospect of anarchy: the outcome that will result if a private monopoly over the provision of protection emerges. Recently, some authors have argued that such is a highly likely scenario once we have granted that a market for protection could indeed develop. Moreover, we might think that it is equally likely that such private monopoly might charge a purely expropriatory price, reducing most individuals’ well-being to those that we might find under the unlikely Hobbesian or Lockean outcomes, and thus restoring the plausibility of the samaritan defense of the state’s infringement on individuals’ rights. This line of thought does not need to ignore the risks the very existence of the state imposes. The claim is that, given the alternative, those risks would not be large enough, despite their undeniable importance, to turn the state either into an ineffective remedy or into an unreasonable imposition.
CHAPTER 7
THE PROBLEM OF MONOPOLY

Robert Nozick suggested that a private market for protection would not stay competitive for long. From competition, a single provider, or an association of them that will behave as if it were one, would emerge.\textsuperscript{296} The normative significance of Nozick’s suggestion seems to be quite independent of what our assessment is of his overall theory. The samaritan approach endorsed in this dissertation would seem to capture this significance. If we could expect that individuals’ freedom to exercise their enforcement rights would yield a state of affairs in which the vulnerability to monopolistic exploitation is significant, and if we could expect that such vulnerability could be considerably reduced by infringing upon those individuals’ rights, a samaritan approach might justify the permissibility of this infringement. The purpose of this chapter is to examine the plausibility of this particular line of argumentation.

The first section explains how, precisely, it is claimed that a monopoly over the provision of protection will inevitably arise in the absence of the state’s characteristic infringements. The second section claims that this particular argument for the inevitability of monopoly is not decisive. More precisely, the claim is that any sort of agreement between providers of protection would face a series of constraints, making the feared exploitation of private individuals a less likely outcome. The third section argues that, contrary to what much liberal political theory suggests, public officials cannot be thought to be constrained by any sort of factor that would not constrain the operations of the private monopoly as well. Thus, if the normative relevance of the argument from monopoly is understood within a samaritan framework, the case for the state that it is supposed to ground will lack conclusiveness.

\textsuperscript{296} Nozick, \textit{Anarchy, State, and Utopia}, p. 17.
7.1 PROTECTION AND MONOPOLY

A monopolist is a provider of a good that faces competition neither from other providers of the same good, nor from providers of close substitutes for that good. In deciding the price to set, and in attempting to set the price that will yield the largest possible profit, a monopolist will still need to take into account the fact that people have limited budgets and multiple needs and desires. But it is clear that he is in a better position to charge a higher price than the competitive provider is. For the latter not only has to take into account those facts about consumers, but also the fact that whatever those consumers can purchase from him they can also purchase from others.

In general, it is not easy to become a monopolist. If those higher prices that the monopolist can charge result in higher than usual profits, other entrepreneurs will enter the business in an attempt to capture those profits. We may expect such a flow of entrepreneurs to take place up to the point in which the resulting competition has driven profits down to the normal rate. This is why it is usually claimed that the problem of monopoly is best understood as the problem of the existence of barriers to entry into a particular business. When charging monopolistic prices creates incentives for potential competitors to enter into the market, or for investing into the development or discovery of close substitutes in other markets, no significant advantages would result from being the only provider in the business.

Focusing on the existence of barriers to entry, as opposed to focusing on the mere existence of a single provider, enables us to understand that, within the state system, many effective monopolies might be due, precisely, to state action. For it is by the use of legal force that barriers to entry are best protected. Sometimes, the government grants a monopoly to a private party, as was the case with chartered companies during the colonial era. Sometimes, the government itself operates the monopoly, as it is still usually the case
with the postal system. In either case, monopoly status is sustained by the mere issuing of credible threats of harm to potential competitors.

But there is also the problem of the so-called “natural” monopoly. A natural monopoly is said to exist when the existence of barriers to entry is the very result of the cost structure of the industry, and not the result of government intervention. In certain industries, the first provider, or the largest among them, might have a significant cost advantage over other actual or potential providers. The industries in question are those that have both extensive economies of scale, that is, unit costs that fall as production increases, and an optimal firm size that is large enough to supply the whole market. If competition were to take place in this type of industry, prices would be driven down to a level at which firms might not be able to make enough profits to pay off the initial investment. This, in turn, would drive most of those firms into bankruptcy. The last firm left standing will then be able to reap monopoly profits.

A natural monopoly might arise not only due to a cost advantage arising from the existence of economies of scale in production. So-called “network effects” might also be responsible for a similar outcome. While economies of scale are usually regarded as a property of the producer’s cost curves, network effects may be regarded as a property of the demand side. 297

Network effects arise from the benefits consumers receive. The provision of a good presents network effects when the value of such a good to potential consumers depends, to an important degree, on the number of people already consuming the good. The provision of a virtual marketplace, such as the one provided by Ebay, is perhaps the clearest example. If we are interested in finding potential buyers or sellers, we would be more

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297 Network effects are sometimes called demand-side economies of scale.
interested in using a website that we expect most people will use. In industries with network
effects, as it has been described, success breeds more success and failure breeds more
failure. This is because higher demand makes the good or service more valuable, and
lesser demand makes the good or service less valuable. It is clear how in this type of
industry a tendency towards a monopolistic equilibrium might then arise. Once a firm has
acquired some market dominance, the greater number of users will make its product more
valuable to its potential customers, and the competing firms will suffer the opposite effect. A
competitor with the larger share might have a forever-widening advantage over smaller
firms.298

Many economists believe that the government should regulate monopolies when they
arise from the cost structure of industries. But many others disagree. Even natural
monopolists, it is sometimes claimed, must face the competition resulting both from the use
of alternative resources by consumers, and from the development of new technology
capable of affecting the industry's cost structure. While this competitive pressure might not
equal the ones we find in other industries, some argue that it might be enough to outweigh
the risks of regulation. These latter risks include failing to improve allocative efficiency due

298 The mere presence of network effects is not, however, a sufficient condition for generating a tendency
towards monopoly. The value of having a fax machine depends on how many people have a fax machine.
But there are plenty of providers of fax machines. If a firm lacks control over whatever it is that makes the
synchronization among users possible, in this case the telephone lines, network effects are then not
sufficient for monopoly. Furthermore, a firm must face falling or constant marginal production costs in
serving a network participant, and the congestion point and 'network value' must be larger than the
market size. It is better to go to a nightclub where there are people one can dance with than to a nightclub
that there are no people at all. Yet, outside of very small towns, there are plenty of nightclubs to which
one can go.
to the regulator’s lack of information and incentives to accurately estimate marginal costs; reducing dynamic efficiency by undermining property rights and distorting investment decisions; failing to ensure efficient investment due to regulatory opportunism; distortion of incentives for cost reduction in the long term; and regulatory capture, that is, control of the regulatory agency by those interests that the agency is designed to regulate.

For our purposes, however, it is important to understand that the economic assessments of public policies are generally done from a particular normative perspective. Economists tend to accept at least a prima facie case against monopolies because monopolies are claimed to reduce aggregate economic welfare. A profit-maximizing monopolist will restrict output so that price is raised above marginal cost. But this will represent a loss of welfare. For the value consumers would derive from the forgone production is greater than the savings in the production cost. Monopoly would be socially costly in the sense that the dollar amount by which consumers are hurt is greater than the dollar amount by which the seller is helped. From the point of view of a samaritan approach, however, what is worrisome about monopolies, as is the case with other instances of “market failure,” is the potential danger that its unregulated operation would put some individuals’ well-being under the samaritan threshold of peril. In many industries, even in those with clear natural monopoly characteristics, this is not a major worry. If justified at all, the regulation of these industries would need grounds other than samaritanism. Yet when it comes to the provision of protection things are different. The worry about a monopoly over protection arises from the fact that it is a monopoly on a particular resource: the use of violence. A samaritan approach might, therefore, justify using coercive means to avoid the greater risk that this concentrated capacity for violence will generate.

Why might one think that a private market in protection would generate a tendency towards monopolistic provision? David Friedman has argued that it is unlikely that a violent
protection firm might be able to outfight all other protection firms—firms that, given their usual adoption of pacific means to resolve disputes, would have more resources at their disposal. But Nozick is not concerned with this type of scenario. He is concerned with the existence of a spontaneous, rather than intended, monopoly order. In other words, he is concerned with whether the monopoly on the provision of coercion would be, somehow, the unintended consequence of people’s choices.

Nozick believes that the degree of protection any agency can provide varies positively with the size of the agency. Thus, as one agency begins to prosper, individuals will clamor to join. Nozick says:

Why is this market different from all other markets? Why would a virtual monopoly arise in this market without the government intervention that elsewhere creates and maintains it? The worth of the product purchased, protection against others, is relative: it depends upon how strong the others are. Yet unlike other goods that are comparatively evaluated, maximal competing protective services cannot exist; the nature of the service brings different agencies into violent conflict with each other. Also, since the worth of the less-than-maximal product declines disproportionately with the number who purchase the maximal product, customers will not stably settle for the lesser good, and competing companies are caught in a declining spiral.

It is not clear whether Nozick believes that there are extensive economies of scale in the business of protection, such that multiple firms will not be able to exploit them fully. He

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does not explicitly claim that the largest firm will develop a monopoly through its cost advantage. The logic of Nozick’s reasoning would seem to be closer to the one introduced by the idea of network effects. As more people join an agency, the value of belonging to such agency increases. As more people leave an agency, the value of belonging to that agency decreases.

According to Nozick, the fact that the nature of protection service brings different agencies into violent conflict with each other explains why maximal competing protective services cannot exist. But as it was argued in the previous chapter, we might have no reason to expect a significantly persistent pattern of conflict between protection agencies. For there are clear opportunities for mutual profit in mediating disputes by means of arbitration. Nozick, however, might be willing to grant this point. Nozick says that competing protection agencies might make arrangements between themselves to settle disputes. But he does not believe that this possible outcome, the most likely one given that it avoids “frequent, costly, and wasteful battles,” contradicts his argument for the inevitability of monopoly. For he claims, “Though different agencies operate, there is one unified federal judicial system of which they are all components.”

Perhaps, therefore, the reference to the ‘declining spiral’ competing companies are supposed to get caught in, and the resulting monopoly that would arise, should be understood not in terms of individual firms but in terms of networks of users. Those networks would be groups of individuals all abiding by an agreed set of arbitration rules and procedures; regardless of whether they belong to the same firm or not. This is how Tyler

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301 Nozick, *Anarchy, State and Utopia*, p. 16.
302 Ibid.
303 Ibid.
Cowen would seem to reformulate Nozick’s worry. Cowen claims, “Private protection agencies may find interagency warfare unprofitable and dangerous, and subscribe to a common arbitration mechanism for settling disputes.”\(^{304}\) Cowen explains that those firms who subscribe to a common arbitration mechanism “have separate shareholders and seek to maximize their own profit.”\(^{305}\) But this, according to Cowen, makes little difference.\(^{306}\) For what really matters is that the multiple firms face a clear incentive to behave cooperatively as if they were one large firm.

In most markets, collusion is not a stable equilibrium. The reason is that as soon as the cartel has been formed, and a higher than competitive price has been agreed upon, each of the members will face a clear incentive to sell for less than that price. Equally important, the formation of a cartel will create a profitable opportunity for potential competitors to enter into the market. Cowen is well aware of this. But he claims that “historical examples of cartel instability do not involve the benefits of joining a common network.”\(^{307}\) Cowen claims that “the network itself overcomes the coordination problem of implementing and enforcing collusion.”\(^{308}\)

As we have already seen, what characterizes a network industry is the fact that the value of a good or service offered to potential consumers heavily depends on the number of people already consuming the good or service. The cartel of protective agencies might then have a simple way of dealing with potential competitors. By not admitting those firms into the cartelized network, those competitors will not be able to offer anything of value to their

\(^{304}\) Cowen, “Law as a Public Good,” p. 255.

\(^{305}\) Ibid, p. 256.

\(^{306}\) Ibid.


\(^{308}\) Ibid.
potential customers. This is because, as Cowen says, “membership in the common arbitration is one of the most important services an agency can offer its members. Network membership implies that interagency disputes are settled without risk of force or radical uncertainty about the final outcome.”

It is also clear how the cartelized network will take care of the problem posed by cheaters. Those members of the network who decide to cheat on the cartelization agreement can be denied further access to the “platform of synchronization” from which the positive network effects arise. This is something extremely easy to do in the market for protection. It is simply the direct outcome of the cartel members’ decision to terminate all agreements on arbitration mechanisms for settling disputes. Thus, neither new entrants nor cheaters will have the means to offer a valuable service of protection. Buying protection from a non-network provider will amount to buying a telephone service with a new technology that makes it incompatible with virtually all other telephones. Few, if any, will find value in having such a telephone service. Few, if any, will have reason to provide such a service.

Cowen concludes that once the network has arisen, its members “find it profitable to write a contract agreeing not to compete with each other. The agencies restrict output and raise prices, thus reaping monopoly profits… Finally, network shareholders can agree to impose taxation upon the populace.” Even worse, once the network obtains its monopoly power on the business of protection, it can use this power to achieve monopolistic positions elsewhere in the economy.” This is because it has the power to threaten to withhold

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310 Ibid, p. 259.
311 Ibid, p. 262.
protection, for example, from private entrepreneurs unless they sell out to the network. Thus, at least initially, the appeal to individuals' samaritan rights could justify the public officials' characteristic way of infringing upon its subjects' ownership and enforcement rights. By threatening individuals with the infliction of harm should they attempt to exercise the full extent of such rights, public officials have the capacity to prevent the private cartel on protection from arising. By preventing such an outcome, those individuals for whom the expected utility of anarchy was lower than the samaritan threshold of peril, could achieve a level of expected utility higher than that threshold.

7.2 CHECKS AND BALANCES

Bryan Caplan and Edward Stringham have recently argued that Cowen's argument against a free market in protection services fails to distinguish between self-enforcing and non-self-enforcing interaction. According to these authors, the network industry argument "neglects the deep contrast between prisoner's dilemmas and coordination games." While voluntary solutions are self-enforcing for the latter, they are not for the former.

Caplan and Stringham claim that there are strategic reasons "why socially beneficial standardization is easier to orchestrate than socially harmful collusion." Cowen says that if the network is able to punish "outlaws," it is also able to implement successful sanctions against potential competitors. But Caplan and Stringham will argue that the nature of a boycott target clearly matters. There are no individual benefits associated with the cooperation with outlaw firms. But that might not be true when it comes to the cooperation

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313 Ibid, p. 309.
with ‘cooperative’ new firms. Cowen says that “The ability to engage successfully in quality collusion…implies that other kinds of collusion are possible also.” As Caplan and Stringham point out, however, this entailment does not seem to hold. Quality collusion amounts to an agreement regarding the use of a common standard. It is, basically, a solution to a coordination problem that no one has incentives to move away from unilaterally. But other kinds of collusion might be different, such as the one that sets a monopoly price. For once such a price has been set, everyone has an incentive to charge a smaller one.

Regardless of some of Cowen’s statements, however, his main point would seem to be immune to Caplan and Stringham’s line of criticism. Cowen’s suggestion is, precisely, that what is collectively rational for the group of firms in a network industry is also individually rational. The reason why this is the case is given by the consequences of free riding: expulsion from the association. In other words, Cowen could grant the point about the general asymmetry between setting a common standard and setting a common price, for example. But this asymmetry would not hold when a dominant network has the power of making the firms’ products incompatible with the products of the rest of its members.

Yet, as Caplan and Stringham also argue, there is little empirical evidence that network industries are more prone to collusion than non-network industries. They present several empirical cases of network industries in which voluntary efforts to restrict competition do not seem to be more successful than in other areas of the economy. Neither Visa nor MasterCard, for example, regulates the amount charged to cardholders by its

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316 Ibid.

317 As Caplan and Stringham put it, “[a]s long as consumers want a uniform product, adhering to industry standards is self-enforcing. As long as consumers prefer to pay less rather than more, price-fixing is not.” Caplan and Stringham, “Networks, Law, and the Paradox of Cooperation,” p. 314.
various issuers or the amount of discounts paid by merchants. As the authors claim, members cooperate to make the product more convenient, but they do not stop from stealing each other’s customers.\footnote{Ibid, p. 317.} Is this an indirect consequence of antitrust legislation? Perhaps. But they also provide examples from the era prior to modern antitrust enforcement. In the nineteenth-century, as they do today, competing banks belong to clearinghouses in order to enhance the value of their products, reduce transaction costs, and bolster reputations. The clearinghouse networks had the power to expel banking members who failed to satisfy its regulations, and expulsion from the clearinghouse was a negative signal concerning the quality of the bank’s liabilities.\footnote{Ibid.} But the threat of expulsion did not lead to a pattern of industry collusion. Member banks continued to compete against each other.

As Caplan and Stringham explain, an important reason for the occurrence of the previous phenomenon might lie in the existence of high transaction costs in some key areas. The process of reaching a broad agreement among members when it came to policies that had different consequences for different firms, for example, rate-fixing, might be significantly costly. Enforcing an agreement achieved only between some of the members might result in a reduction of the network’s breadth of membership, and thus, given the existence of network effects, a reduction in the value of their own products.

Furthermore, it might be true, as Cowen claims, that there is a clear punishment available to the dominant network; something that is not available in the case of other cartels. The network has the power to make the cheater’s product incompatible with the other members’ products. However, having the capacity to apply this punishment might be a
completely different thing. Cowen says that we could imagine the network “implementing a perverse form of ‘antitrust’ law, which would enforce collusion rather than prevent it.”\(^{320}\) But we can also imagine many problems involved in carrying out this enforcement. Sometimes it might not be easy to really know which of the members are implementing competitive policies, either by alteration of prices or quality, or very costly to prove that they are actually doing it. According to Caplan and Stringham, clearinghouses also run into this problem.\(^{321}\)

The previous sorts of checks against collusion are not, however, the only ones that a network of protective agencies might have to face. Both Nozick and Cowen rest their arguments on a characterization of the market for protection as a market with strong network effects. This is an important point. In fact, many of the common worries we have about the anarchical society could be understood as worries about the incapacity of such a society to generate a common means of mediating disputes. The appeal to network effects might help us see how individuals could solve this problem in a decentralized or spontaneous fashion. But despite the importance of network effects in the provision of protection services, it is not the only aspect of importance.

In their studies of network effects, S. J. Liebowitz and Stephen Margolis distinguish between autarky value and synchronization value.\(^{322}\) Autarky value is the value generated by the good even if there are no other users. Synchronization value is the additional value derived from being able to interact with other users. Synchronization value is necessary for network effects. But goods with synchronization value might also have autarky value. Again,

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there is little point in hiring a telephone service that is incompatible with all the other 
services that people have. In this case, the autarky value is clearly zero. But the provision of 
protection might not be completely like the provision of telephone services.

An important good involved in the provision of protection is direct defense, in terms of 
either prevention or intervention, against the aggression or trespass that others might 
commit on our property and us. Whatever importance networks effect have in this case, the 
autarky value is clearly significant. Certainly, we might not want to hire a firm that has no 
customers because we might foresee its inability to protect us in the long run. But that 
remains true in dealing with the provision of many services that do not present a tendency 
towards monopoly. As long as the firm in question has achieved a threshold of 
trustworthiness, we might not be too concerned about whether the firm is the one providing 
protection to the greatest number of customers.

Direct defense against invasion of our person and property is not the only aspect of 
protection that has a significant autarky value. The enforcement of contracts is another 
example. Contracting parties need to agree on a procedure for mediating any disputes that 
might arise in their interaction. A contract is, basically, a law made by the parties. What they 
need, therefore, is merely an impartial party to interpret the facts according to their mutually 
accorded law or procedure. The problem of incompatibility, that is, the problem of the 
existence of competing law codes that in Cowen’s view only the presence of a common 
arbitration network can solve, is not a significant problem in dealing with contractual 
matters. In such matters, there are no significant network effects. For the contracting 
partners, what matters the most is the guarantee of impartiality that the arbitration company 
can provide.

We might have reason to doubt, therefore, that a monopoly needs to arise in the 
provision of these particular services. The network that might arise in the provision of other
protection services might then face multiple firms with equal capacities for violence. Cowen says that the network could threaten to withhold protection from private entrepreneurs unless they sell out to the network. But why would entrepreneurs be especially vulnerable to this threat? They might mainly be interested in having contractual relationships with particular partners, and they might have their own independent system of arbitration. Most importantly, they are capable of hiring services of direct defense against any possible act of aggression in which the network might consider to engage.

Thus, it is unclear that we have reasons to expect that the use of a common set of procedures of conflict resolution will yield the scenario envisioned by Cowen with a significant probability. Of course, that scenario is still possible, and this possibility must be taken into account in the assessment of the prospect of anarchy. Despite their less than certain likelihood, is that possibility significant enough to ground a samaritan defense of the state?

The problem is that similar outcomes to the one envisioned by Cowen are possible also under the prospect of the state. Preventing individuals from exercising the full extent of their enforcement rights requires an organization capable of exercising virtually uncontestable violence. This state of affairs entails, undoubtedly, certain risks. What would stop public officials, after all, which cannot be taken to have a different moral quality than others, to use their position of dominance to exploit and predate on the productive activities of others? Even when created with purely moral purposes, such an organization can be easily turned into a formidable mechanism of rent extraction or of mere annihilation, when facing the increased vulnerability of private individuals.323 So the question becomes whether

323 The twentieth century alone provides plenty of evidence in that regard. Between 1900 and 1920, pre-revolutionary and revolutionary Mexican regimes murdered about a million Indians, peons, and innocent
we have any reasons to believe that the infringement upon individuals’ rights might enable

villagers. From 1915 to 1923, the Young Turk triumvirate was responsible for the death of one and a half million of Armenians throughout the Ottoman Empire. Between 1928 and 1949, Chiang Kai-shek’s Nationalist China murdered nearly 10 million people. From 1934 to 1939, Stalin was responsible for more than 20 million deaths. From 1941 to 1945, 6 million Jews were executed by Hitler’s Nazi Germany. Along with them, at least 5 million of Poles, Gypsies, Roma, homosexuals, handicapped, and political opponents were also murdered. For roughly the same period, reliable estimates of the killings of Serbs, Jews, and Gypsies by the Ustasha regime in the Independent State of Croatia range between 330,000 and 390,000.

Beginning in 1945, Tito’s regime killed several hundred thousands more throughout Yugoslavia. Since its founding in 1949, Mao’s People’s Republic of China killed at least 15 million people, and perhaps more than 40 million. In addition to all these killed, about 27 million died from the famine resulting from Mao’s economic policies. After World War II, the Polish government expelled ethnic Germans, murdering about a million and a half. From 1948 to 1994, that same number of people was murdered in North Korea under the rule of Kim Il Sung. In 1971, more than a million Bengalis and Hindus were killed by Yahya Khan’s Pakistan. Between 1975 and 1979, in his attempt to recreate a primitive agricultural society, Pol Pot murdered about 2 million people in Cambodia, almost a third of the population.

This is hardly an exhaustive enumeration of twentieth century’s criminal states, however. In addition to the previous genocidal regimes, Rudolph Rummel has estimated that in the period of 1900-1987 there were 47 other regimens that murdered at least 100,000 people each, and 156 that killed in the hundreds or a few thousands. Together they killed approximately 13 million men, women, and children. The estimate for the total number of people murdered by government in the twentieth century, apart from any military actions and without including executions due to what are conventionally considered criminal acts, might reach 170 million. See Rudolph J. Rummel, *Statistics of Democide: Genocide and Mass Murder since 1900* (New Brunswick, NJ: Transaction Publishers, 1999), and *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, NJ: Transaction Publishers, 1999), Ch. 7.
those very same individuals to face Cowen’s envisioned scenario with a significantly lower likelihood. This is what indeed many liberal political theorists suggest a proper institutional arrangement can achieve. That arrangement would include constitutions, division of powers, federalism, periodic elections, and other similar mechanisms. Upon the plausibility of this sort of view rests the plausibility of the samaritan defense of the state by an appeal to the possibility of a predatory private monopoly on protection. For if public officials could not be thought to be constrained by the establishment of such institutional arrangements, the state could not be thought as an adequate remedy for anarchy’s alleged tendency towards monopolistic exploitation, regardless of how likely and severe we take such a tendency to be.

7.3 THE STATE: AGENT OR PRINCIPAL?
Within liberal political theory, the state tends to be conceived as a mere agent of the subjects. The liberal model acknowledges the existence of agency costs, that is, costs arising from the fact that agents, being interested in satisfying their own personal goals, might not do exactly what principals expect. But the model holds that such costs can be decreased significantly by a properly designed institutional arrangement. In fact, it is the very availability of these institutional arrangements that, according to this liberal model, enables us to think of public officials as our agents.

By the establishment of such institutional arrangements, public officials are taken to be constrained in what they can do as a means of advancing their own personal well-being. Ideally, public officials’ best opportunities to advance their own personal well-being are made coincidental with what is best for the advancement of the “common good.” This is a theory that finds its classical formulation in The Federalist Papers. In recent times, the theory of Public Choice has shown that the agency costs tend to be much more pervasive that one might have initially thought. But these findings have not eroded the liberal model of
government. On the contrary, they have seemed to reinforce the importance of the central assumption behind such a model, that is, that adopting the right sorts of institutions might preclude those in power from pursuing their own self-interest in a way that is detrimental to the welfare of others. As Buchanan puts it, “public man,” like his counterpart in the market, “can be constrained to behave within the limits of mutual gains.” 324

The liberal model of government has been an extremely influential way of representing the relationship between the individual and the state. It is from the widespread familiarity with this model from which the initial plausibility of a justification of the state by an appeal to the alleged collusion between private providers of protection arises. The infringement on individuals’ rights would enable us to set the corresponding institutional arrangement that would constrain the predatory actions of government officials, aligning their personal incentives with the attainment of public goals. Yet, despite its great popularity, the liberal model of government is based on certain dubious assumptions.

State officials are simply not in the same position with respect to private individuals as firm managers are with respect to shareholders. While shareholders can always punish their managers and regain control of the productive assets, private individuals have no power to do so without actually securing the approval of the state officials themselves. There is simply no outside agency with the coercive capacity to enforce the alleged arrangement between the individuals and the state. If public officials are genuinely self-interested, and if liberal institutional arrangements indeed preclude their access to profitable opportunities, why would they maintain and respect those constraints? Those constraints, after all, only exist on paper. By themselves, they cannot really be taken to constrain the predatory

activities of public officials. These unavoidable facts might support a call for a Copernican turn in our explanatory perspective, a call for conceiving state officials as principals, rather than agents, of private individuals. This is the basic insight behind the so-called “proprietary” theory of the state, according to which the ruling elites hold a monopolistic control over government, and selects policies to maximize its revenue under the constraint of keeping its dominant position. 325

This change of perspective would seem to correspond in a more natural way to the numerous cases of liberal institutional failures, that is, cases where the presence of liberal arrangements did not prevent tyranny from arising. This phenomenon should be puzzling if we really believe that such arrangements themselves are responsible for the non-predatory behavior of certain states. That change of perspective would also better correspond to an “endogenous” answer to the question of why self-interested public officials might want to behave in accordance with liberal institutional systems, as they sometimes do. Under certain conditions, the assignment and protection of legal rights, especially rights against the very activities of government, would be crucial in the effort not to discourage the productive activities from which the rulers obtain their income. Liberal political institutions could then be seen as arrangements by which state officials attempt to align the subjects’ incentives with the achievement of their own personal goals, and not the other way around.

Those who have greater capacities for violence, as ruling elites do, can decide either to enslave their subjects or to leave them free and appropriate the resources that they produce. When the most productive activities are those in which shirking is hard to

monitor—where productivity depends on individuals making personal decisions, for example—the resulting agency costs could make enslavement very costly. By allowing their subjects to become residual claimants of their actions, the ruling elites could be able to expropriate value that was not available in the past, without having to incur all the policing costs involved in slavery.

There are clear limits, however, to what is prudent for the ruling elite to extract from its subjects, once those subjects have been made the residual claimants of their actions. For if those subjects are constantly exploited, they will have little incentive to be productive in the first place. Productivity requires durable assets, but no investment in such assets will take place if the subjects do not expect to be able to reap the fruits of the forgone present consumption. The instability and unpredictability of an environment that is thought to depend on individuals’ discretionary control will also have negative consequences on saving and investment decisions.

Thus, the ruling elite might not only face incentives to restrain themselves, but also might face incentives to invest in the protection of their subjects, and to assign and enforce property rights among them. Lacking such rights, individuals would not produce more than they could immediately consume. Under certain conditions, the iterated character of the exploitative relationship might assure the subjects that, when the time comes, the ruling class will not act opportunistically and ignore their promises of restraint. The greater the expectation of continuity in the relationship, the greater will be the ruling elite’s incentive to keep their promises.

How extensive the self-imposed limits for the ruling elite are will depend on many factors. In general, those limits will depend on the trade off between the expected gains from productivity that result from the subjects’ freedom, and the increased threat of insurrection that both this freedom and the corresponding greater income generate. Thus, if
the ruling elite have control not only over greater capacities for violence, but also over valuable resources, such as diamonds or oil, the incentives for liberating their subjects might be less powerful than if they do not have such sources of income. Significant rights concessions to the subjects might be unnecessary if those subjects truly believe, that the ruling elite are God’s representatives, or that they have a special privilege to govern that others lack.

Things tend to be different, however, when individuals do not believe that the ruling elite have a special entitlement to their monopoly profits. Under certain conditions, when those subjects have increased their bargaining leverage by overcoming the collective action problem involved in mounting a credible threat of insurrection, the ruling class might welcome a process of democratization. The threat of insurrection posed by the subjects lowers the expected benefits of the ruling elite’s monopolistic exploitation. One way of reducing such a threat is by allocating more resources in repression. Another way is by offering concessions to the subjects in the form of policies that would increase their income. The ruling elite will be willing to make such concessions when the expected costs of doing so are lesser than the expected costs of repression. But as Daron Acemoglu and James Robinson emphasize, the opportunity for contesting power is always transitory, and thus it will be relatively easy for the ruling elite to renege later on any promises they make today.326 Due to this commitment problem concerning future policy decisions, the actual transfer of political power to the subjects might constitute the only credible commitment available for the ruling elite, and their most profitable option.

Within liberal political theory, the argument for the state relies on the claim that a proper institutional design is capable, as Madison puts it, in supplying “the defect of better motives.” Yet it is hard to understand how truly self-interested public officials would be ultimately constrained by any institutional design. Public officials, if truly self-interested, are ultimately constrained by factors such as their subjects’ willingness and ability to invest, produce, and revolt, their dependency on the productive activities of those subjects, the coordination costs involved in their own predatory activities, and the costs of repression. Thus, once we realize that the constraints liberal arrangements provide exist merely on paper, we realize that the factors that ultimately constrain liberal governments are not factors that are made available by the infringement on individuals’ rights. Those factors are, basically, the same factors that would constrain the predatory activities of any cartel of protection that might arise out of anarchy. This is why the samaritan defense of the state’s infringement of individuals’ rights based on that appeal loses much, if not all, of its initial plausibility.

7.4 CONCLUSION

Chapter 6 concluded that, should individuals be free from the state’s infringements upon their rights, there might be reasons to expect neither a significant failure of deterrence nor the sort of bloody war between protective associations that political theorists tend to envision. Through no fault of their own, individuals could face certain perils under several sorts of circumstances. We could then believe that, at least for some individuals, the expected utility of anarchy, discounted for personal responsibility, will still be lower than the samaritan threshold of peril. Without having any precise account of what that threshold of

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peril amounts to, it is difficult to see how this could be asserted. But, again, if the source of anarchy’s perils is neither individuals’ incapacity to enter into agreements nor the absence of a unique higher authority, it is unclear why we must think that the state’s infringement of individuals’ ownership and enforcement rights provides any sort of solution that will be otherwise unavailable. So the main claim in Chapter 6 was that, given the source of the expected perils of anarchy, it is unclear how the state’s typical infringement on individuals’ rights would constitute either a proper remedy, or a remedy that does not reallocate such perils to other individuals.

The considerations offered by contemporary authors regarding the alleged inevitability of a private monopoly on protection could be understood as arguing against the conclusion reached in Chapter 6. These considerations point towards a possible relevant outcome of anarchy that was not considered in that chapter: the outcome in which the deterrence failure is the failure to deter the predatory activities of a private monopoly on the provision of protection. By not allowing individuals the freedom to exercise fully their ownership and enforcement rights, public officials have the capacity to prevent the possibility of such a predatory behavior. This would be done by establishing a set of institutional constraints; constraints that do not seem to impose any unreasonable costs to others, where such costs are understood within a samaritan perspective.

This chapter concludes, however, that any tendency that might arise towards monopoly in the market for protection might need to face a decentralized system of checks and balances. This system will be constituted mainly by the competing interests of the protection network’s members, and the existence of other firms with capacities for violence. So the threat that a network of protection generates might not be significant enough once we take into account the corresponding likelihood. More conclusively, however, there are no reasons to believe that state officials could be constrained by a fundamentally different and
more efficient set of constraints. Thus, we would lack the reasons, again, to believe that the state could count either as an effective remedy for the perils of anarchy, or a as remedy that does not merely reallocate such perils to other individuals. Roughly, we still lack a proper answer to the question of what the state’s infringements on individuals rights are needed for, where that need is understood as grounded on the moral demands arising out of individuals’ samaritan rights.
CONCLUSION

Within contemporary political theory, the moral permissibility of the very existence of the state is generally taken for granted. For the most part, contemporary discussions tend to be concerned with the question of what goals justice requires from the state—should the state seek to equalize income or should it limit itself to providing order and security?—and with the problem of how to organize the state as to better serve the demands of justice—should the state adopt a parliamentary system, a presidential system, or a combination of both? Comparatively few discussions deal with what we might see as the first and fundamental problem: whether the state should exist in the first place; or more precisely, whether the state officials, in their efforts to realize justice, are at liberty to threaten individuals in certain characteristic ways that infringe upon their ownership and enforcement rights. Those characteristic ways include the establishment of coercive barriers to entry into the market of protection, and taxing individuals as means of funding the state’s monopolistic administration of justice.

This relative lack of interest in a question of undeniable importance might be explainable by the belief that a case for anarchy, even when understood merely as a case for putting an end to those infringements, must be grounded either upon controversial moral principles or upon unrealistic empirical assumptions. This dissertation has argued, however, that our doubts about the legitimacy of those infringements might not arise from any radical ethical view, but rather from the same liberal values of which many contemporary theorists see the state as a supreme guarantee. Moreover, those doubts might arise even if we hold a realistic conception of human nature, that is, a conception according to which individuals are mainly motivated by the promotion of their own personal good. Given the existence of these alternative grounds for challenging the legitimacy of the state’s infringements on
individuals’ rights, the case for anarchy, understood again merely as the case for putting an end to those infringements, needs to be taken more seriously.

The standard view of anarchy as a constant war of all against all, a view upon which political theorists have traditionally justified the infringing apparatus of the state, is extremely implausible. In the light of relatively recent developments in the economics of cooperation, conflict, and governance, most contemporary social theorists might agree with this statement. But this revision of the received wisdom regarding the nature of anarchy has important implications. These implications have not been adequately noticed within contemporary political philosophy.

At least in part, such implications have not been adequately noticed because they are kept hidden behind a common fallacy. This is the fallacy of favoring political intervention by comparing the prospect resulting from the absence of that intervention directly to a moral standard, rather than comparing it to the prospect resulting from the available institutional alternative. Ultimately, the fallacy is that of not realizing that the relevant choice is between imperfections. Although this fallacy has been exposed in recent decades when it comes to particular policies, it has not been exposed when it comes to the very foundations of the state.

We might worry, for example, that since the law of anarchy will be a law configured largely by market forces, there could be aspects of it that will be morally condemnable. This might certainly be so. Yet the relevant alternative to the envisioned market scenario is not a scenario in which law is the outcome of a moral deliberation process. The alternative is a scenario in which the law is the outcome of some form of political process. And such political process might yield equally condemnable outcomes. Similarly, the alternative to a social system in which property rights are defined by individuals’ willingness to allocate resources for exclusion purposes, is not a system in which such rights are allocated
according to principles of justice. The alternative is a system in which some individuals are *empowered* to allocate such rights according to principles of justice. But, again, there is nothing that precludes such individuals from allocating those rights either according to mistaken principles of justice or according to their own personal advantage.

Thus, what ultimately matters, and what the samaritan framework makes explicit, is how likely all the possibilities are, both within the prospect of anarchy and within the prospect of the state. But then, once we realize that there are no reasons to believe that the expected perils of anarchy are as severe and general as standard accounts take them to be, it is unclear what the infringements on individuals’ rights are necessary for. This is because it is unclear that such infringements have the capacity to bring about any radically different sort of state of affairs, as suggested by standard justifications of the state. Thus, it is not clear why the state’s characteristic actions would not involve the mere use of some individuals for the benefit of others, in a way in which it is not permissible within a view that takes individuals rights seriously. And this view is not one of radical voluntarism. It is rather a more plausible moral view that takes into account how under certain circumstances, the morally innocent actions of some might negatively affect others’ life prospects, and claims that under such circumstances it is indeed permissible to coercively restrain those actions.

Here we cannot conclude, however, that the state is illegitimate, in the sense that there is no justification for the public officials’ characteristic infringements upon individuals’ rights. Certainly, the analysis provided both in Chapter 6 and 7 supports a more optimistic conception of anarchy. Yet those chapters only deal with some standard lines of argumentation found within the liberal tradition. These lines of argumentation tend to share two fundamental features. First, they deal with what we might refer to as the problem of “social order.” The concern is about individuals’ capacities to arrange some form of system under which they are not subjected to the predation or ill nature of others. Second, the need
for the state’s infringements on individuals’ rights is seen as arising directly from the very circumstances of justice. In general, the worry is that certain characteristics invariably held by individuals, in conjunction with certain unalterable features of the external world, will lead to misery, chaos, or oppression should public officials refrain from infringing upon individuals’ rights. The conclusiveness of lines of argumentation that share those two previous features has been found highly questionable.

The circumstances of justice, however, only capture the most general features of the world in which we live. There are also less universal and more historical problems; problems arising from the existence of certain conditions that do not seem to be the expression of anything inevitable. The existence of special circumstances—circumstances arising from historical accidents, cultural beliefs, psychological expectations, etc.—must surely be acknowledged. That genuine problems might arise from such special circumstances is an initially plausible hypothesis. That problems might exist which are not directly related to the problem of social order is also something that needs to be considered, as well as is the idea that the state’s infringement on individuals’ enforcement and ownership rights might be indirectly necessary to provide a solution to those sorts of problems. It is also clear that even in the absence either of such special circumstances or of genuine problems arising from factors other than those related to enforcement issues, there might be no grounds for calling an immediate stop to the state’s infringements. For such an immediate action might indeed create the conditions under which such infringements are justified.

This dissertation has not dealt with any of those previous issues, issues that, due to their more contingent nature, would seem to impose a greater challenge both practically and theoretically. But one possibility is that, within the tradition of natural rights liberalism, the legitimacy of the state’s infringements on individuals’ rights would need to be thought in
equally contingent terms. It could indeed be justified, under certain conditions, to infringe upon individuals’ rights in the characteristics ways in which public officials do. Yet those conditions might not need to be thought of as omnipresent. In their absence, public officials, and for that matter all individuals, should respect the ownership and enforcement rights of others, and seek the promotion of justice and others’ well-being only within the constraints imposed by those rights. This is, however, a mere speculative claim. Whether indeed the legitimacy of the state needs to be thought along those lines must be determined by a careful analysis that takes into account both the prospect resulting from individuals’ freedom to exercise the full extent of their natural rights, and the prospect resulting from any infringement upon those rights. This dissertation has argued that an appeal to individuals’ samaritan rights provides the sort of moral framework needed for carrying on such an analysis, without upsetting any of the central commitments of natural rights liberalism.


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