

NATURAL RIGHTS AND POLITICAL LEGITIMACY*

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I. INTRODUCTION

"Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?"¹ As is well-known, Robert Nozick's reply to this question, in *Anarchy, State, and Utopia* (1974), is that any state more extensive than a minimal one will fail to be justified except under special circumstances (for instance, the rectification of serious wrongs). Some think that even minimal states will fail to be justified given the rights that we have. It may be that the constraints of justice leave no room for the state's exercise of its functions or even for its existence. If we possess (virtually) indefeasible natural rights to life, liberty, and possessions, then it is doubtful that the state may do very much, if anything, without violating our rights. This is Nozick's challenge.

The challenge would have passed unnoticed in the 1970s were it not for the quality of Nozick's argument. In much of the West—certainly in the political cultures influenced by the American and French revolutions—it was widely thought then, and perhaps now, that states are in large part justified to the extent to which they protect our fundamental rights. This might be thought to be the very purpose of the state. The French Declaration of the Rights of Man and of Citizen asserts: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression."² *The end of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.* Americans learn at an early age that "to secure these rights"—the inalienable rights to life, liberty, and the pursuit of happiness enumerated in the Declaration of

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¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), ix.

² Déclaration des Droits de L'Homme et du Citoyen, art. 2 (August 1789). Translation mine.

Independence—"governments are instituted among men." The thought seems to be that in the absence of just and effective government, individuals' fundamental rights are insecure. We turn to the state to secure them. Thus, we may evaluate states by how well they secure our rights and say that those that do well in this respect are justified or legitimate.

Nozick in effect challenged this conception of the justification of states, and this fact is not always appreciated. He argued that our rights are such that the state is not justified by how well it secures certain ends or meets certain goals (for instance, the respect of our rights). Rather, a state that fails to respect our rights (e.g., by instituting or maintaining certain unjust practices) fails to be justified or legitimate no matter how well it generally enforces or otherwise secures our rights (e.g., against violation by others). This would seem to be a consequence of the "historical" account of justice that Nozick sketches in Part II of *Anarchy, State, and Utopia*: "Whatever arises from a just situation by just steps is itself just."³ Suppose that in order to secure our rights, a state violates some of them—for instance, it forbids us to enforce our own rights, or it seizes some of our assets without our permission. Then, even if a state were to prevent other violations of our rights, it would be unjust and presumably illegitimate. Nozick's attempt in Part I to show that a state *could* arise without violating anyone's rights does not show that a state that had violated people's rights would be legitimate.⁴

The authors of the Declaration of Independence may betray an awareness of this point, since the passage cited above goes on to note that governments "deriv[e] their just powers from the consent of the governed." In the absence of this consent, states presumably fail to be legitimate whatever their success in securing certain ends (for instance, the minimization of rights violations). But lack of clarity about the nature of consent, as well as many questions about state legitimacy, concealed the problems for a long time. After the publication of *Anarchy, State, and Utopia*, it was much harder to ignore them.

Suppose we have a fundamental right to liberty, one that is prior to and independent of government or the legal system. This right seems to entail that as long as one is not violating the rights of others or threatening others in ways that are unjust, others may not restrict one's liberty with-

³ Nozick, *Anarchy, State, and Utopia*, 151.

⁴ David Schmidtz's distinction between teleological and emergent justifications of institutions is helpful in this context. "The teleological approach seeks to justify institutions in terms of what they accomplish. The emergent approach takes justification to be an emergent property of the process by which institutions arise." David Schmidtz, "Justifying the State," *Ethics* 101, no. 1 (1990): 90. The account of justice that Nozick defends in Part II of *Anarchy, State, and Utopia* commits him to an emergent conception of justification. See also his critical discussion of "a utilitarianism of rights," the view that one may or must violate someone's rights whenever this would minimize the total quantity of rights violations in the world (*Anarchy, State, and Utopia*, 28). Someone who thought that a state's violation of people's rights would be permissible whenever it would make their rights more secure would not understand these rights, as Nozick does, as "side constraints."

out one's consent. States, however, restrict our liberty in numerous ways. So it would seem that to be justified, states must first obtain our consent. Recent discussions have made it clear that the consent in question must be genuine and that this requires that it be actual (explicit or implicit) rather than hypothetical.⁵ I consent to something insofar as I actually agree, not insofar as I *would* agree if asked; consent is an *act* of the person. Earlier discussions often focused on the ways in which we might be said to consent (implicitly or tacitly) to government, perhaps by voting or merely by not moving to another country. It seems much clearer now that there is little that most people have done that could constitute the kind of actual consent, explicit or implicit, that would be required to justify a state. We cannot consent to something, at least in these contexts, unless we act voluntarily and knowing what we do. Voting and refraining from leaving the country are not acts that imply the consent needed to legitimate a state; we do not vote knowing or even believing that the act implies consent, and for the most part the choice "agree or move out" would be coercive. In general, merely accepting benefits or using resources does not constitute the requisite actual consent (explicit or implicit).

Consent is also to be distinguished from consensus or general agreement. Most forms of political organization depend to some degree on consensus or agreement. But the latter have to do largely with shared *beliefs* (or values). Sometimes terms like these are used to suggest more, but they essentially refer to agreement in belief or thought (or value). Consent, by contrast, involves the engagement of the *will* or commitment. Something counts as consent only if it is a deliberate undertaking. Ideally, an act is one of consent if it is the deliberate and effective communication of an intention to bring about a change in one's normative situation (i.e., one's rights or obligations).⁶ It must be voluntary and, to some degree, informed. Consent can be explicit (express, direct), or it can be tacit or implicit (implied, indirect). Both are forms of *actual* consent. By contrast, (non-actual) hypothetical consent is not consent. If we believe that we have certain fundamental rights—for instance, rights to liberty—we may have to conclude that few if any existing states are justified or legitimate owing to lack of (actual) consent.⁷

⁵ See especially A. John Simmons's writings, especially *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), chap. 3, and *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, NJ: Princeton University Press, 1993), chaps. 3–4 and 7–8. See also Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988), chap. 6.

⁶ What Jean Hampton calls "endorsement consent" might be interpreted as a form of genuine consent. "A regime that receives what I call *endorsement consent* gets from its subjects not just activity that maintains it but also activity that conveys their endorsement and approval of it." Jean Hampton, *Political Philosophy* (Boulder, CO: Westview Press, 1997), 96.

⁷ See the works by Simmons and Green cited above in note 5. Discussions of consent are often less clear than they might be. Tacit consent is frequently confused with hypothetical consent (which is not a genuine species of consent), and agreement or consensus are often thought mistakenly to be forms of consent.

This implication of Nozick's argument may not have been apparent to most readers of *Anarchy, State, and Utopia* when the book first appeared, because of his attempt to argue in Part I that a state *could* emerge from the interactions of free persons in a "state of nature" without violating anyone's rights.⁸ However, Nozick argued that more than a minimal state could not be justified: "Any state more extensive violates people's rights."⁹ Yet a minimal state might also fail to be justified for lack of (actual) consent, as John Simmons rightly notes in his essay in this volume.¹⁰ A consent theorist is normally understood to be someone who thinks that (genuine) consent is necessary to justify or legitimate a state. Nozick is not quite a consent theorist in this sense; he thinks that normally states are justified only if they obtain the consent of the governed, *except* in the circumstances described in Part I of *Anarchy, State, and Utopia*. The implications of Nozick's views, however, seem in the end virtually indistinguishable from those of most consent theorists.

A well-known reaction to the possibly anarchist implications of consent theory or of Nozick's account is to deny the premises that require consent for justification or legitimacy: since some states are justified, we do not have the rights that Nozick and others postulate. I imagine this is what many still believe. Others think that we do have these rights and that few, if any, states are justified or legitimate. I am not, however, certain that matters are quite as simple as this. Some states seem to have a kind of legitimacy, and yet they restrict our liberties in ways that seem to transgress the rights Nozick attributes to us. More needs to be said.

Consider the following possibility. Suppose there is a state that is as just as we could reasonably expect a state to be in our world. At first glance, it respects the constraints of justice and does not act unjustly. It also provides justice to those subject to its rule; it makes and enforces laws, adjudicates disputes, and provides mechanisms for collective decisions (e.g., contracts, corporate law, local governments, parliaments).¹¹ Some of the laws as well as a number of social programs seek to effect distributive justice. In general, government is responsive to the just interests or wishes of the governed. This state is also as efficient as we could reasonably hope. Not only do the trains run on time, but the schools instruct students to read and write and the Department of Homeland Security earns the

⁸ Nozick's difficulty in establishing this—Part I takes up almost half of *Anarchy, State, and Utopia*—is an indication of the extent of the problem. I have argued that Nozick fails; see Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), 166–71.

⁹ Nozick, *Anarchy, State, and Utopia*, 149.

¹⁰ See A. John Simmons, "Consent Theory for Libertarians," in this volume.

¹¹ Contracts are mechanisms for collective decisions, as they enable two or more individuals to act together. That the matter of state enforcement and adjudication of contracts is more problematic than most people think is defended in Morris, *An Essay on the Modern State*, 275–76.

respect of all. (Supporters of the privatization of transportation and education can substitute other examples.)

Suppose that this state “secures our rights” more effectively than any feasible alternative system of social organization, including anarchism. That is, our rights are less likely to be violated in a state such as this one than in other circumstances. However, this state necessarily restricts our liberty in certain important ways. Given that there are unjust and cruel people in the world, there is need for national defense and institutions for the administration of justice, and so the state forbids us from securing our own rights, except in prescribed circumstances of “self-defense.” It does not allow groups of people to leave the state in order to form another state or political community (secession). To provide defense against the unjust and cruel, it appropriates a portion of our resources via taxation—something many consider “on a par with forced labor.”¹² Under certain circumstances, the state requires most able-bodied citizens to serve in the military, as in the United States during World War II or in Israel today, and to participate in other collective ventures for the common good. Citizens are also compelled to serve on juries. Our hypothesized state may also make voting compulsory (with a line on the ballot for “none of the above”). We might in addition consider the possibility that we may not be permitted to do a number of things that are (genuinely) harmful to ourselves, though this adds a dimension to the thought experiment that is not, for the moment, essential. Let us at least suppose that this hypothetical state does not allow us permanently to alienate our liberty, for instance, by selling ourselves into slavery or by agreeing to onerous lifelong contracts (debt slavery, indentured servitude).

Suppose that most people in this hypothetical world live lives that are as good and as fulfilling as is typically possible in favorable circumstances. The state nevertheless appears to restrict people’s liberties in a number of ways and thus to violate their right to be free, as well as their property rights. Suppose large numbers of people do not consent to these restrictions. Does the state (and its practices) fail to be justified?

Some will be tempted to deny the possibility of such a state. They may find the supposition that governments would not waste the time of jury members or the lives of conscripted soldiers too implausible to grant. This reaction is understandable, but I want to consider the question nevertheless. Suppose there were a just and relatively efficient state that secures our liberty but restricts it in a number of ways that appear to transgress our fundamental rights. Does it for that reason fail to be justified? Is it necessarily illegitimate?

¹² “Taxation of earnings from labor is on a par with forced labor.” Nozick, *Anarchy, State, and Utopia*, 169.

II. JUSTIFICATION AND LEGITIMACY

Until now I have talked rather casually about the justification and legitimacy of states, and I need to say something more. States in the sense I intend here are particular forms of political society, characteristically modern. Their jurisdiction is territorial; they claim to govern all who find themselves in their territory. The powers claimed by states are sweeping; they claim very extensive authority and typically back up these claims with considerable force.¹³ States claim legitimacy. One of the central tasks of modern political philosophy is the assessment of this claim. I shall offer an account of what it means for a state to be legitimate and shall introduce a distinction between two kinds of legitimacy.

If a state is legitimate it has a certain status. At the least, its existence is permissible: it has a liberty to exist. It presumably also has a (claim-)right to exist. A state exists to the extent that a territory and its inhabitants are organized politically as I described above, when significant numbers of people comply with the laws and a good number believe the institutions to be legitimate. States are forms of governance, and they also claim certain powers, liberties, and rights related to governance. Legitimacy may also confer these. A legitimate state, we shall say, is minimally one that has a liberty, presumably a (claim-)right, to exist. It would presumably also possess the liberty or the right to establish laws and to adjudicate and to enforce these as necessary for the maintenance of order and other ends. Legitimacy in this minimal sense would be the right to exist and to rule.

The right to rule is often thought of as entailing obligations to obedience on the part of those who are ruled. Trivially, we have an obligation to obey any valid (obligation-creating) law.¹⁴ If an obligation-creating law is valid and applies to us, then we are obligated. Often it is said that this obligation is merely "legal" and not necessarily moral; a more-than-minimal conception of legitimacy might construe the right to rule as entailing a moral obligation to obey the law and perhaps reasons to obey.¹⁵ (Alternatively, instead of distinguishing moral and legal obligations, I prefer to say that subjects would have *genuine* obligations to a more-than-minimally legitimate state.) If a state is legitimate in this stronger sense, then it would be wrong or unjust for a citizen to violate a valid law (except in special circumstances).

¹³ Details as well as some support for this account can be found elsewhere: for example, I have argued that states in modern times are distinctive territorial forms of political organization that claim sovereignty over their realms and independence from other states. See my *An Essay on the Modern State* (cited above in note 8); as well as my essay "The Modern State," in Gerald F. Gaus and Chandran Kukathas, eds., *The Handbook of Political Theory* (London: Sage Publications, 2004), 195–209; and my "Are States Necessarily Coercive?" (manuscript).

¹⁴ My cumbersome formulation is due to the fact that many laws do not create or recognize obligations (e.g., power-creating laws).

¹⁵ On reasons to obey, see my brief remarks at the conclusion of this essay.

It is useful explicitly to distinguish weaker and stronger conceptions of legitimacy. A legitimate state possesses a (claim-)right to exist and to rule. The right to exist entails obligations on the part of others not to threaten its existence in certain ways (e.g., not to attack or conquer it). We may now interpret the obligations correlative to the right to rule in different ways. A state is *minimally legitimate*, I shall say, if its right to rule entails that others are obligated not to undermine it, but are not necessarily obligated to obey it; I assume it is possible to disobey a state without undermining it. Someone would not undermine a state, for instance, by violating certain (valid) laws on occasion.¹⁶

By contrast, a state is *fully legitimate* if its right to rule entails an obligation of subjects, or at least citizens, to obey (each valid law).¹⁷ This obligation may be thought of as a general obligation to obey the law, one that requires compliance with every law that applies to one except in circumstances licensed by law. The second, stronger understanding of legitimacy may be the most common one in contemporary discussions. "Justifying the state is normally thought to mean showing that there are universal obligations to obey the law. . . . [T]he goal of justification of the state is to show that, in principle, everyone within its territories is morally bound to follow its laws and edicts."¹⁸ In addition, fully legitimate states have an *exclusive* right to exist and to rule that others may not challenge. This claim to exclusivity is captured in the popular (and in other respects misleading) Weberian characterization of the state as "a human community that (successfully) claims the *monopoly* of the legitimate use of physical force within a given territory."¹⁹ As I have argued elsewhere, the right to use force is of minor significance compared to the state's other claimed powers. But the emphasis here on rights to monopolize is on target. John Simmons's characterization is helpful and captures my notion of full legitimacy:

¹⁶ For instance, laws requiring drivers to come to a complete stop at stop signs, forbidding jaywalking, forbidding serving minors alcohol, or requiring the payment of local sales taxes on goods purchased out-of-state (in the U.S.). I pick examples of laws that most of us disobey with some frequency. Even noncompliance with more serious laws—e.g., military conscription laws and tax laws—may not undermine a state or threaten its existence. More could be said here as noncompliance with the law will undermine the state in some circumstances, but it is not essential to my point in the text.

¹⁷ Someone is a subject in this sense if he or she is obligated by—subject to—the laws of a state. Citizens are a proper subset of the class of subjects; they are members of a state and enjoy a certain status and certain rights not extended to mere subjects.

¹⁸ Jonathan Wolff, *An Introduction to Political Philosophy* (Oxford: Oxford University Press, 1996), 42.

¹⁹ "[T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence." Max Weber, "Politics as a Vocation" (1919), in *From Max Weber: Essays in Sociology*, ed. and trans. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 78 (emphases changed).

A state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties. Accordingly, state legitimacy is the logical correlate of various obligations, including subjects' political obligations.²⁰

But it will be helpful to invoke the weaker conception too.²¹

What establishes minimal legitimacy in my sense? Suppose a state to be just.²² That is, suppose that it resembles the hypothetical state I described in Section I: It respects the constraints of justice and does not act unjustly. It provides justice to those subject to its rule; it makes and enforces laws, adjudicates disputes, and provides mechanisms for collective decisions (e.g., contracts, corporate law, local governments, parliaments). Some of the laws as well as a number of social programs seek to effect distributive justice. Government in general is responsive to the just interests or wishes of the governed. A state like this would be just. Suppose in addition that it is relatively efficient in its activities. Elsewhere I have argued that a relatively just and efficient state is one that is justified, and that justification confers minimal legitimacy.²³

What is necessary or sufficient for full legitimacy? This is a matter of considerable controversy. I imagine that consent would suffice to legitimate fully a state that had certain properties, presumably those that also secure minimal legitimacy (e.g., justice).²⁴ If (virtually) everyone

²⁰ A. John Simmons, "Justification and Legitimacy," reprinted in Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 130.

²¹ For those conversant with the literature, the distinction I am drawing between minimal and full legitimacy is not Simmons's important distinction between justification and legitimacy. The conception of minimal legitimacy that I am sketching is different both from many popular conceptions of legitimacy and from Simmons's notion of justification. Christopher Wellman employs a minimalist conception of legitimacy, albeit not mine: "[P]olitical 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 obligated to do." Christopher H. Wellman, "Liberalism, Samaritanism, and Political Legitimacy," *Philosophy and Public Affairs* 25, no. 3 (1996): 212.

²² "Without justice, what are kingdoms but great robber bands?" Augustine, *Political Writings*, ed. Ernest L. Fortin and Douglas Kries, trans. Michael W. Tkacz and Douglas Kries (Indianapolis, IN: Hackett Publishing, 1994), 30. "Justice is the first virtue of social institutions, as truth is of systems of thought." John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 3.

²³ Morris, *An Essay on the Modern State*, chaps. 4 and 6. In this book I do not explicitly draw the distinction between minimal and full legitimacy that I make here.

²⁴ Simmons reads Locke to say that a limited state's justification is "a necessary condition for the legitimation (by actual consent) of any particular limited state's rule. Consent is necessary—but not sufficient—for legitimacy and political obligation, (in part) because the justification of a type of state is necessary for consent to a token of that type to be binding. We cannot bind ourselves by consent to immoral arrangements. . . . A state must be on balance morally acceptable and a 'good bargain' for our consent to succeed in legitimating it." Simmons, "Justification and Legitimacy," 129 n. 18. See also Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 88–94.

governed by a just state genuinely consents to its rule, then it is fully legitimate. Under these conditions, consent would suffice to confer full legitimacy. There may be less agreement, however, on the question of the necessity of consent.

Return to the hypothetical state described earlier. That state secured our rights in an efficient manner, more effectively, I hypothesized, than alternative arrangements. I should think that this state would be minimally legitimate. Its existence is permissible; indeed, I should think it has a right to exist and that its subjects (and others) are obligated not to threaten or undermine its continued existence. In addition, I should think that it possesses a right to establish laws, to adjudicate them, and to enforce them, and that others have an obligation not to prevent it from doing so. In general, given the considerable virtues of this state, I should think that others have an obligation not to interfere with it or to undermine its existence and governance. I make, however, no claims about this state's full legitimacy.

This hypothetical state's right to rule would not, however, be exclusive *de jure* as we normally would expect it to be. Rather, it would be exclusive only insofar as no competitor could better secure our rights. Suppose that this state is less efficient in securing our rights than I hypothesized: in certain respects it wastes resources and fails to do effectively all that it might. Suppose another set of agents and institutions could do better and succeeds in taking over the state without harming anyone. It would not have violated any right of the (prior) state.²⁵

We should note something surprising here, namely, that the obligation not to interfere or to undermine is one that all persons would have, not merely citizens of the state or those otherwise subject to its laws (for instance, by virtue of residency). By contrast, the obligation to obey correlative to full legitimacy is normally understood to fall only to citizens and to other subjects of the law.

III. NATURAL RIGHTS

We must return to where we began, with the question of whether our rights leave any room for states to exercise their functions or even to exist. For instance, if we possess (virtually) indefeasible natural rights to life, liberty, and (some of our) possessions, then it is doubtful that states (absent our consent) may do very much, if anything, without violating our rights. The just and efficient state hypothesized earlier would be an incoherent fantasy.

Nozick is usually read as supposing that we have a number of natural rights. I do not want to determine whether this interpretation is correct or what are the best ways to understand traditional natural rights. My inter-

²⁵ Readers will recognize Hobbes's "sovereignty by acquisition" here.

est is in the rights we possess. I think that, in a number of senses, we have some natural rights. We seem to have a right to life and a right to liberty that are natural in the sense of being prior to and independent of convention and held by virtue of our being creatures of a certain kind (i.e., rational agents with interests often at variance with those of others). We may also have limited prior rights to property, but I am less certain about this. Rights of this kind necessarily do not depend for their existence on government and law, even if the state makes them more "secure." As rights that are prior to and independent of convention, they are also prior to and independent of any actual "social contract." In the metaphorical (and misleading) terms of seventeenth- and eighteenth-century philosophy, they are rights that are held in a "state of nature." Thomas Hobbes thinks that humans have no claim-rights prior to and independently of the state, so he denies that there are any natural rights in the sense relevant to my concerns. David Hume's account of justice is conventionalist, and thus he too appears to deny that there are any natural rights.²⁶

Contemporary contractarians such as James Buchanan and David Gauthier argue that we can have rights prior to and independently of government.²⁷ Their accounts, however innovative, are nevertheless conventionalist, and under certain conditions a number of human agents may fail to have any rights. Gauthier is, of course, a hypothetical contractarian; on his view, actual conventions are not a necessary condition for the existence of rights. Nevertheless, neither he nor Buchanan attributes moral standing to all human agents by virtue of their natures, independently of certain interpersonal relations.²⁸ The conventional nature of our fundamental rights is an essential feature of the Hobbesian and Humean

²⁶ Note that rights can be natural in the ways described without committing one either to understanding them as indefeasible or to moral realism. Natural rights, much like natural duties, might be capable of being overridden by other considerations. And a projectivist or quasi-realist account of morals should be able to endorse such rights as well as natural duties.

²⁷ See James Buchanan, *The Limits of Liberty* (Chicago, IL: University of Chicago Press, 1975), chap. 2; and David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), chap. 7. See also Morris, *An Essay on the Modern State*, chap. 6.

²⁸ It is possible our natural rights may be *forfeited*, for instance, by committing serious injustices against others. (Locke suggests this possibility in his *Second Treatise of Government*, chap. 4, sec. 23. See A. John Simmons, *The Lockean Theory of Rights* [Princeton, NJ: Princeton University Press, 1992], especially 148–61.) But an important difference between the conventionalist rights defended by Gauthier and natural rights is that it is possible on the first view for some humans to lack rights even though they have not by any act forfeited them. For instance, agents who have little to offer others and in whom no one takes an interest may lack moral standing in Gauthier's theory. (Something has moral standing insofar as it is owed moral consideration—for instance, others are obligated to it.) Rights are held by virtue of conventions of various kinds, and it is possible that some agents, through no fault of their own, will fail to satisfy the conditions necessary for the attribution of moral standing. In some historical circumstances, it is possible that morals by agreement would not deem unjust a system of slavery or would not consider slavery an injustice to the slaves. See Christopher W. Morris, "Justice, Reasons, and Moral Standing," in *Rational Commitment and Social Justice: Essays for Gregory Kavka*, ed. Jules L. Coleman and Christopher W. Morris (Cambridge: Cambridge University Press, 1998), 186–207.

contractarian tradition to this day. By contrast, most neo-Kantian contractarians, including John Rawls, do not condition moral standing on the satisfaction of certain interpersonal conditions (such as the prospect of mutual gain). Aside from our basic moral standing—that accorded to all “free and equal persons” by neo-Kantian thinkers—most of justice for these theorists seems to be “constructed,” so it is not clear that they admit the existence of natural rights in my sense of the term.

Most norms of justice require determination or specification, and this is typically customary—for instance, the implications of contract or property may differ from place to place, depending on custom or positive law. And some norms of justice seem to be largely conventional—for instance, norms governing fidelity, truth-telling, mutual aid or rescue, and assistance to strangers. But it is hard to believe that all of justice is conventional.²⁹

Assume that we are right in thinking that parts of justice are natural and not conventional.³⁰ In order to determine the implications of our natural rights for the justification and legitimacy of states, we need to know more about the nature and bases of these rights. Contrast two conceptions of the purpose and nature of rights found in the literature. On one view, rights serve to protect the interests or well-being of the right-holder, who is the beneficiary of the correlative obligation(s). This is the interest or benefit conception of rights. By contrast, the choice or will conception of rights conceives their purpose to be the protection of people’s choices. On this view, the freedom of agents to choose among alternatives is to be protected by duties imposed on others and owed to the agent.³¹

Rights as I have been understanding them in this essay are relations connecting a number of agents: the subject(s)—the right-holder(s)—and the object(s)—the agent(s) against whom the right is held, the bearer(s) of the correlative duty or duties. Rights have content: that which the right is a right *to* or that which the duty is a duty *to do* (or refrain from doing). It is customary to distinguish between rights in this sense—claim-rights—and (mere) liberties or Hohfeldian privileges. Someone has a liberty to do something if and only if he or she has no duty not to do that thing (i.e., is free from a duty to refrain from doing it). A claim-right to *x* is typically accompanied by a liberty to *x*. But such a claim-right may be conjoined with a duty not to refrain from *x*. For instance, the right to vote could be conjoined with a duty to vote (as in our hypothesized just state). More

²⁹ “One part of what is politically just is natural, and the other part legal.” Aristotle, *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis, IN: Hackett Publishing, 1985), 1134b19–20.

³⁰ Much more, of course, needs to be said about the distinction, and I am certain that many difficult questions are hidden by my quick characterizations.

³¹ The origin of the distinction(s) between benefit and choice accounts is H. L. A. Hart’s essay, “Bentham on Legal Rights” (1973), reprinted in H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 162–93. My way of drawing the familiar distinction will not necessarily correspond with others.

importantly, claim-rights can be accompanied by *powers*, the capacity to change one's normative relations. The right to *x* might be accompanied by the power to release others from their correlative obligations. For instance, someone may waive a right to be repaid a debt. To be able to alienate a right—for instance, to transfer it to another in exchange for something—is to possess a power. The (legal) right to vote is not alienable—we cannot transfer it to another—and some think that the right to life is similarly inalienable. This is to say that these claim-rights are not accompanied by certain powers.

Understanding fundamental rights as interest-protecting or choice-protecting may affect both the content of the rights and their accompanying elements. For instance, if the right to life is interest- or welfare-protecting, perhaps the right-holder will not be understood to possess the power to release others from their correlative duties (not to kill); by contrast, if our concern lies with the protection of choices, then we may understand the right to be alienable and the right-holder to possess the power to waive or to extinguish it.³²

Nozick's well-known speculative remarks in *Anarchy, State, and Utopia* about the foundations of these rights suggest a choice-protecting conception. It is impermissible, Nozick suggests, to treat beings like ourselves as mere means to the ends of others. This may be because of the importance of our choices for the meaning of our lives: "A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life. . . ."³³ Our fundamental rights may have something to do with the meaning of life for creatures such as ourselves. And there are other reasons for thinking that many fundamental rights are best understood as choice-protecting. Making choices is or can be good for us.

Now if our natural right to liberty is choice-protecting, then it would seem that consent is a necessary condition for the legitimacy (minimal or full) of states. If this is the case, then it is hard to imagine that any of our states, including the efficient and just one hypothesized earlier, are legitimate. Natural rights seem to constrain states by requiring them to secure the consent of the governed.

This is not an unreasonable interpretation of our natural rights.³⁴ But we should be careful and not be misled by the distinction between interest-

³² But consider the matter broached above, the power to alienate one's right to be free and to sell oneself into slavery (for payment of debts or some other reason). Interest-protecting theorists may deny right-holders such a power. But it is not clear that choice-protecting theorists will necessarily be inclined to accord it to them; after all, once the agreement has been consummated, the voluntary slave no longer has any choices to make. But others will argue differently.

³³ Nozick, *Anarchy, State, and Utopia*, 50.

³⁴ I should note that some read Nozick's proviso on the appropriation of unowned resources as a basic interest-protecting right to the level of well-being one would have attained in the absence of appropriation. The interpretation of Nozick's account is more complicated than I have suggested. See Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), 236 n. 13.

protecting and choice-protecting conceptions of rights. These should be understood as alternative accounts of the immediate purpose or aim of rights: we have rights in order to protect interests or choices. The question is *what* is protected, interests or choices? Another question is *why* are they protected? It could be that a person's freedom, a sphere of choice, ought to be protected because it is in that person's interests to have that sphere of choice. The ground for the choice-protecting rights of people may be their interests.³⁵

The right of liberty, we may think, is best understood as a choice-protecting right. We need, however, to inquire deeper into the grounds for this right. Nozick's speculative remarks about choice and the meaning of life do motivate a choice-protecting conception of the right of liberty. But so do other kinds of considerations. Choice-protecting rights may have their sources in their contribution to making our lives go well. Contrast people and nonhuman animals that lack the capacities necessary for rational agency of the kind we typically possess. The latter can have good lives—lives that are good for them, given their capabilities—without striving to do the sorts of things that agents such as ourselves typically do. John Stuart Mill views such lives as those of “a pig satisfied.” He is right to think that such lives are less than what humans are capable of or should strive for, but he is wrong if his remark expresses contempt for such lives. A satisfied pig or turtle, which lives a long life, relatively free of suffering, and is able to reproduce, lives a good life—a good life for a pig or turtle. The lives we can live are different given our different capabilities; these affect what is good for us.

A good life for us will involve the exercise of our agency and of our capacities to choose. The exercise of these capacities contributes to our well-being both in itself and instrumentally. It contributes instrumentally to our lives going well simply because good choices will bring benefits and thus improve things for us. And it contributes intrinsically insofar as the exercise of our distinctive capacities is itself fulfilling or constitutive of our good. Given the sorts of creatures we are, exercise of our agency is important and should be protected by a choice-protecting right to liberty. Humans who lack the full capacities required for agency—young children, defective adults—do not need choice-protecting rights, at least insofar as they do not possess or can never acquire these capacities.

The intrinsic value of choice is especially important for the consideration of the right to liberty. Even if some choices fail to be instrumentally valuable, they may retain their intrinsic value. As some have argued, rights to choose allow the right-holder to choose wrongly.³⁶ Note, how-

³⁵ David Schmidtz's notes have helped me express this point more clearly.

³⁶ See Jeremy Waldron, “A Right to Do Wrong” (1981), reprinted in his *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), 63–87. It is a property generally of (genuine) authority that it may bind even when in error. See Raz, *The Morality of Freedom*, 47–48, 60–62, and 159.

ever, that the intrinsic value of exercising one's agency by a mistaken decision to take one's own life (e.g., teenage suicide motivated by anger at one's parents) or a mistaken decision permanently to alienate one's liberty (e.g., by a lifelong contract of indentured servitude) would be outweighed by the consequent losses of one's life or liberty. So grounding a right to liberty (or a right to life) on the contribution of agency to our lives going well might not accord one the same powers as the line of thinking that Nozick sketches in *Anarchy, State, and Utopia*.

Suppose, then, that our right to liberty is choice-protecting and is grounded in the contribution of agency to our lives going well. Suppose in addition that a just and relatively efficient state, like the one hypothesized earlier, "secures these rights," that is, ensures that they are unlikely to be violated. Then might not such a state be minimally legitimate without obtaining our consent? Might we not say that "to secure these rights, governments are instituted among men" and that we may "alter or abolish" any government that "becomes destructive of these ends" (i.e., the security of our rights) without endorsing the principle that governments "deriv[e] their just powers from the consent of the governed"?

In *An Essay on the Modern State*, I supposed that a state that was just and relatively efficient would be legitimate in the sense I now dub minimal. It would have a right to exist and a right to rule, and we, citizens or not, would have an obligation not to undermine its rule or interfere with its rule. I then asked whether a state that is legitimate in this minimal sense would possess the full set of powers that states characteristically claim—most importantly, sovereignty. Something is sovereign insofar as it is the ultimate source of political authority in a realm, and I interpreted this authority to be comprehensive and supreme in Joseph Raz's sense: comprehensive in claiming the right to regulate any kind of behavior, and supreme in claiming the right to regulate all other sources of authority within its realm.³⁷ I concluded that minimally legitimate states typically would not possess the full powers of sovereignty. In effect, they would not be fully legitimate. I have been suggesting in this essay that even if natural rights block the full legitimacy of states, they need not block states' minimal legitimacy. To the extent that a state is just and relatively efficient, it will be minimally legitimate and we will have obligations not to undermine its existence or interfere with its governance.³⁸

A state's minimal legitimacy need not imply more; that is, it need not imply that we will have an obligation to obey as this is traditionally understood. There is considerable skepticism in the contemporary literature that this more demanding obligation can be sustained. My skepti-

³⁷ See Joseph Raz, *Practical Reason and Norms* (1975; reprint, Princeton, NJ: Princeton University Press, 1990), 150–52, and Morris, *An Essay on the Modern State*, chap. 7.

³⁸ A comparison of this account to that defended by David Copp will have to await another occasion. See David Copp, "The Idea of a Legitimate State," *Philosophy and Public Affairs* 28, no. 1 (1999): 3–45.

cism may be stronger than that of many. A general obligation to obey the state requires compliance with every valid law or directive that applies to one except in circumstances prescribed by the state. It is commonly assumed that someone so obligated always has a reason (of a stringent or preemptive kind) to comply. But it is possible to deny this and to think that obligations, legal or moral, do not always entail reasons (of the right kind) to comply. In moral theory, the first position is labeled "internalism": an obligation to do *x* is always a reason (of a particular kind) to do *x*. (Technically, this is one kind of internalism. "Externalism" is the term for the family of anti-internalist positions.) If one rejects internalism, it will be possible to think that a state may be fully legitimate and that we nevertheless lack reasons to comply with its laws or directives in all instances. So one could admit an obligation to obey without conceding the question about reasons for action. In my view, it is the latter (reasons for action) that ought to be the focus of our attention, but I have followed the literature in formulating the questions in terms of obligation. Given that I do not think that states will possess full legitimacy, it does not matter very much for my concerns in this essay.

IV. CONCLUSION

The existence of natural rights appears to threaten the legitimacy of states. If we have a natural right to liberty, it is hard to see how a state could be legitimate without first obtaining the (genuine) consent of the governed. The "historical" account of justice Part II of *Anarchy, State, and Utopia* implies as much, but Nozick's attempt in Part I to show that a state could emerge from the just interactions of individuals without obtaining their consent may obscure the threat that natural rights pose to state legitimacy. The matter may not be as simple as it might first appear. We need to distinguish between minimal and full conceptions of legitimacy, and we need to be clearer about the kinds of natural rights that we possess.

A legitimate state has a right to exist and a right to rule. The right to exist entails obligations on the part of others not to threaten its existence in certain ways (e.g., not to attack or conquer it). A legitimate state also possesses the right to establish laws and to adjudicate and enforce these as necessary. A state is *minimally legitimate* if its right to rule entails that others are obligated not to undermine it but are not necessarily obligated to obey it. By contrast, a state is *fully legitimate* if its right to rule entails an obligation of subjects, or at least citizens, to obey (each valid law). This obligation may be thought of as the general obligation to obey the law, one that requires compliance with every law that applies to one except in circumstances licensed by law (e.g., justified or excused disobedience). In addition, fully legitimate states have an *exclusive* right to exist and to rule that others may not challenge, a right that is exclusive *de jure*.

It seems most plausible to understand our natural right to liberty as a choice-protecting right rather than an interest-protecting one. This would suggest that consent is necessary for the full legitimacy of states. However, a choice-protecting natural right to liberty might be grounded in our interests or welfare. I suggest that understanding the right to be free in this manner might not commit us to requiring consent for minimal legitimacy. Thus, even if natural rights effectively block the full legitimacy of states—on the assumption that rarely, if ever, will the requisite consent be forthcoming—they may allow minimal state legitimacy.

Well-behaved states may possess minimal legitimacy, and to this extent the skeptical implications of Nozick's framework may not be as great as expected. But he was right to be skeptical that states are fully legitimate.

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