

LIBERTARIANISM AND THE POSSIBILITY OF THE LEGITIMATE STATE

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WE MIGHT BELIEVE THAT there are no conceivable conditions under which the state is legitimate. Alternatively, we might believe that there are such conditions, but deny that they actually obtain. The difference between these two forms of anarchism is important. The classical formulation of libertarianism would seem to entail the first form. Section I of this article argues that this fact alone would constitute a serious objection against its plausibility. In Section II, it is argued that acknowledging a minimal form of positive right might overcome such an objection. Section III shows that, contrary to what we might think, the acknowledgment of this particular type of positive right would seem to provide an adequate normative ground for making sense of some central libertarian insights and concerns.

I

Traditionally, it has been claimed that the morally problematic nature of the state arises from the mere use of coercion. Yet if the negation of the morality of coercion were what the anarchist challenge must amount to, the challenge would be remarkably weak. For it is hard to believe that people have no right to use coercion to defend themselves against those who might want to do certain things to them, such as violating their rights. If that is hard to believe, it is equally hard to believe that the state could not use coercion to exercise such a right on behalf of its subjects.

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A challenge to the legitimacy of the state, however, need not arise from a challenge to the permissibility of the mere use of coercion. It might also arise from a challenge about the justice of what the state coercively requires. In other words, in justifying the state, what might call for an explanation is not the morality of the use of force as such, but rather the morality of some particular uses of it that are characteristic of the state. The state collects taxes, and thus forces its members to pay for the protection of their own rights. The state also monopolizes the provision of justice. The state may recognize a right to use force in self-defense, but it does not recognize a right to punish those who have violated one's rights. 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. Furthermore, the state performs all those actions regardless of the existence of any explicit agreement to do so by its subjects. For the state to be legitimate, it must be morally permissible to act in such a way.

Thus, the very possibility of a legitimate state would seem to depend upon the validity of a moral principle establishing a set of conceivable conditions under which the performance of the state's characteristic actions are morally permissible. We may say that the problem of the existence of such a principle is the problem of the *possibility in principle* of the legitimate state. But clearly, 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 do actually obtain in the real world. This would be the question of the *possibility in practice* of the legitimate state.

In its classical formulation, libertarianism establishes, in addition to full self-ownership, the illegitimacy of all compulsory transfers of justly acquired holdings and the permissibility of all voluntary transfers of such holdings. The state, however, 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. And the state does so regardless of the existence of any explicit agreement on the part of those who are coerced. This is why it has been claimed that libertarianism is incompatible with the idea of a legitimate state.¹ A legitimate state is a state that has a right (at least a Hohfeldian

¹ See, for example, Murray Rothbard, *For a New Liberty* (San Francisco, Fox and Wilkes, 1996 [4th printing]), pp. 45–69, and *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 161–73.

liberty-right)² to perform those characteristic actions. But the classical formulation of libertarianism does not seem to leave any room for anyone having such a right.

It is important to understand, however, that the previous incompatibility between the classical formulation of libertarianism and the legitimate state amounts to a denial of the *possibility in principle* of the legitimate state. In other words, libertarianism would entail that there are no conceivable conditions under which the state would be justified. But if indeed libertarianism entails the impossibility in principle of the legitimate state, the state would be illegitimate regardless of the nature of the stateless society. The state could never be a morally acceptable remedy for any of the inconveniences of the stateless society; it would matter neither how serious such inconveniences are nor how easily the state could be able to solve them. Yet we tend to think that a plausible political philosophy would justify at least a minimally costly state if the inconveniences of the stateless society are considered particularly severe, and that if such a state would be able to overcome them. We must note that 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, if the legitimate state is in principle impossible the inquiry into the nature of the stateless society 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.

Thus, it might be argued that if indeed libertarianism has these particular anarchist implications, these implications will be best understood as a case against that doctrine. In other words, if we must acknowledge that at least a minimally costly state would be justified if it were necessary to overcome some serious inconveniences of the stateless society, it would be true neither that all compulsory transfers of justly acquired holdings are morally impermissible nor that all voluntary transfers of such holdings are morally permissible. Under certain conditions, it would be morally permissible to impose taxes and prohibit the private provision of justice. Of course, the state might still be illegitimate if such conditions do not obtain. But, again, the implausibility 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. Regardless of whether the state is

² In Hohfeldian terms, having a liberty-right to do P only implies the absence of a duty not to do P. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

indeed illegitimate or not, the reason why that would be the case cannot be the one that is rightly deduced from the classical formulation of libertarianism. This is why there might be a case for reconsidering such a formulation.

The most predominant type of liberal argument for the state is an argument that somehow links the moral permissibility of coercing any given subject, with the benefits that this particular action yields to that very same subject. It is not difficult to understand arguments from implicit consent, hypothetical contracts, and fairness as all instances of that type. Perhaps in an attempt to avoid the charge of paternalism, the voluntarist element that is taken to justify the nonpolitical interactions among individuals is claimed to be found somehow even in the coercive arrangement that constitutes a state. Yet the plausibility of this liberal project is quite dubious. The state is not a voluntary association, and nothing seems to be gained by looking for ways in which it might look as if it were one. For those who share a commitment to individual sovereignty, as libertarians do, the morally problematic feature of the state is not other than the phenomenon of genuine compulsory subjection upon which its existence rests. But how could then libertarianism allow for the possibility in principle of the legitimate state without ignoring some of its deepest commitments?

II

It is somehow surprising that in the search for the source of political legitimacy within the liberal tradition, little attention has been paid to the idea of samaritanism; a decidedly non-voluntarist notion but with a quite clear appeal. Only recently, a theory of political legitimacy based on such a principle has been explicitly formulated by Christopher Wellman.³

As Wellman has suggested, the samaritan approach to political legitimacy may be understood as establishing the existence of a certain type of positive right; what we may call “samaritan” rights. The holders of such rights would be the individuals who, through no fault of their own, face certain perils, and they would hold these rights against those who have the capacity to place them out of peril at a reasonable cost. As it is the case with most rights, samaritan rights are not rightly enforceable only by their holders. If the peril that A faces justifies A’s use of coercion against B, we might consider that if A were unable to coerce B, but someone else on his behalf

³ See Christopher H. Wellman, “Liberalism, Political Legitimacy, and Samaritanism,” *Philosophy & Public Affairs* 25 (1996): 211–37; “Toward a Liberal Theory of Political Obligation,” *Ethics* 111 (2001): 735–59; and “Samaritanism and the Duty to Obey the Law” in Christopher Heath Wellman and A. John Simmons (eds.) *Is There a Duty to Obey the Law* (Cambridge University Press, 2005), pp. 3–89.

were so able, this third party would be equally justified in coercing B in order to place A out of 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. Thus, according to a samaritan approach to political legitimacy, the legitimate state could be understood as a mere enforcer of the samaritan rights that others have. The perils in questions will be the ones that could only be avoided by the state coercing its subjects in its characteristic manners, that is, by establishing a tax-funded monopoly on the provision of justice and protection. The mythical story of the social contract needs to be modified only slightly. Rather than assuming that everyone consents to the existence of the state, we must assume, more realistically, that only some do. These consenters may infringe the rights of the dissenters if that is necessary to overcome the consenters' expected perils and the dissenters' losses are not significant.

Presumably, only few will deny that there are positive obligations when it comes to emergency situations. Could we plausibly deny, after all, that by not getting down on our knees to save a baby from drowning in a shallow pond of water we are doing something that, all things considered, we should not do? Perhaps more plausibly, it is sometimes claimed that while it is undeniable that we might have some positive obligations, such obligations could not be rightly enforced. In other words, the existence of samaritan duties could not possibly correlate with the existence of samaritan rights, that is, with valid claims to use coercion to secure the aid that individuals might be morally obligated to give. Surely, 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. Let us think about a familiar example. A gets lost in his hiking expedition. 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. 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. Would it be plausible for us to claim that if A decides to coerce B in ways that are both strictly necessary for his survival and not unreasonably costly for B, A would be doing something that, all things considered, he should not do? It is difficult to see how we could plausibly claim such a thing. After all, would not *we* do the same thing? Would not we believe that we are justified in doing so?

We might want to argue that while A's behavior might be morally excusable, it would be inadequate to qualify it as a right.⁴ But the basic point is whether it is true that, all things considered, A should not coerce B in those particular ways. If that is not true, nothing substantial is denied by referring to A's behavior merely as morally excusable. If we would want to reject the point made by the claim regarding the existence of samaritan rights, we would need to argue that, all things considered, A should not coerce B in the previous type of scenario. Our moral intuitions would seem to resist such a claim. There would also seem to be a good reason to support those intuitions. Denying that A has a samaritan right in those previous cases would seem to entail that in certain circumstances the demands of morality are demands that, in J. O. Urmson's words, only heroes will be able to follow.⁵ Urmson thinks of a case in which a soldier throws himself on a grenade and thus sacrifices his life to protect his comrades. Urmson says that if the soldier had not thrown himself on the grenade, no one could have said to him "you ought to have thrown yourself on that grenade." This is so because his action was heroic, and morality cannot work under the assumption that people are heroes. Urmson was mainly concerned with drawing attention towards what they are usually referred to as "superogatory" actions. But the general lesson is that there are certain actions that, due to their demandingness, no plausible moral theory can be characterized as obligatory. If we deny the existence of samaritan rights, we fail in acknowledging this basic constraint. In order to see more clearly why this is the case, we should discuss what precisely the conditions are for people to acquire samaritan rights. There seem to be at least four major conditions.

First, there is the obvious condition relating to the nature of the peril that people might face. The notion of peril denotes a certain danger of significant proportions; a danger that compromises the minimal satisfaction of certain basic preferences that people might have relating to living. The perils in question are, therefore, serious unfortunate circumstances or dire

⁴ Both Rothbard and Ayn Rand seem to make this type of claim. See Rothbard, *The Ethics of Liberty*, p. 152; and Ayn Rand, "The Ethics of Emergencies" in Ayn Rand, *The Virtue of Selfishness* (New York: Signet Books, 1961): 49–56. It is also common for libertarians to focus their cases on the negative consequences of "legalizing" what we might consider, in extraordinary circumstances, morally excusable behavior. As it will be clear later, this type of consideration is totally consistent with the main line of argument presented in this article.

⁵ J.O. Urmson, "Saints and Heroes," in Steven M. Cahn and Joram G. Haber (eds.), *20th Century Moral Philosophy* (Upper Saddle River, New Jersey: Prentice Hall, 1995), pp. 322–33. Originally published in A. I. Melde (ed.) *Essays in Moral Philosophy* (Seattle, WA.: University of Washington Press, 1958).

straits that some might encounter. Samaritan rights would not arise when one deals with a mere inconvenience or obstacle in satisfying a personal project.⁶

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 condition: from basic claims of desert to practical insights regarding the advantages of internalizing the costs of personal decisions.⁷

Third, for people to acquire samaritan rights, the aid that is morally demanded and may be coercively secured must be strictly necessary to overcome the peril. This condition implies, first of all, that the peril in question must be of a remediable nature. When nothing others can do will place some others out of peril, there is no coercion that the latter may impose onto the former. Evidently, it also implies that samaritan rights emerge only when voluntary solutions are unavailable. Thus, the aid that is morally demanded and that may be coercively secured must not only count as genuine or effective aid, but it must also count as the only available alternative.

Finally, there is the condition limiting the costs of the aid that is required from others. 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. But it is also the case that one has no right to such aid just if it is the case that the cost of the required aid for others is smaller than the costs the peril imposes on us. It is common to regard mere 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

⁶ This is perhaps irremediably vague, and difficult questions might arise when dealing with borderline cases. But acknowledging this would not seem to entail that we should ignore the intuitive normative significance between different classes of preferences that people might have.

⁷ This condition is especially important in dealing with the so-called "Samaritan's Dilemma," 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.

aid that may be coercively secured must not impose more than a reasonably low cost on others.

If we put the previous four conditions together, individuals would acquire a samaritan right when they face a significant dangerous situation for which they are not responsible, and when the only available means to overcome it involves the aid that others could provide at a reasonable cost to themselves. Thus, if we deny the existence of samaritan rights, we would believe that an individual who faces a scenario describable in those previous terms should just endure the danger in question if those others happen to ignore or reject his request for help. But if in Urmson's example we were not willing to tell the soldier that he should have thrown himself on the grenade, how could we be willing to tell that individual, should he decide to coerce those who could help him, that he should have not done that? Could we plausibly claim that he should suppose to do nothing regardless of the fact that he did not do anything to deserve such a misfortune? If we agree that there are things that only moral heroes can do, and that such things could not possibly be made obligatory, it seems to be the case that we must acknowledge the existence of samaritan rights.⁸

If the existence of samaritan rights must be acknowledged in those non-political circumstances that the cabin example illustrates, and if not coercing people in the way the state does will bring about the same type of circumstance, we should also acknowledge the existence of samaritan rights in that situation as well. Thus, a samaritan approach to political legitimacy will conceive the legitimate state as a mere enforcer of such rights.⁹

⁸ In our previous discussion of the conditions for samaritan rights, no mention was made regarding the existence of compensatory obligations. It might be argued that when certain extraordinary circumstances allow us to infringe other people's rights, compensation is usually due to the holders of such rights once the circumstances have turned back to normal. Yet the state might have no manner of paying such compensations. Given the type of structural problem that the state is supposed to solve, it might be hard to identify those from whom resources should be transferred; and it might be equally hard to identify those to whom those resources should be transferred. Contrary to what this objection suggests, it does not seem to be the case that an incapacity to pay what otherwise would be due compensation invalidates the permissibility of acting as the principle of samaritanism allows. This seems especially true when the principle of samaritanism already contains a clause prohibiting the imposition of unreasonable costs. Therefore, if the state is indeed unable to pay compensation to its subjects, the absence of compensatory transfers does not seem to invalidate the permissibility of the state's coercion.

⁹ As Wellman has argued, the principle of samaritanism might be understood both as a principle of political legitimacy, where such notion is understood as referring to the mere moral permissibility of the existence of the state, and as a principle of political

III

If we reflect both on the conditions that give rise to samaritan rights and on the types of issues that we regard as important in discussions about the morality of the state, we might see how the samaritanism approach to political legitimacy has some very clear virtues.

First of all, a samaritan approach allows us to give full moral significance to those empirical facts that, intuitively, we tend to think are quite important. For a samaritan approach, it matters greatly whether or not the state actually produces some important social benefits that were otherwise unavailable in a stateless condition. The state will be morally permissible only if whatever the benefits that the state provides cannot be secured by voluntary cooperation.¹⁰ 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 the stateless society 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.¹¹ But clearly we should favor the state over anarchy on those grounds only if we have reasons to believe that the state will not act as we fear the private monopoly will. Anarchists rightly remind us that in assessing the stateless society's capacities we must not assess them against the benchmark that a perfect system provides. We must assess them against the only alternative we have: the

obligation, where such a notion is understood as referring to the obligations that the individuals have towards the state. See his "Toward a Liberal Theory of Political Obligation," and "Samaritanism and the Duty to Obey the Law." The precise scope and nature of those obligations is, however, a matter of controversy. On this point, see A. John Simmons, "The Duty to Obey and Our Natural Moral Duties," in Wellman and Simmons (eds.), *Is There a Duty to Obey the Law?*, pp. 179–88.

¹⁰ According to a samaritan approach, that the state might be somehow more efficient than the alternative arrangement in producing such benefits will be normatively irrelevant beyond a certain minimal level of production.

¹¹ See, for example, Tyler Cowen, "Law as a Public Good. The Economics of Anarchy," *Economics and Philosophy* 10 (1994): 249–67; and Randall G. Holcombe, "Government: Unnecessary but Inevitable," *The Independent Review* 8.3 (2004): 325–42.

feasible state. By acknowledging the existence of samaritan rights, we are able to capture the normative relevance of this insight.

An additional virtue of the samaritan approach is that it provides a moral framework capable of supporting a doctrine of “provisional” legitimacy. Traditional theories of the state have seen the state’s legitimacy arise from the consequences of some inevitable and universal features of human interaction. Anarchist libertarian theorists have challenged this traditional conception. For a theory of political legitimacy, it is important to capture the significance of this challenge. However, it is also important to acknowledge that society might have other types of diseases besides the alleged chronic ones upon which traditional theories of the state focus their attention. Thus, the basic idea behind a doctrine of provisional legitimacy would be that state is morally allowed to deal with certain problems, that is, to act in certain ways. Given the particular nature of such problems, however, the normative power the state would have will be granted on a mere provisional basis. A principle of samaritanism would seem to provide an adequate moral framework both to identify the relevant problems and to ground the state with a provisional power to resolve them. Among those problems, of special interest would seem to be those related to the present existence of states, such as, perhaps, the problem of national defense, and to the special conditions created by any sudden transition to a stateless condition. The doctrine of provisional legitimacy would seem to be an important element of any plausible political philosophy that advocates the elimination of the state. Yet it is not clear how the classical formulation of libertarianism could be compatible with the underlying sort of considerations. If indeed all and only voluntary transfers of justly acquired holdings are impermissible, how could the state rightly act in order to create the most adequate conditions for its very dissolution?¹²

It is important to note, however, that acknowledging the existence of samaritan rights would not only provide a more adequate moral ground for the libertarian case against the state. It would also help us to make sense of the debate about the plausibility of such a case that might take place among libertarians themselves. Certainly, reasonable disagreement might exist about the extent of the market’s capacities to solve the problem of social order. Reasonable disagreement might also exist about the effectiveness of institutional mechanisms for restraining government. This is why many libertarians favor the state over anarchy. Without acknowledging the

¹² Should we simply ignore, for example, the mere temporal demands of a spontaneous order in the provision of justice and protection? Should we give no moral significance to the outcomes resulting from the existence of present ill-defined property rights?

existence of samaritan rights, however, it is not easy to understand how such a position could be a consistent one. Randall Holcombe, for example, claims that the libertarian argument for minimal government is that it is necessary to prevent the creation of the even more predatory and less-libertarian government that would arise from anarchy.¹³ Holcombe's worry is legitimate, and it deserves serious attention. It is not clear, however, what the implicit moral principle is, and whether such a principle is compatible with the deontological or non-consequentialist character of libertarianism.

As it is sometimes put, a deontological morality is not a morality of goals but of constraints. Deontology does not direct the agent to undertake whatever means are necessary to reach a desirable goal. It rather claims that the agent may pursue whatever goals he has provided that certain constraints on his actions are respected. Those constraints may take either a negative or positive form. They may establish that we cannot kill innocent persons, or that we must assist people in need.¹⁴ Deontology does not claim, as consequentialism does, 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 better secure the goal in question. For deontology, moral constraints are genuine constraints. They cannot be violated for the sake of what is taken to be a better state of affairs. The endorsement of deontology is a central feature of libertarian moral theory. This is what distinguishes the libertarian case from other defenses of the free-market. Acknowledging the existence of samaritan rights is compatible with this type of moral stance.

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 in a greater fashion. If the enslavement of an individual would somehow produce a more secure enjoyment of other individuals' rights, for example, 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 on basic rights that yields a greater gain in impersonal value. Samaritan rights only sanction the permissibility of infringements on basic rights that are necessary to overcome perilous circumstances, and the extent of such an infringement is limited. Furthermore, acknowledging the existence of samaritan rights does not commit us to acknowledging the sort of aggregative moral perspective that

¹³ Holcombe, "Government: Unnecessary but Inevitable." p. 338.

¹⁴ On this point, see Richard J. Arneson, "The Shape of Lockean Rights: Fairness, Pareto, Moderation, and Consent," *Social Philosophy and Policy* 22 (2005): 255–85, p. 259.

underlies consequentialist theories, according to which the small grievances of the many could always outweigh the great misfortunes of the few.

We might believe that due to their limited and exceptional conditions of application, the interest on a minimal form of positive rights that might be said to arise in emergency situations is largely theoretical. This is probably true. The claim made here was that endorsing samaritan rights provides a more adequate normative ground for the type of institutional arrangements that libertarians already endorse. The mere theoretical nature of this issue does not make it unimportant. Many have objected the strict and absolute nature of libertarianism. Acknowledging the existence of samaritan rights would answer those worries. More importantly, as the considerations offered in this article have attempted to show, the only available deontological grounds upon which the possibility in principle of the legitimate state rests might not be other than the ones provided by individuals' samaritan rights. Libertarians could appeal to them to avoid what it otherwise would be a serious objection against either the plausibility or their internal consistency of their view.¹⁵

¹⁵ It could be argue that the reformulation of libertarianism suggested here would clash with the “nonaggression axiom,” an alleged defining feature of libertarianism. But the nonaggression axiom would seem to be a mere formal principle, and thus of little value in differentiating libertarianism from other doctrines. We might believe, for example, that the validity of the “nonaggression axiom” implies the illegitimacy of any redistributive attempt. In other words, we might believe that this axiom is equivalent to the libertarian theory of distributive justice. This would be a mistaken belief. In order to establish whether redistribution implies the initiation of the use of force we must know who the owner is of that which is redistributed. This cannot be known, however, by appealing to the nonaggression axiom. For the nonaggression axiom to have any meaning at all, an independent theory of property rights must be supplied.