Law and Philosophy (2011) 30: 575–601
DOI 10.1007/s10982-011-9105-2

MASSIMO RENZO

STATE LEGITIMACY AND SELF-DEFENCE

(Accepted 4 May 2011)

ABSTRACT. In this paper I outline a theory of legitimacy that grounds the state's right to rule on a natural duty not to harm others. I argue that by refusing to enter the state, anarchists expose those living next to them to the dangers of the state of nature, thereby posing an unjust threat. Since we have a duty not to pose unjust threats to others, anarchists have a duty to leave the state of nature and enter the state. This duty correlates to a claim-right possessed by those living next to them, who also have a right to act in self-defence to enforce this obligation. This argument, if successful, would be particularly attractive, as it provides an account of state legitimacy without importing any normative premises that libertarians would reject.

I. THE PROBLEM OF LEGITIMACY

In this paper I outline a new theory of state legitimacy, that is, of what justifies the state's right to rule over its subjects (generally coinciding with the individuals living in its territory). A state has the right to rule when it has *legitimate* authority, i.e., when it has the exclusive right to impose ''binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties''.[1] A different way of making the same point is to claim that the state has the right to rule when it has the right to coercively subject individuals living on its territory to its authority.[2] Individuals are subject to the authority of the state when the laws of the state provide them with content-independent peremptory reasons for

[1] A. John Simmons, *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), p. 130.

[2] Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), pp. 36–62.

action, i.e., reasons to perform the acts commanded by the state simply because they are commanded by it.[3]

I will follow the traditional way of formulating the problem of legitimacy in terms of whether there are compelling reasons to enter the state rather than live in the state of nature. This formulation is sometimes criticized as unrealistic, but should ultimately be understood as equivalent to the question of whether there are compelling reasons to enter a condition in which we ought to take the laws of the state as providing us with content-independent peremptory reasons for action (and in which these obligations can be coercively enforced).[4] Thus, legitimacy includes both the state's exclusive power to impose (and coercively enforce) duties on its subjects and the right to be obeyed by them. The former correlates with obligations on others not to perform the same tasks; the latter correlates with the subjects' duty to obey the state, i.e., with their political obligation.[5]

This is a conclusion that some reject. While all theories of political obligation necessarily presuppose a theory of state legitimacy (in order to have political obligation we need a legitimate state to which our duty to obey is owed), some have advanced theories of state legitimacy which do not require any theory of political obligation.[6] These theories claim that states are justified in coercing their citizens, but that citizens have no duty to *obey* the law (though they often have a duty to *conform* to it, i.e., to do what the law says for independent moral reasons).[7] Although it would be interesting to compare the merits of these two conceptions, I will not be able to address this problem here. Like most theories of legitimacy, the

[3] These reasons are "content-independent" in that they are supposed to function as reasons irrespective of the merit of the action required: we are supposed to act as commanded whether or not we have reason to act on the content of the command. They are "peremptory" in that they cut off or preempt deliberation: we are supposed to act as commanded without assessing the merits of the action in question [Herbert L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), pp. 253–254].

[4] In the rest of the paper I will omit the enforcement clause when including it would make the text too convoluted.

[5] Simmons, *Justification and Legitimacy*, p. 130, n. 20.

[6] William Edmundson, *Three Anarchical Fallacies* (Cambridge, Cambridge University Press, 1988), pp. 43–60; Allen Buchanan, "Political Legitimacy and Democracy", *Ethics* 112 (2002), pp. 689–719.

[7] The idea that no duty to obey the law correlates to the state's right to coerce its citizens is defended in Robert Ladenson, "In Defense of a Hobbesian Conception of Law", *Philosophy & Public Affairs* 9 (1980), pp. 134–159 and Christopher H. Wellman, "Samaritanism and the Duty to Obey the Law", in Christopher H. Wellman and A. John Simmons, *Is There a Duty to Obey the Law*? (New York: Cambridge University Press, 2005), pp. 3–89.

theory presented in this paper aims to account for political obligation as well. However, the focus of my discussion will be on legitimacy.

According to a view which is quite popular in the liberal tradition, the justification of state legitimacy has something to do with important goods or benefits[8] that states supply to their citizens, most importantly, order and security. In traditional consent-based theories, citizens are supposed to give their consent to state authority in exchange for these goods. Notoriously, however, the problem is that this theory is under-inclusive, since only a vey limited number of people (mainly naturalized citizens and officials) can be said to have actually consented to the state.

The same problem is encountered by another influential theory that attempts to justify state legitimacy by appealing to the benefits provided by the state, namely fair-play theory. Here the connection between benefits and legitimacy is even stronger, for benefits *per se* ground state legitimacy, without even needing to appeal to consent.[9] It is the very fact that we are provided with these benefits by the state that grounds our duty to reciprocate by taking on the burdens associated with political obligation.[10] However, as John Simmons has convincingly argued, we can acquire obligations under the principle of fair-play only if we *accept* the benefits provided by a cooperative scheme first, where this involves either trying to get (and succeeding in getting) the benefits or taking them 'willingly and knowingly' (that is, understanding the source and the cost of these benefits, and still wanting to receive them, even if, given the choice, we would rather receive them in some other way). Only when these psychological conditions are fulfilled can we incur fair-play obligations. Non-voluntary receipt of benefits is not enough.[11]

[8] In this paper I will use these two expressions interchangeably.

[9] In consent theories it is the fact that we consent to the state that grounds legitimacy. These theories generally claim that consent is given in exchange for the benefits provided by the state, but in principle it could be given for other reasons.

[10] Herbert L.A. Hart, ''Are There Any Natural Rights?'', *Philosophical Review* 64 (1955), pp. 175–191; John Rawls, ''Legal Obligation and the Duty of Fair Play'', in *Law and Philosophy*, ed. Sidney Hook (New York: New York University Press, 1964), pp. 3–18; Richard Dagger, *Civic Virtues* (Oxford: Oxford University Press, 1997); George Klosko, *The Principle of Fairness and Political Obligation*, 2nd ed. (Savage, Md: Rowman and Littlefield, 2004).

[11] Simmons, *Justification and Legitimacy*, pp. 1–43. For a classic discussion, see Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), pp. 90–95. George Klosko believes that we can resist this conclusion by noticing that most of the benefits provided by the state are 'presumptively beneficial': since these benefits are necessary for any acceptable life, according to Klosko, we can presume that everyone wants them (*The Principle of Fairness and Political Obligation*, p. 40). This argument however, only shows that everyone *if rational* would want these benefits; not that everyone actually wants them.

Unfortunately only a limited number of citizens can be said to have *accepted* the benefits provided by the state, since most citizens do not try to get these benefits, nor do they take them 'willingly and knowingly'.[12] Thus the same problem with acceptance that afflicts consent theories also afflicts fair-play theories: they are both under-inclusive because they can only justify the state's right to rule over an extremely limited number of individuals.

My aim in this paper is to advance a theory that justifies state legitimacy by appealing to the goods that states provide to their citizens, while at the same time avoiding the problem of being underinclusive (which, as I explain in Sect. IV, does not necessarily require justifying the state's right to rule over *everyone* living within its territory). I argue that by refusing to enter the state, anarchists prevent the state from performing its legislative, executive and judicial functions, which are necessary in order to have a minimal level of order and security. In doing so, anarchists expose those living next to them to the dangers of the state of nature, thereby posing an unjust threat. But since we all have a natural duty not to pose unjust threats to others, anarchists and would-be independents have a duty to leave the state of nature and enter the state.[13] This duty correlates to a claim-right possessed by those living next to them, who also have a right to act in self-defence in order to enforce this obligation. This is what justifies the state's right to rule.

Of course the idea of justifying state legitimacy by appealing to natural duties is not new: John Rawls, Jeremy Waldron, Allen Buchanan, Christopher Wellman and Thomas Christiano all defend versions of this view.[14] But traditional natural duty theories of legitimacy all ground political authority in positive duties to help others or, more generally, to realize justice. The problem with these views, however, is that the very existence of positive duties of this sort is denied by many libertarians, who typically argue that all we have is negative duties not to harm others. Moreover, even those

[12] A further problem for Simmons is that typically citizens do not regard the benefits provided by the state as the products of a cooperative scheme. I find this objection less compelling, but I cannot discuss it here.

[13] Provided that the state is reasonably just. In this paper I will only be considering reasonably just states.

[14] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); Jeremy Waldron, "Special Ties and Natural Duties", *Philosophy & Public Affairs* 22 (1993), pp. 3–30; Buchanan, "Political Legitimacy and Democracy"; Wellman, "Samaritanism and the Duty to Obey the Law"; Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008).

libertarians who acknowledge the existence of positive duties, deny the existence of a more general duty to help ensure that their correlative rights are respected. All we have, according to them, is a duty not to violate other people's rights ourselves.

One of the reasons why my theory is particularly attractive is that in grounding political authority in a negative duty not to harm others, it provides an account of legitimacy without importing any normative premises that libertarians would reject. Independently from whether we share either of the libertarian worries mentioned above, a theory able to justify state legitimacy while relying on a more minimal set of assumptions is to be preferred, all things being equal, to theories that rely on more expansive ones. Moreover, I will suggest that my theory should be preferred to traditional natural duty theories because it provides a more convincing account of the dangers typical of the state of nature.

My discussion is in four sections and a conclusion. In the next two sections I present the principle of self-defense and show how it can be applied to the problem of legitimacy. In the fourth section I consider a possible objection to my theory. In the conclusion I say something more about the structure and the nature of the theory. However, three clarifications are in order before the argument begins.

Firstly, I will keep talking of the legitimacy *of the state* because states are the most common form of political organization, but what I am interested in providing is, more generally, a justification for political legitimacy—i.e., a justification for a set of "official institutions that create legal norms and enforce them through the relative monopoly on force that is characteristic of a legal system".[15] I will leave for another time the question of whether there can be forms of political organization alternative to the state which are supported by my argument.

Secondly, what I intend to justify here is a rather minimal state, whose main functions consist in ensuring the rule of law and protecting its members from coercion. This is not to say that a more extensive state could not be justified, but that if it is justifiable at all, it will have to be justified on further grounds.

[15] Philip Soper, *The Ethics of Deference* (Cambridge: Cambridge University Press, 2002), p. 56, n. 9.

Finally, as I will make clear in Sect. III, my argument relies on an assumption typically made by writers who defend state legitimacy, namely the idea that only states can provide the rule of law and those vitally important benefits necessary to have minimally acceptable lives in modern societies. This assumption is the object of a long debate that cannot really progress until we have a better idea of how social life outside the state could be organized—a problem that has not yet received enough attention by philosophers.[16] Unfortunately, here I will be guilty of this as anyone else, for this is a task that I cannot embark on in this paper (although I will address it in some regard). However, providing an account of state legitimacy under this assumption is by no means a small achievement, for accepting that states indeed are necessary to have the benefits required for minimally secure lives still leaves us with the crucial question of why states can justifiably subject to their authority those who benefit from their action. This is the question that, as we have seen, consent and fair-play theories can only partially answer. My theory aims to provide a novel answer to this question, while acknowledging that its validity ultimately depends on the validity of the assumption above.

II. COERCING UNJUST THREATS

My argument relies on two premises:

(a) *those who pose an unjust threat to others can be justifiably coerced in self-defence, at least when they are morally responsible for posing the threat*;

(b) *by refusing to enter the state, would-be independents pose an unjust threat to those living next to them in the state of nature, and they are morally responsible for posing this threat*;

From these two premises we can derive the following conclusion:

(c) *would-be independents can be justifiably coerced in self-defence to enter the state.*

Saying that would-be independents can be ''justifiably coerced to enter the state'' is to say that it is justifiable to coercively subject them to the authority of the state. As I have explained above, this

[16] For a powerful challenge to this assumption see Michael Taylor, *The Possibility of Cooperation* (Cambridge: Cambridge University Press, 1987).

means two things: first, the very fact that the state commands them to act in a certain way creates new obligations for them to do so; second, the state can coercively enforce these newly created obligations.[17]

The two premises of my argument will be examined in detail in this and the following two sections. Let me start by considering the following thought example:

The Boat Case

Suppose that 20 persons are on a lifeboat. The land is far away and can only be reached if *all* 20 row together. There is no other way for any of them to survive, for nobody would be able to swim to the land and the current, apparently quite strong, would carry the boat to the land too late (since the food available for each passenger is insufficient).

Suppose now that while 15 passengers want to set up a rowing scheme, the remaining 5 passengers believe that the current is strong enough to carry the boat to the land in time, and therefore refuse to enter this scheme.[18] These 5 passengers do not want to be part of the rowing scheme because they falsely believe that they do not need the benefits provided by it. Nor are the other 15 passengers strong enough to move the boat if the 5 do not do their part. Eventually, of course, the 5 would discover that they were wrong, but by then all the passengers would be too weak to row to the land before the supply of food was depleted.[19]

I will argue that in this case the 5 passengers have a duty to enter the rowing scheme, while the 15 passengers have both a correlative claim-right that the 5 do so and a liberty-right to enforce this obligation in self-defence.[20] How is this supposed to be relevant to the question of state legitimacy? I will argue that for the same reasons, would-be independents have an enforceable duty to enter the state, which correlates to a claim right that they do so possessed by those living next to them.

Two clarifications are in order: first, saying that the 5 ''have entered the rowing scheme'' simply means that the directives issued by the

[17] Thus, saying that would-be independents can be justifiably coerced to enter the state is not to subscribe to the view that legitimate authority simply involves the right to coerce those subject to it, without imposing any obligations on them (see above pp. 2–3).

[18] Notice that being part of the rowing scheme involves more than just rowing. In order to successfully reach the land, passengers will have to perform different tasks on board, decide on turns to rest, choose a specific rowing technique and so on. This requires that they set up a scheme to coordinate their movements. It is not enough that each passenger decides to row independently. In what follows I will use 'rowing' as shorthand for 'rowing as part of the rowing scheme'.

[19] Thanks to Jeff McMahan for a helpful discussion of this thought example and, more generally, of the ideas presented in this section.

[20] For the classic distinction between claim-rights and liberty-rights, see Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919).

scheme are now capable of modifying the normative status of the 5, who now have a duty to comply with such directives; whereas saying that the duty to enter the rowing scheme can be enforced by the 15 simply means that the 5 can be coerced by the 15 to comply with these directives.

Second, we should assume that the amount of rowing required to move the boat in my example is proportional to the weight of the boat itself. Thus we should imagine that if the 5 were not on board, the boat would be lighter and the remaining 15 passengers would be able to row to the land. This is why the 5 can be said to be posing a threat to the 15: if the former were not there, the latter would not be in danger. This assumption is not *ad hoc*. As I will make clear, it is because there are some people who do not want to enter the state that those living next to them are threatened. Were it not for the existence of the former, the latter would not be threatened at all. For this reason, if we want the boat case to parallel the problem of state legitimacy, we should maintain the idea that if the 5 were not on board, the 15 would not be threatened.[21] With these clarifications in mind, we can now start examining the boat case.

Notice that even if the choice faced by the 15 passengers is between dying and having their lives saved by coercing the 5, the 5 are not actively trying to harm the 15. Still, most people seem to share the intuition that the 15 passengers have a right to coerce the 5 in self-defense. Some prefer to say that in this case force is used in ''self-preservation'', rather than in ''self-defence''. I do not have strong views about what the best terminology is, nor is this important for my argument as long as we bear in mind that it is because of the presence of the 5 passengers on board that the 15 are in danger. This case should not be confused with cases of necessity, in which we are justified in using force against someone in order to avoid a threat that comes from somewhere else (for example, the case in which we are justified in breaking into someone's cottage by the fact that otherwise we would freeze to death).

What is the justification for the right to act in self-defence against the 5? Two answers are prominent in the literature: one appeals to the idea that by refusing to row the 5 are wronging the 15;[22] the other appeals to the idea that by refusing to row the 5 violate an

[21] See below, footnote 48.

[22] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), pp. 167–173; Michael Otsuka, ''Killing the Innocent in Self-Defense'', *Philosophy & Public Affairs* 23 (1994), pp. 74–94.

important right of the 15.[23] In what follows I will rely on a version of the first strategy, but, as I explain below, my conclusions would be equally supported by the second.

Following Jeff McMahan, I will suggest that the criterion of liability to necessary and proportionate force in self-defense is ''moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others''.[24] Thus, I will argue that the reason why the 15 passengers can permissibly coerce the 5 to enter the rowing scheme is that the latter are morally responsible for posing a threat of unjust harm to the former, and posing this threat is objectively unjustified.[25]

The reason why the threat posed by the 5 is of unjust harm is that we have a duty not to threaten others with harm (unless they are liable or have consented to it), provided that we are in a position not to do so and that this would not be unreasonably demanding. And if we do have such a duty, we also have a duty, whenever we happen to be posing a threat of harm, to stop posing the threat (provided that the same conditions apply). Thus, given that the 5 passengers could easily avoid threatening the 15 with harm, they have a duty to do so, which correlates to a right of the 15 not to be threatened.

But can we really say that the 5 are *threatening* the 15 with harm? Can the 5 be considered morally responsible for posing the threat that the 15 are faced with? Yes, the 5 passengers are morally responsible for posing the threat, given that they voluntarily chose not to row, and the harm that the 15 are threatened with is a direct outcome of this choice. True, the 5 are not responsible for being on board, but they are responsible for not rowing once they are on board.[26] While they could

[23] Judith Jarvis Thomson, ''Self-Defense'', *Philosophy & Public Affairs* 20 (1991): 283-311; Suzanne Uniacke, *Permissible Killing* (Cambridge: Cambridge University Press, 1994).

[24] Jeff McMahan, ''The Basis of Moral Liability to Defensive Killing'', *Philosophical Issues* 15 (2005): 386-405, at p. 394.

[25] I will not discuss here the proportionality and the necessity requirements. It seems reasonable to assume that coercing the 5 to join the rowing scheme is proportionate to the harm that the 15 would suffer otherwise, while the necessity requirement in the *Boat Case* is fulfilled ex-hypothesi.

[26] Someone might rightfully contest the assumption that the 5 passengers are not responsible for being on board. For anyone deciding to get on a ship knows both that there is a risk that the ship might sink and that, should this happen, she might end up on a lifeboat with others. However, if we want the boat case to parallel the situation of individuals in the state of nature (who are not responsible for existing in the state of nature and for being born in a certain territory), we should maintain the assumption that none of the passengers are responsible for being on the lifeboat. We could imagine that they had been kidnapped and carried involuntarily onto the ship, as in the famous example by Hume [''Of the Original Contract'', in *Political Essays*, ed. Knud Haakonssen, (Cambridge: Cambridge University Press, 1994), pp. 186–201].

not have avoided being on board, they could have avoided posing a threat to the 15 by choosing to row once on board. Since they happen to be on board, given the circumstances, they have a duty to row, but they choose not to. Thus, it is through their voluntary action that they are posing an unjust threat to the 15.

It is important here not to be misled by the fact that the 5 passengers are not aware of their being a threat. That their refusal to row depends on their mistaken belief that they are not being a threat does not change the fact that they *are* being a threat. If their mistaken belief is negligent, they are a culpable threat, and thus can obviously be coerced to row. If their mistaken belief is non-negligent, they are excused to some extent for refusing to row, but certainly not justified. In either case they can be justifiably coerced to row. The reasonableness of their belief only matters to establish whether they are to be blamed for not rowing (and how much), but not to in order to establish whether the other passengers can act in self-defense against them.[27] Whether the 15 can act in self-defence only depends on the fact that the refusal to row of the 5 is objectively unjustified, in that it amounts to posing an unjust threat to the 15.[28]

Thus, notice that the numbers chosen for my example do not play any role in justifying which group can justifiably coerce the other. The reason why the 15 can justifiably coerce the 5 in self-defence is that the latter are responsible for posing an unjust threat to the former and posing this threat is *objectively* unjustified. If we change the numbers, and imagine that 5 people want to row while 15 refuse, we should conclude that only the former can justifiably use force in self-defence against the latter (provided that proportionality and necessity are satisfied). For the same reason, if the 15 were mistaken and setting up the rowing scheme was objectively unnecessary to

[27] Some of those who adopt a responsibility-based account of self-defence follow McMahan in arguing that our degree of responsibility, and consequently the degree of liability to defensive force, is reduced proportionally to the extent in which we are excused for what we are doing. However, even McMahan acknowledges that "the claim that a person is fully excused for an act of objective wrongdoing implies only that the person is not culpable, that he or she is entirely blameless. It does *not* necessarily imply that the person is absolved of all *responsibility*" (*Killing in War*, p. 162).

[28] As I have anticipated, my conclusion that it is possible to coerce the 5 passengers is not strictly dependent on the validity of a responsibility-based account of self-defence. The same conclusion would be reached if we adopted a right-based account, like the one defended by Judith Jarvis Thomson and Suzanne Uniacke. According to this account, the justification for acting in self-defence is that some important rights of the victim would otherwise be violated. Both Thomson and Uniacke however adopt an objective account of what it is to violate a right, which allows for the possibility that rights are violated by innocent threats who are not at fault for the threat that they are posing (Thomson "Self-Defense", pp. 300–301).

have their life saved, they could not justifiably coerce the 5 on self-defence (although they might be excused to some extent, if their mistake was not negligent).

Of course it is tough luck that the 5 passengers find themselves in a situation where, in order not to constitute a threat to the 15, they have to perform an action as costly as rowing, but sometimes morality can be demanding and this seems to be one of those cases. If we agree that rowing cannot be considered unreasonably demanding, we ought to conclude that the 5 passengers have a duty to row, even if they did not choose to be in that situation.[29]

III. THE STATE OF NATURE AND ITS DANGERS

So far I have argued that in my boat example the 5 passengers have an objective duty to enter the rowing scheme because they have a duty to stop posing an unjust threat to the other passengers. This duty correlates to a claim-right of the 15 that the 5 enter the rowing scheme, but also grounds a liberty-right of the 15 to coerce the 5 to do so (given that this coercion would be both necessary and proportionate).[30] The argument that I wish now to present in defense of state legitimacy is that for the same reasons, would-be independents have an enforceable duty to get out of the state of nature. Just like the 5 passengers have an enforceable duty to join the rowing scheme, which cashes out in a series of enforceable duties to comply with the orders emanated on board, would-be independents have a duty to enter the state, which cashes out in a series of enforceable duties to comply with the laws of the state.[31]

Defending this view requires defending the second premise of my argument, i.e., that those who refuse to enter the state are morally responsible for posing an unjust threat to those living next to them in the state of nature. In order to do this I will rely on the two following assumptions:

[29] On the other hand, it is important to stress that the use of coercion in self-defense against the 5 is justified only as a last resort. It is an interesting question whether the 15 would be justified in forcing the 5 to join the rowing scheme even if the former could move the boat to the land without their help. It is not obvious that the 15 should take on themselves the whole burden of rowing only because the 5 have a mistaken belief (particularly if we assume that it is a *negligent* mistaken belief). However, I will leave this question for another time.

[30] Thanks to Matthew Kramer for pressing me to clarify this formulation.

[31] At least if we grant (as it seems reasonable to do) that the costs of citizenship are high, but not high enough to justify exposing others to the perils of the state of nature.

1. states save citizens from the perils of the state of nature and supply them with vitally important benefits, which are necessary for minimally secure lives. These benefits would not be available were the states absent;
2. in order for a state to be able to carry out its proper functions (and thus provide these benefits), it must have authority over everyone living on its territory.[32]

If we accept these two assumptions, we can conclude that those who refuse to enter the state are responsible for posing an unjust threat to those living next to them in the state of nature, because:

– in not being subject to the authority of state, they put in question its capacity to carry out its functions (because of assumption 2); *and*
– by putting in question the state's capacity to discharge its functions they threaten those living next to them by exposing them to the risks of the state of nature (because of assumption 1).

Providing a full defense of these assumptions is not something that I can hope to accomplish here. As I have anticipated, I will say very little about the first one. The second assumption is more controversial, and has received less attention in the debate, so I will examine it more carefully.

The first assumption is normally defended by appealing to the idea that in order to lead a minimally acceptable life in modern societies we need a system of law able both to provide security and to lay down authoritative standards of conduct for its members. Not only do we need protection from other people's attacks as well as from hostile environments and natural calamities; we also need a mechanism of standard-setting and dispute-solving so that well known problems of coordination can be overcome. This is something that philosophers as distant as Hobbes, Locke and Kant agree on (though of course they offer very different pictures of life in the state of nature, as well as of the principles that justify leaving the state of nature): individuals cannot safely live in proximity to one another in large societies if they lack an authority able to impose

[32] Some will object that in order to be able to perform their functions states do not need *everyone* to be subjected to their authority, but rather to have authority over *enough* people. I address this problem in Sect. IV.

certain standards of conduct (at least with respect to some areas) and to solve disputes.[33]

Some kind of legal system is thus indispensable in maintaining order and security within a certain territory. By performing its legislative, executive and judicial functions the state aims at making sure that individuals all play by the same rules and prevents conflicts from arising. Where conflicts cannot be avoided, the state at least ensures a univocal way to solve them. However, the state will be able to perform these functions efficiently only if everyone living in the same territory is subject to its authority. If there were individuals living on its territory who were not subject to its authority, it would not be possible for the state to establish and enforce a stable set of rules, nor would it be possible for it to adjudicate those conflicts that are likely to arise any time that these rules are infringed. Since these individuals would not treat its laws as authoritative, all the state could do is use force against them in the same way force is used against enemies in the state of nature[34]; but it would not be able to perform those standard-setting and dispute-solving tasks which are indispensable to guarantee a peaceful and secure coexistence for those living in proximity to each other. Thus the perils typical of the state of nature would arise again.[35]

It is important to make clear that my claim here is not that individuals living in the state of nature would necessarily be aggressive or inclined to threaten others out of strategic considerations. I happily concede (if only for the sake of argument) that most of them would be peaceful and would not try to attack those living next to them. However, the importance of the coordinative function performed by the state is such that even individuals who possess flawless systems of moral beliefs, and always act conscientiously on these moral beliefs, would need it in order to stop being a threat to each other.

---

[33] For two recent defenses of this assumption see Wellman, ''Samaritanism and the Duty to Obey the Law'', at pp. 5–17; George Klosko, *Political Obligations* (Oxford: Oxford University Press, 2005), pp. 17–42.

[34] Jonathan Wolff, ''Political Obligation, Fairness and Independence'', *Ratio (New Series)* 8 (1995), pp. 87–99, at p. 98.

[35] I expand on this below, pp. 24–27.

As Gregory Kavka has persuasively argued, there are at least three kinds of reasons why even these ''morally perfect agents'' (to use Kavka's expression) would end up in disagreement about practical matters.[36] Firstly, even morally perfect agents would be affected by cognitive limitations. Their different intellectual capacities, experiences and information would inevitably lead to factual disagreement, which in turn would lead to practical disagreement. Secondly, morally perfect agents could still be in reasonable moral disagreement, holding irreconcilable and yet reasonable moral beliefs. Finally, the very structure of certain interactions is such that each person's intended moral aim can only be achieved through an enforcement mechanism (Kavka mentions classic cases of Prisoners' Dilemma and other public goods problems, as well as standard coordination problems like traffic laws).

Thus, the reason why violence would spread in the state of nature is not just that malicious individuals would try to pursue their own interests unconstrained by any rule of justice. Given the aforementioned practical disagreements, and given that often the stakes are high, Kavka is right to maintain that, once in the state of nature, even well-intentioned individuals guided by flawless moral beliefs would end up resorting to violence in their attempts to act justly.

The problem however is even more fundamental than Kavka suggests. The reason why it would be impossible even for 'morally perfect' agents to live together peacefully in the state of nature, simply by acting according to justice, has to do not only with their inevitable practical disagreements about what justice requires, but also with the fact that in an important sense there can be no justice in the state of nature.

The problem is that principles of justice are often indeterminate both in their general shape and in their application to particular cases. It is often the case that while agreeing on a general principle of justice, we disagree about how this principle should be interpreted. Most of the time in these cases it does not matter which interpretation of the principle we choose, provided that we all act according

[36] Gregory Kavka, ''Why Even Morally Perfect People Would Need Government'', in *For and Against the State*, ed. John Sanders and Jan Narveson (Lanham, Md.: Rowman and Littlefield, 1996), pp. 41–62, at pp. 43–46.

to the same interpretation (think about principles of private property, e.g., whether ownership should imply inheritance).[37] Acting on different interpretations of the principle, on the contrary, will preclude the possibility of acting according to justice, for justice requires that we all act according to the same interpretation.

A related problem has to do not so much with the *interpretation* of the principle being indeterminate, but rather with its *scope of application* being indeterminate. Agreeing on a specific interpretation of a certain principle will perhaps allow us to apply the principle in a straightforward way in most cases, but there will still be cases which do not clearly fall within its scope of application and about which it is reasonable to disagree (think again about private property: do the principles of private property apply to our own body? If yes, does this mean that we have a right to sell some of our body parts or at least to lease out ourselves for sexual or reproductive purposes?).[38]

Finally, there is a problem with the fact that the same principle of justice can be implemented by different systems of rules.[39] Again, it often does not matter which system of rules we choose in order to implement the principle, provided that we all act according to the same system. As Thomas Christiano puts it, ''[t]o act justly it is essential for us to be on the same page with others, to coordinate with them on the same rules. Otherwise, though two people may be perfectly conscientious and even believe in the same basic principles, they will end up violating each other's rights if they follow different set of rules that implement the same principles''.[40]

To the extent that in the state of nature we have no way of ensuring a univocal interpretation for many principles of justice, nor can we clearly identify their scope of application or which system of rules should be used to implement them, it is only when the state (or some kind of political organization similar to the state) offers a solution to these problems that principles of justice can give rise to specific rights and duties. Thus, it is only within some kind of political condition that these rights and duties can finally receive a

[37] Mill argues that it is not part of the concept of private property that the property of those who did not make any disposition about it during their lifetime should go to their children (*Principles of Political Economy*, ed. Jonathan Riley [Oxford: Oxford University Press, 1994], p. 28), while this is certainly the common understanding today.

[38] Cécile Fabre, *Whose Body Is It Anyway?* (Oxford: Oxford University Press, 2006).

[39] Christiano, *The Constitution of Equality*, pp. 53–56.

[40] *Ibid.*, p. 54.

specific content. In Joseph Raz's words, ''mediation through law serves the role of concretizing moral principles—that is, of giving them the concrete content they must have in order for people to be able to follow them''.[41]

This is why we should take seriously the idea that individuals in the state of nature, even if well-intentioned and guided by flawless moral beliefs, could not live peacefully together by simply following the principles of justice. The problem is not only that these individuals would disagree about which rights and duties they have. The problem is that the content of some of these rights and duties can only be fully specified once some kind of state is in place. Most importantly, this offers a reply to Simmons' argument that anarchists need not leave the state of nature in order to discharge their natural duty of justice given that they can discharge this duty by simply refraining from personally violating others' rights.[42] Contra Simmons, I argue that it is not always possible for individuals to do their duty and respect others' rights in the state of nature, because in such a condition many of these duties and rights would have no clear content.

The same point has been forcefully made by Kant in a well-known passage of the *Metaphysics of Morals*: ''However good-natured and righteous one might imagine [human beings to be], … before a public legal condition can be established, individual people, peoples, and states cannot be secure against violence from one another, due specifically to the right of each to do *what he believes is right and good* and not be dependent on the opinion of others''.[43] And indeed the sense in which those living in proximity to one another in the state of nature constitute a threat to each other is one that Kant himself stresses when he writes that ''by entering into the [*civil juridical condition*], one party guarantees another party the necessary security (by means of the authorities, which have power over both). But a person (or people) in a mere state of nature deprives me of this security and harms me through this very state by existing next to me,

[41] Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009), p. 347.

[42] A. John Simmons, ''The Duty to Obey and Our Natural Moral Duty'', in Wellman and Simmons, *Is There a Duty to Obey the Law*? pp. 93–196, at pp. 152.

[43] Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, ed. Pauline Kleingeld (New Haven: Yale University Press, 2006), p. 111, italics in the original.

although not actively, nonetheless through the lawlessness of his state, by means of which he represents a constant threat to me''.[44]

Notice that in this passage the state is meant by Kant to be *a response* to the threat posed by those who do not want to leave the state of nature, rather than a pre-emptive action aiming to prevent future possible threats they might pose. The threat that I am subject to because of the anarchist is not a particular fact that *might* occur once I am in the state of nature (e.g., the fact that I might be assaulted or robbed by him or someone else). The threat that I am subject to is an *actual* threat that takes place for the very fact that if anarchists are allowed to exist, I am left in the state of nature.

Of course there are profound differences between my theory and Kant's: most notably, the way in which we understand this threat. For Kant, the threat consists in the fact that in the state of nature there would be no law that mutually restricts our wills for the sake of making our freedoms compossible.[45] For me, it consists in the fact that in the state of nature we would be lacking security and authoritative standards of conduct, which can only be uniformly enforced if there is an authority to coordinate our interactions by performing the legislative, executive and judicial functions.[46] However, my proposal shares Kant's idea that once we are in the state of nature we are threatened by *the very fact* that we live in it. Living in the state of nature means being able to enjoy neither order and security, nor those vitally important goods that can be supplied only by a stable and complex organization (in particular those depending on the solution of various coordination problems); and these are dangers to which we are exposed simply because anarchist refuse to enter the state. This explains why the kind of threat I am discussing is posed not only by violent anarchists, but also by those non-violent anarchists who merely reject membership in the state, but scrupulously try to refrain from harmful activities.[47]

---

[44] *Ibid*., p. 73, footnote.

[45] Arthur Ripstein, *Force and Freedom* (Cambridge,Mass.: Harvard University Press, 2009), pp. 145–182.

[46] Two recent reformulations of the Kantian view can be found in Jeremy Waldron's *Special ties and Natural Duties* and in Anna Stilz's *Liberal Loyalty* (Princeton: Princeton University Press, 2009). However, Jeremy Waldron's formulation seems at times closer to the view defended here, given its focus on the problems of disagreement and the conflicts that would inevitably arise in the state of nature [*Special ties and Natural Duties*, pp. 280–281, pp. 286–287; but see also his discussion of the *proximity principle* in Redressing Historic Injustice, *The University of Toronto Law Journal* 52 (2002), pp. 135–60, at pp. 135–138].

[47] Thanks to Katrin Flikschuh for insightful comments on the relationship between my view and Kant's.

It might be objected here that even if I am right that life in the state of nature would be so insecure and unstable that we all have a duty to enter the state, this duty cannot be a negative one. If anything, it is a positive duty to help others by rescuing them from the dangers of the state of nature, as recently suggested by Christopher Wellman.[48] The problem with this view, however, is that it depicts the perils of the state of nature as if they were independent from human interaction; as if they existed 'out there' and others could intervene to lend their help and rescue us from them. This would be a misrepresentation. The dangers to which we are exposed in the state of nature mainly depend on various kinds of coordination problems, which are created precisely by the fact that other individuals live next to us and are not subject to the authority of the state. If these individuals did not exist, or if they were subject to the authority of the state, we would *not* be exposed to these dangers.[49] This is why the duty to leave the state of nature and enter the state is a negative duty, just like the one posed by the 5 passengers refusing to row. The duty in question is not a duty to help others, but rather a duty not to threaten others ourselves by exposing them to the dangers of the state of nature.[50]

IV. THE ROLE OF UNIVERSALITY

My *assumption 2* is often challenged in the following way: an acceptable functioning state requires *general*, rather than *universal*, cooperation. In order for the state to work, we need *most* people, rather than *all* people, to obey the law.[51] Thus, even if we agree that the state needs to be in place in order to avoid the dangers typical of the state of nature, and that this is what justifies its right to rule, this is not yet saying that the state can subject everyone to its authority. Once the state is in place, the objection goes, it will be able to perform its functions in spite of the fact that some are not subjected to its authority.

[48] Wellman, "Samaritanism and the Duty to Obey the Law".

[49] We can now see what justifies the assumptions that I have built into my boat example. See above, footnote 20.

[50] This is not the only problem Wellman's theory. I further criticize his view in Massimo Renzo, "Duties of Samaritanism and Political Obligation", *Legal Theory* 14 (2008) pp. 193–217.

[51] See for example Green, *The Authority of the State*, pp. 228–230.

My strategy in dealing with this objection is twofold. Firstly, I will suggest that the objection tends to underestimate the importance of *assumption 2*. True, as a matter of fact all states tolerate a certain level of disobedience, but this is not to say that they do not need to have authority over everyone living in their territory in order to perform their functions. We should distinguish the question of whether states can tolerate the existence of individuals on their territory who disobey the law from the question of whether they can tolerate the existence of individuals on their territory who are not subject to their authority. I will suggest that while states can tolerate (to some extent) the former, they cannot tolerate the latter.

Secondly, I will grant the objection (for the sake of argument) and suggest that my theory can be reformulated by weakening my *assumption 2* in order to accommodate it. This second strategy will take the form of a conditional argument. I will argue that *if* the objection at hand is correct, we can still run my argument, but the resulting theory will have to give up ''universality'', i.e., the common idea that states can legitimately subject to their authority *all* those living within their territory. This might seem a high price to pay, but if we assume that the objection is correct, there is no reason to expect that a theory of legitimacy should account for universality. Indeed, if the objection is correct, an adequate theory of legitimacy should not do so.

Let us start by considering more closely the scope of the objection. If some independents were allowed to exist within the territory of the state, they would have no duty to obey its laws, but this is not to say that they would be justified in not complying with any of them. Depending on the circumstances, independents might still have both moral and prudential reasons to do what the law says. Indeed, not only would they have a duty to refrain from committing *mala in se* (such as assault, rape or murder), but they might also have a duty to act in accordance to other laws on which those living within the legal system have come to rely. Given that state members normally expect that these laws are obeyed and plan their conduct accordingly, acting in any other way is likely to harm them (an obvious case being laws prescribing to drive on a certain side of the road). And since independents do have a moral obligation not to harm others, they have a prima facie obligation to act in accordance with what is required by these laws.

Moreover, it would certainly be permissible for the state to use force against these independents any time they pose a direct threat to its members (by making an attempt on their life or property). Thus, the objection goes, it is false that the state cannot perform its functions if it does not have authority over everyone. If the state has authority over enough people, it can still perform its functions by merely *exercising power* over the limited number of individuals that are not subject to its authority.[52] The state will be able to perform its functions by using straightforward coercion against these individuals.

The problem, however, is that if independents were allowed to exist within the territory of the state, others could *not* reasonably expect that the laws of the state would be obeyed. For surely this expectation largely depends on the fact that we normally assume that everyone living on the territory of the state is subject to its authority. Now, at first sight this seems to make the objection I am considering even stronger: after all, if others cannot reasonably expect independents to conform to the laws of the state, independents will not be harming them by acting otherwise. But the problem is more fundamental, and has to do with the fact that in a scenario where independents were allowed to exist within the territory of the state, coordination, if possible at all, would be subject to serious problems of stability.

The point is that in this scenario nobody could rely on the fact that independents would be acting in accordance with what the law says (even when they would have moral or prudential reasons to do so), for everyone would know that how independents are going to act will ultimately depend on their fallible individual judgement. To the extent that independents would not take the laws of the state as giving peremptory content-independent reasons for action, members of the state could not rely on the fact that these individuals will be playing by the same rules as everyone else; for whether or not they will do so will always depend on their case-by-case judgments.

It is certainly true that the state could try both to prevent and deter independents from acting in impermissible ways by using mere coercion. Even so, however, the coordinative function of the state

[52] Remember that having authority implies more than exercising actual power. The state has authority over someone when its laws provide her with content-independent peremptory reasons for action, i.e., reasons to perform the acts commanded by it simply because they are commanded. Those subject to the mere power of the state, on the contrary, do not take its commands, but rather the threat of the sanction, as providing reasons for action.

would be impaired, as an important part of this function consists precisely in allowing people to act on the assumption that those living next to them are bound by the same system of norms; an assumption that enables us to anticipate how others are going to behave and rely on this assumption in deciding how to behave ourselves.[53]

In other words, allowing for the possibility that the state can use force against independents in the same way in which force is used against enemies in the state of nature does not solve the original problem, because this would ultimately mean that a state of nature situation, with all it perils and uncertainties, would be created within the territory of the state. And my argument is precisely that whenever this happens, those who are responsible for creating this situation have a duty to get out of the state of nature, and the state acquires a right to subject them to its authority.

Here someone might accept this conclusion and yet object that not all state of nature situations are equally bad. If it is true that the coordinative function of the state would be impaired in case the state could only use coercion against some independents, it is also true that the negative effects on the coordinative function of the state would be negligible if only a very limited number of independents were allowed to exist within its territory. Imagine a state with only 100 independents; or maybe 10; or (as those who run the objection like to suggest) just 1. The fewer of them, the less likely it is that the coordinative function will be significantly impaired.

Although I do not want to dismiss this objection too quickly, I must confess that I am not sure what to make of it. It seems to me that the only way to establish whether states could perform their functions while allowing such a negligible number of individuals to be independent would be to carefully consider how such a system could be implemented. This would require a great deal of empirical work, which I cannot undertake here. However, I am happy to concede that *if* states were in fact able to perform their vitally important functions (thereby guaranteeing security and coordination in their territory), without subjecting *everyone* to their authority, they would have no right to subject those would-be independents whose subjection would be superfluous.

[53] William Boardman, ''Coordination and the Moral Obligation to Obey the Law'', *Ethics* 97 (1987), pp. 546–557.

Imagine that the state could perform its functions even if *N* individuals were allowed to be independent. If so, I believe the state could not justifiably subject to its authority the members of *N*. Of course problems start when the number of those who do not want to enter the state is bigger than *N*. Say that the number of would-be independents is *W*, where $W > N$. In this case, my theory claims that the state can only subject to its authority on grounds of self-defence *W–N*, i.e., those would-be independents whose subjection is necessary in order to avoid being thrown back into the state of nature (let's call this group *C*; thus $C = W–N$). Some kind of fair procedure should be devised in order to select who should fall within this group, and some of the costs imposed on the members of C should probably be spread among all the members of W, where possible (e.g., in the case of some taxes).[54] Still, I am happy to concede that the group of W–C could *not* be permissibly subjected to the authority of the state.

In other words, I am ready to concede that if a legal system were in place and enjoyed enough support to perform its functions, those would-be independents whose subjection were *not* necessary to maintain the system—*if* they existed—could not permissibly be subjected to the authority of the state. In this case, I think we should give up the universality requirement and, consequently, weaken the second assumption of my argument.

Two considerations are in order here. First, notice that this concession does not weaken my theory, since the self-defence principle still plays a decisive role in determining who can be permissibly subjected to the authority of the state. While consent and fair-play theories can only account for state legitimacy over those who somehow accept to be part of the state, directly (by consenting to it) or indirectly (by accepting its benefits), the self-defence principle provides a non-voluntaristic justification that accounts for state legitimacy over many would-be independents who neither consented to the state nor accept its benefits.

Second, some might object that it is a weakness of this theory that it cannot account for universality, but remember that the theory

[54] The best way to see this point is to modify the boat case. Imagine that only 18 passengers were required to row, but, as in the original case, 5 passengers do not want to. My claim is that in this case the 15 passengers would be justified in acting in self-defence and force the 5 to do the amount of rowing of 3 people. This could be done either by having a lottery to choose 3 of them, or by forcing each of them to perform 3/5 of the rowing required by one person.

cannot do so only under the assumption that states are able to perform their functions while allowing some independents to exists. However, once we make this assumption there is no reason to believe that a theory of legitimacy should account for universality. Indeed, I think that if this assumption is true, an adequate theory of legitimacy ought *not* to do so. If the state can perform its functions without subjecting to its authority some would-be independents, subjecting them to its authority ought to be considered impermissible.

Why should a theory of legitimacy account for universality after all? This is certainly part of the 'self-image of the state'[55] (states do claim a right to rule over *everyone* within their territory), but the only plausible reason to require a theory of legitimacy to account for universality is that having such a right is necessary for the state to be able to realize the goals that justify its existence. The structure of any argument in favour of universality as a requirement for a theory of legitimacy must refer to the idea that whatever these goals are (providing security, realizing justice, and so on), they cannot be realized if some independents are allowed to exist. Therefore, those who object that states can perform their functions effectively (thereby successfully achieving their goals) without subjecting everyone to their authority, cannot claim at the same time that an adequate theory of legitimacy should account for universality. For there is no reason to require universality, if not that having independents would be an obstacle to the state successfully achieving whatever aims justify its existence.

What is crucial for a theory of legitimacy is not accounting for universality, but rather avoiding the objection of being *under-inclusive*: i.e., not being able to justify the state's right to rule over all those citizens whose subjection is necessary for the state to be able to perform those functions that justify its existence. This is the real problem with consent and fair-play theories: they do not fail because they cannot justify the state right's to rule over *everyone*, but rather because they cannot justify the state's right to rule over *enough* people. For if the traditional criticisms of these views are correct, the number of those who neither consent to the state nor accept its benefits is so high that the state would not be able to exist and

[55] Green, *The Authority of the State*, pp. 83–84.

perform its functions. My theory, on the contrary, justifies the state's right to rule over all and only those individuals whose subjection to the authority of the state is necessary to this end.[56]

V. CONCLUSION

I have argued that the reason why we all have a duty to enter the state is that refusing to do so would mean exposing those living next to us to the perils of the state of nature. For by precluding the state's capacity to establish and enforce a stable set of rules, we would deprive others of the level of order and coordination required for a minimally secure life. Our duty to enter the state correlates to a claim-right possessed by those living next to us that we do so, but also grounds a liberty-right for them to act in self-defense and enforce this duty, where this ultimately means that they have a liberty-right to enforce all the obligations we incur as members of the state. In other words, the state can justifiably subject us to its authority (i.e., impose and coercively enforce duties on us) because this is the only way in which the state can provide anyone with those vitally important goods that prevent individuals from being exposed to the perils of the state of nature.[57]

[56] When I say that consent and fair-play theories fail, I mean that neither of them is able *by itself* to solve the problem of legitimacy; not that they cannot play any role in solving this problem. A point that is often overlooked by those who reject consent and fair-play theories is that the limited number of individuals who consent to the state or accept its benefits *does* incur a duty to obey the law on these grounds. This suggests that we should be pluralist about legitimacy: different principles justify the state's right to rule over different individuals; moreover, this right is sometimes overdetermined, because there can be more than one principle that applies to the same individual [Jonathan Wolff, *Political Obligation*: A *Pluralistic Approach*, in Maria Baghramian and Attracta Ingram (ed.), Pluralism (London: Routledge, 2000), pp. 179–196, at pp. 182–190]. Still, as I argue in the text, the theory presented in this paper is particularly important because it is the only one capable of justifying the state's right to rule over *all* those for which such right ought to be justified (i.e., the only theory capable of avoiding under-inclusiveness). Whereas only a limited number of citizens are subject to the authority of the state because they consented to it or accepted its benefits, *everyone* is subject to it in virtue of her negative duty not to pose an unjust threat others (Elsewhere I argue that a further justification for the state's right to rule over some can be grounded in associative responsibilities; Massimo Renzo, *Associative Responsibilities and Political Obligation*, Philosophical Quarterly, forthcoming).

[57] A problem that I cannot address here for reasons of space is how this theory can answer the *particularity problem*, i.e., how the natural duty not to threaten others can be particularized to justify the special bond that binds us to *our own* state, as opposed to other states that perform (or could perform) the same functions (A. J. Simmons, *Moral Principles and Political Obligation* [Princeton, NJ: Princeton University Press, 1979], pp. 31–35). I believe that the work here is done by the idea that we constitute a special threat to those living next to us, because they are regularly affected by our action in a way that distant others are not. The kind of problems that the state is supposed to prevent are less likely to arise, or less worrisome when they arise, between distant individuals. This view is typically defended by Kantians such as Waldron or Stilz (Waldron, ''Special Ties and Natural Duties'', pp. 280–281; Stilz, *Liberal Loyalty*, pp. 198–200), but see also Wellman, ''Samaritanism and the Duty to Obey the Law'', pp. 46–52. For criticism see Simmons, ''The Duty to Obey and Our Natural Moral Duty'', pp. 170–179.

I have already explained why my view is different from the account of state legitimacy offered by Kant, although the two are united in justifying the state as a response to the actual threat posed by those living next to us in the state of nature. It should now be noticed that the theory also differs from the approach of Kant's contemporary followers such as John Rawls, Jeremy Waldron, Allen Buchanan or Thomas Christiano. The main difference here is that all these theories ground state legitimacy in a moral duty to promote justice. The reason why, according to them, individuals can be legitimately subjected to the authority of state is that this is the only way (or the best way) to realize the universal value of justice. My theory on the contrary is not based on the moral requirement to promote justice in this sense.

The reason why the 5 passengers have a duty to enter the rowing scheme is not that this is the best way to promote justice, but rather that they have a negative duty not to pose an unjust threat to others. Similarly, the reason why would-be independents have a duty to enter the state is not that this is the best way to promote justice, but rather that they have a negative duty not to expose others to the dangers of the state of nature. Since not taking the laws of the state as providing content-independent peremptory reasons for action prevents the state from performing the functions required to guarantee a minimal level of order, security and coordination, would-be independents have a duty to take these laws as providing them with content-independent peremptory reasons for action. Moreover, others have a right to act in self-defence and enforce this duty.

Of course not posing an unjust threat *is* a matter of justice, but we should bear in mind two important distinctions. First, the distinction between positive and negative duties: the duty not to threaten others with harm is a negative, rather than a positive duty. While everyone acknowledges that negative duties exist and can be normally enforced, the very existence of positive duties, or at least their enforceability, is denied by some libertarians. For these reasons, all things being equal, negative duties provide a less controversial foundation for state legitimacy.

The second distinction is the one between a narrower and a broader understanding of our natural duty of justice. Traditional natural duty theories of legitimacy presuppose a conception of

justice according to which justice requires that we help ensure that all persons have their basic rights respected and, more generally, that they are treated fairly.[58] This view is also particularly problematic for libertarians. Indeed, the distinctive feature of the libertarian position is not so much the rejection of positive duties, but rather the rejection of this conception of justice. Whereas many libertarians acknowledge the existence of positive duties, virtually all of them reject this broader conception of justice in favour of a narrower one, according to which justice only requires that we refrain from personally harming the interests of others and from violating their basic rights (including positive ones). In fact, the main reason why libertarians dismiss the possibility of grounding state legitimacy in a natural duty of justice is precisely that once we understand this duty in its narrower form, we can discharge it in the state of nature, by simply refraining from harming others and violating their rights.[59]

The self-defense argument relies on a less controversial set of principles than traditional natural law theories not only because it grounds state legitimacy in negative duties, but also because it relies on the narrower understanding of the natural duty of justice. If one of the main objections against natural duty theories of legitimacy is that we do not have any duty to help ensure that all persons have their rights respected, but only to refrain from personally violating their (negative as well as positive) rights, this objection will not work against my theory. For our duty to stop posing a threat to others clearly falls within the scope of this second kind of duty. Thus, if successful, my argument would be able to justify state legitimacy while granting at the same time two of the main tenets of the libertarian position.

The reasons to adopt my theory, however, are not merely of argumentative economy. I have argued that the main problem with attempts to ground political authority in positive duties is that they provide a distorted account of the dangers of the state of nature by depicting them as if they somehow pre-existed human interaction. Suggesting that our duty to enter the state is grounded in a duty to rescue others from the dangers of the state of nature misses the crucial point that these dangers are created precisely by the way in

[58] See for example Buchanan "Political Legitimacy and Democracy", pp. 703–706.

[59] Simmons, "The Duty to Obey and Our Natural Moral Duty", pp. 150–155.

which we interact with each other when we are not subject to the authority of the state. The main reason why individuals in the state of nature cannot enjoy order or security is that they live next to each other in a law-less condition, in which there can be no effective way of regulating their interactions. For coordination and security require establishing and enforcing a stable set of rules, as well as peacefully adjudicating those conflicts that arise when these rules are infringed. Thus, the point is not that by entering the state I can rescue those living next to me from some pre-existing danger; the point is rather that the only way for me not to pose a danger to them is by entering the state.

ACKNOWLEDGMENTS

Previous versions of this paper were presented at various seminars and conferences in Oxford, Edinburgh, Pavia, Stirling and Manchester. I am grateful to participants to those events, as well as to Ian Carter, Rowan Cruft, Helen Frowe, Antony Hatzistavrou, Simon Hope, Dudley Knowles, Piero Moraro, Mario Ricciardi and Jo Wolff for stimulating discussions. I am also grateful to Peter Chau, Katrin Flikschuh, John Horton, Doug Husak, Matthew Kramer, Seth Lazar, Jeff McMahan, Fabienne Peter, Alice Pinheiro Walla, Adina Preda, Victor Tadros, Kit Wellman and an anonymous referee for very helpful written comments. Finally, special thanks are owed to Antony Duff, George Klosko, John Simmons and Bas van der Vossen for repeatedly discussing with me many of the ideas presented here.

University of York, York Law School,
Freboys Lane, York YO10 5GD, UK
E-mail: massimo.renzo@york.ac.uk