

# The Duty to Punish and Legitimate Government\*

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## I. INTRODUCTION

**W**HAT IF there were no political obligation? What if governments, even relatively just ones, lacked the moral right to command, and citizens lacked the correlative obligation to obey? Philosophers since at least the time of Socrates have wrestled with the problem of accounting for the political obligation of citizens, for without such an obligation the moral authority of all governments is thrown into serious doubt. Without political obligation, that is, it would seem that all governments are morally illegitimate.

This is exactly the conclusion that the philosophical anarchist reaches after considering accounts of political obligation based on tacit consent, fair play, gratitude, membership and the duty to uphold just institutions.<sup>1</sup> According to the philosophical anarchist, none of these accounts provides a sufficient justification for the general political obligation of citizens, and thus all existing states are illegitimate. This conclusion is not so radical as it might appear, for most philosophical anarchists hold that not *everything* illegitimate governments do is morally wrong, nor does state illegitimacy itself provide us with a good reason to actively resist governments. In many cases there will be strong moral reasons for obeying government commands—as when, for example, these commands are consistent with the duties and obligations we have to our fellow citizens as human beings.<sup>2</sup> What the absence of political obligation does mean is that the *independent* moral authority that states typically wish to claim for their decrees—the general right to command—simply does not exist.

Philosophical anarchism poses a serious challenge for those who wish to defend the authority of existing states. In this paper, I will argue, contra the philosophical anarchist, that states *can* be legitimate in the absence of political

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<sup>1</sup>For criticism of accounts of political obligation see: A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979); Simmons, "Associative Political Obligations," *Ethics*, 106 (1996), 247–73; and John Horton, *Political Obligation* (London: Macmillan, 1992).

<sup>2</sup>See A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, N.J.: Princeton University Press, 1993), p. 262. See also his "Philosophical Anarchism," *For and Against the State*, eds John T. Sanders and Jan Narveson (Lanham, Md.: Rowman and Littlefield, 1996), 19–39 at pp. 23–4.

obligation. In order to make this case, I will consider the “Lockean” philosophical anarchist argument made by A. John Simmons. According to Simmons, the only way for a state to be legitimate is for it to gain the consent of its citizens, consent that is “active, voluntary and deliberate.”<sup>3</sup> Although Simmons is correct that political obligation assumed by an act of express consent is one way, perhaps the best way, for a state to gain legitimacy, it is not the only way. I will argue that the natural executive right, put forward by Locke and embraced by Simmons, can best be understood as a power to perform the duty of punishing moral wrongdoers, and that this duty can provide the foundation for a legitimate government. Based on the duty to punish, a nightwatchman, or minimal, state can legitimately exercise sole executive power, and it can legitimately tax its citizens to support its punishing efforts, all without the consent of those under its authority. This argument will not lead to the conclusion that any existing states are legitimate, nor will it be inconsistent with the philosophical anarchist argument that under many circumstances citizens of relatively just states will have good moral reasons for obeying the commands of illegitimate states. What it will demonstrate is that state legitimacy is not inextricably linked to political obligation. It will also raise the possibility of other legitimate functions of government that may not require consent.

## II. LEGITIMACY AND POLITICAL OBLIGATION

Political obligation has long been considered the basis of legitimate government because an obligation of this sort so clearly establishes the *moral* nature of the relationship between the citizen and the state. It is easy enough to observe that citizens of a country are *legally* obliged to obey its laws. But this observation alone tells us nothing of the moral relationship between citizens and their state, since, as H.L.A. Hart points out, there is a difference between *being obliged* and *having an obligation*.<sup>4</sup> When a person is obliged to do something, he is compelled to act in a certain way, either by the threat of sanctions or by physical force. Being obliged in this way does not necessarily establish a moral relationship, or else we would have to consider the victim of a mugging, who is obliged to surrender his wallet, to be under a moral obligation. Since threats such as these clearly do not establish moral bonds, we can see that a person can be obliged to do something without having incurred a moral obligation.

For those who question whether we have a moral obligation to obey the commands of our governments, those actions that seem most morally significant are typically the least interesting to consider. When a government prohibits murder, for example, this prohibition is morally redundant and thus should not necessarily raise the hackles of those who dispute this government’s legitimacy.

<sup>3</sup>See A. John Simmons, *On the Edge of Anarchy*, p. 216.

<sup>4</sup>H.L.A. Hart, “Legal and Moral Obligation,” *Essays in Moral Philosophy*, ed. A. I. Meldon (Seattle: University of Washington Press, 1958), 82–107 at pp. 95–105.

Since people already have a moral duty not to kill each other, this prohibition is not a burden, and it adds little if anything to our moral considerations. What is more interesting is government interference in activities that seem to be morally neutral, as is often the case with much of civil law. This is because, as Leslie Green argues, political obligation gives the state the power to change “our moral position by giving us further duties or giving existing ones a new source of validity.”<sup>5</sup> According to this view, when a state commands that its citizens refrain from doing X, citizens then have a moral reason for not doing X, even if X is something that has no independent moral significance, such as wearing red shirts on Wednesdays or driving on a particular side of the road. Once a law is passed, citizens are then morally bound to obey it, simply because it is the law (so long as it does not violate some higher moral principle). Political obligation, then, involves a transfer of moral authority that gives a state the power to alter the moral landscapes of its citizens. Without this transfer, it would seem that the state has no special authority over citizens, and it cannot legitimately demand obedience and support.

There have been many attempts to establish the existence of political obligation, and the difficulties involved in this project are well documented.<sup>6</sup> It is not my purpose to revisit these arguments here. Instead, I wish to take as a starting point the philosophical anarchist position that all of these accounts fail. Does it then follow that states can *never* be legitimate? While some philosophical anarchists reach this conclusion,<sup>7</sup> most at least hold out the possibility that a state could theoretically satisfy some exacting standard required for legitimacy. Although accounts of political obligation fail to demonstrate that citizens have political obligations under *existing* arrangements, that is, this does not mean that the possibility of political obligation is necessarily ruled out. A. John Simmons, for example, argues that all existing states are illegitimate, but he also argues that since people can incur obligations through consent, a state could be legitimate if it gained the active, express consent of those within its domain.<sup>8</sup> But if citizens do not incur political obligations, then states do not have the authority to interfere in morally neutral matters, and citizens’ moral landscapes remain unaltered by state decrees. Legitimacy, according to this view, requires political obligation.

This is not to say that, absent political obligation, every action that existing states take is unjust, or that we ought to actively resist states simply because they

<sup>5</sup>Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988), p. 225.

<sup>6</sup>See, for example, Simmons, *Moral Principles and Political Obligation*, and Horton, *Political Obligation*.

<sup>7</sup>See, for example, Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970). See also Simmons’ discussion of the differences between what he describes as “a priori” anarchism (which holds that states can never be legitimate) and “a posteriori” anarchism (which holds that all existing states are illegitimate, but does not rule out the possibility of a state ever being legitimate) in his “Philosophical Anarchism,” pp. 20–1. Simmons considers himself an a posteriori anarchist, and this is the position I will be concerned with in the remainder of this paper.

<sup>8</sup>See A. John Simmons, “The Anarchist Position: A Reply to Klosko and Senor” *Philosophy and Public Affairs*, 16 (1987), 269–79 at pp. 269–70.

are illegitimate. Simmons argues that even though states do not have the general right to command and be obeyed, this is only one factor to consider when determining if their actions are morally justifiable. This is because “[r]ights and obligations (or duties) do not exhaust the subject of morality. It may well be that while a certain government does not have the right to command, its actions may nonetheless be morally justifiable; rights violated by its actions may not be as important as other considerations, such as the need for order.”<sup>9</sup> Given that some actions of illegitimate states will be morally justifiable while others will not, Simmons argues that we should take a “balance-of-reasons” approach when determining whether to comply with a particular law. We should, that is, take into consideration *all* of the moral reasons for and against compliance and then make our best judgements based on this type of reasoning.<sup>10</sup> Thus, if a particular state action involves the violation of some trivial right of mine, and yet the result of this action is that it will relieve the great suffering of some other people, then I should not resist the state action in this case. The point is that I should not obey simply *because* this is a government command—since this command has no independent moral significance—but that I should obey because this will relieve the suffering of others at no great cost to me. Accepting the conclusion of the philosophical anarchist thus only “effectively removes any *presumption* in favor of obedience to established authorities. While the absence of political obligation does not justify disobedience, it does force us to discard as a maxim of action: ‘Other things being equal, obey the political authorities.’”<sup>11</sup>

This balance-of-reasons approach that Simmons advocates seems most clearly relevant when considering state interference in morally neutral matters, such as, for example, traffic laws. There is nothing inherently immoral about driving on the left-hand side of the road, but once the convention of driving on the right exists, we should obey the state’s commands to follow this convention because to do otherwise would be to put other people in danger. This does not mean, however, that the state that issues this command somehow becomes legitimate just because we ought to follow this particular command. Political obligation is *still* required for any general right to command, for the state does not have any special authority to interfere in morally neutral matters, and thus it still violates our (relatively trivial) rights by forcing us to drive on a particular side of the road. Now, as far as it goes, this argument makes sense, but what about interference in those matters that are *not* morally neutral? Most accounts of political obligation are attempts to justify state interference in morally neutral matters, since it is largely taken for granted that this is a fundamental role of government. But governments also regulate activities that *do* have moral significance. Does this have any bearing on the legitimacy of states? Perhaps a better way to approach

<sup>9</sup>Simmons, *Moral Principles and Political Obligations*, p. 199.

<sup>10</sup>Simmons, “Philosophical Anarchism,” p. 24.

<sup>11</sup>Simmons, *Moral Principles and Political Obligations*, p. 200. Also see “Philosophical Anarchism,” p. 20.

the question of state legitimacy would be to determine whether a state could be legitimate if it refrained from interfering in morally neutral matters.

While Simmons accepts that states can, at times, legitimately take actions in areas that are morally significant, he does not believe that this provides an avenue for a state to attain legitimacy absent the consent of its citizens. We can see this most clearly in his discussion of state executive power. Drawing upon Locke's account of the natural right to punish, he argues that when a state punishes a moral wrongdoer, this action itself is not necessarily illegitimate, since the agents of the state, like everyone else, have a right to punish.<sup>12</sup> But this does not mean that a state that punishes justly is legitimate. Even though agents of the state have the right to punish moral wrongdoers, they do *not* have the right to prevent others from punishing, nor do they have the right to demand taxes to support their efforts. If there is no political obligation, then the state simply does not have the authority to demand taxes and to prevent people from punishing. Simmons concludes that in order to legitimately attain a monopoly on force and tax those under its authority, a state must gain the consent of its citizens.

The philosophical anarchist position thus seems to rule out the possibility of state legitimacy in the absence of political obligation. Political obligation is not only required for a state to have a general right to interfere in matters that are morally neutral, but it is also required for a state to have any general right to interfere in matters that are morally significant. Although this argument is initially persuasive, I will argue that there is at least one way for a state to attain legitimacy in the absence of political obligation, and that the reason why it is ruled out by Simmons is because his argument is dependent upon a mistaken notion of the natural executive right. The natural executive right, according to Simmons, is a simple liberty right, one that we may or may not exercise as we see fit, like the right to acquire property. But a proper understanding of Locke's argument, and any independent argument about the right to punish, will show that this right is not a liberty right, but is in fact a power to perform the duty to punish moral wrongdoers. In the next section, I will use Locke's argument for the right to punish as a starting point and argue that we have a duty to punish moral wrongdoers. Once this is established, I will argue, in section IV, that this duty can provide the justification for a minimal state to attain a monopoly on force and impose taxes in order to carry out just punishments for moral wrongdoers. If this argument is successful, it will demonstrate that the political obligation of citizens is not absolutely necessary in order for a state to be legitimate.

### III. THE DUTY TO PUNISH

The natural executive right plays a central role in Locke's account of the creation of civil society. Locke believes that everyone in the state of nature has the right to

<sup>12</sup>Simmons, *On the Edge of Anarchy*, p. 265.

punish moral wrongdoers, and it is only *after* people have come together and given up this right that they can truly be said to have formed a civil society and left the state of nature.<sup>13</sup> Now, as Locke himself acknowledges, there seems to be something “strange” about a natural right to punish. I will argue that this right is best understood as a power to perform a moral duty. In order to determine whether this interpretation is correct, the first question we need to ask is what *type* of right this is, since not all of the rights Locke describes have the same characteristics. Using an approach similar to Hohfeld’s analysis of legal rights, Simmons argues that we can detect four different types of rights in Locke’s works: (1) *Liberty rights*: these are “competitive” rights to do what is morally permissible, but which do not correlate with duties of non-interference by others. The clearest example is the right to acquire property. (2) *Moral powers*: these are powers to alter other people’s moral duties and rights, as when one acquires property and thereby imposes the duty on others to respect this claim. (3–4) *Claim rights*: these are rights that correlate with other people’s duties, and Simmons divides them into *optional* claim rights and *mandatory* claim rights for his third and fourth categories. Optional claim rights are those we can exercise or not as we see fit, while mandatory claim rights are really *powers* to perform our moral duties. The right to trade is an *optional* claim right, since people do not have a duty to trade; parental rights are *mandatory* claim rights, since parents are morally bound to preserve their children, and thus the rights they have over their children are best considered a product of this duty.<sup>14</sup>

Which of these categories best describes the natural executive right? According to Simmons, the natural executive right is a liberty right.<sup>15</sup> He believes this is the best characterization because this right clearly is not a moral power, and it does not resemble either type of claim right. In order for it to be a claim right, some (particular) people would have to have the right to punish, and others would have a duty not to interfere, even competitively. But, according to Locke, we are all equally endowed with the natural executive right, so unless the victims of crimes gain special punishing rights (a position Simmons correctly rejects),<sup>16</sup> there does not seem to be any way for particular people to have executive claim rights.

Although Simmons is correct that the absence of duties of non-interference indicates that the natural executive right is not a claim right, this is not enough to conclude that it is a liberty right. We should be especially suspicious of this

<sup>13</sup>John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), bk II, sec. 130.

<sup>14</sup>Simmons, *The Lockean Theory of Rights*, pp. 70–5.

<sup>15</sup>*ibid.*, pp. 154–5.

<sup>16</sup>*ibid.*, p. 151. Simmons argues that special rights to punish held by victims of crimes are implausible because: (a) this is inconsistent with Locke’s view that the wrongdoer trespasses “against the whole species”; (b) in cases where the victim is killed, this would seem to leave no one with the right to punish the murderer; and (c) punishment is “owed” to the criminal, not to the victim—the criminal does not deserve to be punished *by the victim*. Although the victim may deserve some form of compensation, it is the criminal who deserves to be punished.

position since the natural executive right, on the surface, bears little resemblance to either claim rights or liberty rights. A liberty right, such as the right to acquire property, is a competitive right that we may exercise or not as we see fit. Does this sound like an accurate description of the natural executive right? At least at an intuitive level, there seems to be some difference between opting not to acquire a piece of property and opting not to punish a murderer when we have the power to do so. Maybe the least we can say is that there is some sense in which we *ought* to exercise our right to punish when it is appropriate, and to the extent that this is true, then the natural executive right differs from a liberty right.

If there is a significant difference between the natural executive right and a liberty right, we should be able to account for it by looking to the categories Simmons employs. But we should first consider whether these categories themselves are adequate. In particular, there seems to be a problem with his last category—mandatory claim rights. According to Simmons, a mandatory claim right is really a power to perform a moral duty. Parents, for example, have a duty to care for their offspring, and “as a trivial consequence of this duty, a right to care for and control their children.”<sup>17</sup> This right is mandatory because parents are duty-bound to exercise it; it is a claim right because others have a duty not to interfere with its exercise. Now this seems to be an accurate description of parental rights, but it does not seem to be an accurate description of all the rights that are the product of moral duties. Indeed, as far as duties are concerned, parental duties are rather unusual in that they are moral duties owed to specific people (children) from specific people (parents). But it is more often the case that our duties are owed to all other human beings and that the powers (rights) to perform these duties do not entail claims against interference by others. While I ordinarily may not have the right to seize you, grab you under the sternum and thrust violently upward with my fists, if you have something lodged in your windpipe, my duty to aid those in need presumably gives me the right to behave in this manner, even if you have not expressly given me your permission. So this right is *mandatory* (since I have a duty to perform it), and yet I have no special *claim* to perform it, since anyone with knowledge of the Heimlich maneuver could step in and satisfy this duty without wronging me. Thus the rights that result from moral duties do not have to fall exclusively on any particular individuals and be accompanied by claims, as in the case of parental rights, and therefore we cannot conclude that the natural executive right is a liberty right simply because it is not a claim right. For it may be simply a power to perform a moral duty, like a parental right, but unlike a parental right, it may be a power that does not correlate with claims against others.

So far, we do not have enough evidence to conclude that the natural executive right is a liberty right or that it is a power to perform a moral duty. In order to determine which of these interpretations is correct, we need to consider Locke's

<sup>17</sup> *ibid.*, p. 4.

responses to two questions. First, *how* do people come to have this right? And second, is there any reason *why* they should exercise this right? Although the answers to these questions may be related, they will not *necessarily* be the same. The first will tell us how it becomes permissible to harm wrongdoers. If harming others is wrong, why does not punishment just count as a further wrong? The answer to the second question will more directly help us determine whether people have a duty to punish. For even if it is morally *permissible* to harm wrongdoers, this alone is not a moral reason for harming them. Locke offers four arguments in support of the natural executive right, arguments that will provide possible answers to both of our questions:<sup>18</sup> (a) *Preservation of Mankind*: the right to punish is a tool we are given by God in order to fulfill our duty to preserve ourselves and mankind in general.<sup>19</sup> (b) *Law Entails Sanctions*: if the law of nature is a valid law, then there must be sanctions for violations of this law, sanctions which everyone in the state of nature must be able to impose, since everyone is equal.<sup>20</sup> (c) *Aliens*: since states can legitimately punish resident aliens, and since these aliens are still in the state of nature with respect to the magistrate, there must be a natural executive right.<sup>21</sup> (d) *Forfeiture: when a criminal commits a crime, he forfeits some of his rights.*<sup>22</sup> As Simmons describes it, the criminal then has lower “moral barriers,” and this “leaves others with greater right to interfere in the criminal’s life and makes legitimate the punishment they impose.”<sup>23</sup>

Do any of these arguments provide adequate responses to our two questions about the right to punish? Locke’s preservation argument (a) provides an explanation for *how* we come to have this right, but this argument relies explicitly on theological premises that many of us would be inclined to reject. Simmons argues persuasively that if we reject Locke’s theological premises, then none of the first three arguments, (a), (b) and (c), are sufficient to yield a right to punish.<sup>24</sup> The best account of how we come to be able to harm wrongdoers, he argues, is Locke’s forfeiture argument. This argument is not only the most plausible on Locke’s own terms, but it also provides the most plausible secular answer to our question, one that could draw on a conception of fairness under a system of rules:

Insofar as there are objective moral rules (defining rights) under which all persons (originally) stand, and protection under the rules depends on others’ obedience to them, then, a proportional forfeiture of moral rights may be a necessary consequence of infringing the moral rights of others. Valid moral rules do not

<sup>18</sup>Here I follow the account provided by Simmons in *The Lockean Theory of Rights*, chapter 3.

<sup>19</sup>Locke, *Two Treatises of Government*, II, 7.

<sup>20</sup>ibid.

<sup>21</sup>ibid., II, 9.

<sup>22</sup>ibid., II, 23, 172.

<sup>23</sup>Simmons, *The Lockean Theory of Rights*, p. 149.

<sup>24</sup>ibid., pp. 134–140.

extend protection to persons unfairly taking advantage of others' willingness to abide by them.<sup>25</sup>

According to this view, when criminals violate the law of nature, they take unfair advantage of those who abide by this law. Given this, it is only fair that others are then no longer bound to observe this law (to a proportional degree) when dealing with these criminals. Forfeiture thus provides an answer to the question of *how* people gain the right to harm wrongdoers, and without necessarily relying on theological premises.

What about our second question? Does Locke provide us with any reason *why* we should punish wrongdoers? It seems clear that Locke believes we have a good reason to punish wrongdoers: it is our duty to do so. Both in his preservation argument (a) and his sanctions argument (b), the right to punish serves as a necessary means to performing our duty to uphold natural law and preserve mankind. If we did not have a duty to punish, we would be bound to preserve mankind, and bound to uphold natural law, yet not bound to use the very power we have been granted in order to serve these ends. Punishment, then, would simply be a matter of choice, and our duty to preserve mankind would be incoherent.<sup>26</sup>

Simmons acknowledges that in some sense "punishment in the state of nature is not merely morally permissible, but a *duty*,"<sup>27</sup> but he does not believe that this duty takes effect until after civil society has been established and there is a government that can punish in order to secure the common good:

In the central sections on punishment (II, 7–13), Locke actually almost always talks of punishment as if it is permissible only, *not* a duty. His use of "may," "right," and "power" convey this sense... Punishment only seems to be a duty at all after government takes over and *agrees* to use the right to punish for the common good (making the duty in that case consensual in nature); and it is not always a duty even then, since the magistrate may rightfully decline to punish wrongdoers in some cases (II, 11)... The idea that we have no *duty* to punish seems central to Locke's arguments concerning resistance to oppressive government.<sup>28</sup>

Although Locke does typically speak in terms of "right" and "may" when discussing punishment, Simmons' arguments against a duty to punish are not persuasive. For when Locke says that the magistrate may remit punishment, he is not treating the right to punish as if it were a simple liberty right that he may exercise or not at his whim. The magistrate may choose not to punish only if it

<sup>25</sup>ibid., pp. 153–4.

<sup>26</sup>This argument is further supported by its resemblance to Locke's argument concerning parental rights, which are rights parents are duty-bound to exercise. While these rights are not entirely similar—since parental rights correlate with duties of non-interference on the part of others—the justification Locke offers for each is remarkably similar. Parents have a duty to exercise their parental rights, since they have a duty to preserve the children they have "begotten"; we have a duty to exercise our right to punish, since we have a duty to preserve mankind.

<sup>27</sup>ibid., p. 160.

<sup>28</sup>ibid.

serves some higher good: "the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, *where the public good demands* not the execution of the law, remit the punishment of criminal offenses by his own authority, but yet cannot remit the satisfaction due to any man for the damage he has received."<sup>29</sup> A duty to punish would not mean that we *always* had to punish those who broke the law; for then we would be committed to punishing wrongdoers even if, for whatever reason, the preservation of mankind would be ill served by a particular punishment. Just because the duty to punish might conflict with other, perhaps higher, duties on occasion, is no reason to believe that this duty does not exist.<sup>30</sup>

Locke thus provides answers to both of our questions, answers that complement each other quite well. When a person violates natural law, his moral barriers are lowered, and thus the rest of us do no wrong when we harm him in response. *Should* we harm him? For Locke, the answer is yes, since punishing serves to uphold natural law and preserve mankind, which we are bound to do. The fact that the criminal has forfeited some of his rights simply means that we are permitted to harm him—this answers the question of *how* we come to be able to harm him. Locke's other arguments then provide us with the reason *why* we should take advantage of these lowered moral barriers and inflict punishment on this person—it is our duty to do so.<sup>31</sup>

Of course, Locke's argument for the preservation of mankind is based largely on theological premises, and so we still must determine whether there can be any secular justification for the duty to punish. One reason why Simmons embraces the forfeiture argument is that this argument is detachable from Locke's theological premises—it can stand on its own. If the argument for the duty to punish cannot be similarly detached, then we might have to accept that the natural executive right is a liberty right. On this view, punishing wrongdoers would be permissible, but we would not be morally bound to exercise this right.

Would this be an acceptable account of the executive right? If we did not have a duty to punish, would this mean that there was nothing morally wrong with

<sup>29</sup> Locke, *Two Treatises of Government*, II, 11, my emphasis.

<sup>30</sup> Concerning Simmons' argument that a duty to punish is inconsistent with the right to resist oppressive governments, it is not at all clear where this conflict lies. The idea that a duty to punish wrongdoers would somehow interfere with the right to resist oppressors seems especially strange when we consider that we would have a duty to punish those in government who violate natural law by oppressing us.

<sup>31</sup> Again, we can see parallels between Locke's account of the right to punish and parental rights. Children, because they are in their "nonage," have fewer, or weaker, rights than their parents; criminals, due to their crimes, have fewer, or weaker, rights than those who have not violated natural law. When children attain the age of rationality, they gain a full set of rights; criminals, when their punishment comes to an end, presumably also become full rights-holders again. When children's and moral criminals' moral barriers are lowered, certain others are permitted to exercise control over them. And why should they exercise this control? For parents, the reason is clear: they have a duty to preserve their offspring. In this case, there is no conflict between diminished rights and a duty to exercise a right.

letting wrongdoers go unpunished, even if it were in our power to punish them? Consider the following situation described by Simmons:

Imagine that, for whatever reason, your society “dissolved” into disorder and chaos. Once again in your natural state, unprotected by the rule of law, you witness a man brutally robbing and murdering a defenseless victim. If it were in your power to do so, would you not feel justified in seeing to it that the murderer suffered for his crime?<sup>32</sup>

Simmons’ example is meant to demonstrate the intuitive plausibility of a right to punish outside of positive institutional arrangements. But suppose we ask the following question instead: if it were in your power to punish the murderer, would you consider it morally wrong to let him go unpunished for his crime? If so, why? If we do not have a *duty* to punish wrongdoers, could we not claim that there is nothing morally wrong with not punishing?

Such a view of the right to punish is implausible, for we must have *some* moral reason to punish wrongdoers in order for the harm inflicted to be even considered punishment. If we did not need a moral reason for punishing, then harm inflicted out of a desire for revenge, bloodlust, or merely on a whim could be considered punishment. But, as Simmons acknowledges, in order for a harm to count as punishment it *must* be motivated by moral reasons: “[a]t least *part* of what motivates one inflicting harm must be the belief that a wrong has been done and that the response he is making is morally (legally, conventionally) appropriate or deserved, or that infliction of harm cannot possibly count as *punishment*.”<sup>33</sup> Harm that is inflicted solely out of a desire for revenge or a thirst for blood simply is not punishment, even if the person receiving the harm has violated natural law. And the fact that a criminal’s moral barriers are lowered is not a moral reason to punish him. Indeed, absent a moral reason for punishing, harming such a person would amount to taking advantage of someone who is in a morally vulnerable position. Why should we do that?

What Simmons’ argument needs, then, is a moral reason to punish wrongdoers that does not rely on the duty to punish, yet is consistent with the forfeiture argument he embraces.<sup>34</sup> Without such a reason, any harm that is inflicted on the wrongdoer would be a matter of “moral indifference,” and thus it simply would not be punishment. If this were the case, then there would seem to be little difference between harming a moral wrongdoer and hitting an unruly dog. This

<sup>32</sup>Simmons, *The Lockean Theory of Rights*, p. 126.

<sup>33</sup>*ibid.*, p. 157.

<sup>34</sup>Some might argue that consequentialist concerns such as deterrence come into play here, with deterring crime functioning as a “moral” reason for punishing wrongdoers. But note that the forfeiture argument alone does not give us a reason why we ought to deter crime. We still need to determine (1) how deterrence is morally grounded, and (2) why we should punish *particular* people. By appealing to the duty to preserve mankind and individual desert, Locke is able to answer both of these questions. But an appeal to deterrence alone answers neither. For a discussion of why deterrence does not justify punishing particular individuals, see Michael S. Moore, “The Moral Worth of Retribution” in *Punishment and Rehabilitation*, ed. Jeffrie G. Murphy (Belmont: Wadsworth Publishing Co., 1995), pp. 94–5.

conclusion, Simmons argues, is unacceptable, but we do not have to accept the duty to punish to avoid it:

What this complaint overlooks is that in the case of the wrongdoer, but not in the case of the dog, the punishment is not only permissible but *deserved*. Where it is true both that someone deserves a certain treatment and that it is permissible for us to treat that person in that way, we have good moral reason to act. Thus, punishing the wrongdoer is not a matter of moral indifference on this account (even if it is not, strictly speaking, a duty either), for the mere absence (through forfeiture) of rights is not the whole of the story.<sup>35</sup>

The appeal to desert is clearly a moral appeal, one that could work to distinguish punishment from harm *simpliciter*. But the problem here is that Simmons' defense skirts the entire issue of what it means to deserve something. For it is quite possible that when a wrongdoer *deserves* to be punished, this entails that some other person has a *duty* to provide this punishment. Although individual desert does not always correlate with a duty to provide a treatment, it often does, especially in cases where there is a system of rules and there are people authorized to provide this treatment. For Simmons' appeal to desert to hold, then, we would have to have an account of moral desert that is (1) consistent with the forfeiture argument, (2) not derived from theological premises, and (3) not correlative with the duty to punish.

Can the appeal to desert be consistent with the forfeiture argument? As we have seen, the forfeiture argument can hold independent of theological premises by appealing to the notion of fairness. When someone commits a crime, he takes advantage of those who have obeyed the law, and thus fairness dictates that they no longer have to observe this law (to a proportional degree) when dealing with him. But why is it not the case that only the victim is freed from observing the law, as we are obviously freed in cases of self-defense? Why is everyone suddenly freed in this way? One reason is that the victim is not the only one whom the wrongdoer has taken advantage of. As Jeffrie Murphy argues: "[i]f a man does profit from his own wrongdoing, from his disobedience, this is *unfair* or *unjust*, not merely to his victim, but to all those who have been obedient."<sup>36</sup> Since others have restricted their behavior under the law, when a person violates the law, he unfairly takes advantage of these others as well. Thus, according to Herbert Morris, "[a] person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased."<sup>37</sup>

If this account of fairness is accurate—that the wrongdoer has gained at the expense of all those who have observed the rules—does it support an argument that the wrongdoer then *deserves* to be punished? Perhaps. For if the wrongdoer

NOT. B/c victim could consent.

<sup>35</sup>Simmons, *The Lockean Theory of Rights*, p. 161.

<sup>36</sup>Jeffrie G. Murphy, "Three Mistakes about Retributivism," *Analysis*, 31 (1971), 166–9 at p. 167.

<sup>37</sup>Herbert Morris, "Persons and Punishment," *The Monist* 52 (October 1968), 475–501 at p. 478.

has gained an advantage, it seems only fair that he be made to repay what he has taken. Making restitution will take care of the debt he owes to his victim, or his victim's family. But he also owes a "debt" to all of the other people whom he has taken advantage of by violating the law. And if punishment will in some sense "erase" this debt, then we can say that the criminal *deserves* to be punished, for inflicting this punishment will serve justice.

We still need to determine exactly what a desert-claim of this sort entails, since desert-claims often correlate with duties. For example, claims such as "John deserves compensation for his injury," or "human beings deserve to be treated with respect" are correlative. In these cases, when one person deserves a particular treatment, this entails that some other person has a duty to provide this treatment—and failure to do so would be unjust. On the other hand, claims such as "Sally deserves praise," or "the painting deserves admiration" are not correlative, since no one in particular has a duty to provide these treatments, and it would not be unjust if these desert-claims were not satisfied. If the painting is not admired, could we say anyone was at fault? Certainly not. The difference here is that correlative desert-claims are those that *attach* to particular people. When we make a correlative desert-claim, what we are really saying is that X deserves treatment T *from* Y. When John deserves compensation for an injury, for example, what he deserves is compensation *from* Frank, the man who injured him. Thus, Frank has a duty to compensate. Similarly, the claim "human beings deserve to be treated with respect" also attaches to particular people, since all human beings owe each other respect. In contrast to this, when Sally deserves praise, others do not then *owe* her praise, nor would it be unjust if they withheld their praise. This kind of a claim is simply a way of saying that it would be a good thing if Sally were praised. Since there are no particular people who are bound to provide this treatment, this type of desert-claim is not correlative.

The question we now face is whether the claim "X deserves punishment P" is the type of desert-claim that attaches to particular people. The key here is the distinction between punishment and harm. Harm is simply an injury suffered by a person. Someone can be harmed intentionally, accidentally, or, in some cases, even by inanimate objects. Punishment, on the other hand, is a type of harm inflicted for specific reasons under specific circumstances. According to Jeffrie Murphy, "[p]unishment demands, at a minimum, three conditions: a system of rules, authorities to apply these rules, and authorities to enforce sanctions for breaches of these rules."<sup>38</sup> This means that in order for a particular harm to *be* punishment, it must be inflicted by a person in authority in response to the violation of some rule. Whereas it might be possible to *harm* someone in the absence of rules and authority, it simply would be impossible to *punish* someone under the same conditions. If this were not true, then there would be no way to

<sup>38</sup>Jeffrie G. Murphy, "A Paradox in Locke's Theory of Natural Rights," *Dialogue*, 8 (September 1967), 256–71 at p. 261.

distinguish harm *simpliciter* from punishment. Notice also that if it is impossible to punish someone in the absence of rules and authority, then it is impossible for anyone to *deserve* punishment in the absence of rules and authority. People deserve punishment when they violate rules; therefore, when there are no rules, people cannot deserve punishment. And since punishment also requires authority, it will be impossible for people to deserve punishment in the absence of authority.

So if the desert-claim “X deserves punishment P” only makes sense when there are rules and authority, this then gives us a basis for saying that this type of desert-claim is correlative with duty. For this is a desert-claim that does attach to particular people. What “X deserves punishment P” really means is “X deserves punishment P *from A*,” where A is the person who has the authority to punish. Thus, this desert-claim is correlative, since wrongdoers deserve punishment *from* particular people—those who have the authority to punish. And it is these people, the ones who have the authority to punish, who have the correlative *duty* to punish.

Would it be unjust for those in authority not to punish wrongdoers, as it would be for Frank not to compensate John? Recall that the wrongdoer deserves to be punished because this type of harm will serve to “erase” the advantage he has gained by violating the law. Thus, justice will not be served until the wrongdoer gets what he deserves. Now if others fail to inflict this punishment when they have the power to do so—if, that is, they fail to uphold the rules that benefit them—then they would be contributing to the continuing injustice, for they would be failing to give the criminal what he deserves *from them*. Since justice demands that those in authority give the criminal what he deserves, then, unless there is some other, stronger reason not to punish (if, for example, attempting to punish would put their lives in jeopardy), these people act unjustly by not punishing.

But maybe this argument will only hold if there are certain people *authorized* to inflict punishment, as judges are under positive institutional arrangements. In these cases, the connection between authority and duty is clear: judges have a duty to punish criminals when they deserve it. Is there anyone in a state of nature who is *authorized* to punish wrongdoers? Murphy, for one, argues that this is exactly the problem with Locke’s conception of the natural executive right, since the state of nature lacks the authority necessary for any harm to be considered punishment. Now it is important to note here the two different senses of the term “authority” Murphy uses in his argument: his second condition requires an authoritative interpretation of the rules; the third requires that those who punish have the authority to do so.<sup>39</sup> In Murphy’s view, Locke’s natural executive right is “unintelligible,” since both senses of authority are not met in the state of

<sup>39</sup>For a discussion of the different senses of the term “authority,” see Green, *The Authority of the State*, esp. ch. 2.

nature. Murphy's concern is that if everyone has the right to interpret and enforce the law of nature, then people will be liable to punish for what amount to "felt" wrongs, and there will be no way to distinguish between punishment and vigilantism.

In response to this argument, Simmons counters that the failure of people in the state of nature to fulfill Murphy's second condition does not threaten the natural executive right, since "no ground of authority rules out the possibility of mistake or wrongdoing."<sup>40</sup> If natural law dictates that there is one correct punishment for a particular crime, then people can administer that punishment. And if they punish wrongly, or for motives that are impure, then they too will be subject to punishment. In addition, he argues that even if there is no *authoritative* punishing in the state of nature, this is not a problem, since what really matters is that "we are (or at least can be) *entitled* in a state of nature to harm others for their wrongdoing and that this right must be laid aside in the creation of a legitimate political society. Whether or not we call our natural entitlement a right to *punish* is uninteresting."<sup>41</sup>

This reliance on the entitlement to harm may seem like a good way to avoid the problem Murphy raises, but it comes at the cost of rendering Simmons' appeal to desert as the moral basis for punishment unworkable. Since Simmons is basing at least part of his argument on the claim that moral wrongdoers deserve *punishment*, that is, he can only abandon the term punishment if he is willing to acknowledge that harm inflicted on wrongdoers is a matter of moral indifference. Recall our earlier questions about *how* we come to have the right to inflict suffering on wrongdoers, and *why* it is that we should do this. We are *entitled* to harm wrongdoers because they have violated the law of nature, and thus their moral barriers are lowered as a result. This is what Locke has in mind when he claims that in the state of nature "one may destroy a Man who makes War upon him, or has discovered an Enmity to his being, for the same Reason, that he may kill a *Wolf* or *Lyon*; because such Men are not under the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey."<sup>42</sup> But this entitlement alone does not provide us with a moral reason for harming those who have violated natural law. And it is only when we have a moral reason for inflicting the harm on the wrongdoer—in Locke's case, our duty to uphold natural law and preserve mankind—that we can draw a distinction between *destroying* a "noxious Creature" (which is a matter of moral indifference) and *punishing* a moral wrongdoer (which is a matter of moral significance). At this point, Simmons would appeal to the notion of desert as the moral reason for us to exercise our entitlement. But if we are only entitled to *harm* those who have violated natural law, then the appeal to desert no longer makes sense, for this treatment is no

<sup>40</sup>Simmons, *The Lockean Theory of Rights*, p. 145.

<sup>41</sup>*ibid.*, pp. 146–7.

<sup>42</sup>Locke, *Two Treatises of Government*, II, 16.

longer moral in nature—it is simply harm. If, that is, the treatment that we have a right to inflict on the wrongdoer is not punishment, but simply harm, then it obviously does not satisfy the desert-claim “X deserves punishment P.” Such a desert-claim is a moral claim to a form of moral treatment—a form of treatment that will serve to undo the advantage the wrongdoer has gained at others’ expense. The key here is that the only reason why the wrongdoer *deserves* this form of moral treatment is *because* it will undo the advantage he has gained. But since harm *simpliciter*, unlike punishment, is not a form of moral treatment, it will not undo this advantage, and thus there is no basis for saying that the wrongdoer deserves this treatment. To claim that a harm can satisfy a desert-claim would be like claiming that one could administer punishment to a person who has not violated the law. Just as a harm can only *be* punishment if the person has violated the law and is thus deserving, a desert-claim can only be satisfied if the treatment *is* punishment. Thus, what we call our natural right is not “uninteresting,” as Simmons claims, for unless this is a right to punish, there can be no desert-claim, and the harm that is inflicted on a wrongdoer will be no different from hitting an unruly dog or destroying a “noxious Creature.”

So if Simmons is committed to the position that wrongdoers deserve punishment, then the harm inflicted on them cannot be divorced from the sense of authority that Murphy describes so easily. But this is not really a problem for Locke’s argument, for it is unclear how authority and right are distinct in this context. If I have the right to punish, could it make sense to claim that I do not have the authority to exercise this right? Could I have the authority to punish, yet lack the right to do so? If one of these concepts is derived from the other, it is unclear which is which, or even if there is a meaningful distinction in this case.

Perhaps there is some other element that is crucial to the concept of authority. Murphy argues that “[s]ince there are certain things (like punishing, for example) that it makes sense to speak only of governments or other authoritative hierarchies as doing, it cannot (one would hope) be central to the theory of limited government to demand, as Locke would demand, that legitimate government can have only those rights entrusted to it by the citizens it serves—that is, only rights it also makes sense to speak of the citizen as possessing in a state of nature.”<sup>43</sup> According to this view, punishment requires the existence of some sort of authoritative *hierarchical* relationship in order to qualify as punishment. The authority to punish comes, in part, from having a superior position in the hierarchical relationship: “[w]e can thus speak of the father punishing his son but not of the son punishing the father (no matter how much he harms the father).”<sup>44</sup>

Even if Murphy is correct that one has to be in a *position* of authority in order to punish legitimately, this is not a problem for Locke’s argument, for people in

<sup>43</sup>Murphy, “A Paradox in Locke’s Theory of Natural Rights,” p. 268.

<sup>44</sup>*ibid.*, p. 268n.

why has contractual, positivistic, & s. bbb-bound.  
Can have hierarchy anyway in A/C

Locke's state of nature meet this requirement. Wrongdoers, by violating natural law, place themselves in a hierarchically inferior position to those who have not broken natural law. Since others have a more extensive, or stronger, set of rights than wrongdoers, they are thus in a superior position. To respond that this type of hierarchy does not count because it is not a positive institutional hierarchy is to beg the question of where the right to punish ultimately rests. There is no reason to think that the concept of authority requires that some subset of a population exercise it over a larger group, or that it be validated through some positive institutional arrangement (as the example of the family demonstrates). Why could not everyone be authorized to perform a particular action under a system of rules? We could imagine a system in which each citizen is granted the authority to apprehend and punish criminals, and the fact that everyone shares this authority does not then render the term "authority" unintelligible. Indeed, this seems to be exactly what Locke is claiming: that each of us is given the authority to punish those who violate natural law. The fact that this authority is held by more than one person no more renders it invalid than the fact that authority over children is jointly held by parents renders their authority invalid.

If people in the state of nature have the authority to punish wrongdoers, can we conclude that they have the duty to do so? Consider again what we have established up to this point. In the state of nature, there is a system of rules: the law of nature. Under this system of rules, there are people authorized to punish those who violate the rules: everyone who has not violated natural law. When people violate the law of nature, their moral barriers are lowered, and thus it is not unjust to harm them in certain ways. And because those who violate the law of nature gain an unfair advantage, they deserve to be punished. By whom do they deserve to be punished? They deserve to be punished by those who have the authority to punish. And since this desert-claim is correlative—since, that is, justice demands that wrongdoers receive what they deserve from particular people—those who have the authority to punish wrongdoers also have a duty to punish them. Thus, we can conclude that the natural executive right is not a liberty right, but is in fact a power we have that enables us to carry out the duty to punish those who violate natural law.

*no - only that this is Lockean.*

#### IV. A LEGITIMATE STATE

*NO*

Even if we accept that we have a duty to punish moral wrongdoers, we are still a long way from establishing that a state can be legitimate without the express consent of those under its authority. For even if states can legitimately punish wrongdoers, a state limited to this function would still face two obstacles to becoming legitimate: (1) establishing a monopoly on force, and (2) raising taxes to support its punishing efforts. If a state cannot legitimately do these two things without the consent of those under its authority, then the argument that state legitimacy is not dependent upon political obligation will not hold.

*Actually either is sufficient.*

*OR*

## A. EXCLUSION

When a state exercises sole executive power, both those who have committed crimes and those who have not are affected. Wrongdoers are punished for their crimes; others are prevented from exercising their right to punish. According to Simmons, government agents *can* punish moral wrongdoers legitimately, since these agents, like everyone else, have the right to punish. What these agents *cannot* do legitimately without consent is prevent the rest of us from punishing moral wrongdoers, since these agents have no greater rights than anyone else. In order for a state to legitimately exclude people from punishing, these people must give up the right to punish and they “must agree not to compete with the state in punishing (moral) criminals.”<sup>45</sup>

This account, of course, is based on the view that the natural executive right is a liberty right. But, as we have seen, the natural executive right differs from a liberty right in important ways, the most significant of which is that it is derived from the duty to punish moral wrongdoers. How does this affect the argument that without consent we cannot be prevented (non-competitively) from punishing? Could the duty to punish strengthen a state’s claim to a monopoly on force?

One might argue that reliability and efficiency concerns give a state the right to claim sole executive power. Robert Nozick argues along these lines in order to show that his “dominant protective agency” can legitimately wield sole executive power even without unanimous consent. In Nozick’s view, the natural executive right, unlike the others we possess in the state of nature, is one that is held collectively. Thus, when the dominant protective agency prevents others from punishing, it does not violate any *individual* rights, and its right to exercise this power can be based on its position as the most reliable and efficient punisher.<sup>46</sup> Simmons points out that a collective right to punish seems implausible, especially considering the extent to which Nozick relies on individual rights throughout the rest of his argument. And even if the dominant protective agency is a reliable and efficient punisher, this in no way makes it legitimate to prevent non-consenters from punishing, since independent punishing agencies could also be reliable and efficient.<sup>47</sup>

While Simmons’ criticism of Nozick’s argument is on target, his own argument suffers from a similar misunderstanding of the natural executive right. For in both arguments, the assumption seems to be that the state is *depriving* people of something when it claims sole executive power. But what exactly is being taken from these people? Does it make sense to say that my rights are infringed when someone fulfills a duty that we both share? If the state prevented people from exercising a liberty right, the loss for each individual would be clear. Since the right to acquire property, for example, is a liberty right that we can exercise or

<sup>45</sup> Simmons, *The Lockean Theory of Rights*, p. 162.

<sup>46</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1971), pp. 139–40, 101–10.

<sup>47</sup> Simmons, *The Lockean Theory of Rights*, pp. 159–60n, 164n.

But why does it want to?  
 & what about vic-victims?

not as we see fit, for *our own benefit*, being deprived of this right is clearly a loss. This kind of argument, however, does not apply when considering rights that are really only powers to perform moral duties. Consider again the situation in which I am confronted with a person choking on a piece of food. Under normal circumstances, I do not have the right to seize this person to perform the Heimlich maneuver, but since this person is in need of my aid, and since I have a duty to help those in need, I then have a limited right to take control of his body. If, however, some other person suddenly steps forward and saves the victim before I get the chance, could I then claim I was wronged, since this person prevented me from exercising my “right” to perform the Heimlich maneuver? This would not make sense, since the right to perform the maneuver is really only a power to perform my very specific moral duty to help this person. I can have no complaint when someone satisfies this duty before me, since I have no special claim to satisfying this duty, and when someone else satisfies it, I am not made worse off in any way. Similarly, when the state steps in and punishes in our stead, we are not being deprived of anything, and thus we can have no complaint. The right to punish is a limited right to fulfill our duty to inflict the one just punishment that fits the crime. Our only legitimate concern, then, is to see that this punishment is inflicted on the wrongdoer. So when a state punishes in our stead, we gain *all* of the benefits we could ever gain from punishing—justice has been served, and we suffer no loss.<sup>48</sup> If a state prevented us from punishing, yet let wrongdoers go unpunished, *then* we would have a complaint, for then our duty would go unfulfilled. But if wrongdoers are punished correctly, what could others claim they have lost? Nozick’s sadists might complain about losing the opportunity to harm people, but if they are motivated by such personal desires, then they should not be allowed to punish anyway. The only legitimate motivation for wanting to punish is to see that justice is done; if the state takes care of this, then those who cannot punish are not deprived of anything.

The more difficult problem is that in order to establish a monopoly on force the state must take active steps to *prevent* others from punishing wrongdoers, even if they wish to inflict perfectly just punishments. But, according to Simmons, if he attempts to inflict a just punishment P on Butch, a moral wrongdoer, then the only legitimate reason Chico, another potential punisher, could have for interfering is to compete for the opportunity to punish. Since both Simmons and Chico have a right to punish Butch, neither can justly prevent (by non-

<sup>48</sup>This is not to say that those who are owed compensation from the criminal do not have legitimate claims. But what if the only way a victim could be compensated for his suffering was by inflicting some harm on the criminal? Even if a victim could have a right to this form of compensation (which is doubtful), this harm would have to be in *addition* to whatever *punishment* the criminal deserved, for there is a distinction between the compensation owed to victims and punishment. When someone robs a bank, for example, forcing him to return the money—and pay any other costs incurred by the bank—is not punishment. This is simply returning to the victim what was his to begin with. Punishment, on the other hand, settles the debt the criminal owes to the entire community. So even if the victim has a right to harm the criminal, he has no special right to punish the criminal, and thus he loses nothing when he is prevented from doing so.

no

competitive means) the other from inflicting the punishment, since neither is violating natural law by attempting to punish.<sup>49</sup>

We need, then, some way to justify preventing people from inflicting punishments, even if these are the correct punishments. This may seem like an insurmountable obstacle, but this is only so if the right to punish is a liberty right. But since the right to punish is derived from a duty we all share, and thus those prevented from punishing do not suffer a loss, then an appeal to efficiency will work in ways that it does not in Nozick's argument. Drawing on Simmons' example, suppose that Chico agreed that punishment P was the correct punishment, and he wanted to compete with Simmons for the opportunity to administer this punishment. Now suppose further that Chico is notoriously incompetent, particularly when it comes to punishing, and yet, for reasons known only to him, he has decided to make punishing evildoers his life's work. Each night, Chico dons a mask and a cape and travels the land attempting to inflict just punishments on murderers, rapists and other moral criminals. But, bungler that he is, Chico invariably ends up getting in the way of those better able to punish, and the result is that criminals often escape. Could other punishers legitimately prevent Chico from competing? If the executive right were a liberty right, as Simmons believes, then the answer would likely be no. But if, as I have argued, we all share a duty to see that wrongdoers are punished, and if independent punishers, vigilantes and people like Chico constitute obstacles to fulfilling the duty they share with everyone else, then preventing them from competing is justified. Indeed, it seems that Chico has a duty *not* to attempt to punish, since his efforts only work to aid wrongdoers. To say otherwise would be to say that the right to punish somehow becomes more important than the duty to punish. Or, in Locke's terms, the *power* to preserve mankind would be more important than actually preserving mankind.

So if one central punishing authority is the most efficient way to ensure that our duty to punish is fulfilled, then we can make a case that a state could be legitimate, even without consent.<sup>50</sup> For once such an authority is established, people will have a duty not to interfere with its activities. So long as this authority

*interesting & well-argued - but irrelevant b/c assume common of to punish.*

<sup>49</sup>ibid., pp. 155-6.

<sup>50</sup>This is, of course, in part an empirical claim, since the case in favor of one central punishing authority is based on proving that such a monopoly will be more efficient than a number of competing agencies. But notice that efficiency here means efficiency at minimizing injustice, not simply catching and harming wrongdoers, and it does not seem obvious that competition among punishing agencies would lead to less injustice. One central punishing authority, however, could minimize injustice in three ways. First, by minimizing the injustice that results when wrongdoers go unpunished. Second, by minimizing the injustice that occurs when people do not bear their fair share of the burden of punishing (which I shall address in the next section). And third, by minimizing the injustice that occurs when people are punished too severely. This is the same argument that Locke made to demonstrate that men would have reason to leave the state of nature and enter civil society: "For everyone in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Men's." Locke, Two Treatises of Government, II, 125.

*L? with the word? ?*

is justly, efficiently, and reliably punishing wrongdoers, people will not suffer any losses as a result of being prevented from punishing and any interference will only serve to aid wrongdoers.

## B. TAXATION

But perhaps this argument proceeds too quickly. For even if a duty to punish makes it theoretically legitimate for a state to prevent people from punishing, such a state would still need to generate the resources necessary to carry out its punishing activities. And, according to Simmons, if we do not have a political obligation to a state, then this state cannot rightfully collect taxes without our consent, even if it is only to support what is otherwise a morally permissible activity. This is because

governments were never authorized to be the sole enforcers of natural morality, nor did typical residents ever consent to pay for this. Payment from another may only be required in order to enforce a right (e.g., to repair a wrong or secure what has been promised). Only in the very rare instance when a government program provides the *only* way for an individual to do his or her moral duty can the government legitimately require participation and payment.<sup>51</sup>

Now if a state could legitimately prevent people from punishing, it could thereby create a situation in which the only way for people to satisfy their duty to punish would be to pay taxes. But how could a state legitimately come to be in such a position? Would it not first have to collect taxes in order to establish a monopoly on force? Could anyone legitimately demand taxes to pay for punishments *before* a monopoly on force was established?

Another way to approach this problem would be to consider whether it would be possible for everyone to satisfy his duty to punish wrongdoers in the absence of a centralized punishing authority. For it is likely that many people will be physically incapable of capturing and punishing wrongdoers. Does this mean that they are free of the duty to punish? This cannot be, since there is no reason to believe that just because one man is, say, bigger and stronger than others, and thus better able to capture and punish wrongdoers, he has a special duty to punish. But what if there are so many criminals that the select few capable of punishing must spend most of their time chasing after murderers and rapists in order to ensure that justice is done? Could they claim that they are owed some form of compensation from those unable, or unwilling, to do their duty? Since each of us bears an equal responsibility for punishing, if only a few are fulfilling this duty, then it seems fair to say that these people should be compensated in some way. And suppose that these enforcers realize that the most efficient, reliable way to punish is to form an organization devoted to this purpose, an organization along the lines of Nozick's dominant protective agency. As we have

<sup>51</sup>On the Edge of Anarchy, p. 265.

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seen, this agency could legitimately establish a monopoly on force in its area. Could it also force those who are not punishing to make payments in order to offset the costs of those who are shouldering the burden?

Some might argue that this agency could not demand compensation for its punishing services, since this would amount to forcing a benefit onto people and then seeking payment for it. The argument in favor of compensation, then, would fall prey to the same difficulties that Simmons and Nozick identify in accounts of political obligation based on fair play and gratitude.<sup>52</sup> According to Nozick, “[y]ou may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on . . . One cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment.”<sup>53</sup>

Even if it is illegitimate to demand payment for a forced benefit, this criticism would not apply in the case of an agency devoted to punishing. For the only benefits being “forced” on anyone are the savings that would result from having one agency do all the punishing. Since everyone has a duty to contribute to punishing efforts, all the agency would be forcing us to do is to make a payment on an existing debt in a *particular* way, a way that happens to reduce our overall costs. The benefit, if there is any, is that we would have to contribute *less* than we otherwise would have to. Suppose that a group of strangers collectively owes some money to a bank, and this bank demands that each person pay his monthly installment by check, since making payments in other ways would be inefficient and thus drive up everyone’s costs. Some individuals might not like paying by check (I may prefer, for example, to pay in barter, and feel I am wronged when I am not allowed to send a crate of asparagus from my garden each month). But since they already owe the money, and since their costs are lower as a result of being forced to pay by check, this does not constitute a forced benefit for which they are charged. Similarly, once a dominant protective agency was established, satisfying the duty to punish would cost each individual less than if the protective agency did not exist. This efficient, reliable means of fulfilling our duty would thus be a benefit, but it would not cost us anything more than that which we already owed.

This claim might depend on calculating how much each individual is bound to contribute in order to satisfy a general duty to punish wrongdoers—a difficult task. If, in a community of one hundred people, there were ten crimes committed, would this mean that ten people would have to participate in each punishment, even if it only physically required three? Or could each person be responsible for punishing one wrongdoer, each taking a turn as the crimes were committed? What about those too weak to participate? The difficulty of assessing individual responsibility would increase exponentially with the size of the community, and

<sup>52</sup>See Simmons, *Moral Principles and Political Obligation*, pp. 101–42, and Nozick, *Anarchy, State and Utopia*, pp. 90–5.

<sup>53</sup>Nozick, *Anarchy, State and Utopia*, p. 95.

the inefficiencies resulting from the absence of a central punishing authority would likely lead to some people overcontributing while others shirked their responsibilities. The establishment of a dominant protective agency—or, in other words, a state—would minimize inefficiencies, and thus work to establish the bare minimum that each person owed. In the absence of such an agency, people would still be morally bound to contribute to punishing efforts; but those who contributed would probably end up contributing more, either in terms of effort or money.

Another objection to this argument is that by forcing people to pay taxes, a state deprives people of the liberty to choose *how* to contribute to the punishing effort. We may each have a duty to punish, but this does not seem to support an argument that we have to contribute to any *particular* state's punishing efforts. In some ways, this argument resembles Simmons' "particularity" requirement for political obligation.<sup>54</sup> In his view, in order for a state legitimately to collect taxes, people have to have a specific obligation to that state. A general duty will not satisfy this requirement, he claims, because "[a]ny duty which we may have to support our government because of its quality will be 'nonparticularized'; that duty may bind us as well to other governments sharing that quality. But in that case, the duty in question cannot bind us to compliance or obedience, and hence cannot bind us to the state in the right way."<sup>55</sup>

While Simmons is correct that a duty cannot create a special moral bond between individuals and any particular state, this argument does not threaten the legitimacy of a state that taxed solely for the purpose of supporting its punishment activities. People living in such a state could still be free to leave or to contribute to additional states or punishing agencies. The only requirement would be that individuals, so far as they were able, would have to contribute to at least one state or punishing agency in order to satisfy their moral duty. And just as reasons of efficiency would justify the establishment of monopolies on executive power, efficiency would also justify forcing everyone within a state's domain to contribute (at least insofar as they were able to do so). This would mean that individuals who wanted to live in one state and *only* contribute to another would not be permitted to do so. This sort of restriction might seem problematic—after all, they would be attempting to honor their debt—but by not contributing to the state in which they live, they would be making this state less efficient, which would add to the burden of the others in this state. These others would rightly complain about having to shoulder an increased burden; for if all the states are punishing justly, then there could be no legitimate reason for contributing to one over the other. Maybe a person's taxes would be lower if he could contribute to a state in which he did not live (if permitted, a state might encourage outsiders to contribute in this way, and thus lower the costs for its

But it is in coercion, then as facts - we are

<sup>54</sup>Simmons, *Moral Principles and Political Obligation*, pp. 31-5.

<sup>55</sup>*ibid.*, p. 198.

State will inevitably expand & violate many rights & be inefficient in justice.

residents). But these costs would not accurately reflect this person's debt so long as he did not live in that state. Although each state would work to keep its punishment costs as low as possible (so as to keep its residents from leaving), there would likely be some differences in these costs, differences resulting from variations in size, location, demographics and other factors. Each person's debt would, in part, reflect these regional differences, as well as the extent to which his own presence in a particular state added to or subtracted from that state's costs. (Imagine people living in the US being given the opportunity to pay a share of the punishment costs at home or in a place like Monaco—the cost of punishing would remain constant in both places, while the debt of those left paying to the US would skyrocket.) If someone wished to contribute to a state other than his own because the other state had a greater need for punishing services (which ought to be reflected in lower punishment debts in his state), then he could simply forward the difference between the required payments in the two states.

It is clear that although people would be forced to pay taxes to the states in which they lived, this alone would not render these states illegitimate. So long as states were limited to collecting taxes for the purpose of enforcing natural law, and so long as people were free to leave and free to contribute additional funds to other states, these states could legitimately demand obedience and support.

## V. CONCLUSION

No doubt some will object that the entity that I have just described does not in any meaningful sense resemble a state. Locke, for one, might find the idea of a state limited solely to punishing moral wrongdoers absurd. But if we agree with Locke that the purpose of government is to preserve our "lives, liberties and estates," then perhaps a government that is strictly limited to that purpose might not be so absurd after all.

A more profound objection Locke might raise would be that a government of this type could not be legitimate, since those under its authority would not have consented to its rule. Locke repeatedly stresses that the only way for one person to attain political power over another is by consent,<sup>56</sup> a condition my account plainly fails to satisfy. Then again, Locke himself, only a few pages after laying out this argument, sets about the task of discovering "how far any one shall be looked on to have consented, and thereby submitted to any government, when he has made no expression of it at all."<sup>57</sup> It seems that Locke set the bar too high for even his own argument, for his doctrine of tacit consent leads to the conclusion that there are few if any times when people have not consented to governmental authority, and thus consent does not amount to much. Looked at from this perspective, there seems to be little difference between a limited government to

<sup>56</sup>John Locke, *Two Treatises of Government*, II, 95.

<sup>57</sup>*ibid.*, II, 119.

which people have consented and a limited government to which they have not consented.

But maybe there is a significant difference. For proponents of tacit consent believe that it confers upon a government a wide range of moral powers that would otherwise be unavailable. In this view, tacit consent provides the state with a sort of moral blank check, one it cashes every time it transforms some act that was previously morally neutral into one that is morally significant. In contrast to this, a state limited to enforcing natural law could not make any such transformations. While there would likely be disputes about the nature and scope of natural law, the absence of express consent would rule out involvement in whole classes of activities that existing governments routinely view as their legitimate domain. The limitations on this type of government would obviously be much greater, just as the restrictions on those under its authority would be much fewer. Under both types of regimes, express consent would be absent; but supporters of the more extensive form of government would have a whole lot more to account for.

Simmons correctly argues that accounting for the extensive set of activities that existing governments are typically involved in is a task that has not, to date, been adequately fulfilled. And so long as the relationship between existing states and their citizens is not the result of a voluntary act, people will not have special moral ties to the states under whose authority they live. But the philosophical anarchist argument that *all* states that rule in the absence of consent must be illegitimate is ultimately unpersuasive. As we have seen, this argument depends upon the view that states need consent in order to legitimately wield sole executive power and collect the taxes necessary to support their punishment activities. This is only true, however, if the natural executive right is liberty right. Once we recognize that this is not an accurate description of the natural executive right, that it is better characterized as a power to perform our duty to punish moral wrongdoers, then it becomes clear that states do not need our consent in order to wield sole executive power. Furthermore, if we have a duty to punish moral wrongdoers, then states can justify taxation to support their punishing activities by appealing to this duty. And since states can (1) legitimately exercise executive power, (2) legitimately prevent others from exercising executive power, and (3) legitimately demand compensation for their punishing efforts, states can be legitimate in the absence of political obligation. The practical effect of this conclusion may not seem radically different from Simmons' conclusion, since he does argue that we usually ought to comply with the laws of reasonably just states, and nothing I have said contradicts this. But once we acknowledge that consent is not always necessary for a government to be legitimate, this could, perhaps, pose further problems for the philosophical anarchist position.