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THE STRENGTHS AND LIMITS OF PHILOSOPHICAL ANARCHISM

THE BASIC DEFINITION of state legitimacy as the exclusive right to make, apply, and enforce laws is common, clearly visible in Max Weber and contemporary political philosophy and found less explicitly in the classical contract thinkers.¹ A. John Simmons, drawing on Locke, writes that “A state’s (or government’s) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties” (Simmons 2001, 130). Similar definitions—whether vis-à-vis legitimacy or authority—with slight alterations of terms and in conjunction with a series of other ideas and conditions (for example, “authoritativeness,” background criteria, the difference between force and violence) can be found in Robert Paul Wolff (1998, 4), Joseph Raz (2009), Richard Flathman (1980), Leslie Green (1988), David Copp (1999), Hannah Pitkin (1965, 1966), and others. The point is that the justification of state legitimacy and the (corresponding) obligation to obey involve, more often than not, making, applying, and enforcing laws: political power.

Often left out of these discussions—with important exceptions—are the real practices of legitimate statehood, and perhaps for good reason. What philosophers who explore the question of legitimacy and authority are most often interested in—for a variety of reasons—is the relation of the individual to the state, that is, whether and to what extent a citizen (or sometimes a noncitizen) has an obligation to obey the state. As Raz notes, part of the explanation for this is that contemporary philosophical interest in questions of political obligation emerged in response to political events in the 1960s (Raz 1981, 105). However, focusing on the legitimacy/authority/obedience

relation obscures a particular practice always implicated in the problem of state legitimacy and a central (although not sole) reason we desire a justification for the right of the state to enforce its laws: the need to morally distinguish coercive force used by the state from immoral, unjust violence. Wolff's essay "On Violence" does acknowledge the problem, for if the state is not legitimate then "it is impossible to distinguish between legitimate and illegitimate uses of force," that is, between (morally justifiable) force and (immoral and illegal) violence (Wolff 1969, 607). The need for a moral distinction emerges from the impossibility of distinguishing state violence from nonstate violence at a purely descriptive level (excluding obvious differences in particular cases). The violence in the death penalty and in murder is the same: an agent kills someone. That a moral difference between the two acts must be found is clear if we are to avoid the conclusion that the state's use of force is always (unjust) violence.

For those who present arguments that secure the legitimacy of the state, whether classical or contemporary, the moral justification of state force/coercion/violence and thus its distinction from nonstate violence is resolved by those arguments. As I show in a later chapter, such arguments engage in a justificatory violence that undermines those arguments, but one can understand why, the state having been legitimized, the only real concerns with practices of state force are the justice of particular laws and procedures of enforcing the law. State violence as such is elided or displaced as an issue meriting real philosophical analysis because it has already been morally justified.

The situation is quite different for those who self-describe or can be described as "philosophical anarchists." Those who deny the legitimacy or authority of the state (or a *prima facie* obligation to obey the law)—Simmons includes himself, Raz, Green, Wolff, Regan, and others among this group—face a real difficulty when it comes to the enforcement of the law. Quite consistently from his anarchist position, Wolff argues in "On Violence" that there simply is no morally relevant difference between violent acts committed by the state and violent acts committed by nonstate actors because there can be no legitimate states (Wolff 1969, 609; for a nonanarchist attempt to challenge the legitimate force/illegitimate violence distinction, see Coady 2008, 1–4, 21–42). Wolff's acceptance of the consequences of his position is an exception, however. Most philosophical anarchists—including Simmons, who I focus on here—do not seem willing or feel forced to move in this direction because the consequences

of philosophical anarchism for most philosophical anarchists turn out to be not very radical at all (see Simmons 2001, 112–21; Smith 1973, 969). The reason is that the obligation to obey the law, once denied, removes only one moral reason for conforming to what the law demands of us. Other moral duties compel many, if not most, of the same actions, and thus we have other reasons for obeying the state and its laws that are just as morally compelling as a political obligation to obey a legitimate authority. Correlatively, state violence may be justified by other moral reasons even if the state lacks authority. In short, where political obedience fails to obligate us, moral obligations perform the same task, and where authority cannot justify state violence, other moral justifications do the same work. As we will see, if that morality includes a natural right and even a duty to punish those who break the natural law, then the problem of state violence is once again easily elided because it is too quickly legitimized.

Although I do not defend philosophical anarchism against its critics, I am sympathetic to its conclusions and believe them to be persuasive within the terms of the debate.² I find Simmons's work to be particularly compelling, rigorously and successfully argued, and thus the most important of the various defenses of philosophical anarchism. His basic argument for anarchism is simple: after surveying various grounds for political obligation (including gratitude, fair play, a natural duty of justice and consent), he shows that only express consent given under certain speech conditions could successfully ground a political obligation. Insofar as incredibly few individuals ever have consented or do or will consent to their state, then vis-à-vis the vast majority of individuals, there are no political obligations, and because state legitimacy requires authority, the state is illegitimate (Simmons 1979, 191–201). This position is so persuasive because it rests on the most intuitively powerful and theoretically coherent basis for the generation of an obligation: the actual, express giving of one's word. Not backing away from the fact that consent, for all of its theoretical and political promise, is virtually absent in political life, Simmons accepts the conclusion that existing states are illegitimate in relation to most of their citizens. Furthermore, he is rightly skeptical of "hypothetical consent" positions such as Rawls's in *A Theory of Justice* (1971) because they "have illicitly appropriated the justificatory force of voluntarism while being (like Kant) in no real way motivated by it" (Simmons 2001, 147). Simmons presents an almost purified (Lockean) picture of liberalism in which the power and right of an individual in conjunction with other equally powerful and rightful

individuals to be the generator of political obligations (and, as it were, the political itself) faithfully reflects the “atomistic” side of liberalism while insisting that these prepolitical rights must be understood in conjunction with equally prepolitical duties. In short, we get two of the central founts of liberalism—natural law and natural rights—taken seriously in a coherent argument for the illegitimacy of existing states.

Insofar as one of my main arguments in this book is that there can be no moral justification of state violence, it is perhaps natural that I would be attracted to and convinced by arguments that deny the state the moral authority to enforce its laws. Yet I am dissatisfied by most versions of philosophical anarchism, and Simmons’s exemplary version in particular, for two reasons. First, the very mild consequences of philosophical anarchism claimed by its defenders rest on a set of moral ideas resting on concepts and premises drawn from a metaphysical tradition that has been rigorously historicized and philosophically attacked since at least Hegel, Marx, Kierkegaard, and Nietzsche. This line of critique has continued into the twentieth century with Adorno, Foucault, Derrida, Arendt, and others. The failure to take seriously or even acknowledge this tradition of critique undermines the plausibility of the anarchist’s claim that the loss of state legitimacy does not entail any radical consequences, for this claim uncritically substitutes moral for political obligations.

Second, as I have already suggested, the substitution of moral obligation for political obligation elides the problem of morally distinguishing state violence from nonstate violence, and thus threatens to turn state violence into a paradigm of injustice. As Thomas Senor has argued in response to Simmons, if a state lacks the right to punish its citizens, then when it punishes it is actually only “punishing” (for the authority to punish is part of the concept of punishment); furthermore, it is committing a genuine act of injustice: using violence without right (Senor 1987; see similar worries in Edmundson 1998, 33). As we will see, Simmons argues for the plausibility of the Lockean natural duty to punish to answer these worries; once again he moves the philosophical problem back to the terrain of a moral realism that needs defending not only against communitarians, constructivists, noncognitivists, and others within contemporary analytic moral philosophy but also against the criticism of Nietzsche, Marx, Foucault, and others. The elision of an analysis of state violence is linked to the moral theory underlying those who justify state legitimacy and, more important for me, the philosophical anarchists.

In this chapter, then, I present two arguments. First, I turn briefly to Walter Benjamin's "Critique of Violence" to emphasize Benjamin's reasons for removing the critique and analysis of violence from the means–ends relation that is found in natural law and positivism. Simmons is able to elide the problem of state violence because he defends (sometimes ambiguously) a Lockean moral realism about rights and duties, thereby subsuming violence back into a particular form of the means–ends relation within natural law. However, if Senor is right, and the loss of state legitimacy undermines the moral justification of state violence, we are forced to move the real argument over the consequences of philosophical anarchism to the (unpromising) field of moral philosophy, specifically metaethics.

Second, I argue that although Simmons briefly defends his (largely implicit) moral theory against (some) critics, he fails to account for the most powerful criticisms of the moral subject. I cannot go into the details of the criticisms of the modern (moral) subject that are so prominent in some nineteenth-century philosophers and, in the twentieth century, in post-Heideggerian philosophy and critical theory. But I hope to say enough to argue that Simmons's philosophical anarchism is limited by and subject to criticism for its commitment to a moral theory that is both more questionable than it acknowledges and enables a displacement of the problem of state violence that the justification of state legitimacy is partly designed to solve. To save the moral distinction between state violence and nonstate violence through recourse to the highly contestable field of moral theory is tough enough; failing to take seriously the most powerful criticisms of the modern moral subject only makes such a task harder and less persuasive.

BENJAMIN'S "CRITIQUE OF VIOLENCE"

Walter Benjamin's "Critique of Violence" argues for a number of claims about the relations of violence (mythical and divine) to law and justice. For my purposes, I want to focus only on Benjamin's argument for how we should approach and critique the problem of violence. I do so because it will set the terms within which I would like to question the (non)place of state violence in Simmons's work.

For Benjamin, the "task of a critique of violence can be summarized as that of expounding its relation to law and justice. For a cause, however

effective, becomes violent, in the precise sense of the word, only when it bears on moral issues. The sphere of these issues is defined by the concepts of law and justice” (Benjamin 1978, 277). The first premise, then, is that violence is only properly ascribed to human acts (with the exception of divine violence, which is entirely opposed to all other human, mythical, legal violence), for only human acts—as opposed to natural disasters and the actions of animals—fall within the moral sphere. One might quibble with the claim that moral issues are defined (solely?) by the concepts of law and justice, for Benjamin leaves out other seemingly essential moral concepts (such as value or virtue, although the “value” of the law itself is explicitly at issue in the essay). But insofar as his primary concern is the relation of violence to law and justice, his neglect of other moral concepts does not affect his argument.

The second, more crucial premise in Benjamin’s text is that “with regard to the first of these [law], it is clear that the most elementary relationship within any legal system is that of ends to means, and, further, that violence can first be sought only in the realm of means, not of ends” (Benjamin 1978, 277). That the most basic legal relationship is instrumental in character stands in need of justification.³ The second feature of the premise—that violence is to be sought in the means, not the ends—is less controversial. No legal system—save perhaps totalitarian systems such as the Nazi state—has violence itself as one of its ends; on the contrary, a central aim of law is the reduction if not elimination of violence, and law employs putatively legitimate violence as a means to that end. To return to the first part of the premise, we must ask whether the means–ends relationship is so elemental within law.

Benjamin turns to the two most important philosophies of law to justify the claim. First, natural law gives us a criterion with which to judge violence: whether it is a means to a just or unjust end. For natural law “perceives in the use of violent means to just ends no greater problem than a man sees in his ‘right’ to move his body in the direction of a desired goal. According to this view . . . violence is a product of nature, as it were a raw material, the use of which is in no way problematical, unless force is misused for unjust ends” (Benjamin 1978, 277–78). Benjamin cites Spinoza at this point, but he could just as well have quoted any number of modern contract thinkers. For Hobbes, natural right simply is “the liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature” including, of course, the violence that leads to the state of war (Hobbes

1997, chapter 14). Locke presents a more complicated case because our actions in the state of nature are restricted by natural law (as we will see when we turn to Simmons). For Locke we are either born with or acquire in the state of nature a right to punish others, that is, a natural right to use violence (Locke 1988, §7–8). In both cases, the right to use violence serves a just purpose and is thus justified by the ends of self-preservation or the preservation of humankind. In other words, violence is a means, justified by a just end. Of course, in Hobbes and Locke (and any number of other thinkers), the law itself, as well as particular laws, are means to ends (self-preservation, the protection of property, or any other end). In natural law, then, the means–ends relation of all law is clear, and the criterion by which to justify the means is the justness of the end.

Although one does not find the justification of violent means by just ends in legal positivism, the means–ends relationship remains. For “if natural law can judge all existing law only in criticizing its ends, so positive law can judge all evolving law only in criticizing its means. If justice is the criterion of ends, legality is that of means” (Benjamin 1978, 278). Benjamin, I take it, is referring to the important place of procedures (or of Hart’s “secondary rules”) in positivism, procedures for enacting laws (which find their legitimacy in some basic law or foundational act) and more specifically what Rawls calls “pure procedural justice.” Unlike perfect and imperfect procedural justice—both of which have an independent criterion by which to judge the procedure (although imperfect procedural justice cannot design fail-proof procedures to reach the desired end)—pure procedural justice “obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed” (Rawls 1971, 86). The use of violence as a means within positive law is justified by the propriety of the procedures through which it is used, the way they satisfy secondary “rules of recognition” (Hart 1961, 92). Here, too, the means–ends relationship is central to the structure of law, for the justness of a legal system under conditions where perfect and imperfect procedural justice are not possible or only rarely achieved requires that legal means—that is, legal procedures—are justified and executed properly to justify the ends attained by legal violence.

To be sure, more needs to be said to justify Benjamin’s claim to the elemental place of the means–ends relationship in law. We have already seen enough to move on to Benjamin’s disagreement with the way violence

is understood by natural law and legal positivism and further to the proper way to approach the place of violence within law. The problem faced by natural law's solution to the problem of justifying violence is that natural law can only justify the use of violence as a means in particular cases; it cannot and does not justify violence itself. Benjamin writes:

For what such a system [of natural just ends], assuming it to be secure against all doubt, would contain is not a criterion for violence itself as a principle, but, rather, the criterion for cases of its use. The question would remain open whether violence, as a principle, could be a moral means even to a just end. To resolve this question a more exact criterion is needed, which would discriminate within the sphere of means themselves, without regard for the ends they serve. (Benjamin 1978, 277)

In other words, whenever violence as a means is justified by a particular just end, what one is justifying is not the violence but the use of violence in that (and all other identical) case(s). Benjamin's claim is a condensation of a more complex argument. First, he argues that the normative justifiability of the means comes from the normative justifiability of the ends (just ends [normatively] justify the means). Second, he argues that the means as means, that is, as useful ways of obtaining an end, are justified by the ends (the ends instrumentally justify the means). Third, and crucially, he claims that within natural law the normative and instrumental justifications of the means collapse such that the usefulness of the means in obtaining a just end is the normative justification of the means. What is occluded in this collapse is a normative assessment of the means as such, without relation to ends.

For example, take the use of the death penalty. Undoubtedly, the death penalty can—in either a retributive, deterrence, or mixed theory of punishment—be justified as a means to achieve a just end (if the death of the criminal is a just end, then the use of violence is justified). However, this does not answer the question of whether the violence of killing is itself just, can ever be just, no matter what just ends it serves. Thus, it is left open whether “violence, as a principle, could be a moral means even to just ends.” Benjamin draws a distinction between the justice of violence and the justification of the use of violence, and on the basis of this distinction he argues that natural law deals only with the latter and never the former.

Therefore, natural law cannot be the proper way to approach the relation of violence to law and justice.

On the other hand, legal positivism does offer, for Benjamin, a starting point for a critique of violence. It does so because insofar as violence is not the end of a legal system and no just end can justify violence itself, a critique of violence must look at violence solely within the realm of means, of actions. Insofar as legal positivism justifies ends by the justness of the means, it necessarily attends more closely to an analysis of the means. For this reason, legal positivism makes a fundamental distinction between kinds of violence pertinent to the use of violence as a means: the distinction between legitimate and illegitimate violence. This distinction rests on positivism's "positivism," as it were: that law is made, posited, in a particular historical time and space (Benjamin 1978, 279–80). What legitimizes certain uses of violence as a means is the historical foundation of that violence in a founding act (what Benjamin calls "lawmaking violence"). This founding act—if legitimate—would legitimize the violence of the state that is founded by the act (we return to problems with the founding act in chapter 2).

Thus, a critique of violence begins by attending to the distinction within positivism between legitimate and illegitimate violence, for that distinction, found on the "means" side of the means–ends relation, is an attempt to address violence itself, to make a moral distinction, however dubious, between "kinds" of violence such that one kind is morally justified regardless of the ends it serves. (One might add that the justification of violence in natural law is prospective in a sense, justified by what it achieves, whereas violence in positivism is retrospective, justified by the propriety of the act that legitimizes it.) For Benjamin the distinction between legitimate and illegitimate violence is central to the relation of violence to law, but that very violence, no matter how legitimate, irreparably divides law from justice (I return to this issue in chapter 2).

What is important for my purposes, however, is Benjamin's "methodology." If we want to criticize state violence, we must turn to the legitimacy/illegitimacy distinction, and to understand that we must turn to the founding act of the state (again, I return to this latter point in chapter 2). Philosophical anarchism, as exemplified by Simmons, denies the legitimacy of the state by denying that the only act capable of "founding" the authority of the state has taken place. In so doing, one would seemingly deny the right of the state to use violence to achieve its ends and thus collapse the moral

distinction between legitimate and illegitimate violence, rendering state violence immoral and unjust. However, this is not at all the conclusion Simmons reaches.

THE NATURAL RIGHT TO PUNISH

In responses to his critics (including Senor)—some of whom claim that philosophical anarchism would quite naturally lead to actual (acts of) anarchism—Simmons often makes the same basic point:

The anarchist conclusion is that most citizens have no political obligations and that governments lack the correlative political right to command and be obeyed. In particular, of course, this means that governments possess no right to use coercive sanctions to compel obedience to civil (as opposed to natural) law ... I have argued that the anarchist conclusion does not justify widespread disobedience, as it might at first seem to, and that in at least some kinds of states many citizens have morally compelling reasons to conform their conduct to law, even in the absence of political obligations. (Simmons 1987, 275; see also Simmons, 2001, 112–21)

In addition to a variety of natural duties we owe to others that compel us to conform to the law as well as a “balance-of-reasons” approach to moral reasoning that sometimes morally justifies “unrightful” actions (I return to this set of ideas later), Simmons argues that

while it is certainly true that if there are no political obligations governments cannot have the right to enforce civil law, it is not obvious that they lack the right (or authority) to enforce natural law (or basic moral rules). If we possess a “natural executive right,” governments (as sets of persons and also perhaps as punishers “authorized” by, say, naturalized express consenters) will have the same right to enforce moral requirements as individuals possess. I believe that one variation of Locke’s “strange doctrine” of the natural right to punish is in fact true and in no way incoherent. (Simmons 1987, 276)

The full defense of Locke's "strange doctrine" comes a few years later in Simmons's *The Lockean Theory of Rights* (1992). Even in his brief response to Senor, one can see the important role Locke's natural right to punish plays in Simmons's anarchism. If we have no political obligations, and states have no political right to enforce law, for Simmons this does not mean that state violence is unjustified, for the state (or more precisely, the government or its officials) may have a natural right to punish those who break the natural/moral law. This position fits coherently with the justification/legitimacy distinction Simmons draws in *Justification and Legitimacy*, in which we can "justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives" even if the state is not legitimate (Simmons 2001, 125). If the key to criticizing legal or state violence is to begin with the legitimacy/illegitimacy distinction, Simmons, after undermining that distinction, restores it at a prepolitical level through an appeal to natural law. But if so, then on Benjamin's account, Simmons cannot have justified state violence (e.g., punishment) itself but only its use for certain ends presumed to be just. In the next section, the presumption of the justness of the ends in Simmons's work will be questioned. But here I would like to show how Simmons fails to get at the justification of violence itself precisely by transferring the justification of violence from the positivist moment of legitimate founding to the state of nature, ensuring that violence is justified in its use but not in itself. State violence is justified "naturally" and as "natural," and thus elided at the very moment its morally problematic status would be most obvious.

Locke's strange doctrine is announced early in the Second Treatise: "And that all men be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, which willeth the Peace and Preservation of all Mankind, the Execution of the Law of Nature is in that State, put into every Mans hands, whereby each one has a right to punish the transgressors of that law to such a Degree, as may hinder its violation" (Locke 1988, II, 7). Simmons's reconstruction and defense of this "natural executive right" to punish wrongdoers is interesting in a variety of respects, but I am concerned only with the implications of this right on the consequences for the legitimacy of state violence given the truth of philosophical anarchism. That there is a connection is noted by Simmons at the end of his discussion: "The Lockean account I have just defended is an account of what must take place if legal punishment is to

be legitimate ... It may be true that punishment in many or most civil societies is not legitimate” (Simmons 1992, 165). The Lockean account is one in which the exclusive right to punish wrongdoers is given to the government through a transaction, where each citizen gives up their natural executive right (as well as, on Simmons’s account, some of their rights to self-government) to the state. Insofar as such transactions rarely if ever take place in any state (according to Simmons’s anarchist position), most individuals have never given up their natural executive right to punish, and thus all states have such an exclusive right only in relation to the very few who have explicitly consented to the state. Thus, it would seem fair to say, as Simmons does, that most practices of legal punishment are illegitimate.

Of course, they are not really illegitimate even if the state does not possess and cannot morally justify an exclusive right to punish. The reason is that in defending a natural right to punish, the violence of punishment is naturalized (in the specific sense of the state of nature, often invoked by Simmons, as a logically but not temporally prepolitical state) within the framework of a natural law and realist moral theory. The illegitimacy of state practices of violence does not entail the moral unjustifiability of those practices because there is a prepolitical, natural moral justification for those same practices. The question becomes: what justifies the natural violence involved in the natural right to punish?

Locke’s case appeals to many sources: to God, to the logical necessity that the natural law have real sanctions, to the grounds of a right to punish aliens, and so on. For Simmons, however, the explanation begins in part from the basic “principle” of Lockean moral theory, the fundamental law of nature, which is the right and duty to preserve humankind: “Specifically, the fundamental law of nature is, I think, meant to function in Locke’s moral theory much as the principle of utility has been thought to function in some rule-utilitarian schemes. The superstructure of Locke’s moral theory, then, is a kind of rule-consequentialism, with the preservation of mankind serving as the ‘ultimate end’ to be advanced” (Simmons 1992, 50). What we have, on Simmons’s reading of Locke, is a basic means–ends structure necessary to any consequentialism, albeit a rule consequentialism that allows for a blending of utilitarian and deontological arguments (Simmons 1992, 58–59). Thus we can know the ultimate natural end for which any violence, however far down the instrumental chain, must be used: the preservation of humankind. Punishment and its violence—and presumably all other

justified violence, say, of war or resistance—is justified by the ultimate just end of preserving humanity.

To return to the specific violence of punishment, it is perhaps surprising that Simmons does not rely entirely (or even largely) on a direct derivation of the right to punish from the fundamental law of nature. Largely to avoid Locke's divine foundation of the natural law, Simmons turns to the possibility that the natural right to punish is a matter of rights forfeiture on the part of the criminal, and for this claim he gives something closely analogous to (although not entirely identical with) a "fair play" argument (Simmons 1992, 148–61). Given the existence of moral rules (the law of nature), he argues, it is reasonable that only those who follow the rules deserve the protection of those rules. When a person commits a crime, they forfeit some (or all, presumably in the case of capital punishment) of their rights against being harmed by others. Thus the natural right to punish is the "special right" generated by the wrongdoing of the criminal that belongs to everyone in the state of nature so that they can punish wrongdoing to repair the damage done to the victim (although the right to that reparation belongs to the victim alone) and to preserve humankind through the usual deterrent effects of punishment.

However, there is a real problem with the rights forfeiture foundation of the natural right to punish. In basing the right to punish on rights forfeiture, there is a seeming advantage: the loss of rights against harm from others (and thus the corresponding right to punish when one forfeits those rights through wrongdoing) is given a voluntaristic basis that avoids the divine ground of moral obligation embraced by Locke (in favor of a secular ground of the same rights, something also present in Locke). If coherent, then the argument I have been making—that Simmons's position is thoroughly naturalistic and thus cannot justify violence itself—would fail, for even if what is at issue in the right to punish is no longer the legitimacy of the state based on consent, the natural right to punish would have a "historical" basis in a voluntary system of rights and duties based on fair play. In short, the violence involved in the right to punish would be legitimized not by its naturalness but by a historical, voluntaristic ground.

Indeed, Simmons describes life under moral rules in the state of nature as a conception of social interaction akin to the "fair play" image of political society, that is, one in which our reception of benefits within a system of cooperation is the ground of our obligation to obey the rules. He writes: "Perhaps the most 'natural' way to view forfeiture involves maintaining

that any reasonable or fair system of protective rules (laws, conventions) must specify (explicitly or implicitly) that one's status under the rules depends on respecting them; any rights the rules may define are guaranteed only to those who refrain from violating them" (Simmons 1992, 153). In criticizing the principle of fair play as a ground of political obligation, Simmons rests his case largely on the fact that only a clear acceptance of benefits that almost amounts to or collapses into consent could ground political obligation on the fair play view, but very few citizens have accepted benefits in the "right" way. Moreover, others who receive or accept benefits most likely do not accept the vision of society within the fair play view as one of a "cooperative scheme" (Simmons 1979, 136–42). In short, fair play fails as a ground of political obligation both because very few people accept benefits in the right way and because few view their society in the right terms.

Surely the same arguments apply to the fair play rights forfeiture view Simmons paints. Is it really all that natural to think of individuals in the state of nature viewing themselves as members of a "moral cooperative scheme" in which they know, explicitly or implicitly, that one's status within the system depends on respecting its rules? Is there, as it were, a meta-natural law, or secondary natural law, that reason can discover in which we know our rights are contingent on following the rules? Surely we are bound to obey the natural law even in the absence of any acceptance of benefits or even consent and, further, even if we do not participate in anything like or believe we are participating in anything like a cooperative scheme. If such a rule is "implicit," this would undermine any kind of voluntaristic basis for our participating in the natural law "cooperative scheme," just as the mere reception of benefits cannot generate an obligation to obey the law. The voluntaristic picture of life under moral rules in the state of nature—one that mirrors the picture of life within a political order where obligation is grounded in fair play—seems incoherent on the face of it; even if coherent, this view appears to radically change the conception and point of natural law. The real argument for the right to punish must then be the purely natural one, in which our right to punish, the right to use violence, is justified by the just ends of punishing individuals to achieve the highest end: the preservation of humankind.

But what about the violence itself? Has it been justified, or only its use? Can violence ever be a moral means to even just ends, as Benjamin asks? Put differently: is there a natural right to violence, as Benjamin

claimed to be the position of natural law, a violence that is “as it were a raw material”? (Benjamin 1978, 278).

If the answer, certainly for Hobbes and complexly for Locke and Simmons, is yes, and no matter what restrictions one puts on violence it is undoubtedly natural (in the sense of prepolitical), then a serious problem emerges in Simmons’ anarchism. If consent alone could legitimize the state and its violence (Simmons 1979, 191); if, as Simmons repeatedly notes, the principle of consent, expressing the artificial nature of political obligation, is central to Locke’s (and Simmons’s own) sense of political legitimacy (see also Simmons 1993, 37); and few people have consented to their governments, thus all states are illegitimate; then practices of state violence should be illegitimate but are not because even illegitimate artificial governments have a legitimate natural right to punish. There are three problems here. The first is that one is led to wonder why we need to authorize the state at all—much as Buchanan argues—given that the legitimacy of state violence (and presumably state lawmaking), even on Simmons’s own anarchist account, is morally justified even without being authorized. The second problem is that the artificial, created character of political power equally seems to lose its importance insofar as the only real “wrong” a government can commit when it lacks the exclusive right to punish is to interfere in the equal right of another person or entity to punish the wrongdoer (and is that really an important moral wrong, or even a real practical difficulty if governments, as we know, are capable of maintaining standing armies, police forces, legal systems, and so on). A natural account of the legitimate use of state violence obviates the moral necessity to legitimize that violence through any artificial act of consent.

The third problem is the one I have been emphasizing: violence is too quickly assumed to be morally unproblematic, and the use of violence to achieve just ends (and restrictions on that use) becomes the only pressing matter. In Simmons we see how a natural law thinker, even one who offers persuasive arguments for the illegitimacy of existing states based on the importance of consent (and thus on positivist claims for the importance of founding in thinking about state legitimacy) elides the problem of violence because of a natural law framework that reduces the moral problem of violence back to its usefulness in achieving just ends. That there is something morally problematic about state violence given the illegitimacy of existing states is acknowledged, but too quickly forgotten

or solved through recourse to a moral theory grounded in natural rights and laws. I now turn to the questionability of that theory.

SIMMONS'S DEFENSE OF NATURAL LAW/RIGHT

The closest Simmons comes to defending his moral theory is in his response to “natural rights skeptics” in *The Lockean Theory of Rights*. Before turning to that defense and how it fails to answer to the most powerful criticisms of the philosophical bases of natural right/law theory, I want to note my agreement with Simmons on a basic point. In a footnote Simmons argues:

It is, I think, often tempting to allow historical and social explorations, which sometimes show us how moral concepts come into use and become firmly entrenched, to deflect our attention from the project of determining whether moral judgments using those concepts are justified or valid. That the two are distinct projects seems to me undeniable. To maintain the contrary would be like arguing that because the church is responsible for our view of God, there is no independent question of the meaningfulness, truth, or justifiability of religious propositions. This is not, of course, to argue that explanations of how our moral language comes into use or its role in our lives is not relevant to the latter kind of question, but only that the first project cannot be a simple substitute for the second. (Simmons 1992, 115–16)

I return to the context in which Simmons makes this point in a moment, but I think he is right. Pointing out the history—especially if that history is particularly violent, unsettling, racist, sexist, and so on—of a concept need not entail anything vis-à-vis its meaningfulness or justifiability or truth. When Simmons admits that the history of a concept is relevant to the determination of its truth, I imagine he is referring (at least in part) to the fact that before we can determine the truth of an idea, we must at least understand that idea, and such an understanding is aided by understanding the historical context within which the idea emerged. Similarly, of course, we also need to understand the philosophical context of the idea.

However, I would phrase the point slightly differently because there is a form of historico-philosophical criticism—for example, what we find

in Nietzsche, Heidegger, Foucault, and others—in which the historicization of ideas is purposefully interwoven with philosophical argumentation (and for philosophical reasons). Far from being a confusion, such criticism relies in part on a philosophical interrogation of history, that is, history itself is taken as an object of philosophical analysis and as a matter of philosophical importance. For Nietzsche and Foucault, genealogy is precisely a historical method that is philosophical and relies on a conception of history that has been subjected to philosophical analysis. That the most important and powerful criticisms of the modern moral subject often proceed by blurring the distinction between historicization and philosophical argumentation is not surprising, for temporality itself becomes a matter of ontological, anthropological, and historical concern given the criticisms of the modern (moral) subject one finds in many nineteenth- and twentieth-century thinkers. Thus, I want to be clear that my own response to Simmons does not collapse the history/philosophy distinction in the way he warns against (and which I agree with), but it does not accept the distinction as it stands.

Although Simmons does not offer a full defense of his moral theory, he does acknowledge that “the ‘common core’ of natural law doctrine seems to amount to little more than this: that there are universally binding (‘objectively valid’) moral rules, knowable by use of our natural faculties . . . Natural law theory, in this sense, implies some form of value objectivism—a position that is controversial enough, of course, but one that is still well within the mainstream of active theoretical debate” (Simmons 1992, 103). He further acknowledges that this position does commit him to some version of moral realism (Simmons 1992, 104).⁴ We also find a tentative acknowledgment of the coherence of “ethical pluralism,” that is, that we can work with a plurality of irreducible ethical principles in grounding moral rights and duties (Simmons 1992, 59). Finally, in deciding what to do in cases of conflicts between rights, duties, principles, and prudential concerns, Simmons argues for a “balance-of-reasons” view in which, depending on the case, rights can be overridden by prudential concerns, one right can override another, or rights can serve as “trumps” (Simmons 2001, 108).⁵

Many of these positions inform Simmons’s response to “natural rights skeptics,” for example, Marxists, Hegelians, and communitarians such as Charles Taylor, Alisdair MacIntyre, and Michael Sandel as well as to utilitarians such as Jeremy Bentham. I ignore his response to Bentham (for whom rights are famously “nonsense on stilts”) and focus primarily on his

response to the various communitarians, for in that response Simmons comes closest to addressing some of the criticisms of the moral subject we find in Nietzsche et al., but he deflects the problems in ways that do not address the real nature of the criticisms.

Simmons first responds to Taylor's claim in the essay "Atomism" that the idea of natural rights rests on a concept of an "extensionless subject, epistemologically a *tabula rasa*" (as quoted in Simmons 1992, 104). To this he responds:

It is hard to assess the complaint at this level of generality ... The only salient meaning "natural" seems to have for Locke in connection with rights ... is "nonconventional" or "logically nonpolitical." If this is what a natural right is, the defender of natural rights is not obviously committed to any more than the existence of objective (not essentially conventional) moral rules defining rights ... The standard (but not only) epistemological and metaphysical positions accompanying these views are admittedly realist in character [Simmons is referring here to moral realism, not, I think, to realism more broadly] ... But since moral realism and objectivism are clearly still live issues in moral philosophy, neither of these commitments for the natural rights theorist is obviously damning. (Simmons 1992, 104–5)

Without defending Taylor specifically, I would like to show how Simmons misses the point of the criticism. For the issue of the *subject* of rights, that is, how we philosophically understand the bearer of rights—metaphysically, ontologically, epistemologically, and anthropologically—rests on a set of Cartesian and post-Cartesian ideas that have been a common object of criticism from a number of philosophers (including Friedrich Nietzsche and Martin Heidegger, Michel Foucault and Jacques Derrida, but also Ludwig Wittgenstein and the American pragmatists). Taylor's criticism cannot be met, as Simmons goes about it, by claiming that "natural" means "prepolitical" in Locke. What is at issue in the criticism is how we philosophically conceive the subject, and this is a matter of philosophical importance for Heidegger, to take just one example. In Heidegger's criticism of Cartesian ontology in *Being and Time*, he argues that the picture of the human being's relation to its world that we find in modern philosophy is one of a subject standing against a world of objects to which it relates through forming mental representations of that world. Heidegger shows

that a phenomenology of everyday human existence reveals that the representational stance of a subject vis-à-vis objects is a derivative mode of human being, arising out of a more basic relation in which human beings are always already engaged with “objects” without the mediation of representational mental states. It is the Cartesian picture of the human subject that is being questioned by Taylor, not its “naturalness.” To be sure, addressing Taylor’s “complaint” would then require reading any number of prominent philosophers who dispute the truth of the Cartesian subject.⁶ But the point is that not only in the continental tradition but equally in the analytic tradition, the conception of the subject we find in Descartes has been challenged (of course, it is has also been defended).

This general issue becomes more specific and pertinent when Simmons defends his position against those who would argue that natural rights “must be derived from or somehow turn on facts about human nature” (Simmons 1992, 105). These critics, he notes, often argue that one cannot read off moral facts from natural facts, that there is no human nature to “read,” and that natural rights theories based on human nature are far too general to apply to the variety of real-world contexts they are supposed to help us navigate. To the first criticism—that one cannot read off moral facts from natural facts—Simmons responds that Locke, at any rate, does not do any such thing; rather, “his argument concerns not what is ‘natural’ for humankind in this simple sense, but rather what is rational. To the extent that his derivation of natural rights relies upon facts about human nature, it relies only upon relatively uncontroversial and extremely general claims (about, e.g., rationality, desire for self-preservation, moderate sociableness, etc.)” (Simmons 1992, 105).

The problem with this response is that our understanding of human rationality is one of the central issues in or consequences of criticisms of Cartesian anthropology and ontology. Nietzsche argues—along with Freud and a number of researchers in contemporary neuroscience, philosophers of science and mind, and the like—that consciousness is only a part (he thinks the smallest part) of our thinking:

Man, like every living being, thinks continually without knowing it; the thinking that rises to consciousness is only the smallest part of all this—the most superficial and worst part—for only this conscious thinking takes the form of words, which is to say signs of communication, and this fact uncovers the origin of consciousness

[which, for Nietzsche, is the need to communicate in order to receive help and protection from others] ... You will guess that it is not the opposition of subject and object that concerns me here: this distinction I leave to the epistemologists who have become entangled in the snares of grammar (the metaphysics of the people). (Nietzsche 1974, §354)

The issue is not just one for the philosophy of mind, for the centrality of consciousness and rationality to intentional action and thus to morality is part of Nietzsche's general criticism of morality, just as it plays a central role in Simmons's brief response to natural rights skeptics. The point is not that anyone should be satisfied with Nietzschean or any claims about human rationality simply because the claims are reasonable and defensible. Rather, the point is that both contemporary philosophy and contemporary neuroscience have made it difficult to make uncontroversial claims about rationality. Insofar as a moral theory is based on claims about rationality—and in natural rights theory, rationality plays a crucial, if not the most elemental role (save, in certain theories, God)—then one needs to address the controversy. That the capacity for rationality—perhaps along with some other capacities—plays that role in Simmons's argument is clear, for he explicitly acknowledges that where there is no rationality (or the other capacities necessary for the possession of natural rights), those individuals have no natural rights (Simmons 1992, 113).

The other communitarian criticism Simmons responds to is the Hegelian and post-Hegelian idea that individuals are necessarily situated within communities constituted by roles, norms, rules, and a history that "encumbers" any self such that it makes no sense to speak of a presocial natural individual bearing rights. I agree with one aspect of his response: at least for Locke, who understands the state of nature as a social place, there is no obvious contradiction between the claim that selves are (partly) products of social relations and roles and that they have the right, perhaps even the duty, to criticize (so as to genuinely accept) those roles (Simmons 1992, 111). The real meat of the criticism, as Simmons sees it, is that only within certain societies can the capacities necessary for having and employing rights come into being, and thus there can be no "self-sufficient moral agent" (Simmons 1992, 113). To this, he reiterates the claim that the state of nature can be social, and thus changes the import of the criticism: it is not that capacities for rights cannot develop in the state of nature, but that