De facto monopolies and the justification of the state

Ralf M. Bader

ABSTRACT: This paper explains how Nozick's notion of a de facto monopoly makes room for states that are justified in claiming a monopoly on coercion despite lacking authority and despite their citizens lacking political obligation. Along the way, it establishes that political obligation and political authority are fundamentally distinct mechanisms for underwriting content-independent duties, yet that neither can plausibly apply in the absence of consent.

1 The problem of coercion

> The fundamental question of political philosophy …is whether there should be any state at all (p. 4).[1]

States are coercive. They use force as well as the threat of force in order to make citizens commit or omit various actions. It is because of their coercive nature that anarchists consider states to be objectionable. They argue that only consent on the part of all those who are governed by a state can give rise to political obligation and/or confer the requisite normative powers on the state. The state cannot permissibly claim a monopoly on force within a certain territory unless all the individuals in that territory have consented. As a result, anarchists consider non-consensual states to be illegitimate. Such states cannot permissibly rule and are morally objectionable.

The crucial question for determining whether the state can be justified is whether it is permissible for the state to use force as well as the threat of force. On what grounds and under what conditions can the state be justified in using coercion? On the face of it, there is a strong presumption against coercion and in favour of liberty. "Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do" (p. ix). For the state to be justified, it is not allowed to engage

[1] Unless otherwise indicated, all references are to *Anarchy, State, and Utopia* (Nozick: 1974).

in rights violations. This means that a justified state can only use coercion on condition that doing so is permissible and does not violate any rights. The rights of individuals, however, put into doubt the permissibility of state coercion, or at least to significantly restrict the scope of permissible coercion, thereby limiting the range of activities that the state can permissibly engage in.

Nozick agrees with the anarchist that states lack authority and that citizens do not have political obligation when consent is absent. In order to address the anarchist's challenge and show that non-consensual states can be justified, Nozick attempts to show that it can be permissible for states to exercise a monopoly of force and coerce their citizens even in the absence of consent.[2] Rather than focusing on the obligations that individual citizens have, Nozick is concerned with the prerogatives that the state has and the actions that it can permissibly perform. In particular, he argues that non-consensual states can claim a monopoly on coercion without violating the rights of their citizens.[3] States can, accordingly, be justified despite lacking authority and despite citizens not having political obligation.

2 Enforcing duties

> The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state's fundamental coercive power has (p. 6).

Consensual states can have a wide scope of permissible coercion. As long as there are no limits on which rights can be voluntarily given up (cf. p. 58), the scope of coercion that is rendered permissible on the basis of the consent of the governed

[2] This chapter focuses on how justification works within the hypothetical scenario that Nozick sketches in part I of *Anarchy, State, and Utopia*, i.e. what makes a state justified in this idealised hypothetical situation. For an explanation of how this hypothetical account is relevant for justifying states in the actual world cf. Bader: 2017, where it is argued that historical principles justify the state within the idealised hypothetical scenario whereas counterfactual principles connect this to the non-ideal circumstances of the actual world.

[3] In addition, Nozick claims that justifying the state requires one to show that it is an improvement vis-à-vis the relevant non-state alternative, or that it at least does not constitute a deterioration (cf. pp. 4-5). How exactly to understand the baseline for comparison is somewhat unclear. Does it have to be an improvement relative to what would happen if the state were to suddenly disappear? Relative to what would have happened had the state never come into existence? Or relative to a non-state situation that could feasibly be brought about? How one is to understand the notion of an improvement is also unclear. Does it have to be a Pareto improvement? Or is it enough that it is an improvement on average? Moreover, there is unclarity as regards the metric of evaluation. Along which dimension does it have to be an improvement? Is the metric specified in terms of well-being, or in terms of the extent to which rights are respected? However one resolves these questions, it will be an empirical question whether a given state classifies as an improvement along the relevant metric vis-à-vis the relevant non-state alternative. This chapter instead focuses on the normative question concerning the permissibility of state coercion.

is, in principle, unlimited. The scope of legitimate coercion on the part of non-consensual states, however, seems to be rather limited. In particular, it appears to be restricted to cases where the rights of individuals are either removed or overridden.[4]

The non-consensual use of coercion can straightforwardly be justified when it comes to enforcing duties that are enforceable.[5] Coercion is justified if it is used appropriately (i.e. satisfying procedural constraints, proportionality requirements etc.) both prospectively in order to prevent rights violations as well as retrospectively in order to punish rights violations and rectify past wrongs. Using force as well as threatening the use of force in order to enforce moral prohibitions that are enforceable does not amount to a rights violation. This is because the relevant rights have been forfeited by the aggressor, thereby rendering the use of coercion permissible (cf. pp. 137-138). If rights are forfeited as a result of the rights-violating behaviour of individuals, coercion on the part of the state can be permissible.[6,7]

Whilst the state can be justified in using coercion to enforce moral prohibitions, on the basis that enforceable duties can permissibly be enforced, this justification of coercion does not straightforwardly carry over to enforcing compliance

[4]If one allows for rights to be overridden, i.e. if they are not absolute side constraints, then the state can permissibly infringe rights without violating them (to use Thomson's distinction). "We may (and, indeed, ought to) sometimes act in ways which infringe the rights of others, with no more justification than the great harm that would be done by allowing exercise of those rights. Governments will sometimes have such justifications for coercion (even where they lack the *right* to coerce), particularly where the well-being of many hangs in the balance or where unjust government threatens to replace just" (Simmons: 1987, p. 278). At least given a Nozickian view that treats rights as (quasi-absolute) side constraints, this can only be done in emergency situations to avoid moral catastrophes (cf. p. 30 footnote). If one considers rights to be more easily infringed, then this opens up room for the possibility of a Samaritan approach, whereby the state can permissibly infringe rights in order to protect people from serious harm as long as doing so is not unreasonably costly. "[T]he presumption in favor of each citizen's freedom from coercion is outweighed by the necessity of political coercion to rescue all of us from the perils of the state of nature" (Wellman: 1996, p. 219 fn. 13). On this approach coercion will still be restricted to a limited set of cases.

[5]Enforceability is understood in the sense that it is permissible to enforce these duties, not in the weaker sense that it is possible to enforce them. The restriction to enforceable moral prohibitions means that we are setting aside, amongst others, various imperfect duties, such as duties of beneficence, that cannot permissibly be enforced.

[6]In addition to removal by forfeiture, rights can be removed by someone who has the relevant authority to do so, i.e. by someone who has the Hohfeldian moral power to divest individuals of their rights (cf. footnote 10). However, as we will see shortly, the relevant kind of authority can only be established on the basis of consent and hence does not open up any additional room for permissible coercion on the part of non-consensual states.

[7]Coercion may also be justified when directed towards innocent threats as well as innocent shields of threats (cf. pp. 34-35). These difficult cases cannot be accounted for in terms of forfeiture. We can set these cases aside since they plausibly do not allow for the permissible use of coercion by third parties but only by the person being threatened.

with positive laws, in particular laws that, unlike laws against, say, murder, do not simply codify and promulgate natural duties. States standardly make positive laws that go beyond the narrow content of protecting natural rights and use coercion to enforce compliance. For coercion to be justified in those cases it would either have to be the case that citizens have political obligation or that the state has political authority.

3 Obligation and authority

There are two general mechanisms that give rise to a content-independent justification for using coercion to ensure compliance with positive laws: political obligation and political authority.[8] On the one hand, if citizens have an enforceable content-independent obligation to do what the law says precisely because it is the law, then one can use coercion to enforce compliance with positive laws.[9] If citizens have political obligation and owe a duty of compliance, then the state can be justified in using coercion to ensure compliance.[10] On the other hand, coercion can be justified if the state has the requisite moral powers to impose duties on its citizens. If the state has political authority and is able to impose enforceable duties, then coercion can be used permissibly to ensure compliance.

These two mechanisms differ in important ways. The former makes law-making into a form of duty-activation, whereas it amounts to duty-creation on the

[8] These two mechanisms are general and direct, i.e. the making of the law directly gives rise to an obligation. There can be specific indirect cases whereby law-making triggers an independent duty, e.g. by solving a coordination problem (cf. Brinkmann: 2016, chapter 1.4.3). Duties that are created in this indirect manner do not satisfy content-independence (although it is arbitrary that a coordination problem is solved in one way rather than another, the reason for complying with the law is not due to it being a law but due to it being a focal point that can solve the coordination problem) and may well not be sufficiently strong to warrant coercive enforcement.

[9] Whilst being content-independent, the obligation can nevertheless be conditional, e.g. do what the law says because it is the law on condition that it is not unjust. (Likewise for the case of political authority.)

[10] Perry: 2005 has pointed out that legal systems standardly do much more than attempt to impose obligations and that political obligation is not the relevant notion when it comes to characterising the normative relationship in which a citizen stands to laws that do not impose obligations but, say, attempt to create rights and permissions (these cases are instead to be characterised in terms of political authority on the part of the state and a liability to have one's normative situation changed on the part of the citizens). This point, however, can be set aside for our purposes. When the permissibility of coercion is at issue, we are concerned with the behaviour of the citizens. The question, in particular, is whether they are obligated to conform their behaviour in the way required by the law, so that the state can be justified in enforcing compliance. Political obligation will suffice just as well as political authority when it comes to justifying coercion on the part of the state. (Differences only arise if the state has the authority to directly take away the right not to be coerced in a particular way. Coercion could then be justified without having to proceed indirectly via creating a duty that can be coercively enforced.)

latter.[11] In the first case, citizens have a general duty to do what the law says which is then triggered by particular laws being enacted to give rise to specific duties. These specific duties are derivative. They are derived via factual detachment from a general standing obligation that is naturally understood in terms of a wide-scope requirement: OUGHT(law requires ϕ-ing $\rightarrow \phi$) together with the facts about the specific laws that have been enacted. In the second case, the state exercises a moral power and creates specific duties by enacting laws, i.e. one acquires a duty to ϕ because it is the law that one should ϕ.[12] Exercising a moral power creates non-derivative duties. This can be understood in terms of a narrow-scope requirement: law requires ϕ-ing $\rightarrow$ OUGHT(ϕ). In this case there is no prior standing duty from which the specific duties are derived. Instead, there is a standing liability. Put differently the contrast is between citizens being obligated to comply with a law that requires one to ϕ and a law creating an obligation to ϕ for its citizens.

Although one ends up with a duty to ϕ in each case, these duties are generated via different mechanisms. Whilst the political obligation and political authority models might seem to be practically equivalent and to generate the same sets of duties, they differ in important respects. Differences emerge, in particular, once one focuses not only on what actions people are required to perform and what the state may enforce, but also takes into consideration to whom the duties are owed and who is being wronged in case of non-compliance. Similarly, differences emerge once one operates not with a fixed set of citizens but also considers situations in which the set of citizens varies across time.

First, these mechanisms can differ in terms of the person or group to whom the resulting duty is owed. In the case of political obligation, the obligation to ϕ is owed by the citizens to whomever this general obligation is owed, i.e. the detached duty is owed to the same entity to whom the wide-scope conditional obligation is owed. This is standardly the state, but can also be some other agent or group of agents, such as the other members of society, as happens for instance in the case of a social contract.[13] If x (the state) is owed political obligation by y (the citizen), then compliance with any law that x makes will be owed by y to x, even when the law concerns how y ought to treat z. If one has a standing obligation

[11] This terminology is due to van der Vossen: 2015.

[12] This is a narrow account of Hohfeldian powers that is restricted to duty-creation and does not encompass duty-activation. It is a normative view of the moral power that amounts to something more than the mere ability to change the normative landscape. (It is only by working with a normative rather than merely descriptive construal that one can explain why a moral power is a (second-order) right, i.e. one of the specific Hohfeldian incidents of the general notion of a right.) This robust understanding of normative powers goes together with a normative construal of immunities that makes room for immunity-violations, cf. "Liberty, threats, and ineligibility" (Bader: manuscript).

[13] That political obligation is a case of triggering duties is particularly clear when the duty is owed not to the state but to someone else, e.g. the citizens promise each other to obey the commands of the state. In that case, the state clearly does not have a moral power but can merely trigger a pre-existing obligation.

that is owed to the state, then the derived obligation to treat z in a certain way will not be owed to z (despite it being an obligation that concerns z) but will be owed to the state. Although the existence of the law might well give rise to reasonable expectations on the part of z, such that y ends up having (additional) reasons to comply with the law and treat z in a certain way that derive from z's interests, the enforceable obligation that derives from y's political obligation will not be owed by y to z but to x.[14]

In the case of political authority, by contrast, the law creates a duty that can be owed to particular individuals who are identified by the law. If x (the state) has a moral power to change the normative situation of y (the citizen), then it can create a duty for y that y owes to z. This is particularly clear when the state exercises its moral power to create rights and corresponding obligations. The resulting duties will be owed to the particular rights holders, not to the agent exercising the moral power, nor to the community of persons in whose name that agent is acting.[15] The duty created by someone having authority need not be owed to that agent. If x exercises its authority and creates a (directed) duty for y to treat z in a certain way, then the one who is wronged in case y fails to act accordingly is the person z to whom the duty is owed, not the entity x that exercised authority and created the duty. Although violating a duty that has been created by someone who has the authority to do so conveys disrespect for that authority, i.e. one acts as if no duty had been created, as if the person did not have authority, this phenomenon of disrespect differs from wronging the one to whom the duty is owed.

To whom the duty is owed matters for the question who is being wronged. This, in turn, has various practical consequences such as to whom compensation is owed, to whom one needs to apologise, and which relationships are being impaired. It might be argued that the effects of the two mechanisms can be aligned as long as the state suitably specifies to whom compensation is owed. This, however, requires additional legislation, which means that the two mechanisms are not equivalent in the sense of giving rise to the same duties in the same circumstances. Moreover, whilst this might work when it comes to compensation, it does not work across the board. Problems arise, in particular, when one is concerned with the impairment of relationships. If y owes a duty to the state to the effect that y treat z in a certain way, then the state can make it the case that y needs to compensate z in case of non-compliance and maybe apologise to z, but the state cannot make it the case that y's relationship with z is impaired by non-compliance and hence cannot make it the case that the apology is an appropriate response to the wronging, since the relationship that is impaired is that in which y stands to whom the duty is owed.

[14] This is analogous to the way in which a promise made by y to x to look after z is owed to x. The beneficiary z can come apart from the entity x to whom the duty is owed.

[15] Perry has suggested that the obligation is owed to the community in whose name the state is acting (Perry: 2005, p. 282 fn. 36). This, however, is not correct and does not follow from how moral powers work in general.

Second, these mechanisms differ in terms of the conditions under which a duty arises for a particular individual.[16] As long as someone has a political obligation to obey the laws of a particular state, this person has a duty to comply with all the laws of that state. If x has political obligation at t, then x is under a duty to ϕ at t if there is a law in existence at t that requires ϕ-ing. In the case of political authority, by contrast, the duty comes into existence at the time of the enactment of the law for all those who at that time have the corresponding liability. If the state exercises its authority at t and creates a law requiring citizens to ϕ, then x is under a duty to ϕ only if x is a citizen and hence is under the authority of the state at the time at which the law is enacted.

This has important implications for those becoming citizens subsequent to the enactment of the law, such as later generations. The case of subsequent generations poses no difficulties for political obligation approaches.[17] By acquiring a political obligation to obey the laws of a particular state, e.g. by consenting to a state, one is bound to comply with the laws of that state, independently of when they have been enacted. Normative powers views, on the contrary, run into difficulties. The enactment of a law gives rise to a duty for those who are subject to the authority at the time of enactment.[18] If a law is enacted at time t, yet x only comes into existence at a later time t′ or only becomes a citizen at t′ with the liability to have one's normative situation changed by the law-making authority, then x will not be bound by that law. The initial exercise of the power only created obligations for those who had the liability at that time. Since x was not amongst them, the obligation needs to be created for x afresh. Put differently, becoming a citizen, on the political authority approach, is a matter not of acquiring duties but of acquiring a liability. In order for duties to result from this liability, the authority needs to be exercised afresh, i.e. past exercises do not carry over to those who have only subsequently acquired the liability.[19]

Political obligation and political authority are not two sides of the same coin. They are different mechanisms that generate different duties and operate in different ways. These mechanisms are completely independent of each other. Contra Perry, it is not the case that we have an entailment in one direction but not the other direction, namely from political authority to there being a duty to obey but not vice versa. Instead, we have a forward-entailment problem in addition

[16] Relatedly, they will also differ in terms of the persistence conditions of the duties that are triggered/created.

[17] For an account of political obligation across generations, cf. Leshem: 2018, chapter 3.

[18] Cf. "both the power to impose the obligation, and, necessarily, the correlative liability to be subject to the obligation, must exist at the time that the directive is enacted" (Perry: 2013, p. 34).

[19] Whilst one can generate the same sets of duties by means of additional exercises of authority, the fact that additional actions are required to generate these duties implies that the two mechanisms are not equivalent in the sense that they generate the same duties in the same empirical circumstances but at most in the sense that any duty that can be created by one mechanism can also be created by the other.

to the reverse-entailment problem identified by Perry. This is particularly clear when considering cases where the state has authority but never exercises it, in which case the citizens do not acquire any obligations.[20] In order for political authority to give rise to duties, the moral power must in fact be exercised. When it is exercised, then its exercise gives rise to various specific duties, but not to a (general) duty to obey the law. Put differently, whenever there is a law requiring citizens to ϕ, there will be a corresponding duty to ϕ. There will not, however, be a general duty to obey the law. By contrast, a political obligation can be owed without there being any laws and without any duties having been activated.

Given a broad construal of the duty to obey the law (that encompasses specific duties that can be created by law-making alongside the occurrent general duty to obey the law which can be triggered by law-making) as well as of political authority (that encompasses both duty-creation and duty-activation), there will be entailment in both directions – after all, the specific duties that they yield (whether activated or created) will be the same when they are considered purely in terms of which actions citizens have to commit or omit (i.e. when abstracting from the question to whom they are owed). Given a narrow construal of each, by contrast, there will not be any entailment in either direction. As a result, the notion of political authority is not privileged over that of political obligation. These are simply two different mechanisms that operate in different ways, give rise to different duties and can perform different justificatory work.

Whilst both mechanisms succeed in justifying the use of coercion to ensure compliance with positive laws, neither would seem to be applicable in the absence of consent. Political obligation, where this is understood as an enforceable content-independent duty to obey the laws of a particular state, can only be founded on consent. Other proposed mechanisms for explaining political obligation, such as duties of gratitude or fair play, fail to underwrite duties that satisfy the 1. enforceability, 2. content-independence as well as 3. particularity requirements (cf. Simmons: 1979). Although they can give rise to various pro tanto reasons, they do not succeed in generating enforceable content-independent obligations. Similarly, given the moral equality and independence of individuals, there is no natural moral inequality between states and their citizens (of the kind that is, say, suggested by the idea of a divine right of kings). As a result, moral powers have to be acquired. In order to acquire the relevant moral powers the state would have to be authorised by its citizens, i.e. the latter would have to consensually confer the relevant moral powers on the state.[21]

Since only consent can give rise to political obligation or confer the relevant moral powers on the state, this implies that justified non-consensual states are restricted to enforcing natural moral prohibitions and are not allowed to coercively enforce positive laws that go beyond this. Laws can only be enforced to

[20] Perry: 2013, p. 34 recognises that a moral power can exist without ever having been exercised.

[21] A further potential mechanism for acquiring authority proceeds via rights forfeiture.

the extent that they merely codify and promulgate enforceable natural duties. This means that in order for non-consensual states to be justified they have to be minimal states, in the sense that they are restricted to enforcing natural duties. Otherwise, if a state creates laws and coerces people into doing things that they are not independently obligated to do, then this non-minimal state will be acting impermissibly and will not be justified. It will be coercively enforcing laws that it has created without having the right to do so. By making citizens comply with these laws as well as by punishing them for non-compliance, it will be violating the rights of its citizens.[22]

4 The monopoly on coercion

> The state grants that under some circumstances it is legitimate to punish persons who violate the rights of others, for it itself does so. How then does it arrogate to itself the right to forbid private exaction of justice by other nonaggressive individuals whose rights have been violated? (p. 51)

Non-consensual states lack authority and their citizens do not have political obligation. Such states nevertheless have some fundamental coercive power.[23] The justification of coercion on the part of such a state is based on the right to enforce moral prohibitions. It is permissible for the state to (appropriately) use force as well as the threat of force to prevent and punish rights-violations. However, this is likewise permissible for everyone else. Everyone has the right to use force prospectively to prevent rights violations as well as retrospectively to punish those who have committed rights violations. In short, everyone is at liberty to enforce enforceable moral prohibitions.[24]

The state, however, claims a monopoly on coercion in a given territory.[25]

[22] This does not mean that all unjustified states are equally bad (cf. Simmons: 1999, p. 770). Although all unjustified states act impermissibly, they do so to varying degrees. Moreover, they can differ along a number of other dimensions, e.g. the extent to which they promote the welfare of their citizens.

[23] Fundamental coercive power is power that does not rest on the consent of the person to whom it is applied (cf. p. 6). Coercive power that is conferred upon the state by those consenting to it is derivative and is only had contingently. Nozick is interested in the coercive power that states do not just happen to have as a contingent matter of fact but that they have fundamentally, i.e. in the conditions under which x (the state) can use force vis-à-vis y (a citizen) in the absence of y's consent. (This is part of the reason why Nozick ignores consent theory. Cf. "It is curious that Nozick gives no explicit attention to a Lockean contract as an alternative, more direct, route from the state of nature to a minimal state" (Miller: 2002, p. 16).)

[24] The situation is different when it comes to the right to exact compensation which only resides with the victim (and which can be waived by the victim), cf. p. 135.

[25] "A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly" (p. 23).

In fact, this is one of the defining features of what it is to be a state (given a Weberian framework).[26] To justify the (minimal) state one, accordingly, not only has to establish that it is permissible for the state to use coercion to enforce moral prohibitions, but also that it is permissible for the state to claim a monopoly on coercion. In short, it has to be permissible to use coercion to stop others from enforcing rights within a given territory.[27]

This means that even an ultra-minimal state would seem to go beyond enforcing moral prohibitions by claiming a monopoly on coercion and thereby prohibiting and preventing private enforcement, despite the fact that there would seem to be no duty to refrain from engaging in private enforcement. As a result, it will violate the enforcement rights of those who have not consented. "If the private exacter of justice violates no one's rights, then punishing him for his actions (actions state officials also perform) violates his rights and hence violates moral side constraints" (p. 52). This suggests that prohibiting private enforcement and claiming a monopoly on coercion amounts to a rights violation. This, in turn, implies that the coercion on the part of the state in this regard at least will not be permissible. Yet, since the use of coercion needs to be permissible if the state is to be justified, this implies that there cannot be any justified non-consensual states.

Justifying the state's claim to a monopoly on coercion is rather difficult, given that enforcement rights are universal. The state of nature is a situation of moral equality, with no one being subordinated to anyone else. There is no asymmetry as regards fundamental coercive power. Instead, individuals are symmetrically situated with respect to each other. Everyone can use coercion to enforce moral prohibitions. In a civil condition, by contrast, only the state is meant to be justified in doing so. In order for its monopoly to be justified, the state needs to occupy a privileged position.

The state uses force and claims to be justified in doing things that individuals cannot permissibly do. Why is it permissible for the state to prohibit individuals from ϕ-ing (namely enforcing right) when it is fine for the state to ϕ? Explaining this asymmetry is difficult because a protective association derives its rights from its members. As Nozick notes, no new rights emerge at the group level. The rights of a protective association, and likewise for a state, have to be reducible: "the legitimate powers of a protective association are merely the *sum* of the individual rights that its members or clients transfer to the association. No new rights

[26] The monopoly on coercion is the crucial difference between a (dominant) protection agency and a state, more precisely, an ultraminimal state. This chapter only focuses on the monopoly aspect, i.e. on the ultraminimal state, and will set aside the step that results in a minimal state which involves protecting everyone's rights and consequently might be thought to involve an impermissible redistributive element.

[27] This has two aspects: on the one hand, the state has to prohibit individuals within its territory from engaging in private enforcement, and, on the other, it has to prohibit other states, protective agencies, as well as individuals that are outside its territory from engaging in enforcement activities within its territory.

and powers arise; each right of the association is decomposable without residue into those individual rights held by distinct individuals acting alone in a state of nature" (p. 89).

Accordingly, it would seem that one can establish the requisite moral asymmetry only by means of consent. Either individuals voluntarily transfer their enforcement rights to the state and thereby make it impermissible for them to engage in private enforcement, insofar as giving up these rights implies that they are no longer at liberty to engage in private enforcement. Or a state that can impose duties (either by exercising political authority or by triggering political obligation) can prohibit private enforcement and make it impermissible for citizens to make use of coercion. Yet, in the absence of consent no such moral asymmetry arises and it is consequently difficult to explain how the state can be permitted to do things that the citizens are not permitted to do.[28]

5 The de facto monopoly

The non-consensual state is not normatively privileged. It does not have some special right that others lack. This means that it does not have a de jure monopoly. Only those who have voluntarily transferred some of their rights to the state and over whom the state has some form of authority stand in an asymmetric normative relation to the state. Those who have not consented, by contrast, are the moral equals of the state. The difficulty is thus to reconcile the asymmetry implicated in a monopoly with a commitment to moral equality, without relying on consent.

Nozick's solution to this problem appeals to the notion of a de facto monopoly. Instead of having a de jure monopoly, the state merely has a de facto monopoly. The state is not normatively but only empirically privileged. Since there is no de jure asymmetry, there is no conflict with moral equality. Yet, the way in which it is empirically privileged is nevertheless normatively significant. The asymmetry that is involved in a de facto monopoly does not concern the possession of rights but the exercise of rights. Although it has the very same rights as everyone else, there is a right that is such that the state is the only one who can exercise this right. In short, the state is, due to its dominant position, the unique agent that is capable of exercising a right that everyone has.

Nozick points out that the enforcement of rights might well involve procedures that risk being unfair and unreliable and thereby impose risks on others. He provides two arguments as to why such risk imposition can be permissibly prohibited. On the one hand, one can appeal to procedural rights and argue that

[28] The issue of explaining the moral asymmetry that is involved in the monopoly on coercion arises likewise when operating with a less robust conception of individual rights that makes it easier for rights to be infringed without being violated. If rights can be overridden more easily, one makes it easier for the state to do various things. Yet one also makes it easier for private individuals as well as other protection agencies and states to do those very same things.

those who make use of risky enforcement procedures can be prohibited from engaging in enforcement since they would otherwise violate procedural rights. On the other hand, Nozick puts forward an epistemic principle of border crossing that implies that it is impermissible for x to punish y, even when y is guilty and doing so does not violate y's right, on the grounds that x has not suitably ascertained whether or not y is guilty, i.e. x is not in the requisite epistemic position to permissibly punish y (cf. pp. 106-107).[29]

Whilst everyone has the right to prohibit enforcement that is based on procedures that they deem to be unfair or unreliable, the dominant protective agency is in a privileged position. It is not privileged because its procedures are somehow guaranteed to be fair and reliable. Nozick does not assume the dominant agency to be epistemically privileged or to have special insight into which procedures are fair and reliable. Instead, it is privileged by virtue of its strength.[30] Its strength puts it into a privileged position because "the right includes the right to stop others from wrongfully exercising the right, and only the dominant power will be able to exercise the right against all others" (p. 109). The dominant agency can, accordingly, permissibly prohibit anyone else, in particular all independents (i.e. individuals that have not consented) from engaging in private enforcement when using procedures that it deems to be unfair or unreliable. What the dominant agency deems to be fair and reliable then becomes the standard that ends up being enforced. Due to its strength it can permissibly settle what counts as a fair and reliable procedure.[31] Anything that deviates therefrom and is deemed unfair

[29] When operating with this epistemic principle, force can permissibly be used not only to enforce rights but also to enforce moral prohibitions that are not rights violations.

[30] The fact that it is merely the strength of the agency that accounts for its privileged position suggests that transactional components are inessential for a state to be justified. Although the account of the hypothetical emergence of the state that Nozick puts forward is a historical account that is partly though not fully transactional, insofar as clients but not independents voluntarily become members of the dominant protective association, this is not essential. If strength is all that matters for underwriting a de facto monopoly, then a protective agency that would arise ex nihilo could permissibly prohibit private enforcement despite not having any (or at any rate not many) clients simply on the basis of being the most powerful protective agency.

In chapter 6 Nozick tentatively puts forward the suggestion that the right to punish might be possessed jointly rather than individually. "*To the extent* that it is plausible that all who have some claim to a right to punish have to act jointly, then the dominant agency will be viewed as having the greatest entitlement to exact punishment, since almost all authorize it to act in their place. …Having more entitlements to act, it is more entitled to act" (pp. 139-140). Unlike the permissibility of prohibiting private enforcement, this greater entitlement is not based on the strength of the association but on the number of clients that it has and hence can only result from a large number of individuals voluntarily becoming clients of that agency.

[31] This is not a crude form of 'might makes right'. First, the dominant agency does not make it the case that something classifies as fair. It does not constitute the fairness facts. Instead, it settles how the notion of fairness will be interpreted in its territory and which standard of fairness and reliability prevails. Second, not any interpretation is admissible. It is not the case that anything goes. One can only permissibly prohibit the use of procedures that it is reasonable to deem to be unfair or unreliable.

or unreliable will be prohibited. "The dominant protective agency will act freely on its own understanding of the situation, whereas no one else will be able to do so with impunity" (p. 108). As a result, it has a de facto monopoly and hence classifies as an ultraminimal state.

The notion of a de facto monopoly in this way allows for an asymmetry at the level of the exercise of a right. It thereby justifies the state's claiming a monopoly on coercion in a way that is perfectly compatible with a commitment to moral equality.[32] In particular, it does not require any de jure monopoly that could only be established on the basis of unanimous consent on the part of all those governed by the state.[33]

6 Conclusion

There is room for justified non-consensual states. This space, however, is very narrow and can only be filled by a state that has a de facto but not a de jure monopoly. This is the only way in which a state can permissibly claim a monopoly of force without the consent of the governed.[34] Such a state is only justified in enforcing natural rights and prohibiting those who use risky procedures from engaging in private enforcement.[35] As a result, a justified non-consensual state has to take the form of a Nozickian minimal state. Non-minimal states, by contrast, can only be justified if their citizens authorise them to perform the additional activities that go beyond those of enforcing moral prohibitions.[36]

[32] There are a number of ways in which the ultraminimal state falls short of the Weberian conception of a monopoly on coercion. First, it does not adjudicate conflicts between non-clients but only prohibits non-clients from private enforcement vis-à-vis the agency's clients (cf. p. 109). Second, it does not prohibit independents that are known to use fair and reliable procedures. Third, the Weberian account considers the state to be the sole authoriser of force, yet the dominant protective agency does not claim a de jure monopoly but only a de facto monopoly: it prevents and threatens to punish individuals for using unauthorised force but it does not claim to have a special right to do so. For these reasons Nozick calls it a 'statelike entity' (cf. pp. 117-118). The argument nevertheless does establish the permissibility of non-consensual ruling and succeeds in introducing a normative asymmetry that does not rely on consent.

[33] This kind of de facto monopoly can also be found in Kant's justification of the state, where the state is uniquely empirically positioned to enforce juridical laws (cf. "Kant and the problem of assurance" Bader: manuscript).

[34] Another way to put the point is that the space for states that are justified but lack legitimacy (in the sense in which Simmons: 1999 uses these terms) is very limited and can only be occupied by Nozickian minimal states that have a de facto monopoly.

[35] It is possibly also justified in infringing without violating rights in order to address emergency situations if rights are not absolute but can be overriden.

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