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**The Limits of the (Left)-Libertarian  
Legitimation of Property**

Bachelor's Thesis

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## **Declaration**

1. I hereby declare that I have compiled this thesis using the listed literature and resources only.
2. I hereby declare that my thesis has not been used to gain any other academic title.
3. I fully agree to my work being used for study and scientific purposes.

In Prague on  
31 July 2024

Lukas Baderschneider

## **Abstract**

The objective of this thesis is to develop a comprehensive critique of the claimed legitimacy of a (left)-libertarian institutional order. However, the question of legitimacy far exceeds the realm of political philosophy. In a legitimate societal order, no *one* could be better off in any other naturally feasible social order.

Chapter I therefore develops an ontology of normativity, a conceptual analysis of subjective normative obligations, rationality, well-being and moral obligations as legitimacy conceptually hinges on them. This is followed by an examination of which moral obligations can be derived. First on the subject level, answering the question „what must I do?“. After that on the social level, which leads to the question of legitimacy. On the subject level autonomy constitutes a moral, hence formal and general obligation. Autonomy, the ability to reflexively determine one's will can also entail conflict, even rationally so. Legitimation theory with substantial results claims to be able to rationally sublimate these conflicts via shared norms enforced by a common power. In chapter II the claimed legitimacy of a libertarian institutional order is scrutinized. The social contract gets introduced and defended as a tool to determine legitimate social norms and orders. Three social contract theories, Hobbes's „Leviathan“, Nozick's „Anarchy, State, and Utopia“ and Buchanan's „The Limits of Liberty“ are criticized in detail, as each develops a unique argument for the legitimacy of the (possibly) libertarian institutional order. However, all theories run into serious antinomies and finally only two doubtful empirical hypotheses, the Lockean proviso and the Hobbesian hypothesis, can be salvaged. The onus clearly lies with the libertarians, rather than the other way around. In Chapter III, after further criticism of the Hobbesian hypothesis, and concluding contemplation of the refuted libertarian legitimation project, the left-libertarian legitimation project is further examined. However, this theory too runs into serious antinomies rendering it unable to redeem the claim of legitimacy, hence the claim of having to be endorsed by all rational individuals. Overall, the whole concept of legitimacy simply might be flawed, as it seems to be a claim that can never be (conclusively) redeemed.

## **Keywords**

Legitimacy, libertarianism, left-libertarianism, social contract, autonomy, rights, obligations, philosophical anarchism

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## **Introduction & Methodology**

With this thesis being a philosophical thesis, more specifically a thesis within normative philosophy, a multitude of philosophical tools are employed in a wide-ranging quest for knowledge.

The objective of this thesis is to develop a comprehensive critique of the claimed legitimacy of a (left)-libertarian institutional order. While this thesis strives to be a critique, and not merely a criticism of (left)-libertarian legitimation theory, it should come as no surprise that critical remarks for the sake of intellectual progress outweigh laudation, even though the intensive discussion itself should pay tribute to the great appreciation of the philosophical tradition. The question of legitimacy is the decisive question within political philosophy (Wolff, 1970, p. 3).

However, the question of legitimacy far exceeds the realm of political philosophy. Some even consider it to be the condition of the possibility of political philosophy. It is essentially a moral question, thereby falling into the domain of moral philosophy. Chapter 1 of this thesis is therefore preoccupied with an ontological examination of normativity. Ontology is the method of choice, as this enhances the productivity of the conceptual analysis of generally well-known concepts, such as normative obligations, moral obligations and rationality with the most common shortcoming being the persisting lack of an ontological basis of the developed concepts. When the ontology of normativity cannot be rendered comprehensible, moral philosophy risks building on sand. To prevent this, named concepts are reconstructed within a framework that renders their ontological basis intelligible (Stemmer, 2008). Normative obligations hence exist, iff an action is both a necessary and sufficient condition for realizing what a subject wants. Performing normative obligations is what defines rationality, just as much as every normative obligation creates a reason to perform that action. The claim that nothing but fulfilling ones will constitutes happiness is defended within this chapter. Morality denotes a code of conduct that all rational individuals desire (Gert, Gert, 2020). Ontologically and substantially justifiable concepts of morality can hence never be contradictory to subjective normative obligations. Morality must be rational per definition. This is followed by an examination of which moral obligations can be derived. First on the subject level, answering the question what must I do? After that on the social level, which leads to the question of legitimacy. On the subject level, it can be



derived that to be happy, one must for formal reasons be autonomous, meaning one must possess an internally consistent will structure. Yet, as autonomy does not require any specific content, this does not help in determining the substance of this moral obligation any further (Hegel, 2014, p. 88). What constitutes the “good” life is a choice to be made, and this choice can vary conceptually and does indeed vary empirically. While everyone must want to be autonomous, it might be the case that reciprocal autonomy is not possible on a societal level, that the social ensemble of normative obligations might be disharmonious ex-ante i.e. before considering the possibility of rational pacification through power. Autonomy is hence a moral obligation whose fulfillment hinges on social conditions. If the given conditions do not fit the required ones, one is not rationally obliged to drop that will, as contrary to logic and the laws of nature, social facts depend on human action and can be influenced by power. Power can be effective. It can rationally constitute normative obligations in two ways: First, by linking certain actions of some other agent to sanctions. Sanctions are states of affairs that the person on whom power is projected does not want to occur. Secondly, through subjection i.e. socialization. Since power is successfully exercised upon another person, if that person acts as intended, it can be effective both by imposing sanctions on an empirical will but also, of course, by influencing the formation of that will itself. The seeming impossibility of reciprocal autonomy leads to conflict. Legitimation theory with substantial results claims to be able to rationally sublimate these conflicts via shared norms enforced by a common power.

This claim, and specifically the claimed legitimacy of a libertarian institutional order, gets examined in Chapter II with due considerations of the previously developed and defended concepts.

Making use of the history of political thought of the late Middle Ages and early modernity, the question of legitimacy gets grounded philosophically and historically. The social contract emerged as the dominant philosophical method to derive criteria of legitimacy. The logic of the social contract is laid out, criticized and refined in some meta-reflections on the social contract. The “*Volenti non fit iniuria*” – no wrong can be done to a rationally consenting party – is identified as the basic principle of the social contract tradition (Krüger, Mommsen, 1954, Dig. 47.10.1.5). A general contract, and this is what the social contract idea at last consists of, must therefore be to the benefit of all parties involved to render the agreement intelligible, hence mutually beneficial with the pre-political, pre-moral state of nature as the baseline (Kavka, 1986, pp. 409–415, Habermas, 1987, p. 6). The social contract therefore

fits the beforehand developed ontological examination of normativity, thereby bridging the gap between moral philosophy and political philosophy convincingly. If the effective legal norms and the contemporary institutional order can be conceived as having originated from a contract of fully rational beings can they be deemed legitimate (Radbruch, 1973, 240f.). A legitimate social order can only be one that maximizes everyone's individual utility vis-à-vis feasible alternatives.

In the second half of the 20<sup>th</sup> century a renaissance of the social contract tradition took place. The two works that are of particular interest for this thesis are Nozick's „Anarchy, State and Utopia“ (1974) and Buchanan's „The Limits of Liberty“ (1975) and with that two contributions to the social contract that legitimate a libertarian institutional order, which denotes a social order with strong private property rights and a minimal state.

In analysing Nozick's work it becomes clear, that there are two streams of arguments, that have shaped the rise of Neoliberalism, with only one of them being genuinely libertarian. The libertarian stream tries to work out an ultimate, a moral justification of the libertarian institutional order, thereby claiming it to be an order that all rational individuals must desire. Nozick's argumentation, first and foremost the claim of legitimate private appropriation and with that creation of property rights is laid out and criticized in the subsequent pages.

Criticism always requires a standard, convincing criticism requires a convincing standard. For this reason immanent critique is applied, that assesses social or theoretical constructs only in terms of norms that are endorsed and recognized within the construct itself (Honneth, 2007, p. 61).

For this, reference to Locke and his arguments is required, as Nozick situates himself within this philosophical tradition. In there property itself is revealed as an fundamental philosophical problem solving tool, which legitimate rise hinges on the fulfillment of the Lockean proviso, that requires legitimately appropriated property rights to bring about a Pareto improvement (Steiner, 1987, p. 55). Whether Nozick's proposed libertarian social order, whether comprehensive, strong private property rights fit this criterion is highly questionable, which Nozick does not seriously consider, due to his unjustified restriction of comparative baselines. He only considers primitive common ownership, and not for instance joint-ownership, or simply a somehow redistributive economic model, even though any legitimacy claim immanently requires considering all possibilities (Cohen, 1995, 79ff.). Nozick effectively claims, that the poorest in a capitalist order would not benefit from wealth distribution without providing any evidence for this, even though the onus clearly lies with

him, a libertarian proponent of highly unequal, legitimate wealth distribution, rather than the other way around.

While Nozick is a proponent of natural rights, they at last do not play a decisive role in his argumentation. In the reading of the left-libertarian tradition, the natural right of self-ownership had nevertheless been identified as the decisive libertarian doctrine (Cohen, 1995, 67ff.). The left-libertarian tradition is then striving to effectively synthesize both the virtues of an ideology centered around freedom and the known legal concept of property and the avices identified foundational underdeterminations in the appealing libertarian premise of self-ownership to work out a theory of justice, a standard of legitimacy (Vallentyne, Steiner, 2000, Steiner, Vallentyne, 2000). They maintain that as no one has a privileged entitlement to the world's natural resources, private property rights can only legitimately arise if it is to the detriment of no one, which they argue requires far greater redistributive action than their right-libertarian "counter-parts" grant (Kymlicka, 2005, p. 516).

The immanent critique of Nozick is then followed by external critique. External critique does not assess social or theoretical constructs on terms that are endorsed within the construct itself, but on external terms which necessitates justifying these terms in order not to lose ground here. The applied standard is based on normative concepts justified in Chapter 1. External critique relies on standards that are claimed to apply universally (Stahl, 2021, p. 14).

External critique is necessary due to Nozick's failure to really get a hold of the indeed crucial question of legitimacy, namely what is the right baseline against which no *one* cannot rationally expect to do any better? (Nozick, 1974, p. 177). He, and many others, posit controversial "moral laws" within the pre-moral state of nature, thereby rendering the social contract tradition wholly uninformative and unable to link morality with rationality as laid out in Chapter I. To succeed in that, the baseline, the state of nature cannot be morally prefigured, but must be taken as is, which is precisely what Hobbes, and following him Buchanan are doing. In a legitimate societal order, no *one* could be better off in any other naturally feasible social order (Gauthier, 1969, p. 164). However, rationality and with that legitimacy are necessarily subject dependent concepts. Not all societal orders are feasible, first and foremost Utopia, and this will be laid out in depth, a state in which a practically feasible social will structure exists ex-ante seems not attainable. For as long as conflicts about the preservation of autonomy persist, hostility between equally desiring and equally hopeful subjects must arise (Hobbes, 1949a, p. 63). Everyone who wants anything must want

to be a person with sufficient power to effectively impose their rights, their will and with that obligations upon others i.e. transforming the socially necessary actions for the satisfaction of one's will into subjectively must actions ex-post (Hobbes, 1949a, p. 66). However, as individuals are by nature too equal it is not even ex-post possible for anyone to establish complementary obligations to one's right claims upon others rendering one's naturally unlimited rights (one's autonomy) "in effect no better than if no man had right to any thing. For there is little use and benefit of the right a man hath, when another as strong, or stronger than himself, hath right to the same" (Hobbes, 1928, I, XIV, 10). The only possibility to overcome this deadlock, and indeed create effective, and not merely imagined rights is that taking on obligations constitutes a normative obligation (Hobbes, 1949a, p. 114). Hence a scenario in which all stakeholders reciprocally oblige and thus restrict themselves is preferred by all to the scenario in which nobody is under any restrictions, hence presupposing converging interests (Buchanan, 1975, 110f., Stemmer, 2000, 81f.). However, it is only rational to refrain from certain actions, thereby granting other's rights, if all others whose respective actions may affect one are sufficiently consistently doing the same. To increase the practical reliability of constraint by others, to solve the cooperation problem violations must be linked to sanctions, for these reasons, Hobbes argues, natural persons seek shelter in the state. To successfully create a sovereign (state order) it is necessary that all equally refrain from their practical pursuit of power in order to create a mortal god, the Leviathan (Hobbes, 1949a, p. 89). Relinquishing their rights and their power is not contradictory to the claim that the pursuit of power is an intersubjective normative obligation anywhere but in Utopia, as in the state of nature these rights had never been effective. The Hobbesian hypothesis claims that everyone under a sovereign government is better off than they could reasonably expect to be outside of that authority, where life due to the unchecked perpetual hostility is necessarily "solitary, poore, nasty, brutish and short" (Widerquist, McCall, 2017, p. 30, Hobbes, 1949a, p. 65). The state is hence on formal grounds legitimated. The necessity of examining Hobbes in critiquing libertarian legitimation theory may not be immediately clear. Yet, if Hobbes' arguments cannot be refuted, one would have to accept his conclusion of a morally distinguished affirmation of positive law, making any positivized libertarian institutional order legitimate.

While sub-optimal cost-benefit calculations of the Leviathan in his rule are indeed insufficient to lift state legitimacy, sub-optimal calculations, in the sense of worse than the state of nature, obviously are, or as Locke (1963, p. 392) twists the knife: "this is to think

that Men are so foolish that they take care to avoid what Mischiefs may be done them by Pole-Cats, or Foxes, but are content, nay think it Safety, to be devoured by Lions". It hence ultimately remains an empirical question whether the state is legitimate, the state can hence not be formally, a priori be legitimated. This claim gets criticized further in the final Chapter III. Before that, James M. Buchanan's "solution" of the legitimacy question is examined. While Buchanan stands in the tradition of Hobbes and adopts nearly entirely Hobbes methodology and state of nature conception the Leviathan itself, Hobbes' conclusion is Buchanan's biggest political enemy. He instead attempts to legitimate an effectively libertarian institutional order, thereby strictly constraining legitimate state power (Buchanan, 1975, 13ff., 161ff.). There are, as has been worked out, a multitude of reasons for the rational rise of hostility in the state of nature. Curiously, Buchanan narrows the conflict lines strictly to the material level, the only question and problem in the state-of-nature then becomes the question of ownership, the question of the attainable bundle of consumption goods (Buchanan, 1975, 80f.). A legitimate common power must offer mutual benefits, this condition is upheld by Nozick, Hobbes and Buchanan.

A person can appropriate only as much as they can conquer and defend in the fierce competition for scarce goods that are essential for survival. Depending on the relative skill of a person, the resulting property distribution may vary, but a specific natural distribution will be reached, precisely when the marginal costs of conquest and defense are equal among every stakeholder (Buchanan, 1975, 23ff.). It is mutually beneficial for people to sign a disarmament treaty, with which everyone obliges themselves to respect the property rights of others, to obtain the same right for themselves (Buchanan, 1975, 58f.). A common power, the creation of a protective state is then required to stabilize the now pareto-superior equilibrium state (Buchanan, 1975, 64ff.). The costs of such common power are much lower than the cumulative individual efforts, enabling investments into productive capacities which final products can be offered and exchanged on the marketplace. Buchanan, like Nozick and neoliberals in general, delves into the benefits of a market order and the a priori mutual benefit of trade. If state power gets not constrained, it risks to quickly self-destruct the mutual benefit, the pareto-superiority upon which its claim to legitimacy is based (Buchanan, 1975, 43ff.). However, the claim of the a priori mutual benefit of market interactions cannot be redeemed, just as much as the claim that the arising property rights would be as strong as Buchanan claims. Even if these immanent problems would not exist, with the natural distributive equilibrium being a mere "idea of reason" it is necessarily

underdetermined whether the present, state-backed distribution of property is legitimate. Buchanan's attempt to remedy this problem turns out to be self-contradictory. While he is committed to a rigorous, value-free methodology, he fails to follow it through and come to terms with the impossibility of reaching the desired, or even any conclusion.

Chapter III picks up the unexamined Hobbesian hypothesis claiming that everyone under a sovereign government is better off than they could reasonably expect to be outside of that authority. While it is correct, that there are conflicts in the state of nature, these conflicts persist in the state order, and it is empirically false that these conflicts culminate in unbearable levels of violence without a common "pacifying" power in place. Hobbes simply created a false dichotomy between the individual in the state of nature and society in the state order. Cooperation remains rationally possible in the state of nature and with that far greater welfare than Hobbes state of nature construction predicted (Widerquist, McCall, 2017, 162ff.). This shifts the Hobbesian baseline considerably, just as Cohen's critique did in case of the Lockean proviso. The burden of proof here too lies with state apologists. However, even if the state order might turn out to be legitimate under some circumstances, nothing substantial follows from that. Even if it might not be rational to strive for the abolishment of the state in certain cases, there exists no conclusive reason to not at least try to change the state's government to enhance one's happiness. The legitimacy of a possibly positivized libertarian institutional order is thereby rendered meaningless.

In the final pages, and after libertarian legitimation theory has been conclusively refuted, the left-libertarian legitimation project is further examined. While the premise of self-ownership rights as well as the appropriation of propertarian terminology does seem to be a promising approach in political philosophy, considerable problems persist due to which the left-libertarian project at last goes nowhere. The self-ownership premise is not as clear-cut as it seems, secondly, considerable divergence in the left-libertarian philosophy reveal, that "moral intuitions" are doing most of the work. This turns the left-libertarian claim to legitimacy, hence the claim of having to be endorsed by all rational individuals, into a farce. Overall, the whole concept of legitimacy simply might be flawed, as it seems to be a claim that can never be (conclusively) redeemed.

# 1. What Must I Do? – An Ontology of Normativity

## 1.1 The Rationality of Morality

In the later Middle Ages before the Age of Enlightenment, it was Aristotelian<sup>1</sup> political and moral philosophy that dominated philosophical discourse.

In it a teleological worldview is advocated according to which by nature for every living being, and thus also for human beings, there exists an objectively good way of life (Aristotle, 1982, 1094, 1169b, Cicero, 1928, III, 22(33), Aquinas, 2007). Certain social structures, such as political institutions are deemed necessary as man is considered a *zoon politikon* that can only lead the “good life” by socially engaging in a political community and individually cultivating virtues.

This is claimed despite cases that seem counterintuitive. For example when Plato has Socrates argue that it is objectively better to suffer injustice than to do injustice; better not only in a moral sense, hence measured against moral criteria, but better in the endeavor to lead a truly good and therefore truly happy life (Plato, 2005, Book 1 & 2). While this is a surprising claim, it is a necessary one, given that otherwise the criteria of morality would remain ontologically dubious. Every person naturally strives for happiness, and according to virtue ethics, this can only be achieved through moral action and thus virtuous action. Morality is thereby not contrary, but equivalent to happiness. Morality defines happiness. In short, the argument can be stated as follows:

P1: Everyone wants to be happy.

P2: In order to be happy, one must be moral.

C: There exists a universal normative obligation to be moral.

The argument is valid, but not sound. At least not if morality is equated with being virtuous. P1 was also invoked by Aristotle, who identified individual happiness as the highest human good, the only end in and of itself towards which all other means of human action are directed (Aristotle, 1982, 1097ff.). This premise is considered unproblematic, for as long as happiness is not externally and objectively determined, as the Aristotelian tradition does by equating happiness with virtue, and virtue with morality, rendering the whole argument tautological.

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<sup>1</sup> Aristotle is obviously greatly influenced by Plato, but it is reasonable to speak of Aristotelianism and not Platonism, as after being translated in the 12<sup>th</sup> century it was Aristotle who heavily influenced the philosophical discourse of the later Middle Ages, while Plato’s influence in the early Middle Ages was far greater (Flasch 2013).

Whether the remaining Aristotelian hypothesis “Everyone must be virtuous” is true cannot be answered philosophically, and an empirically qualified statement is for epistemological reasons not possible either (Wittwer, 2010, 5f.). Since scientific reasoning does not appear to be possible, a sceptical position is adopted. Or as Gauthier (2013, p. 617) puts it confidently: “the recognition that norms are not found in or fixed by nature, and that social norms do not reveal an invariant order, opens the door to the possibility of norms different from those in place, and thereby introduces the need for a justification of existing norms”. For that quest, it is worth taking into consideration the significance of a justifiable, meaning rationally affirmable definition of P2, given that P1 seems to be a wholly unproblematic premise. The argumentative fuse has been laid, and it is to be determined how explosive the charge connected to it really is.

Thus, the stage is set for the following pages, where the phenomenon of moral obligations will be analyzed and distinguished from normative obligations.

## **1.2 Subjective Normative Obligations – Conceptual Analysis**

Normative philosophy might seem abstract, complex and thus wholly inapplicable to the practical challenges of common people. The phenomenon of normativity can, however, be demonstrated by something as banal as having to go to the bathroom.

If one has to go to the bathroom, what is actually happening is that one has to answer the call of nature, which could be done everywhere, but one wants to do this only while sitting on the toilet. The normative must consists precisely in covering the required distance before nature overpowers nurture, otherwise one fails to realize their will.

Normativity hence entails a necessity, a pressure to act in a certain way, though, and this is a particular paradox of the normative must, we humans can still act differently than we must, which can never be the case with nomological and logical musts (Stemmer, 2008, 7ff.). However, we then have to accept the negative consequences, which simply consist in not being able to realize our will. Normative obligations hence exist, iff an action is both a necessary and sufficient condition (ingredient 1) for realizing what a subject wants (ingredient 2).

However, normativity is not merely subjective, only the pressure to perform an action in order to prevent frustration is. Just as gravitational acceleration is objective and real, though the necessity to fall only applies to bodies with mass. This explains the ontology of



normativity in all its simplicity, something which remains incomprehensible in numerous other normative philosophies. Wanting to go to the toilet is presumably rational for most people, as not doing so leads to a variety of states which are strongly wished to be avoided.

P1: A must do X so that Y does (not) occur.

P2: Y is a state of affairs that A does (not) want to occur.

C: A has a reason to do X (Stemmer, 2008, p. 99).

Reason hence has the task of maximizing desired outcomes (Stemmer, 2000, p. 21). "Reason is and ought only to be the slave of" volition (Hume, 1739-1740, 2.3.3.4). A reasonable concept of reason is therefore voluntaristic. For instance, if I want to graduate in September, it is a necessary condition to submit my thesis by the end of July. I therefore must submit it by the end of July. This normative must exists regardless of whether I "feel" the pressure or am relaxing on the beach.

Locke alludes to this when he says that "passions", such as relaxing on the beach can restrict freedom (Locke, 1997, p. 245). Locke characterizes freedom as the capacity to pause and reflect on what would best serve one's well-understood self-interest and subsequently act on the results of that deliberation (Locke, 1997, 242f.).<sup>2</sup> While using the term rationality instead of freedom would increase conceptual clarity, it cannot be denied, that passions, cognitive dissonances, do diminish something valuable, though it may not be freedom.<sup>3</sup> An argument that will be worked out in more detail later on. For now, the following conclusion can be drawn: If I do not submit, I am irrational, I am immanently criticizable. The concept of rationality therefore is to be applied relative to the will of a subject, i.e. instrumentally (Stemmer 2008, 71). Happiness or well-being can be measured only by one's success in realizing one's will.

A sceptical attitude is therefore maintained towards claims of normative obligations that are

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<sup>2</sup> What this necessarily presupposes is the possibility of pausing, reflecting and consciously, and thus at any time only possible, utilization of the ability to act based on the unforced force of the best argument, which clearly contradicts a strictly scientific explanatory approach in the paradigm of cause and effect, consequently laying claim to exceptionalism against the modus operandi of rational knowledge of nature. However, as Kant emphasized in his monumental "Critique of Pure Reason", the scientific paradigm has internal limits, most vividly in a necessity of causal explanation of the first causality, in modern terms, the cause of the Big Bang, which must thus end in infinite regress or metaphysical refuge Kant (1988b, A 446/B 474). Without a temporal-spatial object of cognition, the scientific, empirical method of discovery is inadequate and thus cannot reflexively maintain its sole claim to validity. Similarly, a free will cannot be proven within the scientific paradigm; it effectively simply remains a possibility as it has not been convincingly refuted either.

<sup>3</sup> While a radically negative concept of freedom needs to be complemented by another concept that is closely related to freedom, namely autonomy, Hobbes' concept of freedom, according to which interference with freedom must be physically inevitable succeeds in defining the concept of freedom. In our case, there is no restriction of freedom, since the must action simply was not chosen.

detached from the will of a subject, and with that towards ascriptions of rationality to the will or to actions independent of the will of a subject. Critics who nonetheless continue to point to the deficiency of someone's will or actions irrespective of their volition must hence cite external "reasons" which exposes their failure to grasp the subjective ontology of reasons; their criticism is therefore, as Williams (1981, 111) aptly puts it, a "bluff".

Ontologically and substantially justifiable concept of morality can hence never be contradictory to subjective normative obligations. Morality must be rational per definition.

An examination of moral obligations will be undertaken in the following: beginning on the subject level, which will illuminate both the path as well as the difficulty on the intersubjective level of generally justifying, of legitimating a common power.

### **1.3 Reaching Autonomy – A Moral Obligation**

Consider a drug addict, who recognizes the harm caused by their addiction but nonetheless chooses to indulge in it. Is this person normatively unbound, are their actions therefore not to be considered irrational?

The seeming "contradiction", someone like Hobbes would argue, simply reveals that the will to consume the drugs trumps and thereby nullifies the will to stop, just as much as the will to watch TV in the evening regularly trumps and nullifies the coexisting will to go for a run. There then seems to be no possibility for immanent criticism of the empirical will, and hence differentiation between a rational and an irrational will along these lines.

However, this is not the case, and this is evident, when one reconsiders the definition of normativity. Normativity entails a necessity, a pressure to act in a certain way, otherwise the negative consequence of not being able to realize one's will result. Thus, it is rational to state that if upon reflection the desire to watch TV exceeds the desire to go for a run, the normative obligation of watching TV trumps the normative obligation of going for a run and hence must be action-guiding. However, the rational suppression of the will to go running does not mean that this will simply no longer exists. Rather, the existence of a normative must of not wanting what cannot be actualized follows. Since the negative consequence of not realising one's own will, which is constitutive of normativity, also comes into play here. Precisely therein lies the failure of the drug addict and the couch potato. Both are subsequently neither externally coerced nor practically self-determined; their will composition is in dissonance, and with that subjectless heteronomy takes over and negative consequences become

inevitable.

Heteronomy describes a state of affairs in which the empirical will composition of a subject fails to realize itself. Autonomy is hence a state of affairs, in which the empirical will of a subject can and does realize itself. Reaching autonomy is ad-hoc bound by the law of non-contradiction, since inconsistent volition, just like volition contrary to the laws of nature, inevitably leads to performative self-contradictions (Rapp, 1993). The causes for heteronomy can therefore be nomological, logical, epistemic and, as we will later examine further, social. An example of epistemic heteronomy would be, as already mentioned, spending the summer on the beach, even though one wants to graduate in September which far exceeds the pleasures currently being pursued and for which one must submit their thesis by the end of July. Or, if one resorts to dewormer to protect oneself against Covid-19. Epistemic heteronomy does not arise from acting against the overwhelming scientific evidence, but from effectively acting against one's own will, when the dewormer turns out to offer no protection against Covid-19. Heteronomy can therefore even occur when subjects have not acted in a culpable manner.

With these investigations, it is now possible to reconcile the radical negative concept of freedom that Hobbes brought forward, and the concept of autonomy towards which freedom must rationally strive. While elaborating the immanent necessity of autonomy clearly was not the goal, when Hobbes states: “A Free-Man, is he, that in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to”, it nonetheless can be deduced from it (Hobbes 1949a, 110). Whatever one wants must be subsumable under a consistent, law-like order. Yet, autonomy necessitates no determination of the legal substance, “all that it has to be is a law” (Korsgaard, 1996, p. 98).

Living out all the desires of the moment can also be such a law; the result is then the "Wanton", which seems to lead to a reunification of the previously carefully demarcated autonomy with the mere empirical will of the Hobbesian man (Korsgaard 1996, 99; Frankfurt 1971). In the case of the addict, his addiction is only problematic because he wants to stop. In contrast, the "Wanton" affirms his addiction, his momentarily strongest desire all the time. The fact that he presumably could not stop does not matter. Yet, and this is an explicitly empirical, anthropological claim, such “Wanton” cannot exist. The autonomous “Wanton” guided by his instinctually substantiated free will must presuppose what his autonomy negates, namely the constant existence of action-guiding instincts.

The *conditio humana*, already posited in the Bible with the Fall of Man and the realization

of good and evil therein, by Kant presciently interpreted in terms of evolutionary theory, and later reconstructed in more detail by Darwin and his disciples, consists precisely in the "transition from the crudeness of a mere animal creature into humanity, from the carriage of instinct to the guidance of reason, in a word, from the guardianship of nature to the state of freedom" (Kant, 1988a, p. 115). The "Wanton" cannot postulate the realization of his instincts as his autonomous law, exactly because they do not suffice in fully determining his actions. Precisely because of that is "the human situation [...] an ethical problem for humans" (Apel, 1982, p. 677). Humans not only can, but biologically must determine their will, as human action is not fully determined by instincts. This makes humans human, beings that both provide and require reasons in order to heal the wound that freedom itself has struck – and thus actualize the possibility and normative necessity of autonomy, the adequate form of human freedom (Hegel, 2014, p. 88).<sup>4</sup> The realization of one's own autonomy corresponds structurally to the Aristotelian concept of happiness, although it succeeds in shedding the justificatory baggage of objectifying its substance.<sup>5</sup>

P1: Everyone wants to be happy.

P2: In order to be happy, one must be autonomous.

C: There exists a universal normative obligation to be autonomous.

Yet, as autonomy does not require any specific content, only structural consistency, this does not help in determining the substance of this moral obligation any further. Even though autonomy is a moral obligation, it is not possible to derive a moral right to autonomy from it. From the mere fact "that human beings are agents whose lives can have meaning" it does not follow "that we need to respect their choices, that we have to let them decide how to live their lives" for as long as these rights cannot reciprocally coexist, and thereby corresponding obligations be rationally allocated (Bader, Meadowcroft, 2011, 79f.). This is the non-sequitur that Nozick adheres to, whereas Rousseau, and with him Kant simply proclaim autonomy as the highest good, and not merely as a necessary means to the end of happiness. Reaching autonomy is therefore a demanding individual quest, that cannot be undertaken by anyone but the individual. While it is of course not a matter of choice that we humans must

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<sup>4</sup> Nozick conceptualizes the fundamental ethical problem of humans in a similar vein Nozick (1974, 49f.); Nozick (1994, 436ff.).

<sup>5</sup> Nozick too employs such argument, though he emphasizes the existentially required creation of meaning, instead of autonomy, by exercising one's capacities in accordance with some self-made life plan Nozick (1974, 49ff.). Meaning thereby becomes the highest, the only possible human good (this would also be a conclusive reason why to not enter the Experience Machine Nozick (1974, 42ff.).

eat, drink and sleep to sustain ourselves, which is the condition of the possibility of realizing any further will, these biological necessities can be eliminated too, as existence itself is apt to be chosen (Sartre, 1958, 29f.).

To repeat: The human condition presents an ethical problem for humanity that existentially requires a solution. What constitutes the good life is a choice to be made, and this choice can vary conceptually and does indeed vary empirically. Because of that Governmentality, the organized societal practice of governing subjects, cannot merely be legitimated, meaning intersubjectively justified on instrumental grounds as subjective ends differ (Foucault, 1991).

## **1.4 Individual Autonomy & Society**

### **1.4.1 Autonomy and Power**

Before examining the criteria for legitimate organization, it is worth considering what organization even means, which is governing.

Governing describes the calculated employment of means to rationally determine the actions of the governed subjects in a particular way. It hence describes the imposition of norms upon others. The ability to govern thereby presupposes having certain means at one's disposal, namely power, and thus a formal means (Brennan 2013, 54). The means for motivating subjects into norm-compliant behavior is the credible threat of sanctions in the event of disobedience. Sanctions are states of affairs that the person on whom power is projected does not want to occur.

Whenever: someone (B) projects power upon another (A), by linking an action ( $\neg$ ) x to a sanction Y AND the sanction Y subjectively outweighs the benefit of ( $\neg$ ) performing action x, there exists a reason, a sanction-constituted normative obligation for B ( $\neg$ ) to perform action x. Power is therefore successfully exercised upon another person, if that person acts as intended, hence when that person is dominated. If, on the other hand, the subjected person does not act accordingly, the governing person seems compelled to carry out their threat of sanctioning. Ergo, sanctioning itself is a sign of powerlessness, since the supposedly powerful agent has failed to motivate the performance of the desired action (Arendt 2013, 54). Even a person that must obey, can still disobey. The paradox of normativity strikes once more, sanctions can determine the normative status of an action, never the action itself. The remnants of this powerlessness, the sanction, may then however help realize domination in

the future by painfully dissolving the cognitive dissonance of a person who somehow thought that the sanction constituted normative obligation does not apply to them. However, it could also turn out that the threat of the sanction was never credible, in which case the normative obligation does not only disappear, but has never existed in the first place, in the same way that the normative obligation to submit my thesis by the end of July has never existed if it turns out that I can graduate in September submitting in August.

Whenever the autonomous will of a subject A necessitates for its satisfaction a certain action by another subject B, even though B has no intention of performing said action, power decides whether A can transform the required action into a normative obligation for B. Sanctions can link an action with both positive and negative additional consequences; the *modus operandi* does not change.

Since power is successfully exercised upon another person, if that person acts as intended, it can be effective both by imposing sanctions on an empirical will but also, of course, by influencing the formation of that will itself. Marx's famous proclamation that "it is not men's consciousness that determines their existence, but, on the contrary, their social existence that determines their consciousness" states in an undogmatic reading no more than this and has as such become an anthropological truism (Marx, Engels, 1972a, p. 9). Or to put it in Foucauldian terms: "Subjection consists precisely in this fundamental dependency on a discourse we never chose but that, paradoxically, initiates and sustains our agency" (Butler, 1997, 2, 8-10). Only as soon as this heteronomy facilitates autonomy, thereby being a condition of the possibility of it, a necessarily doubly bounded reflection of one's subjectivity is made possible. Autonomous autonomy is hence an illusion, a philosophical problem that will be picked up again later.

#### **1.4.2 Autonomy and Conflict**

Returning to the more common conception of power as something that afflicts the already constituted subject from the outside. Sanctions are always relative to the will of the subject upon which they are projected. If a person wants nothing specific, which defines the radical stoic, all sanctions are rendered ineffective. The radical stoic can never be dominated and must never dominate anyone. However, "man first of all exists, encounters himself, surges up in the world – and defines himself afterwards" (Sartre, 1948, p. 28). While the identity of the radical stoic is indeed conceivable, initially "subjectless" existence must be presupposed and sustained to enable the decision to become a stoic. The will to exist is the transcendental

condition for existence without will. Existence is an initial formal normative must.

Because of humans' existential neediness that necessitates material appropriation to satisfy biological needs, every subject must want something from other subjects. The same material can only be appropriated once, whenever one seeks to appropriate something, for instance a chicken, one presupposes others acceptance of this appropriation. Yet there could be other subjects who want to appropriate the same chicken, or others who want to prevent the appropriation of sentient animals generally speaking. There could be several, overwhelmingly many people longing for the love of one person, or more public figures than publicity. To put it in a nutshell: the social ensemble of normative obligations might be disharmonious and conflictual. Everyone is necessarily affected by such conditions of conflict, as no one exists and could exist outside of society, as has been laid out.

Both logic and the laws of nature exist independently of human action, of power, which is precisely why it is a normative obligation to eliminate the will to drop a stone upwards. So, what about social facts? Imagine wanting to have both a scoop of chocolate and strawberry ice cream but only having enough money for one scoop. Normativity entails, as already laid out, a necessity, a pressure to act in a certain way, otherwise the negative consequence of not being able to realize one's will follows. Thus, if upon reflection the desire for chocolate ice cream exceeds the desire for strawberry ice cream, the normative must of buying chocolate ice cream is comparatively greater and therefore must be action-guiding. Yet, is relinquishing the will to have strawberry ice cream in this case not a normative obligation as well? While it is logically and nomologically possible to have both scoops, under the current circumstances this is only possible by breaking state law e.g. via robbery. Given that the fear of sanction exceeds the desire for strawberry ice cream, one indeed must drop the desire for strawberry ice cream or change the social circumstances. Both might be rationally feasible options, because social norms depend on human action, which like all human constructs, can be influenced by power. If one upholds a will structure that requires different social circumstances for its satisfaction, one must commit oneself to the principle of hope and thus to sociopolitical engagement with which power and thereby change can be organized (Bloch 1985). At present, it is an empirical fact that a scoop of ice cream costs so-and-so much money, and if one does not have enough money to satisfy their desires, there exists no legal way to proceed. It is therefore only natural that hope politicizes, and just as natural that politics disillusion. For just as one person strives politically for more ice cream, the other strives politically for less work. Aspiring unites them, their aspirations divide them.

Only “a dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one's own ego and desires” nevertheless able to productively sublimate these contradictions can be considered a legitimate order (Ratzinger, 2007, p. 453). Whether such a claim in general, and the libertarian claim more specifically, can be successfully defended will be examined in the following chapter.

## **2. What May I hope For?**

The starting point of political philosophy is the question of the justification of norms that people are subjected to, the question of power (Wolff, 1970, p. 3). A code of conduct that all rational individuals desire is precisely what defines morality in normative philosophy (Gert, Gert, 2020). Only social norms whose establishment is wanted by all affected rational individuals can therefore be deemed legitimate, just as much as only an institution whose power is sought after by all rational individuals can claim legitimacy, as there exists “no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives” (Nozick, 1974, 32f.).

### **2.1 Pre-Modern Legitimation Theory**

For almost a century, the secular law of the European Middle Ages “consistently” derived its legitimacy from its conformity with the absolute and supreme validity claim of a divinely ordained law in which “everyone” believed. Law is enacted by the political ruler who is exegetically justified in doing so, and justifiable on substantive grounds, if the ruler strictly complies with the inimitable validity claim of divine law (Flor, 1991).

The mode of justification within this "dual realm of traditional rule" should be comprehensible without, and this is the crux of the matter, necessarily producing a reason for everyone affected (Schluchter, 1985). Within this traditional dual reasoning a moment of unavailability for worldly rule is created through divine law which enables, to an extent, to demarcate legitimate from illegitimate use of power. With the gradual disappearance or rather the balkanization of religious dogmas, the political ruler's entitlement to govern, the legitimation of power, had to emancipate itself from religion and become “sovereign”. However, the distinctive unavailability for worldly rule that constituted its legitimacy to begin with gets lost when political rule gets reduced to the somewhat arbitrary command of



the legislator. This means that legitimacy and legality merge and the reflexive, non-circular justification of this legal power dissolves (Habermas, 1987, 5f.). The fact that the legitimacy<sup>6</sup> of such social order has always been a contingent matter had taken its toll. The concept of legitimacy can no longer play any role within this justificatory framework.

The law of reason, especially in its contractualist variant, established itself as a legitimating remedy at the vanguard of early modern political discourse. From a historical perspective, the problem of legitimacy thus arises from the justificatory need to adapt to the metaphysical changes of modernity: Why should any state exist, and its law be considered binding, apart from its existence and its sanctioning power?

## **2.2 Meta-Reflections on the Social Contract**

### **2.2.1 Volenti Non Fit Iniuria: The Principle of Consent in Contractualism**

The basic figure of civil private law is the contract. Contractual autonomy empowers private legal entities to create subjective rights, hence a legally and coercively enforceable relation of actions. For instance, one party contractually takes on the obligation to fix a bicycle, in exchange receiving the right to get paid an agreed upon amount of money; the other party meanwhile takes on the corresponding obligation to pay thereby gaining the corresponding right of getting their bike fixed. The legitimacy of contracts and the justification for enforcing the contractual relation is based on the long standing and fairly basic principle: *Volenti non fit iniuria* – no wrong can be done to a rationally consenting party (Krüger, Mommsen, 1954, Dig. 47.10.1.5). A contract must be, and this is a necessary presupposition to render the agreement intelligible, to the benefit of all parties involved (Habermas, 1987, p. 6).

In the social contract tradition, this figure is potentiated to legitimate the governing of people in accordance with the terms of a general contract, which by definition can only be mutually beneficial terms. Making use of the social contract hence means adopting an individualistic legitimation theory, as it traces legitimate government back to the consent of the governed individuals, a democratic legitimation theory, as it demands justification in the eyes of all those affected equally, and a procedural legitimation theory, as the justificatory criterion is

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<sup>6</sup> There was never sufficient religious homogeneity, this sort of legitimacy has never existed, its illegitimacy simply became more glaring and in consequence its rule unstable.

the mutual agreement to enter the agreed upon societal order (Kersting, 2005, p. 322).

What is doubtful about this legitimation project, by no means only for Hume, is whether this envisioned contractual agreement has or could ever take place (Hume 1994). However, Hume himself refuted the empirical impossibility objection right-away as insufficient for as long as the social contract serves as a standard for philosophers to assess the legitimacy of a state, and not for historians as an explanatory device for the empirical emergence of any institutional order (Nozick, 1974, p. 7, Knowles, 2010, 101ff.). The social contract is a “mere idea of reason” (Kant 1988c, 153). As Radbruch, closely following Kant, therefore correctly concludes: “The social contract does not claim to be a fact, but only a standard: it is not to be claimed that the state has emerged from real contracts, but that its legitimacy is to be measured by the successful or unsuccessful attempt to conceive it as having originated from a contract of fully rational beings” (Radbruch, 1973, 240f.).

Within the state order people must e.g. pay taxes first and foremost to avoid being sanctioned by said state, and not because this seems beneficial for its own sake. Those “complaints of the masses about the burdens and drawbacks of [collectively binding norms] could be met in no better way than by picturing to their eyes the drawbacks of a state of nature” (Pufendorf, 1672, II, II, §2). Hypothetical consent consequently makes the social contract basically synonymous with mutual advantage with the state of nature as its baseline (Kavka, 1986, pp. 409–415). A legitimate social order can only be one that maximizes everyone’s individual utility vis-à-vis feasible alternatives.

The legitimation strategy of contractualism hence aims to fully trace back the experienced “domination”, to the rationally conceivable “reality” of autonomous creation. While the social contract tradition is closely tied to the justification of the state order, it is not committed to statism in a strict sense, as the enforcement of social norms does not require a Weberian state order (Thrasher, 2017, p. 216).

The social norms agreed upon in the social contract can hence only contain normatively obligated agreements in the state of nature. Iff, and only insofar the effective legal norms, the contemporary institutional order align with the contract can they be deemed legitimate, if they do not, they are illegitimate. The social contract thereby becomes a counterfactual device of critique.

### **2.2.2 The Social Contract as an Uncritical Device of critique?**

Rousseau being both one of the most important critics as well as contributors in the social

contract tradition polemically “reveals” the ideological character in some of the most important contributions, which can only fabricate a fictitious generality, mutual benefit, by misrepresenting the interests or the bargaining situation at hand (Rousseau, 2009, 69ff.).<sup>7</sup> Rather, the general will, the source of law, i.e. the substantive practice of governance, Rousseau argues, must emerge holistically from the autonomous will of each citizen, not once, but through constantly re-assessing consensual deliberation. Laws therefore originate from everyone to whom they apply. Only such laws can be considered legitimate, since they are compatible with the autonomy of every individual. This does not mean that laws are ineffective or merely theoretical, they are indeed effective and thus coercively realized by the thereby republican state, whose founding goal is realizing freedom as non-domination.<sup>8</sup> This renders citizens merely subjugated under their own will, or “as free as before” (Rousseau, 1762, I, 6, 4). Or as Rousseau’s (arguably) most famous disciple emphatically puts it: “There are no two ways of being free: one must be entirely free, or become a slave once more” (Robespierre, 2017, p. 9).

There is a fundamental objection to this and an additional concern. As conceptually outlined above, and empirically ascertainable, there exists considerable disagreement about the “good” individual life as well as the “right” social coexistence, which seems to render reciprocal autonomy and thus the achievement of the republican state objective impossible. Of course, just as Rousseau ultimately argues, this fact might simply be the product of (Bourgeois) ideology which can be overcome through ideological criticism. Rousseau's deliberative legislation model is ideological criticism in the most radical manner, thereby deemed capable of paving the way for consensus. Any such utopianism will be comprehensively criticized hereinafter; moreover, it is indeed the opposite that concerns us: consensus made possible through ideology – as which religion, or more specifically each particular (political) belief system was revealed – which supposedly “homogenously” prevailed in Europe in form of Christianity for centuries. The double life of power (subjection and sanctioning) has been outlined earlier and with that the possibility of the heteronomous homogenization of individual expressions of autonomy. This is not necessarily a sufficient condition for the legitimation of a social order, just imagine the sole

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<sup>7</sup> Rousseau indeed believed that it was not just false consciousness, but malicious ideology as “it is reasonable to believe that a thing was invented by those to whom it was advantageous rather than by those to whom it was detrimental” Rousseau (2008, p. 71).

<sup>8</sup> Why individuals would collectively agree to found and uphold such legal order can obviously neither be conclusively rationalized, and arguably not even be plausibilized.

homogenous pursuit of owning a private jet, but let us for the sake of the argument assume that it is. An example of that could be the universal idolization of general autonomy as a result of century-long Rousseauian indoctrination. Is the resulting social order legitimate? Rousseau, and with him many members of the social contract tradition, lack a demarcation criterion here. What the law prescribes is good and reasonable (Rousseau, 1762, I, 7). The legislator is by definition entirely error-free (Rousseau, 1762, II, 3, 6). Either Rousseau is simply confident about the persistence of an ideology-critical moment in every society, or he withdraws to the stance that „the behaviour of the human actor [...] should be incorporated as data [... that] the political theorist should take his human actors as [s]he finds them“ (Buchanan, Tullock, 1999, 309f.). The former is not certain, the latter is in many respects unsatisfactory. For this is a creed, not a justified conclusion; it is simply a fundamental metaethical decision or, as it has been called since the 20<sup>th</sup> century, an “intuition”.

### **2.3 Modern Social Contract Theory and the Rise of Libertarianism**

Despite this possible grave problem, the idea of the social contract was for centuries the leading concept used to normatively justify and criticize political institutions, until it was increasingly displaced in the 19<sup>th</sup> century by utilitarian, socialist and social Darwinist ideas.<sup>9</sup> In the second half of the 20<sup>th</sup> century, a renaissance of the contractual argument took place, the spark for this certainly being Rawls' "A Theory of Justice" (1971), which attempted to develop a holistic, principled theory of social justice by making use of the social contract as a philosophical problem solving tool. Although Rawls played a pivotal role, a certain intellectual climate, a contractarian affinity must have prevailed already. Otherwise, the enormous resonance and diversity of both critical and constructive responses to Rawls within the contractarian tradition could not be rendered intelligible (Koller, 1987, p. 11). The two responses that are of particular interest for this thesis were published in 1974 by Robert Nozick, a colleague of Rawls at Harvard, titled "Anarchy, State, and Utopia" and in 1975 by James M. Buchanan titled “The Limits of Liberty”. Nozick’s contribution will be examined first.

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<sup>9</sup> An outstanding overview over the “old” tradition can be found in Gough (1936).

## **2.4 Natural Rights and The Social Contract**

### **2.4.1 Nozick's "Anarchy, State, and Utopia" in the Social Contract Tradition**

Nozick poses in accordance with the social contract tradition the essential question, namely "if the state did not exist", which defines the state of nature, "would it be necessary to invent it?", and if so, how would it have to be organized? (Nozick, 1974, 3f.). Part I of Nozick's work, *Anarchy*, is read by some, for instance Brennan (2018, p. 2), as being solely addressed to anarcho-capitalists, immanently criticizing their claim that no state can arise without the violation of libertarian rights. Others, for instance Nagel (1975), read it as a badly executed attempt to ultimately ground the legitimacy of the nightwatchman-state without providing any justification for the comprehensive set of inviolable natural rights upon which the whole argument seems to be based on.

However, as Nozick truly advocates natural rights, he subsequently has to justify them as one cannot simply presuppose controversial normative premises without further justification. Yet, Nozick's justificatory account of the nightwatchman-state does not solely rely on the natural rights doctrine, as can be seen in Part II, where Nozick argues that any further employment of state power effectively contradicts widely shared values, hence once again applying immanent criticism that now addresses the "moral intuition" of a broader audience. Part III of his work is concerned with "Utopia" and sketches out the varieties of "Utopias" that can emerge, co-exist and flourish while all being subsumable under a libertarian meta-order.

### **2.4.2 The Rise of Neoliberalism**

Thus Nozick becomes yet another crown witness for the intellectual and political rise of Neoliberalism during these years and with that a political theory that strives to subsume all spheres of human existence into economic rationality (Foucault, 2008, 148, 226).<sup>10</sup>

Market rationality builds upon subjects as "self-originating sources of valid claims" (Rawls, 1980, p. 543). This is based on the notion that we don't know what persons ought to value

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<sup>10</sup> In the course of this mobilization, as Rothbard acknowledges, the term "libertarianism" has been successfully captured "from the enemy" Rothbard (2007, p. 83). This at least holds in the United States, as can be seen by the founding of the Libertarian Party and the rise of think tanks like the Cato Institute or the Center for Libertarian Studies in the 70s. Since then, the political term "libertarianism" requires further elaboration globally but is increasingly associated with a "laissez-faire" capitalist social order, which thus represents a departure from the terminological tradition of the 19<sup>th</sup> and early 20<sup>th</sup> century.

because no one knows what the good life consists of, or “what sin is” (Friedman, 1987, p. 185). Though specific market equilibrium states materialize, no individual must abandon their interests as they can always hope to find a consensually cooperating other within the market, in which a priori only mutually beneficial exchanges take place that allow individuals to satisfy their interests, thereby creating a dynamic world-building social equilibrium (Friedman, 2002, p. 23). The rules achieve the goal, but only indirectly. “It is in this subjectivism that the objectivity of our science lies” (Mises, 2010, p. 21). While there is considerable convergence concerning the political decisions that ought to be taken, it would be philosophically mistaken to lump everything together under the umbrella term “Neoliberalism”. For this completely undermines the line of argumentation and thus the decisive aspect of discourse analysis. It therefore makes perfect sense to differentiate between two “Neoliberal” streams, the classical liberal and the libertarian stream.

On the one hand, an essentially consequentialist, economic justification emerges in the discourse. Contributors of this stream explicitly locate themselves in the tradition of Smith (1776), Hume (1739-1740), Mill (1848), (1859), Mises (1927), (2010) or Hayek (1944), (1960). Their justificatory account of strong property rights and a minimal to non-existent state, is based on the empirical claim that such an institutional order outperforms any other social order in key indicators (Friedman, 1962, Friedman, 1973, Rodrik, Subramanian, Trebbi, 2004, Schmidtz, Brennan, 2010, Acemoglu, Robinson, 2012). This “economic” account can be put together with those philosophical accounts that “rather than appealing to a general, abstract account of the principles of justice or other social values [...] appeal to intuitions about particular cases” (Huemer, 2016, p. 231). What unites intuitionistic, philosophical and undogmatic economic accounts despite their obvious differences is that the effectiveness of all arguments is always somehow contingent upon the performance indicators being considered relevant and upon the “moral intuitions” being shared. These “if-then” arguments, these hypothetical imperatives nonetheless suffice to seize and maintain political power. It is, however, not a moral justificatory account in the sense that the categorical necessity of being endorsed by all rational individuals is claimed. Yet, such justificatory account always leaves the door open for rational opposition, and with that an omnipresent threat of political change.

On the other hand, the second stream attempts to address this shortcoming by trying to overcome the contingency of the argumentative effectiveness with an ultimate justification for the libertarian institutional order. Only arguments that aim at the ultimate justification

shall be deemed libertarian in this thesis, while the former will be referred to as classical liberal. Ultimate justification means moral justification. The libertarian institutional order thereby claims to be an order that all rational individuals must desire. This is of course a much stronger claim than the hypothetical imperatives that the classical liberal argumentation tries to establish. Nozick's "Anarchy, State, and Utopia" entails both streams, which makes it such an enticing work.

According to the libertarian theory of justice developed by Nozick (1974, 150ff.) in a wholly moral world:

1. Persons are morally rightful owners of their person and their powers (the self-ownership thesis).
2. Persons are entitled, by moral right, to appropriate as much of the world as they like, as long as they do not thereby worsen the position of others (the justice in acquisition thesis).
3. A person is entitled to a holding if it has been acquired by the principle of rectification, by means of which unjust holdings that do not comply with 1, 2 and 4 are corrected.
4. Persons are entitled, by moral right, to alienate or acquire any title to worldly resources appropriated in accordance with 1, 2 and 3 through the market (the justice in transfer thesis).
5. No one is entitled to a holding except by (repeated) applications of 1, 2, 3 and 4.<sup>11</sup>

Furthermore, an action is only morally permissible if it does not violate the rights of others, i.e. if it complies with the non-aggression principle (Nozick, 1974, 33ff.).<sup>12</sup>

### **2.4.3 Nozick and the Lockean tradition**

Nozick regards political philosophy as a domain of normative philosophy, whereby normative orientations set "the background for, and boundaries of, political philosophy". These normative premises that are not established within political philosophy, but presupposed must thereby be justified within moral philosophy (Nozick, 1974, p. 6).

In "Anarchy", Nozick merely refers to the "respectable tradition" of John Locke and

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<sup>11</sup> This reconstruction of the argument incorporated the real helpful account of Vrousalis (2017, p. 52).

<sup>12</sup> Against those who violate the law and do not comply with the NAP, it is permissible to defend oneself, demand rectification and impose sanctions, but only insofar as these serve to rectify past violations and prevent further violations.

subsequently adopts his construction of the state of nature and the natural law even though it does “not provide anything remotely resembling a satisfactory explanation of the status and basis of the law of nature” (Nozick, 1974, p. 9). Nozick is fully aware of “the gap left so yawning” but is postponing working on it “for another time” or “lifetime?” (Nozick, 1974, p. 9).

Locke derives an unlimited right to everything in the state of nature primarily from the divine decree to preserve mankind, and thus oneself (Locke, 1965, 111-113, 117, 157, 199). How self-preservation is to be realized, what self-preservation consists of and in what way the self realizes itself, is not dictated by divine law, but by the free individual pursuit of happiness. As this right is instrumentally derived and bounded by divine law, “it is not a state of license”, but a state, in which no reasonable man “ought to harm another” (Locke, 1963, 347f., §17). The right to freedom in the state of nature thus is the fenced fence for autonomous preservation. If people do harm to others, they are, and here Locke and Nozick agree, violating natural, moral rights.

What exactly constitutes harm is then *ex negativo* defined as that which cannot be decided by consensus among all those affected. This introduces the, according to Locke and his libertarian disciples, fundamental moral problem that humans face: “The Earth, and all that is therein, is given to Men for the Support and Comfort of their being [...] and no body has originally a private Dominion, exclusive of the rest of Mankind. Yet being given for the use of Men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular Man” (Locke, 1963, 353, §26). Without material appropriation humans cannot survive, which is on the one hand a divine decree, and on the other hand simply sought after by most humans. Since every human being therefore necessarily, by nature, has an interest in life, liberty and property, this trinity constitutes a subjective moral right. Of course, this does not yet ensure that these claims exist in cumulative harmony, yet if these subjective moral rights cannot effectively coexist, they could have never existed as such in the first place. This necessitates bringing these claimed subjective moral rights into a reciprocally feasible and thereby enforceable order as a condition of the possibility of actualizing the natural, the moral law.

Addressing this, Locke teasingly asks: "Was it a Robbery thus to assume to himself what belonged to all in Common?", immediately silencing such doubts by affirming “If such a consent as that was necessary, Man had starved, notwithstanding the plenty God had given him” (Locke, 1963, 354, §28). This negation nonetheless reveals that the requirement of



general consent to legitimate appropriation cannot be dismissed on conceptual, but pragmatic grounds only. Expressed consent simply is not the right kind of consensus to seek in this matter. Thus, consent ought to be transformed to a practically feasible, thereby merely hypothetical restriction.

Yet, for any consensus decision to bear moral weight, “the right of freedom to his person, which no other man has a power over, but the free disposal of it lies in himself” must be presupposed (Locke 1963b, 452., §190). Locke follows from this, that not only the will, but also the corresponding body and with that too “the labour of his body, and the work of his hands [...] are properly his [...] this nobody has any right to but himself” (Locke 1963b, 353f., §27). To be precise, this is not exactly the argument that Locke employs, but one that can be made, which being a transcendental argument makes only use of the conditions of the possibility of some other unproblematic presupposition, namely the moral weight, the legitimating force of consent.<sup>13</sup>

Locke once more refers to the criteria of reasonable hypothetical consensus with legitimatory intent when concluding: “He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his” (Locke, 1963, 354, §28). Why nobody can deny this remains unclear, here Locke seems to rely on a common, stable intuition, that thereby becomes a moral fact.

Whatever then is removed from the pristine state of nature, with the admixture of one's own labor, consequently, transitions to personal property.<sup>14</sup> That this is a necessary conclusion within the Lockean theological framework is evident, because “if no one had the right to control anything at all, except his own body, then we would all cease to exist”, yet whether nobody can rationally deny this from a secular point-of-view is yet to be determined (Hoppe, 1988, p. 21). For now, this is begging the question whether Locke (and his disciples) really cannot see the difference between saying, “To sustain oneself one must obtain private control over external objects,” and saying, “To sustain oneself one must obtain *a right* to private control over external objects”.<sup>15</sup>

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<sup>13</sup> Interestingly enough, Hans-Hermann Hoppe employs a similar argument. Of course, the conclusion that this right logically expands to one's labor and one's labor to external objects is a non-sequitur.

<sup>14</sup> But what does this exactly mean? Here at least five different interpretations are possible, something that is neither self-evident, nor something that Locke specifies sufficiently Widerquist (2010, p. 6).

<sup>15</sup> This criticism by Jones (1988) is aimed towards Hoppe's “argumentation ethics” but applies just as much to Locke's theory of rights.

This nevertheless lays out in abstraction how property rights are meant to be obtained (whether legitimately or not). However, considerable problematic ambiguities persist: “If I own a can of tomato juice and spill it in the sea [...] do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?” (Nozick, 1974, p. 175). Locke, aware of the antinomies towards which his theory of rights is heading, hence further restricts legitimate appropriation.

He shares the view with Marx (1972, 563) that “the purpose of private property [...] is the existence of essential objects to man, both as objects of consumption and of labor”. Private property rights, which most importantly consist of a right to exclude others from usage, must, in order to be legitimate, “take as good as nothing at all”, i.e., generally maintain or improve the availability of objects for usage (Locke, 1963, 356f., §33). The Lockean proviso hence requires legitimately appropriated property rights to bring about a Pareto improvement (Steiner, 1987, p. 55).

#### **2.4.4 Nozick and the Proviso**

Nozick asserts confidently that no matter the exact details of appropriation the proviso will always<sup>16</sup> be met in a private property order, as the thereby created market economy organizes the production and allocation of goods with far superior efficiency compared to any other economic system (Nozick, 1974, 178f., 182). This resembles the introduced Neoliberal line of argument, a radicalized Smithian efficiency argument for “making the market, competition, and so the enterprise the formative power of society” (Foucault, 2008, 148, 226). However, it does not merely appeal to citizens on contingent terms to realize the political vision as classical liberals do, but it claims to be a mutually beneficial, it claims legitimacy.

However, as soon as property rights in external objects are established, the uncircumventable requirement of comprehensive consensus for justifiable action vanishes, or to be precise is reduced to those property-owners that are affected. Normative conflicts are then seemingly resolved on a higher level without difficulty, given that all possible contradictory claims within a society can simply be resolved by the unambiguous definition of who has legitimate power over the disputed object X. This power most importantly consists in “the right to determine what shall be done with X” (Nozick, 1974, p. 171). Nozick specifies private

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<sup>16</sup> Apart from exceptionally rare cases in which those who are left worse off would have to be compensated.

property rights as permanent and inheritable and brings forward the familiar arguments in favor of private property (Nozick, 1974, p. 177). However, as Varian (1975, 235ff.) points out, none of these arguments justifies specifically these rights, as the allocative benefits of the market mechanism can also be realized in market socialism (“property-owning democracy”), where the distributive question can be answered in accordance with vastly different principles.<sup>17</sup>

How then can Nozick claim that his proposed libertarian social order maximizes everyone’s individual utility vis-à-vis feasible alternatives, meaning the alternative of the state of nature or alternative orders that could emerge from the state of nature, when the poor could be better off simply by redistributing societal wealth.<sup>18</sup> This is especially puzzling as Nozick’s account of property on another occasion is committed to be a means for coexisting human individuals as ends in themselves, where right violations hence remain permissible for as long as due compensation is paid to the right holder thereby not putting property rights on an unjustifiable pedestal and allowing the rationally required possibility of Kaldor–Hicks efficiency (Nozick, 1974, p. 59). Of course, this is only a minor though rational adjustment within an already presupposed private property order; it simply shows that no right is absolute, but only protected by liability rules.

Nozick’s decisive trick for legitimating such strong private property rights is the unjustified, and unjustifiable restriction of the range of possible comparative baselines to that of primitive common ownership. This gets criticized by Cohen (1995, 79ff.) by presenting a thought experiment involving two self-owning individuals (A, B) in a world where everything non-human is in common ownership. This setup lacks private property, allowing individuals to use any available resources not currently occupied. In that state, both individuals attain a bundle of goods that, for the sake of argument, is equated with a utility value of seven (7, 7). If A appropriates all the land, thereby rendering B incapable of sustenance-drawing, but offers B a salary of eight while A himself receives a utility value of forty due to efficiency gains from labor division (40, 8), then the proviso is according to Nozick satisfied and legitimate property rights have been created. Yet, why not compare the previously described capitalist distribution to the joint ownership baseline of (24, 24). While

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<sup>17</sup> Similar argument is employed by Rawls (1999, p. 4).

<sup>18</sup> To be fair, Nozick’s Lockean proviso merely claims that it generally maximizes the availability of objects for use. That this might not be equivalent to happiness, which is the only justifiable criterion. This weak point gets constantly attacked from a wide-range of standpoints Marcuse (1999); Davies (2015); Franis (2015).

an argument can be made, and is made by both Locke and Nozick, that for pragmatic reasons strict joint ownership, meaning a consensus requirement for use, possession and disposal of every object is not the best suited organizational model, not the most efficient model either, its baseline nevertheless matters, even if it would only result in a (15, 15) distribution. Nozick would have to claim, that under joint ownership not even such distribution could be achieved, that joint ownership would bring about at best an output of 16, that B's welfare is maximized in the libertarian institutional order.

Interestingly enough "Nozick himself said that equality might be the right distribution for manna from heaven, although he signally and consequentially failed to observe that the raw resources of the planet Earth are manna from heaven" (Cohen, 2011, p. 229). He instead seems to believe that only persons and their powers are manna from heaven, that persons are morally rightful self-owners and that this self-ownership must be equally distributed - wherein Cohen (1995, 67ff.) identifies the crucial libertarian doctrine for the moral justification of strong private-property rights. This cannot be entirely false, as Rothbard (1978, 47f.) too affirms this as the fundamental libertarian creed.

Given that, Nozick could employ the argument that joint ownership renders self-ownership a merely formal, insufficient right and is thereby to be neglected, as it is the effective freedom to do something, not merely the rights of non-interference that matter for self-ownership. However, this then leads directly back to the baseline of joint ownership, as self-ownership would be just as much undermined in a libertarian institutional order for a person lacking means of production or income (Cohen, 1995, pp. 92–115).

This criticism is significant but does not address the core of libertarian legitimation theory. Both Locke and, more explicitly, Nozick and later libertarians rely at last not on the self-ownership thesis but on the Lockean proviso and the mutual benefit of a private property order. Nozick even explicitly concedes the empiricity of his claim without bringing forward any evidence to back up his claim (Nozick, 1974, p. 182).

This is broadly speaking the decisive argument in the right-libertarian legitimation of property, which distinguishes the radicalized classical liberal justificatory account from the standard classical liberal account, thereby becoming a libertarian, a logically moral account and with that a legitimation theory (Rothbard, 1982, 244f., Narveson, 1988, 85, 100f., Kirzner, 1989, 98ff., Epstein, 1995, p. 62, Mack, 1995, p. 213).

What Cohen succeeds in is in demonstrating that the arbitrary restriction of the comparative baselines is unjustifiable. It is both questionable, and insufficient that "A beggar in

Manhattan is enormously better off than a primitive person in any state-of-nature situation short of the Garden of Eden” (Narveson, 1988, p. 92). Instead for the proviso to be fulfilled, no feasible societal order is permitted to offer a better life for anyone.

Surprisingly then Cohen (1995, p. 112) identifies the main methodological problem of the libertarian legitimation project not in this grandiose empirical claim, but in the argumentative departure from both doubtful and insufficiently developed normative premises, e.g. self-ownership, which fail to make the conclusion of dramatically unequal legitimate property rights any less doubtful. Cohen himself does not see any problem in normative reasoning with normative premises, and neither do the left-libertarians that are striving to effectively synthesize both the virtues of an ideology centered around freedom and the known legal concept of property and the as vices identified foundational underdeterminations in their attempt to work out a theory of justice, a standard of legitimacy based on the appealing libertarian premise of self-ownership (Steiner, 1994, Vallentyne, Steiner, 2000, Steiner, Vallentyne, 2000, Otsuka, 2005, van Parijs, 2009). The inherent problems of legitimation theories based on natural rights will be addressed repeatedly.

Left-libertarians do not simply without justification presuppose, that “the labour of his body, and the work of his hands [...] are properly his” but reflect under which conditions this claim can actually be redeemed (Locke 1963b, 353f., §27).

They maintain that as no one has a privileged entitlement to the world’s natural resources, private property rights can only legitimately arise if it is to the detriment of no one, hence entailing a moral duty of those who have appropriated to compensate those who are thereby excluded from what was once common property (Kymlicka, 2005, p. 516). This criterion seems no different to the Lockean proviso as laid out by Nozick, suggesting that the diverging conclusions are simply the result of an empirical disagreement as left-libertarians in general favor much more redistribution and equality. A right-libertarian might simply approach the problem differently: “If you want to make sure everybody has enough pie, perhaps you should worry not merely about distributing pie but also about respecting bakers” (Brennan, 2018, p. 7).

This partially captures the left-right divide but not completely. The reason for that, as Friedman (1997) and Wolff (2006) highlight, being the libertarian tendency to mix two different kinds of arguments, namely utility-based arguments and right-based arguments, adopting one where the other seems to fail. Nozick exemplifies this, spending tens of pages on natural rights, then conceding a yawning justificatory gap within the natural rights

doctrine even cynically joking about grave persisting underdeterminations e.g. in the mixing-labor notion, to then not rely on natural rights but solely on the consequentialist, mutual benefit notion to legitimate property rights. The mutual benefit notion then seems to be either not consistently pursued, or with a straight-face and without any empirical evidence the claim made that the poorest in a capitalist order would not benefit from wealth redistribution. Legitimation theory that hinges on empirical claims, especially such doubtable claims, must finally be met with empirical evidence.<sup>19</sup> In this case, the onus clearly lies with the libertarians and their proposition of legitimate, drastic distributive inequality, rather than the other way around (Widerquist, McCall, 2017, 242ff.).

## 2.5 The Rationality of the Legitimacy Question

Considering the introduced and defended concepts of normativity and rationality, the concept of legitimacy begs the question of relevancy.

To answer this question, it is worth going through the implications of both the verdict of legitimacy and illegitimacy regarding a socially constructed power.

If the institutionalization of strong private property rights is deemed legitimate this means that one cannot rationally expect to do any better. This raises the question: Better than what? (Nozick, 1974, p. 177).

Following John Rawls, the baseline is the veil of ignorance, and hence a fair bargaining situation able to lay out the conditions of a just society through an overlapping consensus decision in deliberation (Rawls, 1971). Behind Rawls' veil of ignorance, no party has a reason to arbitrarily favor any particular interest group when deciding about the basic structure of a society, because no party knows about their personal identity. The basic structure, Rawls argues, would center around the two principles of equal basic liberties in the political constitution and the two headed second principle allowing economic inequalities only when they are based on fair equality of opportunity and the difference principle, hence to the benefit of the worst-off (Rawls, 1971, 42f.). Maybe it is the ideal theory of justice, maybe, Cohen (2008) argues it is not, given that it is neither consequently ideal nor in any sense non-ideal.<sup>20</sup> Let us even for the sake of the argument grant, that Rawls has authored

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<sup>19</sup> The long shadow that unexamined empirical claims have cast on legitimation theory over the last 300+ years has been brilliantly reconstructed by Widerquist, McCall (2017); (2022).

<sup>20</sup> Interestingly enough Cohen (2009) makes the same mistake in his appeal to socialism, as has been convincingly worked out by Brennan (2014)

the bible of justice; why must *one* care about justice? Rawls does not answer this question, he cannot answer this question and thus cannot ground the rationality of justice any better than virtue ethics can ground the connection between happiness and virtue. Justice might be the highest value for *some*, just as realizing reciprocal autonomy is for *others*, but neither seems to be a necessary condition for individual happiness. His assertion that the bargaining situation behind the veil of ignorance embodies reasonable conditions, within which the parties can make a rational agreement is hence simply false when measured against the above defended voluntaristic account of rationality.

Normative justification with normative presuppositions is flat out circular. Natural rights theory and social contract theory is hence a contradiction in terms, as the distinctiveness of the social contract approach precisely consists in not relying on exogenous (normative) reasons or moral truths that “govern” the state of nature (D’Agostino, Gaus, Thrasher, 2024). Both Locke and Nozick violate this principle, and thereby the idea of the social contract, by positing natural law, natural rights in the pre-moral, pre-political state of nature without sufficient justification.<sup>21</sup> If one posits controversial “moral laws” as premises, to then derive morally justified, legitimate institutions and social norms from that, one has achieved nothing, as the acceptance of the conclusions remains contingent upon the possible, but never necessary strict acceptance of the premises. This contingency must be reduced, must be overcome to plausibilize, to rationalize obedience, to rationalize legitimation theory based on the social contract. Natural law theories, or any other a priori claims about substantial moral obligations are principally regarded with considerable skepticism. This may seem to be a bold assertion, however, it must be emphasized how grandiose the claims of natural law and other moral objectivists are, given the major difficulties of redeeming their claim through sound argumentation.<sup>22</sup> This is the exact position that Buchanan (1975, 1, 11, 15, 166f.) adopts on this issue.

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<sup>21</sup> Locke grasps the existence of these laws indeed not only as a hypothetical, rationally permissible, pareto-efficient social order in the state of nature but believes this is indeed how pre-contractual societies were governed. Nozick’s outlook on this is not entirely clear. He adopts the Lockean account of the state of nature to demonstrate that even the most optimistic, legitimate outlook of initial anarchism culminates in a morally permissible, pareto-efficient process in a limited, but effective state order in Weberian state terms. However, that Nozick is a natural-rights libertarian himself is undeniable, given that the book begins with the proclamation that “Individuals have rights, and there are things no person or group may do to them (without violating their rights)” Nozick (1974, p. 9)

<sup>22</sup> The notion of natural rights has been arguably conclusively discredited by Bentham (2002, 317-401), he argues that natural rights lack any ontological basis, except and only to the extent that they reflect the personal desires of the person that propagates their existence Schofield (2003).

A far more convincing baseline than the questionable tribunal of “reason” is hence the tribunal of nature, and with that the Hobbesian baseline, which considers “the fact of reasonable pluralism, [that] citizens cannot agree on any moral authority, whether a sacred text, or institution. Nor do they agree about the order of moral values, or the dictates of what some regard as natural law” (Rawls, 1993, p. 97).

### **2.5.1 Justification of the State of Nature Baseline**

Thomas Hobbes is, and how could it be different, writing for his contemporaries, and thus for citizens, who have developed a practical tendency to question the legitimacy of their existing sovereign or in other words a tendency to wage brutal civil war. Whether the state can overcome civil war and with that the remnants of powerlessness to then sanction the insurgents post ex, reminding everyone of the effectiveness of its power, is one question. Another question is whether trying to overcome the state by revolutionizing, can be deemed rational, irrespective of possible state sanctions. The answer to that question is the criterion that distinguishes a legitimate from an illegitimate power. In an illegitimate societal order, it is not generally irrational to dream about its abolishment, as some people can rationally hope for a better life in another naturally feasible social order. In a legitimate societal order, no *one* could be better off in any other naturally feasible social order (Gauthier, 1969, p. 164). This does not mean that any social order in which inequalities persist is necessarily illegitimate, despite it being clear that *one* could be better off, simply by being *someone else*. While for Rawls (and hence allegedly for justice), this indeed is a concern, for legitimacy it is not. Normativity, rationality and in consequence legitimacy are subject dependent; as soon as one starts to imagine being someone else, reference to these concepts is no longer possible. This may nevertheless seem like a bizarre criterion, as it is essentially based on the assessment of the rationality of dreams, but this is, given the centrality of dreams, of hopes in political philosophy and political history, not as odd as it seems. Even if, as is so often the case in philosophy, the practical consequences to be reasonably drawn from these investigations are rather vague.

Furthermore, this “odd” criterion is necessary to maintain a distinction between institutional legitimacy and subjective normative obligations. The revealed illegitimacy of a power construct does not necessarily result in the irrationality of practical subjugation, in a normative obligation of doing something considerable to overthrow the societal order. Just



as much as in a legitimate social order it is not necessarily rational to comply with social norms. While everyone must want to have these social norms in place and hence others' complying with them, this alone is insufficient to consistently rationalize conforming to norms.<sup>23</sup> The rationality of morality might thereby be legitimately instrumentalized through a common power that enforces legitimate social norms.

### **2.5.2 Reevaluating the State of Nature: Contextual Variations and Implications**

While all the authors within the social contract tradition invoke the state of nature as an initial state of affairs with structural deficiencies, that allow a superior social order to be established, they do not take seriously possible variations. Habermas (1987, p. 8) identifies, therein, the philosophical downfall of a priori contractualist legitimation projects that “failed to account for the mobilization of living conditions”. The baseline is decisive for the contractualist legitimation project, and it is quite counterintuitive to assume that the state of nature, ergo living outside the state order during the Stone Age, the European wars of religion or in today’s Norway would converge to one state of nature baseline. Or that the consequences of abolishing private property rights, or the State in general, in rural Finland would be comparable to the consequences of doing the same in New York.

While the states of nature must not be holistically identical, there must be eternal inherent difficulties that can only be solved by a mutually advantageous, thereby universally legitimate social order. If this is not sufficiently possible, one would have to replay in fiction the resulting state of nature baseline in due consideration of the characteristic features of a society in order to be able to derive at least a relativistic but therein objective criterion of legitimacy. Or as (Buchanan, 1977, p. 294) puts it: "The individual who finds himself as a participant in a social order defined by legal rules that he had no part in choosing must ask the question: Are these rules within the set of alternative possibilities that might have merged from an agreement among all persons who are now participants in the game?"

Hobbes claims that the state of nature is an eternal, timeless and necessary misery (Macpherson, 1962, p. 19). His state of nature abstraction must then convincingly decontingentize the historicity and cultural diversity of being human and human coexistence, while still resembling real persons and real circumstances to “provide considerable insight

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<sup>23</sup> Whereas the old social contract tradition was more focused on answering the question what generates an individual political obligation (to abide the law), the more recent tradition has shifted to the question of which institutional order is mutually beneficial and stable over time D’Agostino, Gaus, Thrasher (2024).

concerning how real people would be likely to behave in similar circumstances” (Kavka, 1986, p. 84). Can the libertarian institutional rationally arise out of the state of nature? This would render it legitimate.

### **2.5.3 Autonomy, Scarcity, and Power: Conflict Lines in the State of Nature**

According to Hobbes, the state of nature in which natural persons live, is not a state of flourishing, but “solitary, poore, nasty, brutish and short” (Hobbes, 1949a, p. 65). The reason for that is innate to being human and hence to creatures, which are equipped with a desire to live as they please, and a fear of being repressed in the attempt to do so. Humans naturally do not have any obligations, they are free and, in that regard, equal (Hobbes, 1949a, p. 67, Hobbes, 1949b, 27f.).

The malady of natural persons consists in having, by nature, too similar desires in combination with the natural lack of means for their satisfaction. Grasped within our conceptual framework, Hobbes claims the inevitable, the “formal”<sup>24</sup> existence of an ex-ante conflictuality of subjective normative obligations, i.e. before considering the possibility of rational pacification through power.

However, power can only achieve a consistent allocation of obligations by shifting the “costs” of one's autonomy onto the resulting heteronomy of another, against which everyone must defend themselves. Conflicts about the preservation of autonomy persist for as long as society has not reached a state “in a certain sense beyond justice” namely one, which “has eliminated the occasions when the appeal to the principles of right and justice is necessary”, hence only in societies in which a practically feasible social will structure exists ex-ante (Rawls 1971, 249). A state that shall be called Utopia.

The satisfaction of any materiel desires is always and forever associated with labor (Marcuse, 1969, p. 18, Marx, Engels, 1972b, 578f.). Labor is hence an existential necessity, an obligatory action. Labor is not necessarily enjoyable, for many it might be, for others potentially not, yet everyone depends on the fruits of labor. However, the products of one's labor can also be alienated (Hobbes, 1949a, p. 63). For whenever the accumulation of individual needs exceeds social production, normative conflicts are bound to arise. There are simply more needs than means for their satisfaction. Exactly this is what economists call scarcity. If obtaining some good is the necessary condition for satisfying one's will, doing

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<sup>24</sup> Meaning without objectifying the ethical autonomy of persons.

so is *ceteris paribus* a normative obligation. If appropriating one and the same unsharable (type of) good is inevitably overdetermined by subjective normative obligations, hostility between equally desiring and equally hopeful subjects must arise (Hobbes, 1949a, p. 63). Because in the state of nature there exists "no propriety, no dominion, no mine and thine distinct; but only that to be every man's that he can get, and for so long as he can keep it" (Hobbes, 1949a, p. 66). This creates constant insecurity that in turn hampers social production, further deepening the scarcity and with that the necessary tensions.

The problem-solving strategy that the "scientific utopians" have brought forward is the creation of a state of abundance to overcome the scarcity through the cultural advancement of instrumental reason (Bacon, 1878, 1, III, Keynes, 2010, Marcuse, 1999, Bookchin, 2018, Graeber, 2007, pp. 54–90, Bastani, 2019). Here it is important to distinguish between those who claim the possibility of abundance without having to transform empirical interests, and those who consider abundance possible iff "false desires" are eliminated. In the case of the former claim, it is obvious that this has not and cannot be fulfilled, let alone sustainably. The latter claim is therefore more intriguing but faces the same justificatory difficulties as moral theories that objectify the good life.

Furthermore, some scarcities simply cannot be overcome by technology, for example ethical, political, organizational or religious conflicts. These types of conflicts will be termed ideological conflicts. Human beings are by design "ideology machines" of the finest quality. Ideologies serve a political function: they are "action-oriented systems of beliefs" (Bell, 1962, p. 400, Friedrich, 1963, p. 89). Ideologies are, therefore, a *topoi* that has been developed already, an expression of hope for the materialization of a not yet existing, not yet "recognized" supraindividual normative obligation. Ideological conflicts are unresolvable for as long as they exist, even among the fully rational individuals that we imagine living in the state of nature, with their doctrines disallowing peaceful coexistence.<sup>25</sup> No better example of that could be presented than the ideological conflict that sparked the civil wars during Hobbes' lifetime: the religious war. Protestants and Catholics of that time put forward a comprehensive set of social norms. Coexistence of these ideologies is therefore not possible; there, and here both parties agree, must be one, but there are two.

Conflict is not only conceivable, but inevitable. Utopia is not in sight. Under these circumstances anyone who wants anything must want to be a person with sufficient power

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<sup>25</sup> Habermas (1983, 24f.) is much more optimistic about that, though it is not evident for what reasons.

to effectively impose their rights, their will and with that obligations upon others i.e. transforming the socially necessary actions for the satisfaction of one's will into subjectively must actions ex-post (Hobbes, 1949a, p. 66).

While humans certainly differ in terms of physical strength and intellect, these differences are not sufficient to remove the decisive threat symmetry within the state of nature. In such struggle for power even the strongest, most powerful, most ingenious natural man has insufficient power to prevent attacks of even the weakest, and thereby remains incapable to establish effective rights (Hobbes 1949a, 66f.). Natural persons thus fail to establish complementary obligations both ex-ante and ex-post, even in the case of the most basic right claim of bodily integrity (Hobbes, 1949b, 28f., Pufendorf, 1672, III, V, §3).

Domination is momentarily possible, always and necessarily pursued, but never secure, which seems to rationally allow the pursuit of the climax of domination. This puts life, and thereby the condition of the possibility of volition constantly and reciprocally at risk, thereby establishing the advantageousness of striking first (Hobbes, 1949a, 63f.). However, this does not help in overcoming the anarchistic deadlock, as it simply gets deadlier and with that cooperation ever less frequent (Eggers, 2011). This gives rise to the state of war hypothesis, and with that the cause for the general and timelessness misery in the state of nature, which is "based not on innate hostility, but on hostility derived from the ever-possible conflict between men's powers of self-maintenance. War is the consequence of natural insecurity" (Gauthier, 1991, p. 17).

The seemingly inevitable state of war thereby destructively rules every state of nature, paralyzing substantial efforts to produce, to labor, despite that being an existential prerequisite, as well as the condition of the possibility of cultural progress as "the fruit thereof is uncertain" (Hobbes, 1949a, 64f.). This leaves one's naturally unlimited "rights" "in effect no better than if no man had right to any thing. For there is little use and benefit of the right a man hath, when another as strong, or stronger than himself, hath right to the same" (Hobbes, 1928, I, XIV, 10). For formal reasons, everyone wants to have rights, because that simply means one can effectively enforce a certain action of another. Having rights therefore simply increases power, which is always in everyone's interest.

The only possibility to overcome this deadlock, and indeed create effective, and not merely imagined rights is that taking on obligations constitutes a normative obligation (Hobbes, 1949a, p. 114). The fundamental condition of the possibility for obligations to arise in a rational way is that the scenario in which all stakeholders reciprocally oblige and thus restrict

themselves is preferred by all to the scenario in which nobody is under any restrictions, hence presupposing converging interests (Buchanan, 1975, 110f., Stemmer, 2000, 81f.). To illustrate this: while there exists a universal subjective interest of prohibiting domination, everywhere but in utopia there also exists a universal subjective obligation of domination. While everyone wants every other person to oblige themselves not to dominate anyone, no one can rationally be willing to put that constraint upon oneself, given that we know, that the world we live in does not allow the practical reciprocity of this right, which makes the claim of precisely such natural law existing a bizarre contradiction in terms (Nozick, 1974, p. 33). The feasibility of reciprocity is hence an integral condition, as no rational subject would unilaterally oblige itself without being granted rights at the same time (Stemmer, 2000, p. 81). However, to even become a stakeholder a person must fulfil a particular condition, the power condition. After all being granted rights does require others to oblige themselves, which, to render the agreement comprehensible, requires i.e. in the case of an agreement to prohibit killing, thereby granting the right not to be killed, the ability of every stakeholder to kill the others (Stemmer, 2000, 255f.).<sup>26</sup> This condition of the possibility of specifically that reciprocal contractual agreement thereby hinges on the fulfillment of Hobbes' natural equality premise. Contentwise only a general interest in not being killed, as well as in having access to sufficient means (consumption goods) to sustain oneself can for formal reasons be supposed.<sup>27</sup>

However, the mere having of an interest, as some philosophers argue, simply does not suffice for being granted a moral right, which simply is a derivative of propagating objective, natural rights (MacCormick, 1976, Rothbard, 1978, pp. 27–37, Raz, 1986, Ch. 7). While natural rights might of course exist, just as much as virtues might be necessary to achieve happiness, there remains a difference between the prophet and the philosopher, namely the requirement of justification, which the natural rights proponents regularly violate. While the validity of the natural law hypotheses e.g. of having self-ownership rights seem to be no more than a contingent matter of taste, the conclusions are of general concern, given that each right

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<sup>26</sup> It is irrelevant here to define which living people can be granted rights and which not, but it is clear that no rights as defined above can be granted to weak, dead and unborn people. However, they can still receive protective rights if strong people act as guardians for their interests and thereby establish certain obligations towards them.

<sup>27</sup> This is essentially a Hobbesian argument, even though he at last and just like other natural right theorists denotes these general interests then, for no particular reason, as a natural right Hobbes (1949b, 26f.) Geismann (1982, 169) agrees with the verdict that this is self-contradictory in the case of Hobbes, and he would be well-advised to get rid of natural rights talk altogether.

requires others to take on obligations. To them, an answer must be available as to what bad things would happen if one would not conform to the natural law, to which an informative answer cannot again refer to the intrinsic evil of having violated a person's right to self-ownership. This bad must moreover outweigh the good of keeping the freedom right that is lost by taking on the obligation to respect the self-ownership rights of others. Whether this even is the case for everyone on the matter of bodily integrity or property (of whatever kind) cannot be answered a priori.

To sum it up with Hobbes: “a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down the right to all things [...]; and be contented with so much liberty against other men, as he would allow other men against himself” (Hobbes, 1949a, p. 67). A priori we have no clue whether these conditions amount to any social norms, and if so to which, these are all empirical questions. Yet, mere promises do not magically impose obligations in the sense of different normative obligations upon one, and with that do not contribute anything to change the detrimental state of nature (Hobbes, 1949b, 66f.). All pledges of constraint “without the Sword, are but Words, and of no strength to secure a man at all” (Hobbes 1949a, 87).

The displayed configuration of interests<sup>28</sup> in which the reciprocal assumption of obligations with the subsequent granting of rights only “oblige in foro interno; that is to say, they bind to a desire they should take place: but in foro externo; that is, to the putting them in act, not alwayes. For he that should be modest, and tractable, and performe all he promises, in such time, and place, where no man els should do so, should but make himselfe a prey to others, and procure his own certain ruine, contrary to the ground of” subjective interest (Hobbes, 1949a, p. 82). Although every natural person should have realized by now that cooperation, not domination is required to overcome the miserable natural state of war, coordination problems persist especially in a multiplayer game situation that reasonably prevent cooperation from occurring (Buchanan, 1965). After all, it is only rational to limit one's actions, thereby granting other's rights, if all others whose respective actions may affect one are sufficiently consistently doing the same e.g. to refrain from physical violence against others. To increase the practical reliability of constraint by others, in order to solve the cooperation problem right violations must be linked to sanctions. Of course, this cannot

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<sup>28</sup> Hobbes speaks here about the “Lawes of nature”. These are differently defined and deduced in a, as already hinted in footnote 25 philosophically problematic way, though I cannot go in further detail about that. A very favorable analysis of the Laws of Nature by Hobbes can be found in Zagorin (2010).

guarantee strict compliance either, as the normative paradox persists; the rationality of acting as obliged can nonetheless be increased, or rather, be created in the first place. For these reasons, Hobbes argues, natural persons must seek shelter in the state, which is an institution powerful enough to establish social norms and powerful enough to transform reciprocally beneficial actions-bundles via sanctions into generally obligatory actions (Hobbes, 1949a, 14, 89).

#### **2.5.4 Hobbes' „Solution“**

The justifiability, the legitimacy of the state hence clearly seems to depend, first and foremost, on the substance of these norms. The state can only legitimately enforce obligations, thusly actualizing rights that fit the required configuration of interest in the state of nature. Hobbes negates this. A genuine fusion of wills to create a common power, and thereby pacify the state of nature, can only be achieved if the cumulative will of individuals is in harmony, which, as has been laid out, it is not. Alternatively, this can be achieved if individuals recognize what one person wants as being wanted by themselves, which is the option that Hobbes chooses (Hobbes, 1949a, p. 146).

Before going there, the claim that it is impossible to create a substantially defined common power by consensus must be critically examined, since we have, under the guidance of Hobbes, just outlined how and under what conditions exactly this is possible. It is wholly unclear whether and if so, what rights would consensually arise departing from the state of nature. Substantial information could only be obtained empirically, and every empirical social contract theory runs as laid out into insurmountable antinomies. In addition, the imposition of limits on the legitimate authority of the Leviathan leads to perpetual interpretative problems of whether these have been overstepped, whether the government is still legitimate with factional disagreements arising that might lead back into the state of war or at least hinder effective governance. Every attempt to solve this dilemma entails an infinite regress with one persisting outcome: war. Along these lines Hobbes revokes his initial openness towards possible systems of government for pragmatic, and in hindsight unconvincing reasons laying the justificatory ground for Absolutist monarchy (Kersting, 2005, p. 103, Holman, 2019). For a contract to effectively exist, there must be a power strong enough to enforce that contract, that itself can logically not be part of the agreement.

This then demarcates the Leviathan, the sovereign, distinguished as the carrier of certain capabilities. To successfully create a sovereign (state order) it is necessary that all equally

refrain from their practical pursuit of power and retreat into the inner citadel to advance from the war of the huts to the peace of the palaces (Hobbes, 1949a, p. 89). The concern here is not merely greater material prosperity, facilitated by the absence of war, but the creation of normative stability. It is not a “contract” in which morally autonomous subjects constructively conclude social norms, but one in which all subjects relinquish their rights, their natural power, creating a mortal god, the Leviathan.

Relinquishing their rights and their power is not contradictory to the claim that the pursuit of power is an intersubjective normative obligation anywhere but in Utopia, as in the state of nature these rights had never been effective. They would hence act rationally in relinquishing imagined rights, in exchange for effective rights facilitated by positive state law. No wrong can be done to the citizen, for as long as the abstract condition of the possibility of rational consent is not violated, which in case of the Hobbesian social contract is the general superiority of the Leviathan state to the state of nature.

However, for such unconditional capitulation, such contractual agreement to be rational, the existence of an irresistible power able to solve the resulting Prisoner’s dilemma, must already be presupposed, despite that being precisely what the agreement is meant to establish in the first place. Hobbes thus took a radically circular approach, which oscillates between past and future to remain presently potent. While Leviathan might empirically exist, under Hobbes’ own premises it is not comprehensible how. Yet, it should be noted that Hobbes is not writing for those who are indeed troubled by the state of nature but guiding already “civilized” people on how to avoid the summum malum, the decline into the state of nature.<sup>29</sup> The legitimacy of state law is therefore supposedly rationally justified by its pure form and can reasonably abstain from any substantive concretization of law without running into antinomies. The legitimated formal character of law, though explicitly arbitrary in its content, must nonetheless accord with formal criteria. On the one hand, it must be internally consistent to realize its pragmatic justification of overcoming the state of nature and with that normative anarchy. On the other hand, law must strictly separate actions from convictions, judging only the former, while establishing tranquillized spaces of indifference for the latter. Put differently, belief and conviction are not touched by law if not expressed by unlawful actions – “auctoritas, non veritas facit legem” (Hobbes, 1949a, II, 31).

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<sup>29</sup> The impossibility of rationally leaving the terrible state of nature is another great argument to convince citizens of the necessity of absolute obedience which is precisely Hobbes’ goal Neal (1988, p. 646).



Otherwise, ideologically defeated parties, for instance Catholics or Protestants would not only have to be suppressed but crushed, immediately leading back to the state of nature.<sup>30</sup> Under these conditions the Leviathan rules as a non-utopian supposedly rational-choice based utilitarian, that can commit iniquity by non-optimally calculating his legislative and executive decisions, which is insufficient to be labelled an injustice (Hobbes, 1949a, II, 18). Yet, while non-optimal legislation indeed is not sufficient to lift state legitimacy, sub-optimal calculations, in the sense of worse than the state of nature, obviously are, or as Locke (1963, p. 392) twists the knife: “this is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by Pole-Cats, or Foxes, but are content, nay think it Safety, to be devoured by Lions”. It hence ultimately remains an empirical question whether the state is legitimate. To prevent this becoming an empirical question paving the way back to the state of nature, the occurrence of such cases is a priori rendered impossible as nothing can match the horrors of Hobbes’ state of nature.

Hobbes at last concedes precisely what he in striving to be an a priori political theorist intended to circumvent, namely that the legitimacy of the state of nature, is after all an empirical question by making use of the “savage people in many places of America” in an effort to demonstrate the horrors of living in a state of nature and legitimate the imposition of a state order upon people irrespective of – irrational – opposition (Hobbes, 1949a, p. 65, Kavka, 1986, pp. 4–10).<sup>31</sup> That this is an empirical question can also be derived from the requirements that a “good” Leviathan has to meet, despite him not having any obligation to do anything but “as he should think fit” (Hobbes, 1949a, p. 165). Just as there can be good and better Leviathans, there can be worse ones which do not generally meet the state of nature baseline. Hobbes completely exposed himself to this contingency.

The limits of political obligations, and Hobbes inability to reasonably incorporate them in his calculus have been identified as the Achilles’ heel of his theory by some other recent commentators as well (Lloyd, Sreedhar, 2022).

Because what is meant to define the Hobbesian state construction is not just the sovereign's

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<sup>30</sup> Hobbes has to contend that individuals, when subjected to legally compelled actions that may be perceived as sinful, cannot be morally held accountable, including at the final judgment, given that all public power and thus responsibility rests on the Leviathan Hobbes (1949a, 270, 308). However, here it seems that Hobbes the prophet, and not the philosopher, has raised his voice. For if they could be held responsible it would not be rationally intelligible why one would commit themselves to sin and thus to eternal damnation. Eternal damnation always trumps worldly salvation.

<sup>31</sup> Hobbes was aware that the state is never created via contract, but by way of conquest.

absolute power, but the interdependence of protection by law and a duty to absolute adherence to the law (Schmitt, 1938, p. 103). Only when both conditions are met is political morality rational, hence never. Stability has its benefits, but only a legitimate society is “stable for the right reasons” (Rawls, 1999, p. 29). Hobbes argument is for multiple reasons structurally flawed, this has been established already. It is not an a priori sound argument, but an empirical question. What Hobbes seemingly really never seriously considered, is that he could be falsified by empirical evidence. Maybe people in the state of nature can be better off than in a state-order, because anarchy is not so bad for everyone after all. Structurally similar to the Lockean proviso, the Hobbesian hypothesis claims that everyone under a sovereign government is better off (or no worse off) than they could reasonably expect to be outside of that authority (Widerquist, McCall, 2017, p. 30).

Precisely this is the claim that shall be established in the last chapter.

### **2.5.5 Buchanan’s “Solution”**

Buchanan’s philosophy stands in the tradition of Hobbes, even though the Leviathan state is his biggest political enemy (Buchanan, 1975, 13ff., 161ff.). This might seem contradictory, but it is not. Buchanan and Hobbes share most of their premises, but barely any conclusion. Their outlook on the challenges that legitimation theory must master, their concept of legitimacy, as well as their characterization of the baseline, the state of nature, against which a legitimate social order must be measured are almost identical.

Buchanan deviates from Hobbes' premises in two crucial points. Firstly, the premise of natural equality is dropped, as clearly individuals differ in their physical strength, intellect, effort and talents (Buchanan, 1975, 25f.). It is unplausible to expect such symmetry in the state of nature. The emphasized threat symmetry, and subsequent reciprocity of rights as well as obligations is thereby null and void.

The only persisting condition is that whatever social order is established must improve the well-being of all stakeholders. Mutual benefit is hence claimed by Nozick, by Hobbes and by Buchanan, this is, as has been worked out, the constant in social contract theory. Buchanan adopts the unproblematic, and above defended “measurement” of well-being that depends on whether one succeeds in realizing one's own will. Given that “genuine”<sup>32</sup>, but

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<sup>32</sup> This conceptual demarcation between “genuine” and “mock” social contract theories has been introduced by Zintl (1983, pp. 29–34) Genuine contract theories are characterized by a realistic starting point for negotiations

nevertheless normative contract theories are enhanced by greater correspondence to the facts, this might be a reasonable deviation from Hobbes (Buchanan, 1975, 53f.). Even though Hobbes does not presuppose natural equality in a sophisticated fashion, but specifically in a functional manner concerning the common effective “right”, the common power to kill each other, despite all other differences.

There are, as has been worked out, a multitude of reasons, linked either to material or ideological conflicts, for the rational rise of hostility in the state of nature. Curiously, Buchanan narrows the conflict lines strictly to the material level, the only question and problem in the state-of-nature according to him then becomes the question of ownership, the question of the attainable bundle of consumption goods (Buchanan, 1975, 80f.). Everyone tries to appropriate as much property as possible. Buchanan suggests that for this reason people would not kill each other, but enslave them in order to increase output and with that material welfare (Buchanan, 1975, 59f.). The possibility that the operating costs could exceed the produced benefits – killing would be the rationally obligated action in these cases – is not considered. Not everyone can appropriate as much as they would like to, this defines the state of scarcity. A person can appropriate only as much as they can conquer and defend in the fierce competition for scarce goods that are essential for survival. Depending on the relative skill of a person, the resulting property distribution may vary, but a specific natural distribution will be reached, precisely when the marginal costs of conquest and defense are equal among every stakeholder (Buchanan, 1975, 23ff.). A social equilibrium has been reached, however, this equilibrium is pareto-inefficient (Buchanan, 1977, p. 137). It is mutually beneficial for people to sign a disarmament treaty, thereby transforming seized property to legal property, possession via power to ownership via rights. Everyone obliges themselves to respect the property rights of others, to obtain the same right for themselves (Buchanan, 1975, 58f.).

A common power, the creation of a protective state is obviously required to stabilize the now pareto-superior equilibrium state (Buchanan, 1975, 64ff.). The investments into conquest and defense are thereby considerably reduced, as taxation will be much cheaper, and one can instead invest as one sees fit in productive capacities and produce surplus, which can be offered on the marketplace, enabling a priori mutually beneficial trade, division of labor and

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and are therefore non-presuppositional legitimation theories in the sense that the bargaining situation is not "morally" prefigured.

hence ever greater societal welfare. Property rights and contractual freedom are therefore the foundation of any stable societal order that nevertheless resembles the ideal, but in itself unstable ordered anarchy (Buchanan, 1975, 2ff., 17ff.). Buchanan's conclusions hence closely resemble a libertarian institutional order, laissez-faire capitalism, but his argument stands out from the rest in being (more or less) free from any normative presuppositions (Buchanan, 1977, 287ff.).

A legitimate state, based on quasi Hobbesian premises, can therefore not be sovereign in the Hobbesian sense, as this threatens to quickly self-destruct the mutual benefit, the pareto-superiority upon which its claim to legitimacy is based (Buchanan, 1975, 43ff.). This is fine criticism, but that same logical contradiction also pertains to Buchanan himself, as he must make (implicit) assumptions to reach a stable substantial conclusion. It is questionable that property rights with unrestricted discretionary powers could legitimately arise, as this presupposes strict general dominance of the expected value of such a legal system. A claim that cannot be a priori redeemed given the rational possibility of different risk-taking propensities with which the superiority of alternative order with weaker property rights and different distributive measures cannot be logically excluded (Zintl, 1983, 108f.).

Moreover, the assumption that departing from the initial property distribution, bilateral transactions, hence trade, will always and a priori meet the Pareto criterion – hence making at least one person better off without making anyone worse off – presupposes that no undesirable effects for third parties eventuate (Davis, Kamien, 1970). This claim is empirically false. Two people may consensually engage in a romantic relationship or sexual practices, but such actions nevertheless often provoke community disapproval and social repercussions, demonstrating that third parties can be significantly impacted by bilateral transactions. Similarly problematic is Nozick's famous "Wilt Chamberlain argument" that is meant to illustrate how consensual bilateral agreements disrupt whatever initial "just" distribution of holdings; that „liberty upsets patterns“ (Nozick, 1974, p. 160). While this is first and foremost aimed at Rawls, he too makes the same problematic assumption that Buchanan makes. A person might welcome a world where he/she and a million others each pay twenty-five cents to watch Wilt play, but consistently disfavor one where Wilt ends up making a quarter million from it (Cohen, 1995, p. 26). Reasons for that could simply be envy, disapproval of Wilt's thereby created economic power and consequently influence, resulting increased costs to "book" Wilt for future events due to his strengthened bargaining

position or other, economically relevant issues (Kahn, 1966).<sup>33</sup>

Buchanan's conclusions do not follow; every possible substantial conclusion, and hence legitimate social order is empirically underdetermined and unstable. And this criticism does not even address his indefensible economic concept of welfare, which reduces welfare solely to the available bundle of goods and the resulting elbowroom. This perspective ignores (important) fields of action that, while economically irreducible, are nonetheless crucial for one's well-being. Yet, even further problems arise within Buchanan's legitimation theory.

The emphasis on the departure from a realistic state of nature is unproblematic, it even is the only reasonable point of departure for legitimation theory. However, as the state of nature and the natural distributive equilibrium nevertheless is merely an "idea of reason", in the sense that it is necessarily underdetermined how the natural distributive equilibrium would empirically turn out tomorrow, no one knows whether the present, state-backed distribution of property is actually legitimate. He is aware of this problem, for a social order to meet the criterion of legitimacy, of mutual benefit it must thereby always be pareto-superior to the renegotiation expectations in the state of nature. He assumes that with increasing deviation of the status quo distribution from the renegotiation expectations, the rationality to obey the established order and with it the stability generated benefits decrease (Buchanan, 1975, 74ff.). Of course the protective state could simply step up sanctions, but Buchanan is more interested in the possibility of social contract renegotiation, and hence of property redistribution (Buchanan, 1975, 77f.). However, this might only take place after the protective state has been established, which has no legitimate autonomy but is bound to the initial agreement or later consensual changes. Let us even assume that renegotiation expectations reflect the "truth", a bold, untenable assumption, and simple material redistribution is able to restore mutual benefit: How and why should this redistribution come about? Those having more than they would naturally obtain must only "redistribute" welfare to those having less than they would naturally obtain with the state of nature as a common baseline, however, there now exists a protective state that sanctions any attempts to change the current distribution as this would necessarily involve property right violations. While for the sake of stability some "philanthropic" measures might rationally be adopted, it is

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<sup>33</sup> A more comprehensive list of market-failures measured against the criterion of pareto-efficiency can be found in Lindblom (1977, 78ff.).

incomprehensible how the necessary distributive changes could rationally come about, rendering the societal order illegitimate on its own terms. As Amartya Sen (1970, 24f.) rightfully remarks: “consensus or unanimity as a basis of collective action [...] is a method of supreme conservatism”.

This is more than just an implementation problem; this is a construction problem. Neither is it possible to know which changes would be necessary, nor the rational adoption of them, even though both conditions are necessary to make sure a social order is legitimate. It seems that anything goes in Buchanan’s legitimation theory, even though his initial, respectable and defended criterion of legitimacy, that of mutual benefit with respect to the ethical autonomy of individuals does not allow any of that. Buchanan departed from generally defensible premises that are broadly speaking identical to the laid out Hobbesian conditions of the possibility of rights. In both cases we simply have no idea what legal order, if any, would emerge and hence what can be deemed legitimate or not. Hobbes was aware of this problem, but seemingly not of the antinomies that his nevertheless ingenious solution attempt entails.

Buchanan legitimates certain institutional orders and criticizes other institutional developments for their lack of legitimacy, despite Buchanan’s, methodologically admirable theory being incapable to substantially determine conditions of legitimacy in any sense (Buchanan, 1975, p. 87).<sup>34</sup>

For as long as one makes any problematic assumptions about the state of nature, legitimation theory becomes circular; for as long as one tries to depart from a realistic state of nature “no specific argument follows, but rather contract-theoretical nihilism: anything is possible” (Zintl, 1983, p. 90).

### **3. What Can I Know?**

#### **3.1 The Necessary Failure of Genuine Social Contract Theories**

All a priori attempts to legitimate social norms or a societal order in general, and the libertarian institutional order more specifically have been rebutted in Chapter II.

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<sup>34</sup> „Almost any conceivable activity of the state, either as observed or as imagined, may be explained as a conceptually possible outcome of some sort of ‘social contract’” Buchanan (1977, p. 127). Similarly put in Buchanan (1975, p. 87).

Normativity, rationality and in consequence legitimacy are subject dependent, thus temporally bound concepts; as soon as one starts to imagine being someone else, somewhere else or in another era reference to these concepts is no longer possible. The state of nature is the only defensible baseline for questions of legitimacy, and according to Hobbes, this baseline is not very high. It is nevertheless not a priori possible to determine any societal order or social norm to be legitimate or illegitimate as Hobbes tries to argue. It remains an empirical question whether the claimed mutual benefit can be redeemed in case of legitimacy. A legitimate social order can only be one that maximizes everyone's individual utility vis-à-vis feasible alternatives. Alternatives here describe the state of nature or the alternative orders that could emerge from the state of nature.

Even if the concept of benefit is difficult to empirically quantify, this does not mean that it is not the right criterion for determining legitimacy. It is simply a further obstacle in the way of redeeming any specific claim of legitimacy. This may be incredibly complex, but at least it is conceptually correct. Apart from this empirical challenge, there is also an immanent epistemological problem that arises from the defended voluntaristic conception of rationality, which can undoubtedly be problematized based on its necessarily partial heteronomous genesis. The more closed and thus ideological a society becomes, the more significant and problematic, this open flank can become. The claim that we have dealt with is the libertarian claim of legitimacy, more precisely the claim that a libertarian institutional order is mutually beneficial .

It might not be entirely clear why the in-depth examination of Hobbes was even necessary for that, why he is important for a critique of libertarian legitimation theory. If one could not object to Hobbes' arguments, one would be "forced" to accept his conclusion and thus adopt an emphatic, morally distinguished affirmation of positive law. If a libertarian institutional order just happens to be positivized, it would also be legitimate. Of course, this would not be a conclusion in the interest of the libertarians, who generally adopt a sceptical attitude towards positive law as strong property rights would thereby only be as strong as the Leviathans' commitment to them.

Given that every legitimation theory must claim that the defended societal order Y maximizes everyone's individual utility vis-à-vis feasible alternatives, a proposition that applies to all elements in the universe of discourse, it is sufficient to find one element, one counterexample where this proposition does not apply to falsify the whole theory. The two empirical hypotheses that need to be examined are firstly the Lockean proviso claiming that

a private property order (in the specified sense) maintains or improves the general availability of objects for usage (which is taken to be equivalent to happiness) in comparison to any other feasible alternative order, and secondly the Hobbesian hypothesis claiming that everyone under a sovereign government is better off (or no worse off) than they could reasonably expect to be outside of that authority.

While it is arguably not possible to falsify the Lockean proviso, as it can always be argued that no perfectly libertarian institutional order has ever existed,<sup>35</sup> just as much as every empirical state of nature investigation can be deemed flawed, the burden of proof clearly lies with the libertarians and their controversial claim of legitimacy.

As it has been laid out, that the Hobbesian hypothesis makes prophetic assumptions that render its validity a priori questionable. But let us once more ignore these difficulties for the sake of the argument. The fundamental problem in the state of nature according to Hobbes is the perpetual hostility and consequent violence, so how does this hypothesis hold up empirically. Is “continual fear, and danger of violent death” a reasonable outlook on the state of nature? (Hobbes, 1949a, p. 65). Of course, violent death remains both a possibility in every state society as well as in every state of nature, but the empirical data suggests that not all state societies fare better than stateless societies, possibly not even on average (Widerquist, McCall, 2017, 132ff.).

This raises the question: How do they do it? A decisive mistake in Hobbes' conception of the state of nature is his creation of a false dichotomy between the individual (state of nature) and society (state). While it is true that e.g. forward-looking contracts in an anonymous global economy without a contract-enforcing agency might not emerge, it does not follow that the state of nature must resemble a battle royale. Cooperation remains possible, first and foremost within small groups in which certain mechanisms e.g. reputation, enable the stabilization of cooperation, the prevention of violence without a central authority in place and with that far greater welfare than in Hobbes' supposedly uncircumventable state of nature (Widerquist, McCall, 2017, 162ff.).

This shifts the Hobbesian baseline considerably, just as Cohen's critique did in case of the Lockean proviso. The onus then once more clearly lies with the apologists of state authority, rather than the other way around. Of course, living in mostly nomadic, small-scale societies is not a viable solution, in the sense of superior solution all around the world due to the

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<sup>35</sup> This is precisely the claimed by Nozick (1974, p. 172); Lomasky (1987, 125f.); Machan (2006, p. 170).



enormous population density, that would, arguably, indeed pose considerable, assumingly, Hobbesian problems in the state of nature. Taking up the impetus of the Rousseauian indoctrination problem, it can be argued that this baseline is just as “rigged”, as people are only dependent on the state to protect them from the possible violent conflict that the state has itself created through century-long population politics (Widerquist, McCall, 2017, p. 236).<sup>36</sup>

While it might be conceivable, that the state order is legitimate in areas with a high population density and thriving industry, for instance in London, even then nothing substantial follows from that.<sup>37</sup> As shown, an a priori duty to absolute adherence to the law never exists, just as much as polyarchic forms of sovereignty must not lead back into the state of war or render effective government impossible. In many states, one has an institutionalized right to participate in government, at least through the choice of officials. In many states, one has no institutionalized right to participate in government, or this right is more blatantly a farce than in other states.

Even if it might not be rational to strive for the abolishment of the state in certain cases, there exists no conclusive reason to not at least try to change the state’s government to enhance one’s happiness. The legitimacy of a possibly positivized libertarian institutional order would thereby be rendered meaningless. Hobbes thought he could rebut this claim, as any sort of disobedience would quickly degenerate into war. However, both conceptually, and empirically this is, as Hardin (2003, p. 43) puts it “an unduly confident social-scientific claim”. Even if the Hobbesian hypothesis might sometimes be fulfilled, thus the state is legitimate, this does not mean, that one is obliged to emphatically endorse whatever positive law. The form might be legitimate, but its substance never is. With state power being a global reality, the possible legitimacy of the state order practically entails absolutely nothing specific. Imagine you are considering different hypothetical scenarios to make a decision. The purpose of considering these hypotheticals is to see how different actions or conditions might lead to different outcomes. However, if every hypothetical scenario leads to the exact same outcome, then the specific details of these scenarios do not matter. The conclusion or consequence is the same regardless of the variations in the hypothetical conditions.

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<sup>36</sup> That the state has been doing exactly that in the last centuries has been brilliantly examined by Foucault (2008).

<sup>37</sup> The burden of proof for this nevertheless remains with the statist, which hence entails refuting a multitude of anarchistic societal models e.g. of Bakunin (1972); Ward (2004); Chartier, Johnson (2011).

If the state is illegitimate, the biggest obstacle to change the social order is the state, or more precisely social power; if the state is legitimate, but one wants to change the government, the biggest obstacle is the state, or more precisely social power; if the state is legitimate, and one want to preserve the government, the biggest threat comes from contradictory social powers taking over.

### **3.2 Libertarianism Refuted: Where to go from here?**

The title of this thesis is referring to the limits of the left-libertarian legitimation of property, while the main focus was on rebutting the three possible pathways to a legitimate libertarian institutional order. This is of great importance, as left-libertarianism assumes to be departing from libertarian thought, from fundamental libertarian premises, though it reaches considerably different conclusions especially regarding distributive justice.

However, libertarianism is not hold together by certain premises but by their conclusion of claiming legitimacy for libertarian institutions. This is of course not a problem, as libertarians themselves captured the term from the political “enemy”. But it is precisely this misconception that afflicts the young left-libertarian tradition as a consequence of their flawed reading of Nozick’s influential libertarian political philosophy.

Nozick's argument pretends to depend on premises on which it effectively does not depend, all the more so since it is apparent that Nozick is fully committed to the validity of these "premises". Nozick is not the only one culpable for that misconception as there is an overarching tendency in justifications of the libertarian institutional order to mix together two different sorts of arguments, namely utility-based arguments and right-based arguments, adopting one where the other seems to fail.

It must be remembered that libertarianism itself emerged as a polemical political ideology in the 1970s, in which tough battles were fought to set the political agenda for the economic framework of the coming decades and the state's role within it. Reaching the (desired) conclusion therefore simply overrides the pursuit of watertight argumentation, as is not uncommon in political philosophy and normative social sciences for various reasons. This is particularly evident in the works of Hobbes and Buchanan, both reacting to actual or perceived crises of their time, both committed to a rigorous, value-free methodology, but both unable to consistently follow it through and come to terms with the impossibility of reaching their desired, or even any conclusion, hence employing certain "tricks" to ultimately

reach their goal; and thereby miss it. With Nozick, the matter is more complicated, because he does indeed believe in both his premises and the validity of his conclusions, although he never succeeds in putting these two building blocks together, which is why the conclusion is ultimately reached via detours and the premises are left behind as vague creeds.

Not the conclusions, but the premises, first and foremost the premise of self-ownership rights inspired the left-libertarians to develop a distinct political ideology. The libertarian institutional order is fundamentally centered on the concept of private property. It is against the backdrop of property that notions of rights and obligations, as well as permissibility and impermissibility, are articulated and defined. Left-libertarianism adopts the premise of self-ownership and the centrality of the property concept, but reaches different conclusions regarding legitimate social inequalities. The left-libertarian project allows approaching citizens born and raised in capitalist societies in legal terms and relations they know and (are incentivized to) respect.

For strategic reasons this might seem like a promising approach, however, for two main reasons this initially promising pathway goes nowhere at last: Firstly, the question of self-ownership is not as straight-forward as it seems beyond the merely formal right of non-interference over the use of one's person, that are themselves not even strictly rationally redeemable given the existential necessity of subjection (Waal, 2006, 4f.). Secondly, the in-effect Georgist left-libertarian solution in which agents can legitimately privately appropriate unappropriated natural resources as long as the competitive value of the rights they claim is paid is not as straightforward as many left-libertarians believe (Tideman, Vallentyne, 2001). One of the authors, Tideman, argues that rent payments should be divided equally among all persons, while the other author Vallentyne argues that rent payment should be divided as to promote effective equality of opportunity for a good life, meaning they are divided unequally to compensate for unchosen inequalities in opportunities for a good life (talents, looks, early child education etc.).

This represents a severe blow to meritocratic reasoning, as hardly anything seems to be attributable to individual merit (Steiner, 1997). Nevertheless, considerable differences persist among left-libertarians in this regard as well as the danger that the self-ownership premise gets hollowed out entirely at the offering table of naturalistic de-jure determination (Shnayderman, 2019). Of course, both authors emphasize the overarching unity in their left-libertarian divergence, but the fundamental difficulty is that there is no clear criterion to decide this difference, it is neither an empirical question, nor an analytical one; it simply is

a matter of choice, an intuition.

Furthermore, it is not possible to derive any concrete information about the extent of the legitimately arising property rights (legally speaking) from the self-ownership premise. Can one sell oneself into slavery? Here the two authors disagree once more. What uses of property are legitimate, given that effectively all uses infringe the interests of others? This must be answered to create a legitimate legal order, but it cannot be deduced, it is hence yet another, further normative question that banks on shared intuitions (Fried, 2004, 72ff.).

While legitimation theories based on natural rights, or more precisely moral intuitions seem in itself flawed, because it is simply a matter of contingency whether one shares a moral intuition. The claim of self-ownership at least in the sense of everyone having rights of non-interference over the use of their person might actually be empirically redeemable, hence consensually affirmable. One could for that even, as hinted, develop a transcendental argument.

However, even then left-libertarianism requires many further normative decisions to amount to the comprehensive, substantial political philosophy that it is and aspires to be. The left-libertarian claim to legitimacy is thereby turning increasingly into a farce.

This holds just as much in the social contract tradition, within legitimation theory generally speaking due to the epistemic difficulties of redeeming claims of existing (hypothetical) intersubjective normative obligations. It is reasonable to believe that such order simply does not exist.

These are good, sufficient reasons to turn away from these philosophical questions to a extent, to stop desperately chasing after an answer. However, depoliticization is by no means the rational result of this, but rather a departure from pretentious moralism in political discourse, a departure from pathetic institutional creeds towards a carefree pursuit of individual happiness and the creation or maintenance of the for that necessary societal framework. Intuitions are very much welcome within such discourse, though not any longer under the at best confusing, at worst ideological label of natural rights. No one has the one formula, even though we are all looking for it.

## **Conclusion**

In this thesis, the primary aim has been to critically examine the legitimacy claims associated with a (left)-libertarian institutional order and to evaluate the philosophical underpinnings of such claims. The investigation has unfolded in a manner aligned with the thesis' objectives, revealing both the intricate nuances of legitimation theory and the limitations of (left)-libertarian arguments.

At the beginning, an ontological analysis of normativity, focusing on subjective normative obligations, rationality, well-being, and moral obligations is given. This foundational framework is essential for understanding legitimacy, which the thesis argues hinges on these concepts. Through this lens, it is established that normative obligations define rationality and that fulfilling one's will constitutes happiness. Subjectively, autonomy constitutes a moral, hence formal and general obligation. Autonomy entails the possibility of rational conflict. Legitimation theory with substantial results claims to be able to rationally sublimate these contradictions, it thereby claims mutual benefit. The claim of mutual benefit has been identified as the decisive aspect of the social contract tradition. The three exponents Nozick, Hobbes and Buchanan each fail in their own unique way in their attempt to substantiate legitimation theory and with that legitimate the libertarian institutional order. The same concerns that apply to the libertarian legitimation theory also apply to the left-libertarian legitimation theory. Their reliance on self-ownership and the applied deductions were found to be flawed. The thesis concluded that not only the (left)-libertarian legitimacy claim cannot be conclusively redeemed, but that no substantive claim can ever be (conclusively) redeemed. The whole concept of legitimacy might be fundamentally flawed, or more precisely, our expectation that the questions we pose can yield simple and clear-cut answers might be misguided.

In conclusion, the thesis affirms that while the pursuit of legitimacy in political philosophy is crucial, it must be approached with a recognition of its conceptual and practical limitations. The examination of libertarian and left-libertarian theories demonstrates that claims of legitimacy, when scrutinized, may not withstand rigorous philosophical analysis. While the quest for legitimacy is important, it must be tempered by an understanding of its inherent complexities and limitations.

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