CHAPTER 6

Further Considerations on the Argument for the State

OUR argument detailing how a minimal state arises, legitimately, from a state of nature is now completed. It behooves us, in addition, to consider various objections to the argument, and to comment further upon it, connecting it with some other issues. The reader who wishes to pursue the main flow of our argument may proceed directly to the next chapter.

STOPPING THE PROCESS?

We have argued that the right of legitimate self-defense against the dangers of unreliable or unfair enforcement procedures gives anyone the right to oversee others' enforcement of their rights against him; and that he may empower his protective agency to exercise this right for him. When we combine this argument with our account of the rise of the *de facto* monopoly, does it "prove"

too much? The existence of the *de facto* monopoly creates (within a situation of equal rights) an imbalance of power. This provides increased security for some while it endangers others; it provides increased security for those clients of the dominant agency who cannot be punished by others without their agency's permission, while it endangers those less able to defend themselves against injustices worked by the clients of the dominant agency, or by the agency itself. Does the right of legitimate self-defense allow each of these parties to forbid the other in order to reduce risks to itself? Acting in self-defense, may the dominant protective agency and its clients forbid others from aligning with a competing protective agency? For a competing agency might outdistance the dominant agency in power, thus endangering its clients and making their position less secure. Such a prohibition presumably would be applied to the clients of the dominant agency as well, limiting *their* freedom to switch agencies. Even if no one competitor plausibly is viewed as threatening the dominant agency's power, there is the possibility of all the individually weaker agencies uniting together against the dominant one, thereby constituting a significant threat or becoming jointly stronger even. May the dominant agency forbid others to acquire more than a certain amount of power, in order to eliminate any possibility of its being weaker than the combination of all against it? In order to maintain the imbalance of power may the dominant agency legitimately forbid others to acquire power? Similar questions arise on the other side: if an individual in a state of nature foresees that when others combine into a protective agency or association this will reduce his own security and endanger him, may he prohibit others from so combining at all? May he prohibit others from aiding in the establishment of a *de facto* state? [1]

Does the very right to self-defense, which allows an agency to pass upon others' self-enforcement mechanisms, also allow each person to forbid every other person from joining a protective association? If the right were *that* strong and extensive, then that very right which provided a legitimate moral channel for the establishment of a state also would undercut the state by giving others the right to prohibit the use of the channel.

The situation any two individuals occupy with respect to each other in a state of nature is described in Matrix I.

MATRIX I

Person I	Person II: A′ — Join a protective association and allow I to join any protective association.	Person II: B′ — Join a protective association and attempt to prohibit I from joining another protective association.	Person II: C′ — Don't join a protective association and allow I to join a protective association.	Person II: D′ — Don't join a protective association and attempt to prohibit I from joining a protective association.
A — Join a protective association and allow II to join any protective association.	Balance of power federal system, or (a) I's protective association is dominant or (b) II's protective association is dominant.	One dominant agency in area; more likely to be II's than I's, though it may be I's.	I's association in dominant position. II in inferior position to enforce rights.	I's association in dominant position. II in inferior position to enforce rights.
B — Join a protective association and attempt to prohibit II from joining another protective association.	One dominant association in area; more likely to be I's than II's, though it may be II's.	Balance of power federal system, or (a) I's protective association is dominant or (b) II's protective association is dominant	I's association in dominant position. II in inferior position to enforce rights.	I's association in dominant position. II in inferior position to enforce rights.
C — Don't join a protective association and allow II to join a protective association.	II's association in dominant position. I in inferior position to enforce rights.	II's association in dominant position. I in inferior position to enforce rights.	Neither joins protective association. I and II in pure Lockean unorganized state of nature.	Neither joins protective association. I and II in pure Lockean unorganized state of nature.
D — Don't join a protective association and attempt to prohibit II from joining a protective association.	II's association in dominant position. I in inferior position to enforce rights.	II's association in dominant position. I in inferior position to enforce rights.	Neither joins protective association. I and II in pure Lockean unorganized state of nature.	Neither joins protective association. I and II in pure Lockean unorganized state of nature.

If we assume that it is better to be the client of the powerful dominant protective agency in an area, than not to be; and it is better to be a client of the dominant agency, if the other fellow isn't, then Matrix I instances the structure presented in Matrix II (with the particular intervals between the numbers not to be taken too seriously).

MATRIX II

		Person II		
Person I	A′	B′	C′	D′
A	5, 5	4, 6	10, 0	10, 0
B	6, 4	5, 5	10, 0	10, 0
C	0, 10	0, 10	x, x	x, x
D	0, 10	0, 10	x, x	x, x

If they do not adhere to any moral constraints that forbid this, I will do B and II will do B'. The argument is as follows. $B(B')$ weakly dominates $A(A')$, so I will not do A and II will not do A'.* C and D (C' and D') collapse together, so we need treat only one of them; without loss of generality, we treat C(C'). The question that remains is whether each person will choose to do his B action or his C action. (We need consider only the truncated Matrix III, which collapses $D(D')$ into $C(C')$ and which omits A and A′, since neither loses if the other one does his A action.) So long as $x < 10$, as it apparently is (being in an unorganized state of nature with respect to someone is less preferred than being in the dominant protective association while he is not), B strongly dominates C, and B' strongly dominates C′. So in the absence of moral constraints, two rational individuals would do B and B'. If $x < 10$, this is sufficient to yield (B, B') by a dominance argu-

* In the terminology of decision theorists, one action weakly dominates another if relative to no state of the world does it do worse than the other, *and* relative to some state(s) of the world it does better. An action strongly dominates another if relative to every state of the world it does better.

MATRIX III

	Person II	
Person I	B′	C′
B	5, 5	10, 0
C	0, 10	*x*, *x*

ment.[2] If also $x > 5$, (for example, 7) we have a "prisoners' dilemma" situation in which individually rational behavior is jointly inefficient because it leads to an outcome (5, 5) which each prefers less than another (7, 7) that is available to them.[3] Some have argued that a proper function of government is to prohibit people's performing the dominant action in prisoners' dilemma situations. However that may be, if someone in a state-of-nature situation takes upon himself this supposed function of the state (and attempts to prohibit others from performing *A* or *B*), then *his* action vis-à-vis others is *not* act *C;* for he is forbidding others to perform their dominant action, namely, to join a protective association. Will this person, a self-appointed surrogate for the state, perform act *D* then? He might try to do this. But, in addition to its being individually nonoptimal for him, he is most unlikely to be successful against individuals who combine into protective associations, for he is most unlikely to be more powerful than they. To have a real chance of being successful, he must combine with others to act (performing *A* or *B*), and hence he cannot succeed in forcing everyone, including himself, away from their dominant actions *A* or *B*.

This situation of $x > 5$ has a theoretical interest above and beyond the usual interest of the prisoners' dilemma. For in this situation an anarchist state of nature is jointly best of all the symmetrical situations, and it is in each individual's interest to diverge from this joint best solution. Yet any attempt (promising success) to enforce this joint best solution *itself* constitutes a divergence (which causes other divergencies in self-defense) from it. If $x > 5$, the state, presented by some as the "solution" to avoid the prisoner's dilemma, would instead be its unfortunate outcome!

If each individual acts rationally, unlimited by moral con-

straints, (B, B') will emerge. How will things differ, if at all, with the addition of moral constraints? It might be thought that moral considerations require allowing another to do whatever you do; since the situation is symmetrical some symmetrical solution must be found. To this the fishy reply might be made that (B, B') is symmetrical, and hence someone performing a B-ish action recognizes that the other will do likewise. But recognizing that another will do likewise is not the same as *allowing* him to do this. A person performing a B-ish action is trying to impose a (B, C') solution. What moral right does he have to *impose* this asymmetry, to *force* others not to behave as he does? But before accepting this strong counterreply as conclusive, we should ask whether each person faces or views himself as facing a symmetrical situation? Each person knows more about himself than he does about the other; each can be surer of his own intentions not to aggress against the other if he finds himself in the dominant power position, than he can be of the others' similar intentions. (Following Acton, we might wonder whether any of us can be sure, or even reasonably confident.) Given this asymmetry of each knowing more about his own intentions than about those of the other party,[4] isn't it reasonable for each to pursue the B-ish action? Rather, since it's individually rational, does this asymmetry serve to rebut the argument from symmetry for the (A, A') solution and against the (B, B') solution? Clearly, things become very messy.

Rather than focusing on the total situation, it would be more promising to ask whether something special about the B-ish actions excludes them as morally permissible. Does some moral prohibition rule out B? If so, we must distinguish the B actions from those other prohibitings of actions on the grounds of the risk they present, which we have already held to be legitimate. What distinguishes prohibiting others from joining another protective agency, or forcibly acting to prevent another agency from getting more powerful than your own or yourself from an agency's forbidding others to punish its clients except by a reliable procedure (and punishing those who disobey this prohibition even should it turn out that the clients did wrong these others and were not innocent)? Let us first consider cases which commonly *are* distinguished.

PREEMPTIVE ATTACK

According to usual doctrine, under some circumstances a country *X* may launch a preemptive attack, or a preventive war, upon another country *Y;* for example, if *Y* is itself about to launch an immediate attack upon *X,* or if *Y* has announced that it will do so upon reaching a certain level of military readiness, which it expects to do some time soon. Yet it is not accepted doctrine that one nation *X* may launch a war against another nation *Y* because *Y* is getting stronger, and (such is the behavior of nations) might well attack *X* when it gets stronger still. Self-defense plausibly covers the first sort of situation but not the second. Why?

It might be thought that the difference is merely a matter of greater or lesser probability. When a nation is about to launch an attack, or has announced that it will when and if it reaches a certain level of readiness, the probability is very high that it will attack. Whereas the probability is not as great that any nation getting stronger will attack when it attains greater strength. But the distinction between the cases does not depend upon such probability considerations. For however low the probability, estimated by the "experts" of neutral countries, of *Y*'s launching an attack on *X* (in the second case) within the next ten years (0.5, 0.2, 0.05), we can imagine alternatively that *Y* now is about to wield a superdevice fresh out of its scientific laboratories that, with *that* probability, will conquer *X;* while with one minus that probability, it will do nothing. (Perhaps this probability is the probability of the device's working, or perhaps the device itself is probabilistic.) The device is set to be wielded within one week; *Y* is committed to use it, the timetable is being followed and a countdown has begun. Here *X,* in self-defense, may attack, or issue an ultimatum that if the device is not dismantled within two days it will attack, and so on. (And what if, though the timetable doesn't call for it, the device *can* be used the next day or immediately?) If *Y* were spinning a roulette wheel and with probability 0.025 the damage of war would be inflicted on *X, X* could act in self-defense. But, in the second case even when the probability is equal, *X* may not so act against *Y*'s arming. Therefore, the issue is not merely a matter of how high the probability is. Upon what, then, if not the magni-

tude of the probability, does the distinction between the first type of case and the second type rest?

The distinction depends on how the harm, if it eventuates, is related to what *Y* already has done. For some actions that yield various outcomes with various probabilities, nothing more need be done by the agent (after the action is performed) to produce an outcome which, when it eventuates, is something he did or brought about or caused to happen, and so on. (In some cases, further actions of *others* might be needed, for example, soldiers obeying a commander's orders.) If such an action yields a high enough probability of a dangerous "border crossing," another may prohibit it. On the other hand, some processes might lead to certain possible consequences, but only if further decisions are made by the people engaging in them. Processes might, as in the cases we are considering, place people in a better position to do something, and so make it more likely that they will decide to do it. These processes involve further significant decisions by the persons and the border crossings depend upon *these* decisions (made more likely by the process). It is permissible to prohibit the former actions where the person need do nothing more, but not to prohibit the latter processes.* Why?

Perhaps the principle is something like this: an act is not wrong and so cannot be prohibited if it is harmless without a further major decision to commit wrong (that is, if it would not be wrong if the agent was fixed unalterably against the further wrong decision); it can only be prohibited when it is a planned prelude to the further wrong action. So stated, the principle would protect actions that merely facilitate others' wrongdoing if the acts are harmless in themselves—for example, publishing the plans of the alarm systems of banks. The act would be tolerated were it known that others would not decide to do wrong. Among such actions, the clearest candidates for prohibition are those which, it is

* The former class includes setting processes going whose possible harm does not depend upon significant new decisions, though it may require reaffirmation of old ones. For these cases, the distinction between prohibition (punishing afterwards) and preventing in advance wobbles. Sometimes it will be unclear whether action taken after the process has begun but before the danger is realized was taken to punish violators of the prohibition on the dangerous process or to prevent the danger from occurring.

thought, could be done for no reason other than to facilitate wrongdoing. (Even here, can't one always imagine an eccentric with legitimate though odd reasons?) We may avoid this question of whether such actions so clearly intended only to aid the wrongdoing of others may be prohibited. All the actions we are concerned with could be done for perfectly legitimate and respectable reasons (for example, self-defense), and they require further decision to commit wrong by the agent himself, if wrong is to occur.

A stringent principle would hold that one may prohibit only the last wrong decision necessary to produce the wrong. (Or, the last act necessary to an alternative in a set, any one of which is necessary.) More stringent yet would be a principle holding that one may prohibit only the passing of the last clear point at which the last wrong decision necessary to the wrong can be reversed. More latitude is given to prohibition by the following principle (hence it is a weaker principle against prohibition): Prohibit *only* wrong decisions and actions on them (or dangerous actions requiring no further wrong decisions). One may *not* prohibit actions which are not based on decisions that are wrong, merely on the grounds that they facilitate or make more likely the agent himself later making wrong decisions and doing the wrong actions which follow from them. Since even this weaker principle is sufficient to *exclude* prohibiting others from strengthening their protective agency or joining another one, we need not decide here which principle is most appropriate. (The two stronger principles, of course, also would exclude such prohibitions.)

It might be objected that the principles adumbrated should not be applied to hold impermissible some group A's forcibly intervening in the process of B's strengthening their protective agency. For that process is a special one; if it is successful, A will be in a far weaker position, if not unable, to enforce the prohibition on wrong when finally A is entitled to do so. How can A be asked to refrain from prohibiting the earlier stages when it knows that any wrongs will be done later when it is unable to oppose them as effectively? But if the early stages of B's process involve no commitment to any later wrong, and if B has good (nonaggressive) reasons for its actions, then it is not absurd to hold that others may not interfere with the earlier and in themselves (supposing certain con-

tinuations) harmless stages, even though this abstention will put them in a less strong position later.[5]

We have found a distinction, which appears theoretically significant, that distinguishes a protective agency's forbidding others from using unreliable or unfair procedures to exact justice on its clients from other prohibitions—such as forbidding others to form another protective agency—which might be thought to be allowable if the first is. For our purposes in this essay we need not provide the theory which underlies this distinction and explains its significance, even though investigating these issues promises to lead very quickly to fundamental questions. It is enough to have rebutted the charge we imagined earlier that our argument fails because it "proves" too much, in that it provides a rationale not only for the permissible rise of a dominant protective association, but also for this association's forcing someone not to take his patronage elsewhere or for some person's forcing others not to join any association. Our argument provides no rationale for the latter actions and cannot be used to defend them.

We have put forth a principle which excludes prohibiting actions not wrong in themselves, actions that merely facilitate or make more likely the commission of other wrongs dependent upon other wrong decisions the agent has not made (yet). (This statement is intentionally ambiguous so as to encompass the strong and the weak principles.) This principle does *not* claim that no one may be held responsible or be punished for attempting to get others to do wrong because to succeed the attempt requires the decision of *others* to do wrong. For the principle focuses on whether the thrust toward wrong already has been made and is now out of *that person's* hands. It is a *further* question whether and to what extent any decisions of others can eliminate his responsibility for the result of his original attempt. Prime candidates for responsibility continuing are attempts to get others to do some wrong, which attempt succeeds (not by accident and in the manner intended, and so forth) in getting them to decide and act wrongly. (In this case, isn't the original act wrong itself, and so *not* protected from prohibition under the conditions of the principle?)

The contrasting view holds that the further decisions of others eliminate the responsibility of someone who succeeds in his at-

tempt to get them to act in a certain way; though he persuades them or convinces them or whips them up to do it, they could have chosen to refrain. The following model might underlie this view. For each act, so the model runs, there is a fixed amount of responsibility; this might be measured by how much punishment there is to be for the act. Someone persuaded by another to do something may be punished fully for his action; he may be punished as much as someone who decides all by himself to do the same action. Since all of the punishment for that action is used up, so is all of the responsibility for it; there is no more responsibility or punishment for that action left over to place on another person. So, the argument concludes, a person who persuades another to decide to do something cannot be held responsible for or at all punished for the consequences of the other's action. But this model of a fixed amount of responsibility for an act is mistaken. If two persons each cooperate in murdering or assaulting a third, then each assaulter or murderer may be punished fully. Each may receive the same punishment as someone acting alone, n years say. They need not each be given $n/2$. Responsibility is not a bucket in which less remains when some is apportioned out; there is not a fixed amount of punishment or responsibility which one uses up so that none is left over for the other. Since this model or picture of how responsibility operates is mistaken, a major prop is removed from the view that no one may be punished for persuading another responsible individual to do something.[6]

BEHAVIOR IN THE PROCESS

We have argued that even someone who foresees that a protective association will become dominant may not forbid others to join up. But though no one may be forbidden to join up, might not everyone *choose* to stay out, in order to avoid the state at the end of the process? Might not a population of anarchists realize how individual efforts at hiring protection will lead, by an invisible-hand process, to a state, and because they have historical evidence and theoretical grounds for the worry that the state is a Frankenstein monster that will run amuck and will not stay limited to minimal

functions, might not they each prudentially choose not to begin along that path? [7] If told to anarchists, is the invisible-hand account of how the state arises a self-defeating prophecy?

It will be difficult for such concerted effort to succeed in blocking the formation of the state, since each individual will realize that it is in his own individual interests to join a protective association (the more so as some others join), and his joining or not will not make the difference as to whether or not the state develops. (The *B* actions of the earlier matrices are dominant.) However, it must be admitted that other individuals with special motivations would not behave as we have described: for example, people whose religion prohibits purchasing protection or joining with others in protective ventures; or misanthropes who refuse to cooperate with or hire any other persons; or personal pacifists who refuse to support or participate in any institution that uses force, even for their own self-defense. We must restrict our claim that a state would arise from a state of nature, so as to exclude these special psychologies which thwart the operation of the invisible-hand process we have described. For each special psychology, we may insert a specific clause in the claim to exclude it. Thus: in a territory containing rational individuals who also are willing to use force in self-defense and are willing to cooperate with others and to hire them, . . .

At the close of Chapter 5, we argued that a territory with a dominant protective agency contains a state. Would Locke agree that in such a territory there was a state or civil society? If so, would he say it had been created by a social compact? Clients of the same protective agency are in a state of civil society with respect to each other; clients and independents have exactly the same rights vis-à-vis each other as any two persons in a state of nature, and hence are in a state of nature with respect to each other (*Two Treatises of Government,* II, sect. 87). But does the fact that the independents yield before the superior power of the dominant protective agency and *don't* act as executioners of the law of nature against its clients (despite having a right to) mean that they are not in a Lockean state of nature with respect to the clients? Should one say they are in a *de jure* state of nature but not a *de facto* one? Would Locke use some notion of political or civil society under which there could be a civil society in an area even if not *every* two

people in that area stood in a civil-society relationship with respect to each other? One also would want this notion to be of political interest; if merely two of the many individuals in an area stand in a civil-society relationship with respect to each other, this should be insufficient for there to be civil society in that area.[8]

We have described a process whereby individuals in an area separately sign up for personal protection with different business enterprises which provide protective services, all but one of the agencies being extinguished or all coming to some *modus vivendi,* and so on. To what degree, if any, does this process fit what Locke envisioned as individuals "agreeing with other men to join and unite into a community," consenting "to make one community or government" (sect. 95), compacting to make up a commonwealth (sect. 99)? The process looks nothing like unanimous joint agreement to create a government or state. No one, as they buy protective services from their local protective agency, has in mind anything so grand. But perhaps joint agreement where each has in mind that the others will agree and each intends to bring about the end result of this is not necessary for a Lockean compact.[9] I myself see little point to stretching the notion of "compact" so that each pattern or state of affairs that arises from the disparate voluntary actions of separately acting individuals is viewed as arising from a *social compact,* even though no one had the pattern in mind or was acting to achieve it. Or, if the notion is so stretched, this should be made clear so that others are not misled as to its import. It should be made clear that the notion is such that each of the following arises from a social compact: the total state of affairs constituted by who is married to, or living with, whom; the distribution on a given evening in a given city of who is in what movie theater, sitting where; the particular traffic pattern on a state's highways on a given day; the set of customers of a given grocery store on a given day and the particular pattern of purchases they make, and so on. Far be it from me to claim that this wider notion is of no interest; that a state can arise by a process that fits this wider notion (without fitting the narrower one) is of very great interest indeed!

The view we present here should not be confused with other views. It differs from social compact views in its invisible-hand structure. It differs from views that "*de facto* might makes state

(legal) right" in holding that enforcement rights and rights to oversee this enforcement exist independently and are held by all rather than confined to one or a small group, and that the process of accumulating sole effective enforcement and overseeing power may take place without anyone's rights being violated; that a state may arise by a process in which no one's rights are violated. Shall we say that a state which has arisen from a state of nature by the process described has replaced the state of nature which therefore no longer exists, or shall we say that it exists within a state of nature and hence is compatible with one? No doubt, the first would better fit the Lockean tradition; but the state arises so gradually and imperceptibly out of Locke's state of nature, without any great or fundamental breach of continuity, that one is *tempted* to take the second option, disregarding Locke's incredulousness: ". . . unless any one will say the state of nature and civil society are one and the same thing, which I have never yet found any one so great a patron of anarchy as to affirm" (sect. 94).

LEGITIMACY

Some might deny, perhaps properly, that any normative notion is to be built into an account of the state, even the right to enforce rights and to prohibit dangerous private enforcement of justice provided compensation is made to those prohibited. But since this does not grant to the state or any of its agents any rights not possessed by each and every person, it seems a harmless inclusion. It gives the state no *special* rights and certainly does not entail that all acts of rule by the state are presumptively right. Nor does it entail that persons acting as agents of the state possess any special immunity from punishment, if they violate another's rights. The public whose agents they are may provide them with liability insurance, or guarantee to cover their liability. But it may not *diminish* their liability as compared to that of other persons. Also, protective agencies will not have limited liability, nor will any other corporations. Those voluntarily dealing with a corporation (customers, creditors, workers, and others) will do so by contracts explicitly limiting the corporation's liability, if that is the way the

corporation chooses to do business. A corporation's liability to those involuntarily intertwined with it will be unlimited, and it presumably will choose to cover this liability with insurance policies.

Does the state we have described have legitimacy, does it legitimately rule? The dominant protective agency has *de facto* power; it acquired this power and reached its position of dominance without violating anyone's rights; it wields this power as well as anyone would expect. Do these facts add up to its being the legitimate wielder of the power? As "legitimacy" is used in political theory, those legitimately wielding power are entitled, are *specially* entitled, to wield it.* Does the dominant protective agency have any special entitlement? A dominant agency and another tiny one, or a dominant agency and an unaffiliated individual person, are on a par in the nature of their rights to enforce other rights. How might they have differential entitlements?

Consider whether the dominant protective agency is entitled to be the one which is dominant. Is a restaurant you choose to go to on a given evening entitled to your patronage? Perhaps one is tempted to say, in some circumstances, they merit it or deserve it; they serve better food, less expensively, and in nicer surroundings, and they work long and hard to do so; still, they are not entitled to your patronage.[10] You do not violate any entitlement of theirs if you choose to go elsewhere. By choosing to go there, though, you do authorize them to serve and bill you. They have no entitlement *to be the one* which serves you, but they are entitled to serve you. Similarly, we must distinguish between an agency's being entitled to be the one wielding certain power from its being entitled to wield that power.[11] Is the dominant agency's only entitlement, then, its being entitled to wield the power? We can reach questions of entitlement by another route that illuminates further the situation of persons in a state of nature.

A protective agency may act against or for a particular person.

---

* Attempts to explain the notion of legitimacy of government in terms of the attitudes and beliefs of its subjects have a difficult time avoiding the reintroduction of the notion of legitimacy when it comes time to explain the precise content of the subjects' attitudes and beliefs; though it is not too difficult to make the circle somewhat wider than the flat: a legitimate government is one that most of its subjects view as legitimately ruling.

It acts against him if it enforces someone's rights against him, punishes him, exacts compensation from him, and so forth. It acts for him if it defends him against others, punishes others for violating his rights, forces other to compensate him, and so forth. Theorists of the state of nature hold that there are certain rights residing in the victim of wrong that others may exercise *only if* authorized by him; and there are other rights that others may exercise, whether or not the victim authorized them to do so. The right to exact compensation is of the first sort; the right to punish of the second. If the victim chooses not to be compensated, no one else may exact compensation for him or for themselves in his place. But if the victim does wish to be compensated, why may only those whom he has authorized to act for him exact compensation? Clearly, if several different persons each exact full compensation from the offender, this would do him an injustice. How then is it to be determined which person acts? Is the one who may act the one who acts first to exact sufficient compensation for the victim? But allowing many to compete to be the first successfully to exact compensation will embroil prudent wrongdoers and victims alike in many independent time- and energy-consuming hearing processes, only one of which actually will result in a compensation payment. Alternatively, perhaps the person who first begins the attempt to exact compensation preempts the field; no others may also engage in the process. But this would allow the wrongdoer himself to have a confederate be the first to start compensation proceedings (which would be long, complicated, and perhaps inconclusive) in order to stop others from exacting compensation from him.

In theory, an arbitrary rule could be used to select anyone as the one to exact (or to authorize another to exact) compensation—for example, "the exacter of compensation is to be that person whose name comes immediately after that of the victim in an alphabetical listing of the names of everyone in the territory." (Would this lead to people victimizing their immediate alphabetical predecessors?) That it be the victim who selects the exacter of compensation ensures, at least, that he will be committed to rest content with the upshot of the process and will not continue to attempt to get further compensation. The victim will not believe he selected a process by nature unfair to himself; or if he comes to believe this, he

will have only himself to blame. It is to the advantage of the wrongdoer that the victim be involved in, and committed to, the process, for otherwise the victim will initiate a second process to obtain the remainder of what he believes he deserves. The victim can be expected to accede to a restriction against double jeopardy only if the initial process is one he is committed to and has some confidence in, as would not be the case if a confederate of the wrongdoer made the initial judgment. But what is wrong with double jeopardy, given that if *its* upshot is unjust the person punished can act himself? And, why cannot a victim place his wrongdoer under double jeopardy, even though the first process was one that he himself had authorized? Cannot the victim say that he had authorized another to exact his just compensation, and that since the agent failed to do this fully, he himself is within his rights to authorize yet another to act? If the first person he sends against a wrongdoer fails to reach him, he may send another; if he reaches him but is bought off, the victim may send another; why may he not send another if his first agent fails to perform his task adequately? To be sure, if he does send another to exact something above and beyond what his first agent attempted to take, he runs the risk that others will think his added exaction unjust and so will oppose him. But are there other than prudential grounds for his not doing so? There is reason against double jeopardy in a civic legal system as it is usually imagined. Since all it takes is one conviction, it is unfair to allow the prosecution to keep trying and trying until it succeeds. This would not apply in the state of nature, where the matter is not settled absolutely and is not binding upon all when the victim's agent or agency reaches a judgment. It is unfair to give the prosecutor in a civic system many chances at a final and binding judgment, for if he is lucky one time there will be little recourse for the person found guilty. However, in a state of nature there is recourse for someone who holds the decision against himself unjust.[12] But even though there is no guarantee that a victim will regard his agent's decision as acceptable, it is more likely than his so regarding that of some unknown third party; and so his selecting the exacter of compensation is a step toward ending the affair. (His antagonist also might agree to accept the result.) There is yet another reason, perhaps the major one, for the victim's being the appropriate locus of action to exact

compensation. The victim is the one to whom compensation is owed, not only in the sense that the money goes to him, but also in that the other is under an obligation *to him* to pay it. (These are distinct: I may be under an obligation to you to pay another person money, having promised to you that I would pay him.) As the person to whom this enforceable obligation is owed, the victim seems the appropriate party to determine precisely how it is to be enforced.

THE RIGHT OF ALL TO PUNISH

In contrast to exaction of compensation, which it views as something done appropriately only by the victim or his authorized agent, state-of-nature theory usually views punishment as a function that anyone may perform. Locke realizes that this "will seem a very strange doctrine to some men" (sect. 9). He defends it by saying that the law of nature would be in vain if no one in a state of nature had a power to execute it, and since all in the state of nature have equal rights, if any one person may execute it then everyone has that right (sect. 7); he says also that an offender becomes dangerous to mankind in general, and so everyone may punish him (sect. 8), and he challenges the reader to find some other ground for a country's punishing aliens for crimes they commit within it. Is the general right to punish so counterintuitive? If some great wrong were committed in another country which refuses to punish it (perhaps the government is in league with, or is itself, the wrongdoer), wouldn't it be all right for you to punish the wrongdoer, to inflict some harm on him for his act? Furthermore, one might try to derive the right to punish from other moral considerations: from the right to protect, combined with the view that a wrongdoer's moral boundaries change. One might take a contract-like view of moral prohibitions and hold that those who themselves violate another's boundaries forfeit the right to have certain of their own boundaries respected. On this view, one is not morally prohibited from doing certain sorts of things to others who have already violated certain moral prohibitions (and gone unpunished for this). Certain wrongdoing gives others a *liberty*

to cross certain boundaries (an absence of a duty not to do it); the details might be those of some retributive view.[13] Talk of a right to punish may seem strange if we interpret it strongly as a right which others must not happen to interfere with or themselves exercise, rather than as a liberty to do it, which liberty others also may have. The stronger interpretation of right is unnecessary; the liberty to punish would give Locke much of what he needs, perhaps all if we add the duty of the wrongdoer not to resist his punishment. We may add to these reasons which make more plausible the claim that there is a general right to punish the consideration that, unlike compensation, punishment is not owed to the victim (though he may be the person most greatly interested in its being carried out), and so it is not something he has special authority over.

How would a system of open punishment operate? All of our previous difficulties in imagining how open exaction of compensation would work apply as well to a system of open punishing. And there are other difficulties. Is it to be a system of the first actor's preempting the field? Will sadists compete to be first to get their licks in? This would greatly magnify the problem of keeping the punishers from exceeding the bounds of the deserved punishment and would be undesirable, the opportunities it offers for cheerful and unalienated labor notwithstanding. In a system of open punishment would anyone be in a position to decide upon mercy; and would another be permitted to negate this decision by punishing additionally so long as the sum did not exceed the amount deserved? Could the offender have a confederate punish him only lightly? Would there be any likelihood that the victim would feel that justice had been done? And so on.

If a system that leaves punishment to whomever happens to do it is defective, how is it to be decided who, among all those willing and perhaps eager, punishes? It might be thought that, as before, it should be the victim or his authorized agent. Yet though the victim occupies the unhappy special position of victim and is owed compensation, he is not owed punishment. (That is "owed" to the person who deserves to be punished.) The offender is not under an obligation to the victim to be punished; he doesn't deserve to be punished "to the victim." So why should the victim have a special right to punish or to be the punisher? If he has no

special right to punish, does he have any special right to choose that the punishment *not* be carried out at all, or that mercy be granted? May someone punish an offender even against the wishes of the offended party who morally objects to the mode of punishment? If a Gandhian is attacked, may others defend him by means he morally rejects? Others too are affected; they are made fearful and less secure if such crimes go unpunished. Should the fact that the victim was the one most affected by the crime give him a special status with regard to punishing the offender? (Are the others affected by the crime, or only by its going unpunished?) If the victim was killed does the special status devolve upon the closest kin? If there are two victims of a murderer, do each of the next of kin have a right to punish him with death, with a competition for who will be the first to act? Perhaps then, rather than its being the case that anyone may punish or that the victim alone has authority to punish, the solution is that all concerned (namely, everyone) jointly act to punish or to empower someone to punish. But this would require some institutional apparatus or mode of decision within the state of nature itself. And, if we specify this as everyone's having a right to a say in the ultimate determination of punishment, this would be the only right of this sort which people possessed in a state of nature; it would add up to a right (the right to determine the punishment) possessed by people jointly rather than individually. There seems to be no neat way to understand how the right to punish would operate within a state of nature. From this discussion of who may exact compensation and who may punish emerges another avenue to the question of a dominant protective association's entitlement.

The dominant protective association is authorized by many persons to act as their agent in exacting compensation for them. It is entitled to act for them, whereas a small agency is entitled to act for fewer persons, and an individual is entitled to act only for himself. In this sense of having a greater number of individual entitlements, but a kind that others have as well, the dominant protective agency has a greater entitlement. Something more can be said, given the unclarity about how rights to punish operate in a state of nature. *To the extent* that it is plausible that all who have some claim to a right to punish have to act jointly, then the dominant agency will be viewed as having the greatest entitlement to

exact punishment, since almost all authorize it to act in their place. In exacting punishment it displaces and preempts the actions to punish of the fewest others. Any private individual who acts will exclude the actions and entitlements of all the others; whereas very many people will feel their entitlement is being exercised when their agent, the dominant protective agency, acts. This would account for thinking that the dominant protective agency or a state has some special legitimacy. Having more entitlements to act, it is more entitled to act. But it is not entitled to be the dominant agency, nor is anyone else.

We should note one further possible source of viewing something as the legitimate locus of the exercise of enforcing power. To the extent that individuals view choosing a protective agency as a coordination game, with advantages to their quickly converging upon the same one, though it doesn't matter very much which one, they may think the one that happened to be settled upon is the appropriate or proper one now to look to for protection. Consider a neighborhood meeting place for teenagers. It may not matter very much where the place is, so long as everyone knows the place where others will congregate, depending upon others to go there if anywhere. That place becomes "the place to go" to meet others. It is not only that you will be more likely to be unsuccessful if you look elsewhere; it is that others benefit from, and count upon, your converging upon that place, and similarly you benefit from, and count upon, their congregating there. It is not entitled to be the meeting place; if it is a store its owner is not entitled to have his store be the one at which people congregate. It is not that individuals must meet there. It's just the place to meet. Similarly, one might imagine a given protective agency's becoming the one to be protected by. To the extent that people attempt to coordinate their actions and converge upon a protective agency which will have all as clients, the process is, to that extent, not fully an invisible-hand one. And there will be intermediate cases, where some view it as a coordination game, and others, oblivious of this, merely react to local signals.[14]

When only one agency actually exercises the right to prohibit others from using their unreliable procedures for enforcing justice, that makes it the *de facto* state. Our rationale for this prohibition rests on the ignorance, uncertainty, and lack of knowledge of peo-

ple. In some situations, it is not known whether a particular person performed a certain action, and procedures for finding this out differ in reliability or fairness. We may ask whether, in a world of perfect factual knowledge and information, anyone could legitimately claim the right (without claiming to be its sole possessor) to prohibit another from punishing a guilty party. Even given factual agreement, there might be disagreement about what amount of punishment a particular act deserved, and about which acts deserved punishment. I have proceeded in this essay (as much as possible) without questioning or focusing upon the assumption common to much utopian and anarchist theorizing, that there is some set of principles obvious enough to be accepted by all men of good will, precise enough to give unambiguous guidance in particular situations, clear enough so that all will realize its dictates, and complete enough to cover all problems that actually will arise. To have rested the case for the state on the denial of such an assumption would have left the hope that the future progress of humanity (and moral philosophy) might yield such agreement, and so might undercut the rationale for the state. Not only does the day seem distant when all men of good will shall agree to libertarian principles; these principles have not been completely stated, nor is there now one unique set of principles agreed to by all libertarians. Consider for example, the issue of whether full-blooded copyright is legitimate. Some libertarians argue it isn't legitimate, but claim that its effect can be obtained if authors and publishers include in the contract when they sell books a provision prohibiting its unauthorized printing, and then sue any book pirate for breach of contract; apparently they forget that some people sometimes lose books and others find them. Other libertarians disagree.[15] Similarly for patents. If persons so close in general theory can disagree over a point so fundamental, two libertarian protective agencies might manage to do battle over it. One agency might attempt to enforce a prohibition upon a person's publishing a particular book (because this violates the author's property right) or reproducing a certain invention he has not invented independently, while the other agency fights this prohibition as a violation of individual rights. Disagreements about what is to be enforced, argue the unreluctant archists, provide yet another reason (in addition to lack of factual knowledge) for the apparatus of the state; as

also does the need for sometimes changing the content of what is to be enforced. People who prefer peace to the enforcement of their view of right will unite together in *one* state. But of course, if people genuinely *do* hold this preference, their protective agencies will not do battle either.

PREVENTIVE RESTRAINT

Finally, let us notice how the issue of "preventive detention" or "preventive restraint" is related to the principle of compensation (Chapter 4) and to our discussion in Chapter 5 of the extensive protection it requires the ultraminimal state to provide, even for those who do not pay. The notion should be widened to include all restrictions on individuals in order to lessen the risk that *they* will violate others' rights; call this widened notion "preventive restraint." Included under this would be requiring some individuals to report to an official once a week (as if they were on parole), forbidding some individuals from being in certain places at certain hours, gun control laws, and so on (but not laws forbidding the publication of the plans of bank alarm systems). Preventive detention would encompass imprisoning someone, not for any crime he has committed, but because it is predicted of him that the probability is significantly higher than normal that he will commit a crime. (His previous crimes may be part of the data on the basis of which the predictions are made.)

If such preventive restraints are unjust this cannot be because they prohibit before the fact activities which though dangerous may turn out to be harmless. For an enforceable legal system *that includes prohibitions on private enforcement of justice* is itself based upon preventive considerations.[16] It cannot be claimed that such considerations, underlying the existence of *all* legal systems which prohibit self-help justice, are incompatible with the existence of a just legal system; not, at any rate, if one wishes to maintain that there can be a just legal system. Are there grounds for condemning preventive restraints as unjust that do not apply as strongly also to the prohibitions upon private justice that underlie the existence of every state's legal system? I do not know if preventive restraints

can be distinguished, on grounds of justice, from other similar danger-reducing prohibitions which are fundamental to legal systems. Perhaps we are helped by our discussion early in this chapter of principles that distinguish actions or processes where no further decision for wrong is to be made from processes where wrong occurs only if the person later decides to do wrong. To the extent that some people are viewed as incapable of making a future decision and are viewed merely as mechanisms now set into operation which will (or may) perform wrong actions (or to the extent that they are viewed as *incapable* of deciding against acting wrongly?), then preventive restraint possibly will seem legitimate. Provided disadvantages are compensated for (see below), preventive restraint will be allowed by the same considerations that underlie the existence of a legal system. (Though other considerations may rule it out.) But if the evil (it is feared) the person may do really does hinge upon decisions for wrong which he has not yet made, then the earlier principles will rule preventive detention or restraint illegitimate and impermissible.*

Even if preventive restraint cannot be distinguished on grounds of justice from the similar prohibitions underlying legal systems, and if the risk of danger is significant enough to make intervening via prohibition permissible, still, those prohibiting in order to gain increased security for themselves *must compensate* those prohibited (who well might not actually harm anyone) for the disadvantages imposed upon them by the prohibitions. This follows from, and is required by, the principle of compensation of Chapter 4. In the case of minor prohibitions and requirements, such compensation might be easy to provide (and perhaps should be provided in these cases even when they do not constitute a *disadvantage*). Other measures, including curfews upon some persons and specific restrictions on their activities, would require substantial compensation. It will be almost impossible for the public to provide compensation for the disadvantages imposed upon someone who is incarcerated as a preventive restraint. Perhaps only by setting aside a pleasant area for such persons predicted to be highly dangerous,

---

* Does this hold even if the restrainers make *full* compensation, returning the restrained to at least as high an indifference curve as he would have occupied, instead of merely compensating for the *disadvantages* imposed?

which though fenced and guarded contains resort hotels, recreational facilities, and so forth, can this requirement of compensating for disadvantages imposed be met. (According to our earlier discussion, it might be permissible to charge these persons a fee not higher than their normal rent and food bills in the wider society. But this would not be permissible if the person could not continue to earn income comparable to his outside income, for this charge then would deplete all of his financial resources.) Such a detention center would have to be an attractive place to live; when numbers of people attempt to get sent to it one can conclude it has been made more than luxurious enough to compensate someone for the disadvantages of being prohibited from living among others in the wider society.* I do not discuss here the details of such a scheme, the theoretical difficulties (for example, some would be more disadvantaged than others by being removed from the wider society), and the possible moral objections (for example, are someone's rights violated when he is sent to a place along with all those other dangerous people? Can increased luxuriousness compensate for the increased danger?). For I mention resort detention centers *not* to propose them, but to show the sort of things proponents of preventive detention must think about and be willing to countenance *and pay for.* The fact that the public must compensate persons it preventively restrains for the disadvantages it imposes upon them in those cases (*if any*) where it legitimately may so restrain them would presumably act as a serious check upon the public's imposing such restraints. We may condemn immediately any scheme of preventive restraints that does not include provisions for making such compensation in adequate amount. When combined with our conclusions in the preceding paragraph, this leaves little, if any, scope for legitimate preventive restraint.

A brief discussion of some objections to this view of preventive

---

* Since only the disadvantages need to be compensated for, perhaps somewhat less than a place people would choose would suffice. However, with a change as drastic as detention in a community, it will be difficult to estimate the extent of the disadvantages. If to be disadvantaged means to be hampered, as compared to others, with regard to certain activities, a restriction as severe as detention probably will require *full* compensation for disadvantages. Perhaps only when a place lures some will one be in a position to think it compensates all who are there for their disadvantages.

restraint will enable us to bring to bear considerations we have treated earlier in other contexts. We may wonder whether it ever could be permissible for some people preventively to restrain others, even if they compensate these others for the disadvantages imposed upon them. Instead of a system of preventive restraint, why mustn't those who desire that others be restrained preventively hire (pay) them to undergo the restraints? Since this exchange would satisfy the first necessary condition for an "unproductive" exchange (see Chapter 4), and since what one party (who is no better off as a result of the exchange than if the other party had nothing at all to do with him) gains is only a lessened probability of undergoing what would be a prohibited border crossing if done intentionally, our earlier arguments for market determination of the division of the mutual benefits of exchange do not apply. Instead, we have here a candidate for prohibition with compensation; more strongly (according to our discussion in Chapter 4), for prohibition with compensation only for the disadvantages imposed. Secondly, in many preventive restraint situations, the "product" (namely, *his* being restrained) can be supplied only by that party. There isn't, and couldn't be, some other person, some competitor, who could sell you *that* if the first person's price was too high. It is difficult to see why in *these* cases *of nonproductive exchange* (at least by the first necessary condition), monopoly pricing should be viewed as the appropriate model for distributing the benefits. If, however, the goal of a preventive-restraint program is to bring the total probability of danger to others beneath a certain threshold, rather than to restrain every dangerous person who makes more than a fixed minimal contribution to this total danger, then this might be accomplished without all of them being restrained. If enough were hired, this would bring the total danger posed by the others to below the threshold. In such situations, the candidates for preventive restraint would have some reason to compete in price with each other, for they would occupy a somewhat less commanding market position.

Even if the restrainers need not reach a voluntary bilateral agreement with those they restrain, why aren't they at least required *not* to move those they restrain to a lower indifference curve? Why is it required only that compensation be made for the *disadvantages* imposed? One might view compensation for disadvantages as a

compromise arrived at because one cannot decide between two attractive but incompatible positions: (1) no payment, because dangerous persons may be restrained and so there is a right to restrain them; (2) full compensation, because the person might live unrestrained without actually harming anyone, and so there is no right to restrain him. But prohibition with compensation for disadvantages is not a "split the difference" compromise between two equally attractive alternative positions, one of which is correct but we don't know which. Rather, it seems to me to be the correct position that fits the (moral) vector resultant of the opposing weighty considerations, each of which must be taken into account somehow.*

This concludes this chapter's consideration of objections to our argument which led to the minimal state, as well as our application of the principles developed in that argument to other issues. Having gotten from anarchy to the minimal state, our next major task is to establish that we should proceed no further.

---

* What if the public is too impoverished to compensate those who unrestrained would be very dangerous? Cannot a subsistence farming community preventively restrain anyone? Yes they may; but only if the restrainers give over enough in an attempt to compensate, so as to make about equivalent their own lessened positions (lessened by their giving up goods and placing them into the compensation pool) and the positions (with compensation) of those restrained. The restrained are still somewhat disadvantaged, but no more than everyone else. A society is *impoverished* with regard to a preventive restraint if those restraining *cannot* compensate those restrained for the disadvantages they impose without themselves moving into a position that is disadvantaged; that is, without themselves moving into a position which would have been disadvantaged had only *some* persons been moved into it. Impoverished societies must carry compensation for disadvantages until the positions of those restrained and those unrestrained are made equivalent. The concept of "equivalence" here can be given different glosses: made equally disadvantaged in absolute position (which gloss may seem unreasonably strong in view of the fact that some of those unrestrained may start off in quite a high position); lowered by equal intervals; lowered by the same percentages, as judged against some base line. Becoming clear about these complicated issues would require investigating them far beyond their marginal importance to our central concerns in this book. Since Alan Dershowitz informs me that the analysis in the second volume of his forthcoming extensive work on preventive considerations in the law parallels parts of our discussion in these pages, we can suggest that the reader look there for further consideration of the issues.