

A New Argument Against Libertarianism:

An Inquiry into the Consistency of some Canonical Libertarian Commitments¹

I. Introduction

This paper provides a new argument against canonical versions of libertarianism. It argues that actual consent theory requires endorsing welfare rights. Libertarians are committed to both actual consent theory and to the denial of welfare rights; therefore, we should reject canonical versions of libertarianism.² This argument is new. It does not appeal to the Lockean proviso or the impact of libertarianism on property-less people's basic rights.³ Moreover, it goes beyond traditional arguments that libertarians are committed to welfare rights, although it is compatible with them.⁴ So, even those who reject other arguments against libertarianism can endorse this argument.

This paper's argument will not, however, raise problems for every version of libertarianism. First, it only considers versions of libertarianism on which there are no welfare rights. On these accounts, states do not have to ensure that any of their subjects secure any basic capacities. Almost all libertarians accept some basic rights -- namely rights to one's person, property, and self-defense. Nevertheless, libertarians notoriously reject welfarism and positive

¹ Acknowledgments with-held.

² For other arguments that challenge libertarianism, see: Gillian Brock. 2009. *Global Justice: A Cosmopolitan Account*. Oxford University Press: Oxford. Michael Blake. 2001. "Distributive Justice, State Coercion, and Autonomy." *Philosophy and Public Affairs*. Vol. 30, No. 3: 257-296. Simon Caney. 2002. "Survey Article: Cosmopolitanism and the Law of Peoples." *The Journal of Political Philosophy*. Volume 10, Number 1: 95-133. Darrel Moellendorf. 2011. "Why Global Inequality Matters." *Journal of Social Philosophy* 42 (1):99-109.

³ The most developed arguments along these lines are found in James Sterba, *From Liberty to Equality: Justice for Here and Now*, (Cambridge: Cambridge University Press, 1998). Also see: Cohen, G. A. 1986a. "Self-Ownership, World-Ownership, and Equality" *In Justice and Equality: Here and Now*, ed. Frank S. Lucash. Ithaca: Cornell University Press. Cohen, G. A. 1986b. "Self-Ownership, World Ownership, and Equality: Part 11." *Social Philosophy & Policy* 3(2): 77-96. The capacities necessary to consent may be more or less robust than those protected by the proviso depending on the exact formulations of consent theory and the proviso in play.

⁴ See, for instance: Thomas Pogge. 2005. "Severe Poverty as a Human Rights Violation." *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* Thomas Pogge ed. Oxford University Press: Oxford.

social and economic rights (even left-libertarians reject patterned theories of justice; they just hold that property is initially held in common).⁵ Second, the versions of libertarianism this paper considers are not anarchist.⁶ On these accounts, there should be some, e.g. minimal, states that exercise a *monopoly* on the threat and use of force over *all* of those who do not violate others' rights within a *traditionally defined territory*. Many of those who follow Murray Rothbard call themselves *libertarians* but qualify as *anarchists* as this paper is using the terms. They hold that states should stop exercising a monopoly on the use of coercive force within a traditionally defined territory. Some believe that states should have "holes" in them and cede territory to those who do not consent.⁷ Finally, on the versions of libertarianism this paper considers, *everyone* has basic libertarian rights to their bodies, property, and to protect their rights. It may be acceptable to threaten, or use force against, (henceforth simply *coerce*) those who are not currently capable of consent to protect their liberty or welfare interests.⁸ Still, assuming these people respect others' rights, they retain their basic libertarian rights. Some libertarians deny this. They suggest that those who are only potentially autonomous lack rights. They hold that it is acceptable to

5 The terms "left-libertarian" and "right-libertarian" are heavily contested in the literature as is the relationship between libertarianism and anarchism. I use older understandings of these terms, in part, because I believe doing so will help most readers not seeped in the details of these debates get a handle on the relevant distinctions but nothing substantive hangs on the labels. For other arguments that question the coherence of libertarianism, see: Thomas Pogge. 2005. "Severe Poverty as a Human Rights Violation." *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* Thomas Pogge ed. Oxford University Press: Oxford. James Sterba, *From Liberty to Equality: Justice for Here and Now*, (Cambridge, Cambridge University Press, 1998).

6 Again, nothing substantive should hang on this way of using these terms. However, I draw this distinction in this way in order to argue that this kind of libertarianism is internally inconsistent while allowing that some kinds of anarchism may avoid this problem. For a version of anarchism that does not fall prey to this paper's objections, see: John Simmons. 1979. *Moral Principles and Political Obligations*. Princeton University Press: New Jersey.

7 For an introduction to the relevant literature see: Roderick Long and Tibor Machan, *Anarchism/Minarchism: Is a Government Part of a Free Country?* (London: Ashgate Press, 2008). For a canonical statement of the anarchist's case against libertarianism (including the objection that Nozick's attempt to justify the night-watchman state violates individual rights), see: Rothbard, M. N. "Robert Nozick and the Immaculate Conception of the State." *Journal of Libertarian Studies*, 1 (1), 45–57, 1977. For a similar argument addressing other versions of libertarianism (or objectivism) see: R.A. Childs, "Objectivism and the State: An Open Letter to Ayn Rand," in J. K. Taylor (ed.), *Liberty Against Power: Essays by Roy A. Childs, Jr.* (San Francisco: Fox and Wilkes, [1969] 1994). Finally, see: John Simmons, "Justification and Legitimacy," *Ethics* 109, no. 4 (1999), 770.

8 For a great discussion of different libertarian accounts of obligations to children covered by this principle see: Morry Lipson and Peter Vallentyne, "Libertarianism, Autonomy, and Children," *Public Affairs Quarterly* 5 (1991): 333-352. Also see: Morry Lipson and Peter Vallentyne, "Child Liberationism and Legitimate Interference" *Journal of Social Philosophy* 23 (1992): 5-15.

coerce such people just to benefit others.⁹ Although subsequent sections will say a few things against this conclusion, I believe it is radically implausible.¹⁰ Those who disagree can just consider how this paper’s argument addresses versions of libertarianism on which all people have basic libertarian rights. It will, henceforth, simply refer to those who accept this proposition as well as the other key propositions detailed above as *libertarians*.

It should be interesting, in its own right, that the propositions this paper considers are incompatible. This is not obviously the case. Moreover, I believe many of those who embrace libertarianism in the public sphere would endorse these propositions; even if few professional philosophers defend this view, it remains the best-known basis for libertarian politics more generally.¹¹

II. *The Argument Against Libertarianism*

Setting aside a few qualifications, consider this paper’s *Argument Against Libertarianism*:

- 1) Libertarians should be actual consent theorists: Roughly, they should hold that states are legitimate only if they secure their subjects’ consent.
 - i. This applies to people who currently lack, but could secure, autonomy with assistance (the potentially autonomous).

⁹ Though, these libertarians also take into account the fact that autonomous people sometimes care about the non-autonomous. See, for instance: Jan Narveson, *The Libertarian Idea*. (Ontario: Broadview Press., 2001, Ch. 19).

¹⁰ At least this is so as long as the potentially autonomous are persons – that is, setting aside questions about animals, very young infants and the like.

¹¹ That said, this paper’s argument should be of much more than mere historical interest in explaining why the traditional Nozickian form of libertarianism is problematic. Some accept all of the propositions above. Amongst philosophers, Robert Nozick (plausibly) accepted these propositions. Tibor Machan and Eric Mack may also accept some such version of libertarianism. So this paper is not Taurekian in considering a position no one holds. Mack defends the claim that minimal states can be legitimate here, for instance: Eric Mack, “Nozickian Arguments for the More-Than-Minimal State”. *The Cambridge Companion to Nozick’s Anarchy State and Utopia*. Ralph Bader and John Meadowcroft eds. (Cambridge: Cambridge University Press, 2011, p. 97). Moreover, the problems this paper highlights for libertarianism may explain why few libertarians endorse Nozick’s position today and prevent a resurgence of the view.

- 2) To secure consent, states must ensure that their subjects secure the basic reasoning and planning capacities they need to consent to their rules.
 - i. Libertarians cannot avoid this conclusion by saying states should just refrain from coercing people who need assistance. The version of libertarianism this paper considers is distinct from anarchism. On this theory, there should be (non-hole-ly) states that exercise a monopoly on coercive force over subjects within a traditionally defined territory.
- 3) To secure the requisite capacities, most people must secure some minimal amount of food, water, shelter, education, health care, social support and emotional goods.
 - C1) So libertarians should agree that states must ensure that these people secure these things.
 - C2) C1) is inconsistent with libertarians' denial of (even these odd and inadequate) welfare rights. Moreover, if ensuring that people secure what they need for basic reasoning and planning violates libertarian rights to person, property, or self-defense, C1) is inconsistent with these libertarian rights too.

The Argument Against Libertarianism's first premise has received extensive defense elsewhere.¹² So the next section just reviews the main rationale for this premise in the literature briefly. It explains why the rationale applies to all rights-respecting people. Subsequent sections defend the remaining premises in turn. The paper focuses, in particular, on the Argument Against Libertarianism's second premise as it is the most controversial. Although Nicole Hassoun sketches an argument in defense of this claim in *Globalization and Global Justice*, this paper

¹² For an introduction to this literature see references cited in note vi above.

develops the defense further.¹³ Moreover, as Miriam Ronzoni suggests in “What Does Liberal Legitimacy Really Require?” Hassoun’s book does not go on make the case that libertarian’s basic propositions are incompatible in the way this paper aims to do.¹⁴

III. *The First Premise: Why Libertarians Should be Actual Consent Theorists*

Explicating the First Premise

Before arguing that libertarians should be actual consent theorists it is important to get clear on the nature of the actual consent theory at issue.¹⁵ On the relevant version of actual consent theory, states are legitimate *only if* they secure their subjects consent. At least, on this account, states must secure their subjects’ consent if the following conditions hold. 1) These subjects respect others’ rights, 2) they are capable of securing basic reasoning and planning capacities, 3) they do not relinquish their right to consent, and 4) coercing them is not necessary to protect their liberty or basic interests.

Consider the qualifications implicit in the weak version of actual consent theory at issue (henceforth simply *actual consent theory*). First, states need not get the consent of individuals who do not respect others’ rights. This constraint is included because some acts are impermissible violations of individual liberty.¹⁶ Libertarians may hold that these acts can be legitimately prevented by any person or institution even if prevention requires coercion. Perhaps, as John Simmons suggests, even “the Third Reich was justified in prohibiting rape and punishing

13 Nicole Hassoun, *Globalization and Global Justice: Shrinking Distance, Expanding Obligations*. (Cambridge: Cambridge University Press, 2012).

14 Miriam Ronzoni. “What Does Liberal Legitimacy Really Require?” *Analysis*. 74, no. 1 (2014), 99-107.

15 As this paper uses the term, a state is legitimate if, and only if, it is permissible for the state to exercise this monopoly. Legitimacy here is different from justified authority. A state has justified authority if, and only if, it is legitimate and its subjects have an obligation to comply with its rules. This paper will not assume that if a state has a right to rule through force over its subjects, these people are obligated to obey its dictates (though this may be so).

16 One cannot object that if libertarians make this exception, they cannot explain why consent is required in all other cases; a better explanation for why states do not need the consent of rights-violators is that they do not need it at all (as long as they best secure everyone’s rights). Libertarians believe that everyone has a right not to be coerced without consent.

rapists.”¹⁷ States may not need the consent of those who would unjustifiably attack others to stop them from attacking. Second, on the relevant version of actual consent theory, states need only secure the consent of people who are capable of consent. One is *capable* of securing basic reasoning and planning capacities (or *potentially autonomous*) when one could secure these capacities under some implementable state. States do not need the consent of the permanently comatose, for instance. (Note: this is so even though it is possible to coerce such people. Recall that this paper uses *coercion* broadly to include the *threat or use* of force.) Third, legitimate states may not need the consent of those who have already consented or freely relinquish their right to consent. It is not clear what, if any, obligations states have to those who relinquish their right to consent. Whatever obligations states have in this case, the weak version of actual consent theory at issue at least includes the following condition for legitimacy: States require their rights-respecting subjects’ consent until, and unless, these subjects consent or freely relinquish their right to consent. The final qualification to this conclusion is just that it may be acceptable to coerce potentially autonomous people to protect their liberty or interests. Still, assuming these people respect others’ rights and so forth, they cannot be coerced in other ways without consent. I set aside, for the purposes of this paper, the vexed question about what constitutes a person and whether or not animals or fetuses can ever count as persons.¹⁸ Moreover, nothing in this paper’s argument will rely on the claim that people must be able to withdraw consent from legitimate states. Though, if this is so, the problem for libertarians only gets worse. What follows will leave the above qualifications implicit where their importance is minor.

Defending the First Premise

¹⁷ John Simmons, “Justification and Legitimacy,” *Ethics* 109, no. 4 (1999), 770.

¹⁸ I also set aside worries about the consistency of libertarian actual consent theory based on the claim that it is (virtually or strictly) impossible to secure the free consent even of people with the requisite capacities. Charles Johnson discusses some such worries here: http://radgeek.com/gt/2009/01/08/can_anybody/ The argument in this paper, however, has a different logical structure and is compatible with qualified versions of consent theory that might avoid his worries.

Again, several authors have defended the Argument Against Libertarianism's first premise -- suggesting that libertarians of many stripes should be actual consent theorists -- so this paper will not belabor the point.¹⁹ This paper's innovation is in exploring what follows from this premise.

The basic reason libertarians should be actual consent theorists is this: Everyone has a natural right to protect their rights on a libertarian theory and states, in claiming a *monopoly* on the use of coercive force, violate this right.

So, they require their subjects' consent. Since, on libertarianism, states should only exercise coercion against those who violate rights, one might ask why they require consent. One might argue that states do nothing to these people that would require their consent.

But in claiming a monopoly on the use of force states *do* do something even to those who respect rights. They prohibit them from purchasing protective services from competitors (and protecting themselves).

Recall Nozick's argument for how a state could come into existence without violating rights. Nozick notes that, in a state of nature, people have an incentive to join protective organizations to better protect their rights. Since there is an economy of scale in protective services, most people will choose larger organizations. A few people may prefer to remain independent or stick with smaller protective organizations. Nozick says that the dominant organization can compensate these people for depriving them of their right to protect their rights by providing them with protective services.

But Nozick is wrong to allow independents' rights to be abridged without consent. As Simmons puts it, "the 'principle of compensation' by which Nozick attempts to justify this final

¹⁹ Nevertheless, the debate over its status is interesting. See references cited in note vi above.

move is probably the *least* libertarian-looking component of... [Nozick's] ...entire book (as well as one of the least independently plausible basic principles defended in Part 1).²⁰ At least if independents use safe methods of rights-enforcement, their rights cannot be abridged without consent. After all, Nozick says that protective agencies of all sizes and unaffiliated individuals are “on a par in the nature of their rights to enforce other rights.”²¹ Nozick really only defends the state's monopoly on the use of coercive force with a "...very hesitant and enormously ad hoc speculation that perhaps the right to punish is 'the only [natural] right' that is possessed not individually, but jointly.”²² This would mean that the state (because of its clients' free consent) would end up (by definition) having a bigger *part* of this collectively held right than its competitors. "Since Nozick himself can barely advance the argument with a straight face, we can... safely disregard it.”²³ Rather, consent is necessary to legitimately prevent people from exercising their basic libertarian right to protect their rights. Libertarians should be actual consent theorists.

Perhaps libertarians can argue that only hypothetical consent is necessary for legitimacy as long as people have a formal right to exit from their states. At least when someone is unable to actually consent, their hypothetical consent may suffice to legitimize a state. If someone in a coma needs surgery, it may be acceptable to operate as long as the person would consent, if able. Similarly, we do not ask children to consent to essential medical procedures. We think they would agree were they able.

These are dangerous counter-factuals that libertarians should be reluctant to accept because they are deeply committed to individual liberty. Just as Nozick says it does not matter

20 John Simmons, “Consent Theory for Libertarians” *Social Philosophy and Policy* 22, no. 1 (2005), 335.

21 Robert Nozick, *Anarchy State and Utopia* (New York: Basic Books, 1974), 134.

22 John Simmons, “Consent Theory for Libertarians” *Social Philosophy and Policy* 22, no. 1 (2005), 338.

23 *Ibid*, 338.

how a distribution *could* have arisen, it matters how it *does* arise, libertarians should say it does not matter whether one *would* give up one's rights, it matters whether one *does* give them up. Libertarians should hold that legitimate states must provide people with more than a right to exit from a reasonable regime. Where possible, states must secure consent.²⁴ This is so even though actual consent theorists can say states need only secure the consent of those who are capable of securing basic capabilities.²⁵

Libertarians should not argue that only states have safe methods of enforcing rights. It is not clear why a state's methods of rights enforcement are always better than independents' methods.²⁶

There are many other ways libertarians might deny that they should be actual consent theorists, but this paper's contribution lies in exploring what follows from this conclusion. So, it will not continue with this dialectic. There are already enough good papers on this topic and the consensus seems to be that libertarians should be actual consent theorists.²⁷

It is necessary, however, to consider how libertarians might object to the interpretation of actual consent theory embodied in the Argument Against Libertarianism's first premise. Perhaps libertarians can posit the following counter-example to the claim that it is unacceptable to coerce those who are only potentially capable of consent except to protect their liberty or interests. Suppose that a society contained only one such person. If everyone else in that society gave up their right to self-defense to the dominant protective association, this association could legitimately protect everyone against this person. Libertarians might argue that the protective association would have a monopoly on coercive force and qualify as a state. So, libertarians

²⁴ Again, the idea is that if there is some implementable state that could secure this consent, actual states should secure it.

²⁵ It may also be permissible for states to coerce the merely potentially autonomous to protect their liberty or interests.

²⁶ See, however: John Locke, *Two Treatises of Government*, ed. Thomas Hollis (London: Laslett, 1764).

²⁷ Again, for a good introduction to these arguments as well as libertarian responses, see nt. vii.

might conclude, a legitimate state could come into existence without the potentially autonomous person's consent.

Anyone, including a dominant protective organization, can defend people against even innocent threats, but this does not amount to a legitimate monopoly on coercive force over right-respecting people. Rather, claiming a monopoly on the use of coercive force without consent violates the rights of those who do not threaten, or violate, others' rights whether or not they are autonomous.²⁸

At least those libertarians who accept the propositions set out at the start should accept the Argument Against Libertarianism's first premise; roughly, states are legitimate only if they secure their subjects' consent. Recall that this paper only addresses libertarians who believe *everyone* has basic rights to self-defense as well as person and property. As long as people respect others' rights, and do not give up their right to protect their rights etc., they retain their rights. Some prominent libertarians (e.g. Hillel Steiner) argue that all people incapable of choice lack rights, this implies that many people – including very young children, the severely mentally disabled, and perhaps slaves – lack rights. I believe this view is radically implausible (for further discussion see: Author, with-held k). At least if these libertarians are committed only to rights-based constraints on what we can do to people, their theory will allow us to do terrible things to children and other merely potentially autonomous people. It is better to grant that, as long as

²⁸ On plausible theories of what free consent to a coercive state requires, many of those who lack the requisite capacities still have the capacities they need to hire people to defend their rights. Some of those who cannot protect themselves also retain the right to do so. My being unable to use my property when I am sleeping does not justify others in taking it away. Moreover, libertarians should respect free contracts people enter into before they lose their autonomy (e.g. before the onset of severe dementia).

these people respect others' rights, and do not give up their right to protect their rights etc., states must secure their consent.²⁹

The next section argues that, rather than committing the libertarian to philosophical anarchism, the requirement of actual consent may lead to some strange version of welfare liberalism and, hence, pose other problems for libertarianism. That is, many suppose that, if consent is required for (even libertarian) legitimacy, no existing state is legitimate. The rest of this paper argues that, if consent is required for legitimacy, no existing state is legitimate *if it does not ensure that its subjects secure the capacities they need to consent*. It, then, explains how this conclusion throws into question the coherence of the libertarian propositions set out at the start in a different way than many have supposed.

IV. The Second Premise: Why Actual Consent Requires Basic Capacities

Assuming, then, that libertarians should accept the version of actual consent theory embodied in the first premise of the Argument Against Libertarianism, this section will defend this argument's second premise: To secure consent, states must ensure that their subjects secure the basic reasoning and planning capacities they need to consent to their rules. The next subsection explains the premise and subsequent sub-sections defend it.

Explicating the Second Premise

Before making the case for the second premise, it is necessary to explain its meaning and scope. First, the qualifications in the weak version of actual consent theory the last section sketched will apply to this premise (though, again, they will be left implicit where their importance is minor). A state does not lose legitimacy, for instance, if it does not ensure that someone secures basic reasoning and planning capacities if this person is not capable of securing

²⁹ Libertarians cannot maintain that it is acceptable to coerce people who are only potentially capable of consent because doing so protects their liberty or interests. Depriving these people of their rights does not always promote their interests or protect their liberty.

these capacities. Again, one is *capable* of securing basic reasoning and planning capacities when one could secure these capacities under some implementable state. People who are permanently comatose are not capable of securing these capacities. Some of those in comas will secure basic reasoning and planning capacities with good medical care, however. The second premise suggests that legitimate states must ensure that these people secure these capacities as long as they do not violate others' rights etc. Similarly, though children cannot secure these capacities when they are very young, most children who receive proper care will secure basic reasoning and planning capacities as they get older. The second premise maintains that legitimate states must ensure that these children secure these capacities once they are old enough.

What is necessary to *ensure* that someone secures basic reasoning and planning capacities will vary with the case. It depends on how close the person is to being able to secure these capacities and what resources are already available to the person. In cold climates, for instance, people may need heat in winter. In the tropics, heat is usually unnecessary. Some people will secure basic reasoning and planning capacities as long as they are free from interference. Others require assistance. Suppose, for instance, someone is in a coma from which she could only recover with proper medical care. Suppose she is not receiving such care from friends, family, or benefactors. The relevant premise implies that, in this case, her state must provide this care unless she has relinquished her right to consent to the state etc. Importantly, her state will count as ensuring that she secures basic reasoning and planning capacities, even if it does not provide any assistance, as long as she secures these capacities in some way (e.g. with the help of friends or benefactors).

Finally, the basic reasoning and planning capacities at issue are just those sufficient for people to freely consent to their states. Different actual consent theorists have different views on

what this requires. Most can at least agree, however, that people must be able to reason about, make, and carry out some simple plans on the basis of their beliefs, values, desires, and goals (henceforth: *commitments*). This paper will say more about these requirements below, but the basic idea should do for now.

Defending the First Part of the Second Premise

It is possible to defend the second premise in two steps. This sub-section will defend the claim that libertarian actual consent theory entails the following sub-conclusion: For states to be legitimate, their subjects must secure basic reasoning and planning capacities. The next sub-section will explain why it follows that states must ensure that these people secure these capacities.

Consider why libertarian actual consent theory entails that people must secure basic reasoning and planning capacities for the states to which they are subject to be legitimate. On actual consent theory, states are legitimate only if they secure their rights-respecting subjects' free consent. *In order for someone to actually consent to a state, that person must have the capacities necessary to do so.* So, for states to be legitimate, their subjects must secure the basic reasoning and planning capacities they need to consent. This just is the first part of the second premise of the Argument Against Libertarianism.

Defending the Second Part of the Second Premise

Consider, then, why *states* must ensure that their subjects secure basic reasoning and planning capacities. So far this paper has defended the following claim: When states exercise a monopoly on coercive force over people and do not do ensure that they secure these capacities, they act wrongly. This is because such states are not justified in exercising a monopoly on coercive force over rights-respecting people who have not consented or given up their right to

consent to states' rules etc. and who cannot secure the capacities they need to consent. *If states continue to exercise a monopoly on the use of coercive force, the only way states can be legitimate is if they ensure that their subjects secure the requisite capacities.* Insofar as they exist, states do continue to exercise such a monopoly. So, states must ensure that their subjects secure basic reasoning and planning capacities. Leaving aside a few qualifications, this just is the second premise of the Argument Against Libertarianism.

It is possible to put the basic point another way. This claim follows from the sub-conclusion that people must secure basic reasoning and planning capacities for the states to which they are subject to be legitimate: For states to be legitimate, i.e. justified in exercising a monopoly on coercive force over their rights-respecting subjects, they must either 1) stop subjecting their rights-respecting subjects to this monopoly or 2) ensure that these subjects secure basic reasoning and planning capacities. Because states exercise a monopoly on coercive force, they will not 1) stop subjecting these subjects to this monopoly. So, 2) states must ensure that they secure basic reasoning and planning capacities.

States can be legitimate *only if* they ensure that their subjects secure basic reasoning and planning capacities, in part, because they exercise a monopoly on the use of coercive force over all of their rights-respecting subjects. There would be no obligation for states to ensure subjects secure basic reasoning and planning capacities were states to cease exercising a monopoly on the use of coercive force over these people. But then there would be no states.

Note that helping people secure the basic capacities necessary for consent, when these people cannot secure these capacities on their own or with the help of any other person or institution, is a logically necessary condition for these people to secure these capacities. That is why, to be legitimate, states must provide the requisite assistance if they can. The claim is not

that the state is the only entity that can help its subjects who require assistance secure basic capacities. Rather, it is that, when others fail to do so, the state must fill the breach on pain of illegitimacy.

This argument is different from previous arguments against libertarianism. Unlike Charles Taylor's argument in "Atomism," it does not rely on the claim that the value of freedom or autonomy grounds positive rights to it.³⁰ That is a claim libertarians will certainly reject, however true it may be. Libertarians are concerned with what might be termed freedom's *dignity* or *inviolability*; they do not believe we must promote its value. Nor is the claim that a legitimate authority is necessary for individual freedom and, so, consent is not required.³¹ Rather, it is that states will violate individual rights if they do not provide whatever is necessary to secure consent.

The preceding argument implies that states can be obligated to fix problems they did not create. A state may not be responsible for the fact that some people do not secure basic reasoning and planning capacities. Brain cancer, for instance, can undermine these capacities even if states make their subjects better off with respect to the capacities at issue than they would otherwise be. Even though states are not responsible for the fact that some of their subjects lack basic reasoning and planning capacities, they are responsible for subjecting these people to a monopoly on coercive force. If states continue to subject people to a monopoly on coercive

30 Charles Taylor, "Atomism," *Philosophy and the Human Sciences. Philosophical Papers 2*. (Cambridge: Cambridge University Press, 1985), 195. Taylor believes it is impossible for people to secure (and probably maintain) freedom without authority and so says that we are obligated to support it, but Leslie Green and others point out that society can be maintained by threat and it is an empirical question whether anarchy sufficient to support individual freedom is sustainable. Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988), 199-200. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 110-114.

31 This is so, even if we ignore the distinction between the obligation to belong (with which Taylor is concerned), an obligation to obey, and the justification right to rule (which is this essay's focus). Charles Taylor, "Atomism," *Philosophy and the Human Sciences. Philosophical Papers 2*. (Cambridge: Cambridge University Press, 1985), 196-7.

force, they must ensure that these people secure the basic reasoning and planning capacities they need to consent.

Libertarians cannot say that states should just stop coercing those who have not consented to their rule. The problem with this move is this: the version of libertarianism this paper considers is not anarchist; on this view, there should be some states that exercise a monopoly on coercive force *over everyone in a traditionally defined territory*. Such states do not have “holes” in them. In the traditional debates, the disagreement between libertarians and anarchists hangs precisely on this point: libertarians believe states that exercise the kind of territorial control actual states exercise can be justified, anarchists do not.³² The idea that states need not cede territory to those who do not consent to them was one of the libertarian propositions assumed at the start.

The Argument Against Libertarianism respects the fact that consent is necessary *before* coercion can be legitimate. It hinges on two small, purely logical, points: 1) if states must secure consent to be legitimate, people must be able to consent and 2) when these people have not otherwise secured the capacities they need to consent, states must provide the necessary assistance if they can. The paper will discuss below the possibility that, on libertarian theories, it is not legitimate for states to do what is necessary to secure individuals' consent. Still, securing consent is a logically necessary condition for legitimacy in the future if states continue to coerce – so ensuring that people secure what they need to consent is morally required if states continue to coerce. The argument is, in this way, an argument for a remedial obligation on the part of states that continue to subject people to their rules. States continually exercise a monopoly on

³² Again, on this debate see references cited in nt. vii.

coercive force over their subjects. So, to be legitimate, states must do what they can to ensure that their subjects secure the requisite capacities.³³

The idea that others may be able to ensure that those subject to a state secure basic reasoning and planning capacities does not threaten the claim that states have to ensure that their subjects secure these capacities. It is not even a problem if others have primary responsibility for helping a state's subjects. Recall the nature of *ensuring*. Ensuring is like being a lender of last resort. So, in some cases, states may not need to do anything to ensure that someone secures basic reasoning and planning capacities. If a person secures such capacities on his or her own, or with the help of friends or benefactors, the state need not do a thing to help this person. States must step into the breach, however, if help is required. It is only if states do this that all of their subjects who are capable of securing basic reasoning and planning capacities will do so. Defining *ensuring* in this way does not amount to a clever verbal trick – it is just an attempt to capture in a word the duty states have to help people where necessary (and possible); states must do whatever is necessary to help their subjects secure basic capacities. This is the only way states can be legitimate in our imperfect world.

The next section will address the objection that this paper's argument overlooks the distinction between basic capacities and liberty but, if it is not sustainable, the Argument Against Libertarianism's conclusion should follow (with the qualifications above dully noted). The Argument Against Libertarianism's second premise follows from its first premise, some observations about the nature of states, and so forth. The first premise established that legitimate states must secure their subjects' consent. For people to consent to a state, they must be able to do so. If states continue to subject people to a monopoly on coercive force without securing their

³³ Enabling is also necessary for states not to become illegitimate in the first place.

consent, they act illegitimately. If these subjects have (and will) not otherwise secure basic capacities (for some period of time), states will only be legitimate if they ensure that these people do so. States must not just refrain from interfering with their subject's liberty but help them secure these capacities. The argument so far is interesting precisely for this reason. If it is correct, libertarians (surprisingly!) must agree that states have to help subjects who would otherwise fail to secure basic reasoning and planning capacities.

V. The Third Premise: Libertarian Welfare Rights?

The final step in defending the Argument Against Libertarianism is showing that, to secure basic reasoning and planning capacities, most people must attain some minimal amount of food, water, shelter, education, health care, social support and emotional goods. It will follow that states must ensure that these subjects secure these things. At least this is so as long as these people respect others' rights and have not consented or given up their right to consent to states' rules etc. To make this case, consider what consent requires on actual consent theory.

Most libertarian actual consent theorists can probably agree to at least this much: To consent people must secure basic reasoning and planning capacities; people must be able to reason about, make, and carry out some simple plans on the basis of their commitments. Individuals who cannot reason about, make, and carry out some simple plans on the basis of their commitments may be unable to resist outside suggestion or be torn apart by inner conflict. If people lack reasoning and planning capacities, they cannot make free contracts; they cannot freely agree to be subject to a coercive state. If libertarians accept additional conditions for consent as well, they will be committed to more robust welfare rights.

To reason on the basis of one's commitments, one must have some instrumental reasoning ability. Some hold much more demanding conceptions of reason on which saying that

consent requires the ability to reason would be contentious. Kant, for instance, thinks that reason requires one to acknowledge the categorical imperative as unconditionally required.³⁴ Many deny that reason requires acknowledging such an imperative, however. Fortunately, the conception of reasoning at issue here is relatively uncontroversial. Most people can agree that, to consent, one must have some instrumental reasoning ability.

To make some simple plans on the basis of one's commitments, one must have some internal freedom. Internal freedom is roughly the capacity to decide “for oneself what is worth doing”; to make “the decisions of a normative agent”; to recognize and respond to value as one sees it.³⁵ Even if one is subject to external constraint, one must be able to form some simple plans that one could carry through if free from constraint. It is not necessary to explicate the ability to make some simple plans on one's commitments further here, since there are standard ways of doing this in the literature.³⁶ It should be clear that if one cannot make some simple plans, one's decisions may be shortsighted or contradictory. One will not be able to act consistently. So, one will not be able to freely consent to a state.

Finally, to carry out some simple plans, one needs some external as well as internal freedom. External freedom is roughly freedom from interference to pursue a “worthwhile life.”³⁷ To carry out some simple plans one must be able to carry out those actions necessary to bring these plans to fruition. One must have some freedom from coercion and constraint; one must have some internal control over one's body. If one cannot carry out some simple plans, there is no way that one can freely consent to be subject to a state.

34 See: Thomas E. Hill Jr. “The Kantian Conception of Autonomy,” in *The Inner Citadel: Essays on Autonomy*, ed. John Christman (Oxford: Oxford University Press, 1989). Also see: Onora O’Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development* (London: Allen and Unwin, 1986).

35 James Griffin, *Human Rights: The Incomplete Idea*. Working Draft (Oxford: Corpus Christi College, 2006).

36 Author, with-held b; Author, with-held c; Author, with-held d.

37 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1998).

Consider how the ability to consent is impaired when one cannot reason about, make, and carry out some simple plans on the basis of one's commitments. Suppose that Tamil becomes ill. Suppose that she suffers from delusions. When she is delusional, Tamil is unable to reason about, make, and carry out simple plans on the basis of her commitments. Because she is not able to reason well enough or form simple plans, her decisions will not be sensible. Tamil might ask for water one moment and then refuse to drink the next. She might ask to speak to her children and then forget what she wanted to say to them. Tamil's commitments are like cars on city streets going this way and that, unconstrained by traffic signals.³⁸ Tamil lacks rules with which she can reason about her commitments. She lacks the capacity to choose between them. She does not have basic reasoning and planning capacities necessary to freely consent to be subject to a state.

Contrast the case of Tamil with the case of Emal. Suppose Emal is a devout Muslim. He wants to live his whole life according to his faith. Occasionally he wants to drink with the other young men who live in his neighborhood. He is, however, able to reason about, make, and carry out some simple plans on the basis of his competing commitments. Emal might freely decide, for instance, that his commitment to being a good Muslim is much stronger than his desire to drink and, thus, never drink at all. Emal has basic reasoning and planning capacities necessary to consent to be subject to a state.

Perhaps one could argue that the conception of consent at issue in the Argument Against Libertarianism is too demanding for libertarians to accept. Libertarians might generally take consent at face value. They might hold that consent is free if it is not coerced. Perhaps people only have to be free from external constraint to freely consent on a libertarian theory. Basic reasoning and planning capacities may not be necessary.

³⁸ Joel Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall Inc., 1973).

This objection has some force, but it cannot be entirely correct. The idea that free consent does not require some reasoning and planning ability is radically unintuitive. Any contract made with a person who cannot reason or plan is void. The case of Tamil illustrates the general point. Tamil cannot make important decisions for herself because she is delirious. Just as Oxfam would not be justified in forcing Tamil to give her life savings to the poor if she deliriously agreed to do so, a state would not be justified in forcing Tamil to abide by its rules if she deliriously agreed to do so. She lacks the basic reasoning and planning capacities necessary for free agreement. More generally, people who lack the ability to reason about, make, and carry out even simple plans on the basis of their commitments cannot be held to contracts. If a person who lacks these capacities agrees to be subject to a state, the contract is void; that person has not freely agreed.

Furthermore, if libertarians think those who are only potentially autonomous can consent, they will have to agree that very young children can consent. I leave the lurid consequences of accepting this proposition to the reader's imagination.³⁹

It should be clear that, to secure basic reasoning and planning capacities, everyone in all states must attain some minimal amount of food and water, and most must secure adequate shelter, education, health care, social support and emotional goods. Malnutrition inhibits one's immune system's ability to fight infection and poor nutrition is linked even more directly to many non-infectious illnesses.⁴⁰ Those without basic preventative health care (e.g. immunizations) or adequate shelter (e.g. bed nets in malarial regions) are at risk for illnesses that

³⁹ Libertarians endorse a moralized notion of free consent on which rightful restrictions of choice do not make it involuntary. However, it is not the case that these people lack the ability to consent due to others' actions.

⁴⁰ See: Howard Leathers and Phillips Foster, *The World Food Problem: Tackling the Causes of Undernutrition in the Third World* (Colorado: Lynne Rienner Publishers, 2004).

undermine basic reasoning and planning capacities.⁴¹ Those who lack basic education or emotional and social goods are at high risk for mental and physical illness, suicide, and early death from other causes.⁴² Most people must secure some education as well as emotional and social goods to secure basic reasoning and planning capacities.⁴³

Libertarians might try to maintain the propositions set out at the start and accept the conclusion that they have to endorse welfare rights to things like food, water, and shelter, in a way that leaves this conclusion devoid of significance. Many libertarians seem to think charitable donations, for instance, will literally ensure that everyone secures basic reasoning and planning capacities.⁴⁴ If so, this paper's point might be merely theoretical. It would show that libertarians are committed to establishing welfare states if necessary, but in fact no such states would be required.

Still, modulo some incredibly minimal empirical assumptions, libertarians cannot escape the Argument Against Libertarianism so easily. Charitable contributions have not completely eliminated global poverty (and other capacity-undermining deprivation) and are unlikely to do so soon. Moreover, there are at least *some things some* states can do to ensure that *some* people

41 World Health Organization, "10 Facts on Preventing Disease Through Healthy Environments" (Geneva: World Health Organization, 2007). Available at: <http://www.who.int/features/factfiles/environmental_health/en/index.html>. Center for Disease Control and Prevention, "Vector Control" (Atlanta: Center for Disease Control and Prevention, 2007). Available at: <http://www.cdc.gov/malaria/control_prevention/vector_control.htm>. Red Cross, "American Red Cross Urges Public Health Precautions" (Washington D.C.: Red Cross, 2007). Available at: <http://www.redcross.org/pressrelease/0,1077,0_172_4554,00.htm>.

42 See: Michelle Cullen and Harvey Whiteford, "Inter-relations of Social Capital with Health and Mental Health," Mental Health and Special Programs Branch Commonwealth Department of Health and Aged Care Discussion Paper (Canberra: Commonwealth Department of Health and Aged Care, 2001). See also: Michael Woolcock, "The Place of Social Capital in Understanding Social and Economic Outcomes," *Isuma* 2, no. 1 (2001). Available at: <http://www.isuma.net/v02n01/woolcock/woolcock_e.shtml>. Finally, see: Christopher G. Hudson, "Socioeconomic Status and Mental Illness: Tests of the Social Causation and Selection Hypotheses," *American Journal of Orthopsychiatry* 75, no. 1 (2005), 3–18.

43 Ibid. Also see: Rodger Doyle, "Calculus of Happiness: Assessing Subjective Well-being Across Societies," *By the Numbers*. Scientific American. November 2002. Michael Marmot, *Status Syndrome: How your Social Standing Directly Affects your Health and Life Expectancy* (London: Bloomsbury, 2004). Finally, see: Christopher G. Hudson, "Socioeconomic Status and Mental Illness: Tests of the Social Causation and Selection Hypotheses," *American Journal of Orthopsychiatry* 75, no. 1 (2005), 3–18.

44 See, for instance: Jan Narveson, *The Libertarian Idea*. (Ontario: Broadview Press., 2001, 92). Tibor Machan, *Libertarianism Defended* (Aldershot, Hants, England: Ashgate, 2006), 296. Also see: Robert Nozick, *Anarchy State and Utopia* (New York: Basic Books, 1974), 182. Loren Lomasky, *Persons, Rights, and the Moral Community*, (New York: Oxford University Press, 1980). 125-126.

secure these basic reasoning and planning capacities. I have argued at length elsewhere that there is good evidence for a much stronger conclusion: States can help many of those who would otherwise suffer and die from easily preventable poverty-related illnesses by helping them secure basic food, water, shelter, medical care and so forth.⁴⁵ So, at least until and unless charity helps everyone secure basic capacities, states must do what they can to fill the breach.

In any case, this paper only attempts to move the debate forward by establishing the theoretical propositions outlined above. So those who are skeptical can consider the import of this paper's arguments on the assumption that there is *some* unmet need that is not likely to be addressed by charitable contributions very soon and there are at least *some things some* states can do to ensure that *some* of these people secure basic reasoning and planning capacities.

VI. Conclusions: The Incoherence of Key Libertarian Propositions

The first conclusion of the Argument Against Libertarianism follows: Libertarians must agree that states must ensure that their subjects secure the food, water, shelter, education, health care, social support and emotional goods they need to consent to state's rules. At least this is so when these people have not consented or given up their right to consent etc. In itself, this conclusion challenges the coherence of the libertarian propositions with which this paper started. On the version of libertarianism this paper considers, legitimate states do not have to ensure that any of their subjects secure food, water, shelter, education, health care, social support or emotional goods.

Libertarians cannot easily dismiss the claim that states have to ensure their subjects secure the capacities they need to consent to their rule. They might argue that this requires violating libertarian rights to property since states will have to tax some people to help others.

⁴⁵ For a review of evidence to this effect see: Author, with-held e; Author, with-held f.

However, the obligation to help people secure basic capacities follows from the basic libertarian right to protect one's rights and the other libertarian propositions set out at the start. To deny that states must ensure their subjects secure the capacities they need to consent to their rule, libertarians would have to give up their commitment to one of these propositions. So the tension in libertarianism is quite basic: at least if libertarians hold that there should be states exercising a monopoly on coercive force over everyone in a traditionally defined territory, they must give up their commitment to some basic libertarian rights.

Some of those inclined towards libertarianism may be more willing to accept the very limited welfare rights at issue than to deny the other libertarian propositions. Adam Smith and Friedrich Hayek, for instance, were happy to accept some kind of welfare state. Even Milton Friedman endorsed this conclusion, and many who think of themselves as libertarians are more moderate than Friedman.⁴⁶

Even if libertarians embrace the very odd welfare rights this paper suggests they must accept, however, their problems are just beginning. First, an external critique: the welfare rights libertarians must accept are much too minimal to be plausible. The Argument Against Libertarianism only suggests that libertarians must accept welfare rights as robust as the requirements for consent that they endorse. Libertarians may not want to endorse very robust capacities for consent. If libertarians only accept the minimal capacities relied upon here, the welfare rights they must endorse will be very minimal indeed. States only have to ensure that their rights-respecting subjects secure basic reasoning and planning capacities. States need not ensure that these people *maintain* these capacities if they consent to a regime that does not

⁴⁶ See, for instance: Peter Vellentyne. 2009. "Libertarianism." *Stanford Encyclopedia of Philosophy*. Available at: <<http://plato.stanford.edu/entries/libertarianism/>>.

provide them or freely give them up. States can fulfill their obligations to the radically poor by leaving open to everyone only one treacherous route to securing these capacities.

Moreover, the welfare rights libertarians must accept are also as radical as the non-aggression and actual consent principles libertarians adopt. No existing state has ever fulfilled the condition for legitimacy this paper has argued that libertarians must endorse. If states must avoid claiming a monopoly on coercive force over their subjects without their consent, states must ensure that these people secure basic reasoning and planning capacities. It is not enough for states to ensure that everyone secures the basic capacities at only one point in time. States must, normally, ensure that even completely irresponsible free-riders secure these capacities until these people freely consent or give up their right to do so. If free-riders never freely consent or relinquish their right to do so, their states must ensure that they secure basic reasoning and planning capacities throughout their lives. Furthermore, libertarians have to agree that states must do *whatever they can* to ensure that people who have not already consented to their rule etc. secure basic reasoning and planning capacities, even if ensuring that people secure these capacities takes an extraordinary amount of resources or requires violating rights. It may just turn out, for instance, that the only way to secure the necessary resources is via coercive taxation. Alternately, the only way to ensure that some have the capacity to consent may be to coerce them, e.g., into eating or drinking.

This last point exposes the second internal part of this paper's puzzle for libertarians. Ensuring that people secure basic reasoning and planning capacities may require violating libertarian rights. States may have to coerce people who have not consented to their rules to finance their aid (e.g. with compulsory taxation). The requisite taxation is presumably inconsistent with respect for individuals' basic libertarian rights to their property (if not to their

bodies and to protect their rights). They may also have to coerce people to ensure that they secure the capacities to consent. Presumably, this also violates individuals' basic libertarian rights. Admitting any welfare rights at all will, presumably, violate libertarians' commitment to avoiding patterned or end-state principles of justice or legitimacy. So admitting even the most minimal welfare rights would change libertarianism into something else.

It is hard to see how libertarians can avoid these problems. States violate basic libertarian rights if they do not secure their rights-respecting subject's consent to coercion that does not protect their interests or liberty.⁴⁷ If they do not reject these basic libertarian rights or accept welfare rights, however, libertarians might have to become anarchists. They may have to deny that there should be, e.g. minimal, states that exercise a monopoly on the threat and use of force or require states to cede territory to those who cannot consent to their rule.⁴⁸ Again, this is because there is a much more general tension between accepting the version of actual consent theory libertarians must endorse and avoiding anarchism or doughnut-hole states. If states cannot legitimately coerce those who do not consent, it seems they will have to cede territory to those people (at least if some implementable state could secure their consent). If states do not help people secure the capacities necessary to consent, many will lack these capacities (and will not consent). So, states will not be able to claim a monopoly on the use of coercive force within a traditionally defined territory. If this paper's argument goes through, libertarians must reject at least one of the propositions from which this paper began to rescue their view from incoherence.

47 Presumably, libertarians will also not want to accept the seemingly paradoxical conclusion that states can be legitimate if they ensure their subjects are not able to make autonomous choices as they can then coerce them for their own benefits – though allowing the exceptions this paper has granted opens the door to this possibility.

48 If people must be able to withdraw consent, there may also be a more general tension between requiring consent and excluding anarchy. Those who withdraw consent should, presumably, be free to exit the state with their property (but then states would not be able to maintain traditional territorial integrity).

Denying the Argument Against Libertarianism will come at a cost for libertarians who endorse the propositions set out at the start.