

Libertarian Welfare Rights: Can We Expel Them?

CHARLES GOODMAN
Binghamton University

Abstract

In *Globalization and Global Justice*, Nicole Hassoun presents a new and fundamental challenge to libertarian political thought. Her Legitimacy Argument tries to show that natural rights libertarians are committed by their own principles to a requirement that their states recognize and meet the positive welfare rights of certain merely potentially autonomous persons. Unfortunately, this argument suffers from two flaws. Hassoun needs to show, but has not shown, that the libertarian state would have to infringe any of the negative rights of the merely potentially autonomous in such a way as to require consent from them. Moreover, the libertarians could arrange their institutions, justifiably by their own lights, so as to expel all indigent, merely potentially autonomous persons from their territory. This second solution is intuitively unpalatable, but may be no more morally problematic than the basic natural rights libertarian view itself.

Keywords: libertarianism, positive rights, Nicole Hassoun, autonomy, John Locke.

1. INTRODUCTION: THE LEGITIMACY ARGUMENT

Much recent work on global justice has focused on attempts to convince libertarians that the processes of globalization generate significant obligations to help the global poor. The work of Thomas Pogge and others towards this goal has recently been supplemented by Nicole Hassoun's important book *Globalization and Global Justice*. Hassoun presents a new, fundamental, and apparently devastating challenge to libertarian political thought. According to Hassoun's Legitimacy Argument, natural rights libertarians who reject anarchism, defend the state's monopoly on force, and accept actual consent theory, cannot explain how it is morally legitimate for them to coerce certain non-autonomous but potentially autonomous persons. In order for a libertarian state to exercise jurisdiction over these persons, it must provide them, insofar as it can, with what they need to become autonomous. Thus

the normative legitimacy of even a libertarian state would depend on its practical recognition of certain positive welfare rights.

Hassoun focuses our attention, as other writers have, on the horrifying moral tragedy of our time: the plight of the global poor in a world that contains so much affluence. Libertarians are aware of this tragedy, and have no need to minimize it. They propose to relieve the misery of the poor by extending free trade, the rule of law, and the institutions of capitalist society to every part of the globe. Since these institutions have repeatedly succeeded where no others have in transforming poor countries into rich countries, they constitute the only approach on which we have any reason to rely for saving the world's poor from their wretched condition.

Hassoun would disagree with this program; and she offers various empirical arguments for the importance of foreign aid in helping to alleviate global poverty. But regardless of the outcome of the empirical debate about what measures would most effectively help the poor, libertarians must still contend with Hassoun's case for the claim that, contrary to their view, potentially autonomous people have positive welfare rights that can be grounded in considerations about individual freedom and consent that libertarians themselves accept, and that governments cannot be legitimate if they do not appropriately respond to these rights.

Libertarians advocate the creation of minimal states that do nothing other than protect the negative rights of their citizens. Such states would have police forces, courts, and armies, and would use them to punish crime, deter aggression and enforce contracts, but would not collect taxes from citizens for any other purpose beyond these. Call a minimal political institution of this type a *libertarian state*. Those who claim that only a libertarian state would be legitimate, because any more extensive state would violate the natural rights of citizens, I will call *natural rights libertarians* (see Nozick 1977).

Two prominent theorists, Thomas Pogge and James Sterba, have attempted to show that the natural rights libertarian position, as just explained, is unstable: under contemporary conditions, their view should imply stringent, enforceable duties to help the global poor. For example, Pogge draws on the Lockean understanding of property rights to try to show that unless we provide the global poor with considerably more resources than they now possess, we will be violating their negative rights (Pogge 2002: 208-9). Sterba claims that by enforcing property rights, the libertarian state violates the poor's right to take what they need to survive; this conflict of rights should be resolved in favor of a duty to aid (Sterba 2005: 47-48). But, as Hassoun points out, libertarians have been unconvinced by these arguments. Some "reject Sterba's conclusion because they do not believe that a conflict of rights generates a duty to aid the poor". Others have tried to show "that libertarians are likely to reject Pogge's baseline for harm". (Hassoun 2012:

91). Thus, the arguments of Pogge and Sterba remain controversial. Hassoun therefore proposes her own, new argument, which attempts to show in an entirely different way that the basic moral principles that underlie natural rights libertarianism should, properly understood, require institutions that redistribute resources towards the poor. Although this argument is framed in ways that address the global poor, the core of the argument is applicable to a single libertarian state. Thus, despite the fact that Hassoun's book as a whole is directed to addressing issues of global justice, I will be focusing on her argument primarily as it applies domestically.

On p. 92 of *Globalization and Global Justice*, Hassoun states her Legitimacy Argument as follows:¹

- (1) Coercive institutions must be legitimate.
- (2) Roughly, for a coercive institution to be legitimate it must ensure that its subjects secure sufficient autonomy to autonomously consent to, or dissent from, its rules (henceforth *sufficient autonomy*.)
- (3) Everyone, to secure this autonomy, must secure some food and water, and most require some shelter, education, health care, social support, and emotional goods.
- (4) There are many coercive international institutions.
- (C) So, these institutions must (roughly) ensure that their subjects secure food, water, and whatever else they need for autonomy.

I will not be questioning any of premises 1, 3, or 4. Premise 1 is accepted, in some form, by nearly everyone. Premises 3 and 4 look like straightforward empirical truths. So what supports premise 2?²

According to Hassoun, natural rights libertarians should accept actual consent theory: they should hold that coercive institutions are legitimate only if those subject to them have actually consented to their rule. She persuasively argues that the standard objections against actual consent theory should not be acceptable to libertarians. So a libertarian minimal state must secure the actual consent of autonomous persons that live on its territory. But what about those who are merely potentially autonomous, such as children, or the curably mentally ill? They are still subject to the coercive force of the law of a libertarian state. In order for the state to be

1. The "Legitimacy Argument", as discussed here, is a form of the more general Autonomy Argument that has been adapted to apply to libertarian theories. Although Hassoun believes, and attempts to show in her Chapter 2, that all persons, whether autonomous or not, do have positive welfare rights, the intention of the Legitimacy Argument is to show specifically that, even on purely libertarian assumptions, persons who are merely potentially autonomous would have positive welfare rights against a libertarian state.

2. Premise 2 starts with the word "roughly". Hassoun explains the qualifications to this premise that she thinks are necessary at 93-94. They involve those who do not respect the rights of others; those who can never become autonomous; and those who somehow give up their right to consent. None of these qualifications will be relevant to the argument of this paper.

justified in infringing their rights through coercion, Hassoun argues, it must do what is necessary to get their actual consent. But since these merely potentially autonomous individuals do not presently have the normative capacity to grant valid consent, so long as they remain as they are, the state cannot get what it needs from them. So it is morally required to provide them with whatever they need in order to become autonomous, so that they can eventually consent to its rule. This Legitimacy Argument would, then, require that the curably mentally ill should receive treatment at public expense, and that children should have their basic needs met and should be provided publicly with sufficient education to become autonomous. Since these goods and services will be paid for from taxation, the Legitimacy Argument entails that citizens of a minimal libertarian state have robust positive duties towards the merely potentially autonomous; should these duties not be fulfilled, their state becomes normatively illegitimate.

To derive premise 2 from actual consent theory, Hassoun needs the plausible assumption that even a libertarian state would have to employ coercion against those living in its territory, including those who are only potentially autonomous. But how, exactly, would the libertarian state use coercion against merely potentially autonomous citizens? When we separately examine the various rights that non-autonomous persons might have, we can identify what may be a serious flaw in this argument.

2. FIRST REPLY: THE RIGHTS OF THE MERELY POTENTIALLY AUTONOMOUS

For present purposes, we can say that, from the kind of libertarian perspective we are examining, individuals have natural rights to bodily integrity, property, self-defense, and punishment. The right to bodily integrity is a trivial consequence of the basic libertarian premise of self-ownership. Rights to property are the result of the appropriation of unowned natural objects and their transformation through labor. Various widely accepted and uncontroversial human rights, such as rights to free speech, free association, due process in criminal cases, and so on, are seen by libertarians as flowing from these two more basic rights to bodily integrity and property. The other two basic natural rights authorize responses to rights violations by others. The right to self-defense gives us limited permissions to respond to violations that are occurring in the present or are likely to occur in the future; the right to punish gives us limited permissions to respond to violations that have occurred in the past.

There is no clear reason why a libertarian state would have to commit aggression against non-rights-violating potentially autonomous persons in its territory, depriving them of their rights to bodily integrity. Nor would the

libertarian state arbitrarily confiscate their property. But there is a problem about whether it would be permitted to ask the merely potentially autonomous to pay for its protective services, since they are unable to give valid consent to the contract that authorizes payment for such services. Of course, the citizens of such a state could agree to offer protective services to the potentially autonomous for free. In the case of merely potentially autonomous people who have no valuable resources, this may be the only option. But for those merely potentially autonomous citizens who own some resources, perhaps through inheritance or gift, another approach may be available.

Since they choose to pay the fee for protection, the autonomous citizens of the libertarian state apparently consider that the benefits they receive from this protection outweigh the costs. This is not because of idiosyncratic preferences on their part. The human need for protection against violence is as widely shared as the needs for shelter and food. Thus, we can safely be confident that, if potentially autonomous people receive protection from the state at the expense of being required to pay for it, they will benefit, on net, from the exchange. So perhaps the state can coerce them to pay taxes, or require their guardians to pay taxes on their behalf and out of their property, for paternalistic reasons. Obviously libertarians protest vigorously against paternalist coercion directed against rational adults; but it should be almost equally obvious that libertarians are not required by the logic of their position to reject the paternalist coercion of small children, animals, or other non-autonomous or merely potentially autonomous beings with interests. Hassoun restricts her argument to libertarian views that do not make it easy to justify coercion of the potentially autonomous for the benefit of others (90,) but that restriction does not rule out views that allow coercing such persons for their own benefit. I conclude from these considerations that, in requiring those potentially autonomous beings on their territory who own valuable resources to contribute some of those resources to the defense of their society from violence, the libertarians would not wrong those beings.

Would the libertarian state need to take away the potentially autonomous inhabitants' right to self-defense? It's not clear why it would. Most likely, citizens of a libertarian state who had the appropriate cognitive and physical abilities would retain a robust right to defend themselves against actually occurring violent attacks, especially in emergencies when the police or other agents of the state happen not to be present. Some individuals who lacked the capacity for full autonomy might, in spite of their immaturity or cognitive impairments, still be capable of accurately perceiving that they were under violent attack and of defending themselves in a proportionate manner. The libertarian state could recognize the right to self-defense of both its autonomous and non-autonomous citizens in the same way. Of course there might be some inhabitants of the state's territory who are so young, or so gravely mentally impaired, that they are unable to recognize

when they are under attack, or to assess the seriousness of the attack so as to be able to respond in a reliably proportionate way. But, libertarians could argue, those non-autonomous individuals don't have a right to self-defense, and so the libertarian state can't be accused of depriving them of any right by forbidding them to defend themselves.

That leaves only the right to punish as a potential source of Hassoun's moral criticism. The libertarian state would insist on requiring all inhabitants of its territory to surrender the individual right to punish that, according to natural rights theory, they would have had in the state of nature, and providing them instead with a claim to impartial justice as administered by its courts. It's primarily for this reason that the natural rights libertarian position is not a form of anarchism. But why is it permissible to take away, without consent, the right to punish held by the merely potentially autonomous? This deprivation can't be justified on paternalist grounds. When the libertarian state requires a specific individual to surrender her right to punish, the motivation for doing so is not primarily to benefit that individual herself, but rather to protect others from the consequences of being punished by her in a biased or disproportionate manner. So if the merely potentially autonomous have a right to punish at all, then depriving them of it poses a serious moral problem. But do they?

Locke would have said, I think, that they do not. To have a right to punish in a Lockean state of nature, a being must be capable of knowing the law of nature and of administering punishment in a proportionate manner. Thus Locke writes that a man in the state of nature has

no absolute or arbitrary power, to use a criminal, when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own will; but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his transgression, which is so much as may serve for *reparation* and *restraint* (Locke 1982: II.8. Emphasis in original).

To exercise this limited power of punishment, someone would seem to need those faculties which Locke calls "calm reason and conscience". Indeed, the proper use of punishment by a being in the state of nature would seem to require a fairly sophisticated deployment of rationality. Locke writes that "each transgression may be *punished* to that *degree*, and with so much *severity* as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like" (Locke 1982: II.2). Some might question whether an adult of ordinary intelligence, or even a panel of experts on criminology, would be able to do a good job of ascertaining the correct punishment for a particular offense, on this conception. But Locke, defending his conception of the law of nature as including a scale of appropriate

punishments, insists that “it is certain there is such a law, and that too, as intelligible and plain to a rational creature, and a studier of that law, as the positive laws of commonwealths, nay possibly plainer...” (Locke 1982: II.12). However plausible or implausible this may be, Locke surely could not have claimed, without recourse to innate ideas or other views that he explicitly denied, that a human who has not yet become rational would nevertheless be able to know this law. And if you can’t know, even approximately, what punishments it would be appropriate to administer, you can’t have or claim a right to punish others, even if they encroach upon your undoubted rights.³

When the right to punish is understood in this Lockean way, it is unclear that there would ever be a case of someone who was merely potentially autonomous, in the sense of being insufficiently rational to have the normative power to consent to the authority of the state, who would yet be sufficiently rational in certain specific respects so as to have a right to punish. Nevertheless, suppose that, in rare cases, this condition is met. Someone meeting this condition who was deprived of the right to punish by a libertarian state would be no more wronged than an unusually mature and responsible fifteen-year-old who is denied the right to drive a car in today’s society. A libertarian state could reasonably expect the ability to make a rational assessment about proportionate punishment to be strongly correlated with the measurable aspects of rationality that it takes to be sufficient evidence of the normative power to consent to the authority of the state. The state must draw a line somewhere; if the line is defensible on its own terms, then despite the elements of arbitrariness in its construction, those on the “may not punish” side of the line are not wronged by it.

If these Lockean views, or some modernized version of them, turn out to be defensible, then Hassoun will be unable to support premise 2 of her Legitimacy Argument. It is clear that a libertarian state would sometimes have to use coercion against merely potentially autonomous persons. However, in doing so, this state could defensibly claim that it would not violate or take away any of their rights. In dealing with merely potentially autonomous persons living on its territory, the libertarian state would not take away their rights to person or to self-defense. It could take some of their property to pay for its protective services, but this can be given an acceptable moral justification; and the state would not invade their property rights in any other problematic way. If the merely potentially

3. Recent scholarship on Locke reaches conclusions about what the natural right to punishment requires that are consistent with the claims I make in this paragraph. See, for example, Ward, 2009: 233: “The problems Locke identified in the state of nature are inextricably connected to the natural power to punish, which places a heavy cognitive burden on the private judgment of individuals who are expected to resist the impulses of excessive self-love and perform *ex tempore* highly complex moral reasoning related to difficult questions about reparation, restraint, deterrence, and mutual assistance”.

autonomous persons did have a right to punish, the libertarian state would have to take it away, and this would be difficult to justify; but since, at least in general and in typical cases, they have no such right, there is no charge to answer.

However, if the libertarian state would not, in coercing the merely potentially autonomous, ever have to violate their rights, then it would not need to obtain their consent. And if it would not need to obtain their consent, it would not need to provide them with the goods and services they would need to become autonomous. Hassoun has good reason to claim that libertarian theory implies that a libertarian state would need to get the consent of all autonomous persons subject to its laws; but she cannot claim the same thing about merely potentially autonomous persons. So premise 2 does not follow from actual consent theory; and no other justification for premise 2 has been provided.⁴

3. SECOND REPLY: EXPULSION

Suppose that I am wrong about this issue, and that Hassoun can find a way to show convincingly either that there are merely potentially autonomous persons who nevertheless retain a right to punish, or that the libertarian state would, for some other reason, be morally required to get the consent of the merely potentially autonomous. Libertarians will still have another way to reject premise 2, and thereby, to resist the Legitimacy Argument. This second strategy may not be very appealing, but it strikes me as being in accord with the basic normative logic of the overall libertarian position. To understand it, let's begin to think through some details of the kind of situation Hassoun's argument must be invoking.

Of the potentially autonomous persons living in a libertarian state, some will have family members who love them and have the desire and capacity to provide them with what they need to become fully autonomous. Since their needs are being met, they pose no special moral problem for the libertarian state. Other potentially autonomous persons will have resources of their own, perhaps obtained through inheritance or through their own labor, with which they can purchase what they need in order to become fully autonomous. Again, they pose no special moral problem. So the people we need to concern ourselves with are obviously those who do not have, and

4. Note that a non-libertarian state or international institution would coerce its citizens in many more ways, and for many more reasons, than a libertarian state would. Therefore the reply I have offered on behalf of the libertarians wouldn't be available to defenders of such a state. As a result, the objection I have been pressing does not cast doubt on the validity of Hassoun's Autonomy Argument (45) as applied to coercive international institutions designed on a non-libertarian basis.

cannot obtain through legal, private voluntary transactions, the resources necessary to meet their needs. Let's say, then, that Annie is a young and impoverished orphan, trying to survive in a libertarian utopia.

Almost all of the land in the libertarian society will be privately owned. The only exceptions would be facilities associated with the state's legitimate protective role, such as police stations, courts, and military bases. It would not be difficult to justify refusing to let Annie stay in these facilities. If the society's military bases and police stations were transformed into homeless shelters, those structures would no longer be able to carry out their rights-protective functions effectively. So libertarians would be on firm ground in claiming that, if Annie is going to live in the libertarian state, she'll have to stay on private property.

Would it be permissible, though, for a property owner to allow Annie to stay on his land, but without providing her with what she needs in order to grow up and become autonomous? Before considering Hassoun's arguments, we might have thought so. But if we adopt Hassoun's view, it will now turn out that by giving Annie permission to stay on his land, the property owner in question is consenting to a situation whose moral result will be the existence of an obligation, binding on his fellow libertarian citizens, to provide Annie with resources. This is because, once the property owner gives Annie permission to stay on his land, she will be subject to the jurisdiction of the libertarian state; as a result, according to Hassoun, she will have positive welfare rights, which the property owner's neighbors will have to pay for. In allowing Annie to stay on his land, and thereby creating a situation in which his fellow citizens acquire positive duties, the property owner is arguably violating their negative rights by imposing costs on them without their permission.

Given that allowing Annie to stay would violate other citizens' rights, it would be legitimate for the citizens of the libertarian state to make an agreement, perhaps at the constitutional convention that establishes their form of government, restricting the ability of landowners to harbor indigent potentially autonomous persons such as Annie. According to the agreement I am imagining, the property owner is free to let Annie stay, but only if he also accepts an individual obligation to ensure that Annie gets what she needs to become autonomous. Obviously it would also be permissible for charitable organizations to take on such responsibilities. It might turn out that Annie, and all those similarly situated, would end up getting their needs met due to the voluntary charity of the libertarian state's citizens. In such a happy scenario, Hassoun would have little to criticize. Of course, the happy scenario probably would not be realized. So, if no one agrees to help Annie meet her needs, under the agreement that forms part of the constitution, no one is allowed to let Annie stay on his property. With no place in which she can legally stay, Annie would effectively be expelled from the libertarian

state. The result of the agreement will be that all potentially autonomous persons who remain in the libertarian state will receive what they need to become autonomous. No residents will any longer be in a position to claim libertarian welfare rights against the state.

This reply to Hassoun's argument depends on the fact that premise 2 does not explicitly address the possibility that some persons who are currently subjects of a state will not remain so. Once we notice this possibility, we would have to consider modifying premise 2 to read

(2*) For a coercive institution to be legitimate, it must ensure that *those of its subjects who remain under its jurisdiction* secure sufficient autonomy to autonomously consent to, or dissent from, its rules.

If Annie had a right to remain in the libertarian state, this modification would be of little significance. But the libertarians could arrange their institutions in such a way that, by their own standards, there is no place in the state's territory where Annie has a moral right to be. Therefore, premise 2* does not entail the conclusion of the Legitimacy Argument.⁵

Is this solution morally acceptable? I am sure that most readers will think that it is not. The thought of wretched Annie, waiting alone in the station for the train that will take her to an unknown and precarious future, is enough to inspire pity and compassion in most people, and as a result, the response that more is owed to her than she is getting. But if you had *that* intuition, would you have been attracted to natural rights libertarianism in the first place? The idea that it is permissible for all the property-owners in the society to agree to exclude Annie from their land, as a way of avoiding the obligation to meet her needs, seems so morally objectionable as to be outrageous. But it is objectionable in the same way, to the same extent, and for the same reasons, as the libertarian position itself.

4. CONCLUSION

The history of the twentieth century showed, to everyone willing to open their eyes and learn, that markets have many important benefits and advantages. Surely, though, the important truths in the libertarian position would be

5. For this solution to be available, there must be someplace outside the libertarian state for Annie to go. That is, if libertarians adopt this solution, they must oppose a global government. Given their emphasis on the practical importance of decentralization and competition between jurisdictions, I doubt that libertarians will find this claim unpalatable. Note that, as a result, the constitutional solution defended here does not in any way undermine the appeal of the Autonomy Argument (45) as directed against non-libertarian international institutions of global scope. I do not here consider the deeply problematic situation that would arise for the libertarians if other states refused to admit Annie.

better expressed through a view that rests the justification of markets on those benefits and advantages. Surely we can recognize, and value, the enormously important good consequences of allowing individuals broad scope to make their own choices in economic matters, while also recognizing the failures and limitations of markets in some instances, and the need for prudential regulation. Surely we can recognize, and deplore, the depressing tendency for governments to make problems worse in trying to solve them, and to ignore the unintended consequences of their actions, while also recognizing that in cases of externality, asymmetric information and market failure, there is sometimes no alternative to government action. Surely a consequentialist understanding of the advantages and disadvantages of markets would be better than a libertarian one.

However convincing these claims may be, though, they do not fully address the theoretical motivations behind the natural rights libertarian position. That position must be shown to be unacceptable on its own terms. Hassoun has offered us a novel and very interesting way of trying to do so. I regret to say, however, that her argument seems unsuccessful to me. For all its promise, the Legitimacy Argument turns out to leave natural rights libertarianism just as strong as it was before.

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