

TOWARD META-POLITICS

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If by political philosophy we understand the broad discipline that studies the relationship between the state and the individual—surely a plausible, almost innocuous suggestion—then Robert Nozick’s remark to the effect that “the fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all” becomes immediately appealing (Nozick 1968, p. 4). To be precise, however, we should note that this question does not really belong to political philosophy; rather, political philosophy presupposes an (affirmative) answer to this meta-political question. However fundamental Nozick’s question undoubtedly is, there is another even more fundamental question: What is the state? I shall dub this question the *ontological question*. Obviously, just as political philosophy presupposes an affirmative answer to Nozick’s meta-political question, Nozick’s meta-political question presupposes that there is some concrete answer to the ontological question. The ontological question cannot be answered with a simple yes or no; it calls for a constructive answer.

Libertarianism, I shall argue, is a good starting point in our efforts to provide a constructive answer to the ontological question. To be sure, libertarianism differs from other political doctrines merely as to the details of the state (its size, powers, goals, etc.). Even Nozick’s meta-theoretical program quickly dissolves into a defense of a particular type of state; rather swiftly Nozick’s efforts turn exclusively toward proving to the anarchist that the minimal state is not immoral. Libertarianism is, thus, predominantly a normative theory (whether a merely political or a comprehensive moral theory aside). I propose, however, to focus on an aspect of libertarian thought that allows us to see the movement as presupposing a purely descriptive, ontological stance. Even if quickly abandoned, there is in Nozick’s libertarianism a valuable, fertile ontological moment.

I wish to examine Nozick’s ontological overtures within the context of social and political ontology. I wish to sketch some fundamental aspects of the ontology of politics, via the analysis of the institution of the state. To the

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extent that John Rawls's philosophy can be seen as the avant-garde of contemporary political philosophy, my attempt could be received with suspicion. After all, the development of Rawls's work reveals an ever-increasing distrust for ontology, as Rawls, ingeniously no doubt, labors to show that his views are strictly "political, not metaphysical"¹ (Rawls 1999, pp. 104-05 and passim). Yet, one of the central theses I shall defend here is that the ontological approach to political issues is valuable.²

Now, moral theory has gained in sophistication and clarity since philosophers began in earnest to analyze meta-ethical problems. An important part of meta-ethics is the ontology of ethics. On first approximation, the perspicuous asymmetry between the role of meta-theoretical questions in moral theory and in political theory, points (contra Rawls and the majority of contemporary political theorists) in the direction of developing a comparable meta-politics. Just as moral theory must take into account the amoralist's skepticism, so one could imagine that political theory must take into account the anarchist's skepticism. Nozick, rightly, takes the anarchist's concerns seriously (though he ignores the amoralist's concerns, but that is not important for my purposes here).³ The anarchist is by definition not an amoralist; after all, the anarchist believes that the state is *ab initio* immoral, insofar as it violates basic moral rights of individuals. The amoralist, in contrast, can hardly be an anarchist—and he certainly cannot be an anarchist on the traditional grounds, since he does not believe there are any (moral) rights. Though the taking into account

¹In light of Rawls's aversion to metaphysics, his desire to come up with a "kind of moral geometry with all the rigor which this name connotes," (p. 105) and his suggestion that "the argument [for his two principles of justice] aims eventually to be strictly deductive," (p. 104) seem to indicate that for him logic and metaphysics are rather unrelated disciplines.

²Indeed, while I am not concerned with Rawls's philosophy here, many of his critics (Michael Sandel, Charles Taylor, and Michael Walzer, among others) argue that his metaphysical neutrality is a chimera, that Rawls does have an underlying ontology which he simply assumes but does not defend. See, in general about Rawls and his critics Mulhall and Swift (1992). Whether this attack on Rawls might be successful in some instances, a general case could be made that Rawls's philosophy suffers from the lack of an appropriate ontological framework. Some of the basic concepts of his theory, say, the concepts of "societal groups," "representative persons," "basic structure of society," "primary goods," "basic liberties," etc., are not rigorously defined.

³After all, Nozick simply assumes that there are basic moral rights in the state of nature, and then devises a theory of the state that respects those rights. See in this connection the virulent objection Thomas Nagel raised against Nozick: *Anarchy, State, and Utopia* "is entirely unsuccessful as an attempt to convince, and far less successful than it might be as an attempt to explain to someone who does not hold the position [of libertarianism] why anyone else holds it" (Nagel 1981, pp. 192). Furthermore, Nagel insists, "[t]o present a serious challenge to other views, a discussion of libertarianism would have to explore the foundations of individual rights and the reasons for and against different conceptions of the relation between those rights and other values that the state may be in a position to promote" (p. 193).

of the amoralist's concerns has been an important aspect of the independent discipline known as meta-ethics, the taking into account of the anarchist's concerns has not led to, and is not part of, a corresponding general discipline meta-politics. It is this asymmetry which is the object of this paper.

The transition from normative ethics to meta-ethics presupposes the abandonment of prescriptive, normative language and the embracing of purely descriptive language, insofar as this is possible. Rather than indicating to us how we should behave, a meta-ethicist studies the nature of the good, whether moral statements are propositional, whether moral truths exist and whether they can be known, etc. (Though the name meta-ethics might suggest that the exclusive focus of the discipline is on the metaphysics or ontology of ethics, the discipline encompasses epistemological, semantic, psychological and other aspects of ethics.) The corresponding discipline of meta-politics would study the very nature of the state, whether political statements are propositional, whether there are political truths and whether they can be known, etc. Most political philosophers gloss over Nozick's meta-political question (as to whether or not the state is necessary), and treat the ontological question that I seek to investigate (as to what the state is) even more superficially. That the state is convenient, and therefore that there is an (obvious) answer also to the ontological question is, most of the time, simply assumed, hardly ever argued for in any systematic way.⁴

There are two main currents to approaching social ontology: intentionalism (John R. Searle) and *apriorism* (Adolf Reinach). These two currents might not constitute a strict dichotomy, but they make for quite a contrast nonetheless. The intentionalistic approach, as its name indicates, gives great importance to intentionality, to our beliefs, desires, and intentions, and thus to our agreements, contracts, compacts, etc., in creating social reality. From this perspective, there are social, political, and legal facts, though they depend on human intentionality. The *aprioristic* approach agrees that there are social, political, and legal facts, though it insists that (1) some of them exist independently of human intentionality, and that (2) our knowledge of those is acquired noninductively. I wish to argue that the embryonic ontological position presented in *Anarchy, State, and Utopia* places Nozick in close company with Reinach and the *aprioristic* camp and that this is a good thing: the *aprioristic* approach is a better candidate for being the underlying ontology of politics than is the intentionalistic approach.⁵

⁴See notes 2 and 3 above on Rawls. Some even suggest that Nozick's question might not even be a *real* question. See, for example, Bernard Williams (1981, pp. 27ff.).

⁵This starting point is also reminiscent of Murray Rothbard's views on what he calls a "Crusoe social philosophy," an extension of his "Crusoe economics" which privileges methodological individualism (Rothbard 1982, pp. 29ff.).

EXPLANATORY POLITICAL THEORY

Nozick's "ontological moment" occurs in the very first few pages of *Anarchy, State, and Utopia*. It is noteworthy that Nozick takes great care in qualifying the importance of this discussion, specifically addressing it to the "less trusting" audience, and almost apologizing for its "abstract and metatheoretical" character (Nozick 1968, p. 3). It is as if meta-theoretical issues, including meta-politics, were an unnecessary highbrow luxury. Yet the analyses that Nozick presents of the types of explanation that can be given of the state shed considerable light on the ontology of political phenomena such as the state. (Of all political phenomena, I shall focus on the analysis of the state. After all, it is the state that gives rise to the political realm.)

Nozick wishes to present a *fundamental* explanation of the political realm. By a fundamental explanation of a realm, Nozick means an explanation that succeeds in explaining a given realm X wholly in terms of another realm Y: in the case at hand, he wishes to explain the political realm wholly in nonpolitical terms. Even more specifically, Nozick wishes to explain the state in noncircular terms, i.e., without appealing to it or to notions closely related to it.

Given Nozick's goal, an obvious strategy suggests itself: state of nature theory. State of nature theory seeks to explain, precisely, the transition from an apolitical situation, "a state of perfect freedom [in which individuals are free] to order their actions and dispose of their possessions and persons as they see fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man" (Locke: 1965, chap. 2, p. 106) into a situation in which "every man, by consenting with others to make one body politic under one government, puts himself under an obligation to everyone of that society to submit the determination of the majority, and to be concluded by it" (Locke 1965, chap. 8, p. 146). That is, state of nature theory wholly explains the political in terms of the nonpolitical, i.e., it explains the emergence of the state out of a nonstate situation.

Fundamental explanations pack greater explanatory punch than other types of explanation. Nozick's fundamental explanation of the state seeks to reveal a certain way in which a state could arise; he does not claim that any state ever arose in this specific way. Thus, Nozick also appeals to Carl G. Hempel's notion of a potential explanation, which he paraphrases as "the correct explanation if everything mentioned in it were true and operated" (Nozick 1968, p. 7).⁶ Of all possible potential explanations, only fundamental explanations have value *even if incorrect*. Surely this is a compelling reason to prefer fundamental explanations in general, *ceteris paribus* and whenever possible.

Fundamental explanations can be law-defective (when they include a false law-like statement), fact-defective (when they include a false antecedent

⁶See also, Hempel (1965, pp. 247ff.).

condition), or process-defective (when the realm explained was produced by another process) (Nozick 1968, p. 7). According to Nozick, however, law-defective fundamental potential explanations “carry great illumination,” fact-defective fundamental potential explanations “will illuminate” even if they have “wildly false initial conditions,” and process-defective fundamental potential explanations “fit our explanatory bill and purposes almost perfectly” (Nozick 1968, p. 8). Thus, fundamental potential explanations can be defective in a variety of ways, and yet they could still be valuable. While it might be easy to see what can render a fundamental explanation defective, it is difficult to determine what would render a certain fundamental explanation *nonilluminating* or worthless.

With his fundamental explanation of the state, Nozick does not seek to present an empirical record of the origin of this or that state, nor does he seek to show that all states necessarily have to develop in this or that way. Rather, what Nozick wishes to do is to present the case of a state possibly arising in a given way; it would not be illogical for a state to arise in that given way. And then it seems that what would render a fundamental potential explanation incorrect is its inner intelligibility, its inner logic. The explanation cannot be inductively shown to be nonilluminating or worthless. (The strongly deductive element of fundamental explanations sets the stage for the connection between Nozick’s ontological moment and *apriorism* that I will develop below.) A fundamental potential explanation will only fail to illuminate the phenomena it seeks to explain if, to put it crudely, it makes no sense, that is, if it is illogical.⁷

The noninductive character of Nozick’s fundamental explanation of the state is emphasized further if we pay attention to the specific type of explanation he has in mind. Nozick not only wishes to present a fundamental potential explanation of the political realm, but he wishes to present an *invisible hand* explanation of the state as well. The appeal to this invisible hand, “perhaps the most famous . . . bodily metaphor of all social science,” to echo Robert Reich’s assessment of Adam Smith’s seminal idea, is revealing (Reich 2000, p. xviii). Above all, the metaphor seeks to capture the logical inner workings of a

⁷For an example of an author who believes that Nozick’s lack of concern with whether or not a state ever arose in accordance with his fundamental, invisible explanation is problematic, see Rothbard (1977, p. 45). Rothbard, not entirely without merit, suggests that the lack of an empirical dimension in Nozick’s explanation contributes to make Nozick’s *justification* of the (minimal) state suspicious. Yet, it is precisely this sort of *normative* discussion which I wish to avoid here; I wish to exploit what I have here dubbed the “ontological moment” in Nozick’s *Anarchy, State, and Utopia*. Nozick’s explanation of the state, then, is useful for my purposes even if, as Rothbard suggests, it fails in other respects. In the same volume where Rothbard writes, however, John T. Sanders argues, contra Rothbard, that, even within the normative context, the fact that Nozick’s explanation lacks an empirical dimension is not terribly problematic, see Sanders (1977, pp. 38ff.).

certain process. In the context of economic theory, Smith convincingly showed that individuals could promote domestic industry, without *necessarily* being aware that they were doing so. In Smith's own words:

As every individual . . . endeavours to . . . support . . . domestic industry . . . [h]e generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. (A. Smith 2000, pp. 484-85)

The individual is "led" into bringing about states of affairs that he *need* not have even imagined (though of course he *could* have imagined). The states of affairs arise simply as a result of the way things are, as a result of the inner logic of the processes in question. Or in Nozick's own words: invisible hand explanations "show how some overall pattern or design, which one would have thought had to be produced by an individual's or group's successful attempt to realize the pattern, instead was produced and maintained by a process that in no way had the overall pattern or design 'in mind'" (Nozick 1968, p. 18). Nozick's explanation of the political realm is an invisible hand explanation in that it seeks to show how the state could come into existence without anyone being even aware that the process of creating a state would be actually going on.

A rather brief summary of Nozick's view of the process whereby the state could be created suffices for my purposes here. There are problems in the anarchic situation of state of nature theory: some individuals abuse other individuals' natural (moral) rights, by injuring, stealing, etc. As a result, some individuals (presumably the victims or the potential victims of the abusers) join forces to defend themselves from the violators or potential violators. Protective associations would arise, and with them, the positive law. Eventually, division of labor will set in: in order to avoid always being *on duty*, some will be hired to perform the protective functions, there will be some sort of police force within each protective association. The ebb and flow of conflicts between clients of each protective association and between different protective associations will give rise to a state of affairs whereby each protective association can be mapped onto a specific territory. A dominant protective association will rule each territory.⁸ While no one could be forced to be a member of any protective association (this would violate natural rights individuals had even in the anarchic situation of the state of nature), every protective association will eventually develop certain rules (further developments of the positive law) that would apply to everyone within its territory. The protective association would prohibit

⁸An interesting question is whether Nozick's view eventually leads to a single world-government, i.e., to a single dominant protective association.

certain risky activities, and it would have to compensate, by giving protection, to those who are forbidden from engaging in risky behavior that might not after all have harmed anyone.

In the end, then, the dominant protective associations, through the positive law, would protect everyone within their territory and they would exercise a *de facto* monopoly over the use of most forms of force. In Nozick's view, this protective association would be a state, and a state like this could arise without anyone having ever wondered about the necessity of having a state, or having entered into a contract—other than the contracts involved in setting up the protective agencies themselves. (Indeed, in Nozick's view, any more comprehensive state would be immoral. And, to repeat, most of Nozick's book is devoted to arguing in favor of just this type of state.)

In presenting this explanation of the state, Nozick parts company with Locke, and in general with contractarian explanations of political phenomena. Nozick rhetorically asks: "Was Locke wrong in imagining a compact necessary to establish civil society? As he was wrong in thinking that an 'agreement,' or 'mutual consent,' was needed [in order] to establish the 'invention of money'" (Nozick 1968, p. 18). Nozick answers this question affirmatively. This disagreement between Nozick and the contractarians is very important. Nozick opposes invisible-hand explanations to hidden-hand explanations, which, in turn, he tendentiously comes close to equating with conspiracy theories. In his view, hidden-hand explanations exhibit the sort of unwarranted belief in the existence of scheming parties so characteristic of popular conspiracy theories.

INTENTIONALITY AND INVISIBLE HAND THEORIES

Nozick is quite enthusiastic about the "lovely quality" of fundamental, invisible hand explanations (Nozick 1968, p. 18). His enthusiasm, however, seems somewhat misguided. The lovely quality of invisible hand explanations is that they succeed in showing that, in spite of appearances, there is no overall pattern or design "in mind" giving rise to the phenomenon being explained. In other words, the phenomenon need not be preceded or accompanied by "someone's intentional design" (Nozick 1968, p. 19). Yet, Nozick's use of "intentional" and of "in mind" here is problematic.

The standard philosophical use of "intentional" and related terms is as a property of mental states. Franz Brentano, when he rescued the medieval notion of intentionality, claimed that it was the distinguishing feature of mental states (Brentano 1995; Searle 1983). John Searle, the contemporary leading scholar on the subject, disagrees with Brentano about this—he believes that only some mental states exhibit intentionality (Searle 1983, pp. 1ff.). Yet, beyond discussion is the fact that intentionality is a property of at least many mental states, not only of intentions. As John Searle has put it, "intendings and intentions are just one form of intentionality among others,

they have no special status.”⁹ Searle’s definition of intentionality is eloquent:

Intentionality is that property of many mental states and events by which they are directed at or about or of objects and states of affairs in the world. If, for example, I have a belief, it must be a belief that such and such is the case; if I have a fear, it must be a fear of something or that something will occur; if I have a desire, it must be a desire to do something or that something should happen or be the case; if I have an intention, it must be an intention to do something.¹⁰

In Nozick’s view, the great advantage of avoiding intentional states in the explanation of a given realm is that we then avoid putting forth explanations which contain elements of that very realm “*at least within quotation marks*, as objects of belief and desire” (Nozick 1968, p. 19). For example, if the state were to be explained in the Lockean (or as, we shall see, the Searlean) way, or in any intentionalistic way, then we would need to appeal to the beliefs, desires, or intentions of human beings. They would have to wish or intend that “by doing so and so we would create a state,” or they might believe or suspect that “by doing so and so we would create a state,” etc. Thus, the concept of the state, which is the phenomenon we are trying to explain, will appear, albeit within quotation marks, on its very explanation. There are at least two reasons that suggest caution regarding this alleged advantage of invisible hand explanations.

First, the relation between an agent’s intentions and his intentional actions is subtler than it might appear at first sight. To begin with, there is an ambiguity with the term intentional, as it applies both to actions and to mental states (Zaibert 2003a, pp. 209–32); when Nozick talks about “intentional design” it is unclear to what he is referring. In any event, an act X could be intentional without the person doing X having had the intention to do X. Famously, Bentham referred to this as “oblique intentionality.” In essence, Bentham’s view of oblique intentionality is that if someone intends to do Y, and knows that by doing Y he will also be doing X, then, if he does Y intentionally, he will also be doing X intentionally (Bentham 1980, pp. 85ff.). Thus, it could be argued that when people in the state of nature intend to set up a protective association, they are aware of the fact that the association will eventually be a full-blown state. And, while, *ex hypothesi*, the creation of the state was never an *intention* of any of its members, it could be argued that the state was nonetheless *intentionally* created.

⁹Searle (1983, p. 3). Though not relevant for my purposes here, Searle and many others believe that intentions are unique, but not because they are more intentional than other mental states.

¹⁰Searle (1983, p. 1). This definition, to repeat, differs from Brentano’s simply in that Brentano holds that all mental states exhibit intentionality.

The defender of invisible hand explanations might retort here with the reminder that contemporary philosophers of mind are divided on whether or not there are obliquely intentional actions.¹¹ By endorsing the Benthamite insight I am taking sides on a contested issue—and I do think that there are compelling arguments in favor of obliquely intentional actions.¹² Moreover, the retort from the invisible hand theorist could take a seemingly more promising turn. He could concede the existence of obliquely intentional actions and yet claim that in order for an unintended event X to be intentionally carried out, the agent must be practically certain that by doing Y intentionally he will be also doing X, and while people in the state of nature might very well suspect that by setting up a protective association they may be setting up a state too, it is unlikely they would be practically certain. Luckily, I do not need to dwell much on this discussion here, since both these retorts actually give the game away by admitting that the side-effect of their action was actually “in mind.”

Intentions are not the only intentional states—no one, to my knowledge has ever denied this. Thus, unless one assumes that people in the state of nature are actually stupid, there is no reason to suspect that they will not be *aware* that by doing so and so they are in effect, or might be, creating a state. Take Smith’s case of individuals promoting domestic industry unintentionally. Smith avoids claiming that people would have to necessarily ignore *that* by intending to fulfill their very own needs they are also promoting domestic industry—they merely ignore *how much* they are promoting domestic industry. As a matter of fact, stating that they ignore how much they are contributing entails that they know that they are contributing. Thus, in many instances of invisible hand explanations, people would have the explained phenomenon “in mind,” even though not necessarily in the form of an intention, and even though they might not be bringing the phenomenon about intentionally.

This, of course, opens the floodgates for all sorts of supposedly invisible-hand explanations to be really not invisible-hand explanations after all. All an invisible hand explanation requires is that the agents discussed in the explanation do not have any intentional states “in mind” regarding the phenomenon being explained. But then it is, after all, implausible that there are too many true invisible hand explanations, unless of course, one assumes some general human stupidity. Furthermore, it seems equally implausible to suggest that a (possible) state of affairs about which I am aware is motivationally irrelevant unless it is part of an intention. If I have the intention to lose weight, and I am aware that losing weight will improve my health and looks, it is quite natural for these thoughts to motivate me in my efforts to lose weight, even

¹¹Among contemporary authors who believe that there are oblique intentions, see Bratman (1987) and Mele and Moser (1997). Amongst those holding that the intention to do X is a necessary condition to doing X intentionally see Adams (1986, pp. 281–301) and McCann (1986, pp. 191–211).

¹²See references to Bratman, and Mele and Moser above.

though I am not, under this hypothesis, intending to be healthier or to look better.

Second, it is not apparent how it is that invisible hand explanations do not include, even inside quotation marks, the event to be explained, or why the alleged noninclusion would be an advantage. The inclusion of the event to be explained in the very explanation risks introducing vicious circularity. Yet, there exists enough of a difference between object-language and meta-language, between use and mention. “The table is brown” and “‘Table’ is a five-letter word” are two obviously different senses of *table*, in one case we are referring to the physical table (use), in the second sense to the word table (mention). As long as the term to be explained that appears in the explanation is indeed just being mentioned and not really being used, the risks of circularity are not great. Moreover, Nozick equates protective associations with the state, and he alleges that protective associations are part of the explanation of the state, and that the state itself is not part of the explanation of the state. If we keep in mind, however, that the state *is* the protective association, it is not easy to see the great advantage of not having *the word* state between quotation marks in the explanation of the state.

While I disagree with Nozick’s reasons for being skeptical about the appeals to intentional states in devising explanations of the state and other political phenomena, I do believe that overly intentionalistic explanations face serious difficulties. The difficulties, I believe, do not pertain so much to the structure of the explanation itself, as Nozick has it, but to the ontological commitments that such explanations engender. These commitments are particularly problematic regarding meta-ethics.

John R. Searle (1995) is the main contemporary exponent of an intentionalistic social ontology. I cannot present here a fully adequate account of his views, but a few key tenets will suffice (Zaibert 2003b, pp. 53-84). According to Searle, marriages, nationalities, money, and all sorts of social and political phenomena are real, just as mountains, trees, tables, and chairs are. The existence of the former group of entities is a brute fact whereas the existence of the latter group of entities is an institutional fact. Brute facts exist independently of human intentionality; they exhibit recognitional transcendence. Institutional facts, while facts all right, are constituted by the intentional states of human beings and do not exist independently of them. The distinction is admittedly straightforward. Yet, it faces serious difficulties. It appears as if Searle thinks this pair is exhaustive, that there are no other types of facts outside of these two. If that is so, then it seems that Searle would have to suggest that moral facts (if he believes there are any) must be institutional facts. Thus, he would have to claim that murder is wrong is true, here and now, simply because, here and now a certain number (which number?) of people believe that it is wrong, because a certain number of people have agreed that it is wrong (Zaibert 1998, pp. 230-33; B. Smith 2000, pp. 66-74).

It is a fact that in Taliban-ruled Afghanistan watching TV was considered a crime. That this is a fact is empirically demonstrable, and philosophically

uninteresting. The intentionalistic approach suggests that the wrongness of rape or torture, or the goodness of loyalty and decency, are on exactly the same footing as the criminality of watching TV in 1999 Taliban-ruled Afghanistan—this claim is philosophically interesting. Inevitably, the intentionalistic approach is forced to endorse moral relativism. This seems to me to be enough to discredit it. The alternative approach, which I suspect Nozick would defend too, through a roundabout way, is *apriorism*, of which Adolf Reinach, while regrettably unknown, is perhaps the most sophisticated theorist.

APRIORISM AND REALISM

Apriorism could be seen as a mixed view that combines ontological and epistemological theses. The ontological thesis is that there are facts that exist independently of our intentional states. The epistemological thesis in *apriorism* adds the stipulation that these facts can only be known noninductively. I imagine that even intentionalistic theorists, such as Searle, would have no qualms with the ontological thesis of *apriorism* regarding what Searle calls brute facts: the existence of mountains, seas, planets, etc., is in no way mediated by our awareness of them. (Of course, there are those who are not willing to grant *apriorism* even for Searlean brute facts, yet they stand beyond the scope of the intended audience of this paper. As John Searle [1995, chap. 7] has stated, a minimum dose of realism is necessary for any sane philosophy.¹³) The problem arises, of course, when *apriorism* is suggested as a viable ontological strategy regarding Searlean *institutional facts*.

Perhaps the most sophisticated attempt to defend *apriorism* within the realm of institutional facts was Adolf Reinach's *The Apriori Foundations of the Civil Law*.¹⁴ Reinach sought to attack the view that the concepts and structures of the civil law were created by the civil law, that they were the result of the intentionality of the framers of the laws in question. That is, he sought to show that “the positive law *finds* the legal concepts which enter into it; *in absolutely no way does it produce them*” (Reinach 1983, p. 4; emphasis in the original). Reinach further tells us that specifically legal structures “have a being of their own just as much as numbers, trees, or houses” and “that this being is independent of its being grasped by men” (ibid.). There are true propositions in the realm of the law, and these propositions are true independently of anyone knowing that they are true, and of anyone deciding to create the concepts to which the propositions refer.

¹³It turns out that Searle is not a realist regarding social, political, and moral matters after all.

¹⁴Ernest Beling, Reinach's teacher, attempted an *aprioristic* analysis of the criminal law (Beling 1964). Menger attempted to deploy *apriorism* for the analysis of economics and in this he represents faithfully the spirit of the “Austrian Economics” school (Menger 1871 and 1883).

Thus goes Reinach's *apriorism* regarding legal entities. He wishes it would prevent us from embracing legal relativism. It might seem, on first approximation, as if *apriorism* in the legal realm were equivalent to moral realism in the moral realm; both are antidotes to relativism within their respective realms. If this were the case, *apriorism* would be a full-fledged synonym of realism. But, as we just saw, there is an epistemological element contained in *apriorism*, and it helps to underscore an important difference between *apriorism* and realism generally. To repeat, it is *apriorism's* requirement that the knowledge of facts be noninductive.¹⁵ The difference between a realist and an *apriorist* is that the former is content with postulating recognition-transcendent facts, whereas the latter adds a stipulation as to the way we come to know those recognition-transcendent facts. This difference between *apriorism* and realism is not insignificant.

Perhaps the best example of the consequences of the distinction between *apriorism* and realism is found in Reinach's fear that he might be interpreted as embracing a form of natural law. In his own words:

Above all we have to defend ourselves from the very beginning from the misunderstanding which will surely plague us more than any other: from the misunderstanding that we mean to defend the apriori character of the contents of positive legal codes. This is far from our intention; it is a point of view which would be for us even more absurd than for many jurists and philosophers. For we deny emphatically that positive legal norms can be taken as judgments in any sense. The difference between apriori and empirical has no application to them. (Reinach, 1983, p. 5)

Reinach is not merely a legal realist.¹⁶ Reinach is a legal *apriorist*, and as such he is concerned with the *intelligibility* of legal institutions and concepts. While his legal *apriorism* might be consistent with natural law and with other forms of realism, Reinach had no interest in discussing those connections. Incidentally, realism itself could be formulated in such a way as to be somewhat metaphysically neutral. After all, the moral realist is simply committed to the existence of observer-independent moral facts; these facts might turn out to be "whatever I say", "whatever a given (sacred) book says," "whatever my people does," etc. (Brink 1989, pp. 22ff.). The emphasis on "intelligibility" above seeks to capture an important aspect of *apriorism*: formality. Legal *apriorism* seeks to discover the underlying structures, the constitutive rules of legal phenomena; *these* are the facts that are discoverable noninductively.

¹⁵As Barry Smith (1990, p. 2) has it: "All defenders of apriorism share the assumption that we are capable of acquiring knowledge of a special sort, called 'a priori knowledge' via non-inductive means."

¹⁶The meaning of "legal realism" in this paper is quite different from the standard usage in legal scholarship in America. By a legal realist I simply mean a realist (in the standard philosophical sense) regarding legal entities. Legal realism is also a label for a movement in American law schools with wholly different tenets. See, on this latter sense of legal realism Leiter (1996).

“If there are legal entities and structures which in this way exist in themselves,” Reinach pointed out, “then a new realm opens up here for philosophy. Insofar as philosophy is ontology of the apriori theory of objects, then it has to do with the analysis of all possible kinds of object as such” (Reinach 1983, p. 6). True to this goal, most of Reinach’s book is devoted to an analysis of specific legal concepts, such as claims, rights, obligations, promises, property, etc. In light of Reinach’s analysis, moreover, law resembles other disciplines: like “pure mathematics and pure natural science there is also a pure science of right [law] (*reine Rechtswissenschaft*)” (Reinach 1983, p. 6).¹⁷

The connection between Reinach’s *apriorism* and Nozick’s ontology of the state should now begin to emerge. First of all, attending to the subject matter that each of them studies, there is an obvious connection between Reinach’s pure science of law and Nozick’s discussion of protective associations: the birth of positive law and of protective association are coetaneous. But there is a much more important connection: what Nozick does in the first few pages of *Anarchy, State, and Utopia* as it relates to the ontology of the state is very similar to what Reinach does throughout *The Apriori Foundations of the Civil Law* in relation to specific legal phenomena. They both analyze the fundamental structures, the logical bases, of the realms they investigate.

The similarity of projects is also revealed in that none of their theses would be at all affected by empirical data. That no country has evolved along the lines of the protective associations’ schemes that Nozick develops is utterly unimportant. Similarly, that not all legal codes conform to the dictates of Reinach’s *apriori* theory of law is insignificant. Reinach is rather eloquent in this regard.

Legal entities and structures exist independently of the positive law, though they are presupposed and used by it. Thus the analysis of them, the purely immanent, intuitive clarification of their essence, can be of importance for positive-legal discipline. The laws, too, which are grounded in their essence, play a much greater role within the positive law than one might suspect. One knows how often in jurisprudence principles are spoken of which, without being written law, are “self-evident,” or “follow from the nature of things” to mention only a few of these expressions. In most cases it is not a matter of principles whose practical usefulness or whose justice is fully evident, but rather the essential structures investigated by the apriori theory of right. They are really principles which follow from the “nature” or “essence” of the concepts in question. (Reinach 1983, pp. 6-7)

That an obligation ceases to be due after it has been discharged is a principle that has nothing to do with any agreement between men, it does not involve intentional states of any kind. If someone understands the concept of obligation, he will intuitively realize that *it would make no sense* to suggest that

¹⁷Contrast, again, Reinach’s approach and Rawls’s desire for moral geometry alluded to in note 2 above.

someone under an obligation to do X remains obligated after doing X. Similarly, it follows from the nature of a desire to protect ourselves that, *ceteris paribus*, joining a group of people will afford me more protection than being alone. Expressions such as “self-evident” and “essence,” as Reinach employs them, capture precisely the features of a given phenomenon which fundamental explanations seek to make explicit.

It should also be clear by now how both Reinach and Nozick’s approaches differ from Searle’s intentionalistic ontology. While there is no doubt that Searle also analyzes the logical structures underlying many phenomena, Searle’s intentionalistic framework allows too much to be the result of fiat and convention. If a group of people were to decide, say, that someone under an obligation should remain obligated after he has performed the obligation, it seems to me that Searle would be forced to say that this is just what obligation means for them. Or if a group of people were to believe that the shape of the clouds each morning indicate whether a defendant is guilty, then this method would indicate whether he were guilty or not.

EPILOGUE:

THE ONTOLOGY OF THE STATE AND META-POLITICS

I wish to conclude by suggesting that alongside the *reine Rechtswissenschaft* that Reinach championed, a *reine Staatwissenschaft*, a pure theory of the state, must be added to the list of valuable meta-political enterprises. The foundations of such a pure theory of the state are nicely laid down in *Anarchy, State, and Utopia*, but too incipiently. It is not only true that Nozick devotes just a few pages to this meta-political discussion, and then pours all of his attention over the normative political discussion of why a certain type of state is better than all others. Even in the purely meta-political section of his work, Nozick uncritically assumes that any state must have some characteristics which do not necessarily arise out of the very intelligibility of the concept of the state, but rather are the result of the weight of tradition.

Nozick concludes his fundamental, invisible hand explanation of the formation of protective associations, with the following rhetorical question: “[h]ave we provided an invisible-hand explanation of the state?” (Nozick 1968, p. 22). And then he answers:

There are at least two ways in which the scheme of private protective associations might . . . fail to satisfy a minimal conception of a state: (1) it appears to allow some people to enforce their own rights, and (2) it appears not to protect all individuals within its domain. Writers in the tradition of Max Weber treat having a monopoly on the use of force in a geographical area . . . as crucial to the existence of the state. (Nozick 1968, pp. 22-23)

Of course, from a purely meta-political perspective it is irrelevant whether or not writers of one tradition or of many traditions believe this or that feature

of the state to be a necessary condition for calling an entity a state. Nozick, in any case, argues that the scheme of protective associations he discusses, against appearances, does not fail in these accounts. Part of Nozick's strategy is to show that while his dominant protective association might fail to constitute a real monopoly over the use of force in a given region, the ways in which it might fail are identical to those in which the traditional state fails as well. While effective as a means to stave off objections from the Weberians, Nozick's move evades the ontological issue: is a monopoly of force a necessary condition, part of the essence, of a state?

There are many ontological questions about the nature of the state: *What are the necessary conditions for something to be a state?*, *What are the sufficient conditions for something to be a state?*, etc. Needless to say, I cannot here undertake the daunting task of carrying out analyses of the essences of the political realm, or even of a single individual political phenomenon like the state. All I aspire to have accomplished is (1) to have called attention to the fact that meta-politics is an under-investigated area of research, (2) to have shown that it might pay dividends to undertake a meta-political analysis of political phenomena, in particular regarding the concept of the state, and (3) to have shown that amongst the two competing general methodological strategies, intentionalism and *apriorism*, *apriorism* is better suited to account for the ontology of those political phenomena.

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