

# ROBERT NOZICK'S DERIVATION OF THE MINIMAL STATE

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In Part I of *Anarchy, State, and Utopia*,<sup>1</sup> Robert Nozick undertakes to demonstrate, on the basis of what would ordinarily be considered libertarian anarchist moral and metaphysical assumptions, that a de jure legitimate state could come into existence by a sequence of steps, no one of which violated any person's rights; that such a state would satisfy a plausible definition of the state of the sort Max Weber enunciated; that it could function as a state without violating anyone's rights; and that such a state would be a genuine minimal, or nightwatchman, state. In Part II, Nozick goes on to argue that a state so conceived could be no more than a minimal state without violating someone's rights.

In this Article, I propose to subject the argument of Part I of *Anarchy, State, and Utopia* to examination and criticism. After a brief summary of Nozick's argument, intended to bring into view the elements of it which are especially important for my analysis, I shall develop my critique in three stages, beginning with purely internal considerations of the consistency of Nozick's argument, given his premises, and proceeding to more and more "external" considerations. My conclusions will be that Nozick's argument is internally unsuccessful; that a number of the background assumptions of his argument are wrong, in ways which vitiate his theory; that his entire mode, or style, of doing political philosophy is inappropriate to its subject matter; and finally, that the peculiar tone of *Anarchy, State, and Utopia* serves as a clue to what is awry with it philosophically, as a piece of political theory.

## NOZICK'S ARGUMENT

Nozick begins with a group of individuals in a Lockean state of

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1. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

nature.<sup>2</sup> He simply assumes that there is a clear, objective, rationally knowable moral law which determines the absolute and inviolable rights possessed by those individuals and the duties each owes to others. The individuals, on the whole, are not so righteous as to ensure that they will always act as the moral law commands, but they are sufficiently righteous so that rights-violations, while a genuine social problem are nonetheless a marginal rather than a central fact of life in the state of nature. The individuals have conflicting interests, but they can benefit from far-reaching, systematic exchange, interaction, contract, and cooperation. What is more, it makes coherent sense to speak of them *as* individuals, in abstraction from or independently of their social origins and inheritance.

The moral law, as Nozick invokes it, has rather blurry outlines, although the author appears to have a penetratingly clear intuition of it. However, certain of its key provisions emerge in his discussion. Rights are *inviolable*; hence they function as absolute, not merely as *prima facie*, constraints on the actions of others. Political philosophy "is concerned only with *certain* ways that persons may not use others; primarily, physically aggressing against them."<sup>3</sup> Oddly, but not surprisingly, Nozick construes the attachment of one's property as an act of physical aggression, and hence as fit subject matter for political philosophy. Each individual has the right to punish others for their aggressions against him, although he does not have the right to punish them unless they *have* aggressed against him, nor may he punish them inappropriately.<sup>4</sup> Most important of all, any person, *A*, has a right to punish any other person, *B*, for *B*'s violation of the rights of a third person, *C*. This claim is merely asserted by Nozick without proof, but it is the foundation stone of the entire edifice (however minimal) of the legitimate state.

With this set of assumptions, Nozick proceeds to develop his argument fairly rapidly in four steps:

1. Individuals in a state of nature have a right to band together, through contractual agreement, for purposes of mutual protection.<sup>5</sup>
2. Those individuals have the right, collectively, to assign to employees or agents such rights of self protection, punishment, and so forth as they possess individually and have pooled contractually.<sup>6</sup>

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2. *Id.* at 9; see J. LOCKE, TWO TREATISES OF GOVERNMENT 309-23 (Laslett ed. 1963) (Second Treatise).

3. R. NOZICK, *supra* note 1, at 32.

4. *Id.* at 10-11. Moral intuition appears to be the guide here.

5. *Id.* at 12-15.

6. *Id.*

3. Market forces, strategy calculations, and the like may lead to the emergence of a dominant protective association in a territory. Such an association will possess a *de facto* monopoly of physical force, which it has acquired by a series of totally permissible acts.<sup>7</sup>

4. The monopoly protective association, or "ultra-minimal state," will have an obligation to compensate nonclients, if there are any, for the disadvantage they suffer in their dealings with clients backed by so powerful a protective association. Hence it will have a right, indeed, it will have a duty, to "tax" its clients for the money to buy some sort of protection for the disadvantaged non-clients. This apparent "re-distribution" constitutes it a nightwatchman state, in the traditional sense.<sup>8</sup>

In Part II, Nozick elaborates a neo-Lockean theory of property, the "entitlement" theory, for the purpose of denying any further claims that may be made against the nightwatchman state—claims of the sort that usually go under the banner of "social justice." Since the rights dealt with in Part I are all property rights, given Locke's view that each of us owns, or has sole property in, his own body; and inasmuch as the argument of Part I is couched entirely in terms of boundary crossings, disadvantages, compensations, and the like; it is clear that the theory of property is really presupposed from the beginning, or at least it is presupposed that this theory must be developed as a part of the derivation of the minimal state. Nevertheless, I shall follow Nozick's lead, and ignore the entitlement theory in this analysis of the arguments for a *de jure* legitimate state.<sup>9</sup>

7. *Id.* at 15-22.

8. *Id.* at 24-25.

9. I cannot resist calling attention to one rather curious historicological point concerning Nozick's theory of property, however, particularly since it reinforces the general conclusion of this Article. Nozick presents a recursive theory of entitlement, according to which repeated acts of just acquisition or transfer of property necessarily result in a just set of individual holdings, regardless of its pattern. Although Nozick never enunciates a principle of justice in acquisition (a fatal flaw, one might have thought, in a recursive theory), and explicitly rejects Locke's attempt to ground just acquisition in the notion of mixing one's labor with a bit of unheld property, he does invoke, as an essential element of his "theory," a well-known qualification in the chapter on property in the *Second Treatise* that Nozick labels "the Lockean Proviso." The passage reads:

"Whatsoever, then [man] removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property . . . . For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, *at least where there is enough, and as good left in common for others.*"

J. LOCKE, *supra* note 2, at 329 (emphasis added). The italicised words are the "Proviso." Nozick construes this as claiming that property is initially private and individual, so that society, or the state, can assert no claim to the holdings of an individual that he does not freely warrant—so long as the Proviso has been satisfied. But a careful look at the remainder of Locke's discussion of property makes it clear that his view is the very opposite of Nozick's! According to Locke, God acquires title to the universe by creating it. Since he creates it *ex nihilo*, its entire value is value added—there being

Before we subject Nozick's argument to analysis and criticism, there are several questions of a general sort that might be worth raising about the logical status of that argument, and its precise purpose. One might imagine, from the way Nozick talks, that the argument is intended as a straightforward deduction, or derivation, from a set of assumed premises taken over from moral philosophy. However, so much of the argument depends, at crucial points, on specific interpretations and elaborations of that moral theory, with little or no proof of the interpretations adduced, that after a while it seems that Nozick is providing us with nothing more than a reconstruction or systematization of a set of moral intuitions. Roughly speaking, we might say that his argument is a rational reconstruction of a libertarian moral consciousness. If I disagree with one of Nozick's claims about morality, for example with regard to when, where, to whom, and to what extent I am obligated to pay compensation, what sorts of arguments would he consider it relevant for me to offer? I confess that I cannot tell.

Nozick talks repeatedly of developing a "theory" of this or a "theory" of that. Does he mean a rational reconstruction of our moral intuitions? Whose intuitions? Does he mean, rather, a derivation of normative principles from a set of premises? In this regard, his opening methodological remarks about types of explanation are seriously misleading. Nozick's task is to show that under certain circumstances, a state of a certain sort can be *justified*, not that it, or its appearance, can be *explained*. For this purpose, fact-, law-, and process-defects are irrelevant.

Finally, it should be noted that despite the contrary impression created by some of his language, Nozick is attempting to show that a de jure legitimate minimal state *could* come into existence by a series of morally permissible steps, not that it *would* come into existence under any particular set of social circumstances. In short, the purpose of Part I of *Anarchy, State, and Utopia* is to establish the *possibility* of a de jure

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no raw materials, He pays nothing to primary producers, and since by that creative act He also creates the space which the universe occupies, he need not even pay rent. God, out of His infinite Goodness, then gives (*i.e.*, in Nozick's terms, transfers) the earth to mankind *in common*. At the same time, He lays down the conditions under which an individual may rightfully remove a piece of property *from the common holding*, and appropriate it for himself. If we secularize this theory, it is not difficult to see that it is really based on the supposition that property is originally *social* or *collective*, and that individual rights to property are granted by—and hence can be limited or taken away by—society. The opposite view, that property is originally individual, is completely contrary to Locke's orientation, and also, to the facts of history and society. When Nozick points out, in his attack on Rawls, that commodities come into the world already loaded down with individual entitlements, he forgets that by his own theory, such entitlements arise in the first instance only from just acts of transfer (of labor-power and the other factors of production), and hence presuppose some adequate grounding in just acts of acquisition.

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