

legitimate state. Let us turn now to an examination of Nozick's argument for that claim.

#### AN INTERNAL CRITIQUE OF THE ARGUMENT

The first difficulty we encounter when we examine Part I is that Nozick, by his own admission, has not proved what he set out to prove, even if his argument is sound. The "state-like entity" whose generation by morally permissible or morally obligatory steps Nozick sketches is not, in his own words, the "sole authorizer of violence."<sup>10</sup> It has a right to interfere in disputes between two nonclients, but no special right beyond that which any person possesses. This entity has no right to stop one or another of those nonclients from forcibly but rightfully exacting compensation from the other nonclient for a wrong suffered. In other words, Nozick's "state-like entity" has no right to prevent nonclients from taking the moral law into their own hands in their dealings with other nonclients.

Nozick deprecates the importance of this inferential shortfall, quoting at length from an anthropological account of the state to support his claim that the state-like entity is near to a full-fledged state.<sup>11</sup> Now, for the pure theory of the state, the gap between state and state-like entity is exceedingly important. One might as plausibly respond to Kenneth Arrow's General Possibility Theorem,<sup>12</sup> as an acquaintance of mine once did, by pointing out that majority rule only rarely produces an inconsistent social preference order!

Leaving pure theory to one side, the significance of the limitations on Nozick's "state" will depend on certain matters of fact about which he is silent. His language encourages us to imagine a society in which no more than a handful of individuals choose not to sign up with the dominant protective association. But suppose as many as a sixth or a fifth of the residents of a territory are nonclients. Suppose, further, that they are geographically scattered and not easily identifiable by dress, manner, or occupation.<sup>13</sup> How will the minions of the state-like entity be able to tell who is and who is not a client, as they walk street patrol or rush into a barroom to break up a brawl? Will the state-like entity be forced to conclude that, for all practical purposes, it *must* claim to be the sole authorizer of violence (with due compensations paid, of course)?

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10. R. NOZICK, *supra* note 1, at 117.

11. *Id.* at 116-17, quoting L. KRADER, *FORMATION OF THE STATE* 21-22 (1968).

12. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

13. They are, we may imagine, all that remains of the great anarchist movement that overthrew the more than minimal state and created the conditions out of which the dominant protective association emerged.

Will the state-like entity claim for its employees—its private police—special rights in their role as representatives of the total clientele of the association, over and above their rights as individuals? Will the state require its employees to be clients as well? (Premiums could be conveniently withheld from one's paycheck.) If a nonclient resists a private policeman who mistakenly interferes in what he thought was a fight between clients, will the issue between him and the nonclient be an issue between two individuals, or an issue between an individual and the state-like protective association as represented by its agent, the private policeman? If  $n$  individuals can, through  $n$  acts of contractual agreement, transfer their individual rights to a single protective association, can that association, by a single contractual agreement, transfer those aggregated rights to its agent, the policeman? If so—and Nozick can hardly say no—then will that policeman, in his personal on-duty encounters with others, whether clients or nonclients, have rights quite different from those possessed by the individuals he encounters? Also will that effectively deprive ordinary nonclients of their rights vis-à-vis the policemen?

In short, Nozick's argument will not do as a justification of the state. The plain fact is that states claim de jure legitimacy, and it is such claims, not assemblages or aggregations of transferred individual rights, that ground the further claims made by the state on behalf of its agents, its policemen, its courts, and its executioners.

The second difficulty with Nozick's argument is that it does not, in its own terms, establish its intended conclusion. Since he begins from the libertarian side of the debate, Nozick feels very little need to argue the claim that a dominant protective association can legitimately come into existence without violating anyone's rights. For him, as for all libertarians, the real problem is how to show that the protective association has a right (or indeed, a duty) to tax its clients in order to "redistribute" income to those who cannot or will not buy protection contracts and thereby become clients. In short, for Nozick the real nub of the issue is: What obligation have the rich to buy protection for the poor? His answer—and the linchpin of the entire construction—is the *principle of compensation*. The sequence of Nozick's exposition of the principle, somewhat obscured by his tendency to follow up interesting side-issues, is as follows:

a. After sketching the notion of an area in moral space around an individual that contains his rights, Nozick asks: "*Are others forbidden to perform actions that transgress the boundary or encroach upon the circumscribed area, or are they permitted to perform such actions*

provided that they compensate the person whose boundary has been crossed?"<sup>14</sup>

b. A principle of compensation is suggested: "[T]hose who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others."<sup>15</sup>

c. The principle is reiterated with a charmingly ingenuous acknowledgment of its shaky logical status.<sup>16</sup>

d. Finally, the principle of compensation is flatly invoked as *the* justification for "redistribution," in the form of supplying protection for nonclients, which traditional libertarians decry as an invasion of the rights of those taxed.<sup>17</sup> Three pages later, Nozick announces that his argument is complete.<sup>18</sup>

As this survey indicates, Nozick nowhere argues for his principle, but even if we grant it to him, we must still raise objections to his employment of it. The clients of the dominant protective association are obliged to compensate nonclients for their loss of the ability to enforce their rights against clients. But presumably, only the loss of the ability to enforce their rights *properly* need be compensated. The associated clients are under no obligation to compensate nonclients for the loss of their ability to enforce their rights improperly, or to enforce false rights claims.<sup>19</sup> If I may, I will employ a Nozick-style pair of examples: First, if some madman proposes to enforce his property rights by going out into the world, when he has suffered a robbery, and randomly torturing people to death until he obtains a believable confession, I am not required, should I stop him from doing so, to compensate him for depriving him of the method of rights-enforcement he has chosen; nor am I obliged to compensate a different madman, should I deprive *him* of the ability to enforce the absurd claim that he, as the first-born of God, has a right to all the movable goods in the human world.

Thus, the clients of the dominant protective association are only

14. R. NOZICK, *supra* note 1, at 57.

15. *Id.* at 82-83.

16. *Id.* at 87.

17. *See id.* at 110-11. The phrase "[a]ccording to our principle of compensation given in Chapter 4," *id.* at 110, makes it clear that by this point in the text, Nozick is taking the principle as having been established, not merely suggested. *See id.* at 115.

18. *Id.* at 114.

19. Since Nozick seems to interpret his own principles ad hoc, to suit his argumentative purposes, I am at a disadvantage in attempting to determine what inferences can and cannot be drawn from them, a disadvantage for which, presumably, I ought to be compensated by being held to a somewhat less stringent standard of proof.

obliged to compensate nonclients for depriving them of their ability to enforce their *true* rights *properly* against clients. By hypothesis, however, the protective agency employs methods that it considers proper, and only prohibits methods it considers improper. So from *its* point of view, no *disadvantage* has been suffered by the nonclients. Hence, again from its point of view, it has no obligation that it can see to pay compensation, and consequently no right to tax its clients in order to pay for such compensation. If this suggests Catch-22 or Big Brother, I can only reply that it does indeed. Nozick's dominant protective association looks very much like the traditional state, with the velvet glove of legitimacy removed from the iron fist of enforcement.

Let us examine the notion of compensation more closely, since Nozick rests so much of his argument upon it. It will be seen that in this topic, many of the most important lines of his argument come together. Nozick starts with a very strong version of the classical liberal conception of the individual. This conception assumes a sharp and clear distinction between what is inner, internal, private, or one's own, and what is outer, external, public, or someone else's. Nozick captures this conception quite nicely in his metaphor of the "moral space" of each individual, circumscribed by "a line (or hyper-plane)."<sup>20</sup> After introducing the image of a boundary of one's moral space, he thereafter frequently refers to rights-violations as boundary-crossings. When speaking of actions that threaten to violate the rights of others, or that run the risk of violating the rights of others, he speaks of individuals who come dangerously close to the boundaries of others, and so forth. We are encouraged by such language to conjure up either of two images whenever Nozick speaks of actual or threatened rights-violations. The first is the image of the body. Its surface is the "boundary," and an invasion of its surface is a violation of a person's rights in his own person. It is in light of this image that we can understand the remark that political philosophy is primarily concerned with physical aggression. The second image is that of a piece of "real property," of *land*, whose boundaries may be crossed only with the permission of the owner. Nozick's examples as often suggest this image of "boundary-crossings."

There is a very considerable difference between the physical invasion of my body (or its forcible manipulation by others) and an act of trespass on my property. The frequent talk about "fear," and so on, which we will attend to presently, makes sense only in respect to the threat of physical aggression. The examples of rights violations, however, are clearly couched in terms of the rights in real property. What

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20. R. NOZICK, *supra* note 1, at 57.