

is more, many violations of property rights cannot plausibly be understood either on the model of physical aggression or on the model of trespass. When I infringe your copyright, or steal your car from the public street in front of your house, I am neither invading your body space nor trespassing on your land.

Speaking somewhat more abstractly, Nozick's metaphor assumes that in moral space, my rights constitute, topologically, a compact closed set, the boundary of which is contained in the set. It follows that there cannot be any points in *my* rights space entirely surrounded by points in *your* rights space, although—whatever this means—my rights space might be entirely surrounded by yours. As Marx says, each of us, in this liberal model, finds in each other the barrier, not the realization, of his liberty.²¹ But suppose that our rights are not so neatly partitioned into compact subspaces of the moral space. Suppose, indeed, that in moving from right to right in the interior, and not just at the boundary, of my rights space, I must cross the rights of innumerable other persons. In that event, the notion of a boundary-crossing will dissolve. Nothing in Nozick's discussion provides any support for his account of the structure of the moral space of individual rights.

But this talk of moral topology has about it the air of a *jeu d'esprit*. There are other problems with the account of disadvantage and compensation that cut more deeply into the heart of Nozick's argument. The moral presuppositions of *Anarchy, State, and Utopia*, as we have observed, are radically individualist. They depend on a very sharp distinction between an inner sphere, where society in general and other persons in particular have not even a legitimate concern and an outer or public arena of interpersonal interactions, in which alone the question of the claims of others against me can appropriately arise.

Nozick, in the language and style of his argumentation, leans heavily on such notions as utility maximization, compensation payments, indifference curves, and the like, which presuppose the abandonment of that sharp public versus private distinction. The fear or anxiety I may suffer, on account of my anticipation of a possible violation of my rights, is fair game for an expected utility calculation. But a Locke-Mill theory of the private and the public would rule out such considerations as irrelevant to any moral deliberation concerning rights and duties. If Christian proselytizers set out, sincerely, to convert Jews to their faith, they may thereby generate anxiety in the Jewish community over the survival of Judaism. Would this anxiety count as a disadvantage to the

21. See K. MARX, ON THE JEWISH QUESTION 163, in 3 K. MARX & F. ENGELS, COLLECTED WORKS 146-74 (1975).

remaining Jews, for which—with suitable adjustments and qualifications—they would have a right to be compensated? On Nozick's view, the answer is presumably yes. However, neither Locke, nor Mill, nor any of the classic theorists of rights and border-crossings would agree. Ironically, Nozick has adopted a model that was developed as a theoretical elaboration of utilitarianism, and a moral theory antithetical to the intrusive paternalism of utilitarianism.

In general, the argumentation of Part I assumes a situation of choice under risk rather than choice under either certainty or uncertainty. All the talk about increased and lowered probabilities, the explicit assumption of measurement of utility on an interval scale,²² and the calculations of expected utility, assume choice under risk. Now, in itself, this assumption need not be fatal; it is an idealization of reality, and all theoretical analysis requires some such idealizations. However, there are at least three serious difficulties with this assumption in the context of Nozick's argument.

First, the underlying assumption of the derivation of the minimal state is that individuals, fearful for their lives and property, will band together into protective associations for security. Leaving to one side Nozick's bizarre example of the arm-breaking machine, it is clear that the fear that fuels the drive for security is a product of *uncertainty*, not of *risk*. Even if we ignore the inner versus outer problem raised above, and admit this fear into our moral calculus, we must recognize that it is a product precisely of situations which *lack* the structure required for the probability estimates and expected utility calculations on which the theory of compensation rests.

Second, as Hobbes and many others have noted, fearful, isolated, uncertain individuals in a state of nature band together precisely to achieve that security and predictability that will, for the first time, make rational calculation possible.²³ One might say, anachronistically and somewhat facetiously, that one of the purposes of a social contract is to transform situations of choice under uncertainty into situations of choice under risk. One of the arguments that can be advanced in support of a state-enforced system of laws—especially in the area of property law—is that it reduces uncertainty and thereby facilitates rationally self-interested economic activity. Such a formulation makes Nozick's analysis of the formation, growth, and stabilization of a dominant protective association circular, for it assumes the prior existence of the very state of affairs it is supposed to produce.

22. R. NOZICK, *supra* note 1, at 58.

23. See T. HOBBS, *LEVIATHAN* 189-201 (MacPherson ed. 1968).

Finally—a point to which we shall return—the elaborate calculations implied by Nozick's theory of compensation presuppose an extremely advanced stage of social, economic, and political integration. To take a relatively simple example, consider the degree of bureaucratization of medicine that must come into being in order to generate usable statistics on the relationship between heart disease and air pollution. One cannot even raise the question of "compensating" someone for having inflicted on him an increased risk of heart disease unless one has data of this sort, and the collection of such data requires a very advanced stage of social integration. The invasion of privacy, *de jure* or *de facto*, required by that stage of social integration, is precisely the evil that Nozick seeks to rule out. Merely in order to calculate what it owed in compensation to nonclients, the dominant protective association would have to do most of the snooping and prying and standardizing and regulating that is now carried on by the modern welfare state. The only difference between the two, so far as I can see, is that after inflicting itself on all of us, as the state now does, Nozick's state-like entity would be uncommonly niggardly when it came to distributing benefits.

In short, Nozick's real problem is that given his extremely strong theory of individual rights, side constraints, and so forth, he ought in all consistency to come to the conclusion that *no* unconsented-to boundary-crossings (*i.e.*, rights violations) are permissible, regardless of compensation. But that is a crazy conclusion, as he realizes. If accepted, it would immobilize us all, making us much like a bizarre gathering of morally musclebound rights freaks, lovely to look at, but unable to lift a finger for fear of encroaching on one another's moral space. So Nozick compromises. Of course, once he starts, only his intuition, or the degree of his moral finickiness, tells him when and where to stop, and how much to pay in order to achieve what a mathematically sophisticated Anglo-Saxon of the eighth century might have called a discounted *wergelt* raising the tribe to its previous indifference curve.

Before concluding this first, internal, stage of my critique, I should like to raise an additional question, and also correct an error in Nozick's one explicit use of Game Theory. The error is of no great importance to his argument, but the question, I believe, goes to the very heart of his theory, and indicates one of the ways in which it is inadequate. To put the question as succinctly as possible, what price will a dominant protective association charge for its services? A protective association is merely a private individual or group of individuals who go into business to sell a service. When such associations first spring up, price is

determined by market considerations. Once either oligopoly or monopoly develops, however, the dominant protective association can raise the price. For obvious reasons, there will be rather severe inflexibilities restricting entry of new firms into the market. If Nozick is correct, and a dominant protective association emerges with a de facto monopoly, the price will soar. The owners will charge as much as the market can bear, which will, in the nature of their service, be a good deal. What is more, like other monopolistic firms, the dominant protective association will not maximize output, which is to say that its maximum profit will probably result from a rather lower level of social stability and security than it could provide or than its customers would like. The customary laissez-faire safeguard against the dangers of monopoly is to assign to the minimal state the job of preserving the conditions of competition, but quite obviously it cannot perform such a function in this case!

We may therefore conclude that the protective association, once it acquires a monopoly, ought to charge only the fair market price, not the monopoly price. However, there is no such thing as a fair market price for the service sold by the dominant protective association! There is not even such a thing as what the fair market price would be. There could not be a "market" for what the association sells, because what it sells is the guarantee of a monopoly. Since there are no substitutes for law and order, consumers cannot even set limits to the monopoly price by switching commodities. Needless to say, the owners of the dominant protective association, inasmuch as they are merely businessmen out for a profit, will not be restrained by any of the traditional, irrational constraints on the exercise of political power, such as patriotism, public spirit, or a concern for the general welfare.

Finally, a few words about the payoff matrices, and accompanying analysis.²⁴ The hypothetical matrix is wrong, and the dominance arguments based on it do not go through. The problem lies in the figures postulated for payoffs DA' , DB' , $D'A$, and $D'B$. Nozick proposes the following matrix:

		Matrix II			
		Person II			
		A'	B'	C'	D'
A	5, 5	4, 6	10, 0	10, 0	
B	6, 4	5, 5	10, 0	10, 0	

24. R. Nozick, *supra* note 1, at 121-25.