

WHITHER ANARCHY? HAS ROBERT NOZICK JUSTIFIED THE STATE?*

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One can appreciate *Anarchy, State and Utopia* on many levels. Its emphasis on individual freedom is a refreshing change of pace. It questions assumptions that have long been sacrosanct. It puts forth a theory of entitlement which is nothing short of remarkable in this day and age. And most importantly, it is being taken seriously by the press and, hopefully, the establishment philosophers as well.

But Professor Nozick has attempted more than this. He has attempted to refute the anarchist position. This is a rare endeavor. Few have taken the anarchist position seriously enough to refute it. Few understand it well enough to do it justice. Dr. Nozick displays an intimate knowledge of the anarchist position and yet he rejects it. His refutation is novel, intricate and many-faceted. But does it succeed? In this paper I shall try to outline a few reasons why I think it does not.

Nozick begins by asserting that "Individuals have rights..." (ix).§ The purpose of the first part of his book (the only part which we shall treat here) is to see if it is possible to evolve a state or "state-like entity" (118) without any violation of individual rights. He concludes that such a thing is possible and likely as well. I shall confine my examination to the possibility that a state might exist which does not violate individual rights *ab initio*.

"In a state of nature an individual may himself enforce his rights, defend himself, exact compensation, and punish." (12) But an individual may also delegate this right to friends, relatives, or hirelings. A company

which specialized in defense of its customers Nozick would call a protective association.(12) The protective association has no rights of action other than the sum of the rights delegated to it by its subscribers. (89) To this point the anarchist has no problem. At least he thinks he has no problem. He has yet to hear what Professor Nozick believes is the content of these individual rights.

Nozick analogizes rights to a sort of boundary which "circumscribes an area in moral space around an individual." (57) What happens if one person does something which risks crossing the boundary of another? Nozick answers that you may prohibit the risky activity provided that "those 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." (83) This he calls the "principle of compensation." It "requires that people be compensated for having certain risky activities prohibited to them."(83)

It follows from this principle that an individual *may* be prohibited from using a procedure of enforcing his rights which is risky or unreliable, provided that the principle applies to this type of activity. Nozick gives two parallel justifications for applying the principle to dispute settlement.

Since he maintains that a protective association has no rights of action other than the sum of the rights delegated to it by its subscribers (89), Nozick first seeks to ground his justification on some right held by every individual. He turns hopefully to the notion of "procedural rights." "Each person has a right to have his guilt determined by the least dangerous of the known procedures for

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§ All parenthetical numbers are from Robert Nozick's *Anarchy, State and Utopia*, Basic Books, 1974.

ascertaining guilt, that is, by the one having the lowest probability of finding an innocent person guilty." (96) The association's right to prohibit risky procedures, therefore, derives directly from the individual's procedural rights.

Secondly, Nozick insists that the prohibition of "unreliable" procedures is valid even if there were no procedural rights. He contends that epistemic considerations govern the use of retaliatory force. That is, you must *know* that an aggressor has violated someone's rights before you may retaliate. Use of force on an aggressor without knowing that he is guilty is itself aggression. "If someone knows that doing act A would violate Q's rights unless condition C obtained, he may not do A if he has not ascertained that C obtains through being in the best feasible position for ascertaining this." (106)

On this analysis, a protective association may prohibit others from using procedures which fail to meet some standard of certainty since failure to meet this standard means that the enforcer lacks the requisite knowledge of guilt.

Once you swallow the principle of compensation and its applicability to dispute settlement, the introduction of the minimal state-like entity is all downhill. Nozick envisions one association coming to dominate the market. By his principles, this association would have the right to prohibit all competitors who in its opinion employed risky procedures (provided, of course, "compensation" was paid). Voila! We have a state-like entity which arises without violating anyone's rights, right?

Everything hinges on whether Nozick has successfully outlined an "invisible hand" explanation of the state where no rights are violated in the process. Consequently, Nozick's conception of rights and their basis becomes crucial here. Yet early in the book he apologizes for not presenting a theory of the moral basis of rights. (xiv). Still it is possible to discern a notion of rights being used here.

A right is a freedom to do something, that is, to use property which includes one's body in a certain way unimpinged by external constraints (force or threat of force). The right

of self-defense is contained within the concept of right itself. It is simply a means of exercising your right when someone is trying to prevent you from doing so. The fact you have a right of action means you may act in that way even if another attempts to prevent this. Self-defense, then, is implicit in the notion of rights.

Where do rights come from? How are they grounded? Nozick doesn't say and I will not pretend to offer a final answer to this question. But it seems that since the concept of right carries within it the freedom to use property, rights are created along with property ownership. I would contend that this is what ownership means. Rights (to use property in a certain way), then, can be homesteaded, exchanged, or bestowed to employ the Lockean trichotomy.

Has Nozick's minimal state violated individual rights? You remember that the reason the dominant protective association has a right to prohibit risky, unreliable enforcement methods is that its members, indeed all people have procedural rights. "Each person has the right to have his guilt determined by the least dangerous of the known procedures for ascertaining guilt, that is, by the one having the lowest probability of finding an innocent man guilty." (96). "The principle is that a person may resist, in self-defense, if others try to apply to him an unreliable or unfair procedure of justice." (102).

But where would such a right come from? Was it homesteaded, exchanged or received as a gift? And does this right of self-defense bear any resemblance to the right of self-defense I discussed earlier? Nozick deals with none of these questions. He simply assumes the existence of procedural rights and then proceeds to speculate on what form they should take. This does not mean that Nozick is wrong. It means only that we have no reason to believe he's right.

At the same time Nozick chides the natural-rights tradition which, he says, "offers little guidance on precisely what one's procedural rights are in a state of nature, on how principles specifying how one is to act have knowledge built into their various clauses, and

so on. Yet," he continues, "persons within this tradition do not hold that one may not defend oneself against being handled by unreliable or unfair procedures." (101).

I maintain that this is precisely what the natural rights tradition does hold or, at least, should hold: That there are no natural procedural rights. Let me briefly defend this claim.

In the state of nature one has the right to defend oneself against the wrongful use of force against person or property. But if you commit an aggressive act, the use of force by the victim to regain what was taken from him is not wrongful. If you have stolen a T.V., the rightful owner may come and take it back. You may rightfully resist only if you are innocent or have some legitimate defense. What are we then to make of procedural rights?

Though only the innocent party may rightfully use self-defense, it is often unclear to neutral observers and the parties involved just who is innocent. As a result there exists the practical problem of determining the facts of the case and then the respective rights of the disputants. But I must stress here that this is a practical question of epistemology not a moral question. The rights of the parties are governed by the objective fact situation. The problem is to discern what the objective facts are, or, in other words, to make our subjective understanding of the facts conform to the objective facts themselves.

The crucial issue is that since rights are ontologically grounded, that is grounded in the objective situation, any subjective mistake we make and enforce is a violation of the individual's rights whether or not a reliable procedure was employed. The actual rights of the parties, then, are unaffected by the *type* of procedure, whether reliable or unreliable. They are only affected by the *outcome* of the procedure in that enforcement of an incorrect judgment violates the actual rights of the parties however reliable the procedure might be.

The point is that you have a right of self-defense if you are innocent but not if you are guilty. Only if a procedure finds an

innocent man guilty and someone enforces that finding has anyone's rights been violated. You have the right to defend yourself against *all* procedures if you are innocent, against *no* procedures if you are guilty. The reliability of the procedures is irrelevant. Unless an innocent person agrees to be bound by the outcome of a judicial proceedings, he retains his right of self-defense even after a "reliable" procedure has erred against him.

The purpose of any procedure, then, is to induce adherence to the decisions of the arbitrators. The parties and the community must be convinced that there is a good chance of a just decision before they will be willing to bind themselves to any possible outcome. In a culture which held that rights are based on the facts of the case, disputants would demand procedures suited to discover those facts. The better it worked, the more acceptable it would be. Thus procedures would and should be judged on the basis of utility.

Procedures, then, for discovering the fact situation are not to be confused with rights themselves. You only have a right to a procedure, like any other service, if someone, e.g. your protective association has contracted to provide you with it.

What then of Nozick's second line of attack — the epistemic justification. "On this view, what a person may do is *not* limited by the rights of others. An unreliable punisher violates no right of the guilty person; but he still may not punish him." (107). It is not enough that the guilty party is guilty. The punisher must *know* he is guilty. One is tempted to label this the 'what you don't know *can* hurt you' approach.

This approach neatly avoids an assertion of procedural rights and, in addition, is a conscious effort to answer the objection that a guilty person may not defend himself against unreliable procedures and may not punish someone else for using them upon him. (103). Our attention is now shifted from the rights of guilty persons to the "morality" of protective associations; from the question of whether a guilty person can defend himself against his victim we now move to consider whether a third party can protect the guilty person if that

third party isn't sure of the client's guilt. "But," as Nozick asks, "does this difference in knowledge made the requisite difference?" (108)

He believes the epistemic problem at least allows the protective association to delay the imposition of penalties on its client until it can determine his guilt. This is provided they pay compensation for the delay if it turns out that his client is guilty. While I am unsure about the rightfulness of this delay, it does not appear to present a major difficulty. Nozick, however, goes on to assert that a person using an unreliable procedure "is in no position to know that the other deserves punishment; hence he has no right to punish him." (106) It is one thing to assert that if a protective association delays sanctions against its guilty client it must compensate the victim for the delay. To claim that the association may rightfully prevent any punishment by an enforcer it deems unreliable is quite another matter.

I leave aside the question of whether *anyone* has the right to "punish" if by punish we mean something other than "make restitution to victims." If punishment were limited to restitution, this might minimize Nozick's visceral reaction against the actions of third parties. For clearly he fears the prospect of persons stealing from or hurting someone and then trying to dig up some past indiscretion by the victim in order to "justify" their aggression.

A restitutional standard would justify the actions of thieves who stole from someone who turned out himself to be a criminal *only* if the thieves had given their booty to the original victim. If the thieves kept the loot, the fact that the victim was himself a criminal would in no way justify their acts. This is hardly a *carte blanche* for indiscriminate "punishing."

But Nozick's epistemic justification is more than a gut reaction against loopholes for criminals. It sets forth a principle of morality. Unfortunately he doesn't justify this principle beyond its deterrence value on enforcers using unreliable procedures. (105). And even on this point he concedes that "not anything that

would aid in such deterrence may be inflicted;" but the true question is the (moral) legitimacy of "punishing after the fact the unreliable punisher of someone who turned out to be guilty." (106).

But while this epistemic consideration may be relevant as a practical problem or even a moral problem, I question its relevance to issues of rights. (And I'm sure Dr. Nozick shares my contention that rights and morals are not co-extensive.) If the nature and moral foundation of rights are what I alluded to earlier — a freedom to use property, created along with property ownership — then epistemic considerations cannot create or alter rights. The right of self-defense we contend is a direct result of an infringement on a property right. Its purpose is to protect and restore what is rightfully owned. Since it is ontologically grounded this right exists against an aggressor independently of whether we know who the aggressor is. Consequently we are entitled to take compensation from the actual aggressor whether or not we are sure of his guilt. That is, the actual guilt or innocence of the suspect as opposed to our subjective knowledge of his guilt determines if taking restitution from him is justified.

Nozick's epistemic considerations are relevant to whether one who indiscriminately takes restitution from people he's not sure are aggressors (but happens by chance to be right) is a good man. This is a question of morality, not rights. Epistemic considerations are also relevant when we realize that we are *likely* to aggress against innocent people and be responsible to them if we aren't careful about who we "punish." This is a practical question, not one of rights.

This analysis, like the analysis of procedural rights, highlights the crucial need for a theory of rights and the difficulties we face in political philosophy without such a theory. The fact is that in laying down my argument, I too fail to provide a detailed theory of the moral basis and nature of rights. The purpose of this treatment, however, is merely to show how essential such a theory is and how starkly divergent conclusions flow from even a slightly different conception of rights.

How then are we to properly view the relationship between procedural safeguards, epistemic considerations for enforcers and the right of self-defense? Perhaps Dr. Nozick's intriguing distinction between moral constraints and moral goals would be of service here. "The side constraints view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society." (29). Let me briefly clarify this.

We may take as our moral goal or end a certain state of affairs. Anything which enhances this state of affairs we may do provided we don't violate certain moral side constraints on our actions. Nozick correctly argues that the protection of rights is not a moral goal since this would allow us to violate the rights of a few in order to generally enhance the rights of the many. For example, one may not torture the innocent person to gain information which will prevent the explosion of a bomb even though this would generally enhance the goal of protecting peoples rights (in this case the rights of the potential victims). Rights of individuals are moral side-constraints. We may strive to achieve our goals in any way which does *not* violate an individual's rights.

I would adapt this view to our discussion here. For practical and moral reasons, procedural fairness and knowledge by enforcers of the guilt of their suspects are moral goals to be striven for. Our efforts to achieve them, however, cannot violate the rights of any individual. To punish a victim for taking restitution from his actual aggressor just because he wasn't sure it really was his aggressor is a violation of that victim's right of self-defense and, therefore, a violation of our moral sideconstraint. The right of self-defense, then, dictates that procedural fairness and epistemic certainty are goals, not constraints.

In this discussion, I've tried to show how Professor Nozick has failed to apply his "principle of compensation" to dispute- settlement situations, the lynch-pin of his justific-

ation of the ultra-minimal state. But what of this principle of compensation itself? I think Professor Nozick will agree that if *it* fails there can be no doubt that that the ultra-minimal state is unjustified.

"The principle of compensation requires that people be compensated for having certain risky activities prohibited to them." (83). In other words it is okay for you to forcibly forbid another from engaging in a risky activity provided you compensate him for it. Nozick anticipates our response by pointing out that "it might be objected that either you have the right to forbid these people's risky activities or you don't. If you do, you needn't compensate the people for doing to them what you have a right to do; and if you don't, then rather than formulating a policy of compensating people for your unrightful forbidding, you ought simply to stop it." (83).

Nozick claims this dilemma is "too short" (83); that there is the middle ground of "prohibit so long as you compensate." This middle ground, he says, is based on a distinction between "productive" exchange which you have a right to engage in and "non-productive" exchange which you do not. Since you have no right to non-productive exchange in the first place, the prohibition of such an exchange isn't a violation of your rights.

In a productive exchange each party is better off than if the other party's activity wasn't done or the other party didn't exist at all. (84). "Whereas if I pay you for not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me." (84). The principle of compensation merely says that if the prohibition of a non-productive exchange causes you to forego some benefit (other than what you might have charged in the exchange) you are entitled to compensation.

My concern in this discussion is not so much whether such a distinction exists, but whether such a distinction is relevant to political philosophy or, more particularly, to rights. What seems to have occurred here is an unfortunate mixing of economic explanation

with moral imperatives. The concept of an *ex ante* increase in individual psychic utility as a result of exchanges was developed as an axiomatic explanation of why voluntary exchange occurs. It was never intended to serve as a moral or political justification of that exchange. Its use as such disregards the whole notion of title.

If something belongs to me what I own is the title to that object. I may do with it what I wish and that includes exchanging my title for other titles. The *reason* I exchange is to maximise my psychic utility but this says nothing about my *right* to make the exchange. In Nozick's example of a blackmailer it is true that the blackmailed party would be better off if the blackmailer didn't exist (as opposed to an auto purchaser who would not be better off if G.M. did not exist). But the reason why this is true is because the blackmailer is a free man who has the right to tell what he knows as we all do. Wouldn't a businessman be better off without his competition? If a rival company offered to leave the market for a price would the remaining company have the right to prohibit any further competition by the rival simply because the rival was offering a non-productive exchange? I think not.

Nozick admits that even under his principle of compensation, the blackmailer may charge for what he foregoes which Nozick incorrectly assumes to be little or nothing. What the blackmailer foregoes is his right to use his body in any way which he sees fit, i.e. speech. This introduces the fallacy of a "just price." There is no just price for this right or, more precisely, his title to use some property — the body — in a certain way. It has no intrinsic, objectively measurable value. Its only fair price is the freely bargained one. Anything less would mean a right of title had been taken by force from its owner. By definition this is a violation of the blackmailer's rights.

This just price fallacy permeates the whole of Nozick's discussion of "compensation". It confuses the morally permissible exchange with the penalty for violating a right which is compensation. If someone violates another's rights, the victim is entitled to compensation to make up for the transgression. This simply

means he is entitled to what was taken from him. We don't pretend that money is the equivalent or even "fair price" for the loss of life or limb. We say only that some attempt must be made to restore to that victim what was taken from him as far as humanly possible.

The crucial distinction here is while voluntarily paying a purchase price makes an exchange permissible, compensation does not make an aggression permissible or justified. It is not permissible to deprive you of free speech provided I "compensate" you. You would have the right to defend yourself. If you were unsuccessful, unable or unwilling to defend yourself, you would then, in addition, have a right to compensation. Put in more analytic terms, voluntariness is a necessary condition for a morally permissible exchange of values. Compensation is not a sufficient condition for justifying or permitting a violation of rights.

Contrary to Nozick's principle of compensation, all violations of rights should be prohibited. That's what right means. The only way rights are abdicated is by consent of the right holder. Nozick rejects this on the grounds that "some factor may prevent obtaining this prior consent or make it impossible to do so. (Some factor other than the victim's refusing to agree)". (71). To this one must reply, "so what?". Practical problems of obtaining consent sometimes can't be avoided it's true, but this doesn't mean that consent is not required. Nor will an argument from utility suffice since utility we saw can only be applied to moral goals and not to rights which are moral side-constraints (to employ the Nozickian distinction). Nozick is too quick to reject the principle that rights violations are always prohibited.

WHITHER ANARCHY?

Political reality dictates that the *practical* burden of proof falls on those who wish to make a radical change in society. Anarchists must face this burden. But it is those who seek to impose a state, those who wish to justify their use of force against the individual who face the *moral* burden of proof.

As I tried to emphasize at the beginning of this paper, there are many reasons why we should be grateful to Robert Nozick for writing this book. Not the least is that he has properly perceived the moral burden of proof. More than this, he has tried to meet that burden. I have tried to determine whether he has succeeded. Has Robert Nozick justified the state? I conclude that he has not, though not for want of an intricate and ingenious effort.

It is essential to his endeavor that he show that the rise of the state violates no individual rights. He has attempted to show this by implicitly redefining rights. The crucial step in this process is the principle of compensation

and its application to dispute settlement. I believe that the application of the principle to dispute-settlement via procedural rights and epistemic considerations fails. The principle itself, I contend is grounded on a misguided economic-type explanation rather than a moral argument. Lastly I feel that Nozick's own concepts of moral constraints *and* moral goals helps us to see where he later falls short.

Nozick's book neither claims to be nor succeeds in being the last word on the anarchist-minimal state controversy. For that matter, neither does this paper. I conclude simply that Nozick fails to meet his burden of proof. The state remains unjustified.