

NOTE ON ANARCHY, STATE, AND UTOPIA

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I. INTRODUCTION

Robert Nozick's widely hailed *Anarchy, State, and Utopia* has been analyzed primarily in terms of the arguments he engages in with his fellow "public philosopher", John Rawls. Yet perhaps the most unusual line of thinking introduced by Nozick is his "invisible hand" explanation for the origin of the state (pp. 78 ff.). This is not meant to be a genuinely historical account. It is clear that no state ever emerged in the way described by Professor Nozick. Yet he finds this satisfying because it attempts to explain the single most important step in the political evolution of mankind in terms largely divorced from the political realm. He feels that he has been able to demonstrate that it is possible for the state to emerge from the Lockean state of nature without violating anyone's rights and without anyone having planned to create a state (p. 113).

Nozick tries to shield his "invisible hand" argument by conceding that it may be "fact defective", "law defective", and/or "process defective", yet still remain a "fundamental explanation" packing "explanatory punch and illumination, even if incorrect" (p. 8). It is the purpose of this paper to demonstrate that the "invisible hand" explanation posited by Professor Nozick is incoherent, and fails to be a "fundamental" explanation of the emergence of the state. It does not present an underlying mechanism capable of yielding that result. (Further, it will be suggested that owing to faulty concepts of prohibition and compensation, Nozick's model of the minimal state contradicts his moral dicta posited elsewhere in the book.)

II. MICROECONOMICS IN THE STATE OF NATURE

Nozick provides an imaginative and subtle account of economic activity in the state of nature. Rather than merely positing that the state of nature would provide an insufficient setting for human action, Nozick attempts to demonstrate this point. In the process however, he comes to the curious conclusion that the state of nature and the state of civil government may be "one and the same thing" (p. 133).

This fallacy is the product of a number of errors in a long and convoluted argument. Oversights, contradictions, importations of aspects of civic government into the anarchistic economy, and a faulty admixture of moral and economic analysis propel his proof in wrong directions.

(a) *Gratis provision of services by protective agencies*

(i) *Monopolistic behavior in the state of nature.* At certain stages in his analysis, Nozick discusses the way men *ought* to act in order to remain in conformity with moral principles. In other stages of his analysis, he attempts to describe the way men *would* act in the state of nature. It should be obvious that only the latter components of his argument can properly bear upon the operation of an "invisible hand process". Thus, his crucial contention that a "dominant protective agency" would provide service to non-customers is unsupported. He fails to adduce any plausible reason to expect that such an agency would so act. He says that the dominant agency, having acquired a *de facto* monopoly, would be "morally required to do

so". But this presupposes behavior totally unlike that customary to monopolies.

(ii) *Consequences of competition.* The view that protective agencies would *not* donate their services to non-customers is encouraged if we consider the case of multiple protection agencies co-operating together. Nozick enumerates the possibility that economies of scale among protective agencies could evolve so that distinct agencies would operate through a federated appeals procedure. Having admitted this, he fails to treat adequately the resulting possibilities. Apparently the stipulated cooperation suffices in his mind to allow the federated agencies to be treated as a *de facto* monopoly, with no need of consideration separate from the case of the single dominant agency discussed above. This assumption is unsupportable on several counts:

(a) It is unclear that a federation of distinct agencies could be correctly considered a monopoly. The stipulated fact that their appeals procedures were integrated would not put any of the individual firms in a position to charge a monopoly price. Each firm would still be competing for customers with all the other firms, and potential customers would remain in Nozick's terms "independent". The situation would be similar to that of competing telephone companies servicing the same geographical areas. (There remain some instances of this in the United States at present, so the analogy need not be dismissed as far-fetched.) If there were three or four or X firms competing in rates, services, and technology, in what sense would they be a "monopoly" simply because they might agree to employ interconnecting equipment which enabled a customer of one to call a customer of any? How would the situation of analogous competition between "protective agencies" differ? Given that each protective agency in a similar circumstance would retain its proprietary incentive to maximize income, none would be expected to extend service gratuitously to non-clients unless it had been organized as a charity for that purpose.

(b) The possibility that several protective agencies could remain in cooperative compe-

tion within a certain area would increase the prospect that their areas of service might not fully coincide. Thus a complex map of overlapping service boundaries, typical of inter-firm competition, might arise. In addition to the normal influences of happenstance, and the divergence of entrepreneurial judgment in forming distinct service areas, each firm would have an additional incentive to disperse its business as widely as possible so as to minimize the risk of loss from the sudden emergence of an "outlaw agency" in any given locale. This would further obviate any minimal incentive that might exist for firms to provide service to non-clients, since those unaffiliated with any given firm would comprise the large majority of a population dispersed over a wide area.

(c) In the contract theory of the emergence of the state there is no crucial need to specify why states have boundaries. The incidence of boundaries is merely posited as reflecting, perfectly or imperfectly, the area delimited in the past when citizens were presumed to have joined together in executing a given social contract. Similarly, those theorists who hold that the state originated coercively, such as Gumplowicz, Ratzenhofer, and Oppenheimer can explain the boundaries of states as having evolved from the vagaries of raw power and the fortunes of war. Anthropological concepts, such as the "circumscription" theory of Carneiro, incorporate certain demographic, cultural, and ecological conditions for the emergence of the state which themselves presuppose boundaries. But the "invisible hand" argument contemplates no boundaries in its dynamic. They are merely posited as existing. This may seem unimportant. But the problem of boundaries is not simply a minor detail. We need to know how and why proximity delimits the moral responsibilities of the dominant protective agency in a state of nature. This bears directly both upon Nozick's claim that "maximal competing protective agencies cannot coexist," and upon his dictum that the dominant protective agency would be "morally required to extend protection to non-clients".

Since conflicts between clients and non-clients in a state of nature could take place over any distance, what would allow procedural uncer-

tainties to be resolved without resort to force-monopoly at a distance of X miles, but not at a distance of $X - 1$? What is the distance required to counter the presumed economies of scale? It does not suffice to stipulate that at a certain point other protective agencies would predominate "with some gradient being established". How could a distinction be entertained between conditions in the "gradient" and the overlapping patterns of competition by other firms (which Nozick denies could exist?). Customers within the gradient would still be able to shift business from one firm to another. Who would stop them? Certainly not the firm to which business was being shifted. And what would prevent agencies whose main power resided in one area from establishing a branch within the space subsumed by the presumed "dominant agency" of Nozick's argument? Could not a newly competitive agency secure a foothold merely by purchase of a strip of property? How could this be morally prevented? To forbid owners to execute land sales would violate rights.

Nozick posits a state like a Swiss cheese, with internal and external boundaries. He notes that geography alone is insufficient to isolate on internal boundaries non-clients of the dominant agency, A, who might employ helicopters in their misenforcement of rights. In what respect would geography suffice to isolate non-clients of A who were capable of striking across the presumed external boundaries? Why would not *the* dominant agency be morally obliged to absorb non-clients on its periphery until it was protecting the earth? Assuming as Nozick does, that the dominant agency would necessarily prohibit non-clients from protecting themselves directly, or through other voluntarily chosen agents, on what basis could it allow any boundaries to its monopoly? Must we assume, then, that the minimal state would be universal? Clearly, the "invisible hand process" is defective in analogizing the evolution of the state in the political realm, since its concept of distinct states must be imported by observation of existing states. The process itself contemplates no mechanism whereby *several* states could morally arise.

(d) Nozick's argument appears to incorporate the unacceptable assumption that the provision

of protection is an indivisible service. But without the existence of a state to adumbrate boundaries between protective alternatives which are monopolized or forbidden, and those which may be sold on the market, even the necessarily vague distinctions we know today would disappear. Exactly which firms are to be classified as protective agencies? Would hardware stores selling locks, fences, and other presently banned protective devices be protective agencies? What if they promised to pursue and capture anyone who successfully penetrated a fence or picked a lock? Would karate schools be considered protective agencies? Suppose they guaranteed to provide a gang of roughnecks to hunt down and punish anyone who successfully attacked one of their customers? That firms would be free to offer such guarantees in the state of nature is obvious. Who would there be to stop them? It does no good to assert here that the "dominant protective agency" would prevent such a multiplication of protective alternatives. For at the point in the postulated "invisible hand process" where these possibilities are contemplated, there is yet no dominant agency. Thus, instead of only a few firms, there might be fifty or a thousand, many of which would be expected to concentrate upon offering protection to highly specified areas of the market. Firms could arise offering protection only to persons of Italian ancestry, or only to Negroes, prospects which coincide with the anthropologically observed fact that defense is normally first organized along clannish lines. There could be firms selling protection services only to long-haul truckers, or only of valuable gems, or only to Communists. For various reasons, all of the respective agencies could be affiliated in a single dominant appeals unit (a Better Business Bureau), thus satisfying Professor Nozick's stipulations about patterns of competition. Given these prospects of elaborate market division, the plausibility of expecting any given firm to step outside its specialty and gratuitously protect non-clients is nil.

Accordingly, we must conclude that neither of Professor Nozick's conditions for emergence of a minimal state has been fulfilled by his argument. He has not demonstrated that a *de*

facto monopoly need arise from the state of nature of economic causes. Nor has he shown that any "general distribution" of protective service would arise from "an invisible hand process" (p. 52).

(b) *Sale of the state and other problems*

Many other crucial points which bear on the plausibility of the Nozick argument are not explained. At what point, for example, would the evolving state (assuming that the argument can be extended that far), cease to be a business? If its stock were freely trading, or its ownership saleable, might not the minimal state, once in existence dissolve? Suppose the cost of providing gratis service to independents so depleted the profit of the owners that a management change brought new policy. If the gratis service were terminated, would the state cease to be a state? Could not, under certain circumstances, managers of the state control decisions about extension of coverage which would affect the profitability of the agency, and thus manipulate its value? Could they "short sell" the state, and expand coverage, gaining from inside knowledge of the resulting decline in profits? If stock of the putative "state" were to remain on sale, why could not a controlling interest be purchased so that the "state" would be merged with a cookie company? Could presumed enemies or criminals from far or near conquer the state by purchasing it?

Possible objections to the conclusions which Nozick draws from his line of microeconomic analysis are legion. If he is to assume that economic behavior propels persons in the state of nature, he must answer to consequences of similar economic motivation which would deflect from his conclusion.

III. COMPENSATION, RISK AND PROHIBITION

Nozick's treatment of the issues of compensation, risk, and prohibition rests upon assumptions which contradict his moral dicta. He posits a compensation theory which excludes and minimizes the compensable damages from border crossings, thus tautologically "dividing the benefit of the exchange" in favor of the

transgressor. By focusing the search for compensation upon the victim's valuations prior to the act of transgression, Nozick places no value upon the experience itself and excludes from consideration the subjective consequences which bear directly upon its cost to the victim. Paradoxically, he insists instead that there is a requirement to compensate fear, a subjective emotional state, which need not arise from the specific border crossing, nor indeed from any border crossing. The ramifications of this faulty view of compensation include a theorem of prohibition which so punctures Nozick's "hyper-plane surrounding an individual in moral space" that it could be elaborated into a justification for a slave state.

(a) *Full compensation*

Nozick posits that "something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person X for person Y's action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had not done A." In clarification of this view, Nozick modifies it further in the direction of reducing compensable damages by requiring "reasonable precautions and adjusting activities by X" to "respond adaptively and so limit losses". Although applications are most easily imagined in terms of direct material loss, the principle, as Nozick makes clear, applies to all border crossings.

But does not this doctrine require that the victim cease to define his own ends and become a means for the transgressor? Within the limits of an individual's epistemic resources, he will always act to minimize his losses in terms of his overall ends. But this does not necessarily entail acting to minimize losses from any specific border crossing. That may be conceived as "non-coping" as Professor Nozick labels it. But why must one be forced to cope? May one individual, through acts of moral trespass, throw obstacles in the path of another with which the victim must then be obliged to "cope?" Why must the victim be diverted from his own most valued ends merely to minimize the compensation due from a transgressor? And if the victim fails voluntarily to reduce losses,

thus increasing the amount of retribution, so what? Why is that less preferred than allowing the transgressor to shirk the costs of his acts?

Imagine rancher A driving along a highway adjacent to his grazing lands. As he travels he sees that an automobile driven by B has crossed the ditch and damaged a fence. If the fence were to be immediately repaired, the damage might be limited. If not, two hundred cattle might escape, and later have to be re-captured at considerable expense and the likely loss of several of the herd. Must the rancher stop on the spot and repair his fence? That is suggested. If he does not, is B spared the liability of compensating for any lost cattle? Suppose that A knew that one of his friends had just been gouged by a bull, and was rushing to the doctor for help. Would B *then* be obliged to compensate for the loss of cattle? If humanitarian endeavor on A's part would alter the circumstances requiring him to "adapt", would other ends also suffice? Suppose rancher A to be intent upon nothing other than making money. Suppose he were rushing to the airport to catch the only plane which could deliver him to an important business meeting. At that meeting he might either consummate a large sale of cattle, making \$50,000, or he might fail to win the agreement and thus make nothing. Would A then be obliged to halt his car and "cope" with the broken fence? If he did not, would the errant driver B remain responsible for all the consequences of the broken fence? Would B be responsible only if the deal were consummated? Only if it fell through?

Suppose further that the damage to the fence had not resulted accidentally. Driver B might have been hired by one of A's competitors X to damage the fence and thus divert A from the important meeting, thereby gaining business for X. Would A be obliged to choose between making the meeting, where he might not be successful, as against the certain loss of several thousand dollars, knowing that losses from his herd would not be compensable since he might have acted to avoid them? Imagine further that as B waits to have his car towed after having intentionally demolished A's fence, A's daughter, C, happens by directly from a meeting of some mystic religious order. Seeing the accident,

she stops to inquire of B's condition. Unrepentant, B then rapes C and leaves the scene in her car. Is it to be imagined that because C's exotic beliefs exclude the use of medication and forbid abortion, that B would be exonerated from child support should C conceive? Would "full compensation" as stipulated by Nozick encompass little more than replacing the broken fence posts and returning the car with a full tank of gas?

The qualification that the victim must "respond adaptively" under Professor Nozick's compensation theory requires that the victim choose between altering his own ends and facing uncompensable losses at the hands of an aggressor.

Yet even if the caveat that the victim must limit his losses were removed, the compensation theory employed by Nozick would still underestimate compensable damages. It fails to consider the full costs to the victim which arise from the inconstancy of valuations over time.

Because valuations are inconstant, to be compensated they must be focussed upon as they are *after* the act of trespass, not before. By way of illustration, suppose person F to be the owner of an old automobile which had long sat in his driveway and which he intended to junk as soon as he obtained \$50 to pay a wrecking crew to remove it. Before this could happen, Y comes along and recognizes the old car as a valuable Studebaker Dictator which could command a considerable price when restored. Knowledgeable Mr. Y then proceeds to steal the car. If, one year, later, F recognizes his car in restored condition, would his compensation be to pay the thief \$50, thus bringing his "indifference curve" to its former position? Or would he be entitled to compensation based upon the valuation he would certainly place upon the car *at the present time*?

To assert that the victim is compensated by being left "no worse off" is to place the degree of compensation so low as to favor the trespasser over the victim. It provides the violators of rights with a *carte blanche* to act without risking compensable damages, provided that they select victims who are sufficiently depressed or ignorant.

Another example will reiterate the important

point that compensation must be based upon valuations in present time rather than at the time of the transgression. Imagine that individual E is terribly morose. He scarcely cares whether he lives or dies. He has apparently been jilted in a love relationship, so he has drawn out his savings — the equivalent of \$5000 — and is wandering the street contemplating suicide. He is then accosted and robbed by individual X. In the depths of despair, he encounters his lover, who makes up and they resume their lives together. Sometime thereafter, a business associate Y makes him aware of an opportunity of which he had previously been unaware to invest \$5000. E is emphatically convinced that the price of world cocoa will quadruple within one year. If he had the \$5000 he could invest at a margin of 20:1, matching the investment of his business associate Y. But because of the theft he lacks the means to pursue his ends. The price of cocoa quadruples. The associate employs the resulting \$40,000 in a project (in which E might have participated with his equal yield). This project is successful also, making Y a millionaire. He retires. The thief X is then captured, who turns out to be a very wealthy individual, capable of paying “full compensation” whatever that might be.

To hold that payment of \$5000, plus some interest consideration is sufficient, would clearly leave E very much the worse for the transgression, according to his valuations in the *present*. Yet if X had attempted to borrow \$5000 from E on the night of the theft, he might have been able to negotiate the deal at a negative interest rate because E was so depressed.

(b) *Full compensation and market compensation*

When full compensation is calculated on the more accurate basis of valuations in the present rather than at the time prior to the transgression, it is clear that full compensation would be market compensation.

If the home of person A were burgled by person B who stole a can of vichyssoise what would the damage be? (Imagine B as too lazy to go to the store one night, so sneaking into his neighbor's house, he helped himself.) In the absence of an exchange transaction to establish

an upper limit on A's valuation of the vichyssoise, determination of damages to assure “full compensation” would be impossible. The vichyssoise could have been a highly valued possession. Suppose that A's mother, knowing her son appreciated vichyssoise, had purchased a can as a favor to him on a trip to a distant locale, and forwarded it as a present before her return trip. If A's mother were subsequently killed in an accident returning home, the valuation he placed upon the otherwise ordinary can of soup might be intensely high. Whether he received word of his mother's death after the theft, or before, would make no difference.

In a free exchange, both parties, subject to caveats of the contract, forego future claims which might arise from the essential inconstancy of human valuations. The exchange establishes relative valuations placed upon an item of exchange at the moment of trade. It can never tell us the precise upward valuation which any individual places upon the consideration which he *receives* in trade, it can only set a relative (to the other item) limit on the item which he *expends*. Part of the owner's right to ownership is his right to refrain from exchange, while assessing the valuations which he imputes to items. A transgressor has no right to force an exchange at any point X, and thus force the victim who would seek full compensation to settle upon the basis of his valuations at point X.

Of course, determination of “full compensation” for theft of the vichyssoise, or for any other alienated value is a judicial task which would tax any formulation of retributive justice. In the absence of an exchange equation we can never know the upward limit of A's valuation of the soup can. But while we lack the epistemic tools to assess precisely the magnitude of “full compensation” we can say authoritatively what “full compensation” is *not*. It is not less than any amount which a wronged individual would refuse to accept in exchange for dropping his right to recover the lost or alienated value. In the example of the soup, A cannot be fully compensated if he would not sell his right to recover the can for the amount of proffered compensation. In the example of the stolen auto considered earlier, person F cannot be fully compensated, regardless of any evidence as to

his previously low valuations of the Studebaker, if he would not willingly exchange his compensation for the right to recover his property. Thus, the concept of "full compensation", contrary to the argument stipulated by Professor Nozick, can never encompass the forced alienation of values.

(c) *Preventive restraint*

Nozick's concept of preventive restraint culminates the arguments arising from his fallacious concept of compensation. There are no principles which give exact guidance as to who may prove a threat, and under what circumstances. Thus all decisions limiting threats are arbitrary. In a society with civil government, the state makes decisions which apply everywhere because the state has dominion over all property. In the state of nature, numerous individuals would make the decisions (no less arbitrarily), the sum of which would amount to "preventive restraint". These decisions would be made by the criterion of ownership. Thus, the owner of an ice cream parlour might refuse entry to any potential customer carrying weapons. A proprietary community or housing development might stipulate, as a matter of contract, that no residents keep dogs, or lurk around the grounds after certain hours. This "preventive restraint" could morally take any form whatever, including denying access to any property by person A for any reason whatever — in the absence of previous contractual arrangements to the contrary. Permissible precautions, which would not violate the rights of anyone, would include ostracism, with or without cause. But they would not encompass preventive detention which would be imprisonment without cause.

No compensation for the consequences of ostracism would be called for. No one is entitled to cross any land or space, nor conclude any agreement, trade, nor interaction with any other individual under Nozick's formulation of rights. Clearly, one may not sue a potential lover because he or she refuses to accept a proffered relationship. That is uncompensable because no one is entitled to a lover's affection. By the same token, one could not sue the potential lover because she was disinclined to purchase an

encyclopedia offered for sale at her door. One could not sue if she prohibited salesmen from her step altogether, nor if she denied them free passage over her property. In none of the cases is one entitled to anything, thus no compensation is in order for denying it.

Social prohibitions in the state of nature would arise from an invisible hand process. Persons who hoped to travel freely and obtain access to interaction with others would be prudentially constrained to conform to a standard which filtered out alarming or dangerous behavior. Thus, while one would have the right to arm oneself to the teeth, one would have no right to go armed on anyone else's property. There would be few or no common thoroughfares where anyone could congregate without meeting the contractual tests of an owner.

Those threat-limiting decisions made without prudence would prove anti-social, and thus penalize the decision-makers by reducing their desired contact with others. If owner A opened a restaurant where potential customers (to limit robbery possibilities) could wear no clothes, the result might be to reduce concealed weapons. But it might also eliminate customers. A balance would be struck commercially. There would be other restaurants, perhaps more dangerous, but offering other conditions of entry. In the state of nature, there would be no "public" decisions to occlude dangerous behavior. There would only be market decisions to filter out behavior which the consensus of owners found to be risky.

To presume that preventive detention would be permissible, providing "full compensation" were paid, betrays a fundamental misconception. If it were truly "full compensation", those staying would be doing so voluntarily. If not, their refusal to stay would demonstrate the compensation to be insufficient. Contrary to Professor Nozick's claim, it is precisely the "monopoly pricing" of compensation to the individual which makes slavery impossible. Because the detained could raise his price infinitely by demonstrating a preference to depart, it would be impossible to morally enslave anyone in the state of nature. That reflects Locke's description of the state of nature as a place where men enjoy "perfect

freedom to order their actions and dispose of their possessions as they think fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any man". That suggests nothing if not the monopoly of each individual over himself, and hence the ability to monopoly-price his freedom.

Otherwise, the Hatfields, depending upon Professor Nozick's formulation of preventive detention and "full compensation", might legitimately imprison any McCoy at birth. They would have reason to "predict of him that the probability is significantly higher than normal" that he would either commit a crime or attempt to exact independent retribution for a crime, either of which would in Nozick's terms justify preventive detention. And as Baby McCoy would have all alternative uses of his time foreclosed, would the compensation required then be minimal?

Because the child, and later the adult, would have been forbidden to exercise any entrepreneurial skills, and thus earn his "entitlement", which Nozick's theory elsewhere supposes for him, would it be permissible to compensate the detained McCoy only according to the average productivity of an individual in the state of nature? And if this is admitted, would not a Communist dictator, acting in the

high probability that individuals in the future may commit more crimes than those in the present, impress everyone into preventive detention on a communitard basis, seeing that this would conform to conditions of compensation by Nozick for an *impoverished* society, so long as the "position of those restrained and those unrestrained are made equivalent"?

While one may doubt that Nozick formulated his concepts of compensation and restraint with an eye to justifying a slightly more fanatical version of present-day Albanian society, there is also reason to doubt that it points the way toward the sort of complex social order which he imagines as "Utopia". Such a society could only be realized as the consequence of a system of justice less inimical to individual freedom. That means, in particular, that there could be no articulated formula of preventive restraint.

IV. CONCLUSION

That there are some appreciable defects and contradictions in the thrust of Nozick's argument, does not mean that his work is of less than the highest value, both for its brilliant demolition of many of the moral claims of advocates of distributive justice and for its generally provocative effect upon the evolution of libertarian thought.