THE WITHERING OF NOZICK'S MINIMAL STATE

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June 26, 1979
Robert Nozick has attempted to demonstrate that a state can emerge from anarchy which will be legitimate, in that it acquires power in morally permissible (i.e., non rights violating) ways. Its monopoly on force and apparent redistribution of holdings are, according to Nozick, justified by the steps required to prevent risky behavior by the dominant agency. These steps, I argue, contravene Nozick's own entitlement principles and so, his dominant agency is not warranted in taking them. This leaves Nozick "stranded" within his own state of nature, the dominant agency unable to legitimately transform itself into a night watchman state.
The Withering of Nozick's Minimal State

In Part I of his Anarchy, State, and Utopia Robert Nozick proposes a new solution to the old problem of political legitimacy. The problem of political obligation within a natural rights framework received its classic treatment in John Locke's Second Treatise of Civil Government. There, Locke adduced two necessary and, cumulatively, sufficient conditions of political obligation: first, that civil society be created by the unanimous agreement of the governed and second, that the public instrument so created be granted only the substantive power of protecting natural rights. As a natural rights libertarian Nozick finds the social contract an insufficient basis for establishing political legitimacy. In the first place, the state created by it monopolizes protective services and, thereby, restricts the property rights of those succeeding generations who were not parties to the contract. In the second place, it transfers to the majority the power to tax the citizenry, binding subsequent generations to that power, again, an apparent contravention of Lockean property rights. These weaknesses lead Nozick to seek a new instrument of political legitimacy in an "invisible hand" process which can transform the state of nature into civil society without depriving the governed of their Lockean natural rights.

In what follows I will contend that this attempt to replace the social contract with an invisible hand mechanism is a failure, so that Nozick's minimal state never receives the justification that would politically obligate its citizenry. In attempting to construct that justification Nozick tries to be responsive to the libertarian critique that the contractarian created minimal state is rights violating in the aforementioned ways. This critique would, if sustained, imply that any state, no matter how limited in authority, is not justified. It is the libertarian anarchist, then, that Nozick feels compelled to answer in justifying his new instrumentality of political obligation.

The libertarian anarchist, according to Nozick, opposes on two counts even the minimal state which confines its activities to the protection of libertarian rights. First, the state, says Nozick's anarchist opposition, is a coercive monopoly in the provision of certain services
(legislation, adjudication, and punishment) and so, arbitrarily and forcibly prevents the free use of personal property to hire or finance such services. This type of restriction upon the use of property is an obvious violation of Nozick's principle of justice in transfer and so, is apparently anti-libertarian in nature. The state's coercive monopoly is, for this reason, rejected by Nozick's libertarian anarchist.

But the anarchist has another reason for condemning the state according to Nozick. Its geographical monopoly on legal violence implies that it assumes responsibility for the protection of all those within its domain whom it has forcibly deprived of the means of self-protection, including those who will not voluntarily remunerate it for such protective services. This obligation seemingly requires the redistribution of property from those who are willing (and able?) to pay the state for its services to those who are neither willing nor able to make such payments. Hence, the state, of necessity, appears to violate libertarian principle by being redistributive.

Nozick's method of rebutting these anarchist complaints includes an explication of the steps by which a state of nature becomes transformed into a minimally governed society and an alleged demonstration that each of these steps is morally permissible, i.e., is rights preserving. In order to assure that the transition from anarchy to minarchy violates no one's Lockean rights, Nozick undertakes to show that the state's monopolistic and redistributive functions were acquired precisely in order to defend rights. I will contend that Nozick's arguments in this regard fail.

Nozick's narrative of transition begins with a state of nature in which a number of mutual protection associations have arisen, each engaged in the defense against and punishment of violations of libertarian rights. How, Nozick inquires, does one of these become a government without transgressing libertarian principle? That is, on what grounds can one agency violently restrict the rights protecting activities of other agencies without infringing upon the property rights of those agencies and their clients? On the grounds, answers Nozick, that the means being employed by those other agencies are inappropriate to the end of rights protection; that they, in fact, systematically risk rights violation. And their very riskiness provides the justification for their forcible prevention, according to Nozick.
Now, how can this be? Risky behavior is certainly not the moral equivalent of rights violating behavior. And on the Nozickian view it is only examples of the latter that may be coercively prohibited. How can agencies whose behavior is risky but not rights violating have their operations forcibly, but justifiably, curtailed?

Nozick's view, here, seems to be that a procedure of rights protection which risks a rights violation can be forcibly prevented, provided that the individual whose rights were being defended via the risky procedure is suitably compensated. But, how does the compensation "erase" what ought to be considered on Nozick's own principles a straightforward violation of rights? Either the risky activity of the agency constitutes a violation of rights, or it does not. If it does, then its prohibition is merely a legitimate defense of rights and no compensation ought to be due the perpetrator of the violation who would be a criminal on Nozickian grounds. If the risky activity was no violation of rights, then, its forcible prevention is a wrongful (rights violating) act which deserves at least punishment and, perhaps, compensation. But, to say that an act of "risk prevention" is not wrongful and, yet, requires the payment of compensation to its victim would appear to be, within Nozick's libertarian context, a contradiction. For, either a principle of entitlement has been contravened or not. If so, compensation is due, if not, no restitution is indicated. Nozick's alleged third category of threats to entitlement would seem to be vacuous from an entitlement perspective.

Further, if a particular risky activity is neither actually rights violating nor intended to be rights violating, then someone who finds the activity threatening is free to negotiate its cessation with its perpetrator, or to threaten him with prosecution should the activity result in injury. More than this he cannot do on entitlement grounds.¹

¹Nozick considers this sort of criticism and dismisses it, cryptically, as "too short." If he is referring to the parsimony of this kind of argument then his dismissal is logically groundless. Brevity is neither a formal nor informal fallacy of reasoning. See Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, Inc., 1974), p. 83.
Nozick has objected to this kind of argument because it is sometimes too difficult or costly to negotiate with the perpetrator. But, so what? Difficulties and costs are not, according to Nozick's historical principles of justice, entitlements.

In order to buttress his case for an alleged third category of activity, neither criminal nor tortious, but requiring prohibition nevertheless, Nozick unfurls the notion of a procedural right. If the requisite degree of riskiness can be identified with a failure to abide by certain procedural proprieties and, if those proprieties can be elevated to the status of a right, then occasions for prohibition become, at once, objectively evident and morally justifiable. They are objectively evident because what Nozick calls "relatively reliable procedures" are codified by various protective agencies and, therefore, the question of whether they have been adhered to can be independently assessed. Morally, an individual "... may resist, in self-defense, if others try to apply to him an unreliable or unfair procedure of justice. In applying this principle, an individual will resist those systems which after all conscientious consideration he finds to be unfair or unreliable. An individual may empower his protective agency to exercise for him his rights [underline my own] to resist the imposition of any procedure which has not made its reliability and fairness known, and to resist any procedure that is unfair or unreliable." If procedural reliability has attained the status of a moral right, then it may be robustly defended.

Although everyone possesses this right, according to Nozick, and, therefore, "Everyone may defend himself against unknown or unreliable procedures and may punish those who use or attempt to use such procedures against him" only the dominant protective agency will be able to enforce its clients' procedural rights:

... its strength leads it to be the unique agent acting across the board to enforce a particular right. It is not merely that it happens to be only the

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2 Nozick, Anarchy, State, and Utopia, pp. 71-73.
3 Nozick, Anarchy, State, and Utopia, p. 102.
4 Nozick, Anarchy, State, and Utopia, p. 108.
exerciser of a right it grants that all possess: the nature of the right is such that once a dominant power emerges, it alone will actually exercise that right. For the right includes the right to stop others from wrongfully exercising the right, and only the dominant power will be able to exercise this right against all others. Here, if anywhere, is the place for applying some notion of a de facto monopoly: a monopoly that is not de jure because it is not the result of some unique grant of exclusive right while others are excluded from exercising a similar privilege. Other protective agencies, to be sure, can enter the market and attempt to wean customers away from the dominant protective agency. They can attempt to replace it as the dominant one. But being the already dominant protective agency gives an agency a significant market advantage in the competition for clients. The dominant agency can offer its customers a guarantee that no other agencies can match: "Only those procedures we deem appropriate will be used on our customers."5

Therefore, by morally permissible means we have, according to Nozick, the morally permissible state. Or do we?

The argument appears markedly flawed at several stages. First, there is the notion of procedural rights itself. This is the notion of a right to be judged by a certain type of procedure which implies the rightful authority to punish the wielder of unreliable procedures. But, whence comes this right? Clearly, it is not an entitlement principle. It does not specify how certain "holdings" come to be justifiably acquired. Nor do substantive procedures seem deducible from the manifestly formal Lockean rights. How could specific sets of procedures be implied by entitlement principles? Such procedures are obviously strategies adopted by legislators and jurists, not entailments of the natural rights. Typically, a procedural right is a convention defined within and granted by a particular legal code. It is not an abstract, pre-legal natural right, but a right created by and recognized within a specific body of law. Its authority does not extend beyond that particular legal code. To speak of procedural rights which transcend and may be defined apart from any particular code is at least odd, if not obscurantist. Yet, Nozick analogizes his conception of procedural rights to Locke's extra-legal notion of

natural rights, thereby attempting to impart to it the political force of a Nozickian entitlement.

Nozick's commitment to this construal of procedural rights would seem to involve him in a regression problem. For, if everyone accused of violating Lockean rights has a right to be judged according to reliable procedures, then, suppose one's procedural rights are themselves transgressed. Must not this alleged transgression be evaluated according to a set of relatively reliable second-order procedures? And those second-order procedures will require a third-order set so that putative invasions of their second-order predecessors might be adjudicated reliably. And so on. Each rights violation is potentially encumbered with an infinite set of decision procedures. And no agency will ever be able to dominate its competitors for it will never be able to complete its deliberations which may require an infinite length of time should there be continuous allegations of procedural impropriety.

At this point Nozick might wish to respond that the dominant agency will simply terminate its deliberations at any point in time that it becomes convinced of the reliability of its procedures. But this move would fail on two counts. First, a putative property rights violation can only be established through a reliable procedure. Similarly, an alleged procedural rights violation can only be properly identified by another reliable procedure. As long as procedural improprieties are alleged by someone to have occurred, that allegation can only be evaluated by a review which employs some further set of procedures. Once the spectre of procedural impropriety has been raised the issue can be resolved either by further procedural review or through the exercise of force majeure by the dominant protective agency in order to arbitrarily terminate the reviewing process. In the former case, the procedural review is a potentially infinite one and, consequently, one which will not culminate in the emergence of an ultra-minimal state. In the latter situation, the dominant protection agency after failing to establish its claims of procedural propriety through further procedural review may well transform itself into the minimal state, but it will have done so by trampling the rights of others and, so, contra Nozick, the state will have emerged through the use of immoral means. In either case, a moral minimal state will not have arisen and Nozick's argument for its evolution, therefore, fails.
In fact, even if Nozick's commitment to procedural rights did not imply an infinite set of such rights, the transition from dominant protection agency to minimal state might still not be morally effected. For suppose X is the dominant protection agency but applies suboptimal procedures to the clients of others while believing its procedures to be more reliable than those of its competitors. Y, on the other hand, is an independent whose procedures are, in fact, more reliable than X's. X's erroneous beliefs concerning its own procedures lead it to inhibit the use of the more reliable procedures of Y on its clients. X, thereby, becomes a minimal state, but by morally impermissible moves.

Furthermore, I would contend that Nozick's attachment to procedural rights implies a commitment to what I would call "stalemated anarchism." Nozick concedes that "Everyone may defend himself against unknown or unreliable procedures and may punish those who use or attempt to use such procedures against him."6 This, of course, includes the clients of the dominant protection agency. Yet, in the process of prohibiting procedures which it believes to be defective the dominant agency may deprive others of their rights to reliable procedures as they understand them. The problem, here, is that there is no specific set of procedures common to all protection agencies that would enable public or independent verification of alleged procedural rights violations. Procedural rights in the state of nature refer to no body of rules other than those devised by anyone who cares to think them up. With many persons believing their procedures to be best and with no independent means of assessing the comparative merits of those beliefs, why is anyone entitled to impose his own views to the exclusion of others? Of course, Nozick has demonstrated that the dominant agency has the strength to do so, but does it have the right to do so? If everyone has the right to impose procedures which are in fact ideal, but, if, because of the emptiness of the Nozickian concept of procedural rights they are never able to identify those procedures with certitude, then everyone is entitled to impose what they believe to be procedurally best. But, this means that the dominant agency may not act in contravention of the beliefs of others. Hence, it morally may not act at all (although, of course, it is fully able to act) when

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6Nozick, Anarchy, State, and Utopia, p. 108.
its views of procedural propriety are in dispute. And so long as there is a plurality of views about what constitutes procedural justice, it is morally impermissible to move from anarchy to statism. And so we are left in the limbo of "stalemated anarchy."

Recently, Nozick appears to have modified his views on procedural rights somewhat. His views, now, appear to be that one may prohibit behavior which risks a rights violation if one compensates the potential violator for any disadvantages incurred by him. This argument does not utilize the procedural rights notion. But, the problem, here, is that no right has been actually violated. On Nozick's own entitlement criteria, the use of coercion in order to prohibit a risky but non-rights violating action would be inappropriate.

One might negotiate with the risk taker, attempting to induce him to desist from his risky activity. Nozick rejects such prior negotiations as not conducive to what he calls "productive exchanges." Such exchanges are defined in terms of the benefits accruing to the parties as a result of the exchange, as well as the motivations of the parties, and not in terms of coercion and ownership. If X and Y both justly acquired what they exchanged and did so voluntarily, then the propriety of the exchange is, on entitlement grounds, established whether or not that exchange is "productive." Hence, a negotiation motivated by the desire to avert risky but non-coercive action is a perfectly plausible and morally superior alternative to the forcible prohibition of risky activity. And such prohibitions, if not clearly defensive in nature are violations of rights. If such prohibitions are in fact defensive then no compensatory payment is due the perpetrator of the offensive and invasive act. But, if the dominant agency does not have to compensate those whom it justifiably defends its clients against, no basis exists for "redistributing" its services to the clients of independent agencies. As a monopolization of such services is a sine qua non of the minimal state, no such entity can possibly arise. For without procedural rights, agencies

\footnote{Remarks made by Robert Nozick at the Liberty Fund Conference on Liberty, Ethics, and the Economy held by the Center for Study of Public Choice, Virginia Polytechnic Institute and State University, Blacksburg, Virginia, July 11–22, 1977.}

\footnote{Nozick, Anarchy, State, and Utopia, pp. 84-88.}
can merely defend their clients and punish criminals. They cannot forcibly restrict the enforcement power of others, nor are they obliged to replace the prohibited enforcement services of others with their own as a form of compensation.

And so, we must conclude that with or without the conception of procedural rights Nozick's minimal state cannot arise by morally permissible means. The "invisible hand" mechanism, designed by Nozick to replace Locke's social contract fails as a justificatory lubricant for political authority: hence, the withering of Nozick's minimal state.

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