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NOZICK, ANARCHISM AND PROCEDURAL RIGHTS

JEFFREY PAUL

Department of Philosophy, Northern Kentucky University

One of the more striking features of Robert Nozick's *Anarchy, State and Utopia* to libertarians is the unusual argument which it contains in behalf of the state. This argument has been perceptively dissected by Mr. Barnett[1] and while I wish here to expand upon some of his criticisms, a preliminary explanation of what I take to be unique about the Nozickian argument will help to familiarize the reader with my own perspective.

While many minimal state theorists, such as Ayn Rand, have found in anarchism an unacceptable vehicle for the conveyance of natural rights libertarianism, Nozick, with Locke, does not dispute the logical compatibility of anarchism and natural rights theory. Instead, having conceded to the anarchists that advocacy of no government is not inconsistent with the espousal of natural rights libertarianism, Nozick purports to have demonstrated that (a) a state-like entity will emerge naturally from anarchy, and (b) that its emergence is both morally necessary and proper. The anarchist, he says, finds morally objectionable the monopoly of force which allows the state to punish the "private exacter of justice" who "violated no one's rights." Also, the anarchist will protest the process by which the minimal state in its attempt to protect the rights of all must overcharge those willing to pay for protective services in order to provide these services to those reluctant to finance the state. This overpayment will, according to Nozick, appear to the anarchist to be an instance of collectivist redistribution and, consequently, will draw his condemnation.

And yet, voluntary and rights-preserving mechanisms will inevitably transform the natural social order into a state-governed society. Thus, the libertarian purity of the state of nature will find its moral counterpart in the "minimal state".

Now, this approach of Nozick's, I repeat, is unique; for, as Mr. Barnett has correctly discerned, it assumes that the burden of proof lies with the pro-governmentalist and that the libertarian governmentalist must defend the state, not attack anarchy. Many, myself included, would argue, contrastingly, that there is a logical inconsistency between a conception of libertarian rights which construes them as imperatives of human behavior and a conception of the state of nature which systematically allows the uses of physical force to be a matter of individual choice. If, as I would argue, it is imperative that no human being coerce another — then why allow physical force to be applied according to the subjective inclinations of buyers in the marketplace? The uses of force according to natural rights theory ought not to be left to human choice. The restriction of physical violence to its defensive applications is ethically imperative, not simply morally normative for human behavior. Even if a libertarian legal code were written for a particular geographic area, the extent of its employment is to be left, according to the individualist anarchist, to the marketplace; i.e. to human discretion. If the anarchist will not explicitly acknowledge that his position entails a commitment to such politico-ethical subjectivism it certainly appears to me that this view is a logical implication of anarchist theory and that anarchism, having formally enthroned human discretion, is equally compatible with either "coercivism" or libertarianism.

Nozick, as I say, refrains from this (or any other) kind of attack upon the libertarian propriety of anarchism and, instead, begins with an examination of anarchism's criticisms of the

state, claiming that there are certain subtle empirical, political, and epistemological considerations which nullify these criticisms.

What are these considerations? The crucial one, I believe, is the notion of procedural rights. In identifying his conception of procedural rights as the linchpin of Nozick's argument I differ with Mr. Barnett's analysis, for on his view the *sine qua non* of *Anarchy, State and Utopia* is the compensation principle. In point of fact, Professor Nozick's argument cannot survive without either — but, as Barnett points out, it is Professor Nozick's contention that the compensation principle can be combined with either procedural rights or epistemic fallibility to yield the conclusion that the libertarian government is as moral as anarcho-capitalism.

In what follows I hope to demonstrate two things — that Nozick's argument will not go through if it is deprived of the notion of procedural rights and that procedural rights cannot possibly have the status which Nozick's argument must require of them.

Nozick's two arguments for the moral propriety of the minimal state are as follows: (i) All individuals have a right to property defense which they may delegate to others. Each individual, in addition, has a right to be judged according to procedures which will minimize the likelihood of his property rights being infringed. If in the defense of his procedural rights he deprives another of the means of protecting his property rights he must compensate him sufficiently to enable the re-acquisition of those means. Such deprivation is never immoral since it leaves the latter with his property and procedural rights still intact. Therefore, a dominant protection agency which deprives independent agencies of the means of defending their clients against the actions of the dominant agency's clients has committed no injustice so long as it compensates the independent's members sufficiently enough to enable them to purchase protection from it without incurring additional costs. A dominant agency which does so neither violates the property nor procedural rights of its alleged victims. It is merely safeguarding the rights, property and procedural, of its membership while replacing the original means which its "victims" employed in defending their property rights with more adequate means.

It is rather easy to appreciate the strength of this argument — for if procedural propriety is a right of men, then it may be robustly defended. Moreover, if there is an analytical principle enabling us to determine when the costs of aggression are fully compensated — then we retain the epistemic ability to fully restore for our victim the means of defending his property rights at no additional cost to him. Further, if *we* must bear certain costs in order to have our procedural rights safeguarded — then, in spite of the fact that we are paying for the additional costs of providing protection for independents and thereby giving them a free ride — the cost to us is borne as a result of *our* perception that our rights were endangered. This is a cost incurred in return for our increased safety. Our purpose in incurring it is not to redistribute our wealth but rather to safeguard our procedural rights. That is, our agency, in compensating others through our increased payments, has not redistributed our incomes. Such, I believe, is Nozick's first argument.

It depends for its strength upon an implied similarity between the natural rights of property and the right to adequate procedures for the enforcement of these rights. That is, just as property rights are taken to be pre-legal rights which can be stated, enforced, codified, but are not human creations or devices, so procedural propriety must also lay claim to pre-legal, non-created origins. If it does not, then its contingent status reduces it to a mere instrument, to a right assigned *in* particular legal codes — a right not *binding upon* all legal codes. However, in order that one agency may claim this as a right against the membership of other agencies, procedural propriety cannot be merely accidental to its legal code. It must possess the same status as self defense; i.e. it must be a right which is prior to, regulative of, and, therefore, required to be embodied in *all* legal codes. If Professor Nozick wishes to accord such an equal status to procedural rights some argument must be produced by him to justify that alleged equality.

What we can say is that any agency may defend its clients against enforcement or adjudi-

cation procedures in which their property rights are either threatened or violated. That is, while we all have rights of property which may neither be threatened nor violated with impunity, we do not have similar pre-existing rights to have a specific set of enforcement procedures followed. Our only rights are *to* property and, therefore, *against* any particular application of a procedure which threatens or violates our property rights.

Furthermore, if there is a pre-existing right to a procedure to judge alleged violations of property rights, is there another pre-existing right to a procedure whereby alleged violations of procedural rights are to be judged? And is there a further right to a procedure to judge that procedure? Professor Nozick's original procedural right seems to have fathered an infinite sequential set of like offsprings — each a right of procedure necessary to the regulation of its immediate ancestor. If there is an infinite regression here, no "dominant" agency will ever be able to complete the elimination of its competitors.

(ii) Nozick's second argument, so far as I can tell, is not, as Barnett alleges, distinct from the first. His second argument requires that persons be *known* to be guilty (in addition to actually being guilty) in order that they be punished. Hence, procedures which do not tend to lead to such knowledge may be prohibited. That is, this argument does not and, indeed, cannot abandon the notion of procedural rights — it only expands it. Here, Professor Nozick seems to be saying that everyone has *not only* the right to have procedures X, Y, or Z followed but one also has the right to be *known* to be guilty or remain unpunished. Here, the guilty party's procedural rights supersede the violated property rights of his victim. The same arguments which we made against the first version of procedural rights would apply here.

Now, Nozick's contention that a dominant protection agency which eliminates its competitors after it alleges that these did not efficiently guarantee procedural rights does so without violating natural rights, is false. By forcibly prohibiting the clients of its competitors from using their wealth in order to purchase protection at the agency of their choice, the dominant agency has violated their property rights. All that Nozick has demonstrated is that a dominant agency which infringes upon the property rights of its competitors' clients does so in the *belief* that in so doing it is eliminating a threat to the rights of its own clients. However, suppose that it is wrong in its belief. Does its ability to eliminate competition, plus the sincerity of its erroneous convictions, sanction its invasions of the rights of others? It is difficult to see, on libertarian grounds, how it could.

Finally, a word about the specific complaints that Professor Nozick believes the anarchist has against the minimal state position. Nozick suggests that these are twofold: that, first, the state punishes others for safeguarding rights, i.e. for what it does itself; and, second, that the minimal state by charging some for services that it provides to others is thereby redistributing the wealth of the former. In the case of this latter complaint, Nozick asserts that the justifiability of the claim that illicit redistribution is indeed taking place will not depend exclusively upon whether these alleged overcharges are exacted by physical coercion but rather upon the reasons given for the overcharge. However, he fails to limit those reasons to ones which libertarian theory commonly treats as justifying forcible transfers — namely, that all forcible transfers be made only as restitution for previous violations of property rights. Later, Nozick tries to introduce via the principle of compensation an alleged third category of reason — namely, compensation for the forcible prevention of risk. But either this forcible prevention was undertaken to defend one's manifestly threatened rights or not. If it was so undertaken it was an instance of responsive force; if not, it was an example of initiated and, therefore, illicit force. The systematically aggressive redistribution of taxation that proceeds without reference to particular infractions can never be justified by reasons which do not refer to their restitutive function. Further, overcharges which are voluntarily paid in order to subsidize free riders can *never* be properly characterized as redistributive. (Consider the company which gives away free samples, or cuts its prices for some customers while holding them firm for others.)

Now, what of the alleged injustices of monopoly imposed by the minimal state? I believe that this issue has to a large extent been overblown and is something of a red herring for the following reasons. Surely the libertarian anarchist does not contend that there ought to be a market in force *per se*. What he is really saying is that their ought to be a market in defensive and retaliatory force. His position would seem to suggest minimally, therefore, that only force which is employed in accordance with rules which restrict it to defensive uses is politically permissible. How to ensure such restriction? In the first place we cannot let the creation of rules be a market function — i.e. certain rules which might be desired by Fabians, for example, must be excluded. But in order to assure their exclusion an ultimate set of rules or, if you like, a framework for rules must be drawn up. And, in order to assure that no other anti-libertarian rules could be applied with impunity within a specific territory some instrument of physical defense must be employed the exclusive function of which will be to prevent anti-libertarian rules from being employed against its clientele. Thus, it would seem that libertarians of the anarchist persuasion must, by their adherence to libertarian principle, provide a vehicle by which the market in force will be strictly limited to libertarian uses. This vehicle must have a monopoly over the ultimate or last use of violence only so long as it conducts its business in conformity with the libertarian legal framework or constitution. Such a monopoly would not in the least exclude private police forces or courts or prisons — its presence would only be required in order to insure that ultimate or final adjudication and enforcement would proceed according to libertarian criteria.

Thus, while Professor Nozick's defense of the libertarian state may well succumb to the kind of criticisms presented here, the anarchist position still has other minimal state arguments with which it must contend.

NOTE

1. Randy E. Barnett, "Whither Anarchy? Has Robert Nozick Justified the State?", *J. Libertarian Studies* 1, (No. 1), pp. 15-21.