

Robert Nozick, *Anarchy, State and Utopia*

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Robert Nozick's *Anarchy, State, and Utopia* (1974), along with John Rawls's *A Theory of Justice* (1971), radically changed the landscape in analytic political philosophy. For much of the preceding half-century, under the influence of logical positivism's heavy emphasis on empirical verifiability, much of moral philosophy was taken up with meta-ethics (e.g., the semantics of moral discourse)—with little attention given to normative moral theories. Moreover, to the extent that normative theories were considered, utilitarianism was the center of attention. This all changed with the publication of Rawls's articulation and defense of liberal egalitarianism and Nozick's libertarian challenge to the legitimacy of anything more than the night-watchman state.

At the core of Nozick's book are two arguments. One is that a night-watchman state (which protects only against violence, theft, fraud, and breach of contract) could be legitimate, even without the consent of all those to be governed. The other is that nothing more extensive than the night-watchman state is legitimate, except with the consent of all. The argument is complex, and Nozick often inserts long—and very interesting—digressions. Below I shall focus only on his core argument. I shall thus not address his discussions of Rawls' theory of justice (Ch. 7, Section 2) and other arguments attempting to justify more than the night-watchman state (Ch. 8), nor his discussion of utopias (Ch. 10).

## 1. The Anarchist Challenge

Nozick attempts to rebut anarchism, which comes in several shapes and forms. The strongest

version says that it is *impossible* for any state to be legitimate. Almost everyone finds this view implausible because a state seems perfectly legitimate when, for example, it efficiently and fairly promotes individual wellbeing and all those governed by it have given, under fair conditions, their free and informed consent to it. A weaker version of anarchism—moderate anarchism—holds that a state is morally illegitimate unless all those governed by it have given appropriate consent. Relative to many theories of political morality—such as utilitarianism and (hypothetical) contractarianism—even this moderate version of anarchism is implausible. A version of utilitarianism, for example, can hold that a state is legitimate if it maximizes the total wellbeing in society (compared with other social arrangements). Consent and rights of self-defense play no special role in this theory of political justification. Nozick, however, starts with a libertarian theory of individual rights in which consent and rights of self-defense play very significant roles. In the context of such a theory (which we will examine below), the moderate anarchist position seems quite compelling. Nozick, however, argues that even here it is mistaken. He argues that the state can be legitimate even without unanimous consent. If his argument is successful, it is a very significant result.

Before considering Nozick's argument, we need to get clearer on what a state is and on his libertarian theory of justice.

## 2. The State

Defining statehood is no easy matter, and there is no uncontroversial comprehensive definition. Something like the following, however, seems at least roughly right for our purposes: A *state* is a rule-of-law-based coercive organization that, for a given territory, effectively rules all individuals in it and claims a monopoly on the use of force (e.g., killing, maiming, or inflicting pain). This can be unpacked as follows: A state is a *coercive organization* in that it threatens to use force against

individuals who do not comply with its dictates (either via prior restraint to prevent non-compliance or via punishment or the extraction of compensation for non-compliance) and it generally implements its threats. A state is *rule-of-law-based* in that in general it uses force only for violation of public and proactive dictates (and not on the whim of its officials). A state *effectively rules* the individuals of a given territory in that those individuals generally obey its dictates. A state *claims a monopoly on the use of force* in that it prohibits the use of force (or credible threat thereof) without its permission.

The rule of law requirement is controversial, and, in any case, Nozick does not invoke it explicitly. He characterizes the state as a coercive organization that has, for a given territory, an effective monopoly on the use of force.<sup>1</sup> This is at least roughly equivalent to the definition given above, if we assume, as we shall, that (1) the rule of law requirement is either met or irrelevant, and (2) a coercive organization *has an effective monopoly* on the use of force in a given territory (roughly) if and only if it claims a monopoly on the use of the force in that territory and effectively rules that territory.

The (moderate) anarchist claim is thus that no coercive organization that exercises an effective monopoly on the use of force over a given territory is legitimate unless all those governed by it have consented to its rule. It is worth noting here that the claim concerns legitimacy—as opposed to authority. A state is *legitimate* just in case its use of force (and threat thereof) is typically morally permissible. A state has *authority* just in case individuals in its territory typically have at least an all-else-being-equal moral obligation to obey its dictates. Ideally, a state should have both features, but in principle, a state could be legitimate even if it has no political authority (and vice-versa). Following Nozick, we shall focus on the legitimacy of the state.

### 3. Libertarianism and Justice

Nozick argues that a state can be legitimate even without the consent of those governed. He does this on the basis of certain principles of justice. In the philosophical literature, the term “justice” is used in several different ways, but Nozick understands it as the permissible use of force.<sup>2</sup> So understood, justice is not concerned with all of one’s moral obligations. It only concerns the moral restrictions on the use of force. The legitimacy of a state is thus a matter of its actions being just.

Nozick holds a kind of libertarian theory of justice, which we shall consider below. We shall start, however, by considering some more general aspects of his theory of justice. First, he holds that normal adult humans have certain strong natural rights—including the right to bodily integrity (which prohibits killing, torturing, or maiming the right-holder). These rights are natural in the sense that they do not depend on any legal or social conventions. All individuals having the requisite features—roughly, the ability to make free and rational choices in accordance with some reflectively chosen conception of the good life—have these rights. The rights are strong in the sense that they are not easily overridden by other moral considerations. Indeed, Nozick believes that these rights are nearly absolute: they may not be infringed except perhaps when necessary and effective in avoiding a great social catastrophe. Positing natural rights is not uncontroversial. Act-consequentialists (such as act-utilitarians) deny that there are any natural rights. Nonetheless, most people would acknowledge that there are some natural rights, and that the right to bodily integrity is among them.

A final general point to note about Nozick’s theory of justice is that it is *historical*. What it is just to do depends in part on what happened in the past. It is not normally just to punch another in the face, but it may be if it is part of a consensual boxing match. Likewise, it is not normally just to lock someone in a room, but it may be so if that person murdered several people

in the past. Both past consent and past wrongdoings are relevant to what is just at a given time. This aspect of Nozick's theory is highly plausible, and his emphasis on this feature has had a very positive impact on theorizing about justice. It's worth noting, however, that a theory can be historical (i.e., sensitive to the past) without being *purely* historical (i.e., making the future consequences irrelevant).

Nozick's theory of justice is a property-rights based theory. He claims that individuals have, or can acquire, *full property rights* (or full ownership) over various things, where full property rights over a thing consist (roughly) of (1) the right to *use* and *control use* of the thing by others,<sup>3</sup> (2) the right to compensation from those who have violated one's rights in the thing, (3) the right to *use force* to stop those who are about to violate one's rights in the thing, to extract compensation from those who have already violated such rights, and perhaps to punish such offenders, (4) the right to transfer these rights to others, and (5) an immunity to losing any of these rights as long as one has not violated, and is not in the process of violating, the rights of others.

Nozick's theory of justice is a libertarian theory, according to which an action is just if and only if it violates no libertarian rights, where the libertarian rights are the following:

- 1) initial *full self-ownership*: each autonomous agent initially has full property rights in him/herself (paradigmatically rights of bodily integrity, which rule out killing or physically assaulting one without one's permission);<sup>4</sup>
- 2) initial rights of *common use* of the external world: the right to use non-agent things (as long as this violates no one's self-ownership);
- 3) rights of *initial acquisition*: the right to acquire full property rights in unowned things as long as one leaves "enough and as good" for others;
- 4) rights of *acquisition by transfer*: the right to acquire any property right in a thing held by

another by voluntary transfer.

This theory of justice is modeled on that of John Locke in *Two Treatises of Government*. Nozick does not systematically defend this theory, but he does provide motivation for its key aspects. The rights of self-ownership, he claims, “reflect the Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent” (pp. 30-31), “express the inviolability of others” (p. 32), and “reflect the fact of our separate existences” (p. 33). Although the core of full self-ownership—roughly the right, under normal circumstances, to be free of interferences with one’s body—seems highly plausible, many would reject some of the other rights included in *full* self-ownership. One could question, for example, whether this right holds even where the harm to the holder is slight and the benefit to others is great (e.g., a small prick to my finger saves the lives of many). One could also question whether one has the right to enslave oneself voluntarily (as full self-ownership asserts).

Nozick does not spend much time discussing initial rights of common use. He simply asserts that the non-agent world is initially unowned, and individuals are free to use any part of it when others are not. He (like Locke) rejects, for example, the view that the world—other than the self-owning agents—is initially owned by some individual or group of individuals. (Such a view was invoked by 17<sup>th</sup> century proponents of the “divine right of kings”—a doctrine which Locke vigorously rejected.)

The right of initial acquisition is the power to acquire private property rights over things that are not already privately owned by others. Locke’s version of this right requires that one “mix one’s labor” with the thing and that one leave “enough and as good” for others.<sup>5</sup> Nozick notes (pp. 174-75) that the content and significance of the labor-mixing metaphor is not clear: Does an astronaut who clears a plot on uninhabited Mars mix his labor with the plot, all of Mars,

or the entire uninhabited universe? Nozick never resolves this issue, but nothing significant is lost if we replace the labor-mixing requirement with the more general requirement that the individual stake a claim to the object in some appropriate manner (e.g., publicly declare/register that she is claiming ownership of the object). The crucial question concerns the other requirement, that “enough and as good” be left for others. Nozick calls this “the Lockean Proviso”.

The Lockean Proviso can be interpreted in different ways. Nozick interprets it to require that the situation of others not be worsened by the appropriation. More exactly, he interprets it to require that no one be worse off in overall wellbeing with the appropriation than he/she would if the appropriation were not to take place (i.e., if the object were to remain in common use). Given that common use is generally inefficient (e.g., because individuals don’t have sufficient incentives to preserve the resource), this interpretation of the proviso sets a low baseline and makes it relatively easy for individuals to acquire full private property in unappropriated things.<sup>6</sup>

It’s worth noting here that there is disagreement within libertarian theory concerning the right to appropriate unappropriated things. *Extreme right-libertarianism* denies that there is any kind of requirement that enough and as good be left for others. It holds, for example, that the first person to discover, claim, or mix labor with an unowned object can thereby fully own it. *Moderate (or Lockean) right-libertarianism* holds that that some kind of Lockean Proviso must be satisfied, but interprets the proviso to be a weak requirement (e.g., as Nozick does). *Equal Share Left-Libertarianism*—advocated by Steiner (1994)—holds that the proviso applies and requires that one leave an equally valuable share of unappropriated resources for others (and thus allows one to appropriate only up to one’s per capita share of the value of unappropriated resources). *Equal Opportunity for Wellbeing Left-Libertarianism*—advocated by Otsuka (2003)—holds that the proviso applies and requires that one leave enough for others so that they

each have an opportunity for wellbeing that is at least as valuable as the opportunity for wellbeing that one acquires with the appropriation. This version of the proviso holds that those with less desirable internal endowments (e.g., those who are less smart, strong, and handsome) are permitted to appropriate more than those with more desirable internal endowments.<sup>7</sup> Even within libertarian theory, then, Nozick's version of the right to acquired unappropriated things is controversial.

Consider finally the fourth element in Nozick's libertarian theory of justice—the right of acquisition by transfer. The core idea is that if I have full property rights over a car (which includes the right to transfer these rights to others) and you and I each give our free and informed consent for those rights to be transferred to you, then those rights are transferred to you. Nozick emphasizes that justice depends in part on what contractual agreements have been made and thus that no purely end-state (i.e., non-historical) theory of justice can be adequate. He further claims (pp. 155-64) that the relevance of contractual agreements shows that no adequate theory of justice—even if historical—can be *patterned* in the sense of requiring (resources or wellbeing) to be distributed in accordance with some specified pattern of features. The pattern might, for example, be equality (which is not historical) or moral desert (which is historical, given that it requires that rewards match desert from past actions). We shall now briefly examine his famous Wilt Chamberlain argument for this claim.

Nozick asks us to consider a hypothetical case in which resources are distributed in accordance with our preferred pattern (e.g., equality or in proportion to moral merit) and Wilt Chamberlain (a famous basketball star in the 1960s and early 1970s) signs a contract with his team according to which he gets 25 cents for each home-game ticket sold. Because he plays so well, the team owner freely agrees to this deal. At the end of the season, Wilt has earned an extra \$250,000 and is much richer than everyone else. Nozick claims that such informed and free



contractual agreements preserve justice in the sense that, if the original situation was just, then so is the situation that results from such agreements (and no other influences). Consequently, if we stipulate that there were no other relevant influences, the resulting situation must be just—given our assumption that the original one was. Justice, Nozick claims, is procedural: if one starts with a just situation and applies just steps, the result must be just. The crucial point here is that, given (according to Nozick) that transfers of rights in conformance with free and informed contracts are just steps, the resulting situation will generally not be in accordance with the specified pattern (e.g., equality or proportional to merit). Hence, contractual agreements—and the rights to transfer and to acquire by transfer that make them possible—are incompatible with a patterned theory of justice. Given that individuals surely have the right to engage in contractual agreements, no pattern can be maintained without unjustly restricting people’s liberty. Thus, no patterned theory of justice is, he claims, plausible.

This is an important argument, but there are several ways of resisting the conclusion, and I shall mention two. First, if Wilt’s initial earning power is significantly greater than that of others, the initial situation might include a very high head tax for him that would equalize opportunities for earnings<sup>8</sup>. Wilt would thus be free to earn lots of money playing basketball, but he would also have an enforceable duty to pay high taxes based on his earning power. This would be a kind of historical patterned principle (initial equality opportunity for earnings) in which contractual agreements preserve justice. It is not, however, the kind of patterned theory that Nozick was targeting, since it only imposes the pattern on the initial situation and not on later situations. A second way of resisting Nozick’s conclusion is to note that he presupposes that Wilt has *full* rights of acquisition by transfer, which preclude any taxation of transfers. One could, however, endorse less than full rights of acquisition by transfer, and these could make transfers subject to whatever taxation is necessary to preserve the specified pattern. Thus, Wilt

would be free to make contracts, but he would know that they may generate a tax bill. Obviously, the issue is complex, and I am here merely flagging aspects of the argument that have been challenged.<sup>9</sup>

In sum, Nozick insightfully articulates and motivates a right-libertarian theory of justice, but does not provide a systematic defense. His discussion does, however, provide a powerful case for thinking that an adequate theory of justice must be historical by being sensitive to what wrong-doings took place in the past and to what agreements were made.

We are now ready—finally—to turn to the central topic of *Anarchy, State, and Utopia*: the possibility of a state being legitimate without the consent of all those governed.

#### 4. The argument for the legitimacy of the minimal state

A state, recall, is a coercive organization that has, for a given territory, an effective monopoly on the use of force. A state is legitimate just in case its use (via its agents) of force (and threat thereof) is typically morally permissible. There is no puzzle about how, according to certain consequentialist theories, a state could be legitimate without the consent of those governed. It is, however, quite puzzling how a state could be legitimate without the consent of all those governed—if one assumes (as Nozick's libertarianism does) that individuals initially fully own themselves. Such rights protect holders from the use of force by others and give them rights to use force to protect those rights. If individuals do not lose those rights, then any coercive organization that claims a monopoly on the use of force is illegitimate. If Nozick can answer the anarchist challenge and show that—even assuming initial full self-ownership—a state can be legitimate without the consent of all those governed, this will be significant indeed.

Nozick offers an account of how, starting from a state of nature, a legitimate state could arise through an invisible hand process (i.e., without anyone intending this result) and without

violating anyone's rights. In a state of nature, each individual fully owns herself and typically has other rights as well.<sup>10</sup> These rights include the right to enforce these rights by using force to stop others from violating those rights, to extract compensation when they do, and perhaps to punish violators.<sup>11</sup> With the consent of the right-holder, others may assist in this enforcement. It would thus be natural for individuals to form mutual protection associations in which they commit to helping each other enforce their rights. This could lead naturally to individuals hiring private protection agencies to enforce their rights, and this in turn could lead naturally (e.g., because of economic efficiencies) to there being a single dominant protection agency. Nozick argues, as we shall see below, that such a single dominant protection agency can be a state, indeed a legitimate one.

In order for a dominant protection agency to be a state, it must have an effective monopoly on the use of force in its territory. This means that (1) it prohibits everyone in the territory from using force in ways that it has not authorized, and uses force against those who violate this dictate, (2) it is effective in getting individuals to comply with these prohibitions (e.g., they comply in part because it has so dictated), and (3) it is the only organization or individual that is effective in this way. The question is whether a dominant protection agency can have these features without violating anyone's rights. It's important to note that not everyone in the given territory need be a (fee-paying) client of the dominant protection agency. Some individuals may be clients of smaller protection agencies and some may not be clients of any protection agency. We must consider both the rights of those who are clients of the dominant protection agency and the rights of those who are not.

There will be no violation of the rights of clients, as long as their contracts with the protection agency require them to transfer *all* their enforcement rights to the agency. Indeed, such an arrangement will typically be efficient, since it will reduce retaliation and counter-

retaliation between individuals. Clients, we may thus suppose, voluntarily give up their enforcement rights as part of the contract with their protection agency.<sup>12</sup>

The difficult case concerns the dominant protection agency's enforced prohibition against the use of non-authorized force against its clients *by non-clients*. Given that non-clients have not voluntarily given up their enforcement rights, this appears to be a violation of their rights. There is no problem when the protection agency uses force to stop a non-client from *wrongly* applying his enforcement rights against an innocent client. Here the non-client has no right to use force and is violating the client's rights. The problem arises when a non-client reliably and fairly applies appropriate force against a guilty client (e.g. to prevent a rights violation, to extract compensation, or punish, for one). Nozick claims that in a state of nature each individual has the right to use force to stop others from using unreliable or unfair enforcement mechanisms against herself. For example, I may use force to resist your attempt to forcibly extract compensation from me, or punish me, for a rights-violation that I did not commit. Moreover, I may also, in such a case, use force to resist being tried by a corrupt and biased jury that you hand-picked to assess whether I am guilty. If each client transfers this right to the dominant protection agency, then that agency may use force against anyone—even non-clients—who attempts to use unreliable or unfair enforcement mechanisms against its clients.

The net result is that, although the dominant protection agency does not claim any monopoly on the *right* to use force against those using unfair or unreliable enforcement mechanisms (since non-clients also have the same rights), only the dominant protection agency has the *power* to impose its own views on what is fair and reliable. It claims something close to a *de facto* monopoly on the use of force, even though it does not make any claim to a *de jure* (i.e., as a matter of right) monopoly. It prohibits everyone in the territory—clients and non-clients—from using force against its clients except in accordance with its own rules.<sup>13</sup> Moreover, because

the dominant protection agency effectively rules the territory, it has (and not merely claims) a something close to a *de facto* monopoly on the use of force.

Nozick argues that the dominant protection agency is not yet a state, but it can naturally evolve into one. It is not a state, he claims, because it does not protect everyone in its territory. This is because not everyone need be a client of the dominant protection agency, and those who are not clients are not protected. It's not clear to me that a coercive organization needs to protect all in a given territory in order to be a state. The crucial problem concerns who counts as part of the "all". Many historical "states" have offered minimal protection to slaves and women. Of course, most have offered at least some protection, but, even if they offered no protection, they would still seem to be states (although illegitimate ones). For the sake of argument, however, let us grant this requirement and consider how Nozick believes it will be met.

The crucial issue for Nozick concerns the justness of the dominant protection agency prohibiting—with a threat of force—non-clients from using enforcement procedures, which the agency has not authorized, against clients. There is no problem with prohibiting them from using procedures that will definitely violate the rights of clients. The problem arises when the prohibited enforcement procedure is merely *risky* in the sense that there is a less than certain chance that it will result in injustice. Nozick has an extremely interesting and important discussion of the issues that arise in this case, but we shall have to limit ourselves to the big picture. He argues roughly that it is permissible to prohibit risky activities where those activities would generate a general fear in the population even if it were known that compensation would always be provided to those whose rights were violated. The crucial point here is that he further argues that, if a protection agency prohibits non-clients from using risky enforcement procedures, it must compensate them for any disadvantage this imposes. This is what he calls "the Principle of Compensation" (p. 82). The cheapest and most effective way of providing this

compensation is to provide protection services to the non-clients at a reduced price (reduced by the amount of compensation owed). Of course, the non-clients are free to decline those services, but given that those services also protect them against other non-clients, there will be a strong tendency to accept the protective services.<sup>14</sup>

Thus, something approaching universal protection will be achieved by the dominant protection agency. The dominant protection agency will be a state. Moreover, it can, Nozick claims, arise without violating anyone's rights, and thus can be legitimate. We shall now briefly review the key steps in this argument.

One point to note is that Nozick's account of how a state could arise without violating anyone's rights does not establish that any existing state is legitimate. As Nozick emphasizes, justice and legitimacy are historical, and the legitimacy of a state depends at least in part on how it actually arose. The mere fact that a state could be legitimate does little to show that any actual state is legitimate. It would, however, show that anarchism is mistaken to hold that no state can be legitimate without the consent of all those governed. Given that this is Nozick's focus, the hypothetical nature of his account is not a problem. (Admittedly, Nozick sometimes writes, and has been interpreted, as if he claims that his hypothetical account could justify an existing state not having that history. So things are not perfectly clear in this regard. See pp. 292-294.)

A more important issue concerns whether Nozick has indeed established that a state can arise without violating anyone's rights. Clearly, there is no violation of rights when individuals voluntarily contract with a protection agency. They may agree to pay certain fees (taxes) and give up their enforcement rights as part of such agreements. The crucial question concerns non-clients, that is, those who do not contract with the protection agency. After all, even moderate anarchists agree that a state can be legitimate if *everyone* it governs consents to its powers. Nozick argues that the dominant protection agency violates no one's rights when it prohibits—

and uses force to stop—non-clients from using enforcement procedures that it deems unfair or unreliable (provided that it provides appropriate compensation). I shall now argue that is not so.

Consider two examples: (1) Prior Restraint: Suppose that I am perfectly innocent of violating anyone's rights, and you wrongfully attempt to rob me. Suppose that I use the minimum force necessary to stop you and that this merely involves pushing you to the ground and running away. (2) Restitution: Suppose that I am perfectly innocent of violating anyone's rights and that you have wrongfully robbed me of my wallet. Later I see you on the street with my wallet and after careful observation confirm that it is mine. I then gently strike your hand, grab my wallet, and run away. In both these cases, I claim, I have a right (at least on the libertarian view) to use these enforcement procedures (of prior restraint and of restitution) and I violate no one's rights in using them. Is Nozick correct that the dominant protection agency does not violate my rights if it prohibits me—as a non-client—from using these procedures, as long as appropriate compensation is paid? I claim that he is mistaken on this issue.

According to Nozick (pp. 102-103), the crucial issue is whether the dominant protection agency has enough information about my enforcement procedure to establish that it is reliable and fair. If it does, then, Nozick rightly claims, it may not prohibit my use of it. Nozick further claims, however, that the dominant protection agency may prohibit my enforcement procedure when the agency does not have enough information to establish that it is reliable and fair. This seems mistaken. Suppose that my enforcement procedure is reliable and fair and that I am in fact applying it appropriately against a guilty party (e.g., as in the above examples). The dominant protection agency will not *deem* my enforcement procedure reliable and fair (e.g., because of lack of information), but in this case it is. I am fully within my rights to use them, and the agency violates my rights if it uses force against me in response to my doing so. This remains true even if I am compensated for such interference. Of course, as Nozick emphasizes, the protection

agency has to act on the basis of its own judgements, and thus, if it *deems* my enforcement procedures unreliable or unfair, it will *deem* it morally permissible for it to use of force in response to it. The crucial point is that the agency may be mistaken, and, where it is, it violates the rights of those whose just enforcement procedures it prohibits—even if compensation is paid.

In sum, the crucial question that Nozick addresses is how a state could be legitimate without the consent of all of those it governs. The crucial move that Nozick makes to answer this question is that, prior to any contractual agreements, each individual is permitted (as long as appropriate compensation is paid) to use force to stop others from using enforcement procedures that he/she deems unfair or unreliable. Where there is a single dominant protection agency representing individuals, it is also so permitted on behalf of its clients. I have suggested, however, that Nozick is mistaken that individuals and protection agencies violate no rights when they mistakenly use force to stop someone from using an enforcement procedure that is in fact fair and reliable. If this is so, Nozick's argument for the possibility of a state arising without the consent of all and without violating rights succeeds only if the dominant protection agency approves of all enforcement procedures that are in fact reliable and fair. Given the limitations of human knowledge, this is extremely unlikely. It could happen by chance, but it is not practically possible in the sense that we could reasonably ensure that it is so.

Not all is lost, however. The legitimacy of the state, as I have defined it, requires that the state's use of force be *typically* permissible. This allows that a state can be legitimate without being perfect. It may be enough to meet this test that the state scrupulously (e.g., as carefully as can reasonably be expected of anyone) (1) gather information about what enforcement procedures are reliable and fair, (2) approve all for which there is strong evidence that they are reliable and fair, and (3) be suitably cautious about using force against non-clients where the evidence is murky. Thus, Nozick's argument may well show that a state can be legitimate



without the consent of all those governed, even if he does not show that a state could arise in practice without violating anyone's rights.

5. The argument for the illegitimacy of the more than the night-watchman state.

The argument so far has concerned protection agencies, which by definition restrict their activities to protecting their clients against having their rights violated. If Nozick's argument succeeds, it establishes the possibility of the legitimacy of a *minimal state*, which is a state that restricts its activities to protecting the rights of its citizens. A minimal state, however, need not be a *night-watchman state*, which (following Nozick) is a state that restricts its role to protecting its citizens against violence, theft, fraud, and breach of contract. Because Nozick holds a right-libertarian theory of justice, he equates the minimal state (which protects all natural rights) with the night-watchman state (which protects only the right-libertarian rights). If, however, individuals have more natural rights than right-libertarianism recognizes (e.g., a right to adequate nutrition or basic health care), then his argument, if successful, shows that more than a night-watchman state can be legitimate. The dominant protection agency can permissibly use force (even against non-clients) to ensure that individuals fulfill their duties (e.g., to provide adequate nutrition) to clients.

Nozick argues, however, that nothing more than a night-watchman state can be legitimate. If he is right, then none of the following state activities are legitimate: (1) *promoting impersonal goods* (i.e., goods, such as perhaps great art or cultural artifacts, that are intrinsically valuable for their own sake and not merely good for any individuals); (2) *providing paternalistic protection* (i.e., protecting individuals against themselves; e.g., by prohibiting drug use or requiring retirement savings); (3) *aiding the disadvantaged* (e.g., the poor); and (4) promoting the wellbeing of all by *overcoming market-failures* (i.e., providing goods and services that the

market cannot provide in a cost-effective manner).

Nozick argues that nothing more than the night-watchman state is legitimate on the basis of his right-libertarian theory of justice. Given that individuals typically *fully* own themselves and various external things, they have no duty to provide personal services (i.e., labor) or pay taxes (i.e., part with some of their wealth) for the above state activities. Moreover, they have a right against others—including agents of the state—that they not be forced to provide such personal services or pay such taxes. Of course, protection agencies might branch out, provide such services, and contractually require their clients to provide such personal services or pay fees for them. This is perfectly legitimate (although few individuals may sign up for such services). The problem concerns non-clients. It would clearly violate the rights of non-clients to impose such requirements.

Nothing more extensive than the night-watchman state is justified on the right-libertarian view.<sup>15</sup> The least controversial component of this view is probably the view that it is illegitimate for the state (or anyone) to coercively require individuals to provide aid for the promotion of impersonal goods (i.e., goods that are good in themselves, as opposed to good for individuals). Although many people think that it is legitimate, for example, for the state to promote the arts, it is usually because they believe the arts are good for at least some of the citizens. It is relatively (but not completely) uncontroversial that coercion is not permissible *merely* to promote impersonal goods.

Somewhat more controversial is the idea that the state may not restrict people's freedom in order to protect them from themselves (i.e., for the state to engage in paternalism). Although many people think that it is legitimate for the state to prohibit recreational drug use and to require people to make payments to a retirement savings plan, this is often at least in part to protect third parties. For example, if drug use leads to crime and poor retired people are typically

looked after by others, then such regulations may protect citizens from the costs of other people's choices. Thus, part of the rationale for many seemingly paternalistic laws is the protection of the interests of others. When one considers *purely* paternalistic state restrictions, many people agree with right-libertarianism that such restrictions are illegitimate. The state should leave people free to live their lives as they choose as long as they are not violating the rights (or otherwise harming) others.

Much more controversial is right-libertarianism's claim that it is illegitimate for the state to require individuals to provide aid to the disadvantaged. Of course, the legitimacy of the state requiring citizens to aid others depends on exactly on what is required. The easiest case to defend is one where the state imposes only a small tax on those who are very rich and uses it to ensure merely that everyone has an adequate opportunity to obtain the most basic nutrition, shelter, and health care. Such aid might, for example, be provided to young orphans and those severely disabled through no fault of their own. Right-libertarianism rejects even such minimal taxation for meeting the very basic needs of others, but most people think that some such taxation is legitimate.

The most controversial right-libertarian claim in this context is the claim that it is illegitimate for the state to provide goods and services that benefit everyone and that the market does not provide efficiently or effectively. Of course, there is much controversy about which goods can be provided effectively by the market and about the role of the state in providing those that are not so provided. Most people, however, would agree that it is legitimate to provide goods and services that make everyone better off than he/she would be without state provision. Right-libertarianism, however, denies the legitimacy of such a role for the state.

It is important to note that the state can require citizens to provide aid for the above kinds of activities in two distinct ways. One is to require citizens to provide personal services (e.g.,

serve in the military or serve on a jury). The other is to require citizens to contribute money or other external resources (e.g., to pay for the military or court services). Right-libertarianism is on its firmest ground when it rejects the legitimacy of the state requiring personal services for the above activities and on its weakest ground when it rejects the legitimacy of the state requiring the payment of taxes to fund the above activities. The personal freedom and security of full self-ownership is much easier to defend than the freedom from taxation provided by full property rights in external things.

Putting all this together, we can say that right-libertarianism is on relatively firm ground in its rejection of the legitimacy of (1) any state requirement to provide personal services to promote a purely impersonal good, and (2) any state prohibition of activities that do not violate the rights or otherwise harm others. Right-libertarianism is, however, on relative weak ground in its rejection of the legitimacy of state taxation to (1) provide for the very basic needs of the most vulnerable members of society (e.g., children and the severely disabled), and (2) make everyone's life better by providing goods and services that the market does not provide effectively.

In sum, right-libertarianism may be right that individuals fully own themselves and thus that it is illegitimate for the state to limit their freedom by requiring them to provide personal services for the above kinds of state activities. Right-libertarianism's view that individuals can acquire *full* private property in external things—which rules out any taxation—is much more controversial. Almost everyone agree that individuals can acquire *robust* private property in external things, but most would reject the view that such rights are so strong that they preclude all forms of taxation. If this view is correct, then more than the minimal night-watchman state is legitimate.

## 6. Conclusion

Nozick's defense of the possibility of the legitimacy of the state assumes the rights of full self-ownership (including enforcement rights). This makes Nozick's task particularly difficult, and establishing the possibility of a legitimate state from such a starting point would be a significant result. Nozick's defense of the impossibility of the legitimacy of any state more extensive than the night-watchman state without the consent of all governed, however, assumes right-libertarianism's commitment to *full* property rights in external things, and this makes Nozick's task particularly easy. It rules out the possibility that individuals have an enforceable duty to pay any taxes to promote any social goals. Given that this view is subject to powerful objections, the significance of the second argument is very limited.<sup>16</sup>

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<sup>1</sup> Nozick initially (e.g., p. 23) says that the state claims a monopoly on the use of force, but he later (pp. 117-18) modifies this to it having a *de facto* monopoly on the use of force.

<sup>2</sup> Two other uses of “justice” are (1) as distributive fairness, and (2) as what we owe others. Authors have tended not to keep these three senses distinct.

<sup>3</sup> An owner’s right to use a thing is, of course, constrained by the rights of others in other things. Thus, for example, my right to use the baseball bat that I fully own does not permit me to smash your car with it.

<sup>4</sup> Nozick lays out his theory of justice in Ch. 7, section 1. Unlike most libertarian authors, he does not typically use the term “self-ownership”. His invocation and discussion of rights against violence (as well as theft and fraud) makes clear, however, that he invokes full self-ownership. Note also that full ownership of one’s self or of a thing includes enforcement (rectification) rights and thus these rights need not be mentioned separately (as Nozick does).

<sup>5</sup> Locke also imposes a non-spoilage condition that limits one’s property rights to what one can use prior to it spoiling, but Nozick does not invoke this condition.

<sup>6</sup> In the text, I interpret Nozick as holding that a particular appropriation is just as long it leaves no one worse off than non-appropriation in that case. Nozick sometimes writes, however, as if the proviso is satisfied as long as the general practice/system of appropriation leaves no one worse off than he/she would be if everything were to remain in the common use. This latter approach factors in the benefits and costs of the appropriation of other things by other agents. This appeal to a general practice/system, however, does not fit well with Nozick’s general libertarian framework, and I here ignore it.

<sup>7</sup> For an introduction to left-libertarianism, see Vallentyne and Steiner (2000a, 2000b).

<sup>8</sup> A head tax on earning power is of course incompatible with full self-ownership. The point here

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is simply that it can be part of a (historical) patterned principle that respects whatever valid contractual agreements people make.

<sup>9</sup> See, for example, Fried (1995) and various essays in Cohen (1995).

<sup>10</sup> It's important to note that Nozick's argument for the possible legitimacy of the state assumes full self-ownership but does not assume any of the other right-libertarian property rights (in external things). The crucial issue concerns the use of force against a person.

<sup>11</sup> Nozick assumes that there is a right to punish, but, following Barnett (1998), I believe that a plausible version of libertarianism will not include such a right (e.g., because it limits losses of self-ownership to what is necessary to prevent or compensate rights violations). It will instead limit the use of force to prior restraint and compensation extraction. In what follows, I shall therefore typically focus on those two enforcement rights, but the points extend to punishment as well.

<sup>12</sup> On p. 15, Nozick notes that protection agencies might not require clients to transfer over all enforcement rights. They might simply refuse to offer any protection after authorized self-enforcement is used by a client. When he discusses the dominant protection agency, however, he assumes that all enforcement rights have been transferred to the agency. Otherwise, the agency would not claim a monopoly on the use of force.

<sup>13</sup> The dominant protection agency does not literally claim a *de facto* monopoly on the use of force, because it does not prohibit the use of force by non-clients against non-clients. Thus, Nozick seems to be assuming that the state only needs to claim something close to a *de facto* monopoly on the use of force.

<sup>14</sup> It's worth noting that, if all non-clients accept the protective services at the reduced rates, then there is a sense in which the legitimacy of the resulting state is grounded in a kind of consent. In



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this case, it's not entirely clear that the scenario rebuts moderate anarchism. Still, as long as one person does reject the offer of protective services at a reduced rate, moderate anarchism will, if the argument is successful, be rebutted.

<sup>15</sup> Nozick does provide an account in Ch. 9 (Demoktesis) of how something like the extensive modern democratic state could arise and be legitimate. Roughly, the story involves everyone selling shares in themselves and their property so that eventually (e.g., for efficiency reasons) everyone has one share in each person and each thing. As shareholders, they then collectively decide on how the country will be run. This is not a counterexample to Nozick's claim that no state more extensive than the night-watchman state can be legitimate without the consent of all governed, since in this case everyone consents. The critical issue—which Nozick discusses but does not resolve—concerns how those who have not so consented—such as people born later—are to be handled.

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