

ROBERT NOZICK AND THE IMMACULATE CONCEPTION OF THE STATE*

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Robert Nozick's *Anarchy, State, and Utopia* (New York: Basic Books, 1974) is an "invisible hand" variant of a Lockean contractarian attempt to justify the State, or at least a minimal State confined to the functions of protection. Beginning with a free-market anarchist state of nature, Nozick portrays the State as emerging, by an invisible hand process that violates no one's rights, first as a dominant protective agency, then to an "ultra-minimal state," and then finally to a minimal state.

Before embarking on a detailed critique of the various Nozickian stages, let us consider several grave fallacies in Nozick's conception itself, *each of which* would in itself be sufficient to refute his attempt to justify the State.

First, despite Nozick's attempt (6-9) to cover his tracks, it is highly relevant to see whether Nozick's ingenious logical construction has ever indeed occurred in historical reality: namely, whether any State, or most or all States, have *in fact* evolved in the Nozickian manner. It is a grave defect in itself, when discussing an institution all too well grounded in historical reality that Nozick has failed to make a single mention or reference to the history of actual States. In fact, there is no evidence whatsoever that any State was founded or developed in the Nozickian manner. On the contrary, the historical evidence cuts precisely the other way: for every State where the facts are available originated by a process of violence, conquest and exploitation: in short, in a manner which Nozick himself would have to admit violated individual rights. As Thomas Paine wrote in

Common Sense, on the origin of kings and of the State:

"could we take off the dark covering of antiquity and trace them to their first rise, we should find the first of them nothing better than the principal ruffian of some restless gang; whose savage manners or pre-eminence in subtilty obtained him the title of chief among plunderers; and who by increasing in power and extending his depredations, overawed the quiet and defenceless to purchase their safety by frequent contributions"¹

Note that the "contract" involved in Paine's account was of the nature of a coerced "protection racket" rather than anything recognizable to the libertarian as a voluntary agreement.

Since Nozick's justification of existing States—provided they are or become minimal—rests on their alleged immaculate conception, and since no such State exists, then none of them can be justified, *even* if they should later become minimal. To go further, we can say that, *at best*, Nozick's model can *only* justify a State which indeed did develop by his invisible hand method. Therefore it is incumbent upon Nozick to join anarchists in calling for the abolition of all existing States, and *then* to sit back and wait for his alleged invisible hand to operate. The only minimal State, then, which Nozick *at best* can justify is one that will develop out of a future anarcho-capitalist society.

Secondly, *even if* an existing State had been immaculately conceived, this would *still* not justify its present existence. A basic fallacy is endemic to all social contract theories of the State, namely, that *any* contract based on a promise is binding and enforceable. If, then, *everyone*—in itself of course a heroic assumption—in a state of nature surrendered all or some of his rights to a State, the social contract theorists consider this promise to be binding forevermore. A correct theory of contracts, however, termed by Williamson Evers the "title-

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transfer" theory, states that the only valid (and therefore binding) contract is one that surrenders what is, in fact, philosophically *alienable*, and that *only* specific titles to property are so alienable, so that their ownership can be ceded to someone else. While, on the contrary, *other* attributes of man: specifically, his self-ownership over his own will and body, and the *rights* to person and property which stem from that self-ownership, are "inalienable" and therefore cannot be surrendered in a binding contract. If no one, then, can surrender his own will, his body, or his rights in an enforceable contract, *a fortiori* he cannot surrender the persons or the rights of his posterity. This is what the Founding Fathers meant by the concept of rights as being "inalienable", or, as George Mason expressed it in his Virginia Declaration of Rights:

"...all men are by nature equally free and independent, and have certain inherent natural rights, of which when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity"⁽²⁾.

Or, as Evers writes, "all philosophical defenses of human rights to life, liberty, and estates... are founded upon the natural fact that each human is the proprietor of his own will. To take rights like those of property and contractual freedom that are based on a foundation of the absolute self-ownership of the will and then to use those derived rights to destroy their own foundation is philosophically invalid"⁽³⁾.

Thus, we have seen (1) that no existing State has been immaculately conceived — quite the contrary; (2) that therefore the only minimal State that could *possibly* be justified is one that would emerge *after* a free-market anarchist world had been established; (3) that therefore Nozick, on his own grounds, should become an anarchist and then wait for the Nozickian invisible hand to operate afterward, and finally (4) that *even if* any State had been founded immaculately, the fallacies of social contract theory would mean that no present State, even a minimal one, could be justified.

Let us now proceed to examine the Nozickian stages, particularly the alleged necessity as well as the morality of the ways in which the various stages develop out of the preceding ones. Nozick begins by assuming that each anarchist protective agency acts morally and non-aggressively, that is,

"attempts in good faith to act within the limits of Locke's law of nature" (17).

First, Nozick assumes that each protective agency would require that each of its clients renounce the right of private retaliation against aggression, by refusing to protect them against counter-retaliation. (15) Perhaps, perhaps not. This would be up to the various protection agencies, acting on the market, and is certainly not self-evident. It is certainly possible if not probable that they would be outcompeted by other agencies that do not restrict their clients in that way.

Nozick then proceeds to discuss disputes between clients of different protection agencies. He offers three scenarios, on how they might proceed. But two of these scenarios (and part of the third) involve physical battles between the agencies. In the first place, these scenarios contradict Nozick's own assumption of good-faith, non-aggressive behavior *by each of his* agencies, since, in any combat, clearly at least one of the agencies would be committing aggression. Furthermore, economically, it would be absurd to expect that the protective agencies would battle each other physically; such warfare would alienate clients and be highly expensive to boot. It is absurd to think that, on the market, protective agencies would fail to agree in advance on private appeals courts or arbitrators whom they would turn to, in order to resolve any dispute. Indeed, a vital part of the protective or judicial service which a private agency or court would offer to its clients would be that it had agreements to turn disputes over to a certain appeals court or a certain arbitrator or group of arbitrators.

Let us turn then to Nozick's crucial scenario 3, in which he writes that "the two agencies... agree to resolve peacefully those cases about which they reach differing judgments. They agree to set up, and abide by the decisions of, some third judge or court to which they can turn when their respective judgments differ. (Or they might establish rules determining which agency has jurisdiction under which circumstances.)" (16) So far so good. But then comes a giant leap: "Thus emerges a system of appeals courts and agreed upon rules... Though different agencies operate, there is one unified

federal judicial system of which they are all components." I submit that the "thus" is totally illegitimate, and that the rest is a *non sequitur*. The fact that every protective agency will have agreements with every other to submit disputes to particular appeals courts or arbitrators does *not* imply "one unified federal judicial system". On the contrary, there may well be, and probably would be, hundreds, even thousands, of arbitrators or appeals judges who would be selected, and there is no need to consider them part of one "judicial system." There is no need, for example, to envision or to establish one unified Supreme Court to decide upon disputes. Since every dispute involves only two parties, there need be only one third party appeals judge or arbitrator; there are in the United States, at the present time, for example, over 23,000 professional arbitrators, and presumably there would be many thousands more if the present government court system were to be abolished. Each one of these arbitrators could serve an appeals or arbitration function.

Nozick claims that out of anarchy there would inevitably emerge, as by an invisible hand, one *dominant* protection agency in each territorial area, in which "almost all the persons" in that area are included. But we have seen that his major support for that conclusion is totally invalid. Nozick's other arguments for this proposition are equally invalid. He writes, for example, that "unlike other goods that are comparatively evaluated, maximal competing protective services cannot exist"(17). Why *cannot*, surely a strong term? First, because "the nature of the service brings different agencies...into violent conflict with each other" rather than just competing for customers. But we have seen that this conflict assumption is incorrect, first, on Nozick's own grounds of each agency acting non-aggressively, and, second, on his own scenario 3, that each will enter into agreements with the others for peaceful settlement of disputes. Nozick's second argument for this contention is that "since the worth of the less than maximal product declines disproportionately with the number who purchase the maximal product, customers will not stably settle for the lesser good, and competing companies are caught in a declining spiral." But

why? Nozick is here making statements about the economics of a protection market which are totally unsupported. *Why* is there such an "economy of scale" in the protection business that Nozick feels will lead inevitably to a near-natural monopoly in each geographical area? This is scarcely self-evident. On the contrary, all the facts — and here the empirical facts of contemporary and past history are again directly relevant — cut precisely the other way. There are, as was mentioned above, tens of thousands of professional arbitrators in the U.S.; there are also tens of thousands of lawyers and judges, and a large number of private protection agencies that supply guards, night-watchmen, etc. with no sign whatsoever of a geographical natural monopoly in any of these fields. Why then for protection agencies under anarchism?

And, if we look at approximations to anarchist court and protective systems in history, we again see a great deal of evidence of the falsity of Nozick's contention. For hundreds of years, the fairs of Champagne were the major international trade mart in Europe; a number of courts, by merchants, nobles, the Church, etc. competed for customers; not only did no one dominant agency ever emerge, but they did not even feel the need for appeals courts. For a thousand years ancient Ireland, until the Cromwellian conquest, enjoyed a system of numerous jurists and schools of jurists, and numerous protection agencies, which competed within geographical areas without any one becoming dominant. After the fall of Rome, various co-existing barbarian tribes peacefully adjudicated their disputes *within* each area, with each tribesman coming under his own law, and with agreed-upon peaceful adjudications between these courts and laws. Furthermore, in these days of modern technology and low-cost transportation and communication, it would be even easier to compete across geographical boundaries; the "Metropolitan", "Equitable", and "Prudential" protection agencies, for example, could easily maintain branch offices over a large geographical area.

In fact, there is a far better case for *insurance* being a natural monopoly than protection, since a large insurance pool would tend to reduce premiums; and yet, it is clear that there is a

great deal of insurance competition and that there would be more if it were not restricted by state regulation.

The Nozick contention that a dominant agency would develop in each geographical area, then, is an example of an illegitimate *a priori* attempt to decide what the free market would do, and it is an attempt that flies in the face of concrete historical and institutional knowledge. Certainly, a dominant protective agency *could conceivably* emerge in a particular geographical area, but it is not very likely. And, as Roy Childs points out in his critique of Nozick, even if it did, it would not likely be a "unified federal system". Childs also correctly points out that it is no more legitimate to lump all protective services together and call it a unified monopoly, than it would be to lump all the food growers and producers on the market together and say that they have a collective "system" or "monopoly" of food production⁽⁴⁾.

Furthermore, law and the State are both conceptually and historically separable, and law would develop in an anarchistic market society without any form of State. Specifically, the concrete *form* of anarchist legal institutions — judges, arbitrators, precedential methods for resolving disputes, etc. — would indeed grow by a market-invisible hand process, while the basic Law Code (requiring that no one invade any one else's person and property) would have to be agreed upon by all the judicial agencies, just as all the competing judges once agreed to apply and extend the basic principles of the customary or common law⁽⁵⁾. But the latter, again, would imply no unified legal system or dominant protective agency. Any agencies that transgressed the basic libertarian code would be open outlaws and aggressors, and Nozick himself concedes that, lacking legitimacy, such outlaw agencies would probably not do very well in an anarchist society (17).

Let us now assume that a dominant protective agency has come into being, as unlikely as that may be. How then do we proceed, without violation of anyone's rights, to Nozick's ultra-minimal state? On pages 55–56 Nozick writes of the plight of the dominant protective agency who sees the independents, with their unreliable procedures, rashly and unreliably retaliating

against its own clients. Shouldn't the dominant agency have the right to defend its clients against these rash actions? Nozick claims that the dominant agency *has* a right to prohibit risky procedures against its clients, and that this prohibition *thereby* establishes the "ultra-minimal state", in which one agency coercively prohibits all other agencies from enforcing the rights of individuals.

There are two problems here at the very beginning. In the first place, what has happened to the peaceful resolution of disputes that marked scenario 3? Why can't the dominant agency and the independents agree to arbitrate or adjudicate their disputes, preferably in advance? Ahh, but here we encounter Nozick's curious "thus" clause, which incorporated such voluntary agreements into one "unified federal judicial system": In short, if every time that the dominant agency and the independents work out their disputes in advance, Nozick then *calls this* "one agency", then by definition he precludes the peaceful settlement of disputes *without* a move onward to the compulsory monopoly of the ultra-minimal state.

But suppose, for the sake of continuing the argument, that we grant Nozick his question-begging definition of "one agency". Would the dominant agency still be justified in outlawing competitors? Certainly not, even if it wishes to preclude fighting. For what of the many cases in which the independents are enforcing justice for their *own* clients, and have nothing to do with the clients of the dominant agency? By what conceivable right does the dominant agency step in to outlaw peaceful arbitration and adjudication between the independents' own clients, with no impact on *its* clients? The answer is no right whatsoever, so that the dominant agency, in outlawing competitors, is aggressing against their rights, and against the rights of their actual or potential customers. Furthermore, as Roy Childs emphasizes, this decision to enforce their monopoly is scarcely the action of an invisible hand; it is a *conscious*, highly visible decision, and must be treated accordingly⁽⁶⁾.

The dominant agency, Nozick claims, has the right to bar "risky" activities engaged in by independents. But what then of the independents? Do not *they* have the right to bar the

risky activities of the dominant? And must not a war of all against all again ensue, in violation of scenario 3 and also necessarily engaging in some aggression against rights along the way? Where, then, are the moral activities of the state of nature assumed by Nozick all along? Furthermore, as Childs points out, what about the risk involved in having a compulsory monopoly protection agency? As Childs writes: "What is to check its power? What happens in the event of its assuming even more powers? Since it has a monopoly, any disputes over its functions are solved and judged exclusively by itself. Since careful prosecution procedures are costly, there is every reason to assume that it will become less careful without competition and, again, only it can judge the legitimacy of its own procedures, as Nozick explicitly tells us"¹⁷.

Competing agencies, whether the competition be real or potential, not only insure high-quality protection at the lowest cost, as compared to a compulsory monopoly, but they also provide the genuine checks and balances of the market against any one agency yielding to the temptations of being an "outlaw", that is, of aggressing against the persons and properties of its clients or non-clients. If one agency among many becomes outlaw, there are others around to do battle against it on behalf of the rights of their clients; but who is there to protect anyone against the State, whether ultraminimal or minimal? If we may be permitted to return once more to the historical record, the grisly annals of the crimes and murders of the State throughout history give one very little confidence in the non-risky nature of *its* activities. I submit that the risks of State tyranny are far greater than the risks of worrying about one or two unreliable procedures of competing defense agencies.

But this is scarcely all. For once it is permitted to proceed beyond defense against an overt act of actual aggression, once one can use force against someone because of his "risky" activities, then the sky is the limit, in short there is then virtually no limit to aggression against the rights of others. Once permit someone's "fear" of the "risky" activities of others to lead to coercive action, then *any* tyranny becomes justified, and Nozick's "minimal" state quickly becomes the "maximal" State. I maintain, in fact, that there

is no Nozickian stopping point from his ultraminimal state to the maximal, totalitarian state. There is no stopping point to so-called preventive restraint or detention. Surely Nozick's rather grotesque suggestion of "compensation" in the form of "resort detention centers" is scarcely sufficient to ward off the specter of totalitarianism (142 ff). A few examples: Perhaps the largest criminal class in the United States today are teenage black males. The risk of this class committing crime is far greater than any other age, gender, or color group. Why not, then, lock up all teenage black males until they are old enough for the risk to diminish? And then I suppose we could compensate them by giving them healthful food, clothing, playgrounds, and teaching them a useful trade in the "resort" detention camp. If not, why not? Example: the most important argument for Prohibition was the undoubted fact that people commit significantly more crimes, more acts of negligence on the highways, when under the influence of alcohol than when cold sober. So why not prohibit alcohol, and thereby reduce risk and fear, perhaps "compensating" the unfortunate victims of the law by free, tax-financed supplies of healthful grape juice? Or the infamous Dr. Arnold Hutschneker's plan of "identifying" allegedly future criminals in the grade schools, and then locking them away for suitable brainwashing? If not, why not? In each case, I submit that there is only *one* why not, and this should be no news to libertarians who presumably believe in inalienable individual rights: namely that no one has the *right* to coerce anyone not himself directly engaged in an *overt* act of aggression against rights. Any loosening of this criterion, to include coercion against remote "risks", is to sanction impermissible aggression against the rights of others. Any loosening of this criterion furthermore, is a passport to unlimited despotism. Any state founded on *these* principles has been conceived, not immaculately without interfering with anyone's rights, but by a savage act of rape.

Thus, even if risk were measurable, even if Nozick could provide us with a cutoff point of when activities are "too" risky, his rite of passage from dominant agency to ultraminimal state would still be aggressive, invasive, and

illegitimate. But, furthermore, as Childs has pointed out, there is no way to measure (the probability of) such "risk", let alone the fear, both of which are purely subjective^[8]. The only risk that can be measured is in those rare situations — such as a lottery or a roulette wheel — where the individual events are strictly homogeneous, and repeated a very large number of times. In almost all cases of actual human action, this condition does not apply, and so there is no measurable cutoff point of risk.

This brings us to Williamson Evers' extremely useful concept of the "proper assumption of risk". We live in a world of ineluctable and unmeasurable varieties of uncertainty and risk. In a free society, possessing full individual rights, the proper assumption of risk is by each individual over his own person and his justly owned property. No one, then, can have the right to coerce anyone else into reducing *his* risks; such coercive assumption is aggression and invasion to be properly stopped and punished by the legal system. Of course, in a free society, anyone may take steps to reduce risks that do not invade someone else's rights and property; for example, by taking out insurance, hedging operations, performance bonding, etc. But all of this is voluntary, and none involves either taxation or compulsory monopoly. And, as Roy Childs states, any coercive intervention in the market's provision for risk shifts the societal provision for risk *away from* the optimal, and hence *increases* risk to society^[9].

One example of Nozick's sanctioning aggression against property rights is his concern (55 *n*) with the private landowner who is surrounded by enemy landholders who won't let him leave. To the libertarian reply that any rational landowner would have first purchased access rights from surrounding owners, Nozick brings up the problem of being surrounded by such a set of numerous enemies that he *still* would not be able to go anywhere. But the point is that this is not simply a problem of landownership. Not only in the free society, but even now, suppose that one man is so hated by the whole world that no one will trade with him or allow him on their property. Well, then, the only reply is that this is his own

proper assumption of risk. Any attempt to break that voluntary boycott by physical coercion is illegitimate aggression against the boycotters' rights. This fellow had better find some friends, or at least purchase allies, as quickly as possible.

How then does Nozick proceed from his "ultraminimal" to his "minimal" State? He maintains that the ultraminimal state is morally bound to "compensate" the prohibited, would-be purchasers of the services of independents by supplying them with protective services — and hence the "nightwatchman" or minimal state. In the first place, this decision too is a conscious and visible one, and scarcely the process of an invisible hand. But, more importantly, Nozick's principle of compensation is in even worse philosophical shape, if that is possible, than his theory of risk. For, first, compensation, in the theory of punishment, is simply a method of trying to recompense the victim of crime; it must in no sense be considered a moral sanction for crime itself. Nozick asks (57) whether property rights mean that people are permitted to perform invasive actions "provided that they compensate the person whose boundary has been crossed?" In contrast to Nozick, the answer must be no, in every case. As Randy Barnett states, in his critique of Nozick, "Contrary to the principle of compensation, all violations of rights are prohibited. That's what rights means." And, "while voluntarily paying a purchase price makes an exchange permissible, compensation does not make an aggression permissible or justified^[10]." Rights must not be transgressed, period, compensation being simply one method of restitution or punishment after the fact; I must not be permitted to cavalierly invade someone's home and break his furniture, simply because I am prepared to "compensate" him afterward^[11].

Secondly, there is no way of knowing, in any case, what the compensation is supposed to be. Nozick's theory depends on people's utility scales being constant, measurable, and knowable to outside observers, none of which is the case.^[12] Austrian subjective value theory shows us that people's utility scales are always subject to change, and that they can neither be

measured nor known to any outside observer. If I buy a newspaper for 15 cents, than *all* that we can say about my value-scale is that, at the moment of purchase, the newspaper was worth more to me than the 15 cents, and that is all. That valuation can change tomorrow, and no other part of my utility scale is knowable to others at all. (A minor point: Nozick's pretentious use of the "indifference curve" concept is not even necessary for his case, and it adds still further fallacies: namely, that indifference is *never* by definition exhibited in action, in actual exchanges, and is therefore unknowable and objectively meaningless, and because an indifference curve postulates two commodity axes — and *what* are the axes to Nozick's alleged curve?)⁽¹³⁾ But if there is no way of knowing what will make a person as well off as before any particular change, then there is no way for an outside observer, such as the minimal state, to discover how much compensation is needed. The Chicago School tries to resolve this problem by simply assuming that a person's utility loss is measured by the money-price of the loss; so if someone slashes my painting, and outside appraisers determine that I could have sold it for \$2000, then that is my proper compensation. But first, no one really knows what the market price would have been, since tomorrow's market may well differ from yesterday's, and second and more important, my psychic attachment to the painting may be worth far more to me than the money price, and there is *no way* for anyone to determine what that psychic attachment might be worth: *asking* is invalid since there is nothing to prevent me from lying grossly in order to drive up the "compensation."⁽¹⁴⁾

Moreover, Nozick says nothing about the dominant agency compensating *its* clients for the shutting down of *their* opportunities in being able to shift their purchases to competing agencies. Yet their opportunities are shut off by compulsion, and furthermore, they may well perceive themselves as benefitting from the competitive check on the possible tyrannical impulses of the dominant agency. But *how* is the extent of such compensation to be determined? Furthermore, if compensation to the deprived clients of the dominant agency is

forgotten by Nozick, what about the dedicated anarchists in the anarchistic state of nature? What about their trauma at seeing the far from immaculate emergence of the State? Are *they* to be compensated for their horror at seeing the State emerge? And *how much* are they to be paid? In fact, the existence of only *one* fervent anarchist who *could not* be compensated for the psychic trauma inflicted on him by the emergence of the State, is enough by itself to scuttle Nozick's allegedly non-invasive model for the origin of the minimal state. For that absolutist anarchist, no amount of compensation would suffice to assuage his grief.

This brings us to another flaw in the Nozickian scheme: the curious fact that the compensation paid by the dominant agency is paid, not in cash, but in the extension of its sometimes dubious services to the clients of other agencies. And yet, advocates of the compensation principle have demonstrated that *cash* — which leaves the recipients free to buy whatever they wish — is far better from their point of view than any compensation in kind. Yet, Nozick, in postulating the extension of protection as the form of compensation, never considers the cash payment alternative. In fact, for the anarchist, this form of "compensation" — the institution of the State itself — is a grisly and ironic one indeed. As Childs forcefully points out: Nozick "wishes to prohibit us from turning to any of a number of competing agencies, other than the dominant protection agency. What is he willing to offer us as *compensation* for being so prohibited? He is generous to a fault. He will give us nothing less than *the State*. Let me be the first to publicly reject this admittedly generous offer. But...the point is, we *can't* reject it. It is foisted upon us whether we like it or not, whether we are willing to accept the state as compensation or not."⁽¹⁵⁾

Furthermore, there is no warrant whatever, even on Nozick's own terms, for the minimal state's compensating every one uniformly, as he postulates; surely, there is no likelihood of everyone's value-scales being identical. But then *how* are the differences to be discovered and differential compensation paid?

Even confining ourselves to Nozick's compensated people — the former or current would-be clients of competing agencies: *who* are they? How can they be found? For, on Nozick's own terms, *only* such actual or would-be competing clients need compensation. But how does one distinguish, as proper compensation must, between those who have been deprived of their desired independent agencies and who therefore deserve compensation, and those who wouldn't have patronized the independents anyway and who therefore don't need compensation? By not making such distinctions, Nozick's minimal state doesn't even engage in proper compensation on Nozick's own terms.

Childs raises another excellent point on Nozick's own prescribed form of compensation — the dire consequences for the minimal state of the fact that the payment of such compensation will necessarily raise the costs, and therefore the prices charged, by the dominant agency. As Childs states:

"If the minimal state must protect everyone, even those who cannot pay, and if it must compensate those others for prohibiting their risky actions, then this must mean that it will charge its original customers *more* than it would have in the case of the ultraminimal state. But this would, ipso facto, increase the number of those who, because of their demand curves, *would have chosen* non-dominant agencies...over dominant agency-turned ultraminimal state-turned minimal state. Must the minimal state then protect *them* at no charge, or compensate them for prohibiting them from turning to the other agencies?

If so, then once again, it must either increase its price to its remaining customers, or decrease its services. In either case, this *again* produces those who, given the nature and shape of their demand curves, *would have chosen* the non-dominant agencies over the dominant agency. Must *these* then be compensated? If so, then the process leads on, to the point where no one but a few wealthy fanatics advocating a minimal state would be willing to pay for greatly reduced services. If this happened, there is reason to believe that very soon the minimal state would be thrown into the invisible dustbin of history, which it would, I suggest, richly deserve!⁽¹⁶⁾

A tangential but important point on compensation: adopting Locke's unfortunate "proviso", on homesteading property rights in unused land, Nozick declares that no one may appropriate unused land if the remaining population who desire access to land are "worse off." (178 ff.) But again: how do we

know if they are worse off or not? In fact, Locke's proviso may lead to the outlawry of *all* private ownership of land, since one can always say that the reduction of available land leaves everyone else, who could have appropriated the land, worse off. In fact, there is no way of measuring or knowing when they are worse off or not. And even if they are, I submit that that, too, is their proper assumption of risk. Everyone should have the right to appropriate as his property previously unowned land or other resources. If latecomers are worse off, well then that is their proper assumption of risk in this free and uncertain world. There is no more vast frontier in the United States, and there is no point in crying over the fact. In fact, we can generally achieve as much "access" as we want to these resources by paying a market price for them, but even if the owners refused to sell or rent, that should be their right in a free society. Even Locke could nod once in a while!⁽¹⁷⁾

We come now to another crucial point: that Nozick's presumption that he can outlaw risky activities upon compensation rests on his contention that no one has the right to engage in "non-productive" (including risky) activities or exchanges, and that therefore they can legitimately be prohibited!⁽¹⁸⁾ For Nozick concedes that if the risky activities of others were legitimate, then prohibition and compensation would not be valid, and that we would then be "required instead to negotiate or contract with them whereby they agree not to do the risky act in question. Why wouldn't we have to offer them an incentive, or hire them, or bribe them, to refrain from doing the act?" (83-84). In short, if not for Nozick's fallacious theory of illegitimate "non-productive" activities, he would have to concede people's rights to engage in such activities, the prohibition of risk and compensation principles would fall to the ground, and neither Nozick's ultraminimal nor his minimal state could be justified.

And here we come to what we might call Nozick's "drop dead" principle. For his criterion of a "productive" exchange is one where each party is better off than if the other did not exist at all; whereas a "non-product-

ive" exchange is one where one party would be better off if the other dropped dead. Thus: "if I pay you for not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me." (84). Nozick's "principle of compensation" maintains that a "non-productive" activity can be prohibited provided that the person is compensated by the benefit he was forced to forego from the imposition of the prohibition.

Let us then see how Nozick applies his "non-productive" and compensation criteria to the problem of blackmail. Nozick tries to rehabilitate the outlawry of blackmail by asserting that "non-productive" contracts should be illegal, and that a blackmail contract is non-productive because a blackmailee is worse off because of the blackmailer's very existence (84-86). In short, if blackmailer Smith dropped dead, Jones (the blackmailee) would be better off. Or, to put it another way, Jones is paying not for Smith's making him better off, but for *not* making him *worse off*. But surely the latter is *also* a productive contract, because Jones is still better off making the exchange than he *would have been* if the exchange were not made.

But this theory gets Nozick into very muddy waters indeed, some, though by no means all of which, he recognizes. He concedes, for example, that his reason for outlawing blackmail would force him also to outlaw the following contract: Brown comes to Green, his next-door neighbor, with the following proposition: I intend to build such-and-such a pink building on my property (which he knows that Green will detest). I *won't* build this building, however, if you pay me x amount of money. Nozick concedes that this, too, would have to be illegal in his schema, because Green would be paying Brown for not being worse off, and hence the contract would be "non-productive". In essence, that Green would be better off if Brown dropped dead. It is difficult, however, for a libertarian to square such outlawry with any plausible theory of property rights. In analogy with the blackmail example above, furthermore, Nozick concedes that it *would* be legal, in his schema, for

Green, on finding out about Brown's projected pink building, to come to Brown and offer to pay him not to go ahead. But why would such an exchange *be* "productive" just because Green made the offer? ^[19] What difference does it make *who* makes the offer in this situation? Wouldn't Green *still* be better off if Brown dropped dead? And again, following the analogy, *would* Nozick make it illegal for Brown to refuse Green's offer and *then* ask for more money? Why? Or, again, would Nozick make it illegal for Brown to subtly let Green know about the projected pink building and then let nature take its course: say, by advertising in a newspaper about the building and sending Green the clipping? Couldn't this be taken as an act of courtesy? And why should merely *advertising* something be illegal? Clearly, Nozick's case becomes ever more flimsy as we consider the implications.

Furthermore, Nozick has not at all considered the manifold implications of his "drop dead" principle. If he is saying, as he seems to, that *A* is illegitimately "coercing" *B* if *B* is better off should *A* drop dead, then consider the following case: Brown and Green are competing at auction for the same painting which they desire. They are the last two customers left. Wouldn't Green be better off if Brown dropped dead? Isn't Brown therefore illegally coercing Green in some way, and therefore shouldn't Brown's participation in the auction be outlawed? Or, *per contra*, isn't Green coercing Brown in the same manner and shouldn't *Green's* participation in the auction be outlawed? If not, why not? Or, suppose that Brown and Green are competing for the hand of the same girl; wouldn't each be better off if the other dropped dead, and shouldn't either or both's participation in the courtship therefore be outlawed? The ramifications are virtually endless.

Nozick, furthermore, gets himself into a deeper quagmire when he adds that a blackmail exchange is not "productive" because outlawing the exchange makes one party (the blackmailee) no worse off. But that of course is not true: as Professor Block has pointed out, outlawing a blackmail contract means

that the blackmailer has no further incentive *not* to disseminate the unwelcome, hitherto secret information about the blackmailed party. However, after twice asserting that the victim would be "no worse off" from the outlawing of the blackmail exchange, Nozick immediately and inconsistently concedes that "people value a blackmailer's silence, and pay for it". In that case, if the blackmailer is prohibited from charging for his silence, he need not maintain it and hence the blackmail-payer would indeed be worse off because of the prohibition! Nozick adds, without supporting the assertion, that "his being silent is not a productive activity." Why not? Apparently because "His victims would be as well off if the blackmailer did not exist at all..." Back again to the "drop dead" principle. But then, reversing his field once more, Nozick adds — inconsistently with his own assertion that the blackmailer's silence is not productive — that "On the view we take here, a seller of such silence could legitimately charge only for what he forgoes by silence...includ(ing) the payments others would make to him to reveal the information". Nozick adds that while a blackmailer may charge the amount of money he would have received for revealing the information, "he may not charge the best price he could get from the purchaser of his silence." (85–86).

Thus, Nozick, waffling inconsistently between outlawing blackmail and permitting only a price that the blackmailer could have received from selling the information, has mired himself into an unsupportable concept of a "just price." *Why* is it only licit to charge the payment foregone? *Why not* charge whatever the blackmailee is willing to pay? In the first place, both transactions are voluntary, and within the purview of both parties' property rights. Secondly, *no one knows*, either conceptually or in practice, what price the blackmailer could have gotten for his secret on the market. No one can predict a market price in advance of the actual exchange. Thirdly, the blackmailer may not only be gaining money from the exchange; he also possibly gains psychic satisfaction — he may dislike the blackmailee, or he may enjoy selling

secrets and therefore he may "earn" from the sale to a third party more than just a monetary return. Here, in fact, Nozick gives away the case by conceding that a blackmailer "who *delights* in selling secrets may charge differently." (86*n*). But, in that case, what outside legal enforcement agency will ever be able to discover *to what extent* the blackmailer delights in revealing secrets and therefore what price he may legally charge to the "victim"? More broadly, it is conceptually impossible ever to discover the existence or the extent of his subjective delight or of any other psychic factors that may enter into his value-scale and therefore into his exchange.

And fourthly, suppose that we take Nozick's worst case, a blackmailer who could not find any monetary price for his secret. But, if blackmail were outlawed either totally or in Nozick's "just price" version, the thwarted blackmailer would simply disseminate the secrets for free — would *give away* the information (Block's "gossip or blabbermouth.") In doing so, the blackmailer would simply be exercising his right to use his body, in this case his freedom of speech. There can be no "just price" for restricting this right, for it has no objectively measurable value^[20]. Its value is subjective to the blackmailer, and his right may not be justly restricted. And furthermore, the "protected" victim is, in this case, surely worse off as a result of the prohibition against blackmail^[21].

We must conclude, then, with modern, post-medieval economic theory, that the *only* "just price" for any transaction is the price voluntarily agreed upon by the two parties. Furthermore and more broadly, we must also join modern economic theory in labelling *all* voluntary exchanges as "productive", and as making both parties better off from making the exchange. Any good or service voluntarily purchased by a user or consumer benefits him and is therefore "productive" from his point of view. Hence, all of Nozick's attempts to justify either the outlawing of blackmail or the setting of some sort of just blackmail price (as well as for any other contracts that sell someone's inaction) fall completely to the ground. But this means, too, that his attempt

to justify the prohibition of *any* "non-productive" activities — including risk — fails as well, and hence fails, on *this ground alone*, Nozick's attempt to justify his ultra-minimal (as well as his minimal) state.

In applying his theory to the risky, fear-inducing "non-productive" activities of independent agencies which allegedly justify the imposition of the coercive monopoly of the ultra-minimal state, Nozick concentrates on his asserted "procedural rights" of each individual, which he states is the "right to have his guilt determined by the least dangerous of the known procedures for ascertaining guilt, that is, by the one having the lowest probability of finding an innocent party guilty." (96). Here Nozick adds to the usual *substantive* natural rights — to the use of one's person and justly acquired property unimpaired by violence — alleged "procedural rights", or rights to certain procedures for determining innocence or guilt. But one vital distinction between a genuine and a spurious "right" is that the former requires no positive action by anyone except non-interference. Hence, a right to person and property is not dependent on time, space or the number or wealth of other people in the society; Crusoe can have such a right against Friday as can anyone in an advanced industrial society. On the other hand, an asserted right "to a living wage" is a spurious one, since fulfilling it requires positive action on the part of other people; as well as the existence of enough people with a high enough wealth or income to satisfy such a claim. Hence such a "right" cannot be independent of time, place, or the number or condition of other persons in society. But surely a "right" to a less risky procedure requires positive action from enough people of specialized skills to fulfill such a claim; hence it is not a genuine right. Furthermore, such a right cannot be deduced from the basic right of selfownership. On the contrary, everyone has the absolute right to defend his person and property against invasion. The criminal has no right, on the other hand, to defend his ill-gotten gains. But what *procedure* will be adopted by any group of people to defend their rights — whether, for

example, personal self-defense, or the use of courts or arbitration agencies — depends on the knowledge and skill of the individuals concerned. Presumably, a free market will tend to lead to most people choosing to defend themselves with those private institutions and protection agencies whose procedures will attract the most agreement from people in society. People who will be willing to abide by their decisions as the most practical way of approximating the determination of *who*, in particular cases, are innocent and who are guilty. But these are matters of utilitarian discovery on the market as to the most efficient means of arriving at self-defense, and do not imply any such fallacious concepts as "procedural rights".^[22]

Finally, in a scintillating *tour de force*, Roy Childs, after demonstrating that each of Nozick's stages to the State is accomplished by a visible decision rather than by an "invisible hand", stands Nozick on his head by demonstrating that the invisible hand, *on Nozick's own terms*, would lead straight back from his minimal State to anarchism. Childs writes:

"Assume the existence of the minimal state. An agency arises which copies the procedures of the minimal state, allows the state to sit in on its trials, proceedings, and so forth. Under this situation, it cannot be alleged that this agency is any more 'risky' than the state. If it is still too risky, then we are also justified in saying that the state is too risky, and in prohibiting its activities, providing we compensate those who are disadvantaged by such prohibition. If we follow this course, the result is anarchy.

If not, then the 'dominant agency'-turned minimal state finds itself competing against an admittedly watched-over competing agency. But wait: the competing, spied upon, oppressed second agency finds that it can charge a lower price for its services, since the minimal state has to compensate those who would have patronized agencies using risky procedures. It also has to pay the costs of spying on the new agency.

Since it is only *morally* bound to provide such compensation, it is likely to cease doing so under severe economic pressure. This sets two processes in motion: those formerly compensated because they would have chosen other agencies over the state, rush to subscribe to the maverick agency, thus reasserting their old preferences. Also, another fateful step has been taken: the once proud minimal state, having ceased compensation, reverts to a lowly ultraminimal state.

But the process cannot be stopped. The maverick agency must and does establish a good record, to win clients away from the ultra-minimal state. It offers a greater variety of services, toys with different prices, and generally becomes a more attractive alternative, all the time letting the state spy on it, checking its

processes and procedures. Other noble entrepreneurs follow suit. Soon, the once lowly ultraminimal state becomes a mere dominant agency, finding that the other agencies have established a noteworthy record, with safe, non-risky procedures, and stops spying on them, preferring less expensive agreements instead. Its executives have, alas!, grown fat and placid without competition; their calculations of who to protect, how, by what allocation of resources to what ends...are adversely affected by their having formerly removed themselves out of a truly competitive market price system. The dominant agency grows inefficient, when compared to the new, dynamic, improved agencies.

Soon — lo! and behold — the mere dominant protection agency becomes simply one agency among many in a market legal network. The sinister minimal state is reduced, by a series of morally permissible steps which violate the rights of no one, to merely one agency among many. In short, the invisible hand strikes back!^[23]

Some final brief but important points. Nozick, in common with all other limited government, *laissez-faire* theorists, has no theory of taxation: of how much it shall be, of who shall pay it, of what kind it should be, etc. Indeed, taxation is scarcely mentioned in Nozick's progression of stages toward his minimal state. It would seem that Nozick's minimal state could only impose taxation on the clients it *would* have had before it became a state, and not on the would-be clients of competing agencies. But clearly, the existing State taxes *everyone*, with no regard whatever for who they *would* have patronized, and indeed it is difficult to see how they could try to find and separate these different hypothetical groups.

Nozick also, in common with his limited government colleagues, treats "protection" — at least when proffered by his minimal state — as one collective lump. But *how much* protection shall be supplied, and at what cost of resources? And what criteria shall decide? For after all, we can *conceive* of almost the entire national product being devoted to supplying each person with a tank and an armed guard; or, we can conceive of only one policeman and one judge in an entire country. Who decides on the degree of protection, and on what criterion? For, in contrast, all the goods and services on the *private* market are produced on the basis of relative demands and costs to the consumers on the market. But there is no such criterion for protection in the

minimal or any other State.

Moreover, as Childs points out, the minimal State that Nozick attempts to justify is a State *owned* by a private, dominant firm. There is still no explanation or justification in Nozick for the modern form of voting, democracy, checks and balances, etc.^[24]

Finally, a grave flaw permeates the entire discussion of rights and government in the Nozick volume: that, as a Kantian intuitionist, he *has no* theory of rights. Rights are simply emotionally intuited, with no groundwork in natural law — in the nature of man or of the universe. At bottom, Nozick has no real argument for the existence of rights.

To conclude: (1) no existing State has been immaculately conceived, and therefore Nozick, on his own grounds, should advocate anarchism and then wait for his State to develop; (2) even if any State had been so conceived, individual rights are inalienable and therefore no existing State could be justified; (3) every step of Nozick's invisible hand process is invalid: the process is all too conscious and visible, and the risk and compensation principles are both fallacious and passports to unlimited despotism; (4) there is no warrant, even on Nozick's own grounds, for the dominant protective agency to outlaw procedures by independents that do not injure its own clients, and therefore it cannot arrive at an ultraminimal state; (5) Nozick's theory of "non-productive" exchanges is invalid, so that the prohibition of risky activities and hence the ultraminimal state falls on that account alone; (6) contrary to Nozick, there are no "procedural rights", and therefore no way to get from his theory of risk and non-productive exchange to the compulsory monopoly of the ultra-minimal state; (7) there is no warrant, even on Nozick's own grounds, for the minimal state to impose taxation; (8) there is no way, in Nozick's theory, to justify the voting or democratic procedures of any State; (9) Nozick's minimal state would, on his own grounds, justify a maximal State as well; and (10) the only "invisible hand" process, on Nozick's own terms, would move society from his minimal State back to anarchism.

Thus, the most important attempt in this

century to rebut anarchism and to justify the State fails totally and in each of its parts.

NOTES

1. *The Complete Writings of Thomas Paine*, ed. P. Foner (New York: Citadel Press, 1945), V.I., p. 13.
2. In Robert A. Rutland, *George Mason* (Williamsburg, Va.: Colonial Williamsburg, 1961), p. 111.
3. Williamson M. Evers, "Toward a Reformulation of the Law of Contracts" (unpublished MS.), p. 12. The great 17th century English Leveller leader Richard Overton wrote: "To every individual in nature is given an individual property by nature, not to be invaded or usurped by any: for everyone as he is himself, so he hath a self propriety, else he could not be himself...Mine and thine cannot be, except this be: No man hath power over my rights and liberties and I over no man's; I may be but an individual, enjoy myself and myself propriety." Quoted in Sylvester Petro, "Feudalism, Property, and Praxeology," in S. Blumenfeld, ed., *Property in a Humane Economy* (LaSalle, Ill.: Open Court, 1974), p. 162.
4. Roy Childs, "The Invisible Hand Strikes Back", *Journal of Libertarian Studies*, pp. 23-33.
5. Cf. Bruno Leoni, *Freedom and the Law* (Los Angeles: Nash Publishing, 1972), and F. A. Hayek, *Law, Legislation, and Liberty, Vol. I* (Chicago: University of Chicago Press, 1973).
6. Childs, "The Invisible Hand Strikes Back", pp. 23-33.
7. Childs, "The Invisible Hand Strikes Back", pp. 23-33.
8. Childs, "The Invisible Hand Strikes Back", pp. 23-33.
9. Childs, "The Invisible Hand Strikes Back", pp. 23-33.
10. Randy Barnett, "Whither Anarchy? Has Robert Nozick Justified the State?" *The Libertarian Forum* (December, 1975), p. 5.
11. Nozick, furthermore, compounds the burdens on the victim by compensating him only for actions that respond "adaptively" to the aggression (58).
12. Nozick explicitly assumes the measurability of utility (58).
13. I am indebted for this latter point to Mr. Roger Garrison of the economics department, University of Virginia.
14. Nozick also employs the concept of "transaction costs" and other costs in arriving at what activities may be prohibited with compensation. But this is invalid on the same grounds, i.e. that transaction and other costs are all subjective to each individual, and not objective, and hence are unknowable by any outside observer.
15. Childs, "The Invisible Hand Strikes Back", pp. 23-33.
16. Childs, "The Invisible Hand Strikes Back", pp. 23-33.
17. Nozick also reiterates Hayek's position on charging for the use of one's solitary waterhole (180).
18. See Barnett, "Whither Anarchy?", pp. 4-5.
19. Nozick doesn't answer this crucial question; he simply asserts that this "will be a productive exchange." (84, 340n16). Ironically, Nozick was apparently forced into this retreat — conceding the "productivity" of the exchange if Green makes the offer — by the arguments of Professor Ronald Hamowy: ironic because Hamowy has also delivered a devastating critique of a somewhat similar definition of coercion by Professor Hayek.
20. See Barnett, "Whither Anarchy?", pp. 4-5.
21. Nozick compounds his fallacies by going on to liken the blackmailer to a "protection racketeer", pointing out that, whereas protection is productive, selling someone "the racketeers' mere abstention from harming you" is not (86). But the "harm" threatened by the protection racketeer is not the exercise of free speech but aggressive violence, and the threat to commit aggressive violence is itself aggression. Here the difference is not the fallacious "productive" vs. "non-productive" but between "voluntary" and "coercive" or "invasive" — the very essence of the libertarian philosophy. As Professor Block points out, "In aggression, what is being threatened is aggressive violence, something that the aggressor has no right to do. In blackmail, however, what is being 'threatened' is something that the blackmailer most certainly *does* have a right to do! To exercise his right of free speech, to gossip about our secrets..." Walter Block, "The Blackmailer as Hero", *Libertarian Forum* (December, 1972), p. 3.
22. For an excellent and detailed critique of Nozick's concept of "procedural rights", see Barnett, "Whither Anarchy?", pp. 2-4. Professor Jeffrey Paul has also shown that any concept of "procedural rights" implies a "right" of some other procedure to arrive at such procedures, and this in turn implies another set of "rights" for methods of deciding on *those* procedures, and so on to an infinite regress. Paul, "Comment on Barnett", (unpublished MS).
23. Childs, "The Invisible Hand Strikes Back", pp. 23-33.
24. Childs, "The Invisible Hand Strikes Back", pp. 23-33.