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In *Anarchy, State, and Utopia*, Robert Nozick sets out to demonstrate—counter to claims of anarchists, social democrats, and dictators—that only the "minimal state," one "limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on,"[1] is justifiable. But his conclusion is unwarranted. The state to which Nozick's argument gives birth has far broader powers than he is willing to concede.

The clue to Nozick's fallacy lies in his failure to articulate the substantive laws the state is entitled to enforce. Though never clearly stated, an assumption runs throughout his argument that the minimal state will act as a court sifting evidence to judge offenders and not as a legislature defining offenses. In Nozick's apparent view, the state comes into a world of preexisting law (namely, the natural rights with which each person is endowed). At its birth, the state is assumed to know the law instinctively, as a gosling knows its mother upon being hatched. Yet we know that a gosling will fix an unshakable but erroneous conviction of motherhood on the first thing that moves past it at birth.[2] Might not the state make the same error? There is nothing in Nozick's philosophy to stop it.

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1. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1975), p. ix.

2. See Konrad Z. Lorenz, *King Solomon's Ring* (New York: T.Y. Crowell & Co., 1952); John N. Bleibtreau, *The Parable of the Beast* (New York: Macmillan, 1968).

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It is not enough to say that the minimal state has limited functions, any more than it is sufficient to say that every gosling has a mother. For the safety of the gosling it is necessary to recognize the actual mother, just as, for the well-being of the citizenry, it is necessary to devise a means of judging whether in an actual case the state oversteps its limited powers. If we knew what constitutes protection of property, proper protection of contractual obligations, "and so on" (in Nozick's revealing open-ended phrase), we would have a basis for evaluating the legitimacy of any particular rule of law that the state chooses to assert.

But Nozick does not tell us because he cannot. His theory does not permit us to judge whether a particular state action is legitimate or not. This inability does not stem from any oversight on Nozick's part. It is built into his premises. Nozick's theory is capable of generating a political structure, but there are no built-in limitations on how that structure is to be used. The logic of the transformation from protective association to state requires us to accept the legitimacy of *some* institution that can authoritatively settle disputes, but that logic can provide us with no basis for judging particular results.

In short, although Nozick derives a state, he cannot derive the substantive rules that it is obliged to follow. And because he cannot, he cannot show that the state acts improperly in creating (that is, legislating) rights for some that are arguably not found in his (or anyone's) state of nature. Nozick thus has the argument about legitimacy reversed. The legitimate state does not spring from preexisting legitimate law. Rather, law derives its legitimacy from a preexisting legitimate state. Only in a world of perfect certainty would Nozick's conception make sense. In a world of uncertainty, the task is to create institutions that will judge or legislate according to procedures that are thought to be legitimate. That is not merely the best that can be done; it is the only thing that can be done.[3]

3. Nozick does not dwell on the problem of uncertain knowledge, though in typically oblique fashion, he acknowledges it only to (apparently) dismiss it. "To have rested the case for the state on the denial" of an assumption that a set of principles exists that is acceptable, unambiguous, clearly understandable, and complete "would have left the hope that the future progress of humanity (and moral philosophy) might yield such agreement, and so might undercut the rationale for the state" (p. 141). This amounts to saying that because we may one day learn to harness nuclear fusion we can, right now, abandon oil and coal to supply our energy needs. The state is necessary for two reasons,

How we can determine the legitimacy of the state is a question I will defer for the moment. First I want to turn to Nozick's central conclusion: that the state that evolves through the invisible hand process has limited functions (that is, it is a minimal state). Nozick has drawn the wrong conclusion from his painstakingly enumerated premises for two related reasons. He has failed to inspect carefully what is common to the rights that people ostensibly possess in the state of nature, and he has neglected to consider the inherent difficulties in explaining these precisely in the contract that each individual makes with his protective association.

What do natural rights have in common that would justify Nozick's (I think proper) use of the etcetera ("and so on") clause in naming the functions of the minimal state? Each, fundamentally, is a *right not to be injured.* But this is an open-ended right, and the lack of boundaries is pregnant with consequences for political theory.

The first clients of a simple protective association might try to specify precisely the injuries they wish to be protected against. For example, "the undersigned is to be protected from theft of his new gold watch, pollution of the air above his farm, and lowering of the table of water in the stream that flows through his land." But such specifications would not last long as the preferred method of engaging a protective association's services. Sooner or later people will sign up for protection against such ill-defined wrongs as "theft of or injury to my personal property," "assault," "breach of contract" (all explicit responsibilities of Nozick's associations). And some time after that, a canny client will write into his contract that his coverage against injury "includes but is not limited to" the list of enumerated acts of aggression that he sets forth (a first-year law student's drafting trick). It is necessary to write in generalities because of the unforeseen contingencies of events in the real world, the same contingencies that compel us to adopt political institutions in the first place. One might be assaulted in the foot, the thigh, the abdomen, the head. One's ax might be stolen or one's words plagiarized. Protection against each contingency is necessary, but it would be a crippling and ultimately impossible assignment to label each one.

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outlined in this essay: we do not possess the requisite certainty today and it is impossible ever to achieve it.

This open-endedness of the right against injury necessarily requires the state to make substantive choices about what claimed injuries it will remedy. This is implied by the state's first duty, which is to honor its own contract with its clients. Not to do so would be the worst injury. But in attempting to honor its commitments, the state will discover it necessary to adopt rules for interpreting the vague language in the contract—"property," "assault," "breach of contract," and so on. These rules, however, will not be the kind of procedural devices that Nozick says the protective association may choose for itself. They will be substantive rules; in short, legislation, which may go well beyond the limited functions of the minimal state. And notice that these are not rules that only a rogue state will adopt. All states will ultimately need to devise them because the same "invisible hand" process that brought the state into being initially will continue to operate.

Since this is the critical point, let me underscore it. The state's role cannot be limited to deterring or remedying acknowledged injuries, as in Nozick's model. Inescapably the state must sort out from the frenetic bustle of the world what amounts to a compensable or remediable injury and what does not. The dominant protective association cannot restrict itself to selecting the fairest rules—that is, those most calculated to be accurate—for the determination of who *committed* a complained of injury. The reason is easy to see. In a world of even minimal complexity, a client will come forward one day and complain that he has been injured in a new way—for example, "My neighbor wore her skirt above her ankles in plain sight of me and my family." All concerned will agree that the neighbor in question really did do so, but there will be the bitterest dispute whether or not such a display of flesh was wrongful—that is, whether or not the action had unlawfully injurious consequences. (It is the unlawfulness of the injury that is at issue, not merely the injury. For we can hypothesize that the plaintiff really did suffer mental distress from observing the neighborly limbs. The question is whether, nevertheless, the neighbor had a right to exhibit herself.)

To whom if not to the dominant protective agency, could the disputants turn? If to anyone else, then the hegemony of the protective agency is threatened; to remain itself as the dominant arbiter it must also be the dominant legislator. It must decide whether the raised

skirt is an injury worth preventing. If it so decides, the neighbor's "state of nature" right to flaunt the turn of her ankle will be quashed. And as the dominance of the protective association is transformed into exclusivity with the emergence of the state, so the power of legislation will pass with it. Thus we see that the legitimate state is not merely the institution with a monopoly on coercive power to deter infringement of preexisting rights. Far more importantly, *the state is the final authority for the defining of injury.*[4]

Just such a process occurred in medieval Europe, with the rise of the nation-state out of feudal institutions. Under medieval pluralism, contesting power centers each claimed a sphere of life in which its writs were superior.[5] These gave way to central states. Though it may allow different political institutions discretion to act, the state always posses the ultimate legislative authority to define the nature and scope of injury. The laissez-faire notion that the owners of corporations possess the constitutional right to use their property as they see fit directly contradicts the rationale of this state. Private property as a sovereign "estate," as an autonomous power center, is an inadmissible reversion to the old pluralism. No dominant protective agency in Nozick's theory—as no state in real life—can permit any other institution the ultimate authority to define injury and hence to commit it.

Now we can see why Nozick's failure to articulate a theory of substantive rules cripples his case. Since the power to interpret is the power to create law, the state must ultimately make substantive rules that go beneath the surface of the clients' broadly phrased directives to the original protective associations. The interests and activities of people being wondrously variegated, the state must quickly face up to the *relativity of injuries*. In a market society, one man's rights are

4. Is the state legitimately entitled to such authority? Nozick suggests in a peculiar section on legitimacy (pp. 133 ff.) that the dominance of one protective association rather than another cannot be explained by recourse to some notion of "special entitlement" (p. 134). Yet clearly the state with a monopoly on the power to define injury has a special entitlement. Nozick's concern is how the state gets its power. But as we will see, legitimacy does not depend on how the state arose but on who exercises the power that it has.

5. In 1628, Sir Edward Coke in his famous *Institutes* discerned fifteen separate sets of legal institutions in England that functioned more or less autonomously.

often—perhaps always—another's injuries. There can never be an absolute non-injury, if "injury" is conceived broadly enough. Any change in one place will create ripples of change throughout. Whether or not any given action that causes change or affects others should be considered legally injurious is a question that cannot be answered with certainty nor fixed for all time.

When two people argue about whether or not a specific act undertaken in a specific set of circumstances is injurious in a legal sense, both cannot be right. But some answer must be given. As human society grows complex the state will be called upon to settle ever more numerous quarrels over matters becoming increasingly complicated as they are removed from the simple conditions that obtained in the state of nature. Inevitably, therefore, the svelte lady of the state whom Nozick embraces will become stout as she ages. Because time and resources are limited, making certainty impossible to achieve, regimentation in the name of social order will appear. Dispute settlement will require regulations that will restrict the freedom of many and sometimes of all.

But this tendency of the state to assert jurisdiction over affairs unregulated in the state of nature poses grave danger. What principle will keep the state to its general limited policing function (even allowing it a generous measure of freedom to expand its repertoire of techniques for policing obvious injuries)? How do we know when the state has gone too far and become the "maximal" state?

Libertarian theory hopes to avoid this question for the very reason that it cannot, under the libertarian view of the world, be answered. That is because the libertarian focuses on *what* the state may do rather than on *who* is doing it in the state's name.

One of the most remarkable aspects of Nozick's disquisition is the absence of discussion about the state's governors. Nozick writes as though the protective associations are some sort of computers: subject to programming errors, to be sure, but not natively malicious or in business to satisfy themselves. They apparently solve people's problems through a set of prerecorded instructions. To these neutral agencies the people yield their own power to determine the fairness of the associations' proceedings. As the dominant protective association extends its power at each stage of its metamorphosis into the state, the

people seem to lose forever the power to define and weigh the operations of the state's rules (a strangely Hobbesian argument for a libertarian to make). But if they do lose this power, the people forfeit any chance to be free of the threat of injury. For an agency—composed, after all, of human beings—that is beyond any but self-control may always adopt rules that unfairly enhance the position of its governors to the detriment of clients.[6] Nozick offers no way of deducing that the original intent of the parties to the contract (that is, clients and their protective associations) would not be forgotten. Nozick's argument hinges on an assertion that the dominant agency achieves what it thinks is fair solely because it has the clout to enforce its will. Missing is any demonstration that the transition to statehood would or could ever be accomplished while preserving a set of rules that would in fact be fair (for example, protecting each person's property equally). It is a major irony that this anti-statist writer depends so heavily in his formal philosophy on the implicit good will of the rulers of the state.

This predisposition to trust the rulers is a necessary feature of Nozick's case, however. Only by constructing a single-minded ruler programmed to cause no harm itself can the earlier dilemma of the overreaching state be solved. Then the legitimate state will adhere to its minimal functions because its leaders will have no choice but to do so. This proposition is scarcely credible, for there is no reason to believe that a minimal state with monopoly power will not become a rogue agency in the absence of some external control.

Moreover, as we have seen, there are no formal limits to the power to define injury. The state's duty will be open-ended no matter what the programmed instructions. To use Joseph Weizenbaum's terminology, political choice is not "computable."[7] To hypothesize an autonomous state as the defining agency is simply to maximize the chances of the minimal state's becoming a rogue state, for there will then be no check on its power to transcend its Nozickian limits.

The question of who controls is therefore central to the problem of legitimizing the state. Nozick's implicit answer to the question, un-

6. How professionals' self-regulation has failed to protect the public is the theme of my *The Tyranny of the Experts* (New York: Walker & Co., 1970).

7. Joseph Weizenbaum, *Computer Power and Human Reason, From Judgment to Calculation* (San Francisco: W.H. Freeman & Co., 1976), pp. 207 ff.

surprisingly, is that philosopher-kings will govern. But the great task of the state–defining the scope of human action so as to mitigate injury–is not one for experts of any stripe. Unless the people themselves can participate in the process of defining injuries, their very contract with the protective association is rendered nugatory. Only if the social contract is subject to constant renegotiation and revision can it serve its intended purposes. This is just a philosophic way of saying that the people must be given a voice in the state. The legitimate state is thus not the minimal state, not the state with a fixed jurisdiction, but a state governed by its own people.

This conclusion is consistent with the earlier proposition that Nozick has derived a political structure only. The laws of a state are legitimate to the extent that the state is legitimate. In turn this means, we now see, to the extent that the state is run by the people, and not vice versa. The basis of political legitimacy in a world where all people are presumed to have equal rights is popular sovereignty, not limited jurisdiction.

The argument so far may seem no less abstract than Nozick's. Illustration may be helpful in assessing the point to which we have come. Let us take a simple proposition–that one of the functions of the state is to safeguard the property of each of us–to see whether a rule of the forbidden type can be derived. That is, can a rule that seems to take from some in order to give to others (a rule intended for the benefit of "society") be justified? Is there implicit in the minimal state a theory of the nature of injuries that will guide the state to proper rules and lead it to reject improper ones?

Put yourself in a congested urban area in which hundreds of butchers slaughter cattle on their premises. Live cattle are brought in by rail and parceled out across city streets to the slaughterhouses. The city elders decide that the situation presents worrisome hazards: the congestion is noxious and the dangers of disease are great. So they enact an ordinance centralizing all slaughtering at a single slaughterhouse near the rail yards. The law forbids the butchers from continuing to use their shops as slaughterhouses.

Three questions arise. May the state legitimately establish a monopoly for the conduct of the slaughtering business in order to benefit "the people"? If it may, does the means selected–prohibiting inde-

pendent butchers from conducting their business on their own premises—constitute a "taking" of private property? If it does, must the independent butchers be compensated for their loss?

In 1873 the United States Supreme Court wrestled with these questions and answered the first affirmatively and the others negatively.[8] To protect the health and safety of the people, a city may zone out dangerous activity and restrict it to a single spot. This zoning regulation is not a "taking" of property (and, hence, did not require the city to compensate the butchers), the Court said, because, unlike land condemned for a public road, the butchers' land and the structures thereon were left intact.

If this result seems unjustified, it must be so only because property is being defined expansively to include all acts that people have been accustomed to doing without objection by the state. But this is not a necessary definition of property. Indeed, it is not even a possible one. Does someone obtain a vested right to do something that is injurious merely because the person injured forbears initially from complaining or seeking to deter it? Does acceptance of slight injury shield the commission of greater injury later on? If I tap you lightly on the shoulder and you grin and bear it, am I thereby entitled to punch you in the stomach? And must you pay me for the privilege of having me refrain from similar roughhousing in the future? To avoid such obviously absurd conclusions, it must be conceded either that long-established custom does not of itself comprise a property right or that the state may regulate a supposed property right that causes injuries to others. To hold otherwise is to say that the definition of "injury" can never be legitimately changed, at least without providing compensation for those who are committing it (as feudal lords maintained when insisting on payment for their forbearance in asserting ancient privileges over their vassals).

But could not the city have enacted a less restrictive regulation that would have permitted each butcher to operate a slaughterhouse? For example, the city ordinance might have created a health inspection system financed by the butchers, and transportation of cattle might have been limited to certain hours of the day. But will anyone contend that the difference between the course chosen and the less restrictive

8. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

alternative amounts to a violation of natural rights?[9] However desirable it may be for a legislature to choose the least restrictive regulation, there is no standard by which to know when the "least" point has been reached, nor will it ever be clear whether a proposed alternative achieves the same objectives as the more draconian route.

To assume there is a way of knowing is to assume an a priori, external standard. This can be supplied only by someone usurping the people's place. A philosopher-king, perhaps, which is exactly what the Supreme Court became shortly after deciding the *Slaughterhouse Cases*. By the 1890s, new judges imbued with a laissez-faire philosophy that events had already outdated began to hold that the increasing number of government regulations burdening corporate enterprise were impermissible interferences with private property. The judges either voided the regulations altogether (if they deemed the state interference too rank) or sustained the regulations on condition that the government compensate the owners for their loss in property value.

What had occurred in this Nozickian experiment was a critical redefinition of the property concept, from a property right in possession to a property right in "exchange value," in the words of the economist John R. Commons.[10] The Court assumed that the value of the possessions any business controlled lay in the ability of the enterprise to make them produce revenue. Any interference with that ability was necessarily a confiscation of the property.

This led to absurd results, however, because it meant that those who committed injuries had to be compensated for what they lost in being prohibited from committing them further. Thus in 1898 the Court ruled that valid railroad rate regulation depended upon a company's earning a "fair" rate of return on the value of its land.[11] Because the value of land was dependent on the rates that railroads had been able to charge prior to the imposition of rate regulation, one writer dubbed this the "fair value fallacy."[12] If just compensation requires

9. See Guy L. Struve, "The Less-Restrictive-Alternative Principle and Economic Due Process," *Harvard Law Review* 80 (1967): 1463.

10. John R. Commons, *The Legal Foundations of Capitalism* (Madison: University of Wisconsin Press, 1957).

11. Smyth v. Ames, 169 U.S. 466 (1898).

12. Robert L. Hale, *Freedom Through Power: Public Control of Private Governing Power*, 1952, pp. 462 ff.

the giving back to a company the value of what had been limited by a regulation called forth because the rate was exorbitant, then regulation would be self-defeating.[13]

Which definition of property is proper: the right to possess (occupy) land or the right to use it however its owner sees fit? This was not a dilemma for classical political theorists because the use of land in pre-industrial times rarely caused injury to other landowners, meaning that the necessity of limiting the use of property to avoid injury rarely arose. And as long as it did not, the problem of weighing the application of the postulated rule—the state's duty is to protect property—was rather simple: it was enough to deter trespassers and punish poachers.

With industrialization, however, the dilemma grew acute. New uses meant that conflicts would inevitably arise between property owners. Thus an owner of an old estate was said to have an easement for "ancient lights," that is, the right to enjoy sunlight and hence to prohibit an adjacent property owner from building any structure that reduced the light that fell on his estate. Similarly, those who lived on land through which a stream ran were entitled to a "natural flow" and could prevent others from interfering with the course of the stream, for instance, by building a mill or a dam. "The premise underlying the law as stated was that land was not essentially an instrumental good or a productive asset but rather a private estate to be enjoyed for its own sake."[14]

Is a transformation in the theory of property toward a conception of private property as an instrumental good—a shift that took place in America early on in the nineteenth century—an illegitimate one? The courts changed rules of riparian rights to permit reasonable use of streams for mills and manufacturing activities, despite the claim that natural (agricultural) or even "prior use" (the first mill preempting the entire river) should predominate. The transformation, which made possible the rise of capitalism, was justified in the courts as necessary to the promotion of economic growth. In so doing, the

13. Yet so it was held for more than forty years until the Supreme Court finally returned in 1940 to the position it had announced in 1873. See Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 59 (1940).

14. Morton J. Horwitz, *The Transformation of American Law, 1760-1860* (Cambridge, Mass.: Harvard University Press, 1977), p. 36.

courts were explicitly conferring benefits on one group of private individuals at the expense of others. But there is no clue in Nozick's philosophy that would permit us to declare this general outlook illegitimate, for it is not clear on what grounds the possession of land or its proximity to a stream could justify a rule that would bar the improvement of still other land. To assert the primacy of the prior use would require a finding in the name of Nozickian principles that capitalism itself is, historically at least, illegitimate. So it once was thought. Eighteenth-century English courts gave judgments to shopkeepers suing established customers who deserted them in favor of more competitive merchants. But the claim that one has a vested right against being "injured" by loss of patronage is as absurd as the claim that one can gain a vested right to continue to injure someone because the injury was initially accepted without complaint.

In short, no rule of property can with any clarity prevent at least an apparent redistribution—a taking from some to aid others. To say that someone's property is being illegitimately "taken" is, in this context, to say that the definition of "injury" is wrong. But the political determination of what constitutes unlawful injury can be overturned and a different rule substituted only by assuming some other institution has higher authority. In the abstract model this is not possible, since by hypothesis the maker of the rule, the dominant protective association, is supreme.

In the real world, the democratic dominant protective association—the representative state—is divided into competing power centers. In asserting its primacy on substantive constitutional grounds the Supreme Court pretended to be passing an abstract judgment on the legitimacy of the legislative determination. But this was really an internecine struggle, Hobbes against Locke. (Should an absolute authority define the nature of injury or should the people be able to tell the protective agency how to conduct itself? This is a problem, as I have said, that Nozick does not consider.) Eventually it became clear that the Supreme Court, not Congress, was acting illegitimately, since the accepted model of decision making is for legislators, not judges, to define the nature of injury. This meant the legislative determination must be final.

The principle that a person is entitled to protection against aggres-

sion toward his person and his property thus affords no help in determining how far the use of his property may be permitted to injure others. Reconciling the claims of property owners with the claims of those who say they are injured by the owners' use is ultimately a series of value judgments on which people may reasonably differ.

To quarrel with this conclusion is to imply that a society with a capacity to err is an unjust one—that a "positive" state that goes beyond simple watchman-in-the-night duties is perforce illegitimate. But an industrial civilization does not carry out aggression only during the dark of night; the larger share of thievery and injury by far is carried out in the plain light of day. As the industrial age matured, for every man of property injured by the stealing of a loaf of his bread or a piece of his silver, thousands were injured far more by intolerable conditions in mines and factories. The recognition that these conditions were injurious led to an outpouring of protective legislation that goes unabated to this day. This legislation has often been condemned for exceeding the authority of Nozick's minimal state. But against the claim of the factory owner to use his factory as he sees fit and to contract for labor on any terms he likes must be measured the injury that accrues. The protective agency must choose to consider one thing or the other an injury—interference with property owners or the sickness and maiming of workers. The majority may err, but this does not make the process by which it comes to a decision an improper one. In a technological age, in other words, the duties of even the watchman-in-the-night (or, more properly, the watchman-in-the-day-and-night) will no longer be simple.

Popular sovereignty is not the end of political analysis, however. It is nearer the beginning. For we understand almost instinctively that unrestrained majority rule is dangerous. The extent of the state's jurisdiction—*what* it may do as opposed to *who* may order it done—remains an important question. To those accustomed to the constitutional tradition, it is axiomatic that the state must be hedged by certain restraints, among those the familiar First Amendment freedoms and the concepts of equal protection and due process. Many explanations of and justifications for these constitutional provisions

can be given, but in the present context they follow from our notion of legitimacy. If people could be imprisoned without cause, silenced, subjected to rank discriminations, then their ability to participate in the affairs of the state and to help direct it would wither, contrary to our fundamental assumption that the legitimate state is one in which all people may participate. I think it is possible, therefore (though the demonstration is not within the scope of this paper) to derive from the idea of a legitimate state a theory about the brakes in the form of constitutional prohibitions that should be applied to state power.

In so doing we will have reversed Nozick's procedure. He believes that it is questionable whether the state may act at all and only with great ingenuity does he find a way to permit it to wiggle a muscle. But this will not do. Government is the prerequisite of the human community. A key question for our age is not what government may do but what it should not do and how it can be restrained therefrom. To this question there can be no final answer. The boundary between private and public can never be marked with manicured shrubs; the border will forever remain in a wild domain, for the meaning of rights and injuries will always be determined by the shifting passions and interests of humanity.