Does Nozick Have a Theory of Property Rights?

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Abstract

In the almost forty years since Anarchy, State and Utopia has appeared, Nozick's libertarian theory of property rights, laid out in Part II of the book, has been subject to innumerable internalist critiques. In this paper, I argue that the Nozick of Parts I, II and III, read together, holds at least three mutually inconsistent theories of property rights: utilitarian; libertarian; and anything goes, provided that citizens have some unspecified level of choice among legal regimes. If any of the three predominates, it is not libertarianism but utilitarianism.

Nozick is hardly alone in this regard. Nozick's inconstancy to libertarian principles is symptomatic of the problems deontologists of all stripes encounter in translating abstract articulations of rights theory into concrete rules. His de facto solution is typical as well: When the going gets tough, rights theorists tend to turn utilitarian.

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A. Introduction

Surely the most famous statement in Anarchy, State and Utopia (ASU) is the manifesto with which it opens: "Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do."[1]

In Part II of ASU, Nozick elaborates that view as follows:

> No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over. Other peoples' rights and entitlements to *particular things* (*that* pencil, *their* body, and so on) and how they choose to exercise these rights and entitlements fix the external environment of any given individual and the means that are available to him. If his goal requires the use of means which others have rights over, he must enlist their voluntary cooperation. … No rights exist in conflict with this particular substructure of rights. Since no neatly contoured right to achieve a goal will avoid incompatibility with this substructure, no such rights exist. The particular rights over things fill up the space of rights, leaving no room for general rights to be in a certain material condition. (p. 238)

From these and other statements throughout Part II, one can glean the essential features of Nozickean property rights:

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[1] All cites to Anarchy, State and Utopia will appear in the text, with page number only.

(i) They are absolute: if you are the owner of X, you control it absolutely.

(ii) One of the key rights of control you possess over X by virtue of owning it is the right not to have your interests in X interfered with or altered in any way without your consent. As a corollary, whatever price you can negotiated for your agreeing to an alteration is just: "[A]n entitlement theorists would find acceptable whatever distribution resulted from the party's voluntary exchanges." (p. 188)

Even self-styled libertarians generally accept the need to interfere with an owner's rights of enjoyment to some extent. Some of those limitations are innocently packaged in the classic common-law adage, "sic utere tuo ut alienum non laedas" (use your property so as not to wrong others). Others arise from a recognition that the state must deploy some coercive powers to solve collective action problems for the good of all. Among libertarians, Nozick stakes out a position pretty far at the end of "no interference" in Part II. The heart of that position is that, in general, "people have a right not to be forced to do" things they don't want to do with themselves or their property, subject only to the right of the nightwatchman state to use force, if necessary, to protect the like rights of others.

This prohibition holds, even if (in others' view or even your own) you would be left better off as a result. Thus, for example, compulsory redistributive taxation is impermissible in a Nozickean world, even if everyone supports helping the poor and coordinated giving to the needy is (by hypothesis) more efficient than uncoordinated individual action because of collective action problems. (p. 268) If everyone would really prefer it, says Nozick, then get their consent. If you can't get everyone's consent because there are dissenters, hold-outs, or the transactions costs of getting consent is too

high, tough. That's what it means to have an historical rather than end-state theory. "[I]t would violate moral constraints to compel people who are entitled to their holdings to contribute against their will." (p. 269)

(iii) Consent means explicit consent. As Nozick famously put it, "tacit consent isn't worth the paper it's not written on." (p. 287) You may not imply consent to a rights waiver from the fact that an owner has voluntarily continued to reside physically in the jurisdiction that strips her of that right. (To put it another way, individuals have a right of internal exit: they can stay put in a jurisdiction but refuse to abide by individual laws if they deem those laws unjust from a libertarian perspective.)[2] And you also may not (pace Herbert Hart) imply consent to pay for benefits received from the state. (pp. 90-93)

(iv) Natural rights are straightforwardly derivable from libertarian premises: "A line (or hyper-plane) circumscribes an area in moral space around an individual. Locke holds that this line is determined by an individual's natural rights, which limit the action of others" (p. 57). Moreover, the rights derived from libertarian premises are not just abstractions like "self-ownership." They are "particular rights over particular things." (p. 238)

(v) The boundaries around individual rights are non-overlapping. To put it in Nozick's terms, "[i]ndividual rights are co-possible."

(vi) Rights occupy most of the space of social interaction, drastically limiting the domain of collective choice. "The exercise of… rights fixes some features of the world. Within the constraints of these fixed features, a choice may be made by a

[2] For Nozick's insistence that only such a right of internal exit could legitimize the more-than-minimal state, see pp. 173-74; 292-293.

social choice mechanism based upon a social ordering." (166) But, warns Nozick, "After we exclude from consideration the decisions which others have a right to make, and the actions which would aggress against me, steal from me, and so on, and hence violate my (Lockean) rights, it is not clear that there are *any* decisions remaining about which even to raise the question of whether I have a right to a say in those that importantly affect me. Certainly, *if* there are any left to speak about, they are not significant enough a portion to provide a case for a different sort [that is, a more extensive] state." (p. 270)

Over the past forty years, this conception of rights has been subject to vigorous criticism on a number of fronts, in particular its analytic indeterminacy and normative underpinnings. I agree with many of these criticisms, and have voiced some of them myself. (Fried, 1995, 2003, 2005). But with the exception of criticisms going to points (iv) and (v) above, I do not want to press them here. Instead, I want to suggest that when one reads the three parts of book together, one begins to doubt that Nozick has any theory of property rights at all. More precisely, he appears to have at least three mutually inconsistent theories: utilitarianism; Lockean libertarianism; and anything goes, provided that citizens have some unspecified level of choice among legal regimes. Insofar as one can detect any predominant theory, it is not libertarian, or even liberal, but utilitarian.

Some of the inconsistencies in Nozick's treatment of property rights are doubtless explained by the book's origins. As others have pointed out, the three parts of ASU started out as three unconnected essays, and in many ways that's where they ended up. Others can be written off to the analytically casual nature of

Nozick's enterprise. If that were the end of the story, Nozick's inconstancy to his professed libertarian commitments would be of limited philosophical interest. But many of Nozick's lapses are symptomatic of the problems deontologists of all stripes encounter in translating abstract articulations of rights theory into concrete rules. One way of putting the difficulty is, when the going gets tough, rights theorists tend to turn utilitarian. To that extent, there are broader lessons to be learned for rights theory more generally from a close reading of ASU.

I will consider Nozick's treatment of property rights in Parts I and III of ASU, then return to reconsider Part II, and conclude with some speculations about how best to understand Nozick's inconstancy to libertarian principles.

B. Anarchy

The task Nozick sets for himself in Part I of ASU is to show that the minimal state could have come about from the state of nature (SON) through a series of uncoordinated, private transactions, none of which violates any individual's rights.[3] If some of the hypotheticals he tests libertarian property rights against in Part II aren't exactly taxing (e.g., ruling out forcible eyeball transfer from the two-eyed to the blind), he has gone to the other extreme here.

Nozick starts out with an imaginary SON populated with multiple independent protective associations (IPAs) in close proximity to each other. Each of the IPAs is pursuing the identical, prima facie legitimate end (protecting its own members from

[3] "I argue that a state would arise from anarchy (as represented by Locke's state of nature) .... by a process which need not violate anyone's rights." (xi) In particular, will show that the "transition from a SON to an ultraminimal state (the monopoly element) was morally legitimate and violated no one's rights and that the transition from an ultraminimal state to a minimal state (the 'redistributive' element) also was morally legitimate and violated no one's rights." (113)

wrongful transgressions by non-members). In the course of pursuing that end, each imposes identical risks on non-members by virtue of its unavoidably error-prone enforcement procedures.

Being able to show that "individual rights are [at least roughly] co-possible" (point (v) above) is essential to any theory of rights. If there is an absolute right to do X, but A's doing X entails B's not doing X, or not doing it to the same extent as A, then we need some meta-principle to adjudicate the conflict between A's and B's asserted right to do X. The consequence of that meta-principle will be to leave A, B, or both with a less than absolute right to do X.

Stepping back for the moment from the details of Nozick's baroque thought experiment, there would seem to be only three places a good (Nozickean) libertarian could go from that starting point.

The first is to get the unanimous, explicit consent of the members of all IPAs to give up their rights to their own IPA in return for the benefits of a minimal state. Nozick rejects this possibility as implausible. Some people may prefer to remain independent; others may hold out in negotiations for strategic reasons. Finally, even if all are willing to cooperate, such agreements are often prohibitively costly to reach.

But, of course, these are just the typical problems that make unanimous consent to collective action, practically speaking, unattainable. The way around the problem that most social contractarians have adopted is some version of implied consent. Nozick, however, rejects that solution as not consent at all. (See point (iii) above.) It is tantamount, says Nozick, to giving someone a book and grabbing money from him to pay for it, on the grounds he has "nothing better to do w/ the money" (and by implication also

would have valued having the book at least at its cost). The fact that we are "social products," says Nozick, "does not create in us a floating debt which the current society can collect and use as it will." (p. 95)

The second alternative is to decide that individuals don't, after all, have a right to their own IPAs in the SON—that in the SON, might makes right, and moralized Lockean rights arise only after a state, by whatever means, comes into being. This strategy, however, renders Part I of the book irrelevant, and Nozick ostensibly rejects it out of hand ("might doesn't make right").

The third alternative is to give up on the idea of a minimal state and make one's peace with anarchy. It is true that doing so requires one to forego the social gains that a minimal state makes possible. But that's the price you pay for being a strict libertarian with a strong notion of consent: it can (and in collective action situations often will) lead to suboptimal results for everyone. If that bothers you enough to dispense with consent, then you are a consequentialist, not a libertarian—the characterization Nozick inevitably invites in rejecting this third alternative as well.

Instead, Nozick opts for a fourth alternative, which is a complicated amalgam of alternative (ii) and the implied consent version of alternative (i). His solution takes on board all the objectionable features of both of those alternatives, from the perspective of a strict libertarian, and adds a few of its own. Here are the essential moves.

1. Doing away with consent: In Nozick's "invisible hand" tale, the minimal state emerges from the anarchic SON when the dominant protective association (DPA) unilaterally forces all nonmembers to give up their IPAs and join the DPA. Thus, in place of actual or implied consent, Nozick does away with consent entirely. (The door to

this solution is opened with surprising insouciance. After asserting, famously, that "A line (or hyperplane) circumscribes an area in moral space around an individual," determined for Lockeans by an individual's natural rights, Nozick opines that that principle raises the following question: *"Are others forbidden to perform actions that transgress the boundary or encroach upon the circumscribed area, or are they permitted to perform such actions provided that they compensate the person whose boundary has been crossed?"* Unravelling this question, says Nozick, "will occupy us for much of this chapter." (p. 57) But no libertarian should need thirty pages to answer that question. Three words should suffice: They are forbidden. That's what consent means.

Presumably the IPAs are free to leave the territory now ruled by the DPA-turned-ultraminimal-state if they wish. But if they stay put, they will be deemed to have relinquished any independent right of self-protection. That is to say, there is no right of internal exit for dissenting IPA members. That result is arguably even more objectionable from a libertarian perspective than would be implying consent to pay for benefits, pursuant to something like Herbert Hart's "principle of fairness." Hart's principle is addressed to a situation where holdouts are happily enjoying the benefits of membership but refusing to pay for them. They are, in short, free riders. In Nozick's ultraminimal state, dissenters don't want to be free riders; they want to remain completely independent, but have been denied that option.

In the section on "Prohibition, Compensation and Risk," Nozick tries to reconcile the coercion he licenses here with a strong consent version of libertarianism by arguing that what the IPAs lost involuntarily —an absolute right to self-defense—they never had to begin with, because in exercising that "right," the IPAs unavoidably jeopardized the

rights of others through their unreliable enforcement procedures.[4] Hence what the DPA took from the losing IPAs without their consent (the right to act in a way that puts the rights of others at risk) was never "theirs" to begin with.

This strategy might seem promising at first, but it is hopeless, for reasons that go to the heart of the problems rights theorists face in translating abstract rights claims into operationalizable rules about "particular rights over particular things."

2. What is the rights violation here? The face-off between identical interests that are not co-possible puts any rights-based argument on an obvious collision course between incompatible intuitions about who is the wronger and who the wronged. When the DPA forbids other IPAs from protecting their own members, who is the (would be) victim here? The DPA, which is protecting its members from the risky conduct of all the other IPAs (albeit at the same time imposing an identical risk on those other IPAs)? Or the other IPAs, who have lost the right to protect themselves, merely because doing so imposes some risks on others—a loss that arguably is incompatible with a free society?[5] And whichever side we deem to have the entitlement to be free from harm, how is that right to be protected? By a property rule, which gives them the right to retain the entitlement without paying any compensation? By a liability rule, which allows the other side to trample that entitlement provided it pays compensation?

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[4] Id. at 108, 114. Nozick is ambiguous through as to whether the "unreliability" is procedural ("fair" substantive rules applied in an imperfect fashion) or substantive (rules substantively unfair to the members of the other IPAs). He seems to lean toward the former, raising a further question: why should we assume that the procedural imperfections would systematically disadvantage the members of the other IPAs, compared to IPA's own members, such that the former is entitled to some sort of special protection?

[5] Id. at p. 78: "Since an enormous number of actions do increase risks to others, a society which prohibited such … actions would ill fit a picture of a free society as one embodying a presumption in favor of liberty, under which people permissibly could perform actions so long as they didn't harm others in specified ways."

Rather than trying to reconcile these two sets of warring intuitions in some fashion, Nozick simply embraces them in seriatim. The result is an analytic train wreck, in which Nozick flips between three of the four possible answers to the two questions that have to be resolved in assigning rights: who gets the entitlement; and is it protected by property or liability rule.

(a) Nozick initially assigns the entitlement to the IPAs (in assuming they have a right to defend their members), which entitlement he protects by a property rule (the IPAs could enjoin the DPA from interfering with their activities, which right the DPA would have to negotiate to buy out from the IPAs in a voluntary transaction).

(b) He then switches the entitlement to the DPA (to be free from IPAs' risky enforcement activities), and protects that entitlement by a property rule (the DPA may enjoin the IPAs from any enforcement activities).

(c) Then, pursuant to the Principle of Compensation, he abruptly shifts the entitlement back to the IPAs, but concludes that the entitlement should be protected not by a property rule (which would permit the IPAs to continue to defend themselves) but by a liability rule (which permits the DPA to enjoin such activities, but requires compensation to be paid equal to the diminution in the IPA members' welfare as a result of the injunction).

Again, it is easy to write this mess off to the casually speculative nature of Nozick's enterprise. But there is a deeper cautionary tale here for rights theorists about trying to derive a scheme of rights from the key libertarian principle, 'you may do whatever you wish with yourself and what you own, provided you do not harm others.' Traditionally, the deontological literature on harm to others has assumed that this proviso

is more or less self-executing: it is presumptively violated whenever one party harms another (without justification or excuse). Since the popularization of the Coase Theorem (Coase, 1960) in the 1970s, it has been widely recognized in legal circles that the presence of harm-in-fact resolves nothing. All disputes between two or more parties involve conflicting desires about how to deploy scarce resources; however we decide the dispute, one side will be "harmed" as a matter of fact, in the sense that it will no longer be able to do as it wishes with impunity. As a result, the question of who is *wronging* whom cannot be resolved by an unmoralized (factual) determination of who is *harming* whom. It can be resolved only on the basis of some normative commitments (implicit or explicit) that lead us to favor one side's interests over the other's.

In the typical hypotheticals that populate the deontological literature, it is easy to miss this analytic truth, because we have clear and widely shared intuitions about whose interests deserve protection, and those intuitions frequently track the more visible and violent forms of harm-in-fact (in Nozick's words, acts involving "primarily, physical aggressing" against others). (p. 32) We all know who will win the dispute between the two-eyed and the blind over forcible eyeball transfers, or the able-bodied and the society that wishes to harvest his organs to save ten lives (p. 206), just as we all know who will win as between A, who wishes to stick her knife into B's back just for the hell of it, and B, who would prefer that A not do so. (pp. 170, 282). Because the conclusion in these "slightly hysterical" examples, to borrow Nozick's characterization (p. 206) is never in doubt, the reasons adduced in support of it tend to go unscrutinized-- in particular, the assumption that the mere presence of harm-in-fact to the "victim" resolves the question.

In contrast, the conflict that the Nozickean SON sets in motion forces the Coasian problem front and center, both because all of the IPAs are engaged in identical conduct (self-defense) that imposes an identical risk of harm to others (inadvertent boundary crossings), and because that conduct is of the sort we regard as prima facie socially productive. Nozick, understandably lacking any clear moral intuition how to resolve this stand-off—whether to regard the imposition of risk as a right or as an incursion on others' rights, and how to break the tie between identically positioned parties-- just cycles among the various possibilities.

3. The set of "rights" that emerge from Nozick's "invisible hand" procedure are not co-possible. This follows directly from the fact that all the IPAs are identically situated at the start. Given that symmetry, the only way to get from multiple IPAs to a minimal state without favoring one IPA over another is to endow all IPAs with equal prerogatives, and let them work it out among themselves—by force, in a Hobbesian SON, by explicit agreement in a Lockean one.[6] As noted above, Nozick rejects both of these alternatives. Instead, he gives one of the IPAs (the DPA) the prerogative to extinguish all other IPAs, relegating the members of the other IPAs to the lesser right to be compensated for their involuntary loss. Whatever else this is, it is not an example of co-possible rights.

4. Measuring compensation for the losers. In the chapter on "Prohibition, Compensation and Risk," Nozick considers three possible measures of compensation for the loser IPAs. The first, market compensation, is "that price that would have been

[6] Nozick himself raises this objection but never answers it: "It might be thought that moral considerations require allowing another to do whatever you do; since the situation is symmetrical some symmetrical solution must be found.... What moral right does [one party] have to impose this asymmetry, to force others not to behave as he does?" (p. 125)

arrived at had a prior negotiation for permission [to extinguish the loser PAs' right of self-defense] taken place." (p. 65) The second, "full compensation," is equal to the minimal amount the loser PAs would have settled for to give up their rights voluntarily (in normal economic parlance, their minimal reservation price) (p. 63). The meaning of the third, "compensation for disadvantages," is a bit elusive. At one point, Nozick defines it as the diminution in preference-satisfaction suffered by the prohibited individual "as compared to the normal situation." (pp. 82-83) This appears to refer to the situation of others, but it is unclear what others and how we are to calculate the value of their "normal situation." At various points, Nozick states unambiguously that "compensation for disadvantages" provides less compensation than would "full compensation." (pp. 87; 145-46) At other points, however, he defines it in a manner that appears indistinguishable from "full compensation."[7] I will assume for present purposes that it entails something less than full compensation.

For a libertarian, the choice should be clear: The second-best alternative to requiring the DPA to get the loser IPAs' consent to extinguish their rights to self-protection would be to make the DPA pay them whatever price the loser IPAs could have extracted in arms' length negotiations to give up that right-- in Nozick's parlance, "market compensation." Indeed, in another context Nozick himself goes even further, requiring "supercompensatory damages" (a penalty levied on top of compensatory damages) for unconsented-to boundary crossings) (p. 57).

Instead, Nozick relegates the loser IPAs either to "full compensation" or "compensation for disadvantages." As Nozick notes, the effect of full compensation is to

[7] Nozick states that compensation should be set at "one extremity of the contract curve," which he (correctly) equates with "full compensation." (p. 84)

give to the DPA *all* of the joint gains from achieving one state with a monopoly on power, a result that he himself describes as "clearly unfair." (pp. 63-65) A fortiori, "compensation for disadvantages," which leaves the loser IPAs with even less, is more unfair. Why then choose it? Nozick's defense is that partial compensation is a fair resolution to "risk of harm" cases, because both sides have some legitimate claim of right: the DPA, to protect itself from the loser IPAs' risky procedures, the loser IPAs, to protect themselves via procedures that *might not ever* result in harm to the DPA. (pp. 82-82; 84; 145-46).[8]

But the DPA and the loser IPAs don't just have offsetting claims of right; they have *identical* claims of right. Given that, Nozick's solution seems like adding insult to the loser IPAs' injury. They not only lose the right to the protective agency of their choice; they also get no share in the surplus value generated by the forcible creation of a monopoly state, and indeed, under the "compensation for disadvantages" measure, are likely to find themselves in a worse position than they were in the SON.

Worse yet, in conceding that both sides have legitimate claims, Nozick threatens to win the battle but lose the war for libertarianism, as that concession exposes the wholesale inability of libertarian principles to delineate "particular rights over particular things." I return to this point in subsection 6 below.

5. Might makes right.

While Nozick goes to much trouble to present the minimal state as an outcome of a non-rights-violating "invisible hand" procedure, in the end, might makes right in

[8] What Nozick actually argues is that "compensation for disadvantages" is a fair compromise between full compensation and no compensation. Id. at 146. But the real question for a libertarian is not whether to compromise from *full* compensation but whether to compromise from *market* compensation.

Nozick's SON.[9] The hand that produced it is "invisible" only in the very limited sense that it does not result from any explicit social choice procedure. Otherwise, it lacks the two key attributes of the Smithian invisible hand: *voluntary,* private transactions that produce an optimal outcome (here, the minimal state) *without any one trying to produce it.* What it does is replace the "visible hand" of collective action with the "visible hand" of one dictatorial PA that conquers and absorbs all the others by force. The fact that might makes right in Nozick's tale would seem to doom the enterprise from the start, rendering the rest of the argument in Part I superfluous.

At the end of the day, then, the "invisible hand" process that Nozick imagines will ferry us from anarchy to the minimal state without any rights violations violates virtually every tenet of libertarian rights. The DPA gains a monopoly on coercive force by forcefully extinguishing every other IPA's natural right to self-defense. The loser IPAs are relegated to compensation (under the Principle of Compensation) equal at best to their minimal reservation price for giving up their own PA. If the losers are unhappy with that outcome, they are left with exactly the choice that Nozick denounces in Part II as no choice at all: If you don't like it, leave the territory; if you stay put, you will be deemed to have consented to the legitimacy of the resulting state. Indeed, the losers in Part I are arguably worse off than the losers in the more-than-minimal, redistributive, state imagined in Part II. The latter can at least console themselves that they lost pursuant to a

[9] Id. at 108-09 (Although all IPAs may act to protect their members against other IPAs' unfair procedures by seeking to prohibit the use of those unfair procedures, only the DPA "will be able to do so with impunity," because the DPA occup[ies] a unique position by virtue of its power," and as a consequence "alone is in a position to act solely by its own lights.") Nozick explicitly denies that this argument amounts to "might makes right." Id. at 118. But it is hard to see what else explains it, as the disavowal itself goes on to concede inadvertently: "Our explanation does not assume or claim that might makes right. But might does make enforced prohibitions, even if no one thinks the mighty have a special entitlement to have realized in the world their own view of which prohibitions are correctly enforced." Id. It is hard to see how to construe these two sentences, other than as saying: I'm not saying might makes right; I'm simply saying might makes might.

majority (or supermajority) vote, in which their vote counted as much as everyone else's.[10] In contrast, the losers in Part I were vanquished solely by force.

And how does Nozick justify this rout of libertarian rights? At first, he asserts that it is the *only* way to get us to "civil government," which alone can remedy (in Locke's words) the "'inconveniences of the state of nature'"-- that is, its suboptimality. (p. 10) He then extends that argument to any case in which it would cost more to obtain consent than it would be worth, and still further to any case in which it would be the "efficient" solution because "the transactions costs of reaching a prior agreement are greater, even by a bit, than the costs of the posterior compensation system," provided that the benefits of the act are "great enough." (p. 73) That position seems vanishingly close to straight utilitarianism.[11]

Indeed, Nozick reveals his true utilitarian colors from the start of Part I, when he declares that one could justify the state *either* by showing it "would arise by a process involving no morally impermissible steps, *or* would be an improvement if it arose," and then conditions the first route on being able to show that it too would lead to improvements rather than deterioration. (p. 5 and fn. * (itals added)). If we are to take Nozick at his word here-- and the rest of Part I certainly suggests we should—then the entire historical (invisible hand) justification can be dispensed with, in favor of a comparison of the goodness or badness of the end-states of anarchy and the minimal

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[10] Nozick famously asks in Part II, what rationale yields the result that a person is free to emigrate to escape any obligation to help the poor, but can't stay put and opt out of that compulsory scheme? (p. 173). The rationale, of course, is democracy.

[11] It is not clear that requiring there to be significant benefits from overriding rights meaningfully differentiates Nozick's proposal from straight utilitarianism, as circumventing the market for gains anticipated to be small is unlikely to be optimal from a welfarist perspective in any event. For other statements casually embracing a utilitarian cost/benefit calculus, see, e.g., id. at 79 (on how to decide what forms of pollution to allow): "Presumably [society] should permit those polluting activities whose benefits are greater than their costs," which should be determined via the Kaldor/Hicks criterion.

state.[12] But of course this is exactly the instrumental justification for coercive collective action that Nozick repudiates in Part II, on the ground that, even if collective action would benefit everyone, including the dissenters, one may never "compel people who are entitled to their holdings to contribute against their will." (pp. 269, 238, 263-64).[13]

6. What is left of libertarian rights?

Nozick intermittently recognizes that dispensing with consent if there are significant enough welfare gains from doing so leaves libertarian rights in a shambles. But he tries to contain the damage by suggesting that we may jettison rights for utility, provided we pay compensation, *only* when we "are acting in self-protection in order to increase [our] own security" from potential harm resulting from the actions of others, and those actions "might actually have turned out to be harmless." In short, the conduct must "risk crossing another's boundary," with a probability less than 1.0.[14]

The unstated assumption here is that deontological principles can handle cases of certainty in either direction: If a given act is certain to result in harm to others, it is wrongful and may be prohibited without compensation; if it is certain not to result in harm to others, it is permissible, and hence any waiver of that right

[12] Indeed, one could argue *must* be dispensed with, as—to quote the Nozick of Part II—"Contract arguments embody the assumption that anything that emerges from a certain process is just. Upon the force of this fundamental assumption rests the force of a contract argument." (p. 208)

[13] Nozick seems to suggest at the very end of Part II that he might waive consent even for the more-than-minimal state, judging the justness of resulting societies instead by the extent to which they embody and protect the moral side constraints of individual rights. Indeed, Nozick goes even further down the consequentialist road, to suggest that consent is neither necessary nor sufficient to validate the society it produces: A society that protects individual rights but arose unjustly is much preferable, says Nozick, to one that arose justly but fails to protect individual rights. (p. 294, last paragraph). In short, the end-states justify the means.

[14] Id. at 74. See also id. at 110: Enjoined IPAs must be compensated only where "it is perfectly possible that the independents' activities including self-help enforcement could proceed without anyone's rights being violated."

must be negotiated.[15] Only where an action might or might not turn out to be harmful do deontological principles run out. In such cases, says Nozick, "[I]t is difficult to imagine a principled way in which the natural-rights tradition can draw a line" between acceptable and unacceptable risks imposed on others. "This means that it is difficult to see how, in these cases, the natural-rights tradition draws the boundaries it focuses upon."[16] (p. 75)

In fact Nozick doesn't limit the Principle of Compensation to conduct that presents merely a risk of harm.[17] More importantly, the category of conduct that merely risks harm to others is not small. It encompasses virtually everything we do, including conduct that we routinely prohibit without requiring compensation (e.g., driving 100 MPH through crowded city streets) and conduct that we permit people to engage in with impunity (e.g., driving prudently down a crowded city street, knowing that doing so imposes some irreducible risk of harm to pedestrians), as well as conduct that we permit people to engage in provided that they compensate victims for any harm that results (so-called strict liability rules). If, as Nozick suggests, we should assign risky conduct to one of these three categories based not on the natural rights of the actor but on the social utility of the conduct (judged both by the value of the activity to society at large, and its value to the would-be actor), he has effectively conceded the regulation of most human conduct to welfarist principles. That means that rights, rather than occupying most of the space of social

[15] As I suggested in point (b) above, I don't believe that articulated libertarian premises can resolve cases of certain harm either without an assist from other unstated normative premises that often turn out to be welfarist manqué.

[16] See also p. 101: "The natural-rights tradition offers little guidance on ... how principles specifying how one is to act have knowledge built into their various clauses."

[17] He applies it, for example, to polluting activities without regard to whether harm is certain to result or merely possible.

interaction, occupy almost none. The bulk of that space is to be governed by "a social choice mechanism based upon a social ordering." (p. 166).

C. Utopia

Nozick's Utopia is a Tieboutian paradise, in which every imaginable sort of community is on offer: ones to satisfy the preferences of "visionaries and crackpots, maniacs and saints, …capitalists and communists and participatory democrats," Nozick and Rawls, you name it. (p. 316) In this utopia, individual consent operates at the level of choice of which community to join rather than the collective rules governing that community. "[I]n a free society people may contract into various restrictions which the government may not legitimately impose upon them. Though the framework is libertarian and laissez faire individual communities within it need not be." (320) If Swedenville wants to run itself on social-democratic principles, god bless it. If you don't like it, don't join Swedenville.

So, the best of all possible worlds that Nozick can imagine is one in which we are given a choice among a reasonably diverse menu of communities and then told, with respect to each of them, take it or leave it. But to the naïve observer, that arrangement sounds a lot like the position of citizens in many countries of the world. If American citizens don't like the laws adopted by their fellow countrymen by majority rule (indeed, by any means), they are free to leave. If they would prefer a more socialist-democratic alternative, there's Canada and Western Europe. If they'd prefer something closer to the libertarian ideal of unregulated capitalism, there's the Cayman Islands.[18]

[18] One might legitimately question how much that right of exit is worth in a world in which rights of entry are severely limited. But as suggested below, libertarian principles don't lend themselves well to a functional interpretation of

Nozick of Part II, however, explicitly rejects the Tieboutian justification for permitting a hundred flowers to bloom at the national level: "The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights." (p.149). Nozick would allow a very narrow exception, when every citizen explicitly consents to a given deviation from the minimal state. (p.293) But this exception-- if it is even an exception-- is a null set, since one could never get unanimous consent to any term of governance.

Is it possible to reconcile Nozick's vision of Utopia at the community level in Part III with his vision of the just (minimal) state in Part II? To a libertarian sensibility, the problems with the "let-a-hundred-flowers-bloom" solution in Part III are clear, and well rehearsed in the literature on Tieboutian sorting. Even in (ideal) theory, there will never be enough communities on offer for any person to realize all of her preferences about political arrangements; in order to assemble a critical mass of co-citizens, everyone will have to make compromises. In the real world, the choice of political community is further constrained by a host of non-political considerations (job opportunities, financial constraints, proximity to friends and family) that for many people are determinative, thereby forcing further compromises with respect to political arrangements. And once located in a given community (by choice or by birth), the costs of exit for many people become prohibitively high.

Thus, inevitably, people will happily opt into a particular community (say, Swedenville) because the total package of social, economic and political benefits on offer is better than in any other community (or at least not so much worse that it is worth the

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rights. More importantly, if closed borders are the problem, that suggests a very different solution from the one proposed by the Nozick of Part II: not that we pressure any given country to reconfigure its political arrangements along libertarian (or any other) lines but that we pressure all countries of the world to open their borders.

costs of exit), but want to opt out of particular Swedenville laws that are unjust from a libertarian perspective (say, its steeply progressive income tax or its socialized medical care). As noted above, the Nozick of Part II concludes that the state is morally required to give its citizens the right to opt out at the national level. But faced with the same hypothetical demand at the local level, the Nozick of Part III concludes otherwise. It is enough, he argues, that you are given a diverse range of choices-- which choices, incidentally, need not include a libertarian option (p. 320). Once you have chosen Swedenville, you are bound by all of its laws, whatever they are. You may leave any time if you wish, but you have no right to stay put and opt out of particular laws you disagree with.[19] Nor does it matter whether you disagree with the law as a matter of mere preference or because it violates (libertarian) rights: "A nation or protective agency may not compel redistribution between one community and another, yet a community such as a kibbutz may redistribute within itself (or give to another community or outside individuals)." (p. 321)

What explains this radical disjunction in the legitimate reach of collective action on the local and on the national level? Nozick considers and rejects what is surely the most obvious and plausible explanation: For most people, it is simply more feasible to move from Massachusetts to New Hampshire to obtain the tax-and-expenditure package they prefer than to move from the US to the Cayman Islands.[20] Given the greater

[19] "Founders and members of a small community may, quite properly, refuse to allow anyone to opt out of equal sharing, even though it would be possible to arrange this." (p. 321)

[20] Nozick considers and rejects another possible defense -- that nations can more easily accommodate internal exit than communities-- as empirically unproved. (p. 322) To a true libertarian, however, the ease of accommodating rights should be irrelevant to our obligation to accommodate them.

feasibility of exit from local communities, we need not be as solicitous of their preferences about the public sphere if they stay put.

Having so much turn on the practical feasibility of exit is not without its dangers for libertarians. It opens them up to demands more generally to evaluate freedom on substantive rather than formal grounds, demands they rightly perceive will be their undoing.[21] In addition, even within the narrow confines of political exit options, it plunges them into a normative and empirical morass it is not easy to climb out of.[22] On the other hand, concern with meaningfulness of choice at least sounds in values (liberty, self-determination) that are congenial to libertarianism.

Nozick, however, refuses to distinguish the local and national cases on this basis:

> Even if almost everyone wished to live in a communist community, so that there weren't any viable noncommunist communities, no particular community need also … allow a resident individually to opt out of their sharing arrangement. The recalcitrant individual has no alternative but to conform. Still, the others do not force him to conform, and his rights are not violated. He has no right that the others cooperate in making is nonconformity feasible. (p. 322)

Instead, he suggests the cases should be distinguished on the following ground. Many people will be offended by the knowledge that their fellow community members have refused to comply with some of the (duly adopted) laws of the community. Such offense constitutes a harm, which is itself a rights violation, *but only if one has one's face rubbed in it daily*. That will be the case with respect to dissenters with whom one must interact

[21] For Nozick's insistence on a bright-line rule turning on the legality of the constraining factors, see id. at 262: "If facts of nature [limit one's alternatives], the actions are voluntary. Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did." (262)

[22] For more on this, see Fried (2003).

face-to-face on a daily basis, but not dissenters in far-flung regions of the country. (p. 322)

The distinction Nozick urges here is an empirical one, and it may well be wrong. In the world of mass media. we often have much more intimate knowledge of events in far-flung places than we could glean from casual contact with our neighbors. But even granting the truth of Nozick's empirical assertion, it is stunning that any libertarian would think that thwarting others' nosy preferences about how you live your life might constitute a cognizable harm that trumps your right to live as you wish.[23] And should it turn out that Nozick's empirical hunch is wrong, and the offense we take at how others live knows no geographical bounds within a given country, does that mean that our conception of Lockean rights in the minimal state must be reconfigured to accommodate this newly cognizable harm?

D. The Minimal State Reconsidered

Up until now, I have implicitly treated the libertarian credentials of Nozick of Part II as impeccable. But in fact, many of the same problems that dog Nozick of Parts I and III are present in Part II as well. The only reason they aren't more prominent in Part II is that, with a very few exceptions, Nozick never spells out the "particular rights over particular things" implied by libertarian principles, relying instead on (in his words) "placeholders for [those] conventional details." (p. 150) The exceptions tend to be the easy cases: acts of physical aggression in which our universally shared intuitions (and most policy arguments) clearly favor the victim. Because they are easy cases

[23] Just to remind Nozick what a libertarian would say about this argument: "Others have no right to a say in those decisions which importantly affect them that someone else … has a right to make." ASU, Part II, at 270.

whatever normative premises one starts with, they do not put libertarian (or any other) principles to a serious test.

Since ASU was published, numerous commentators have observed that, depending on how the details are filled in, Nozick's three principles (Justice in Acquisition (JIA), Justice in Transfer (JIT) and Rectification) could house virtually any distributive scheme of "particular rights over particular things," from requiring us to give the United States back to the Native Americans, to Rawlsianism, to something approximating Nozickean libertarianism. I want to make a different point here: that whatever scheme ultimately emerges, it cannot be derived straightforwardly from libertarian principles. What Nozick dismisses as merely "conventional details" emerge from thousands of micro decisions about how to balance conflicting but prima facie legitimate interests, and libertarian principles-- which do not admit of the need to compromise-- cannot tell us how to make them.

Nozick acknowledges as much with respect to the Principle of Rectification, which requires us to "balanc[e] the conflicting considerations" that argue in favor of the wrongly deprived (or their successors in interest) on the one hand, and the settled expectations of third party beneficiaries of that unjust acquisition on the other. (p. 173) And, one could argue, he implicitly acknowledges it in the countless questions he raises but never answers throughout Part II.

But equally difficult choices have to be made at almost every juncture in fleshing out Nozick's three principles, once one gets beyond the easy cases. Consider for example income taxation, the one genuinely hard case that Nozick tackles in Part II. Famously equating income taxation with forced labor, Nozick concludes it is clearly

impermissible under the libertarian principle of self-ownership. (p. 172) Nozick's target in making this argument is taxation used to finance the redistribution of wealth. But his argument applies with equal force to taxes used to finance the operations of the minimal state. Nozick of Part I avoided confronting the permissibility of such taxation by assuming away the public goods nature of the "protective services" the minimal state would provide. If (as he assumed) individual residents could be excluded from the benefits of protective services if they chose not to pay for them, then such services could be financed through voluntary (market) transactions. (pp. 110-15) And Nozick of Part II ignored how we are to finance the minimal state entirely.

But given the public goods nature of many of the functions performed by the minimal state, its operations cannot be financed by a voluntary market model. At some point coercive taxation will be required. If coercive taxation violates libertarian rights when the proceeds are used for redistributive purposes, why does it not equally violate them when used to finance the minimal state? There are a number of possible answers (including H.L.A. Hart's "benefit" principle, which as noted above Nozick rejects), but they all require adopting a much more qualified notion of consent than JIT gestures towards. Those qualifications, whatever they are, are *not* going to come from JIT or any other libertarian principles themselves.

Finally, the one "particular right over a particular thing" that Nozick deals with in detail in Part II—our right to appropriate things out of the commons-- he resolves the same way he derives the minimal state in Part I: by doing away with consent, and requiring only that we compensate those who were deprived of "enough and as good" without their consent. As in Part I, the compensation required under this "weak"

reading of the Lockean proviso is set at a level sufficient to return the expropriated to the same place on the indifference curve they would have occupied in the absence of private property. (p. 178) As Nozick plausibly concludes, this is functionally equivalent to giving an unfettered right of appropriation that can be overridden in the case of "catastrophe," since "the baseline for comparison is so low as compared to the productiveness of a society with private appropriation that the question of the Lockean proviso being violated arises only in the case of catastrophe (or a desert-island situation)." (p. 181) At a minimum, all of the surplus value generated by converting the commons to private property goes to the expropriators themselves. And as in Part I, Locke's motivation for doing away with consent is the immense utilitarian benefits to be derived from allowing private appropriation out of the commons. (p. 177) Again, the point is not to criticize that resolution; it is to insist that it cannot be derived from libertarian premises.

E. Conclusion

What are we to make of Nozick's inconstancy to libertarian principles? I'm not sure, but here are some possibilities.

(a) Nozick is a fair weather libertarian. When the going gets tough—meaning when it doesn't give him the answer he wants—he deserts.

(b) Nozick isn't a libertarian. The only distinctly libertarian thing he really cares about is blocking income redistribution. All the rest of the trappings are there to justify that result in terms that seem to have broader philosophical interest.

(c) Nozick is a libertarian; the concessions he's made in Parts I and III are either minor or unnecessary.

This may be true of some of the concessions Nozick has made, but not most. The problems that Nozick the libertarian founders on are ones that any liberal rights theory has difficulty handling: What background options must someone have to make her consent to any one of them voluntary? What should we do about collective action problems that cannot be solved by unanimous consent? And can we really derive "particular rights over particular things" from broad and vague libertarian principles like self-ownership, the rights to the fruits of one's labor, the rights to transfer what one owns, etc.? In Nozick's optimistic view, once we exclude the clear cases where I have an unfettered right to do X and the equally clear cases where I have no right to do X, almost no details remain to be filled in. (p. 270). But in reality almost everything remains to be filled in. The details fill volumes and volumes of civil-law statutes and court decisions in contracts, torts, real property, intellectual property, trusts and estates, civil procedure, corporations, debtor/creditor law, environmental law-- the list goes on and on. By and large, the details resolve problems that would arise under a minimal or maximal state, and that the broad principles of libertarianism cannot resolve. That's why they are not clear cases. And what is true of law is true of morality as well, which faces the same array of complicated problems to resolve.

Many (indeed, most) deontologists have done a more careful job than Nozick of filling in the details of their proposed scheme of rights. But in the end, none has satisfactorily shown that broad principles such as "we own ourselves and the products of our labor" can generate answers to the everyday problems we actually face, without an

illicit assist from ad hoc intuitism, naked self-interest, or (I believe) most often welfarism manqué, snuck in through terms like fault, due care, negligence, and definitions of what constitutes a boundary crossing. Which brings us to last possibility:

(d) Libertarianism, and indeed all rights theory, is in some significant trouble, once it gets beyond a relatively limited set of clear-cut cases that everyone agrees on. My own view is that this—if anything-- is the overarching lesson to be learned from ASU at thirty-five years' distance.

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