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Feser on Nozick

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ERIC MACK

Edward Feser's *On Nozick* (Toronto: Wadsworth, 2004) is an excellent and pleasing brief introduction to the political thought of Robert Nozick as that thought is embodied in Nozick's now classic *Anarchy, State, and Utopia* (1974). The book has three main virtues. First, it provides an accurate and sometimes insightful introductory account of the philosophical contentions of *Anarchy, State, and Utopia*. Second, it places these contentions in the broader context of philosophical defenses of libertarian conclusions and in the context of complementary empirical support for these conclusions. Third, unlike almost all discussions of Nozick's views, it is animated by a strong, but not uncritical, sympathy for Nozick's enterprise, and that sympathy generates some of Feser's most insightful points about Nozick as well as some nice responses to well-known criticisms of the doctrine of *Anarchy, State, and Utopia*. Because of these virtues, I strongly recommend this short work not merely as an introduction to Nozick's political philosophy, but also and more generally as an introduction to rights-oriented libertarian theory.

Nozick's *Anarchy, State, and Utopia*

Before describing in more detail some of the valuable contents of *On Nozick* and then going on (of course) to register various criticisms, I want to recall the general structure and purposes of *Anarchy, State, and Utopia*. Nozick's book begins with a strong pronouncement about the existence of individual moral rights and about the apparent implications of these rights. "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

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its officials may do” (p. ix). Nozick’s overall contention is that these rights are indeed strong enough to rule out any more-than-minimal state—that is, any state that goes beyond the protection of life, liberty, and property, but these rights do allow and in some sense even legitimate the minimal state. The first and longest part of *Anarchy, State, and Utopia*—titled “State-of-Nature Theory, or How to Back into a State Without Really Trying”—is devoted to this latter claim. Nozick’s goal here is refute the individualist anarchist’s contention that rights that are strong enough to rule out the more-than-minimal state are also strong enough to rule out the minimal state. In the course of defending the minimal state against the individualist anarchist’s critique, Nozick explores questions about the character and purpose of state-of-nature theory, the place of rights and the “moral side-constraints” that are correlative to rights within morality, the stringency of rights, the moral status of actions that risk violations of rights and of actions that suppress such risky activities, the place (if any) of procedural rights within state-of-nature theory, and the conditions necessary for an institution to count as a state.

Having established to his satisfaction that the minimal state is legitimate, Nozick proceeds in part 2—titled “Beyond the Minimal State?”—to argue that no state more extensive than the minimal state is justified. Here Nozick’s main target is the view that a correct theory of distributive justice requires a state that redistributes wealth and income among individuals; the main example of this target is the view of distributive justice advanced in John Rawls’s book *A Theory of Justice* (1971), according to which distributive justice requires that the income of those in the lowest income group be raised as much as possible. Nozick rejects all conceptions of distributive justice that call for a more-than-minimal state. In place of all such conceptions, he defends his historical entitlement conception of justice in holdings, according to which a holding is just if and only if it arises from voluntary and nonaggressive acts of initial acquisition or transfer or from just compensation for unjust transfers. Having established to his satisfaction that no more-than-minimal state is justified, Nozick goes on in part 3, titled “Utopia,” to contend that the minimal state is inspiring not because *it* is utopia, but rather because it is the framework in which all individuals are free to pursue their own visions of utopia.

Feser’s Account

I turn now to some of the nice points in Feser’s account of Nozick’s doctrine and its intellectual context. In his chapter 1, Feser does a good job of describing how, throughout the middle decades of the twentieth century and under the influence of logical positivism and linguistic analysis, philosophy retreated from normative theorizing and how Rawls’s *Theory of Justice* played a central role in reversing that retreat. Feser correctly notes that *Anarchy, State, and Utopia* strongly reinforced philosophy’s return to normative theorizing. Unfortunately, it is pushing things a great deal for Feser to say that, along with Rawls’s tome, Nozick’s work is “one of the two most influential books in [political philosophy] of the 20th century” (p. 3).

In chapter 2, Feser does a good job of providing the reader with a basic picture of the spectrum of libertarian views. He emphasizes that libertarianism per se is simply a doctrine about the centrality of individual liberty (or rights) in the assessment of individual and group action. It is not per se a comprehensive moral doctrine, nor does it announce the general moral priority of individual liberty (or rights) over all other values or principles. He does a nice job of distinguishing between the more empirical and pragmatic arguments for libertarian conclusions and the more philosophical and principled arguments for those same conclusions. Within his account of the pragmatic arguments, Feser provides a good economical exposition of the workings of the invisible hand and the nonworkings of the visible fist—although he might have distinguished between the information that the central planner will lack because it appears only in the form of market prices and the information that the central planner will lack because it does not appear even in the form of market prices.

In chapter 3, Feser deals with Nozick's assertion of individual rights and with the intellectual context of such an assertion. He discusses three bases for accepting Nozick-like claims about fundamental rights against being killed, enslaved, maimed, or imprisoned. First, belief in such rights is central to our ordinary moral understanding. No morally serious person doubts that unprovoked killing, enslaving, maiming, and imprisoning are criminal activities. The only problem is that even morally serious people believe that these sorts of activities somehow become morally acceptable when they are carried out by state officials. Here the simple libertarian contention is that state officials are no more clothed in moral privileges than are ordinary people. Second, belief in these rights follows from the appealing Kantian principle, "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only" (p. 31). Third, belief in these rights follows from the appealing thesis of self-ownership, according to which each person has original moral rights over his own mind, body, capacities, efforts, and so on. Feser correctly points out that Nozick appeals sometimes primarily to the Kantian principle and sometimes primarily to the self-ownership thesis, but also that it is not clear what the relationship between these two crucial moral claims is supposed to be.

Feser notes that many commentators on Nozick, including Nozick's most important critic, G. A. Cohen (1995), take the self-ownership thesis to be his central contention. As Feser indicates, after numerous attempts to show that Nozick's conclusions do not follow from the thesis of self-ownership, Cohen concludes that indeed they do follow. Hence, Cohen has decided that anyone who, like himself, wishes to escape Nozick's libertarian conclusions has to reject the self-ownership thesis. He offers no direct refutation of this thesis, however. Rather, and more modestly, he argues that we do not *need* this thesis in order to explain our ordinary moral beliefs that, for example, enslaving people or redistributing their healthy eyeballs is wrong because we can appeal instead to some principle of noninterference or autonomy. Feser provides a very nice critical analysis of Cohen's argument. He should have gone on to make the final point that each alternative principle that Cohen himself suggests

also leads to the libertarian conclusions that Cohen wants to avoid. (For a much more extensive analysis of the contest between Nozick qua libertarian and Cohen qua Marxist and egalitarian socialist, which also concludes that libertarianism wins, see Mack 2002.)

Feser's chapter 4 is devoted to Nozick's response to the individual anarchist's claim that fundamental rights robust enough to rule out the more-than-minimal state also rule out the minimal state. In particular, the individualist anarchist claims that these rights encompass a right to compete with the aspiring minimal state in the protective services market. Hence, the aspiring minimal state may not suppress its competitors; and, if it does not suppress its competitors, it will not achieve statehood. According to the individualist anarchist, statehood can be achieved by the minimal state only if it violates the rights of its competitors. Feser does a good job of indicating Nozick's basic response to this argument. Nozick focuses on the right of the aspiring minimal state to suppress unreliable competitors—that is, competitors whose defensive, restitutive, or retributive activities pose an unacceptable risk of violating the rights of the aspiring minimal state's clients. According to Nozick, the aspiring minimal state has a right to suppress these risky activities and also the right to engage in the necessary monitoring and regulation of other protective agencies. In the exercise of these rights, the state is born.

Chapter 5 of *On Nozick* deals with Nozick's rejection of all theories of distributive justice that would call for the institution of a redistributive and, hence, a more-than-minimal state. As always, Nozick proceeds by way of negation. He describes the alternatives to the position he favors, displays flaws in these alternatives, notes that his favored position is free of these flaws, and concludes that therefore his position is to be adopted. In the case at hand, Nozick describes two sets of views about distributive justice that he wants to reject. The first set consists of end-state theories. Picture a matrix in which each row represents a possible distribution of income among individuals in a society. Each end-state theory offers a formula for identifying the "best" row and, hence, the just distribution for that society. For example, the egalitarian says that the row with the least deviation among the payoffs for individuals is best. The utilitarian says that the row with the greatest sum of payoffs is the best. The Rawlsian says that the row in which the smallest payoff is greater than the smallest payoff in any other row is best. All end-state theories hold that the only (!) information needed in order to identify which possible distribution of incomes is the just one for a given society is the information that appears in the matrix of possible distributions. The second set of views Nozick wishes to reject comprises pattern theories. A pattern theorist holds that the just distribution of income among individuals is the distribution that assigns income in proportion to the incidence of some characteristic *C* among individuals—for example, blueness of blood, virtue, or need. Pattern theorists disagree about what the crucial *C* is, but they all agree—in opposition to end-state theorists—that before one can say which distribution of income is just in any society, one must know which distributions are possible *and* what the incidence of *C* is.

Feser does do a good job of describing some of Nozick's key arguments against both end-state and pattern theories. The most famous of these arguments begins by asking each advocate of an end-state or pattern theory to specify the distribution D_1 that his own theory—call it T —identifies as just and to presume that this purportedly just distribution has been established. Nozick then points out that if individuals are free to transform or exchange what they receive as their shares under D_1 , then through innocuous acts of transformation and exchange they will quickly generate a new distribution of holdings D_2 that will be unjust according to T . So any advocate of any end-state or pattern theory T will have to do one of two difficult things: (1) accept distribution D_2 —which, after all, has arisen by innocuous means from a situation that the theorist has declared to be just—and reject the pronouncement of his own theory that D_2 is unjust, or (2) stick with the judgment that D_2 is unjust and thereby commit to the view that justice requires continuous interference with the results of continuous interferences that are aimed at producing just results.

As Feser explains, in place of all end-state or pattern theories Nozick advances his historical entitlement conception of justice in holdings. This is a purely procedural conception. An individual becomes entitled to this or that particular holding if and only if he has come to possess it through acts of just initial acquisition or just transfer or just rectification of some violation of his entitlements. An individual acquires an entitlement to a particular holding only by actually going through the relevant entitlement-generating processes. A just societal distribution is *whatever* distribution emerges from individuals' engagement in entitlement-generating activities. Hence, there is no reason to expect that the just distribution will accord with *any* end-state formula—for example, equality in holdings—or with any pattern formula—for example, holdings in proportion to virtue. And there is every reason to expect that any policy of bringing holdings into line with any end-state formula or any pattern formula will infringe on people's just entitlements.

Feser points out that Nozick does not offer a direct vindication of property rights in, for example, Lockean fashion. Rather, he relies on arguments that favor the historical entitlement conception of justice over all end-state and pattern conceptions and on arguments that taxation for redistributive purposes infringes on self-ownership itself rather than on property rights that exist because of self-ownership. (Nozick's end run around any direct argument for property rights is discussed extensively in Mack 2002.)

Feser's sixth and final chapter describes the argument of part 3 of *Anarchy, State, and Utopia* that the background framework of the minimal state, in Nozick's words, "provides the only common ground on the basis of which individuals and communities with radically different values can live together in peace" (p. 92). Feser nicely points out the asymmetry between the minimal-state framework that allows willing individuals to form socialist or egalitarian (or fascist) subsocieties and subeconomies, on the one hand, and the socialist or egalitarian (or fascist) state framework that forbids willing individuals from forming alternative subsocieties and subeconomies, on the other.

Some Flaws

I now turn briefly to some flaws in *On Nozick*. Clearly, Feser was allowed only approximately a hundred pages and was also charged to stay on the introductory level. Nevertheless, he ideally should have found a way to guide the reader to, if not through, some of the interesting complexities of Nozick's argument. For example, we have seen that the principle that individuals may be prohibited from engaging in risky actions if they are compensated for disadvantages caused by that prohibition plays a crucial role in Nozick's argument against the individualist anarchist. In *Anarchy, State, and Utopia*, this "principle of compensation" emerges from an important discussion of whether rights are to be understood as protected by liability rules or (more strongly) by property rules. Yet Nozick's openness to the idea that rights may be merely claims that are protected by liability rules—so that it will be permissible for one to infringe on a right whenever one is prepared to compensate the right holder—seems to conflict with his forceful initial claim that "individuals have rights, and there are things no person or group may do to them (without violating their rights)." *On Nozick* offers no indication of the underlying reason from which the principle of compensation emerges or of the possibility—which is highly significant, given the individual anarchist's claim that strong rights rule out even the minimal state—that in arguing for the minimal state Nozick implicitly switches to a weaker conception of rights.

Another example of an issue that Feser should have identified involves how Nozick's case against the individualist anarchist seems to consist entirely of an elaborate hypothetical story. *If* there were a world of competing protective agencies, and *if* the most powerful of those agencies were really devoted to protecting the rights of its clients, and *if* this agency perceived the activities of its competitors as risky, *then* this powerful agency legitimately would suppress these unreliable competitors while compensating those who thereby would be disadvantaged. Hence, the minimal state *would* arise by way of permissible actions. In general, however, Nozick rejects the idea that hypothetical stories have justificatory force. Suppose you take my car while depositing ten dollars in my bank account. When I challenge your action, you correctly point out that I *would have* agreed to transfer my car to you for ten dollars *had* you simply proposed this exchange. Nozick's view is that the truth of this hypothetical is morally irrelevant. What is needed to justify your taking the car (along with making that ten-dollar deposit) is my *actual* agreement to this exchange. So why does Nozick think that his elaborate hypothetical story about how the minimal state *would* arise is relevant to establishing the legitimacy of any *actual* minimal state?

Probably Nozick *should* have said that—contrary to the suggestion of his own presentation—the legitimacy of any state depends on what it does (and avoids doing), not on how it arose or would have arisen. Ellen Paul (1981) made this point years ago. In contrast, Feser attempts to pump up Nozick's hypothetical story by saying—without support in Nozick's text—that the state of nature "inevitably" (p. 57) or "inextricably" (p. 59) would lead to the minimal state; but *this* attempt does not

resolve the problem. Even if it is true that were you to have offered me ten dollars for my car, I would *inevitably* and *inextricably* have entered into an exchange of my car for the ten dollars, your actual performance of that exchange without my actual agreement remains illegitimate.

The reader will notice that the issues involved in the previous two paragraphs are connected. If my having a right to holding H is merely a matter of your being liable to compensate me with D dollars if you take H from me, then my actual agreement to the exchange of H for D dollars is not morally necessary. If hypothetical agreement vindicates exchange that is not actually agreed to, then all you have to do to vindicate your taking of H from me is to accept liability for compensating me to the tune of D dollars. Both Nozick's toying with the idea that rights may be protected merely by liability rules and his toying with the idea that hypothetical stories have legitimizing force threaten the stringency of the rights he begins by endorsing.

A final example of an issue that Feser completely passes over concerns Nozick's endorsement of a "Lockean proviso" that requires that persons' just acquisitions not make anyone worse off. Drawing especially on the work of David Schmidtz (1994), Feser argues that systems of capitalist acquisitions do not (ever?) make anyone worse off in the relevant sense. This conclusion may be true, but it leaves unexamined the question of why Nozick advances a Lockean proviso in the first place. What is the theoretical motivation for his adding this complexity to the historical entitlement conception of just holdings? Does Nozick's endorsement of a Lockean proviso compromise the theoretical structure of his position? Both sympathetic and hostile commentators have thought that it does.

I certainly am not saying that Feser should be expected to have dealt *comprehensively* with these (and other) complications within Nozick's argument. It would have been good, however, if he had found a way to point toward some of these complications and to specific scholarly literature that would help his reader think further about them. Perhaps a short appendix on "further issues" would have been possible. Perhaps this discussion will serve as that appendix.

My penultimate criticism is directed against what Feser may take to be his slickest philosophical move in *On Nozick*. Both at the end of the chapter on individual rights (pp. 53–54) and at the end of the chapter on justice holdings (pp. 86–88), Feser seeks to enhance the Nozickean libertarian position by arguing that the burden of proof really weighs on those who would allow intrusions on the individual or would allow interferences with the individual's holdings. The general problem with Feser's attempts to shift the burden of proof is that he ascribes to the antilibertarian person stronger claims than the antilibertarian actually needs to make. Were the antilibertarian to make these stronger claims, he would need to bear the burden Feser seeks to shift on to him; but he does not, so he need not.

Let me explain. Feser says that anyone who denies that person A possesses a fundamental right over himself must assert that some other individual or some group of individuals (perhaps including A) possesses a fundamental right over A. Because this

statement is a bold philosophical claim and one that is less *prima facie* plausible than the claim that A possesses a right over himself, the burden of proof is on the antilibertarian opponent of self-ownership. The crafty antilibertarian, however, need not assert that some other individual or group has rights over A; he need only *deny* that A possesses a right that morally prohibits the killing and enslaving and maiming of A even for glorious causes. At that point, the burden falls on the friend of self-ownership to provide positive reasons for affirming A's possession of a fundamental right over himself.

Similarly, Feser says that anyone who denies that A possesses a right to some current holding H must assert that some other individual or group possesses a right to that H. Because this statement is a bold claim and one that is less *prima facie* plausible than the claim that A has a right to the peacefully acquired H, the burden of proof again is on the antilibertarian. In this case, however, the crafty antilibertarian need not assert that some other individual or group has a right to H; he need only *deny* that A possesses a right that morally prohibits the taking of H. At this point, the burden falls on the friend of A's right to provide positive reasons for affirming that right. Feser's speculation that these burdens may be shrugged off, which he may have picked up from Anthony de Jasay's 1997 essay "Before Resorting to Politics," is mistaken.

My final criticism is primarily organizational. I have said that one of the several important virtues of *On Nozick* is the placement of Nozick's contentions in a broader context of the philosophical and empirical arguments for libertarian conclusions. Unfortunately, Feser has not found a good device for indicating when he is no longer explicating Nozick's claims in *Anarchy, State, and Utopia* and has passed over to the presentation of complementary claims that Nozick himself does not advance. For example, in his discussion of Nozick on rights, Feser remarks that "the notion that all genuine rights are property rights is a very important one in libertarian theory" (p. 36). A reader who does not know the Nozick text might easily—and mistakenly—be led to believe that Nozick himself explicitly endorses this notion.

Moreover, Feser does not mark for the introductory reader the points at which he passes from the presentation of standard libertarian contentions to the presentation of his own more individual perspective. For example, he makes a nifty rhetorical move against the egalitarian who points to the fairly tolerable overall quality of Western societies as evidence that his demand for equality does not really threaten liberty. Feser notes that this very egalitarian is always complaining that current Western societies have not yet been sufficiently ground under the egalitarian heel, so the egalitarian can hardly hold up these current societies as examples of societies that have achieved equality but not at the expense of liberty. Yet the reader does not know whether this sally is Nozick's, a standard libertarian retort, or Feser's own contribution.

The introductory reader may also miss the fact that Feser's eagerness to find a sense of compatibility between conservatism and libertarianism is also special to Feser himself—motivated by his own moral and cultural conservatism—and not standard to libertarian theorizing. Feser is correct to say that *if* conservatism is defined as Hayekian suspicion of hyper-rationalism and appreciation of the fruitfulness of

unplanned processes, *then* conservatism and libertarianism are at least compatible. But this particular compatibility hardly establishes that conservatism has “a unique relationship with libertarianism” (28), for we can assign some special sense to other “isms” so that they too are at least compatible with libertarianism. We could say, for example, that *if* modern liberalism is the view that material progress is possible and beneficial, *then* modern liberalism and libertarianism are at least compatible. We recognize, however, how strained both of these claims of compatibility are, for we all know that actual modern liberalism has little to do with the belief that material progress is possible and beneficial—as little as actual current conservatism has to do with a suspicion of hyperrationalism and an appreciation of the fruitfulness of unplanned processes.

In sum, although Feser’s book is not a perfect introduction to the doctrine of *Anarchy, State, and Utopia* or to libertarian theorizing in general, its imperfections pale before its virtues, given its primary purpose.

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