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The Squirrel and the State

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NICOLÁS MALOBERTI

Robert Nozick maintains that “[t]he fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all” (1974, 4). Perhaps we disagree with Nozick and believe that other questions in political philosophy are more fundamental—for example, whether individuals have the “strong and far-reaching” rights that Nozick himself believes they have. He might reply that the question of the existence or justification of individual rights does not belong to political philosophy, but rather to moral philosophy. In any case, however, this latter issue is a trivial, terminological matter, not something that requires disputation, and we may easily distinguish it from the important, substantive question of whether a state should exist.

In attempts to answer that important question, however, the terminological issues are not usually easily distinguished from what ultimately matters. Nozick himself seems to fail in this regard. This failure is important because it conceals the considerable gap between the substantive moral stance at which he arrives and what one might think that stance is on the basis of his endorsement of the “state.” Nozick maintains that one of his main conclusions in *Anarchy, State, and Utopia* is “that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified” (1974, ix). But even if one accepts that all of his arguments are sound, what he vindicates is something quite short of what the anarchist opposes. Nozick may be right in claiming that, according to certain set of standards, “the protective association dominant in a territory, as described, *is* a state” (118, emphasis in the original). Yet the worry is that we might base our position with regard to the state’s legitimacy on something about which

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there should be no occasion for dispute, as the campers do in William James's story about the squirrel going around the tree.

I

James begins chapter 2 of *Pragmatism* as follows:

Some years ago, being with a camping party in the mountains, I returned from a solitary ramble to find every one engaged in a ferocious metaphysical dispute. The corpus of the dispute was a squirrel—a live squirrel supposed to be clinging to one side of a tree-trunk; while over against the tree's opposite side a human being was imagined to stand. This human witness tries to get sight of the squirrel by moving rapidly round the tree, but no matter how fast he goes, the squirrel moves as fast in the opposite direction, and always keeps the tree between himself and the man, so that never a glimpse of him is caught. The resultant metaphysical problem now is this: *Does the man go round the squirrel or not?* He goes round the tree, sure enough, and the squirrel is on the tree; but does he go round the squirrel? In the unlimited leisure of the wilderness, discussion had been worn threadbare. Every one had taken sides, and was obstinate; and the numbers on both sides were even. (1907, 43–44, emphasis in the original)

At this point, James tells the reader, his companions appealed to him to decide between the two opinions and thereby give one side of the dispute a majority.

“Which party is right,” I said, “depends on what you practically mean by ‘going round’ the squirrel. If you mean passing from the north of him to the east, then to the south, then to the west, and then to the north of him again, obviously the man does go round him, for he occupies these successive positions. But if on the contrary you mean being first in front of him, then on the right of him, then behind him, then on his left, and finally in front again, it is quite as obvious that the man fails to go round him, for by the compensating movements the squirrel makes, he keeps his belly turned towards the man all the time, and his back turned away. Make the distinction, and there is no occasion for any farther dispute.” (1907, 44)

This story has great philosophical importance, yet its main lesson is usually forgotten. The main lesson is that some philosophical problems are illusionary because they involve merely terminological issues. What exactly did we not know about the squirrel, the human, and the tree before James gave his answer? About the situation, we had all the information that we could possibly have. If we did not know something, it was how the term *going round* was supposed to be used. But these sorts of terminological issues are of

little consequence because they have a bearing neither on how things actually are nor on how things should be, and only in those realms can substantive, significant disagreements arise. If we disagree neither about how things are nor about how things should be, but we still disagree, in all likelihood we are disagreeing about something of no significance—that is, only about the names to be given to such things.

Without a doubt, many so-called metaphysical problems turn out to be merely terminological issues.¹ But the lessons to be taken from the squirrel story extend further. Like the campers in the story, political philosophers may also misdirect their efforts and fail to consider what truly matters.

John Rawls claims that “political power is always coercive power backed up by the government’s use of sanctions” (1996, 136). Christopher Morris argues, however, that because “states without coercion or force are conceivable . . . state and coercion and force cannot be conceptually connected” (2004, 200). Morris asks us to imagine a state that does not need to use force or coercion because its subjects are always motivated to comply with its laws. Is not this possibility, “admittedly fantastic and utopian,” perfectly coherent? Morris then concludes that it does not seem to be a conceptual truth that states are coercive (200). Similarly, Gregory Kavka claims that for an organization to be regarded as a state, it “must possess enough power to enforce its rulings with sufficient regularity to discourage self-help among citizens” (1986, 158, see also 245). But “if there were enough cooperation” (Kavka 1986, 170), a purely voluntary arrangement among individuals might count as a state.

Max Weber famously defined the state as a “compulsory association with a territorial basis.” In such a territory, “the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it” (1947, 156). But John Hasnas argues that we should not think that exclusive control over coercive power is “logically necessary for an organization to be a state” based on the historical fact that “all existent states claim such exclusive control.” He asserts that if the essential features of the state—that is, those that are necessary for it to realize its purposes—can be achieved without monopolizing the legislative, judicial, and enforcement functions, “there can be a state that does not exercise such a monopoly” (2003, 125).

We might have thought that the state’s morally problematic feature is that it coerces its subjects to act or to refrain from acting in particular ways. More precisely, we might have thought that in regard to the state, what stands in need of justification is its monopolization of the provision of justice and protection. We might have also believed that the imposition of taxes on the citizens was a central issue in any justification of the state. However, if it is not true that the state must do those things to be regarded as a

1. The question of identity in the famous example of Theseus’s ship is a clear example in this regard. If all the ship’s old planks have been replaced by new and stronger timber, is this vessel still the same ship? Again, the answer cannot be important because it will add nothing to what we knew already. We knew that there was a ship and that all of its planks were later replaced by new ones. As Derek Parfit puts it, although some questions may have no answers, “there may be nothing that we do not know” (1984, 213). According to Parfit, questions of *personal* identity are also verbal and not substantive. This view, however, is not an uncontroversial one.

state, were we mistaken in thinking in that way? Clearly not. Defined in a particular manner, the state would certainly lose its morally problematic features. In dealing with the state's morality, however, we are not interested in whether the state can perform other actions that do not disqualify it as a proper reference for the term *state*. We are interested, rather, in whether particular actions that we have previously identified as morally problematic may be rightly performed.

Tibor Machan argues that the controversy between the anarchist and the statist concerns whether a government must violate basic individual rights or may exist and function without violating those rights (2008, 66). But this formulation is misleading because the question seems to admit of a terminological answer.² The controversy about the legitimacy or justification of the state is better viewed as concerning whether a particular set of actions is morally permissible or not—that is, whether people should or should not perform them. Thus formulated, the controversy pertains to different possibilities, and it will then be more difficult to fail to agree or disagree on what matters rather than on how the terms *government* or *state* should be used. Indeed, we can see how the discussion might be advanced if we referred directly to whatever it is that we consider those terms' references, as James suggests the campers do in the story. Is it permissible for public officials to tax people? Is it permissible for public officials to threaten people with some form of harm should they decide to set up a just, alternative judicial system?

II

Nozick has famously argued that acknowledging that individuals have certain fundamental natural or prepolitical rights to their lives and property does not preclude the legitimacy of the state, as the individualist anarchist would claim. The reason is that “a state would arise from anarchy. . . even though no one intended this or tried to bring it about, by a process which need not violate anyone's rights” (1974, xi). Many doubts have been raised about some of the claims that Nozick needs to make to reach this conclusion (Barnett 1977; Childs 1977; Holmes 1977; Paul 1977; Rothbard 1977; Mack 1978; Paul 1979; Postema 1980). Doubts have also been raised about the normative relevance of that conclusion for the moral evaluation of states that did not arise in such a way. But even if all these doubts were unfounded, Nozick's argument falls short of justifying what, according to the anarchist challenge, is in

2. Indeed, Machan himself seems to provide such an answer by arguing as follows: “anarcho-libertarians share something with statist: the belief that government *requires* the initiation of physical force (and its threat). The anarchists conclude from this that no government is justifiable, whereas statist conclude that the allegedly required coercion is justifiable. There are some libertarians, however, who reject the premise that government entails the initiation of coercion” (1982, 201, emphasis in original). Elsewhere he adds, “Why are we to accept that the concept of ‘government’ necessarily implies coercion (e.g., taxation)? The fact that most governments have been coercive is no more a defense of this position than it would be to claim that the concept ‘marriage’ necessarily implies adultery because most marriages throughout human history have involved adultery” (2007, 92).

need of justification. This shortcoming is significant because it reminds us about the true nature of the problem that the state poses for any philosophical outlook grounded on a theory of natural, libertarian rights.

For interesting, substantive reasons that deserve great attention, Nozick claims that out of anarchy a “dominant protective association” will arise (1974, 17).³ That dominant protective association is “something very much resembling a minimal state” (17). Yet it is not quite a state. Nozick claims that in order to show that a state can arise from anarchy through permissible means, he must show how the dominant protective association can rightly prohibit its nonmembers from enforcing their own rights. He calls a state with such a power an “ultramiminal” state. He claims he must also show how the ultramiminal state can become a minimal state—that is, a state that provides protection and enforcement services to everybody under its territory and not only to those who voluntarily purchase those services (26).

Nozick argues that it is morally permissible to stop someone from doing something that *might* harm others. If the action prevented is something generally done, important in people’s lives, and cannot be forbidden without creating a serious disadvantage, he argues that imposing a prohibition is morally permissible, but only if compensation is paid to those who are disadvantaged by it. Thus, he claims that the dominant protective association is justified in prohibiting nonmembers from privately exacting justice against its clients if their procedures are known to be too risky and dangerous or if those procedures are *not* known not to be risky and dangerous (88).⁴ The prohibition that the dominant protective association is entitled to impose, however, makes it impossible for the nonmembers or independents to protect themselves adequately and therefore disadvantages the independents in their daily life and activities (110). Nozick therefore concludes that in these circumstances, “those persons promulgating and benefiting from the prohibition must compensate those disadvantaged by it” and that “the least expensive way to compensate the independents would be to *supply* them with protective services to cover those situations of conflict with the paying customers of the protective association” (110, emphasis in the original).

In this reasoning, Nozick asserts that the dominant protective association may become, without violating anyone’s rights, not only an ultramiminal state, but also a minimal state—that is, a state that not only prohibits people from enforcing their own rights, but also one that provides protection for everyone within its territory.

Nozick clearly recognizes the morally problematic aspect of the ultramiminal state: How can any group of persons “arrogate to itself the right to forbid private exaction of justice by other nonaggressive individuals whose rights have been violated” (51)? The morally problematic aspect of the minimal state, however, is less

3. On this particular issue, see, for example, Cowen 1994, Friedman 1994, Caplan and Stringham 2003, and Holcombe 2004.

4. Nozick also attempts to establish this conclusion by introducing the notion of “procedural rights” (1974, 96–108), but he acknowledges that the assumption that procedural rights exist makes his argument too easy (103). He claims, however, that his argument stands even without such an assumption (107).

clearly recognized. One might have thought that the morally significant difference between the ultraminimal state and the minimal state was that under the former, those who choose *not* to purchase protection and enforcement policies are not coerced into purchasing them. Yet it is worth noting that Nozick does not attempt to justify this familiar problematic aspect of the state. Under his ultraminimal state, no one has a right to coerce people to buy their own protection. No one has that right under his minimal state, either. The members of the dominant association choose to buy its protective services. The nonmembers do not choose to do so, and the dominant association has no right to extract their resources by coercive means. The nonmembers or independents who would need to pay a fee to cover the part of the protective services that would not compensate any disadvantage may also refuse to do so. And members of the dominant association are free to become nonmembers; that is, the association cannot force them to pay for its services except on terms they have accepted.

What, then, is the morally problematic aspect that Nozick sees in the transition from the ultraminimal to the minimal state that his arguments are supposed to justify? In appealing to the distinction between the ultraminimal and the minimal state, he seems to have in mind exclusively the problem of *redistributive* taxation. According to him, one of the reasons for holding the belief that the state is intrinsically immoral is that “[i]t does not constitute a violation of someone’s rights to refrain from purchasing something for him (that you have not entered specifically into an obligation to buy)” (52). But the state, according to Nozick, forces some to buy protection for others. Therefore, he believes that according to the “individualist anarchist,” not only is monopolizing the use of force itself immoral, but so is “redistribution through the compulsory tax apparatus of the state” (52) because if refraining from purchasing something for someone does not constitute a violation of his rights, then the state violates one’s rights if it threatens him with punishment when he does not contribute to the protection of another.

The problem is that Nozick’s argument does not justify “the state[’s] forcing some to buy protection from others” (52), and in this sense it is unclear in what way he has presented a substantive answer to the individualist anarchist. Nozick merely argues that only those who *choose* to be protected against unreliable procedures of justice by the dominant protection association may be requested to compensate those who are disadvantaged. But, again, no one is required to purchase protection from the dominant protection agency. If they do choose to do so, they are not required to buy protection against unreliable procedures of justice. Moreover, when their contractual obligations expire, the members of the dominant agency, including those who choose to buy protection against unreliable procedures of justice, cannot be forced to pay for anybody else’s protection. Nozick claims that “since compensation is paid only to those who would be disadvantaged by purchasing protection themselves, and only in the amount that will equal the cost of an unfancy policy when added to the sum of the monetary costs of self-help protection plus whatever amount the person comfortably could pay” (113), there

will not be a powerful incentive to leave the dominant association. He also claims that “[s]ince the reasons for wanting to be protected against private enforcement of justice are compelling, almost all who purchase protection will purchase this type of protection, despite its extra costs” (114). Both statements may be true. If we are serious in our rejection of paternalism, however, these assertions do not entail that the association may prohibit members from becoming independents if they choose to do so or that it may force them to buy such a form of protection if they decide not to buy it. Nozick does not claim otherwise.

Thus, Nozick’s argument for the moral legitimacy of the transition from the ultraminimal state to the minimal state does not seem to justify what, in his own words, the individualist anarchist condemns: forcing some to buy protection for others. Neither does his argument justify coercing individuals to buy protection for themselves. He says repeatedly that his argument justifies the minimal state, but it is unfortunate that nowhere is he explicit about what his argument does not justify: the permissibility of any form of taxation.

III

We might still believe that Nozick’s argument shows how a libertarian, natural-rights perspective is compatible if not with taxation, then at least with the most fundamental coercive arrangement characteristic of the state: the prohibition of private enforcement. Nozick explicitly recognizes that a necessary condition for the existence of the state is that it threatens to punish its subjects if they decide to enforce their own rights. As we have also seen, he argues that the dominant protective association has a right to prohibit nonmembers from privately exacting justice using unreliable procedures on its clients. But does the dominant protective association have a right to prohibit nonmembers from privately exacting justice on its clients when the nonmembers do not use such procedures? After all, the use of risky procedures, like anything else that generates significant risks to the property and life of others, might be thought to violate individuals’ rights in a quite unproblematic manner.

In discussing the application of the principle of compensation, Nozick says that “[i]t goes without saying that these dealings and prohibitions apply only to those using unreliable or unfair enforcements procedures” (1974, 112). Besides, he explains that an individual may empower his protective association to exercise for him his rights to resist the imposition of any procedure that “after all conscientious consideration he finds to be unfair or unreliable” (102). But if “he finds the system within the bounds of reliability and fairness he must submit to it” (102). It is clear that Nozick does not claim that the process of conscientious consideration is a merely subjective one because doing so would imply that “a criminal who refuses to approve anyone’s procedure of justice could legitimately punish anyone who attempted to punish him” (101). The dominant protective association, therefore, “does not claim the right to prohibit others arbitrarily; it claims only the right to prohibit anyone’s

using actually defective procedures on its clients” (108–9). Thus, it is not true that the dominant protective association can rightfully prevent independents or other agencies from competing in the market of protection—on the grounds that everyone has a right not to be subject to risky procedures.

Nozick does claim, however, that only the dominant association will be able to exercise the right to ensure that individuals do not use risky procedures on others. He says, “[T]he nature of the right is such that once a dominant power emerges, it alone will exercise that right. For the right includes the right to stop others from wrongfully exercising the right, and only the dominant power will be able to exercise this right against all others” (109). He explains that he is not assuming that might makes right. He claims only that “might does make enforced prohibitions, even if no one thinks the mighty has a *special* entitlement to have realized in the world their own view of which prohibitions are correctly enforced” (119, emphasis in original). Yet it is not clear how this type of consideration entitles us to conclude that the dominant association may then become an ultraminimal state. The dominant association, given its position of dominance, might be the only one able to exercise the right to ensure that individuals do not use risky procedures. But this condition does not mean that it has a right to exercise that right *wrongfully*. To be sure, might makes enforced prohibitions. In the context of providing a justification of the state, however, what matters is whether the enforced prohibitions are morally permissible or not—whether the dominant association may or may not act as a coercive monopolist.

Nozick also claims that the dominant protective association will tend to deem all independents’ procedures unreliable or unfair, even if they are the “same” procedures the dominant association applies, on the grounds that they are conducted by others (108). Again, perhaps so, but the question is whether the association can act on those grounds without violating the independents’ rights. The fact that “only the dominant protective association will be able, without sanction, to enforce correctness as it sees it” or that “[i]ts power makes it the arbiter of correctness; *it* determines what, for purposes of punishment, counts as a breach or correctness” (118) cannot be a relevant consideration in explaining why the dominant association would not wrongfully exercise the right to prohibit unreliable procedures of justice. The moral principle that Nozick advances to justify the transition from a dominant protective association to an ultraminimal state holds that the dominant association has a right to defend its members against unreliable or unfair procedures of justice. It does not hold that the dominant association has a right to defend its members against whatever the association *claims* to be unreliable and unfair procedures of justice. Even if we acknowledge that within a certain range what counts as a risky set of procedures may be disputed, and even if we acknowledge that it is morally permissible for the dominant protection agency to act on its own judgment within that range, Nozick’s argument seems to fall short of explaining why the state can arrogate to itself the right to forbid private exaction of justice regardless of the quality of the corresponding procedures—which is precisely the manner in which all existing states arrogate such a right.

Thus, it seems that any dominant protective association, if acting morally, would have to tolerate other comparably reliable agencies. In fact, Nozick himself says that one of the possibilities worth considering is the emergence of a “a system of appeals courts and agreed upon rules about jurisdiction and the conflict of law” (16). He claims that in this scenario, although different agencies operate, “there is one unified federal judicial system of which they all are components” (16). Yet this characterization should not obscure the resulting structure’s confederation character or the moral legitimacy that Nozick himself grants to that very arrangement. He acknowledges that the dominant association does not have a right to prohibit independents from solving their conflicts among themselves by their own private means (102) because the dominant protective association protects the independents it compensates “only against its own paying clients on whom the independents are forbidden to use self-help enforcement” (113). However, as long as the independents make public the procedures of justice they follow, and as long as those procedures are reliable and fair, Nozick’s argument does not establish that the dominant association has *a right* to prohibit the application of those procedures against its members. In other words, Nozick does not show that the dominant association has a right to raise coercive barriers to entry regardless of the quality of the procedures of justice that the potential competitors adopt, as states typically do, which prompts anarchists to condemn their doing so.

Nozick begins *Anarchy, State, and Utopia* by noting that his investigation “will raise the question of whether all the actions persons must do to set up and operate a state are themselves morally permissible” (6). Furthermore, he claims that “[t]he moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state’s fundamental coercive power has” (6).⁵ If asked to identify the morally problematic actions that persons must take to set up and operate a state, we certainly would have included these two: the suppression of competing rights-protecting agencies and taxation to fund the state’s (putatively) rights-protecting activities. But Nozick’s arguments do not establish any enforceable moral prohibitions that would in turn entail the legitimacy of such typical state actions. In what sense, then, can Nozick claim that his argument justifies the state?

IV

Returning to James’s story, if by “going round” the squirrel we mean passing from the north of him to the east, then to the south, then to the west, and then to the north of him again, it makes little sense to deny that the camper goes around the squirrel because he is not first in front of the squirrel, then on the right of him, then behind him, then on his left, and finally in front again. It makes little sense not because something is wrong with the latter definition of the term *going round*, but

5. According to Nozick, fundamental coercive power is power that does not rest on the consent of the person against whom it is applied.

simply because the claim is irrelevant to assess the truth value of the initial proposition. Nozick's answer to the anarchist challenge has the same nature. The problem with his answer is not that it is based on a dubious characterization of the state's essential features, but that it does not respond to the initial challenge the individualist anarchist poses to the state's legitimacy.

As noted previously, Nozick does not claim that the dominant protective association has the right to coerce individuals to purchase its services. Moreover, he claims that the monopoly that the dominant protective association acquires is simply a *de facto* monopoly (1974, 119, 134). This association has no right to prohibit the entry of competitors. Another point, although Nozick does not explicitly mention it, is that the dominant protective agency presumably draws all of its revenues from the sale of its services or from its investments; and if an electorate exists, it consists of the association's stockholders. Furthermore, there seems to be no legislature and no legislation in any usual sense. Why then does Nozick claim that he has justified the state? Because he believes that an organization that provides protection to everybody within a territory and has some sort of exclusive control over the administration of justice "fits anthropologists' notions" (117) of what constitutes a state. On that basis, "one would *call* it a state" (117, *emphasis added*). This is a disappointing answer.

It is disappointing because it leads the reader to conclude that the promise of a justification for the state has not been fulfilled. In seeking such a justification, we seek to justify what the state does in the manner in which it does it. Nozick has shown: (1) that anyone has a right to provide protection to others without charging them for such a protection, using resources voluntarily obtained from others; (2) that anyone has a right to prohibit others from using procedures of justice that impose significant risks on others; and (3) that based on certain linguistic considerations, an organization that enjoys some sort of *de facto* monopoly of the administration of justice should properly be called a "state." Few, however, would have disagreed with any of those claims to begin with. Disagreement probably would have emerged if we had asked whether it is permissible for the state to act as it *typically* does. Is it morally permissible for public officials to tax people and to prohibit them from enforcing their own rights? We simply evade this question if we claim that for a state to be regarded as such, no such actions need be performed.

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