New Problems in Nozick's Derivation of the Minimal State

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Robert Nozick's starting point is an individualist anarchist one. His state of nature is like Murray Rothbard's anarchism. Nozick says:

> More to the point, especially for deciding what goals one should try to achieve, would be to focus upon a nonstate situation in which people generally satisfy moral constraints and generally act as they ought. Such an assumption is not wildly optimistic; it does not assume that all people act exactly as they should. Yet this state-of-nature situation is the best anarchic situation one could reasonably hope for. Hence investigating its nature and defects is of crucial importance to deciding whether there should be a state rather than anarchy. (*ASU*, 5)[1]

His project is to show how a state might justifiably arise from this starting point, and to understand this project, it is crucial to grasp what he means by a state. He says:

> For our purposes here we need focus only upon a necessary condition that the system of private protective agencies (or any component agency within it)

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1. All page references are to Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

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> apparently does not satisfy. A state claims a monopoly on deciding who may use force when: it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore, it claims the right to punish all those who violate its claimed monopoly. (23)

People in his state of nature would arrive at the state, thus characterized, through steps that are to their advantage and also morally permissible. One frequent mistake in understanding Nozick's argument should be emphasized here. In Nozick's invisible-hand derivation of the state, he is claiming more than that no step violates anyone's rights. He is also claiming that each step is to people's advantage to take.

As Nozick remarks: "If one could show that the state would be superior even to this most favored situation of anarchy, the best that can realistically be hoped for, or would arise by a process involving no morally impermissible steps, or would be an improvement if it arose, this would provide a rationale for the state's existence; it would justify the state" (5). (In this passage, *or* in its first occurrence is best taken as a mistake for *and*, as taking *or* to mean "either A or B but not necessarily both" would not make sense of Nozick's argument for the state. The second occurrence of *or* is not a mistake, as I read this passage. In other words, I take Nozick to be saying, "If the state is better than my state of nature, and you can get there without doing anything morally wrong, you have a justification for the state. Further, if people in my state of nature didn't take the morally permissible steps that would get them to an improvement, then it would be true that if they took these steps, the state would be justified.")[2]

Consideration of this starting point suggests a very simple idea that has, I believe, been lost sight of in the literature discussing Nozick's intricate derivation of the minimal state. As is well known, and as will be considered below, the derivation has to do with what is permissible for protective associations to do to one another. Nozick argues that a dominant protective association is likely to arise and, under certain conditions, can in effect put competing protective associations out of business.

But if people "generally act as they ought," then the conditions Nozick discusses are unlikely to arise very frequently. There will be few occasions in which serious crimes occur, and even fewer in which the perpetrator and the victim belong to different protective agencies, triggering the process of agencies' attempting to

2. A reader has questioned my suggestion, arguing that no use of *or* in the passage is a mistake. The reader says, "If A or B or C holds, then the state is justified." While this reading has the advantage of acquitting Nozick of error, the sense in which the state would be justified is not plausibly taken to be a moral justification of the state, since it could arise through morally impermissible steps. And a moral justification of the state is what Nozick is after.

prohibit the imposition of risky decision procedures on their clients. For why would it matter if they did? There is little at stake. If, to avoid this problem, one shifts to a starting point in which crimes occur more often, then the scenarios described by Nozick indeed become salient. But even if he succeeds in showing that a minimal state is likely to arise, he would not meet the terms he has specified for showing that the minimal state is superior to "the best anarchic situation one could reasonably hope for."

Let us now turn to some of the details of Nozick's derivation of the minimal state. When people hire protective associations, one association might turn out to be best at winning conflicts with other protective associations. In that case, there will be a "cascading" process of people who join the winning association.

This suggests something else that has not been addressed in the literature. The argument that individuals would form a dominant protective association by a cascading process fails because it involves an arbitrary stopping point. In order for the dominant association to transform itself into the ultraminimal and then minimal state, a substantial number of people must remain outside the association. Otherwise, we would simply have a situation in which everyone was a member of the same private protective association. This would not be a minimal state, because there are no other agencies whose procedures are being prohibited.

A reader has objected, "Why does a state of any kind require 'other agencies'? Why cannot it merely be the enforcer of an agreement of everyone in the area not to coerce each other and abide by common procedures?" The answer to this is that everyone's agreement on the common procedures of enforcement wouldn't entail that the enforcer had the right to prohibit people who wanted to use different procedures if they came on the scene. The agreement thus wouldn't constitute a state in Nozick's sense.

If, however, Nozick's argument for the formation of a dominant association is correct, there is no reason to think a substantial number of people will remain outside the association, as his argument requires. Why would this cascade end at just the point where there remain enough clients of other associations to allow the dominant association to prohibit them from applying risky decision procedures to its own clients?

There is yet one more problem with Nozick's derivation of the minimal state that, so far as I am aware, has not been covered in the literature. It is crucial to his argument that the dominant protective association be able to prohibit competing associations from imposing risky decision procedures on its clients. (The procedures are "risky" as understood by the dominant association but not "risky" by their own lights.) "Able to prohibit" is here to be understood as "both practically and morally able to prohibit." Nozick thinks there is a range of morally permissible decision procedures, and each protective association is morally permitted to choose one of these procedures and attempt to act on its choice. Other associations aren't obliged

to refrain from interfering with the attempt by an association to impose risky procedures on its clients, and in a struggle over procedures among associations, the dominant one will win.

If associations cannot be prohibited from imposing procedures on the clients of the dominant association that the latter deems risky, but are required only to compensate those who are wrongly subjected to such procedures, then the derivation of the minimal state fails. The reason for this is that competing associations will be able to apply their own decision procedures, albeit at a cost to themselves, and a situation in which they can do this differs crucially from a situation in which a state or "state-like entity" determines the decision procedures used in putting criminals on trial.

Nozick raises a difficulty for allowing protective associations to use their own decision procedures even though the dominant association deems these procedures risky, so long as compensation is paid to the clients of the dominant association. This difficulty has to do with a type of fear. Suppose you know that someone in your neighborhood is likely to break your arm. You will feel fear even if you know you will be compensated, including for the fear you have felt, if in fact you are assaulted. But if you aren't assaulted, you will feel fear that isn't compensated for. Thus, compensation for the imposition of risky decision procedures is insufficient to protect all the clients of the dominant association, and it can prohibit other associations from imposing such procedures.

In other words, Nozick is assuming that a client of the dominant association will think, "There is a chance I'll be in a dispute with a client of another association and that person's association will try to impose a risky decision principle on me. This possibility frightens me, and if my association doesn't have the right to prohibit the other association from doing so, my association won't be of help to me in this situation. It might be objected that my fear is groundless, so long as an association that wrongly applies a risky decision procedure to me will have to compensate me. For example, suppose the protective association of a bank finds me guilty of robbery, using a trial by jury that doesn't require unanimous agreement for a conviction. If later evidence turns up showing I'm innocent, the bank will have to compensate me for wrongful imprisonment, and this compensation will have to include compensation for the fear I felt. If the compensation is high enough to leave me indifferent to the choice between prohibiting convictions by less than a unanimous jury and receiving compensation, what is the justification for prohibition?" Nozick's response to this is that the person who is wrongly subjected to the risky procedure is all right once he gets compensation. But what about the clients of the dominant association who aren't subjected to the risky procedure? They will be afraid that a situation might arise in which the risky procedure is applied to them, but they won't receive compensation for feeling this fear. I might be arrested by the bank's protective association and wrongly convicted of bank robbery, but so long as I haven't been, I am fearful but uncompensated.

There is a problem with the fear argument. Consider the compensation for risky decision procedures that is given to clients of the dominant association who *are* subjected to such procedures. This compensation will include payment for the psychological damage they suffer because of their fear that the risky decision procedures will be applied to them. This compensation may be so high that the chance of receiving it, if one is the victim of a crime that induces such fear, is sufficient to induce clients of the dominant association to accept the risk that other associations might impose such a procedure on them, even though they feel fear but don't receive compensation, because they are not in fact subjected to such procedures. If so, the justification of prohibiting risky procedures by the dominant association fails.[3] Suppose, e.g., an association that imprisoned someone for bank robbery using a non-unanimous jury had to pay $50 million to people wrongly convicted. A client of the dominant association might think, "I'm willing go along with this and not insist the risky procedure be prohibited, because of how well I'll do if it happens. [We are assuming here that the compensation would be high enough to leave the person better off than he would have been had the procedure been wrongly applied to him.] Because of the high compensation, I'm willing to accept the situation in which I feel fear but am not compensated, because the procedure isn't applied to me."

In the foregoing, I have endeavored to raise three difficulties for Nozick's derivation of the minimal state: a failure to show that a minimal state is superior to the best anarchic situation one could reasonably hope for; an internal difficulty in the "cascading" argument for the emergence of a dominant protective association; and a problem with the "fear" argument as a way to justify the dominant association's being able to prohibit other associations from applying risky decision procedures to its clients, as opposed to compensating their clients if the associations apply such procedures. I wish I had the opportunity to discuss these points with Nozick, whose power, speed, and imagination in argument I found endlessly fascinating in our many talks over twenty years.

3. I owe this argument to my late friend Ronald Hamowy. He and I had hoped to write an article about it.

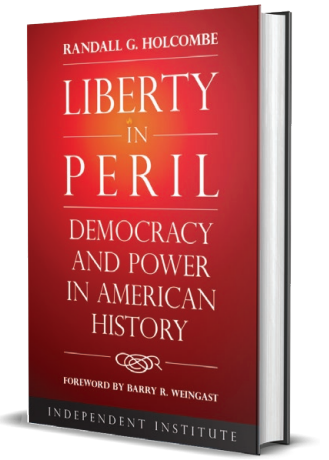
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