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NOZICK'S FAILED DEFENSE OF THE JUST STATE

ERIC ROARK

I

ROBERT NOZICK BEGINS THE preface to his highly influential *Anarchy, State, and Utopia* (Nozick 1974)[1] with the following observation and ensuing question:

> 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. How much room do individual rights leave for the state? (p. ix)

One quite plausible answer to Nozick's question, which I will consider throughout this paper, is that the respect of individual rights leaves *no* moral room for the state at all. Nozick ultimately rejects this answer; nonetheless he clearly recognizes its force, and as such devotes the first part of *Anarchy* (150 pages of argumentation and philosophically worthwhile digressions) to defending the claim that "a state would arise from anarchy (Locke's conception of the state of nature) . . . *by a process which need not violate rights*" (p. xi; emphasis mine).[2] Throughout *Anarchy* Nozick employs a *libertarian*

ERIC ROARK is a doctoral candidate in the philosophy department at the University of Missouri-Columbia where he is also the research assistant to the Kline Chair in Philosophy (esrz5d@mizzou.edu). Special thanks to Eric Heidenreich, Brian Kierland, Jenean McBrearty, Shaun McDonough, Alan Tomhave, Jonathan Trerise, Peter Vallentyne, Paul Weirich, and an anonymous referee from this journal, for offering extremely valuable comments.

[1]All page references to Nozick, unless specified, are to this book.

[2]An interesting idea advanced by Nozick throughout *Anarchy* is that the processes which lead to the formation of the state are to be explained in terms of an "invisible hand explanation." That is, agents in the state of nature do not actually intend to "build a state," but nonetheless their actions serve to do just that. The important idea here is that state-forming processes,

understanding of rights, and thus it is fair to read Nozick as understanding the rights in his above claim as libertarian rights.[3]

Importantly, Nozick's above claim is best understood as defending the *justness* as opposed to the *legitimacy* of the state. Justness is a matter of respecting rights. A necessary condition of a state's being *just* is that it arose through processes which did not violate rights. A state is legitimate, alternatively, only if others are not permitted to forcefully interfere in its activities. To clarify this important distinction between the two notions consider that a pacifist (using the distinction noted above), for example, could consistently argue that the state is both unjust *and* legitimate. The state could be unjust because it arose through processes which violated rights, but at the same time it could also be the case that no one is morally permitted to use force against the state or anyone else for that matter (and hence the state is, strictly speaking, legitimate). This distinction is important to note early because it suggests that Nozick's focus on (libertarian) rights in *Anarchy* is a defense of the justness of the state as opposed to its legitimacy *per se*.[4]

In this paper, I argue that Nozick fails to adequately defend the claim that a *just* state would arise from a Lockean state of nature by a process which need not violate libertarian rights. In particular, I argue that the state-creating processes cited by Nozick are antithetical to the

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for Nozick, are (or at least could well be) unintentional. This idea is obviously borrowed from Adam Smith who famously argued that a type of unplanned general good arises when individual economic actors pursue their self-interest. Accordingly, when this paper refers to state-building or state-creating processes keep in mind that for Nozick such processes were not necessarily intentionally planned to bring about the state.

[3]Henceforth, when I speak of rights this is meant to imply natural moral rights that persons possess in virtue of their personhood, as opposed to political rights which persons possess in virtue of the political circumstances in which they find themselves.

[4]Nozick himself is not clear about the distinction between justness and legitimacy in *Anarchy*; at times he speaks of defending the legitimacy of the state and at other times the justness of the state. It could well be that Nozick intends his usage of justness and legitimacy in *Anarchy* to be effectively synonymous. In this paper, I will simply assume that Nozick's defense of the state (given his focus on rights) is a defense of the "just state," that is, a defense of a rights-respecting state. Thus, whatever political nomenclature we decide to use (just, legitimate, or whatever) Nozick seeks to defend a rights-respecting conception of the state. I merely make the distinction clear here, early on, so that a clear use of terms can better guide the paper.

enforcement rights (those rights such as self-defense and the exacting of just restitution) of persons. I will examine Nozick's argument defending the just state in two broad parts. First, I will make clear how an anarchist, of a rights-respecting sort, finds a serious inconsistency between state-building processes and the enforcement rights of persons. Second, I will outline Nozick's defense of the just state against this pressing anarchist charge. Specifically, I will focus on Nozick's treatment of: (1) the development of a dominant protection association (DPA) within the parameters of a Lockean state of nature, (2) his principle of compensation regarding risky activities (especially applied to those who refuse to join the DPA), (3) the procedural rights of persons, and (4) the notion of a *de facto* monopoly on the use of force by the DPA. As Nozick's defense of the just state unfolds I will offer reasons why his efforts to defend the just state fail. Before moving along to consider the anarchist's worry, I will make clearer what Nozick's defense of the just state amounts to as well as clarify his notion of libertarian rights.

Nozick's Hypothetical Defense of the Just State

Nozick charges himself with the task of demonstrating that the processes which plausibly constitute the development of a state from a Lockean state of nature *need not* violate rights. His claim is *prima facie* rather weak. Nozick does not defend the claim that any *actual* state, as a matter of empirical fact, has ever arisen through just processes (those that did not violate rights), or even that the hypothetical state he presents in *Anarchy* necessarily arose in a manner consistent with the nonviolation of rights. It is enough for Nozick's defense of the just state to succeed if (plausibly) the hypothetical state he presents need not have violated rights. Thus, while Nozick's account of the state is historically motivated (as any account that utilizes notions of a state of nature will be), it is not dependent on the *actual* history of our world. Here, it is important to note that Nozick's claim is not challenged by the highly plausible suggestion that every *actual* state in our world arose through processes that did *in fact* violate rights.

Nozick's Rights-Based Libertarianism

Nozick is interested in offering a libertarian (rights-based) defense of the just state. For Nozick, moral constraints pre-exist the political. In emphasizing that moral philosophy sets the background for political philosophy, Nozick notes that "what persons may and may not do to one another limits what they may do through the apparatus of the state, or do to establish such an apparatus" (p. 6). Nozick understands the moral limits of such actions in terms of *rights*. According to Nozick, "a line (or hyper-plane) circumscribes

an area in moral space around an individual" (p. 57). This *moral space* marks the bounds of noninterference around each person. It places constraints on how one may permissibly treat another. A person has a right that other(s) not transgress her moral space, and accordingly that same person has an enforceable obligation not to transgress the moral space of others. Further, Nozick makes clear that rights are *individual* enjoyments and constraints. Aggregates of people (or the associations they choose to form) do not have rights; only the specific individuals *in* a group have rights.[5]

Nozick explicitly notes, in a number of places in *Anarchy*, that rights are not to be morally *outweighed* by concerns for the overall social good or utility. For example, he remarks,

> the moral constraints upon what we may do . . . reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to an overall greater social goal. (p. 33; emphasis in original)

And further:

> There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him. (p. 33)

Nozick's above treatment of rights suggests the following: (1) rights, as pre-existing the political, are had by persons whenever and wherever they exist (be this in a state of nature [anarchy] or a state), (2) rights serve as strong constraints which protect the moral space of *individuals*, (3) the protection afforded to an individual by her rights may not be morally overridden or transgressed by concerns of the overall social good,[6] (4) rights place constraints on how the state may

[5]Here one might wonder why it is that groups (as groups) cannot possess rights. The best reply, I think, is that rights are things that only moral agents can possess, and groups (as groups) simply are not moral agents and as such cannot possess rights. Of course, the agents within groups have rights, but groups (as groups) lack the agency that serves as a condition to be a rights-holder. One might well try (as some have) to advance the argument that groups are moral agents, but I see no clear way how such an argument could be made plausible.

[6]Strictly speaking, I think, that the textual evidence noted in this section supports this third claim. However, it is appropriate to note that Nozick does

be justly established. With Nozick's basic conception of rights in hand let us now proceed to briefly consider the specific rights that Nozick suggests protect one's moral space.

The paradigmatic case of a right which protects one's moral space is the right of self-ownership, or in Nozick's language the right of bodily integrity. Whatever else might mark the boundary of one's moral space it seems reasonable to think that the parameter of one's body surely does.[7] But in addition to the right of self-ownership persons also possess enforcement rights.[8] Enforcement rights serve to protect the integrity and practice of rights associated with one's moral space (namely the right of self-ownership). Such rights are necessary for protecting and taking seriously the notion of a moral space in a world where some opt to transgress the moral space of others.[9] Indeed, Nozick argues, in the Lockean tradition, that persons possess enforcement rights. As he puts the point in full:

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entertain the possibility that rights may be transgressed to avoid *catastrophe*. For example, in *Anarchy* Nozick notes, "The question of whether . . . side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid" (p. 30). Thus, it is not altogether clear whether Nozick regards rights as *absolute* constraints.

[7]Nozick agrees with this as he has a section in *Anarchy* (pp. 33–35) devoted to discussing how a theory of libertarian rights produces a principle of nonaggression against innocents.

[8]Besides a right of self-ownership (and enforcement rights that plausibly follow from such a right) might a person possess other rights which protect her moral space? Quite plausibly a person also has a right to (at least) a minimal amount of natural resources, a place to plant her feet so to speak. But what about a more encompassing set of rights that protect one's moral space? Do persons, as left-libertarians suggest, have a right to some egalitarian share of natural resources? Do persons have a right that others set up a civil government so that their moral space may be *better* protected than it might be in a state of nature? Or perhaps persons have a right that others not "epistemically interfere" with their moral space by not lying about, for instance, the fidelity of their spouse? These questions seeking to clarify the notion of a "moral space" are interesting and worthwhile questions for political philosophers. However, in the spirit of Nozick and most other libertarians, I will posit in this paper that libertarian rights are limited to self-ownership, enforcement rights (self-defense, and the just exacting of restitution), and perhaps, as will be discussed later in this paper, procedural rights to be judged by fair and reliable procedures of justice.

[9]Interestingly, if persons did not have enforcement rights, but did have (absolute) rights of self-ownership, this would ridiculously imply that *no* just physically defensive measures could be taken against a rights-violator who

> In a state of nature an individual may himself enforce his rights, defend himself, exact just compensation, and punish (or at least try his best to do so). Others may join with him in his defense, at his call. They may join him to repulse an attacker or to go after an aggressor because they are public spirited, or because they are his friends, or because he has helped them in the past, or because they wish him to help them in the future, or in exchange for something. (p. 12)

This passage is crucial because it makes explicit what Nozick takes to be (at least some of) the rights of persons (in a state of nature). If the processes by which the state arose from a Lockean state of nature violated the right (of even one person) to practice self-defense or exact just compensation (restitution) in response to a rights-violation, then the state would be an unjust rights-violator. And accordingly, Nozick's defense of the *just* state would fail. If Nozick's defense of the just state is to succeed, then minimally he must argue that a state would arise from a Lockean state of nature which need not violate the enforcement rights he explicitly endorses above.

Consider this example to better illustrate the enforcement rights that persons possess. Jim, acting without provocation, violates Joe's self-ownership by breaking his arm. Clearly, Jim has violated the moral space of Joe, but what, according to Nozick, are Joe's enforcement rights? First, Joe has the right to use self-defense to thwart Jim's rights violation. Second, Joe has the right to receive (and retrieve) just restitution from Jim for his rights violation.[10] Both of these

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was about to assault an innocent for "the fun of it" (even if such defensive measures used a very slight amount of physical force against the attacking aggressor).

[10]Both Locke and Nozick suggest that persons possess enforcement rights that allow for punishment. I am, however, skeptical that persons possess a right to punish *per se*, and as such will not consider such an enforcement right unless in reference to Nozick's own position. Nonetheless, I do allow that exacting just restitution *might*, when force is involved, appear much like punishment (but it is in fact nothing more or less than the just exacting of restitution for the victim). I think a plausible view of using-force-after-the-fact in response to a rights violation would be that a victim and her agents can use all necessary force-after-the-fact to retrieve restitution (from the rights-violator) that makes the victim "whole again." This is largely a victim-centered approach to using-force-after-the-fact. For instance, if one assaults a Buddhist monk and the monk refuses to press any claim of restitution which is owed him, then I think it is right to say that no force-after-the-fact should be used against the assailant. However, let us say that Sue is horribly raped by Al and the only thing that can make Sue "whole again" is to see Al horribly tortured; then I think Al may justly be horribly tortured by either

enforcement rights are extremely difficult to describe in full, and this paper is not concerned with offering an exact formalization of them. Nonetheless, something like the following seems both plausible and suggestive of Nozick's treatment of enforcement rights in *Anarchy*. (1) Joe may thwart a violation of his self-ownership brought about by Jim, by using the least amount of force necessary to prevent the violation. (2) Joe may use force, if necessary, to retrieve just restitution, that is, the amount of just compensation owed to him by Jim, consistent with the severity of Jim's rights violation. At the least it seems right to say (although issues of just compensation are complex) that Jim should compensate Joe *at least* as much as it would take to put him in the same position he would have been in had the violation not occurred.[11] Joe may permissibly use force as described above, *and* it would be unjust for some third party (the state included) to interfere with Joe's moral space in order to prevent him from practicing his rights of enforcement against Jim.

Thus far we have briefly considered Nozick's claim that a state would arise from anarchy (a Lockean state of nature) in a manner which need not violate libertarian rights. Additionally, Nozick's libertarian treatment of rights has been examined with specific attention toward enforcement rights. Now, I will press ahead to present the formidable Anarchist challenge that confronts Nozick's defense of the just state.

II
NOZICK'S FORMIDABLE ANARCHIST CHALLENGE

Anarchists, at least the stripe examined here, argue, *contra Nozick*, that the state (plausibly) can only arise from processes which violate rights. Such an anarchist (call her a rights-concerned anarchist) argues the following: the state is unjust because the processes that form the state will plausibly, *in principle*, violate the enforcement rights of individuals. By Nozick's own admission he takes the rights-concerned anarchist seriously; as he writes, "I treat seriously the anarchist claim that in in the course of maintaining its monopoly on

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Sue or her agents. Of course, this view needs a lot of work such as assigning plausible upper limits to the types of force-after-the-fact that can be used in response to certain rights-violations.

[11]But how are we supposed to know what Joe's position (say of well-being) would have been had the violation not occurred? Dealing with counterfactuals like these are very difficult. We really cannot know the answer to this question, although we can give it a fair approximation.

the use of force and protecting everyone within a territory, the state *must* violate individuals' rights and hence is intrinsically immoral" (p. xi; emphasis mine). To better understand why the rights-concerned anarchist suggests that the state is an *in principle* rights-violator it is worthwhile to consider what Nozick and most other political philosophers have (roughly) in mind when they speak of the state.

The State

Nozick offers two necessary conditions of a state.[12] Nozick spells out the first necessary condition of the state as follows:

> 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. (p. 23)

The second necessary condition of the state, according to Nozick, is that it (the state) protect, in some broad sense, all members within its borders. He tells us, for instance that, "under the usual conception of the state, each person living within (or even sometimes traveling outside) its geographical boundaries gets (or at least, is entitled to get) its protection" (pp. 24–25). Nozick reiterates these two necessary conditions of the state when he notes that merely being an association which charged certain people within a territory for a protection, "not only lacks the requisite monopoly over the use of force, but also fails to provide protection for all in its territory; and so . . . appears to fall short of being a state" (p. 25).

In this paper I will only consider Nozick's Weberian-minded, first necessary condition of the state, because the second condition is false. For instance, if the United States, in its current form, decided that it would no longer protect John Smith at 412 Elm Street, it seems wrong to say that the United States would cease to be a state. The United States would still be a state in such a case, it would simply be a state that does not protect John Smith. A state may exercise its prerogative and decide that it no longer wishes to protect certain persons within its domain and yet remain a state.[13] Germany, for

[12]Nozick does not attempt to try to make clear the sufficient condition(s) for qualifying someone or some organization of persons as a state. It could be that the necessary conditions noted above are sufficient, but Nozick is careful not to endorse this suggestion.

[13]Of course, we might suggest that a state which did such a thing is acting impermissibly. But this move won't help Nozick's position here. States

instance, in the late 1930s did not protect many persons within its "domain," but it was still a state (an unjust state, but a state nonetheless). Simply put, a state need not protect everyone within its "domain" in order to be (or remain) a state.

Nozick's first necessary condition of the state (which seems to be correct) is best exemplified by the notion that the state (whatever else it may be) is conditioned upon being a geographically codified force-monopolizing association.[14] The state, and only the state, "reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries"(p. 23).[15] This notion of the state does not require that only agents of a state may permissibly *use* force, but it does mean that *all* uses of force by *anyone* within a codified geographical territory must pass the muster of state sanction. Such sanction (the force-monopolizing element of the state) allows the state to prevent beforehand, or punish after the fact, anyone within its boundary who uses force in an unauthorized fashion. A state, for instance, will almost certainly establish rules that allow those within its boundary to use force to defend their lives from unjust attack (self-defense), although such rules might well be limited (depending on what the state decides) to include *only* cases of "imminent threat," or similar restriction. Such allowance by the state does not threaten its monopolization of force, as it still monopolizes the rules that govern force, and reserves the power to punish and prevent those who neglect or disregard such rules. As this paper proceeds I will simply treat the state as a force-monopolizing association

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which act impermissibly are still states, and Nozick's necessary conditions of "statehood" are merely meant to tell us the necessary conditions of the state, be it unjust, impermissible, morally unacceptable, or whatever.

[14]Often the state will be referred to as a "violence-monopolizing association." The more neutral term, however, here is force, as violence often has a ring of viciousness that talk of force does not. Thus, to put the state on fair conceptual terms it is best to consider it as a "force-monopolizing association."

[15]This necessary condition of the state is consistent with interesting aspects of ordinary language talk. For instance, when we think of a state as "failing to be a state" it often does so because it can no longer monopolize the use of force within a codified geographical territory. If a separatist movement were to take over (in the full sense of monopolizing force within the state on a wide scale) the state of Montana, and the United States government were powerless to stop it from happening, then when drawing the geographical territory of the United States, one would be wrong to include Montana. Montana, if a political state at all, would be under the political jurisdiction of those who monopolize the force within its borders.

within the bounds of a codified geographical territory. This treatment of the state is probably not sufficient, but it should serve as no disservice to Nozick's defense of the just state because whatever (else) the state may be, Nozick (and most other political philosophers) readily admit that the state is surely *at least* a force-monopolizing association situated within a codified geographical territory.

We are now in a position to offer a more formalized statement of Nozick's claim that the state may arise by processes which need not violate (libertarian) rights. His claim now more appropriately reads: *A process by which an association comes to monopolize the use of force within a codified geographical territory need not violate the moral space of any individual living within such territory, even where the rights protecting one's moral space include (minimally) the right to self-ownership, the right to self-defense, and the right to exact just restitution*. This formalization helps show that Nozick's defense of the just state is actually more daunting than its outward appearance initially suggests.

The rights-concerned anarchist notes that it is difficult to see how (absent the relevant consent) any person or association of persons could come to justly *monopolize* the use of force, and hence be a just state. Won't a monopoly on the use of force (by a state or anyone else for that matter) fail to respect the enforcement rights of persons? If X has the right to use force (exercise his enforcement rights using force if necessary), then how can Y (the state) *monopolize* the use of force, and hence forcibly prevent X from exercising force absent its sanction? After all, it's not as if a person needs to get permission from others (the state included) before she justly exercises her rights. Rights don't operate like this. The distinction between a liberty right and a claim right is helpful here. Persons have a liberty right to use force in order to defend themselves or retrieve just compensation for a rights violation after the fact. Additionally, persons also have claim rights against others that they not interfere with the enforcement actions that they have a liberty right to perform. By monopolizing the use of force the state specifically violates a claim right.[16]

Sheriff Tina

To better appreciate the importance of the rights-concerned anarchist's worry, consider the case of Sheriff Tina. Imagine that in a Lockean state of nature, Tina has decided to anoint herself sheriff. Tina's *neighborhood* is becoming more dangerous than she likes, and as such she affixes a note in a public meeting square informing everyone that, "From now on I will be sole arbiter of who may use

[16]I thank Brian Kierland for helping me see this point.

force and under what conditions. I reserve for myself the sole right to pass on the legitimacy and permissibility of any use of force within a ten square mile area. Further, if anyone dare use force in a manner not sanctioned by myself, I will (if I choose to) punish such an action!" The mere posting of such a note does not violate rights (nor does the state's mere *posting* of a similar note).[17] It is morally permissible for any deranged person to post notes declaring herself the sheriff. It is just that such notes do not carry moral force. However, Tina's carrying out of such a proclamation would violate the rights of others who did not consent to its dictates. Sheriff Tina cannot justly decide the circumstances in which others may practice self-defense (use force to prevent a rights violation) or exact just restitution (permissibly use force after the fact to gain compensation for a rights violation), and she certainly is beyond her rights in forcing others to adhere to her dictates about such matters. Of course, it is permissible for Sheriff Tina to *ask* others to adhere to her dictates, but she violates rights when she coercively enforces the proclamation against others who have not consented to it. Sheriff Tina cannot cross the boundary of another's body merely because he did not adhere to Tina's dictates. How could anyone in the ten square mile region justly have his enforcement rights held at bay simply because Sheriff Tina *decided* that she was going to be the arbiter of whether and when the use of force is morally permissible?

But, the rights-respecting anarchist is bound to ask, what is the relevant difference between the rights-violating behavior of Tina (assuming she coercively acts on her proclamation), and the state? What is the relevant disanalogy between the state and Sheriff Tina? The rights-concerned anarchist argues that the process of state-construction is much like that of Sheriff Tina posting her sign. Sheriff Tina acts unjustly when she monopolizes the use of force, and so does the state when it monopolizes the use of force. If persons in a state of nature may exercise their enforcement rights in a manner not wanting of sanction or approval by others, then others (the agents of a developing state included) *do* violate rights when they *monopolize* the use of force.

Now, after having made clear why the rights-concerned anarchist finds the state unjust (as the state's monopoly on the use of force violates the enforcement rights of persons), it is fitting to move toward considering how Nozick defends the state from such a charge.

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[17]Of course, one could argue that Tina's *mere* posting of the note does violate one's moral space, but it is highly doubtful that Nozick or most any other libertarian would think such a thing.

III
NOZICK'S DEFENSE OF THE JUST STATE

Protection in a State of Nature

Considering how Nozick would treat the case of Mary and Bob will help us better understand how Nozick's state emerges from a Lockean state of nature.[18] (The ensuing account of Mary and Bob takes place in a Lockean state of nature.) Mary has the right not to be assaulted by Bob and *vice versa*. She has a right to defend herself from Bob if he attempts to assault her, and to retrieve (using force if necessary) just restitution from Bob if he does assault her. Bob assaults Mary. Mary is not as strong as Bob, and although she has enforcement rights, it is almost certainly the case that she (given her relative lack of physical strength) will be unable to exercise them against Bob. What happens when Bob refuses to respect Mary's moral space, and further does not compensate for his rights violation? Others *could* assist Mary in helping her enforce her rights of defense or exacting just restitution, but this is no guarantee that they will assist her. For Nozick (and most libertarians generally), Mary has no right to insist (by using force) that others defend her from Bob, or that others help her retrieve restitution owed to her by Bob. In other words, everyone has a negative duty *not to* cross the boundary of Mary's moral space, but no one has a positive duty (understood as an enforceable obligation) *to* assist Mary when she is under threat. Nozick rightly suggests that the inability to effectively exercise enforcement rights constitutes a primary reason why *many* people would very plausibly desire to leave the state of nature and voluntarily enter into state-like (protective) political associations.[19]

Mary, anticipating the actions of a moral villain like Bob, will seek out a way to protect her moral space, even if she is not the one administering her enforcement rights. Mary may hire agents that either defend her from unjust attack or retrieve just restitution owed her. The specifics of such a protection contract can take a wide variety of many different forms. The key feature is that such protection contracts *obligate* Mary's protection association to assist her with defense, and if applicable the just exacting of restitution when and if Bob, or anyone else, assaults her.[20] For instance, it is morally permissible for

[18]Nozick's treatment of such a story is found on pages 10–25 of *Anarchy*.

[19]Nozick cites sections 123 and 126 from Locke's *Second Treatise* as supporting this contention.

[20]One might suggest here that a Lockean state of nature is peaceful enough that most people will not purchase protection services. No doubt the

Mary to hire Jack to protect her right of self-ownership, that is, to serve as her bodyguard. Now, when Bob attempts to assault Mary, Jack will be morally obligated, given the terms of the protection contract to which he and Mary agree, to defend her. It was always morally *permissible* for Jack to defend Mary (an innocent) from Bob's assault; now the contract to which Mary and Jack agree renders Jack's protective assistance *obligatory*.

Initially, many protection associations will surface (Mary will have many reasonable choices in whom she can hire to help administer her enforcement rights), as the protection market will have a high demand, and there will likely be a number of different people or groups economically interested in fulfilling the supply. However, given the nature of protection markets this proliferation of protection services will be short-lived. This is because the "service sold" by those offering protective services has little value unless it is the very best available, or at least the best available in a specified geographical territory. To see why this is the case consider that Mary and Bob have a dispute regarding Bob's guilt in the manner of his assaulting her (let us add that there is no *obvious* fact to the matter as the assault happened while Mary was drugged). Mary gets very upset after her assault and calls Jack to execute her right of restitution against Bob (which, *if* Bob did assault her, she surely has just claim to). Bob, fearing what form this restitution might take, calls upon his protection agency (Bruce and Associates) to protect him from Jack. After all, Bob maintains his innocence, and he has a contract with Bruce and Associates that bind them to exercise *his* right of self-defense whenever he maintains his innocence and his bodily integrity might be in jeopardy.

What happens (as a matter of empirical fact) when both protection agencies clash as they attempt to administer what they take to be their respective clients' enforcement rights? The protection agency best able to administer what they take to be their clients' rights will win out; it will survive and the other agency will perish. The unsuccessful agencies could perish either because they were economically outcompeted, or because they were physically forced

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Lockean state of nature is much more peaceful than a Hobbesian state of nature (war). However, given that a violent rights violation need only happen *once* to end one's life or make it much worse, I think that a Lockean state of nature would be violent enough to motivate *most* people to purchase protection services. But it is worth noting that persons in a Lockean state of nature would *pay* much less (on average) for such services than persons in a Hobbesian state of nature (war) would pay.

out (killed, injured, or had their equipment destroyed) of the market.[21] Accordingly, in time, *one* dominant protection association (DPA) will emerge over a relatively stable geographical territory. Protection from an agency other than the DPA would offer one little recourse when she came into conflict with a client of the DPA. This seems to give people, as Nozick nicely points out, very good reason to greatly desire being clients of the DPA.

If one could plausibly defend the claim that *everyone* in a specified geographical territory would consent to being a client of the DPA, then we would have the beginning of a hypothetically motivated defense of the just state. In such a case we could say that *all* persons voluntarily handed the administration of their enforcement rights to the DPA. If all people would choose to let the DPA administer their enforcement rights and hence allow the DPA to monopolize force, then (at least hypothetically) it is not difficult to see how a state (as a force-monopolizing association) *might* arise which need not violate rights. The rights-concerned anarchist concedes this point, but does not think that such *universal* consent is plausible within the framework of a Lockean state of nature.[22]

Astutely, Nozick does not stop the discourse here, because he likewise realizes that it is implausible to suggest that *everyone* in a Lockean state of nature, in any substantial geographical territory, will consent to be a client of the DPA. Even if a vast majority of people in a Lockean state of nature agree to be clients of the DPA, there will still be others, whom Nozick labels *independents*, that refuse (for whatever reason) to join the DPA. The independent binds himself to no rules (regarding the use of force) set forth by the DPA, and it seems as if it would be a violation of his rights for the DPA to force him to live by its set of rules involving the use of force. I imagine an independent who finds it despicable that he hire someone else to administer *his* rights of enforcement. This independent values rugged self-sufficiency more than anything else in his life, and he

[21]Nozick does consider the possibility that two or more protection agencies could be so equally matched that no single protection agency clearly outcompetes its competitor(s). In such cases, Nozick argues that the agencies of similar strength would merge into one federative arrangement, and in practice the federation of protective organizations would function in much the same way as a single DPA.

[22]However, if such consent were considered within the framework of a Hobbesian state of nature (where people would be much more scared and hence more likely to seek out a protective association) such universal consent becomes a much more plausible contention.

simply cannot take seriously the notion that he would ever willingly let another administer *his* rights of enforcement.[23]

Let us return to the case of Sheriff Tina, our tree-posting (would-be) monopolizer of force. What if we added to the story that: (1) the same proclamation mentioned before is signed by Sheriff Tina and ten of her neighbors, (2) that the ten square miles *just is* all the territory in the world, and (3) that the world consists of only twelve persons (there is one independent "hold-out" who refuses to agree to the proclamation that Sheriff Tina posts). The eleven members of the DPA (Sheriff Tina included) may do their best to persuade, in a fashion that does not violate rights, the lone independent that it is best for everyone if Sheriff Tina monopolizes force. But what if the independent still does not budge? Here, the rights-concerned anarchist stops the discourse and says: "Well, you tried through just contract to form an association that monopolizes the use of force, but your endeavor failed; there is after all one independent. No just force-monopolizing institution (state) can be had. The independent maintains full control over his enforcement rights, and you may not violate these rights in order to increase the social good. In fact, this one independent is no more justified in monopolizing the use of force against Sheriff Tina and her ten clients, than Sheriff Tina and her ten clients are justified in imposing such a monopoly on him. The independent has the right not to join the DPA or any other association for that matter as well as the right to protect the integrity of his moral space (using appropriate force when necessary) free from the sanction of anyone or any group. You can either have a force-monopolizing association (the state), or you can respect the (enforcement) rights of the independent, but you cannot have both. So which will it be?" Nozick must avoid having to choose either horn of this dilemma if he is to defend the position that the DPA is to evolve into a force-monopolizing association which need not violate rights (a just state), but how?

Nozick's Principle of Compensation

To address this dilemma Nozick introduces his principle of compensation (POC). The principle is important because it allows for the just prohibition (using coercive force if necessary) of *risky* activities (under certain conditions), provided that compensation is given to those who undergo the prohibition. Nozick refers to this principle as

[23]Indeed, I find it plausible to suggest that (under some circumstances) an independent might come to have a life not worth living if he were coercively forced into letting another administer his rights of enforcement.

fuzzy (p. 87), but he does offer the following treatment of the principle:

> Some types of actions are generally done, play an important role in people's lives, and are not forbidden to a person without seriously disadvantaging him. One principle might run: when an action of this type is forbidden to someone because it *might* cause harm to others and is especially dangerous when he does it, then those who forbid in order to gain increased security for themselves must compensate the person forbidden for the disadvantage they place him under. (p. 81; emphasis in original)

A few introductory remarks about the principle are in order. First, the risky behavior involved must be dangerous to *others*. Thus, prohibiting a person from engaging in risky activities directed toward oneself is not allowed by the principle (regardless of whether compensation is provided). The principle, for instance, would not warrant the prohibition of suicide or the playing of Russian roulette on oneself. Second, Nozick argues that if one (forcefully) prohibits, consistent with the POC, then he is *not* violating the rights of the person prohibited. This is important to note because one might mistakenly read the principle as suggesting that the coercive prohibition of risky behavior *does* violate the rights of the prohibited, but that "all is made well" so long as appropriate compensation is provided to the prohibited person. In fact, for Nozick, one does not act unjustly (that is, violate rights) when one prohibits in accordance with the POC. Additionally, Nozick suggests that his principle is a middle ground position between allowing risky activities, and forbidding them outright. Nozick points to the middle ground nature of the POC by noting the following:

> It might be objected that either you have the right to forbid these people's risky activities or you don't. If you do, you needn't compensate the people for doing to them what they have a right to do; and if you don't, then rather than formulating a policy of compensating people for your unrightful forbidding, you ought simply to stop it. . . . But the dilemma, "either you have a right to forbid it so you needn't compensate, or you don't have a right to forbid it so you should stop," is too short. It may be that you do have a right to forbid an action but only provided you compensate those to whom it is forbidden. (p. 83)

Nozick uses the example of an epileptic driver to support his POC. The epileptic *might* cause severe harm to others by engaging in the risky activity of driving-while-having-epilepsy. As such (according to the POC), those seeking increased security may prohibit an epileptic from driving, just so long as they compensate for the disadvantage

that is caused by their prohibition where such compensation would include compensating for the disadvantages imposed by barring someone from driving minus the normal costs associated with driving.[24] Presumably, if those seeking increased security are unable to compensate, then they are also barred from prohibiting (as without the element of compensation the rights of the prohibited *are* violated).

Importantly, Nozick does not think that *all* prohibitions of risky behavior must abide by the POC. Some risky activities may be justly prohibited without *any* compensation being given to the prohibited. As Nozick asks and answers, "[m]ust I really compensate someone when, in self-defense, I stop him from playing Russian roulette *on me*? . . . Surely not" (p. 79; emphasis in original). Nozick's POC suggests the following: One may invoke the right of self-defense and accordingly forcefully act preemptively against another who threatens (in the relevant sense) to violate her moral space (and need not compensate for this prohibition).[25] However (and this is where the force of the POC comes into play), when the risky activity being prohibited involves *an important activity done by almost all* (as in the case of driving in an auto-dependent society), then prohibition is justly done *only if* compensation is provided to the prohibited.

Nozick's POC is important to his defense of the just state because it allows him to argue that people can justly be coercively prohibited from engaging in actions that *in fact* do not violate the rights of anyone. For instance, when the epileptic goes to the store to pick up a carton of milk and makes it home without having a seizure, she has not violated anyone's self-ownership rights (and plausibly no rights at all), but nonetheless the POC allows her nonrights-violating action to be coercively prohibited.[26] Yet, Nozick's POC allows

[24]For example, a very simple quantification of this might run as follows: the ability to drive in an auto-dependent society normally offers a gross benefit to a normal person of $13,000 a year, but the normal expense of operating and maintaining a vehicle costs a normal person $8,000 a year. Thus, the compensation owed to the epileptic driver is $5,000 a year, not $13,000 a year.

[25]How much of a threat is in order to invoke rights of self-defense and act preemptively against another? Nozick never adequately addresses this tricky and interesting question. But it is relevant to mention that any rights of (preemptive) self-defense must allow one to protect herself prior to the blade of knife *actually* piercing one's skin.

[26]I think this is right, but I do notice that the case can be pushed. Does the drunk driver violate my rights when she passes me in her car? Maybe the drunk driving case is different in that it presents "so much" danger that my right of self-defense allows me to forcibly "pull over" the drunk driver and prevent her from driving drunk.

us to cross the moral space of the epileptic (provided we compensate), merely because she engages in an activity which *might* violate the rights of others. Nonetheless, the epileptic driver case hints that there is something attractive about Nozick's POC. This much is undeniable. With very little trouble we could probably devise a utilitarian justification that would allow us to prohibit the epileptic from driving. But is it plausible to suggest that the prohibitions allowed by Nozick's principle do not violate the (libertarian) rights of the prohibited? I doubt it because Nozick's principle allows force to be used against moral *innocents* who have not obviously violated the rights of anyone, and who very well *might* not violate rights.

To illustrate why prohibiting innocents from engaging in actions that very well might not violate the moral space of another poses a serious objection against Nozick's POC generally, imagine the following. In the very near future geneticists will be able to determine which persons have a strong disposition for aggressive (rights-violating) behavior. This calculation coupled with relevant considerations of social environment (and many other factors) allows for a reliable estimate of a person's odds of impermissibly and seriously violating the moral space of others (all persons are then assigned a rights-violating index score). Let us add that Luke (who is 21 years old) has just had such odds calculated at over 90 percent. Luke's activity of "being a free member of society" is a risky activity, which *might* violate the rights of others. Intuitions may differ here, but I think it would be unjust to forcibly prevent Luke from being a free member of society, *even if* he were (somehow) compensated for the disadvantage. In other words, when we use force against an innocent, such as Luke, we violate his rights, period.

No doubt prohibiting and compensating Luke is morally preferable to prohibiting and not compensating at all, but no amount of compensation erases the rights violation that Luke undergoes as he is prevented from being a free member of society. When we coercively prohibit Luke from being a free member of society we are violating his rights, irrespective of whether or not we compensate him for this violation. Now, after having given reasons for thinking that Nozick's POC generally suffers from a major shortcoming, I would like to discuss his application of the POC to the case of independents.[27]

[27]In fairness to Nozick it is worth mentioning that he does demonstrate a general skepticism about the moral permissibility of preventive restraint, (Nozick 1974, pp. 142–46; exactly what I suggest could well be done with

The Principle of Compensation Applied to Independents

Nozick argues that independent(s) who exercise enforcement rights engage in a *risky activity*, and as such may be justly prohibited from exercising enforcement rights (consistent with his POC) just so long as they are compensated for the disadvantage that this prohibition causes.[28] If Nozick could successfully argue for this claim, then he would score a major victory in his defense of the just state because this would help show how independents who do not consent to being members of the DPA could nonetheless be prohibited from exercising their enforcement rights. And if the DPA can justly prohibit independents from using force (consistent with the POC), then plausibly the *only* just uses of force would be exercised by the DPA. This would give the DPA a monopoly on the just use of force and effectively render it (in plausible fashion) a state which need not violate rights. But, of course, all this depends on the POC (assuming it is a just principle, which I challenged in the previous section) being appropriately applied to independents.

As Nozick observes, "[T]he victim of the independent's wrongful and unjust retaliation may be not only damaged but seriously injured and perhaps even killed" (pp. 55–56). Surely, Nozick continues:

Luke consistent with Nozick's POC). Despite this skepticism expressed by Nozick I think that the POC is consistent with the type of preventive restraint I offered in the above example, and Nozick's expressing skepticism about preventive restraint won't help make it any less consistent with *his* POC.

[28]Here, Nozick suggests that the compensation provided to the independent (for prohibiting them from engaging in the risky activity of exercising enforcement rights) should be some type of free basic membership package to the protective services that the DPA offers. This is how Nozick comes to support a minimal state that is obligated to protect *all* the persons within its territory. The issues surrounding the compensation provided to independents and the transition to the minimal state from an ultra-minimal state is beyond the purview of this paper (and hence relegated to this footnote), but one comment needs to made here. Can we really suggest that one is compensated for a prohibition forced on them if they are given compensation that they do not want at all? The strongly intuitive answer here is no. The independent does not want to be a member of the DPA; he might even despise being a member of such an association. It seems strange to think that such a person can be compensated with a free membership package to the DPA. Simply put, we cannot compensate people with things that they would rather not have.

> there would be some probability of the independent's misenforcing his rights, which is high enough (though less than unity) to justify the protective association from stopping him until it determines whether his rights indeed were violated by the client. Wouldn't this be a legitimate way to defend their clients? (p. 56)

There is admittedly something compelling about Nozick's thought here. An independent *can* get things wrong when exercising his enforcement rights, and when he does, the moral space of his *innocent* targets is unjustly transgressed. Simply imagining oneself as the innocent target of an overly zealous independent nicely motivates Nozick's worry. Shouldn't the DPA have the right to *forcefully* stop the independent (and his client) so as to verify whether the independent is acting properly before *anyone* (client or independent) uses force? The DPA is merely taking steps to ensure that its client(s), who might be innocent (as far as it knows), are defended from a potentially overzealous (or simply mistaken) independent.

Before we accept that an independent may be forcibly curtailed from exercising his enforcement rights, consistent with Nozick's POC, consider a few noteworthy points. The first, and most obvious, is that the independent in question may well be *justly* enforcing his rights. That is, he may be doing nothing wrong at all. Further, there are two plausible ways to read Nozick's claim that there would be "some probability of the independent misenforcing his rights." Nozick might be suggesting, (1) that *every* independent engages in a risky activity when he exercises enforcement rights consistent with his decision procedures. That is, the exercise of enforcement rights by independents is intrinsically "risky enough" to warrant prohibition. (2) Independents, as a collective, engage in a risky activity, and as such the probability that any particular independent will engage in a risky activity is "high enough" to prohibit *every* independent from exercising enforcement rights. The first reading proposes something definite about every independent, and the second assigns some probability to every independent based upon knowledge of the class independent. Both readings suffer major shortcomings, and accordingly give us good reason to think that Nozick's POC (if it should be accepted at all) should not be applied to *every* independent who opts to exercise her rights of enforcement.

As for the first reading it seems implausible to suggest that *every* independent engages in a sufficiently risky activity when she exercises her enforcement rights that would justify prohibiting (with or without compensation) her exercise of rights. Couldn't some independents (or at least one independent) within a codified geographical

territory exercise enforcement rights in a manner that is not risky enough (a level not well spelled out by Nozick) to warrant invoking the POC? Here, the answer is very plausibly yes. The exercise of enforcement rights is not an *intrinsically* risky activity, and as such we could plausibly imagine human agents who engaged in such an activity in a nonrisky fashion (even if we could also easily imagine human agents who would pursue the exercise of enforcement rights in a risky manner).[29] Additionally, if the exercise of enforcement rights were understood as a generally intrinsically risky activity, then it would be impossible for agents of the state to exercise the enforcement rights of their clients in a nonrisky fashion, as they would be in the same boat—so to speak—as the independent. Of course, one could attempt to argue that such enforcement is intrinsically risky for independents but not for agents of a DPA or state, but I seriously doubt such an attempt at this distinction would prove promising.

Thus, the first reading of Nozick's POC fails to justify the prohibition of *every* independent from exercising enforcement rights. Note here the important thought that even if *most* independents engage in a risky activity (and may be prohibited from exercising enforcement rights consistent with the POC) this won't help Nozick defend the just state. This is because the state is a force-*monopolizing* association, and just so long as *any* independent does not fall under the purview of Nozick's POC (due to her not engaging in a risky activity when she exercises enforcement rights), then the POC cannot be used by Nozick to demonstrate how *all* uses of force except those sanctioned by the state may be justly prohibited. Now, on to considering whether the second reading of Nozick's POC as applied to independents works any better than the first in his defense of the just state.

When the DPA answers a protective call from one of its clients it is not asked to deal with the class "independents"; instead it is asked

[29]I admit here that some activities might well be *intrinsically* risky and dangerous, and as such are potentially good candidates for universal prohibition. For instance, playing Russian roulette on others with a six-chambered gun is an intrinsically risky activity that can be prohibited under the guise of self-defense (assuming the parties playing did not consent to play in the relevant sense). However, in such cases of prohibition I am inclined to think that no compensation is owed to the prohibited regardless of whether the activity done "is an important activity that is done by almost all." The actors (playing Russian roulette on others without their consent) plausibly violated rights, and they need not be compensated for such action (consistent with Nozick's POC) when it is prohibited. Thus, when preventive prohibition is plausibly warranted, I deny that a POC (depending on whether the activity is done by almost all) is morally relevant.

to deal with a particular independent. What grounds does the DPA have for thinking that "this particular" independent (the one their client is asking for protective service against) is engaging in a risky activity? The DPA will likely have no convincing answer to the question (nor, as suggested above, may the DPA plausibly plead that every independent "just does" engage in a risky activity when he exercises enforcement rights against their clients). Instead, the DPA will likely insist that *independents* (as the second reading of Nozick suggests), as an aggregate, engage in a risky activity and as such the probability that any particular independent engages in a risky activity is *high enough* to invoke the POC and accordingly justly prohibit *every* independent from exercising his enforcement rights. But this quick move from knowledge regarding the aggregate to individual prohibition suffers from a counterintuitive result. The following case should nicely illustrates this.

Imagine a world with a population divided equally between persons of a dark skin complexion and persons of a light skin complexion (but persons of a dark skin complexion run and operate the DPA and as such hold a near monopoly on the use of force). And let us add that *generally* people of a light skin complexion were accurately known to misenforce their rights at a high rate (say 70 percent of the time), while persons of a dark complexion *generally* misenforce their rights at a very low rate (say 2 percent of the time). That is, for any particular "protective call" the responder can rest assured that seven out of ten persons of a light skinned complexion will be engaging in a risky "enough" activity to invoke the POC, and that only two of one-hundred persons of a dark skinned complexion will be doing the same. Would it be morally permissible for the more powerful dark skinned group to prohibit *every* member of the light skinned group from exercising rights of enforcement under the auspices of the second reading of Nozick's POC? I do not think so. It is not permissible to cross the moral space of a person merely because he belongs to a group or class, which stands a good (better than not) chance of engaging in risky rights violating activity. Such a crossing does not respect the rights of the person in question; it merely treats the person *as a part of a group* and not as an individual with her own discrete moral space. A necessary condition of prohibiting another from exercising *her* rights (regardless of whether she is compensated) is that something relevant must be known about *her* (and not merely about those she is associated with) that might justify the prohibition. Do we really think that associating person X with the class of persons tells us something relevant about X that would justify prohibiting *her* from exercising *her* rights of enforcement? The answer here, if we are

to respect the rights of the individual, must be an emphatic no. The second reading (like the first) will not help Nozick establish that the POC should be applied to *every* force-wielding independent. In fact, I doubt that the second reading of Nozick's POC (unlike the first) would allow for the just prohibition of *any* exercise of enforcement rights by any particular independent.

Uncompensatable General Fear

Thus far I have strongly resisted Nozick's move to prohibit (and compensate) an independent from exercising her enforcement rights. But in response one may ask, how then are we to justly handle the actions of independents who enforce their rights? I suggest, *contra* Nozick, that an independent should be allowed to take action against anyone who violates her rights (without having to obtain permission from the state or anyone else), and if in the process she violates the rights of an innocent, then this violation should be handled as any other rights violation. That is, the *innocent* victim or her agents may use force either defensively, or after the fact, to retrieve the restitution owed by the independent's unjust acts. Nozick rejects this suggestion because he says that a force-utilizing independent creates a type of *general fear* that *cannot* (even in principle) be compensated for. As Nozick puts the point, "A system which allows fear-producing acts provided their victims are compensated . . . itself has a cost in the uncompensated for fear of those potential victims who are not actual victims" (p. 68). For Nozick, independents, even when they "get it right" and *justly* exercise enforcement rights, create a "general fear" for which they cannot compensate. Nozick, in strongly consequentalist language, argues this point as follows:

> Even under the strongest compensation proposal which compensates victims for their fear, some people (the nonvictims) will not be compensated for *their* fear. Therefore there is a legitimate public interest in eliminating these border-crossing acts, especially because their commission raises everyone's fear of its happening to them. (p. 67; emphasis in original)[30]

The rights-concerned anarchist has a ready reply to Nozick's talk of "general fears" and "legitimate public interests" which proceeds as follows: "People only need to compensate each other when they violate rights (or at least threatened to violate rights). Nozick cannot be correct, because none of us has the right not be afraid of another's *rightful* action. When someone's action is done consistent with her

[30]Nozick's strategy of argumentation here is a bit baffling given his apparently strong libertarian position outlined earlier in this paper.

rights (including her rights of enforcement), then it is just too bad for us that we might feel afraid of such action. That *feeling* is certainly nothing that need be compensated."

This reply is quite compelling. A utilitarian would certainly be worried about fear-inducing actions that do not violate rights, but it is strange to think why a *libertarian*, such as Nozick, would be concerned. Nozick might have advanced the argument more successfully by suggesting that people have a *right* not to be afraid of the actions of others (and are owed compensation when this right is violated), but Nozick does not argue for such a right, and I see no obvious way to successfully argue it for him in a libertarian fashion. Indeed, it would be very odd for a libertarian to hold (as Nozick apparently does) the following principle: Anyone, regardless of whether he violated rights or not, must compensate others for the general fear created by his actions. This principle, which Nozick uses to justify the barring of an independent from forcefully exercising her rights of enforcement, is simply not libertarian-acceptable.

To demonstrate why such a principle would run counter to the libertarian insistence that we respect the moral space of individuals, consider the following. Circumstances arise wherein others (say a strong majority of all persons in the world) were generally fearful of Tom's continued existence. A professed psychic (who is very good at making accurate predictions about future events) says quite publicly that Tom is a demon who came to destroy the world. In fact, Tom is no such demon, and he is violating no one's rights. In such a case Tom's continued existence does produce a vast amount of general fear, but I see no reason why he is under any moral obligation to compensate others for their justified *fear* that he will destroy the world. (I assume that the fear of others is justified so as to make Nozick's case as strong as possible.) In fact, there is no good reason why anyone *justly* exercising his rights (of enforcement or otherwise) must compensate others at all. Nozick is wrong to suggest that an independent may justly be prohibited from exercising his enforcement rights on the ground that he produces an uncompensatable general fear.

Thus far I have considered: (1) Nozick's hypothetical, yet historically minded, account of how a DPA would arise from a Lockean state of nature, (2) his principle of compensation (POC), (3) and his specific application of his POC to cases where independents attempt to administer their enforcement rights. In the spirit of the rights-concerned anarchist I have lodged multiple criticisms against both Nozick's POC generally as well as his specific application of the principle to an independent's exercise of his enforcement rights. Now, I

will proceed to examine the role of procedural rights in Nozick's defense of the just state.

Procedural Rights

The exact role that Nozick assigns to procedural rights in his defense of the just state is not obvious and open to interpretation. This said, I think a careful reading of *Anarchy* suggests that procedural rights work to "shore up" the loose ends of a DPA's prohibiting the use of force by independents that might not be covered under the POC.[31] Nozick is willing to admit that the POC (as applied to independents) is not sturdy enough to bear his *entire* defense of the just state. This is because he admits that:

> If it is known that the independent will enforce his own rights by his very unreliable procedure only once every ten years, this will *not* create general fear and apprehension in the society. The ground for prohibiting his widely intermittent use of his procedure is not, therefore, to avoid any widespread uncompensated apprehension and fear which otherwise would not exist. (pp. 88–89; emphasis in original)

Nozick concedes that concerns of an uncompensated general fear will not be enough to *always* ground prohibiting an independent's exercise of enforcement rights. (Earlier, I argued that such concerns of an uncompensated general fear would never be enough to prohibit an independent from exercising his rights, but on with Nozick's argument.) In order to argue that an independent who *rarely* exercises his enforcement rights (and does not create a general fear) may be nonetheless prohibited from exercising her enforcement rights Nozick appeals to procedural rights.

Nozick has the following to say about the procedural aspects to the enforcement right of self-defense that all persons have:

> [A] person may resist, in self-defense, if others try to apply to him an unreliable or unfair procedure of justice. In applying this principle, an individual will resist those systems which after all conscientious consideration he finds to be unfair or unreliable. (p. 102)

Furthermore, "An individual may empower his protective agency to exercise for him his rights to resist the imposition of any procedure which has not made its reliability and fairness known, and to resist any procedure that is unfair or unreliable" (p. 102). Importantly, Nozick explicitly rejects the claim that an individual

[31]Here, I think it is fair to understand the POC as doing most of the work for Nozick's defense of the just state.

"may punish anyone who applies to him a procedure of justice that has not met his approval" (p. 101). For this would be to ridiculously claim that "a criminal who refuses to approve anyone's procedure of justice could legitimately punish anyone who attempted to punish him" (p. 101). For Nozick, persons have a procedural right that force be used against them only in accordance with a fair and reliable procedure of justice. One important implication from this is that clients (or independents for that matter) irrespective of their guilt, according to Nozick, may resist the use of force by another if the user of force applies unfair or unreliable procedures of justice against them.

Nozick's description of procedural rights is vastly overstated. It is *not* the case that a rights-violator may resist the imposition of just restitution, *even if* he is resisting procedures which are unfair or unreliable. People do *not* have the procedural right to resist the imposition of just restitution which they owe to another. Imagine (from our earlier case) that the *bone-breaking* Jim asks Joe, how do you know that I broke your arm? Joe says nothing and need say nothing, because he owes the guilty no answer. The rights-violating Jim now says (as Nozick argues is his right), "Your silence is not enough, you are obliged to judge me by fair and reliable procedures (given my procedural rights) and accordingly tell me what such procedures are so that I may either resist your exercise of force because it does not cohere with my fair and reliable standards, or acquiesce because it does, and if you cannot or will not provide this, then you must let me go."

Here, I think it is permissible for Joe to (forcefully, if necessary) retrieve just restitution from Jim (without explaining his procedures of justice) because Jim's guilt serves as a sufficient condition for Joe's exercise of enforcement rights.[32] Surely, some (like Nozick) will want to claim that Jim's guilt only provides a necessary condition for Joe's use of force against him, and that in addition to Jim's guilt, Joe must satisfy some epistemic condition justifying the use of force against Jim. I deny this move, because I deny that people have procedural rights. The innocent person has the right to defend herself (practice the *enforcement* right of self-defense) from unjust attack. But no one, despite Nozick's suggestion, has a procedural right to be judged by fair and reliable procedures of justice. However, the innocent do have self-ownership rights that protect their moral space from being

[32]I stress here that Joe does have an obligation to make his demand of restitution known to Jim, so that Jim may meet the demand absent Joe's use of force. Joe may not use force unless he needs to do so to retrieve what is owed to him.

crossed. That is, the innocent already have (moral) protection against another crossing their moral space, and as such procedural rights, as far as the innocent are concerned are, *in principle*, superfluous. What could a procedural right protect the guilty from? Nothing but the chance that their wrong acts will be found out and dealt with accordingly. People do not have a right to this.[33]

Interestingly, Nozick argues that, once a person violates the rights of another, the rights violator cannot invoke self-defense as a moral reason that allows him to use force against his victim. Nozick asks and answers the question of whether a guilty aggressor may justly invoke the enforcement right of self-defense in the following fashion:

> [may] someone wrongfully attacking (or participating in the attack of) another . . . claim self-defense as justifying his killing the other when the other, in self-defense, acts so as to endanger his own attacker's life. The answer is, "No." . . . His job is to get out of that situation; if he fails to do so he *is* at a moral disadvantage. (p. 100)

The rights-violator is at a moral disadvantage, and may not justly exercise the right of self-defense in response to the just exercise of force from his victim. I think Nozick's line of reasoning here is right. The rights-violator who starts a fight is at a moral disadvantage, and may not invoke the right of self-defense (and use even more force against the innocent) midway through the fight because he finds himself on the losing side. The problem is that Nozick does not extend this reasoning to cases where innocents (independents) exercise their rights and use force to retrieve the just restitution that they are owed from a guilty rights-violator. Just as in the case of self-defense the guilty aggressor (who owes restitution to her victim) is at the moral disadvantage, and has no right to insist that his victim use fair and reliable procedures of justice to determine his guilt.

Nozick's failure is that he does not extend (as I suggest we should) the moral disadvantage of the guilty aggressor to cases where an independent attempts to exact just restitution. What morally relevant reason would allow the guilty to be at a moral disadvantage in the case of resisting just self-defense from an innocent victim, but not at the same moral disadvantage in resisting the just exacting of restitution from the same victim? In *both* cases, it seems

[33]Of course, *in practice* people might decide (upon forming a state) to construct procedural protections. This seems quite plausible. But notice that this would afford persons a legal entitlement (legal right if you will) to procedural protection and not a moral right to such protection.

right to say that the guilty person has no right to forcibly resist the innocent from exercising her rights of enforcement (be they self-defense rights or exacting just restitution rights). It is true that more time passes in the case of the just exacting of restitution than it does in the case of self-defense. But the moral disadvantage of the rights violator extends through time, and is not mitigated by it. A rights-violator (including a guilty client of the DPA) has no right (procedural or otherwise) to invoke self-defense to forcibly prevent an innocent (independent) from using necessary force to retrieve just restitution that she is owed pursuant to the violation.

The serious problem that this creates for Nozick's defense of the just state is that if a guilty rights-violator does not have the right to use force (that is, exercise self-defense) against an independent who is merely seeking to exact just restitution from him, then the rights-violator cannot *justly* ask, nor may his DPA *justly* provide, for his defensive assistance. The DPA has no right to use force against an independent who is merely exercising his rights of enforcement against a *guilty* client.[34] After all, according to Nozick, the DPA may only justly exercise the rights that its clients possess, and (as I have argued above) its guilty clients have no right to use self-defense to resist a force wielding independent who is justly exercising her enforcement rights. If the DPA *knew* their client to be guilty of transgressing the rights of an independent, they would be morally required to step aside (much as their client would be morally obliged to do) and let the independent administer his enforcement rights. Defending the guilty by using force against an innocent who is merely exercising her rights of enforcement is unjust. In such cases (where a guilty client calls upon his DPA for protective help against an independent who is merely exacting force to retrieve the restitution owed him) the DPA has no more right to use force against the independent than does its guilty client (which is no right at all). This is significant because it suggests that *any* use of force used by the DPA to defend a guilty client from the just exercise of force by an innocent (independent) is unjust, and a violation of an independent's rights.

[34]Of course, it is *possible* that *all* the clients of the DPA are innocent and that *all* independents are guilty rights-violators. Thus, whenever the DPA answers a defensive or restitution call it never violates rights. Here, we do indeed see the potential for a just state, but it isn't a plausible one. Sometimes (whether intentionally or not) the DPA will use force against innocent independents to defend guilty clients, and when it does it violates rights.

The DPA's Epistemic Gap

Nozick addresses this pressing worry by arguing that while often times a client *knows* of his guilt, his DPA will not, and as such this epistemic gap is best bridged by the DPA restraining all parties involved until *it* (the DPA) determines through *its* fair and reliable process if their client is guilty. At first blush, it might seem as if this epistemic gap between a client and his DPA will successfully allow Nozick to argue that while the right of the DPA to use force arose from the client, it might be justly exercised differently (depending upon epistemic information) by the DPA than by its client. After all, the DPA has made contractual commitments to protect its clients, and for all it knows the clients (who they have promised to protect) are innocent. The DPA is merely erring on the side of caution by restraining *all* parties (both clients and independents) until it can determine (through the fair and reliable processes it establishes) whether their client is guilty. If the client is judged guilty by the DPA, then the DPA steps aside and allows the independent to exact just restitution (using force if necessary), but only *after* the DPA establishes its client's guilt in the fair and reliable manner it decides upon. Surely, if the DPA had the right to do this, then Nozick's defense of the just state would be greatly aided.

Nozick has tried very hard *not* to create any special rights of enforcement belonging to the DPA that did not first belong to its clients. His efforts here are owed to his correct observation that all rights are individual rights. But I worry that his talk of the epistemic gap between the client and the DPA does in fact *create* a new right for the DPA, which does not arise from any right held by an individual client. Importantly, if the DPA uses force against an independent in a manner that cannot be traced back to a right of their client, then it acts unjustly. Recall that one's right of self-defense, as argued by Nozick, is predicated on the grounds that one did not (in the relevant sense) transgress into another's moral space. This is the right of defense that one may justly ask their DPA to administer. But this is *not* the right that the DPA administers when it protects its client(s) from an independent. The DPA, instead, must *invent* a new right given its third-party epistemic status—something like "the right to protect others, by using force against all parties in an altercation, who make a claim of innocence." But individuals do *not* have this right, and as such cannot transfer its administration to the DPA. Accordingly, it is wrong to think that the DPA's *epistemic gap* allows it to "restrain all parties" until it can render a determination as to the guilt or innocence of the parties involved. No one has a

right to do this, and as such the DPA can never come to justly administer it.

Individuals do *not* have the right to physically restrain all parties to an altercation while they decide, for themselves, who was acting justly. *Even if* the restraining individual were a fair arbiter of justice (as the DPA might well be), he does something beyond the scope of his rights when he forcibly restrains parties to a dispute in which he has an "epistemic gap." If X comes upon a situation in which two persons (Y and Z) are engaging in combat, X does *not* have the right to forcefully restrain (transgress the bodily integrity of Y and Z) until he decides who he is permitted to defend.[35] But this is exactly the right that Nozick would have us believe that a client allows the DPA to administer on her behalf. Thus, the epistemic gap between client and DPA (regarding knowledge of the client's guilt) cannot serve as the relevant difference that would allow the DPA to restrain "all parties" in "all disputes" and thereby justly *monopolize* the use of force. No one (including agents of the DPA) has a right to do such a thing.

In a closely related point Nozick argues: "It is a soldier's responsibility to determine if his side's cause is just; if he finds the issue tangled, unclear, or confusing, he may not shift the responsibility to his leaders, who will certainly tell him their cause is just" (p. 100). Nozick continues by noting that even in matters of self-defense (with enemy airplane overhead) self-preservation is no moral excuse for firing on an enemy that one does not know is unjust. But, oddly enough, Nozick does not expect the DPA to know if its *side* (client) is just before they offer her defensive services, yet he holds this expectation for the individual soldier enthralled in the grips of combat. The DPA, according to Nozick, is allowed to coercively restrain all parties to an altercation while it figures out who is guilty according to its standards. Would a soldier be acting justly if he did this? It does not seem that he would be. Imagine that an individual soldier actually possessed the power to physically restrain all parties in a war. Would this soldier be just to gather up all participants in a war and restrain them until he determined using his fair and reliable

[35]I realize here that this suggestion is not uncontroversial. My suggestion places severe restrictions on the defense of persons who *might* be innocent. It is true that any intervention involved in defending an innocent will involve some degree of uncertainty, and I do not want to suggest that we can never defend innocents. But I would say that the mere "claim of innocence" from someone is neither necessary nor sufficient by itself to justify crossing the moral space of parties involved in a physical altercation.

processes which side was just? No, an individual soldier does not possess this right, because in gathering up everyone in a war and forcibly restraining them he violates rights that others have to be secure in their bodily integrity. The soldier, Nozick rightly notes, cannot plead ignorance, an "epistemic gap" or a "just following orders defense," in order to permissibly use force against an *enemy* when her nation calls her to do so. Likewise, the DPA cannot justly offer an "epistemic gap" or a "just following the client's innocence plea defense," as a just reason to forcibly restrain all parties involved in a dispute. The DPA may not use its epistemic gap as a moral excuse that allows it to use force against independents merely because its clients call upon it to do so. Such an excuse is not just for the soldier, nor for her DPA. When the DPA (either intentionally or mistakenly) protects a guilty client by using force against an innocent independent who is merely exercising her enforcement rights, it (by violating the rights of the independent) acts unjustly. And no appeal to the DPA's epistemic gap can mitigate this charge of unjust action. Nozick's appeal to procedural rights, for a variety of reasons noted in this section, will not effectively aid his defense of the just state.

A Blameless DPA

Briefly I would like to consider the possibility that the DPA, while violating rights, does so (or at least might do so) in a blameless fashion. (Nozick himself fails to discuss this interesting possibility.) To motivate this thought consider the following example: The DPA (not wanting to violate anyone's rights) is rather conscientious and accordingly keeps track of both the activities of its clients as well as independents. Bill, a client of the DPA, who has *never* been known to lodge a false claim against another, calls on his DPA to protect him from Ralph (an independent). The DPA knows that Ralph has a spotty (but not horrendous) track record of violating rights. Ralph is known to occasionally violate rights. But it just so happens that on *this* occasion Ralph is only planning to use the least amount of force necessary to exact the restitution that is owed to him by Bill. The DPA (reasonably believing that Bill is not lodging a false complaint) answers Bill's call for defensive assistance and forcibly prevents Ralph from exercising his rights of enforcement.

Given its "epistemic gap," the DPA did not *know* that it was acting unjustly (although it was acting unjustly), and in fact had taken steps not to act unjustly. Perhaps a DPA which took significant steps to avoid violating rights (for instance keeping accurate and up-to-date records on both clients and known independents) might well be a

blameless rights violator on the occasions when it did violate rights. At times this DPA will likely violate rights (and an honest DPA acknowledges this possibility), but it does its best to prevent, or at least limit, this. Certainly this DPA would be morally preferable to a corrupt DPA which always sided with its clients no matter the circumstances. But a blameless rights violator is still a rights violator, *and* hence unjust. Simply taking precautions to avoid violating rights is neither necessary nor sufficient for just action. Thus, even if the state can be shown to arise through processes which blamelessly violate rights this will not help show that the state is just. A defender of the morally acceptable state, at this juncture, could simply deny that a *legitimate* or *permissible* state need be a just state (in the sense noted above). Maybe something like this is correct, but I do not wish to pursue the point here. In any event, pointing out that the DPA might be constructed to be a blameless rights violator would not help Nozick defend the *just* state (although it would likely make important headway in offering an account of a morally acceptable or legitimate state).

The DPA's de Facto *Monopoly on the Use of Force*

The DPA, as exercising only the rights that its clients possess, has no special rights of enforcement (nor do they claim any special right of enforcement). However, Nozick points out:

> Although no monopoly is claimed, the dominant protection agency does occupy a unique position by virtue of its power. It, and it alone, enforces prohibitions on others' procedures of justice, as it sees fit. It 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. . . . Claiming only the universal right to act correctly, it acts correctly by its own lights. It alone is in a position to act solely on it own lights. (pp. 108–09)

This "acting correctly by its own lights" according to Nozick, "will be a strong tendency for it [the DPA] to deem all other procedures, or even the 'same' procedures run by others, either unreliable or unfair" (p. 108). This is because the extent of its power allows it to (above all rivals) determine what fair and reliable procedures of enforcement amount to. The DPA, through merely being most able to enforce what it takes to be fair and reliable standards of justice, gains a *de facto* monopoly on the use of force. Importantly, it is not, Nozick argues, that the DPA acts properly because it is most powerful. (Nozick, to his credit, never endorses a "might makes right" justification in his defense of the just state.) The DPA, instead, administers the same enforcement rights that independents administer; it just so happens that the DPA (given its relative strength) will enjoy

its determination of what constitutes fair and reliable standards of justice, while others will not. Likewise, the DPA, using *its* standard of fair and reliable procedures of justice, will (or at least plausibly could) judge any enforcement procedure not cohering to its dictates to be a risky activity, and can accordingly bar such activities consistent with Nozick's principle of compensation. Once this process occurs the DPA is a state, as it monopolizes the use of force within a codified geographical territory.

I have already offered a variety of different reasons for thinking that Nozick's defense of the *just* state before his introduction of the *de facto* monopoly is flawed in one fashion or another, but here it seems extremely pressing to note that there is no good reason to think that the relative power differences between the DPA and an independent confer any justness whatsoever to the DPA. Yes, as an empirical fact, the DPA will almost certainly get its way when it has a dispute with an independent, and yes the DPA will, as an empirical fact, form a *de facto* monopoly on the use of force, but this tells us nothing about whether the DPA acts *justly*. I think Nozick would agree with this; his real work defending the just state (in the form of the POC and defending procedural rights) is done before the inclusion of the DPA as a *de facto* monopoly. The *de facto* monopoly element, nonetheless, nicely demonstrates descriptively how a DPA actually evolves into a force-monopolizing state.

It is tempting, although misplaced, to suppose that strong majorities (of power or number) confer some semblance of justness to the monopolization of the use of force, when no such semblance can be had by such status. Again, I think Nozick would agree, but it is important to guard against the tendency to think that the *actual* monopolization of force confers justness to the state. Let us modify (one last time) the example of Sheriff Tina to reinforce this point. Let us assign Sheriff Tina superhuman strength, that is, make her into Super Tina (give Sheriff Tina the power of Superman). Super Tina posts the same type of proclamation she has throughout this paper, and (as in the modification of the original case) has the support of all in the world except for one lone independent holdout. Further (given her strength and inclinations), Super Tina acts on the proclamation, and accordingly *monopolizes* the use of force (this includes of course coercively forcing the lone independent to abide by her dictates regarding the circumstances of when force may be employed). Super Tina is a DPA with a *de facto* monopoly on the use of force within a codified geographical territory. Super Tina *is* the state, but surely there is no moral reason to suspect that Super Tina is any more just than Sheriff Tina.

CONCLUSION

Nozick, through the use of his POC as well as his treatment of procedural rights, has argued that the state (and by implication Super Tina) need not violate the enforcement rights of the lone independent holdout as it (or she) monopolizes the use of force within a codified geographical territory. Throughout this paper I have denied such a move by employing a number of different arguments. First, I raised objections to Nozick's POC generally. His principle allows *innocents* (as exemplified by the case of Luke) who might not violate rights (in accordance with a probability he never clearly spells out) to be forcibly prohibited (just so long as they are compensated). This sour consequence of his principle, calls for its serious revision or rejection. Further, I lodged a number of attacks against Nozick's POC being applied to independents. First, I dismissed, as implausible, the suggestion that *every* independent engages in a risky activity when he exercises enforcement rights. It is just incorrect to suggest that the exercise of enforcement rights is an intrinsically risky activity. Next, I considered that perhaps the POC was meant by Nozick to apply to the *class* of independents. Here I suggested that this application of the principle to independents treats each independent as little more than a member of a class, and unjustly prohibits the actions of an individual based upon group association. I argued that such prohibition does not take seriously the rights of persons. In response to Nozick's argument that an independent may be prohibited from enforcing his rights (by using force) because he creates an umcompensatable general fear, I maintained that such a position is not libertarian-acceptable. Simply put, no compensation is owed to X from Y, when Y merely exercises her rights. The proper exercise of a right should never create a duty to compensate. If one's just practice of rights creates fear (or other negative emotional reactions) in others, then so much the worse for the fear of others (it is not something they should get compensated for). Additionally, I denied that Nozick's stance toward procedural rights shores up any gaps in his defense of the just state that might have been left unaddressed by the POC. Straightforwardly, I deny that persons have procedural rights at all (obviously it follows from this that the purported procedural rights of persons cannot help Nozick defend the just state). Further, I denied that an "epistemic gap" between a guilty client and her DPA could make a moral difference in the DPA's using force against an independent who is justly exercising his enforcement rights against a guilty client.

I conclude that Nozick's defense of the just state (while extremely interesting and worthy of extended consideration) ultimately fails. Neither Nozick's POC nor his treatment of procedural rights can defend the force-monopolizing actions of the state as just. Nozick's hypothetical defense of the just state fails because the state he presents (plausibly) *must be* a rights-violator. The rights-concerned anarchist's dilemma still stands. You can have either a force-monopolizing association (the state), or you can respect the (enforcement) rights of the independent(s), but you cannot have both.

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