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NOZICKS REPLY TO THE ANARCHIST

What He Said and What He Should Have Said about Procedural Rights

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ABSTRACT. Central to Nozick's *Anarchy, State and Utopia* is a defense of the legitimacy of the minimal state's use of coercion against anarchist objections. Individuals acting within their natural rights can establish the state without committing wrongdoing against those who disagree. Nozick attempts to show that even with a natural executive right, individuals need not actually consent to incur political obligations. Nozick's argument relies on an account of compensation to remedy the infringement of the non-consenters' procedural rights. Compensation, however, cannot remedy the infringement, for either it is superfluous to Nozick's account of procedural rights, or it is made to play a role inconsistent with Nozick's liberal voluntarist commitments. Nevertheless, Nozick's account of procedural rights contains clues for how to solve the problem. Since procedural rights are incompatible with a natural executive right, Nozickeans can argue that only the state can enforce individuals' rights without wronging anyone, thus refuting the anarchist.

I. INTRODUCTION

Central to Nozick's Lockean libertarian project in *Anarchy, State and Utopia*¹ is a defense of the legitimacy of the minimal

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¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). All unidentified references in this paper refer to this work.

state's use of coercion against anarchist objections. Locke's own anarchism stems from his strong voluntarist conception of political obligations. This conception involves a defence of four tenets underlying the liberal state's use of coercion: (1) state authority requires coercion; (2) coercion by an unauthorised state is illegitimate since it is inconsistent with respect for a person's 'natural executive right' (the natural power of an individual to enforce the laws of nature); (3) only an individual's *actual* (explicit or tacit) consent can authorize the state to exercise the individual's natural executive right on her behalf, and (4) individuals can authorize the state to enforce their rights for them and to enforce new laws as long as those laws are consistent with the laws of nature.² Nozick's conception of justice defended in *Anarchy, State and Utopia* and as interpreted here is Lockean, yet distinct from Locke in that Nozick attempts to refute the third condition above.³ Nozick denies the

² Somewhat simplified, Locke argues that the reason we must enter civil society is *prudence*. Entering is the prudent choice given "the inconveniences" of the state of nature (TT, II, p. 127), which makes "the enjoyment of the property... [the individual] has in this state... very unsafe, very unsecure" (TT, II, pp. 123, cf. 124, 128, 149, 222). Despite demonstrating that it is prudent and justifiable to enter civil society, Locke does not permit forcible entry into it: "MEN being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate [the state of nature], and subjected to the Political Power of another, without his own *Consent*" (TT, II, pp. 95, cf. II: 22, cf. 15, 90, 96–99, 104, 106, 112, 116, 119–122, 134–136, 175, 186). Entering civil society is not an enforceable right or duty, since individuals have a natural executive right. Each individual upon reaching the age of reason must decide for himself whether or not to enter civil society (TT, II, pp. 73, 116–118, 191, 211) – either through explicit or tacit consent (TT, II, pp. 87–89).

³ It seems fair to say that there is no one, standard or classical interpretation of Nozick's text. Part of the reason for this is probably the nature of the text itself. As Nozick emphasizes, at many places it is suggestive and possibly not everything he argues for or suggests is ultimately defensible within "one perimeter" (p. xiii). Nevertheless, I believe that my interpretation is true to his text, even if other interpretations also may be true, and that it also presents the text as having something philosophically important to contribute to the contemporary debate on the nature of the state. The proposed way of interpreting Nozick project should therefore be both interesting as an interpretation of Nozick and as a philosophical contribution to philosophical issues in political philosophy.

need for actual consent to justify a (minimal) state's assumption of a monopoly on coercion. He argues that due to the risk involved the state can, at least partially, usurp a non-citizen's ('independent's) natural (executive) right to enforce her procedural rights with respect to the state's citizens. If Nozick's account is successful he will have shown that actual consent is not necessary for legitimate state coercion, thus providing a version of Lockean voluntarism that is neither anarchist nor vulnerable to the objection that it does not take Locke's anarchism seriously. This paper recognizes the philosophical importance of Nozick's project for all theories having roots in voluntarism, provides an evaluation of the success of that project, and suggests a way to help Nozick succeed in refuting the anarchist.

It is not surprising that Nozick not only sees Locke's strong voluntarism (actual consent) as central to Locke's political philosophy, but also views the overcoming of it an important aim for the Lockean project in general and thus his own project. To start, actual consent appears crucial to justifying the coercive authority of the state on the Lockean conception. Because Lockean maintain that justice is in principle possible in the state of nature by individuals acting within their natural rights, individuals are seen as having a natural executive right or a natural right to enforce their natural rights. But if so, then it seems that the establishment of a state – an artificial person – to enforce individual rights requires special justification. Locke reasonably proposes that actual consent to a social contract between all people can provide this special justification. Nevertheless, Locke's appeal to actual consent to justify the state's legitimate use of coercion has been subject to constant criticism ever since he proposed it. For example, Hume famously objects that states are neither supported by actual consent nor come into existence through actual consent.⁴ Therefore, finding an alternative to actual consent to justify the state's monopoly on coercion is an intriguing project for any Lockean.

In addition to these reasons, which seem to have motivated Nozick himself to take on this central feature of Locke's theory,

⁴ See David Hume: 'Of the Original Contract', *David Hume's Political Essays* (Indianapolis: Bobbs-Merrill Company, 1953).

much contemporary liberal theory, namely weak voluntarist theories, would greatly benefit if Nozick were to succeed. According to weak voluntarism, political obligations require only hypothetical, rather than actual, consent. If only individual rights are enforced, only those restrictions that individuals can be seen as (hypothetically) consenting to are enforced. Hence, according to weak voluntarist conceptions of political obligations, any state that only enforces the rights of individuals is legitimate and people subject to its coercive power are politically obliged to obey its authority. This position, however, is under serious attack from contemporary Lockeans, one of the most prominent of whom is A. John Simmons.

Simmons defends Locke's strong voluntarism and uses Locke's position to critique contemporary weak voluntarists. To start, Simmons defends Locke's distinction between the natural political power individuals have to enforce their rights and the state's 'artificial' political power to do the same.⁵ Simmons argues that if it really is the case that the rights of the state are co-extensive with those of individuals, as weak voluntarists typically assume, then surely individuals must be granted the right to interact without the state. In other words, if the state cannot do anything that individuals cannot in principle do on their own, then individuals must be seen as having a natural executive right. Yet once this is recognized, it seems reasonable to argue that an individual's actual consent is necessary for the state legitimately to obtain this right. Therefore, Simmons criticizes weak voluntarist positions, such as many contemporary Kantian theories, for failing to respond to the anarchist challenge.⁶ He argues that even though state coercion

⁵ John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), pp. 123f, cf. 164, 218f, 1993: 59f, 261f, and *Justification and Legitimacy*, pp. 138f, 154f.

⁶ This is a recurrent objection Simmons makes against liberal non-Lockean accounts of justice, such as neo-Kantian accounts. He argues that they typically affirm weak voluntarism, but fail to justify the resulting, implicit claim that the reasons they use to justify the state can also be used to legitimate it. See, for example, *Moral Principles and Political Obligations* (New Jersey: Princeton University Press, 1981), pp. 35ff, 46, 47f, 52, and *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), pp. 147–155.

might be *justified* in that it does not exceed the natural rights of individuals, the establishment of an 'artificial' (state) coercion cannot be *legitimate* without actual consent. Thus, Simmons concludes that there are two different kinds of issues involved in liberal voluntarist theories stemming from the distinction between natural and artificial political power: issues of justification of state coercion and issues of legitimacy of the state's coercion. "[C]onsiderations that justify the state,' argues Simmons, "cannot by themselves also serve to legitimate it."⁷

On Simmons's view, then, issues of justification are merely concerned with whether a particular use of coercion is consistent with the laws of nature. In this regard, the justified boundaries of state coercion are uses of coercion consistent with the laws of nature. When a theory draws these boundaries, it describes how a state must function in order for it to represent a morally justifiable and prudent way to cope with the inconveniences of the state of nature.⁸ In contrast, issues of legitimacy concern the rightfulness of the state's assumption of political power. These issues arise because individuals have political power naturally, whereas the state has political power only artificially. Thus, whether or not a state is legitimate depends on how the state has obtained its current political power. A state is legitimate, on Simmons's account, only if its coercive power is derived from the natural political power of actually consenting individuals. The absence of a good response to Simmons's argument that actual consent is necessary for state legitimacy shows the difficulty of getting around the need for actual consent in any liberal voluntarist theory. It also highlights the seeming necessity of the anarchist element of liberalism. What makes Nozick's project philosophically interesting in this regard is that if successful Nozick has provided a Lockean account of state legitimacy that does not require actual consent. He will have shown that voluntarism and actual consent can come apart, which serves not only to silence those who see Lockean voluntarism as objectionably anarchist, but also to help those trying to defend weak voluntarism against

⁷ Simmons (2001, p. 139).

⁸ Simmons (2001, pp. 126, 154).

anarchist objections.⁹ If Nozick succeeds in his account of procedural rights, he can provide weak voluntarists with the argument they typically lack. He can explain why a state that only enforces individual rights does not thereby deprive anyone subjected to its monopoly on coercion of their rights.

In this paper I argue that in *Anarchy, State and Utopia* Nozick challenges the anarchist interpretation of the Lockean project through what I will call a ‘bilateral’ voluntarist account of the state. Nozick aims to provide a justification of the state’s rightful monopoly on coercion in a territory without an appeal to each politically obliged person’s actual consent. The bilateral nature of the account refers to the way in which individuals acting within their natural rights can establish the state without thereby committing wrongdoing against those who disagree with its establishment. Nozick maintains that a series of rightful bilateral interactions between individuals can give rise to a just state without depriving anyone of her rights – including her natural executive right – and without appealing to actual consent to a Lockean social contract.¹⁰

To clarify what is meant by ‘bilateral’ relations between individuals, we can contrast it to what we might call an ‘omnilateral’ relation between individuals. For example, we can see Locke’s social contract as an omnilateral relation, since it is

⁹ Simmons points out that Kant himself does not make this mistake, since Kant argues for the non-voluntarist account. Nevertheless, the problem with Kant’s non-voluntarist position is that Kant “never explains very clearly why I have an obligation to leave the state of nature and live in civil society with others, rather than just a general obligation to respect humanity and the rights persons possess (whether in or out of civil society)” (2001, p. 140). I have argued against this claim that Kant’s argument is unclear in ‘Kant’s Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature’, *Kantian Review* 13–2 (2008): 1–45.

¹⁰ This is why Bernard Williams describes Nozick’s theory as a “State-of-Nature theory without the social contract” (Williams, 1983, p. 29). Similar descriptions of Nozick’s project are found in Jeffrey Paul’s ‘The Withering of Nozick’s Minimal State’, in J. Paul (ed.), *Reading Nozick* (Totowa, NJ: Rowman and Allanheld, 1983), p. 69, in Thomas Scanlon’s “Nozick on Rights, Liberty, and Property”, *Reading Nozick*, pp. 126f, in Peter Singer’s “The Right to be Rich or Poor”, *Reading Nozick*, p. 39, and in Jonathan Wolff’s *Robert Nozick. Property, Justice and the Minimal State*, pp. 40ff.

a relation between *all* the citizens. The public authority (civil society) may be described as an omnilateral relation between all persons capable of and actually consenting to establish it. Bilateral relations, on the other hand, exist between only two persons or two groups of persons. So, though all Lockean understand rightful relations *in the state of nature* in terms of bilateral relations – how one person interacts with another, the public authority is seen as involving an inherently omnilateral relation between all persons – the social contract. Nozick's project is to explain the establishment of the (minimal) state as the result *only* of bilateral relations between individuals interacting rightfully one with another. Thus, the establishment of a legitimate state requires neither a social contract nor actual consent. This is what Nozick means when he says that his aim is to show that “[a]nything an individual can gain by such a unanimous agreement [the social contract] he can gain through separate bilateral agreements” (p. 90, cf. 18f, p. 118). Nozick's view is that a series of rightful, bilateral actions between individuals can unintentionally, through what he calls an ‘invisible hand,’ bring about a minimal state without wronging anyone in the process. The success of Nozick's project, therefore, depends on whether or not a series of bilateral relations between individuals can serve to establish the state without violating anyone's rights.

The beauty of Nozick's argument, if successful, is that it shows that even if we grant people a natural executive right, strong voluntarism accompanied by an omnilateral conception of the social contract need not accompany a Lockean libertarian account. Instead, weak voluntarism accompanied by a fundamentally bilateral conception of the relation establishing the state can capture the libertarian notion of the state. Therefore, weak voluntarism can be justified as the libertarian and liberal ideal of political obligations, and the criticism that Lockean voluntarism is objectionably anarchist is silenced. Another way to say this is to say that Nozick's justification of the establishment of the minimal state as the result of a series of bilateral relations between persons can explain how, *pace* Simmons, ‘issues of justification’ and ‘issues of legitimacy’ can be seen as identical. Consequently, if

Nozick's account is successful, individuals do not actually have to consent to incur political obligations to obey a particular state's coercive authority in a territory.

Unfortunately, however, as novel and philosophically ingenious as it is, Nozick's project on its own does not appear to succeed. A just establishment of the state requires that no one person's rights is violated. Central to Nozick's bilateral account of the establishment of the state is an account of compensation as a remedy for the infringement of the procedural rights of some persons. Therefore, the success of Nozick's project can be seen to rest on the success of his argument that compensation can do the necessary remedial work. I will argue that it does not. Instead the argument ends in a dilemma: either compensation ends up playing no substantive role in Nozick's account of procedural rights or it is made to play a role that is inconsistent with Nozick's liberal voluntarist commitments. If compensation plays no substantive role, then Nozick has no argument to explain the legitimate transition from what he calls the 'dominant protection agency' to the 'minimal state.' If compensation has a role, then the role it plays leads to an unacceptable arbitrariness and asymmetry within the theory itself. Therefore, Nozick's bilateral account of the establishment of the minimal state is insufficient for its legitimacy.

In the final sections of the paper I argue that Nozick's account of procedural rights contains clues for how to solve the problem. If we can show that there is a fundamental problem with the natural executive right itself – something Nozick seems close to recognize – then Nozick can argue that the state, and only the state, can enforce individuals' rights without wronging anyone. The advantage of this argument is not only that it solves the problems currently characterizing Nozick's position, but also that it can be seen to provide weak voluntarists with the argument they need to justify their assumption that the state does nothing wrong when it enforces individuals rights. It is true, however, that the result is that 'weak voluntarist' arguments would concern the proper limits on state coercion, which would then be seen as supplemented by a non-voluntarist conception of political obligations.

II. NOZICKS BILATERAL ACCOUNT OF THE STATES RIGHTFUL MONOPOLY ON COERCION

Nozick is drawn to Locke's theory of justice in part because of its account of freedom. Nozick remarks approvingly: "[i]ndividuals in Locke's state of nature are in 'a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any other man' (Sect. 4 [Second Treatise])" (p. 10)). Freedom, therefore, is not to be able to do whatever one wants – that would be license – but to do whatever one wants *within* the laws of nature and not as subject to anyone else's 'arbitrary will.' In Nozick's view, the bounds of the laws of nature delineate one's individual rights. "Individuals," Nozick therefore argues, "have rights, and there are things no person or group may do to them (without violating their rights)" (p. ix). Hence, for Nozick, individual rights function as 'side constraints' on individuals' choices when they interact (p. 30ff). That is to say, Nozick's side constraints take the place of Locke's laws of nature: they are the rightful restrictions on interactions that must be upheld if freedom is to be possible at all. An overarching aim for Nozick is therefore to arrive at an account of the state that avoids Locke's infamous anarchism and yet is compatible with Lockean freedom so understood.

In true Lockean spirit, then, Nozick identifies the "fundamental question of political philosophy... [as] whether there should be any state at all? Why not have anarchy?" (p. 4) Nozick, however, parts company with Locke by investigating whether the availability of private resources within the state of nature is sufficient to deal with the inconveniences characteristic of it. Only by evaluating "how serious are the inconveniences that yet remain to be remedied by the state," Nozick argues, is it possible to "estimate whether the remedy is worse than the disease" (p. 11). More specifically, Nozick explores the possibility that individuals could "separately sign up for personal protection" by private protection agencies instead of establishing the state. If a private agency can legitimately take the place of a state, then Locke's conception of the state as

arising through the social contract, by all individuals agreeing “with other men to join and unite into a community” (p. 132, cf. p. 131), appears unnecessary. As Nozick suggests, “perhaps joint agreement where each has in mind that the others will agree and each intends to bring about the end result of this is not necessary for a Lockean compact” (ibid.).

Nozick explains that a so-called ‘minimal state’ can legitimately arise within the state of nature rendering unnecessary the social contract. Persons in the state of nature can attempt to remedy the inconveniences by establishing private security companies to protect their individual rights. In turn, these private companies can be transformed, according to Nozick, into ‘minimal states’ without wronging anyone in the process. In this way, Nozick argues that it is extremely likely that “a state would arise from anarchy (as represented by Locke’s state of nature) even though no one intended this or tried to bring it about, by a process which need not violate anyone’s rights” (xi). Nozick labels this process an ‘invisible hand’ account (p. 19). “No express agreement,” Nozick argues, “and no social contract... is necessary” to explain the minimal state’s rightful use of coercion (p. 18). Rather, the explanation just is that a minimal state with a certain kind of monopoly on coercion in a territory is likely to arise as the result of individuals rightfully interacting with each other to provide (privately) for their own protection, and it can happen, or so the argument goes, without violating anyone’s rights. Hence Nozick claims, contra Locke, that ‘civil’ society can arise within the state of nature (p. 133).

Essential to Nozick’s argument that an account of bilateral relations is sufficient to explain the transformation from the protection agencies to the minimal state is an account of compensation as part of a conception of procedural rights. Procedural rights, Nozick explains, concern both the right to be subjected only to just procedures and the right to a just determination of which procedures should be employed when establishing guilt in particular cases of wrongdoing (p. 96).¹¹ Certain

¹¹ Cf. Lacey, A. Rawls, *Robert Nozick* (Princeton: Princeton University Press, 2001), p. 65, and Jonathan Wolff, *Robert Nozick. Property, Justice and the Minimal State* (Stanford, CA: Stanford University Press, 1991), p. 62.

ambiguities and problems crop up in Nozick's account of procedural rights. In order to see these ambiguities, I first outline the more non-controversial aspects of the story of how the minimal state gets established (Sect. 2.1.). Subsequently (Sect. 2.2) I turn to the ambiguities. In particular, I note how it is interpretively unclear whether the minimal state obtains rightful authority over *all* independents or *only* over those independents who attempt to enforce their rights by means of unreliable procedures. As we shall see, the two interpretive options actually lead Nozick's account of the justification of the transformation from the ultraminimal to the minimal state by way of compensation in a dilemma: either compensation has no role to play or it is made to play a role that Nozick's voluntarism cannot permit.

A. From Protection Agencies to Minimal States

Nozick's argument to justify the minimal state starts with the assumption that individuals in the state of nature "generally satisfy moral constraints and generally act as they ought" though not always (p. 5). Since some individuals do not always act as they ought, those living in the state of nature are likely to form professional protective associations (PAs), or private security companies, to protect their rights (pp. 10–13). In time, it is likely that one of the PAs in each geographical territory will become dominant: "[o]ut of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest there arises something very much resembling a minimal state or a group of geographically distinct minimal states" (p. 16f). When a particular PA gains dominance it is rational for all individuals living in the area to join it rather than any less powerful association. Therefore, in all likelihood, each geographical territory will eventually come under the control of a dominant protective association (DPA).

Nozick gives two reasons why a DPA 'merely resembles' and so fails to be a state. First, it does not "announce that, to the best of its ability... it will punish everyone whom it discovers to have used force without its permission," and second, "under it... only those

paying for protection get protected” (p. 24). In other words, a DPA fails to be a state because it does not enjoy a monopoly on coercion, and it does not provide protection for all persons living within its territory. But Nozick claims that lacking these two features is “deceptive” (p. 25, cf. 51f, p. 113), because the DPA can rightfully transform itself into a political structure with these characteristics (a state) without wronging anyone in the process. As explained below, it is somewhat controversial what Nozick means by ‘deceptive’ here. For now, let me simply note that Nozick labels a DPA that obtains some kind of monopoly on coercion an ‘ultramiminal state’ (UMS). If the DPA has the additional feature – through “redistributive compensation” – that independents at least can use the DPA’s legal system to enforce their rights against the DPA’s members, then it is called a ‘minimal state’ (MS). The difference between the UMS and the MS, therefore, is that the MS provides at least some protection for all.¹²

Nozick’s account of the enforcement of procedural rights with respect to independents plays the crucial role in justifying the coercive authority of the minimal state. It is this argument that moves us from the DPA to the MS. As noted above, procedural rights concern our rights to have our guilt established by reliable procedures. Moreover, Nozick considers the enforcement of procedural rights a type of risky activity that can be prohibited as long as there is compensation for the involved infringement of these rights. Nozick’s general claim seems to be that independents can be prohibited from enforcing their procedural rights privately because their unreliable procedures pose too much risk for others. The procedures are too unlikely successfully to identify wrongdoers. For example, Nozick argues: “[a]n independent might be prohibited from privately exacting justice because his procedure is known to be too risky and dangerous... or because his procedure isn’t known not to be risky” (p. 88). But Nozick also argues that anyone prohibited from privately enforcing her own procedural rights must be compensated for the disadvantage incurred. Compensation, therefore, is Nozick’s remedy for prohibiting someone from privately enforcing her rights. It is by

¹² The textual ambiguity concerns whether a DPA and an UMS constitute the same entity.

providing such compensation that the UMS transforms itself into the MS, namely by assuming some protection for all.

The appropriate amount of compensation, according to Nozick, is “full compensation,” meaning that the one who infringes upon another’s rights by preventing her from engaging in a risky activity, must leave the one infringed upon on as high an “indifference curve”¹³ as she enjoyed before the restriction was put in place. Such full compensation is provided by the UMS transforming itself into a MS (pp. 82, 87). The legitimate MS must therefore secure independents at least an “an unfancy [insurance] policy” against the minimal state’s clients (p. 113). In this way the MS compensates independents by providing insurance that they have enforceable procedural rights even though they are prohibited from enforcing them on their own. The insurance consists mostly in access to at least a decent defence of their natural rights through the MS’s legal system. This account of the procedural rights of independents and the remedial work of compensation is crucial to Nozick’s project to refute the anarchist, as it shows how a minimal state with a monopoly on coercion can arise without actual consent *and* without wronging anyone in the process. It also caps Nozick’s project to show that a series of bilateral interactions can result in the transformation from the state of nature to the MS.¹⁴

¹³ The concept of an indifference curve is borrowed from economics. A person’s indifference curve expresses his preference with regard to various goods, and it shows which combinations of these goods that leave him equally satisfied.

¹⁴ Regardless of interpretation, Nozick’s account of the rightful domain of the DPA “does *not* extend to quarrels of nonclients *among themselves*” (pp. 109, cf. 110). As emphasized by Robert Paul Wolff (1983, p. 81) and Jonathan Wolff (1991, p. 71), Nozick argues that the DPA does not have a general right to intervene in the independents’ interactions – let alone for paternalistic reasons. The DPA does not wrong independents, however, by giving assistance to those who request help (p. 109), though this presumably does not mean that the DPA *must* intervene even it is a defenseless victim who asks for help. After all, an independent is not seen as having the *right* to the DPA’s protection, since only those who have the means to *buy* protection from the protective agency can become members of it. So, the DPA’s assistance must be either supported by the actual consent of its members or at least provided through a contract with the independents who request it, since otherwise it wrongs its own clients by non-consensually transferring their resources to the independents.

At no time during this transformation (from the PA-DPA-UMS-MS) is there an appeal to an omnilateral relation between all the persons as provided by the Locke's social contract. Even the last step to the MS is a bilateral relation, namely between the MS (an artificial private person) and individual independents (natural private persons). Moreover, the MS is clearly a state, Nozick argues, since it enjoys a just monopoly on coercive authority with regard to all interaction involving its members, and it provides some protection for everyone living in its territory (p. 113f, 117f, p. 119). Nozick concludes that he has successfully silenced the objections from anarchists:

The moral objections of the individualist anarchist to the minimal state are overcome. It is not an unjust imposition of a monopoly; the *de facto* monopoly grows by an invisible-hand process and *by morally permissible means*, without anyone's rights being violated and without any claims being made to a special right that others do not possess. And requiring the clients of the *de facto* monopoly to pay for the protection of those they prohibit from self-enforcement against them, far from being immoral, is morally required by the principle of compensation (p. 115, cf. p. 51).

Against the (Lockean) anarchists, Nozick claims to have demonstrated that the (minimal) state's monopoly on uses of coercion and its apparent redistribution of resources to provide protection for all has not involved any wrongdoing. In fact the last step, from the UMS to the MS is seen as morally necessary.

B. The Problems with Compensation as Justifying Infringements on Rights

To illustrate the problems in the foregoing argument, it is necessary to start by paying attention to an interpretive ambiguity in Nozick's account of the status of political obligations in the transition from the DPA to the MS. Here we must return to Nozick's remark that the DPA's failure to be a state is 'deceptive.' The ambiguity concerns the sense in which Nozick takes himself to refute Locke's anarchism. On one interpretation everyone (independents and members) must use the MS's legal system when interacting with its citizens. That is, on this interpretation all independents, meaning even those

independents with reliable procedures must use the MS's procedures, as parts of its legal system, when interacting with its members.¹⁵ On another interpretation the monopoly on coercion enjoyed by the MS is more limited in that it never involves denying independents the right to enforce *reliable* procedures of justice against its clients. Only unreliable (risky) procedures are prohibited. Nevertheless, to ensure that only reliable procedures are employed, the MS requires independents to obtain its seal of approval before enforcing their own reliable procedures against its members. Moreover, those for whom approval is denied can still enforce their rights through the MS's legal system.¹⁶ The following objections to Nozick's justification of the minimal state will be sensitive to these differences in interpretation in that which of the two horns of the dilemma we face depends on which interpretation we choose. On the first interpretation, compensation plays an important role but one that is impermissible given Nozick's voluntarist commitments. On the second interpretation, compensation ends up with no role to play, and we have no argument to explain the move from the UMS to the MS.

Consider the first interpretation wherein the MS enjoys a more complete monopoly on coercion. This interpretation leads to the horn in which compensation plays a crucial role. On this interpretation, the transformation from the DPA to the MS requires two steps: first from the DPA to the UMS and then from the UMS to the MS. The DPA becomes a UMS when it outlaws *all* individual ('self-help') enforcement of justice or denies *all* persons on the territory (including independents) the

¹⁵ On this interpretation Nozick can be seen as replacing Locke's 'strong' voluntarism with 'weak' voluntarism, since the rightfulness of state authority is explained simply in terms of the independents' hypothetical (rather than actual) consent to the minimal state's use of coercion.

¹⁶ In this case, actual consent is always required to establish a complete monopoly on coercion in the traditional sense – and so Nozick is still seen as defending some form of 'strong voluntarism'. Nevertheless, since the MS is simply the 'sole authorizer' on coercion on such an interpretation, I believe it is somewhat misleading to equate Nozick and Locke's strong voluntarist positions.

right unilaterally to enforce their procedural rights against its members. On this reading, the UMS is seen as denying any independent the right to employ coercion against its members on the grounds that *some* independents' procedures are unreliable.¹⁷ Moreover, according to this interpretation the UMS can take this step only if it also takes a second step of compensating independents inconvenienced by the prohibition against the enforcement of reliable procedures. In taking this second step, the UMS is transformed into the MS.¹⁸

Textual support for this interpretation is found in the section entitled 'Protecting Others' in *Anarchy, State and Utopia*:

If the protective agency deems the independents' procedures for enforcing their own rights insufficiently reliable or fair when applied to its clients, it will prohibit the independents from such self-help enforcement. The grounds for this prohibition are that the self-help enforcement imposes risks of danger on its clients. Since the prohibition makes it impossible for the independents credibly to threaten to punish clients who violate their rights, it makes them unable to protect themselves from harm and seriously disadvantages the independents in their daily activities and life. Yet it is perfectly possible that the independents' activities including self-help enforcement could proceed without anyone's rights being violated (leaving aside the question of procedural rights). According to our principle of compensation... in these circumstances those persons promulgating and benefiting from the prohibition must compensate for the disadvantages imposed upon them by being prohibited self-help enforcement of their own rights against the agency's clients. Undoubtedly, the least expensive way to

¹⁷ This reading seems consistent with that of Robert L. Holmes. He argues that the difference between the DPA and the UMS lies in the latter's monopoly on coercion. He argues that the UMS comes into existence "if people do in fact... empower the DPA" to protect them against unreliable procedures (Holmes, 1983, p. 58f).

¹⁸ Hence, on this interpretation independents with unreliable procedures are not seen as having a right to compensation. This seems reasonable since Nozick several times clearly seems to say that no one has a right to enforce unreliable procedures. For example he argues that "[t]he principle is that a person may resist, in self-defense, if others try to apply to him an unreliable or unfair procedure of justice" (p. 102), and that a person "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". Indeed, on (p. 107f) Nozick argues that the protective agency may punish independents who subject its clients to unreliable procedures even if the client is guilty.

compensate the independents would be to *supply* them with protective services to cover those situations of conflict with the paying customers of the protective agency (p. 110).¹⁹

On this interpretation of this passage, Nozick is seen as justifying *both* the transformation from the DPA to the UMS *and* the transformation from the UMS to the MS.²⁰ The transformation from the DPA to the UMS takes place when it outlaws all self-help enforcement because many of the independents' procedures are too risky. But without self-help enforcement independents find themselves unable to enforce their rights against the clients of the UMS. From Nozick's point of view this is problematic because 'it is perfectly possible' that some of these independents have solid and reasonable conceptions of justice, including reliable procedures, and therefore could exercise their natural rights without violating the clients' (members) rights.²¹ Thus, Nozick concludes that the UMS must pay compensation to the independents with reliable procedures and thereby transform itself into a MS. Moreover, on this interpretation, the lack of a monopoly on coercion in relation to independents is why the DPA need not pay compensation. In contrast, because the UMS deprives independents with solid conceptions of procedural justice from exercising their natural executive right, it must pay compensation, and in so doing it becomes a MS.

The problem with the philosophical position put forward as a result of this interpretation is that it is hard to see how a libertarian like Nozick can appeal to compensation in this way to justify the MS without also contradicting fundamental voluntarist commitments. First, remember that the MS is an 'artificial' private person that represents only its clients – not the independents. Hence, the MS cannot have the right to do

¹⁹ See also pp. 113, 119 for textual support for this reading.

²⁰ Given the title of this section and the emphasis on compensation in this passage, one can argue that Nozick is here only concerned with the transition from the UMS to the MS. But that is beside the current point, which merely is to indicate why the two-step reading is textually plausible.

²¹ On this reading, when Nozick says 'leaving aside the problem of procedural rights' he presumably thinks of the special problem arising from the fact that many independents have unreliable procedures.

anything on behalf of its clients in relation to independents that its clients cannot do themselves. As Nozick emphasizes time and again, he adheres to the fundamental Lockean voluntarist assumption that the rights of the minimal state must be explained “without any claims being made to a special right that others [private individuals] do not possess” (p. 115, cf. 6, 89, 118, 133). Consequently, on the interpretation above, arguing that the MS’s monopoly on coercion is justifiable as long as it pays compensation requires that Nozick first demonstrate that *any* person has a right to deprive another person of his right to enforce *reliable* procedures given appropriate compensation.

In order to make this case, Nozick must show that person A may deprive person B of her procedural rights because another person C has unreliable or risky procedures. The problem with this argument is manifold. First, it would entail that even though person C is external to the bilateral relation between A and B, person A can appeal to person C’s behaviour to deny B her rights. And this is an impermissible move on Nozick’s bilateral account of rightful relations. Second, the argument makes no use of Nozick’s original argument about risk. As we saw above, when Nozick introduces the risk argument, he says that a person can infringe upon another’s procedural rights if this person’s (and not somebody else’s) procedural rights are ‘risky or not known not to be risky.’ But in our example, person B’s procedures are not risky from the point of view of A (person A deems them to be reliable). Hence on this interpretation, person B is seen as rightly being denied her right by person A without having done anything wrong or posing any risk to A.

Third, the argument entails that Nozick is committed to the view that after having denied person B of his right to enforce his reliable procedures, the compensation required to rectify B’s disadvantage is simply for A to ensure that B can able to use A’s procedures instead of B’s own. So not only does person A get to continue denying person B the right to enforce his reliable procedures, but the proposed remedy is that B must do as A wants all

along, namely use A's procedures.²² Fourth, the position entails that if a weaker person B (the independent) accuses²³ a stronger person A (the MS/the stronger party) of wrongdoing, the stronger person A gets to choose the procedures with which the weaker person B must prove the stronger persons' (A's) guilt and the stronger person (A) gets to demand that the weaker person B proves the guilt to him. Again, remember that in relations to independents, the MS is simply an agent acting on behalf of its members – it is not a representative of everyone involved in the conflict or a neutral negotiator/agency.²⁴ Hence, on this position, the stronger person gets to choose the procedure according to which the weaker must prove the stronger person's guilt and the stronger gets to be the judge of whether or not his guilt is proven. Finally, on this argument there appears to be a strange notion – if any – of 'coercive' punishment left, since it becomes a kind of self-punishment if guilt against the client is proven. When the client is punished, the agent acting on behalf of the client decides her punishment, but since the client has consented to this arrangement, she has consented also to this possible outcome – and she is not properly speaking subjected to 'coercive' punishment.

²² One might suggest a similar, though somewhat distinct interpretation. On this interpretation, the state outlaws all self-help enforcement because it does not know whether particular individuals have reliable or unreliable procedures. This interpretation is problematic in light of Nozick discussion of the need for publicity regarding procedures. For example, Nozick argues that "[e]very individual does have the right that information sufficient to show that a procedure of justice about to be applied to him is reliable and fair... be made publicly available or made available to him" (p. 102, cf. 100f). Hence, though it is true that those who do not make their procedures public cannot be seen as having a right to enforce their procedures, this does not seem to be the argument that gives the state the general right to outlaw self-help enforcement (pp. 102–104). Moreover, even if we permit this interpretation, the problem is that the state can now only outlaw self-help enforcement given that independent do not make their procedures public.

²³ Alternatively, the stronger person A may accuse B of wrongdoing. The point is that because the MS is always the stronger person, it will always be given such an asymmetrical, strong standing in the relation – or might replace right.

²⁴ With regard to this relation, we can therefore not assume that the PA is separate from its member – they are both 'the same' legal person (A), since the PA merely acts on behalf of its members.

In sum, this interpretation of Nozick's account of procedural rights effectively replaces right with might: B's actions are subjected to A's (or the MS's) arbitrary preferences regarding procedural rights rather than 'neutral' side constraints. That is to say, if the above is correct, then procedural rights as outlined by Nozick fail to operate as side constraints on interactions, and instead become the means of some, namely the powerful, to subject others to their arbitrary choices. But if this is the case, then Lockean freedom, which, in Locke's words, requires the subjection of interactions to the laws of nature (side constraints) rather than any particular person's arbitrary choice or 'will,' is denied.

These problems might tempt us to follow the other interpretative route. On this interpretation instead of two there is only one transformative step: the UMS is transformed into the MS either when it announces itself as the sole authorizer of reliable procedures²⁵ or its dominance makes it impossible for independents to enforce unreliable procedures. Therefore, on this interpretation, the DPA and the UMS are seen as the same entity.²⁶

²⁵ See, for example Wolff (1991, pp. 46, 71ff) for such an interpretation.

²⁶ For example, A. R. Lacey (2001, p. 59), Singer, Peter, in 'The Right to be Rich or Poor', *Reading Nozick*, p. 39f, and Robert Paul Wolff, in 'Robert Nozick's Derivation of the Minimal State', *Reading Nozick*, p. 77, do not make any significant distinction between the DPA and the UMS. They agree that when the DPA has become truly dominant it has become a UMS. These interpretations are encouraged by the fact that the section following Nozick's discussion of the enforcement of reliable procedures is entitled "The De Facto Monopoly". Here Nozick says that what is unique about the DPA is that it is "the most powerful applier of principles" (p. 109), yet it does not have a right to announce that everyone must obtain its approval prior to applying procedures since no one can have such a right (p. 101, cf. 119). This interpretation also fits well with Nozick's view that the monopoly enjoyed is a *de facto* and not a *de jure* monopoly on coercive power, and that it involves prohibiting the use of unreliable procedures against the agency's clients (p. 109). Hence, the agency never claims to be the "sole authorizer of violence", but its *de facto* monopoly entails that it is "the territory's sole effective judge over the permissibility of violence" (p. 117f). Simmons (2001, pp. 126–128) gives an alternative, strong voluntarist interpretation of Nozick. He argues that "[t]he state's special legitimacy arises from the fact that its consenting clients give it a greater share of the collectively held 'right to punish' than held by any of its competitors (e.g., individual nonclients, cooperative associations of allied nonclients" (128, n. 15). I cannot properly engage this interpretation here

In addition, independents are *not* seen as prevented from enforcing *reliable* procedures, *only unreliable* procedures.²⁷ But the immediate problem with this interpretation is that Nozick's account of compensation to independents now seems superfluous. Surely no one can have the right to be compensated for being denied the opportunity to enforce unreliable procedures of justice? That is, it seems completely reasonable and not an infringement of a right to require people to use reliable procedures of justice when they enforce their rights against others. But if compensation is superfluous to the establishment of the minimal state, then there is no libertarian argument that takes us beyond the DPA, and on this interpretation too, Nozick has not succeeded in justifying the coercive authority of the MS.²⁸ Therefore, Nozick has

Footnote 26 continued

beyond noting two sceptical responses. First, this interpretation entails that in Nozick does not actually provides the argument for the state in his main chapter on the state (entitled "The State"), but only provides it in the subsequent chapter (entitled "Further Considerations on the Argument for the State"). Second, Nozick's reasoning now becomes very problematic: Nozick first argues (p. 139) that the right to punish may be a right held jointly and so may be impossible to realize in the state of nature, and then he proceeds by claiming that this *entails* that a larger group or its representative has more right to punish than a smaller group. But there is no entailment here. If the right to punish is a joint right, then only the joint group can exercise it – not the 'almost' joint group.

²⁷ This limitation on the extent of the monopoly on coercion enjoyed by the MS fits well with several features of Nozick's text. For example, it fits well with how his whole compensation argument is based on an argument concerning the risk entailed by employing unreliable procedures of justice (pp. 83, 87), and with how Nozick never explicitly argues that *all* independents are compensated – not even when he sums up his findings. Instead, Nozick seems to say that only those with unreliable procedures (or those independents about whose procedures no such information is publicly available) can be disadvantaged in this way (pp. 113–115, 117–119).

²⁸ Note that all these interpretations are consistent with Nozick's view that the members can 'opt out' of the PA's arrangements (p. 110) as well as his claims that members can choose to buy only insurance against "theft, assault, and so forth" and not also the more comprehensive package that also protects "against risky private enforcement of justice", which establishes the MS (pp. 114, cf. 110, 119). On the interpretation of a non-traditional conception of monopoly on coercion, the members can change their minds and leave the

not given us a viable Lockean alternative to Locke's strong voluntarist account of political obligations.

III. NOZICKS ACCOUNT OF PROCEDURAL RIGHTS – ONE MORE TIME

Interestingly, other problems not only with Nozick's account, but more importantly with the Lockean notion of a natural executive right, become evident once light is shed on Nozick's difficulty in establishing a legitimate MS. The problem is that Nozick appears unable to justify the establishment of an original protective agency (PA), which is the very first step toward the MS. This is for two reasons having to do with procedural rights: first, it is unclear whether Nozick thinks guilty persons have procedural rights in the state of nature, and such rights are important to the justification of the PA. Second, even if we assume the guilty have procedural rights, Nozick seems unable to justify the way in which the establishment of the PA fundamentally changes the type and amount of evidence required to determine guilt, and without such an explanation the establishment of the PA appears to contradict Nozick's conception of rights functioning as side constraints. This latter failure points to some interesting, and yet currently unaddressed, problems facing any defence of the Lockean natural executive right. These problems give us good reason to think that giving up the idea of the natural executive right might be an advantage for liberal accounts of freedom – something that is beneficial for those seeking to defend a weak voluntarist account of political obligations.

Footnote 28 continued

PA and they can choose to interact with the independents without the PA's protection. On the traditional interpretation of monopoly on coercion, because it distinguishes between the DPA and the UMS, one can argue that although once the UMS (with its full monopoly on uses of coercion) is established, it must assume responsibility for independents' procedural rights (pay compensation or transform it into a MS). But the members of the DPA may resist the conversion into an UMS in the first place. Hence both types of accounts can explain opt out options and how the MS may never be established in the first place.

*A. Procedural Rights of the Guilty and the Establishment
Protective Agencies*

Some of Nozick's statements suggest that he is deeply puzzled about whether or not criminals should be protected by procedural rights (pp. 103–107). For example, Nozick says that it is not so bad that a guilty person is found guilty by means of *unreliable* procedures, since he is, after all, guilty (p. 107). This suggests that the guilty do not have procedural rights. Yet at the same time, he emphasizes, a protective agency must treat everyone, including the guilty, as if they have procedural rights, since it does not know if the accused is guilty. "The [protective] agency," Nozick explains "does not, of course, *know* that its client is guilty, whereas the client himself does know... of his own guilt" (p. 103), and Nozick presumably also thinks that in many cases the independent wrongdoer knows of the client's guilt. Consequently the PA must take reasonable steps to ensure that the people accused of wrongdoing really are guilty. The immediate problem with this argument, however, is that if the guilty do not have procedural rights, then the PA cannot assume and exercise them on their behalf. After all, the rights of PA must be reducible to the rights of individuals.²⁹

So, let us assume that the guilty do have procedural rights. In this case, there must be an argument justifying the way in which the establishment of a PA radically changes the amount and type of evidence needed by independents to prove accusations of wrongdoing against the PA's clients. The establishment of a PA entails that *all* cases involving its clients must be treated as having

²⁹ This makes me suspect that an important discussion missing from Nozick's discussion of procedural justice is a discussion of procedural rights versus procedural duties. It seems that what he finds intuitively plausible is not that criminals have procedural rights in the state of nature, but that those who accuse them of wrongdoing have procedural duties. But if we cannot make duties and rights match up in a libertarian account of procedural justice in the state of nature, then this in itself deserves attention – an attention that Nozick unfortunately does not give it. Even though Nozick's discussion of procedural justice is rather ad hoc, unstructured and hard to make sense of, I still think it's worth pursuing some of its implications since these give rise to important questions for Lockean defenses of the natural executive right.

an inescapable, serious uncertainty regarding a person's guilt. Innocence is the assumption until guilt is proven. Hence, Nozick must demonstrate that the PA has the right to force everyone, including independents, to treat *all* cases involving its clients as having such an uncertainty. Nozick, however, does not address the consequences in this difference in epistemic standing between the client as perpetrator, the independent as victim, and the PA as a third party. The problem is that prior to the establishment of the PA all persons can confidently exercise their rights when they have full knowledge of who violated their rights. But after the PA is in place the victim must prove the perpetrator's guilt *to the PA*. And surely it is quite a different task and a much higher standard to meet to prove one's case to a third party to a crime. Hence, to justify why the PA does not infringe on the independent's right to exact justice for a crime committed against her, Nozick must explain why the PA has the right to force independents to accept the fundamental way in which its existence changes how they exercise their natural executive right. Moreover, it seems that a suitable explanation is unavailable since a person's procedural rights appear not to include the right to demand that her guilt be proved to a third party. If procedural rights were to include such a right, then the possibility of enforcing one's rights against another would be subject to a third person's consent, which leaves Nozick with a non-Lockean conception of rights. On such a conception, people would not be seen as having a natural right to enforce their rights. Rather, the exercise of one's 'natural' executive right would require someone else's consent. Furthermore, if individuals cannot be said to have such a non-consensual right, then surely neither can the PA, since all rights of the PA are reducible to the rights of individuals. Therefore, it seems that Nozick cannot justify the establishment of the PA.

Consider the following illustration of the problem as seen through the lenses of a Lockean position. Assume that we are in the state of nature. In his own kitchen, in broad daylight a man is tied down and raped by his neighbour. Although the rapist is clearly seen by his victim, cleverly, the rapist leaves behind no physical evidence of his guilt. Nevertheless, consistent with the Lockean position it seems reasonable to argue that the victim's

case against the rapist is not lessened because he has no 'further evidence' beyond his own first-hand knowledge. Although it is reasonable that he should check that he has not been dreaming or that his mental capacities are well-functioning, it is unreasonable to ask the victim to prove the rapist's guilt to a third party – say another neighbour. Not only would such a restriction undermine the point of the natural executive right, but also and more importantly, it is inconsistent with it, since its exercise is now dependent upon the consent of another, namely the third party to whom the victim must now prove the rapist's guilt. So it seems reasonable that a Lockean theory must allow that the victim can enforce his rights by punishing the rapist neighbour.³⁰

Note, however, what happens when a PA comes into existence. The PA *cannot know* first-hand if a client (the rapist in the illustration) is guilty, and so it *will always* require additional physical evidence beyond the victim's testimony – 'word against word' will not be good enough. Therefore, the PA will always require an independent (the victim) to prove his case to the PA – a third party.³¹ But since the rights of the PA and the rights of individuals are co-extensive on Nozick's (and any) Lockean account and individuals in the state of nature do not have this right, there appears to be no good reason justifying a PA having that right. Therefore, along with the problems of establishing the MS as argued in the previous section, perhaps more devastating for Nozick is that issues of procedural justice

³⁰ In order for the lack of physical evidence to become more important, we presumably must introduce some serious doubt into the example. For example, we may assume that it is dark in the kitchen and so the victim, though he thinks it is the neighbour (he has the same smell, constitution, voice etc.), he is not certain. In this case, it seems reasonable that the victim requires some more evidence to ensure that he is correct in his suspicions. But also in this case, it seems fair to argue proving the case to a third person is still not required – only more evidence.

³¹ In fact, the PA presumably must establish which kind of evidence different types of crimes requires.

actually show why individuals cannot rightfully establish PAs in the state of nature in the first place.³²

At this point Nozick might object that Locke's own account allows that everyone has such a right to change the procedural requirements involved in a particular case. According to Locke, he might argue, it is included in the natural executive right that all morally and legally responsible persons have the right to authorize others to enforce the laws of nature on their behalf. Hence, there is no inconsistency in a person's authorization of a PA to enforce his rights for him. And indeed, Nozick may continue, this is a virtue of the Lockean theory. It is this feature of the natural executive right that makes it possible to be protected by our rights when we are incapable of actually exercising our natural executive right on our own.

If this is a viable counter-objection, and I am tempted to think that it is, then it shows that there is a corresponding, serious problem with the Lockean natural executive right. To see why, let's return to the example above. Assume that the day after the rape, the victim manages to capture his rapist. He then locks him up while trying to establish the appropriate punishment. Now the rapist shouts out that he has authorized another neighbour to exercise his procedural rights on his behalf. If the Lockean authorization story holds up, then the victim must now, in order to live up to his procedural duties and the rapist's procedural rights, prove his case to whatever third party the rapist has authorized. By mere choice the rapist is able to change the nature of his procedural rights and his victim's procedural duties. But then, again, there is the problem that one person's (the victim's) choices are subject to another person's (the rapist's) arbitrary choice ('will') rather than to side constraints ('laws of nature'). The victim cannot punish the

³² It may be worth noting a difference between my argument and the one provided by Nozick in his chapter on "Further Considerations on the Argument for the State". Here Nozick considers the objection that a person or a DPA may prohibit others from establishing a (new) DPA because "this will reduce... [their own] security and endanger" them (p. 121). My argument, in contrast, is not one of reduced security and increased dangers, but one that focuses on the question of whether the establishment of the protective agency deprives persons of their natural procedural rights.

rapist without the authorized third party's consent to the case having been sufficiently proved. If so, then Locke's own account of the natural executive right actually fails to provide a non-consensual conception of freedom, since the possibility of rightful interactions once more has become subjected to some particular person's consent. Therefore, unless libertarians can show us a way out of this conflict with the natural executive right, it seems fair to say that whatever is the correct liberal account of procedural rights it cannot be this one. Or, more radically, perhaps liberal accounts of justice should reconsider their commitment to the natural executive right, as the weak voluntarists have done.

IV. AN ALTERNATIVE NOZICKEAN RESPONSE TO THE LOCKEAN ANARCHIST

Liberal theory has recently been dominated by weak voluntarist theories, even though these theories have been unable to respond to strong voluntarist objections. One of the great virtues of Nozick's theory were it successful is that it would provide the argument weak voluntarists are looking for. Indeed, Nozick's attempt is particularly attractive in that, if successful, he would provide an argument that Locke himself – the foremost champion of strong voluntarism as the liberal ideal of political obligations – would have to find acceptable. Although I have argued that Nozick's attempt fails as it is, the lessons from Nozick's attempt are indeed instructive for how to help weak voluntarism make its case. The reason is that some of what Nozick has to say about procedural rights can show that we have good liberal reasons to be sceptical to the virtues of defending a natural executive right. And if we have good reasons to let go of the natural executive right, not only can we help overcome the problems facing Nozick's own account of procedural rights, but also we can justify the coercive authority of a state without requiring actual consent. On this argument, we can explain – against Lockean anarchism – why it is in principle impossible to exercise individual rights in the state of nature, and consequently why choosing to stay in the state of nature is to commit wrongdoing and why no one does anything

wrong in establishing the state. True, such a move requires these accounts to defend a non-voluntarist conception of political obligations and then see their current hypothetical arguments as outlining the state's rightful uses of coercion, but it seems that these accounts will give up nothing they consider important in so arguing.

At one point in his treatment of procedural rights, Nozick notes that the natural law tradition has failed to specify adequately the actual procedures constitutive of procedural right and that he suspects the reason is due to a deep problem of indeterminacy (p. 101, cf. 97ff.). The problem involves specifying, once and for all, the procedures comprising these rights. For example, exactly which criteria must be fulfilled in order to have demonstrated guilt appropriately? And although Nozick suspects that some of the indeterminacy problems in procedural right can be solved, he seems sympathetic to the claim that there are "acute problems" that resist solution, namely the possibility that "two groups each believe their own procedures to be reliable while believing that of the other group to be very dangerous" (p. 98). Moreover, though he often points out that some kinds of procedures obviously are better than others – using probability based on empirical evidence is obviously a better way of establishing guilt than tea leaves (p. 99) – the problem is that there are, for example, many reasonable suggestions with regard to, for example, what counts as sufficiently probability of guilt. "With the best will in the world" Nozick argues "individuals will favor differing procedures yielding differing probabilities of an innocent person's being punished" (p. 97). Moreover, Nozick concludes by pointing out that the natural right tradition has been unable to supply a single answer, even if it remains committed to the idea of procedural rights by proposing various, reasonable yet different conceptions (p. 101).

Nozick does not investigate nor draw out the implications of the indeterminacy problem he notes. But if Nozick is right that procedural rights are indeed characterized by a deep problem of indeterminacy, then we have our reply to the anarchist. The reason is that the enforcement of any particular member of a set

of reasonable procedures results in the subjection of one person's freedom to what Locke would describe as someone else's 'arbitrary will' rather than to the 'laws of nature' or Nozick's side constraints. What follows from this is that freedom understood in terms of choice within laws of nature that restrict everyone equally – the Lockean conception of freedom – is proven impossible in the state of nature. With this argument in hand we can reply to Lockean anarchism that it is in principle impossible to exercise individual rights in the state of nature without also denying freedom. Consequently, choosing to stay in the state of nature is to commit wrongdoing, and therefore, no one does anything wrong in establishing the state.

The general problem highlighted by the problem of indeterminacy in procedural rights seems to be a problem of specification and application of general normative principles to empirical interactions. There are, in other words, many reasonable answers to the question of which procedures must be implemented to enable an individual's procedural right. And yet if this is the case, then individuals' arbitrary choices will determine how to specify and apply the general normative principle. Consequently, the arbitrary choices (will) of individuals rather than freedom understood as restriction by laws of nature rules the state of nature. Thus, justice is impossible in the state of nature. The only way to overcome the problem seems to go via the notion of a *public* authority – a notion of a choice or a will that is not any particular person's choice or will, but the will or choice of all. Only through such a public will is it possible to interact as persons subject to the 'laws of nature' or side constraints rather than to some particular person's arbitrary will or choice. Therefore, the establishment of the state (the public authority) is constitutive of realising Lockean freedom. It is not merely a prudential response to the inconveniences of the state of nature.³³

It is important to note that this argument alone does not require Nozick, the weak voluntarist, or any Lockean libertarian

³³ The structure of this argument is, I take it, the structure of the argument Kant uses when he argues against Locke's defence of the natural executive right in *The Metaphysics of Morals*. I explore this argument in...

to give up his idea that the state's rights are in principle "de-composable without residue" to those of individuals (p. 89). This is not to say that these positions take the state and individuals to have exactly the same rights. Rather that the state's rights are 'de-composable' to individuals' rights is intended to capture the idea that the rightful limits of state coercion are reducible to individuals' rights when natural executive right is not part of the equation, since the state has no separate rights of its own to enforce. The point is that the limit of enforceable rights must be the same: the state cannot enforce a right that individuals do not already have, or the boundaries of justified coercion cannot be drawn differently from the point of view of the state and from the point of view of individuals.³⁴ So, the argument concluding that justice is impossible in the state of nature challenges the idea that individuals can be seen as having a natural executive right at all. Due to the problems characterizing procedural rights, individuals cannot enforce their rights without thereby replacing side constraints/the laws of nature with particular person's arbitrary choices/wills. Therefore, the natural executive right comes into conflict with the Lockean notion of freedom. The result is that staying in the state of nature is to commit wrongdoing and consequently no one is wronged if forced to enter civil society. Against Simmons's words, 'issues of justification' and 'issues of legitimacy' are shown not to be distinct concerns, since the rightful enforcement of individual rights requires the state. Once there is no natural executive right, therefore, there is no need for actual consent, and Nozick, other Lockean libertarians, and weak voluntarists have their reply to the anarchist. Making use of this reply would require weak voluntarists to re-conceive their position. They would have to be seen as defending a non-voluntarist account of political obligations, and as defending

³⁴ Kant challenges also this view in his account of 'public right'. I give an interpretation and defense of this argument in 'Kant's Non-Absolutist Conception of Political Legitimacy: How Public Right 'Concludes' Private Right in 'The Doctrine of Right', *Kant-Studien* (forthcoming). For our purposes in this paper, however, this argument is irrelevant.

the view that hypothetical consent is the perspective through which the limits of rightful state coercion are delineated. But such an argument seems to capture exactly what they are after and hence appears to strengthen their position rather than weaken it.

Finally, it is worth pointing out that we now have a solution to the problems characterizing Nozick's account of the MS's assumption of a monopoly on coercion. Since the MS is now not only seen as a precondition for rightful interaction at all, but also as a public authority that represents all interacting persons and yet none of them in particular (rather than merely yet another private person), it can legitimately assume a monopoly on coercion. It is in virtue of its principled impartiality that the MS has rightful standing in the interactions between anyone interacting on its territory. And it is necessary to grant such a public authority standing to regulate the interactions because rightful enforcement of one's rights is impossible without it. This is also why no one can refuse to become a member of the MS (stay independent) and live on the territory or refuse to provide the means necessary to have an operating legal system that protects everyone. Having such a right would be to have the right to deny rightful interaction with others. Moreover, this argument also explains why only the state, and not any third private person, has rightful standing in disputes involving claims of wrongdoing. In virtue of its impartiality the state has standing to specify and apply procedural rights – including how much evidence is required to prove a perpetrator's guilt. Because there are many reasonable answers to questions of procedural right, particular states may develop somewhat different conceptions of the appropriate application of the principle of procedural right to empirical cases. Indeed this is why there is a fair bit of disagreement on the exact requirements of procedural right among various current liberal legal systems. Yet because the disagreement is reasonable and the enforcement of procedural right is public, the people subjected to the various (legitimate) systems are all politically obliged to respect their various legal requirements. The state's positing, application and enforcement of

procedural rights is the means through which liberal freedom is possible.

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