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EDITORIAL

In recent years, there has been an enormous growth in the extent and depth of libertarian scholarship, the study of human action which is germane to the concept of individual liberty. In many cases, the libertarian position is distinctly in the minority.

The Journal of Libertarian Studies has been founded not simply to provide an outlet for scholarship and research that may be unpopular in a particular discipline. It is the belief that there is a new and growing interdisciplinary discipline — libertarianism — enriched by contributions in each of the particular and seemingly isolated fields that study human action which provides the motive for this Journal. Philosophy, political science, economics, history, law, sociology, geography, anthropology, education, and biology will be carried in this Journal.

Several annual Libertarian Scholars Conferences have already been held which generated numerous scholarly libertarian papers of high quality. Communication among libertarian scholars between, as well as within, the various relevant disciplines was thereby enriched.

By its existence as a regularly appearing publishing outlet, we hope to stimulate significant expansion in the research and production of scholarly libertarian material. We hope to intensify the development of the emerging discipline of libertarianism. Finally, we expect that the existence of the *Journal* will serve to multiply the number of libertarian scholars and to intensify communication among and cross-fertilization of them. Whether or not the scholar is personally a libertarian will not be a criterion for acceptance of a manuscript; rather, the criterion will be whether an article will advance the discipline of libertarianism, regardless of the personal beliefs of the author.

Murray N. Rothbard
Editor

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TOWARD A REFORMULATION OF THE LAW OF CONTRACTS

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Many of the problem areas in the law of contracts stem from the historical fact that the law of contracts has been fashioned out of material that does not fit together logically. Some jurists view contracts as conventions serving to secure people's expectations.[1] These jurists, who support their approach by invoking the allied philosophical traditions of utilitarianism and pragmatism, have tried to make the law of contracts a device to protect parties who rely on promised advantages. Therefore, these jurists want law-enforcement processes to make people live up to the expectations they arouse in others.

On the other hand, other jurists, particularly those who base their legal theory upon the natural rights philosophical tradition, view contracts as instruments by which rights to things (both present and future alienable goods) are assigned, delineated, transferred or exchanged.

Because there have been influences from these two conflicting approaches, the law of contracts as now constituted has many internal inconsistencies. It is true of positive law in general, as it is of such particular fields as the law of contracts, that in order to facilitate human social life such law must be sensible, coherent, and consistent. This is a necessary but not a sufficient attribute of a sound legal system. The law must also properly order real-world social life in a way that is in accord with human nature. In both these endeavors, reason and logic must function as guidelines for the discovery of sound law.

At present, the law of contracts is predominantly influenced by the expectations-oriented approach.[2] This expectations model has its historical origins in the medieval action of assumpsit, within the evolution of the common law, but it has received a full-blown philosophical defense and intellectual sustenance from the utilitarian-pragmatist tradition.

HISTORY

The present Anglo-American law of contracts developed as part of the English common law. It should be noted, however, that apart from the common law there existed channels in which laws of contract also developed. In the canon law of the Church and in the customary law of merchants, mere promises (with no consideration) were recognized as binding. Each of these legal systems had a profound influence on equity decisions and an indirect influence on the common law.[3]

In pre-Norman medieval England, ownership was thought of largely in terms of physical possession.[4] Debts were thought of as bailments in which a specific set of chattels (conceived of as belonging to the lender throughout the period of the loan) were turned over to another person to be returned at a later date. Debt in this period of English legal theory was viewed by the law in the way that today one might view lending a neighbor a lawnmower. The lender kept his property-right relationship to the items loaned. If the debtor did not return the items lent to him, then he was sued for unjustly detaining the lender's property. Such detention was considered an aggressive tort analogous to trespass upon land. In the early legal theory of medieval England, then, the creditors' remedies at law regarded default as delictual and not as contractual in the modern promissory sense.[5]

In medieval England there were various writs that were common law remedies in commercial transactions. There were *detinue* (for bailments on specific chattels or against a seller for the chattels in a bargain and sale), *account* (to secure trusts for the payment of money), *covenant* (where the transaction was recorded in a sealed instrument), and *debt* (for a specific amount of money or of undifferentiated chattels).

Most of the various writs that could be used in commerce — detinue, account, and debt — were actions intended to reclaim and recover property. They were *real* actions, actions *in rem* aimed at securing property. They were not *personal* actions aimed at enforcing personal obligations or duties. This network of remedies for obtaining justice in commercial transactions was upset, according to Edward Jenks, by the Norman Conquest. The deeply feudal Normans did not recognize the legitimacy of a real action to recover a chattel; they recognized only such real actions that concerned land owned under freehold tenure.[6]

There were in medieval England also actions of *trespass* (for cases of direct violent injury) and of *trespass on the case* (for cases of indirect injury due to negligence). This action of trespass on the case was extended after the Norman Conquest from instances of misfeasance and malfeasance to instances of nonfeasance where an undertaking was promised (and where there was consideration: a detriment to the promise stemming from reliance). This new action was *assumpsit.* Early assumpsit writs were for negligence, for impelling those in certain statuses (innkeepers, common carriers, etc.) to fulfill their callings, and for compelling the performanc of activities undertaken.[7] Assumpsit eventually supplanted the older action of debt and the other old writs pertaining to commerce.

The origins of assumpsit lay in the law of torts, but it became the basis of the law of contracts. Assumpsit brought to the fore an emphasis on duties and obligations deemed to arise from a promisee's reliance on a promised expectation. Assumpsit underplayed the conveyance of title that takes place in commercial transactions. On the one hand, assumpsit boldly enjoined the enforcement of promises. On the other hand, assumpsit refused to recognize as legally binding contracts, promises that were not given for good consideration. Jenks suggests that the legal doctrine of consideration has a mixed parentage. The positive element requiring recompense or benefit to the promisor is descended from the older action of debt: In order to bring the action of debt, there had to be a physical object that was unjustly detained. The negative element requiring detriment to the promisee is derived from the requirement of damage in order to support an action to trespass on the case.[8]

The doctrine of consideration introduces considerable logical discord into the law of contracts. The idea of consideration has its roots in the older idea that a breach of contract was a form of theft or injury to a property right. This clashes directly with the predominant view, after the creation of assumpsit, according to which a breach of contract is the breaking of a promise.

THE EXPECTATIONS-ORIENTED APPROACH

At present, the law of contracts is predominantly influenced by the expectations-oriented approach and the pragmatic-utilitarian tradition which sustains that approach. Nonetheless, pragmatist Roscoe Pound once noted that the law of contracts did not as yet fully conform to the expectations model, though he hoped someday it would:

> In a developed economic order the claim to promised advantage is one of the most important individual interests that press for recognition. If it is a task of the legal order to secure reasonable individual expectations so far as they may be harmonized with the least friction and waste, in an economic order those arising from promises have a chief place. Credit is a principal form of wealth. It is a presupposition of the whole economic order that promises will be kept. The social order rests upon stability and predictability of conduct, of which keeping promises is a large item. But the law has been slow in coming toward this demand of the economic order, and Anglo-American law has not fully secured individual interests in promised advantages to the extent of the jural postulate of the economic order[9].

Pound's lament that the lawmakers have not consistently cleaved to the idea of security of expectations is eloquent. But careful scrutiny of the expectations model will show that it is unsatisfactory in important respects.

The first question to be raised is: Why should the law enforce promises? Keeping one's promises may well be part of leading a good, morally correct life. But being considerate toward one's spouse is also morally excellent — yet it is not a concern of the police. Keeping promises may enhance one's reputation. But that should be incentive enough to keep promises normally, without judicial involvement. If law enforcement is to take on the task of enhancing people's reputations, irrespective of their wishes, let this task be argued for directly. Many aspects of social life may well be facilitated, as Pound argues, by stability and predictability. But the marketplace can meet consumer demand in these areas. In some cases, insurance schemes may be used to pool risks. In other cases, performance bonds may be used to make erratic conduct costly. Both these marketplace remedies require only a legal approach treating contracts as transfers of title. Thus, despite Pound's eloquence, it is not immediately clear that courts and law enforcement agencies should hold people to their promises *per se.*

Legal theorist Lysander Spooner viewed contracts as conveyances of property titles. From his stance within the natural-rights philosophical tradition, Spooner criticized the apotheosis of promise:

> The words, "I promise", are no essential part of the contract. Nor is a formal promise in any case essential to the validity of a debt — that is, to the obligation to deliver money that has been sold and paid for. A man may make as many naked promises to pay money, as he pleases, and they are of no obligation in law. On the other hand, if a man have received value from another, with the understanding that it is not a gift, or that an equivalent is to be paid for it, the debt is obligatory — that is, the obligation to deliver the equivalent is binding — whether there be any formal promise to pay or not. This we see in the case of goods sold, and charged on account. And the obligation to deliver the equivalent consists in this — that it, (the equivalent or money) has been bought and paid for, and now actually belongs to the creditor or purchaser, as a matter of property. The promise, then, is a matter of mere form in any case, and of no importance to the validity of an obligation to deliver an equivalent, that has, by contract, (consent), been exchanged for value that has been received. It may be important as evidence of the contract; but it is no part of the contract itself; that is, it of itself, conveys no rights of property to the promisee, and no rights of any, to the equivalent promised, which he would not have without any formal promise.
>
> But it may be said, (and this is the language of the lawyers) that where a man has paid a *consideration* for promise, there the promise is binding. but the truth is, (as has before been stated), that a man never pays a consideration for a *promise.* He simply pays an equivalent, a price, or consideration, for the *thing promised.* And his right of property to the thing promised, of course, attaches at the time of the contract — at the time he pays the equivalent of it — or it can never attach at all. And *then* the promise to deliver, or pay it, (the thing promised), is made solely as evidence that it (the thing promised) has been sold, and now belongs to the promisee as a matter of property.[10]

Despite Spooner's misleading emphasis on exchange of equivalents (an emphasis that stems from his economic theory of value), the concept of transfer or exchange of property titles figures prominently in Spooner's analysis of contract. It is not promising which is essential, Spooner noted, but rather the transfer of title to an alienable good. Such a title-transfer model for the law of contracts is an alternative to the expectations-oriented approach.

Both the title-transfer model and the promised expectations model are more logically defensible and consistent than the present mixed content of the law of contracts. But building contract rights and remedies on a foundation of promised expectations presents difficulties. If one has the right to the fulfillment of promised expectations, should the law enforce specific performance (including the performance of personal services), or should the law demand payment of the pecuniary equivalent of performance, or should the law demand compensation for all costs incurred because of reliance on the promise? Some examples will help illustrate these difficulties.

Suppose my uncle promises to pay my way through Harvard. He comes through with the money the first three years. But the fourth year he says, "Business was not good this year. I'm sorry, but I can't pay for you this year". Meanwhile, in reliance of my uncle's original promise, I have planned out my life, have neglected to get a summer job, and so forth. Should I have any legal remedy against my uncle?[11]

If one wishes to afford security to expectations, as Pound does, my uncle should have a binding legal obligation to come up with the scholarship money once promised, even if the promise has not been relied on.

If one wishes to protect reliance on expectations, my uncle should be estopped to deny liability for the cost I have incurred because of reliance. Under promissory estoppel theory then, my uncle would be held liable for damages to the extent of my reliance on his promise.

On the other hand, under the title-transfer model, I would have no valid claim upon my uncle's property. This is because he still retains the absolute title to it.[12] My uncle has made a mere promise, what was called a *nudum pactum* in Roman law[13]. No formal transfer of title has taken place.

Let us change the example somewhat. Suppose my uncle says he will pay my way through Harvard if I will come to dinner every week to tell him about what I have learned. In this case, under the title-transfer model, my uncle has made a conditional transfer of title. It does not matter whether title-transfer or promissory language is used in the transaction. As Spooner pointed out, one is not entitled to the *promise* but to the alienable *thing* that is conditionally transferred. If I accept and I perform the services which are the condition for receiving the scholarship, then I am legally entitled to it[14].

Needless to say, under the title-transfer model, if my uncle explicitly transfers title to the money to me at the time of the original discussion about college, then this gift is mine absolutely. It would, of course, also be mine under the promised expectations approach.

To take a different example, suppose I contract with a construction firm to have a building erected. The firm, however, does not put up the building at all, or does not put it up on time, or does not put up the sort of building described in the contract. Should I be able to compel the construction firm to go through with the positive act of putting up the building[15]? Should I be able to sue for damages[16]?

According to the logic of the expectations model, I should rightfully be able to force the firm to put up the building. But in order to compel specific performance, I would have to make the construction firm's personnel forced laborers for me[17].

The involuntary servitude involved here is more starkly apparent in another example. Suppose an opera singer or a comedian promises to show up for a performance, but doesn't. Should it be lawful to capture him and force him to perform?

Some courts have attempted to get around being in the position of enforcing obvious slavery by instead issuing an injunction that while it doesn't compel specific performance of personal labor, does prohibit the enjoined party from engaging in any alternative remunerative work[18]. While this is more discreet then kidnapping or forced labor, it is still the enforcement of a slave contract.

Both the rationale for compelling specific performance of a contract requiring human labor (a rationale which the courts today do not follow) and the rationale for breach-of-contract damages imply that one can properly have an enforceable legal claim to one's expectations. Yet this is not so. Suppose that a woman who is eligible for marriage leads a suitor to believe that his suit is favored. (He may even incur expenses in reliance of this expectation.) Yet in the end his suit is rejected, and his proposal is turned down. What sort of right should and does this suitor have to the fulfillment of his reasonable expectations. None. People cannot really have a property right to their expectations, which are mere subjective mental states. Neither should the law attempt to give them any such rights.

If we reconsider, under the title-transfer model, the construction firm example given above, we find quite different results from what the expectations model gave us.

If the non-performing construction firm received pre-payment for the work, the law under the title-transfer model will force the firm to restore the money. Transfer of title was conditional on performance of the work.

The original contract might have included a performance bond (according to which title to certain amounts of the firm's money would be transferred to the landowner if such conditions obtained as misfeasance, nonfeasance, or completion behind schedule). Such a performance bond is perfectly compatible with the title-transfer model.

If the construction firm damaged the landowner's physical property, the firm would be liable for damages.

But, under the title-transfer model, it would be illegitimate to compel the construction firm to build. Any expenses incurred because of reliance are simply the costs of poor entrepreneurship on the part of the landowner[19]. This is the proper assignment of risk-bearing.

THE TITLE-TRANSFER MODEL

Spooner and other legal philosophers like Immanuel Kant have constructed theories of the law of contracts based on property titles rather than on promises[20]. Fully developed and in pure form, such a legal theory would consider contracts solely as instruments by which titles to alienable goods are assigned or transferred.

An adequate title-transfer model must distinguish between alienable and inalienable goods. One cannot sell one's "true gratitude", because it is the product of an inalienable attribute — the will. Living human beings always are possessed of a will, and any attempt to deprive them of control over it is an attempt at dehumanization. Compelling personal service or compelling specific performance of labor is an illegitimate attempt to alienate another's will[21]. Likewise a human cannot rightfully alienate his liberty of will and sell himself into slavery. The argument against the validity of slave contracts was cogently set forth by Rousseau in *The Social Contract:*

> To renounce liberty is to renounce being a man to surrender the rights of humanity and even its duties... Such a renunciation is incompatible with man's nature; to remove all liberty from his will is to remove all morality from his acts. Finally, it is an empty and contradictory convention that sets up, on the one side, absolute authority, and, on the other unlimited obedience. Is it not clear that we can be under no obligation to a person from whom we have the right to exact everything? Does not this condition alone, in the absence of equivalence or exchange, in itself involve the nullity of the act? For what right can my slave have against me, when all that he has belongs to me, and, his right being mine, this right of mine against myself is a phrase devoid of meaning[22]?

John Stuart Mill adds further arguments against the supposed right to sell oneself into slavery:

> In [Great Britain] and most other civilized countries... an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law or opinion...The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his own good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself...It is not freedom to be allowed to alienate his freedom[23].

To extend Mill's argument and put it in Lockean terms, all philosophical defenses of human rights to life, liberty, and estates (other than the contention that such rights are privileges granted at the convenience and pleasure of the sovereign) are founded upon the natural fact that each human is the proprietor of his own will. To take rights like those of property and contractual freedom that are based on a foundation of the absolute self-ownership of the will and then to use those derived rights to destroy their own foundation is philosophically invalid. Using a piece of equipment mounted on the upper stories of a building to knock out the foundations of the same building will do nothing but bring down the entire edifice.

One can readily see that a suit for breach of promise of marriage or arresting people for desertion from the military are entirely consistent with the promised expectations model. But under the title-transfer model, promises of marriage would be naked promises (an interesting thought), employees of the military would be free to quit their jobs as other persons are, and divorce would be no-fault.

Restrictive covenants

Under the title-transfer model, the rights pertaining to different aspects of some piece of property could be divided up among several actual owners. For example, one person might own a copy of a book and another person may own the right to make copies of the book (the copyright). Such a right would have to belong to some existing owner (whether person or corporation) to have effect under the title-transfer model[24]. Covenants and deed restrictions could not simply "run with the land".

An example will serve to illustrate how restrictive covenants might work. *A* might sell *B* item *X* reserving in *A*'s possession the right to sell or loan the item to non-Catholics. *A* could then exercise this restrictive covenant by never selling or loaning to non-Catholics. In a different case, A might sell B the deed to Blackacre reserving in A's possession the right to construct all buildings over five stories high. The restrictive covenant in both cases is a right belonging to A which B or some other party subsequently could acquire in a manner analogous to a homesteading if A or his assignees abandon it, could purchase, or could receive as a gift.

Product warranties

Product warranties would have legal recognition under the title-transfer model, not because they are promissory representations[25], but because they describe one of the entities, the title to which is changing hands in the contract. Product warranties are part of the terms of the contract. If the entity is not as described, fraud (and therefore implicitly theft) has taken place[26].

Creditor's forgiveness of a debt

A creditor's forgiveness of a debt in whole or upon partial payment has been questioned as to whether it could be considered a binding contract[27]. The creditor receives nothing (no consideration) to which he was not already entitled. Merton Ferson points out that the creditor's act is a gift not a contract (in the present legal sense of a promise given for a consideration). Since it is a gift, the question of consideration is irrelevant under the present law of contracts. Since a gift is a transfer of title, such forgiveness is quite legitimate under the title-transfer model as well. Ferson writes:

> The creditor's act by way of releasing a claim is of the same kind as the ordinary act of transfer. In either case the act is simply the manifested consent of the owner of the right. In either case the effect of the act on the owner is intended to be the same, i.e. to divest him of his right or rights[28].

Purchase breaks hire

It would seem that those who adhere to the promised expectations model are caught in an internal contradiction on the question of whether purchase breaks hire. If they make promise primary, the original promiser is no longer the owner and his personal obligation no longer pertains to the item. Therefore purchase breaks hire if promise is primary. But if expectations are primary, then the leaser (old or new) is breaking the lease illegally before it is up. Purchase cannot break hire if expectations are to be secured.

The title-transfer model would contend that purchase cannot break hire (unless any express lease provision said it did). The leaseholder owns use of the property for the contractual period of the lease.

Alienability of choses in action

It is now a settled legal principle that choses in action are alienable. This was not so in the past. With the appearance of the action of assumpsit, the personal nature of the obligation involved in contract was stressed[29]. A promise was made by one person to another. If one bases one's theory of the law of contracts on promises, it is not at all clear why the personal obligation bound up in a promise should be alienable[30]. On the other hand, it is not difficult to see that claims to titles can quite properly be transferred from one person to another.

Death of an offeror

Three hypothetical examples will illustrate how the title-transfer model handles the death of an offeror. First, consider the following example given by Ferson: A has said to B, "I request that you furnish goods to C, and for doing so I will pay you X dollars". A dies; and B thereafter furnishes goods to C. Should B have a claim against A's estate[31]? The title-transfer model would indicate that A had made a transfer of title to B conditional on the delivery of the goods to C and with the delivery of X dollars to follow delivery of the goods. Therefore B has a proper claim on A's estate. The key is when the title was transferred.

Secondly, consider another case: A advertises that he will sell Wheaties for X dollars. B sees the ad and sends off the X dollars by messenger. In the interval, A dies. In his will he has left the inventory of Wheaties to C, who is a natural foods fanatic. C decides to sell no more Wheaties and to destroy the inventory. B's X dollars arrive. In fact, in reliance upon A's ad, B has made future business plans making use of the Wheaties. C returns the X dollars to B, explaining the new policy. B sues C to obtain the Wheaties.

Under the title-transfer model, A's offer is no more binding than a naked promise. It was only an offer containing the terms for a contract. But there was no transfer of title at any point. An offer should be revocable at any time[32].

Thirdly, consider a situation in which the Wheaties were in a vending machine and *C* was suing *B* to get the Wheaties back. They had been placed in a vending machine by *A*. But *B* bought them out of the vending machine after *A*'s death. Again the key to the problem is determining whether good title is transferred at some point.

A placed the Wheaties in an automatic selling device preprogrammed to accept a certain contractual situation. *C* inherited the Wheaties as they were placed. If *C* can get to them in time, he can recover them. If *B* buys them first from the vending machine, whose automatic operation is an objective act symbolizing consent, then *B* purchases good title.

If, however, we subsequently learned that *A* had stolen the Wheaties from *D*, under the pure title-transfer model, neither *C* or *B* (even though he is an innocent purchaser without notice) would have good title. The Wheaties would have to be returned to *D*.

It should be noted that the adherent of the promised expectations model faces the same difficulty with the death of an offeror that he did on the question of whether purchase breaks hire. A dead man's promised personal obligations die with him; therefore his offers are void. But if expectations are to be protected, all his offers should still be considered good.

Unilateral contracts

When one offers a reward either to any member of the public or to such specific person, one is setting forth the terms for a conditional property transfer. A person might say, "Do *X*, and I will give you *Y* as a reward". Law enforcement agencies do not force a person to whom a reward offer is made to do the project, even if he says he plans to undertake it. If a person who tries to earn a reward fails at the task or quits, he is not forced to pay damages. The person who offers the reward, under the title-transfer model, can withdraw it anytime. The reward may be for reaching the top of the greased pole; the reward may be withdrawn when someone is almost in reach. This is the proper assignment of risk-bearing. At present the courts do not recognize the validity of this conception of unilateral contracts. They award partial payment for partial fulfillment of conditions[33].

Maurice Wormser presents a convincing defense of the right of the offeror to withdraw his offer in unilateral contracts:

> Suppose *A* says to *B*, "I will give you $100 if you walk across the Brooklyn Bridge", and *B* walks... When *B* has walked across the bridge there is a contract, and *A* is then bound to pay *B* $100. At that moment there arises a unilateral contract... Let us suppose that *B* starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment *A* overtakes *B* and says to him, "I withdraw my offer". Has *B* any rights against *A*?... The objection is made...that it is very "hard" upon *B* that he should have walked half-way across the Brooklyn Bridge and should get no compensation... By way of reply the pertinent inquiry at once suggests itself, "Was *B* bound to walk across the Brooklyn Bridge?" The answer is obvious. By hypothesis, *B* was not bound to walk across the Brooklyn Bridge. *B* had never surrendered his volition with regard to walking across the bridge... *A* was bound to pay the $100 in the event that *B* should walk across the bridge, but *B* had not bound himself to walk...*B*...could have refused...at any...time to continue to cross the bridge without making himself in any way legally liable to *A*. If *B* is not bound to continue to cross the bridge, if *B* is will-free, why should not *A* also be will-free? Suppose that after *B* has crossed half the bridge he gets tired and tells *A* that he refuses to continue crossing. *B*, concededly, would be perfectly within his rights in so speaking and acting. *A* would have no cause of action against *B* for damages. If *B* has a *locus poenitentiae,* so has *A*. They each have, and should have, the opportunity to reconsider and withdraw. Not until *B* has crossed the bridge, thereby doing the act called for, and accepting the offer, is a contract born. At that moment, and not one instant before, *A* is bound, and there is a unilateral contract. Critics of the doctrine of unilateral contract, on the ground that the rule is "hard" on *B*, forget the primary need for mutuality of withdrawal, and in lamenting the alleged hardships of *B*, they completely lose sight of the fact that *B* has the same right of withdrawal that *A* has[34].

It should be borne in mind that if the easy withdrawalthat Wormser points out is characteristic of unilateral contracts is not desired by the parties, they can do away with it by making the contract bilateral. The person offering the reward and assigning the task can demand performance bonds of those to whom he offers the reward. The person undertaking the task in order to earn the reward can demand that the contract specify that he is to be rewarded in proportion to the extent he accomplishes the task.

In conclusion, although only a sketch of the title-transfer approach has been possible within this brief compass, it seems plausible that this approach is more consistent and rationally defensible than either the present law of contracts or a pure promised expectations approach (as suggested by Pound). The title-transfer model seems to be able to handle adequately the historic problem-areas of the law of contracts. In addition, it meshes well with the rights set forth in the Bill of Rights and proclaimed in the Declaration of Independence. It would seem that the title-transfer model might well be the appropriate law of contracts for a free society.

NOTES

1. For a utilitarian defense of security as "the most vital of all interests", see John Stuart Mill, *Utilitarianism* (1863), in *Great Books of the Western World* (Chicago: Encyclopaedia Britannica, 1952), Vol. 43, p. 471. The utilitarian defenses of *ancien regime* privileges (especially in Bentham) and later of the welfare state follow directly from the primacy given to security.
2. Adam Smith: "The foundation of contract is the reasonable expectation, which the person who promises raises in the person to whom he binds himself; of which the statisfaction may be extorted by force". *Lectures on Justice, Police, Revenue and Arms* (Cannan ed., 1896), p. 7.
John L. Austin: "The main essentials of a convention are these: first, a signification by the promising party of his *intention* to do the acts or observe the forebearances which he promises to do or observe. Secondly, a signification by the promisee that he *expects* the promising party will fulfill the proferred promise... To prevent disappointments of...expections is...the main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts or agreements". *Lectures on Jurisprudence,* 4th ed. (London: John Murray, 1873), Vol. 1, pp. 326-327. Also see William Paley, *Principles of Moral and Political Philosophy,* 8th American ed. (1815), Chap. 5; Jeremy Bentham, *A General View of a Complete Code of Laws,* in his *Works,* ed. by John Bowring (Edinburgh: William Tait, 1839), Vol. 3, pt. 9, p. 191.
Thomas Erskine Holland: "When the law enforces contracts it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise". *Jurisprudence,* 12th ed. (1916), p. 262. Though Holland was a follower of Austin, his difference on the matter of intention should be noted.
Edwin W. Patterson: "The law enforces promises, when it does, because of the expectation aroused in the promisee or because of his justifiable reliance... because the social interest in the security of transactions demands that some, at least, of the reasonable expectations of men be given a sanction through the machinery of administering law. The classes of promises which are to be enforced should be determined by a balancing of the social interests involved on either side, for and against". "'Illusory' Promises and Promisors' Options", in *Selected Readings on the Law of Contracts* (New York: Macmillan, 1931), pp. 405-406.
Arthur L. Corbin: "That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules, and a determination of their effectiveness requires a lively consciousness of their underlying purpose". *Law of Contracts* (1950), Vol. 1, p. 2. It should be noted that the warranty deed, the deed poll, and the bill of exchange are considered contracts by the American Law Institute, yet they contain no promises. See Morris R. Cohen and Felix S. Cohen, eds., *Readings in Jurisprudence and Legal Philosophy* (New York: Prentice-Hall, 1951, p. 102.
3. Lord Mansfield (1705-1793), who incorporated the law merchant into the common law, was influenced by the principles underlying the law merchant and wished to make moral obligation to fulfill promises rather than consideration the basis of the law of contracts. See William Searle Holdsworth, "The Modern History of the Doctrine of Consideration", *Selected Readings,* pp. 82 ff; E. Allan Farnsworth, "The Past of Promise: An Historical Introduction to Contract", *Columbia Law Review,* Vol. 69, no. 4 (April 1969), p. 592n.69, Roscoe Pound, *Jurisprudence* (St. Paul, Minn. West, 1959), Vol. 3, p. 201.
4. This emphasis on possession, combined with the construction of early English thought in terms of remedies rather than rights, meant that the idea of *title* to an article was very imperfectly conceived of. The case of *William of Tempsford* v. *Austin Chaplain,* in 1291, in the fair-court of St. Ives shows how the law changed on the holding of good title. The theory of the law had previously been that a transfer of possession was necessary to transfer ownership. But this case held that as against a creditor of the vendor the purchased article (a horse) belonged to the customer who had agreed to pay for the item. This changed the theory as to transfer of ownership. It passed at once upon the bargain being made. Changing the theory of ownership gave the vendor the right to sue for the price (since the title to the property had passed). Previously the customer could sue for the goods once the bargain had formally been struck, but the vendor could not sue for the price (although he could re-sell the goods if the purchase price was not delivered). See Robert L. Henry, *Contracts in the Local Courts of Medieval England* (London: Longmans, Green, 1926), pp. 239-241, 245. Such confusions in the concept of ownership did much to inhibit development of a title-transfer approach to contracts.
5. Frederick Pollock, "Contract", *Encyclopaedia Britannica,* 14th ed. (1929), Vol. 6, pp. 339-340; Farnsworth, p. 586; James Barr Ames, "The History of Assumpsit",

Harvard Law Review, Vol. 2, no. 2 (15 May 1888), pp. 55–57; Edward Jenks, *The History of the Doctrine of Consideration in English Law* (London: C. J. Clay and Sons, 1892), pp. 115–118; and Merton Ferson, *The Rational Basis of Contracts* (Brroklyn: Foundation Press, 1949), p. 121.

On similar views of debt in other cultures, see Max Gluckman, *The Ideas in Barotse Jurisprudence* (New Haven, Conn.: Yale University Press, 1965), pp. 177, 182–183, 198; N. Chandrasekhara Aiyar, ed., John D. Mayne, *Treatise on Hindu Law and Usage,* 11th ed. (Madras: Higginbothams, 1953), Chap. 9, pp. 395–447; Pherozeshah N. Daruvala, *The Doctrine of Consideration* (Calcutta: Butterworth, 1914), p. 270: "Where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein"; Farnsworth, p. 587.

Nineteenth-century libertarian legal theorist Lysander Spooner tried to defend a return to treating debts as bailments in his 1846 work *Poverty: Its Illegal Causes* (in Vol. 5 of Charles Shively, ed., *The Collected Works of Lysander Spooner,* Weston, Mass: M & S Press, 1971).

While Spooner correctly sought to derive the law of contracts from the natural law pertaining to property titles, he was mistaken in his belief that this entailed a return to debt as bailment. The modern libertarian view is that first title to the creditor's money is transferred to the debtor, then at later contractually-agreed-upon due dates, title to the debtor's money is transferred to the creditor. Before the money falls due, the debtor has full title to it. Once the money falls due, the debtor who does not pay up is defrauding the creditor and is unjustly detaining his property. This is true, under the modern libertarian view, even if the debtor does not have the funds on hand to pay the creditor. (It would not be true under Spooner's bailment approach if the debtor had showed due diligence.) So the creditor properly has a lien on the defaulting or bankrupt debtor's future earnings.

Spooner's theory has numerous flaws. By ruling out the assignment of title to future goods, for example, it effectively prohibits partnerships and corporations as well as simpler arrangements. In return for medical care, a patient who has no property should be able to give a physician a legally binding claim on the patient's future earnings. But this is prohibited by Spooner's approach. (See *Poverty,* p. 85.)

6. Jenks, pp. 115–116.
7. Jenks, pp. 124–125; Ames, "History of Assumpsit", in *Selected Readings,* pp. 37–40; and Daruvala, p. 112.
8. Jenks, Chap. 3.
9. Pound, pp. 162, 163. For Pound's explicit statement of his hopes for the triumph of the expectations model, see pp. 220–221. Also see Pound, *Introduction to the Philosophy of Law,* rev. ed. (New Haven, Conn.: Yale University Press, 1954), pp. 157ff. Compare Morris R. Cohen, "The Basis of Contract", *Harvard Law Review,* Vol. 46, no. 4 (February 1933), p. 573 for an explicit rejection of Pound's position.

   Pound's pragmatist view of property is worth quoting at length: "We may believe that the law of property is a wise bit of social engineering in the world as we know it, and that we satisfy more human wants, secure more interests with the sacrifice of less thereby than by anything we are likely to devise. Moreover we may believe this without holding that private property is eternally and absolutely necessary and that human society may not expect in some civilization, which we cannot forecast, to achieve something different and something better". *Jurisprudence,* Vol. 3, p. 140.

   On Pound's pragmatism in legal matters, see Francis E. Lucey, "Natural Law and American Legal Realism". *Georgetown Law Journal,* Vol. 30, No. 6 (April 1942), pp. 496–497. Although I have grouped the utilitarian tradition with the pragmatic tradition as backers of the expectations model, strictly speaking this applies only to rule-utilitarianism and not to act-utilitarianism.
10. Spooner, pp. 100–101. See note 5 above for discussion of Spooner's contention that the right of property must attach at the time of the contract.
11. A case in which the grantor of a tuition gift attempted to recover it (*Keith & Hastings* v. *Miles,* 39 Miss. 442, 1860) is discussed by Ferson, pp. 26–27. Illustration 2 to Sec. 75 of the first *Restatement of Contracts* hypothesizes that "*A* promises *B* \$500 when *B* goes to college" and concludes that "if the promise...is reasonably to be understood as a gratuity, payable on the stated contingency, *B*'s going to college is not consideration for *A*'s promise".

    In the second *Restatement,* the "when *B* goes to college" illustration has been omitted. The following new illustration is substituted: "*A* promises to make a gift of \$10 to *B.* In reliance on the promise *B* buys a book from *C* and promises to pay *C* \$10 for it". The second *Restatement* then says that *A*'s promise and others like it are subject to promissory estoppel. For a discussion of this change, see Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974), pp. 59ff.
12. On the importance of titles in contract, see John W. Salmond, *Jurisprudence,* 2nd ed. (London: Stevens and Haynes, 1907), pp. 303–305. In the pure title-transfer model, all contracts executory are uncompleted, conditional conveyances of title.
13. Salmond, p. 318; Pollock, *Principles of Contract,* pp. 119, 120. *Ex nudo pacto non oritur actio* was a Roman legal maxim. In his dialogue of *Doctor and Student,* St. Germain writes: "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do him such certain service and nothing is assigned for the money, for the building, nor for the service; these are called naked promises because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. Also if I promise to another to keep him such certain goods safely to such a time and after I refuse to take them, there lieth no action against me for it". Quoted in Daruvala, p. 98.
14. Under the older view of consideration, this would also be a binding contract since there is a direct benefit to the promisor (or detriment to the promisee) that is sought.
15. Early in the reign of Henry VI, an action *ex delicto* was brought for failure to build a mill within the time promised. One judge dissented from the compelling of specific performance, insisting correctly that mere nonfeasance could not be construed as an act of trespass. He said: "If this action is to be maintained on this matter, one shall have an action of trespass on every

agreement that is broken in the world". Sir Frederick Pollock writes that this "was the very thing sought, and so it came to pass in the two following reigns, when the general application of the action of assumpsit was well established". Pollock, *Principles of Contract,* p. 125. The dissenting judge's view was, it should be remembered, the dominant view in that era. See also Ames, "The History of Assumpsit", *Harvard Law Review,* Vol. 2, no. 1 (15 April 1888), pp. 10–11; Daruvala, p. 66.

For a defense of compelling specific performance, see William T. Barbour, "The 'Right' to Break a Contract", *Selected Readings,* pp. 500–503. On the current revival of specific performance, see Gilmore, p. 83.

16. Damages have to be awarded on some basis and the choice of a basis means facing the question again of which is primary expectation or reliance. Should the law demand payment of the pecuniary equivalent of performance, or should the law demand compensation for all costs incurred because of reliance on a promise? Holmes' theory that the promisor takes upon himself the risk of some event as between himself and the promisee emphasizes the appropriateness of damages. Oliver Wendell Holmes, Jr., *The Common Law,* Howe ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963), pp. 235–236. Also see Holmes, "The Path of the Law", *Harvard Law Review,* Vol. 10, no. 8 (25 March 1897), p. 462. However, it seems that Holmes is confusing contracts and insurance policies in his discussion. For a treatment of the theoretical underpinnings of Holmes' view, see Gilmore, pp. 14–15.

For a utilitarian welfare-economics treatment of damages, see John H. Barton, "The Economic Basis of Damages for Breach of Contract", *Journal of Legal Studies,* Vol. 1, no. 2 (June 1972), pp. 277–304. For a utilitarian welfare-economics analysis of the law of contracts in general, see Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972), pp. 41–64. Posner's attempt to reformulate the law of contracts in order to facilitate exchange-at-the-least-cost must fail because costs are subjective not objective.

17. Holmes speaks of the "theory that contract is a qualified subjection of one will to another, a kind of limited slavery. It might be so regarded if the law compelled men to perform their contracts, or if it allowed promisees to exercise such compulsion. If, when a man promised to labor for another, the law made him do it, his relation to his promisee might be called a servitude *ad hoc* with some truth". *The Common Law,* p. 235.

18. John Norton Pomeroy, Jr. and John C. Mann, *A Treatise on the Specific Performance of Contracts,* 3rd ed. (Albany, N.Y.: Banks, 1926), sec. 24, pp. 78–79; sec. 310, pp. 683–686; sec. 311, p. 687.

19. Murray N. Rothbard, a proponent of the title-transfer model, writes: "Take the case of a promise to contribute personal services without an advance exchange of property. Thus, suppose that a movie actor agrees to act in three pictures for a certain studio for a year. Before receiving any goods in exchange (salary), he breaks the contract and decides not to perform the work. Since his personal will is inalienable, he cannot, on the free market, be forced to perform the work there. Further, since he has received none of the movie company property in exchange, he has committed no theft, and thus the contract cannot be enforced on the free market. Any suit for "damages" could not be entertained on an unhampered market. The fact that the movie company may have made considerable plans and investments on the expectation that the actor would keep the agreement may be unfortunate for the company, but it could not expect the actor to pay for its lack of foresight and poor entrepreneurship". Murray N. Rothbard, *Man, Economy, and State,* Vol. 1, p. 153. The belief in a right to security in one's expectations is supportive of welfare-state legislation, as pointed out in note 1 above.

20. Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (Edinburgh: T. & T. Clark, 1887), p. 101. Kant derives the obligation of contracts not from promises but from a consensus of free wills to transfer rights under conditions set up by a civil society governed by a Rousseauian general will. Kant's position has two difficulties. One is the conflict between free choice and civil obedience in a Rousseauian society. The other is his view that contracts are essentially instances of the mental unanimity of two parties (*consensus ad idem*). Courts and law enforcement agencies cannot, however, read people's minds. Hence any legal principles based on overriding concern with Kant's subjective will theory are sure to be fraught with troubles.

The proper resolution of the problems raised by the subjective will theory is to make objectively observable conduct symbolizing consent the standard for determining whether consent has been given. See *Hallock* v. *Commercial Ins. Co.,* 26 N.J.L. 268 (1857). If the two parties act to transfer titles (and neither is under threat of physical duress), then the contract is consensual and legitimate. See William Anson, *Principles of the English Law of Contract,* 2nd ed. (1882), p. 13; Cheshire and Fifoot, *Law of Contract,* 4th ed., pp. 21–22; Samuel Williston, "Mutual Assent in the Formation of Contracts", *Selected Readings,* pp. 119–127.

Similarly, in matters of fraud, whether or not the seller believes his description of the entity he is selling is not relevant. The question is whether it is objectively true. See Holmes, *The Common Law,* p. 254.

21. On the importance of freedom of the will and self-ownership in supporting the judicial doctrine prohibiting compulsion of the specific performance of personal service contracts, see Pomeroy and Mann, sec. 310, p. 683.

22. Jean-Jacques Rousseau, *The Social Contract,* bk. 1, Chap. 4, in *Great Books,* Vol. 38, p. 389; see also Locke, *Second Treatise of Civil Government,* Chap. 4, in *Great Books,* Vol. 35, p. 30; Kant, p. 99. In Robert Paul Wolff's book *In Defense of Anarchism,* he criticizes civil obedience as being in conflict with autonomy.

23. John Stuart Mill, *On Liberty,* Chap. 5, in *Great Books,* Vol. 43, p. 316; see also Herbert Spencer, *Justice,* sec. 70.

It should be noted that the idea of a social contract in political philosophy depends on the notion of contract as promise. See Richard Taylor, *Freedom, Anarchy, and the Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), chap. 16, pp. 109–114; Christopher D. Stone, "Comment", in Eugene V. Rostow, ed., *Is Law Dead?* (New York: Simon & Schuster, 1971), pp. 95–96. The title-transfer model would rule out the acceptability of a social contract as a justification of governmental rule.

24. I am indebted to Murray N. Rothbard for this suggestion.
25. Pound, *Jurisprudence,* Vol. 3, p. 200.
26. Ames notes that the action of deceit against the vendor of a chattel upon false warranty was originally a pure action of tort. "The History of Assumpsit", *Harvard Law Review,* Vol. 2, no. 1, p. 8. Compare Holmes, *The Common Law,* p. 216.
27. On the rule in *Foakes* v. *Beer* as an absurd consequence of the Holmes-Williston bargain theory of contracts, see Gilmore, p. 33.
28. Ferson, p. 159.
29. Holdsworth, "The History of the Treatment of Choses in Action by the Common Law", *Selected Readings,* p. 708.
30. See Ames, *Lectures in Legal History* (Cambridge, Mass.: Harvard University Press, 1913), pp. 211–212.
31. Ferson, p. 103.
32. Compare Williston and George J. Thompson, *Selections from Williston's Treatise on the Law of Contracts,* rev. ed. (New York: Baker, Voorhis, 1938), sec. 55, pp. 62–63, sec. 60, pp. 67–68, sec. 60B, pp. 70–71; also see Clarence D. Ashley, *The Law of Contracts* (1911), p. 26. The title-transfer model would view a paid-for option contract, however, as similar to any conditional title transfer.

    The question of the formation of a contract between parties who are not in each other's presence has been governed by the rule that acceptance should be considered effective once sent off. Langdell criticizes this position. He argues that an acceptance is a counter-promise and as such must first be an offer, and therefore must be communicated. C. C. Langdell, *Summary of the Law of Contracts,* 2nd ed. (Boston: Little, Brown, 1880), secs. 12–15, pp. 13–21. The title-transfer model includes an analogous position. Holmes cannot believe that if an acceptance were snatched from an offeror's hands before he read it, there would be no contract. *The Common Law,* p. 240. But in a legal system based on the title-transfer model snatching it from the messenger's hands would stop the contract from coming into effect. Snatching it from the offeror's hands complicates matters by introducing what may be a theft.

    The adsurdity of the rule that acceptance should be considered effective when dispatched is shown in the hypothetical case of an offeree undertaking to communicate the acceptance himself after traveling in his automobile or airplane. See Florence Hodel, "Communication of Acceptance Between Parties at a Distance", *Selected Readings,* p. 292.
33. See Cardozo's opinion in *Jacob & Younger, Inc.* v. *Kent,* 230 N.Y. 239, 129 N.E. 889 (1921). This sets forth the rule of substantial performance.
34. I. Maurice Wormser, "The True Conception of Unilateral Contracts", *Selected Readings,* pp. 307, 308–309. Compare Frederick Pollock, review of Clarence D. Ashley, *The Law of Contracts,* 28 *L. Q. Rev.* 100.

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WHITHER ANARCHY? HAS ROBERT NOZICK JUSTIFIED THE STATE?*

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One can appreciate *Anarchy, State and Utopia* on many levels. Its emphasis on individual freedom is a refreshing change of pace. It questions assumptions that have long been sacrosanct. It puts forth a theory of entitlement which is nothing short of remarkable in this day and age. And most importantly, it is being taken seriously by the press and, hopefully, the establishment philosophers as well.

But Professor Nozick has attempted more than this. He has attempted to refute the anarchist position. This is a rare endeavor. Few have taken the anarchist position seriously enough to refute it. Few understand it well enough to do it justice. Dr. Nozick displays an intimate knowledge of the anarchist position and yet he rejects it. His refutation is novel, intricate and many-faceted. But does it succeed? In this paper I shall try to outline a few reasons why I think it does not.

Nozick begins by asserting that "Individuals have rights..." (ix).§ The purpose of the first part of his book (the only part which we shall treat here) is to see if it is possible to evolve a state or "state-like entity" (118) without any violation of individual rights. He concludes that such a thing is possible and likely as well. I shall confine my examination to the possibility that a state might exist which does not violate individual rights *ab initio*.

"In a state of nature an individual may himself enforce his rights, defend himself, exact compensation, and punish." (12) But an individual may also delegate this right to friends, relatives, or hirelings. A company which specialized in defense of its customers Nozick would call a protective association.(12) The protective association has no rights of action other than the sum of the rights delegated to it by its subscribers. (89) To this point the anarchist has no problem. At least he thinks he has no problem. He has yet to hear what Professor Nozick believes is the content of these individual rights.

Nozick analogizes rights to a sort of boundary which "circumscribes an area in moral space around an individual." (57) What happens if one person does something which risks crossing the boundary of another? Nozick answers that you may prohibit the risky activity provided that "those who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others." (83) This he calls the "principle of compensation." It "requires that people be compensated for having certain risky activities prohibited to them."(83)

It follows from this principle that an individual *may* be prohibited from using a procedure of enforcing his rights which is risky or unreliable, provided that the principle applies to this type of activity. Nozick gives two parallel justifications for applying the principle to dispute settlement.

Since he maintains that a protective association has no rights of action other than the sum of the rights delegated to it by its subscribers (89), Nozick first seeks to ground his justification on some right held by every individual. He turns hopefully to the notion of "procedural rights." "Each person has a right to have his guilt determined by the least dangerous of the known procedures for

* The original version of this paper was delivered at the Third Libertarian Scholars Conference, October 1975, New York City.

§ All parenthetical numbers are from Robert Nozick's *Anarchy, State and Utopia*, Basic Books, 1974.

ascertaining guilt, that is, by the one having the lowest probability of finding an innocent person guilty." (96) The association's right to prohibit risky procedures, therefore, derives directly from the individual's procedural rights.

Secondly, Nozick insists that the prohibition of "unreliable" procedures is valid even if there were no procedural rights. He contends that epistemic considerations govern the use of retaliatory force. That is, you must *know* that an aggressor has violated someone's rights before you may retaliate. Use of force on an aggressor without knowing that he is guilty is itself aggression. "If someone knows that doing act A would violate Q's rights unless conditon C obtained, he may not do A if he has not ascertained that C obtains through being in the best feasible position for ascertaining this."(106)

On this analysis, a protective association may prohibit others from using procedures which fail to meet some standard of certainty since failure to meet this standard means that the enforcer lacks the requisite knowledge of guilt.

Once you swallow the principle of compensation and its applicability to dispute settlement, the introduction of the minimal state-like entity is all downhill. Nozick envisions one association coming to dominate the market. By his principles, this association would have the right to prohibit all competitors who in its opinion employed risky procedures (provided, of course, "compensation" was paid). Voila! We have a state-like entity which arises without violating anyone's rights, right?

Everything hinges on whether Nozick has successfully outlined an "invisible hand" explanation of the state where no rights are violated in the process. Consequently, Nozick's conception of rights and their basis becomes crucial here. Yet early in the book he apologizes for not presenting a theory of the moral basis of rights. (xiv). Still it is possible to discern a notion of rights being used here.

A right is a freedom to do something, that is, to use property which includes one's body in a certain way unimpinged by external constraints (force or threat of force). The right of self-defense is contained within the concept of right itself. It is simply a means of exercising your right when someone is trying to prevent you from doing so. The fact you have a right of action means you may act in that way even if another attempts to prevent this. Self-defense, then, is implicit in the notion of rights.

Where do rights come from? How are they grounded? Nozick doesn't say and I will not pretend to offer a final answer to this question. But it seems that since the concept of right carries within it the freedom to use property, rights are created along with property ownership. I would contend that this is what ownership means. Rights (to use property in a certain way), then, can be homesteaded, exchanged, or bestowed to employ the Lockean trichotomy.

Has Nozick's minimal state violated individual rights? You remember that the reason the dominant protective association has a right to prohibit risky, unreliable enforcement methods is that its members, indeed all people have procedural rights. "Each person has the right to have his guilt determined by the least dangerous of the known procedures for ascertaining guilt, that is, by the one having the lowest probability of finding an innocent man guilty." (96). "The principle is that a person may resist, in self-defense, if others try to apply to him an unreliable or unfair procedure of justice." (102).

But where would such a right come from? Was it homesteaded, exchanged or received as a gift? And does this right of self-defense bear any resemblance to the right of self-defense I discussed earlier? Nozick deals with none of these questions. He simply assumes the existence of procedural rights and then proceeds to speculate on what form they should take. This does not mean that Nozick is wrong. It means only that we have no reason to believe he's right.

At the same time Nozick chides the natural-rights tradition which, he says, "offers little guidance on precisely what one's procedural rights are in a state of nature, on how principles specifying how one is to act have knowledge built into their various clauses, and so on. Yet," he continues, "persons within this tradition do not hold that one may not defend oneself against being handled by unreliable or unfair procedures." (101).

I maintain that this is precisely what the natural rights tradition does hold or, at least, should hold: That there are no natural procedural rights. Let me briefly defend this claim.

In the state of nature one has the right to defend oneself against the wrongful use of force against person or property. But if you commit an aggressive act, the use of force by the victim to regain what was taken from him is not wrongful. If you have stolen a T.V., the rightful owner may come and take it back. You may rightfully resist only if you are innocent or have some legitimate defense. What are we then to make of procedural rights?

Though only the innocent party may rightfully use self-defense, it is often unclear to neutral observers and the parties involved just who is innocent. As a result there exists the practical problem of determining the facts of the case and then the respective rights of the disputants. But I must stress here that this is a practical question of epistemology not a moral question. The rights of the parties are governed by the objective fact situation. The problem is to discern what the objective facts are, or, in other words, to make our subjective understanding of the facts conform to the objective facts themselves.

The crucial issue is that since rights are ontologically grounded, that is grounded in the objective situation, any subjective mistake we make and enforce is a violation of the individual's rights whether or not a reliable procedure was employed. The actual rights of the parties, then, are unaffected by the *type* of procedure, whether reliable or unreliable. They are only affected by the *outcome* of the procedure in that enforcement of an incorrect judgment violates the actual rights of the parties however reliable the procedure might be.

The point is that you have a right of self-defense if you are innocent but not if you are guilty. Only if a procedure finds an innocent man guilty and someone enforces that finding has anyone's rights been violated. You have the right to defend yourself against *all* procedures if you are innocent, against *no* procedures if you are guilty. The reliablility of the procedures is irrelevant. Unless an innocent person agrees to be bound by the outcome of a judicial proceedings, he retains his right of selfdefense even after a "reliable" procedure has erred against him.

The purpose of any procedure, then, is to induce adherence to the decisions of the arbitrators. The parties and the community must be convinced that there is a good chance of a just decision before they will be willing to bind themselves to any possible outcome. In a culture which held that rights are based on the facts of the case, disputants would demand procedures suited to discover those facts. The better it worked, the more acceptable it would be. Thus procedures would and should be judged on the basis of utility.

Procedures, then, for discovering the fact situation are not to be confused with rights themselves. You only have a right to a procedure, like any other service, if someone, e.g. your protective association has contracted to provide you with it.

What then of Nozick's second line of attack — the epistemic justification. "On this view, what a person may do is *not* limited by the rights of others. An unreliable punisher violates no right of the guilty person; but he still may not punish him." (107). It is not enough that the guilty party is guilty. The punisher must *know* he is guilty. One is tempted to label this the 'what you don't know *can* hurt you' approach.

This approach neatly avoids an assertion of procedural rights and, in addition, is a conscious effort to answer the objection that a guilty person may not defend himself against unreliable procedures and may not punish someone else for using them upon him. (103). Our attention is now shifted from the rights of guilty persons to the "morality" of protective associations; from the question of whether a guilty person can defend himself against his victim we now move to consider whether a third party can protect the guilty person if that third party isn't sure of the client's guilt. "But,", as Nozick asks, "does this difference in knowledge made the requisite difference?" (108)

He believes the epistemic problem at least allows the protective association to delay the imposition of penalties on its client until it can determine his guilt. This is provided they pay compensation for the delay if it turns out that his client is guilty. While I am unsure about the rightfulness of this delay, it does not appear to present a major difficulty. Nozick, however, goes on to assert that a person using an unreliable procedure "is in no position to know that the other deserves punishment; hence he has no right to punish him." (106) It is one thing to assert that if a protective association delays sanctions against its guilty client it must compensate the victim for the delay. To claim that the association may rightfully prevent any punishment by an enforcer it deems unreliable is quite another matter.

I leave aside the question of whether *anyone* has the right to "punish" if by punish we mean something other than "make restitution to victims." If punishment were limited to restitution, this might minimize Nozick's visceral reaction against the actions of third parties. For clearly he fears the prospect of persons stealing from or hurting someone and then trying to dig up some past indiscretion by the victim in order to "justify" their aggression.

A restitutional standard would justify the actions of thieves who stole from someone who turned out himself to be a criminal *only* if the thieves had given their booty to the original victim. If the thieves kept the loot, the fact that the victim was himself a criminal would in no way justify their acts. This is hardly a carte blanche for indiscriminate "punishing."

But Nozick's epistemic justification is more than a gut reaction against loopholes for criminals. It sets forth a principle of morality. Unfortunately he doesn't justify this principle beyond its deterrence value on enforcers using unreliable procedures. (105). And even on this point he concedes that "not anything that would aid in such deterrence may be inflicted;" but the true question is the (moral) legitimacy of "punishing after the fact the unreliable punisher of someone who turned out to be guilty." (106).

But while this epistemic consideration may be relevant as a practical problem or even a moral problem, I question its relevance to issues of rights. (And I'm sure Dr. Nozick shares my contention that rights and morals are not co-extensive.) If the nature and moral foundation of rights are what I alluded to earlier — a freedom to use property, created along with property ownership — then epistemic considerations cannot create or alter rights. The right of self-defense we contend is a direct result of an infringement on a property right. Its purpose is to protect and restore what is rightfully owned. Since it is ontologically grounded this right exists against an aggressor independently of whether we know who the aggressor is. Consequently we are entitled to take compensation from the actual aggressor whether or not we are sure of his guilt. That is, the actual guilt or innocence of the suspect as opposed to our subjective knowledge of his guilt determines if taking restitution from him is justified.

Nozick's epistemic considerations are relevant to whether one who indiscriminately takes restitution from people he's not sure are aggressors (but happens by chance to be right) is a good man. This is a question of morality, not rights. Epistemic considerations are also relevant when we realize that we are *likely* to aggress against innocent people and be responsible to them if we aren't careful about who we "punish." This is a practical question, not one of rights.

This analysis, like the analysis of procedural rights, highlights the crucial need for a theory of rights and the difficulties we face in political philosophy without such a theory. The fact is that in laying down my argument, I too fail to provide a detailed theory of the moral basis and nature of rights. The purpose of this treatment, however, is merely to show how essential such a theory is and how starkly divergent conclusions flow from even a slightly different conception of rights.

How then are we to properly view the relationship between procedural safeguards, epistemic considerations for enforcers and the right of selfdefense? Perhaps Dr.Nozick's intriguing distinction between moral constraints and moral goals would be of service here. "The side constraints view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society." (29). Let me briefly clarify this.

We may take as our moral goal or end a certain state of affairs. Anything which enhances this state of affairs we may do provided we don't violate certain moral side constraints on our actions. Nozick correctly argues that the protection of rights is not a moral goal since this would allow us to violate the rights of a few in order to generally enhance the rights of the many. For example, one may not torture the innocent person to gain information which will prevent the explosion of a bomb even though this would generally enhance the goal of protecting peoples rights (in this case the rights of the potential victims). Rights of individuals are moral side-constraints. We may strive to achieve our goals in any way which does *not* violate an individual's rights.

I would adapt this view to our discussion here. For practical and moral reasons, procedural fairness and knowledge by enforcers of the guilt of their suspects are moral goals to be striven for. Our efforts to achieve them, however, cannot violate the rights of any individual. To punish a victim for taking restitution from his actual aggressor just because he wasn't sure it really was his aggressor is a violation of that victim's right of self-defense and, therefore, a violation of our moral sideconstraint. The right of self-defense, then, dictates that procedural fairness and epistemic certainty are goals, not constraints.

In this discussion, I've tried to show how Professor Nozick has failed to apply his "principle of compensation" to dispute- settlement situations, the lynch-pin of his justification of the ultra-minimal state. But what of this principle of compensation itself? I think Professor Nozick will agree that if *it* fails there can be no doubt that that the ultra-minimal state is unjustified.

"The principle of compensation requires that people be compensated for having certain risky activities prohibited to them." (83). In other words it is okay for you to forcibly forbid another from engaging in a risky activity provided you compensate him for it. Nozick anticipates our response by pointing out that "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 you 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." (83).

Nozick claims this dilemma is "too short" (83); that there is the middle ground of "prohibit so long as you compensate." This middle ground, he says, is based on a distinction between "productive" exchange which you have a right to engage in and "non-productive" exchange which you do not. Since you have no right to non-productive exchange in the first place, the prohibition of such an exchange isn't a violation of your rights.

In a productive exchange each party is better off than if the other party's activity wasn't done or the other party didn't exist at all. (84). "Whereas if I pay you for not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me." (84). The principle of compensation merely says that if the prohibition of a non-productive exchange causes you to forego some benefit (other than what you might have charged in the exchange) you are entitled to compensation.

My concern in this discussion is not so much whether such a distinction exists, but whether such a distinction is relevant to political philosophy or, more particularly, to rights. What seems to have occurred here is an unfortunate mixing of economic explanation with moral imperatives. The concept of an *ex ante* increase in individual psychic utility as a result of exchanges was developed as an axiomatic explanation of why voluntary exchange occurs. It was never intended to serve as a moral or political justification of that exchange. Its use as such disregards the whole notion of title.

If something belongs to me what I own is the title to that object. I may do with it what I wish and that includes exchanging my title for other titles. The *reason* I exchange is to maximise my psychic utility but this says nothing about my *right* to make the exchange. In Nozick's example of a blackmailer it is true that the blackmailed party would be better off if the blackmailer didn't exist (as opposed to an auto purchaser who would not be better off if G.M. did not exist). But the reason why this is true is because the blackmailer is a free man who has the right to tell what he knows as we all do. Wouldn't a businessman be better off without his competition? If a rival company offered to leave the market for a price would the remaining company have the right to prohibit any further competition by the rival simply because the rival was offering a non-productive exchange? I think not.

Nozick admits that even under his principle of compensation, the blackmailer may charge for what he foregoes which Nozick incorrectly assumes to be little or nothing. What the blackmailer foregoes is his right to use his body in any way which he sees fit, i.e. speech. This introduces the fallacy of a "just price." There is no just price for this right or, more precisely, his title to use some property — the body — in a certain way. It has no intrinsic, objectively measurable value. Its only fair price is the freely bargained one. Anything less would mean a right of title had been taken by force from its owner. By definition this is a violation of the blackmailer's rights.

This just price fallacy permeates the whole of Nozick's discussion of "compensation". It confuses the morally permissable exchange with the penalty for violating a right which is compensation. If someone violates another's rights, the victim is entitled to compensation to make up for the transgression. This simply means he is entitled to what was taken from him. We don't pretend that money is the equivilant or even "fair price" for the loss of life or limb. We say only that some attempt must be made to restore to that victim what was taken from him as far as humanly possible.

The crucial distinction here is while voluntarily paying a purchase price makes an exchange permissible, compensation does not make an aggression permissible or justified. It is not permissible to deprive you of free speech provided I "compensate" you. You would have the right to defend yourself. If you were unsuccessful, unable or unwilling to defend yourself, you would then, in addition, have a right to compensation. Put in more analytic terms, voluntariness is a necessary condition for a morally permissible exchange of values. Compensation is not a sufficient condition for justifying or permitting a violation of rights.

Contrary to Nozick's principle of compensation, all violations of rights should be prohibited. That's what right means. The only way rights are abdicated is by consent of the right holder. Nozick rejects this on the grounds that "some factor may prevent obtaining this prior consent or make it impossible to do so. (Some factor other than the victim's refusing to agree)". (71). To this one must reply, "so what?". Practical problems of obtaining consent sometimes can't be avoided it's true, but this doesn't mean that consent is not required. Nor will an argument from utility suffice since utility we saw can only be applied to moral goals and not to rights which are moral side-constraints (to employ the Nozickian distinction). Nozick is too quick to reject the principle that rights violations are always prohibited.

WHITHER ANARCHY?

Political reality dictates that the *practical* burden of proof falls on those who wish to make a radical change in society. Anarchists must face this burden. But it is those who seek to impose a state, those who wish to justify their use of force against the individual who face the *moral* burden of proof.

As I tried to emphasize at the beginning of this paper, there are many reasons why we should be grateful to Robert Nozick for writing this book. Not the least is that he has properly perceived the moral burden of proof. More than this, he has tried to meet that burden. I have tried to determine whether he has succeeded. Has Robert Nozick justified the state? I conclude that he has not, though not for want of an intricate and ingenious effort.

It is essential to his endeavor that he show that the rise of the state violates no individual rights. He has attempted to show this by implicitly redefining rights. The crucial step in this process is the principle of compensation and its application to dispute settlement. I believe that the application of the principle to dispute-settlement via procedural rights and epistemic considerations fails. The principle itself, I contend is grounded on a misguided economic-type explanation rather than a moral argument. Lastly I feel that Nozick's own concepts of moral constraints *and* moral goals helps us to see where he later falls short.

Nozick's book neither claims to be nor succeeds in being the last word on the anarchist-minimal state controversy. For that matter, neither does this paper. I conclude simply that Nozick fails to meet his burden of proof. The state remains unjustified.

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THE INVISIBLE HAND STRIKES BACK*

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Surely one of the most significant occurrences on the intellectual scene during the past few years has been the emergence of a professor of philosophy at Harvard University as an eloquent and forceful spokesman for the doctrine of Libertarianism. Indeed, so much attention and praise has been lately showered upon the man, Robert Nozick, and his National Book-Award-winning treatise, *Anarchy, State and Utopia,* that all who uphold the doctrine of human liberty have been cheered.

If they have been cheered by the reception given to the book, however, and to the new concern of portions of the intellectual establishment with libertarianism, they have not been equally cheered by the content of the book itself. For amidst the book's subtle and wide ranging critiques of doctrines such as Marx's theory of exploitation, egalitarianism, and John Rawls' theory of justice (so hailed by intellectuals in recent years), appears an argument so central to Nozick's thinking that it dominates the first third of the treatise itself: a defense of the "minimal State" against the claims and arguments of anarchism.

Part of the consternation caused by this section is due to the fact that Nozick's argument is often of brain-cracking complexity, using against the reader all of the techniques and tools of contemporary philosophy — with not a few other technical insights from other fields, such as economics, thrown in for good measure — giving the reader oftentimes the feeling of being on a merrygoround moving at a dizzying pace, changing speed and direction in unpredictable ways.

But part of the consternation is caused equally by the nature of the arguments themselves, with their seemingly anti-libertarian bent; arguments resting on notions such as the "compensation principle", the principle of "risk," and the alleged "right" to prohibit certain risky activities of others.

It is no accident, then, that *Anarchy, State and Utopia* has raised a storm of controversy in Libertarian circles. While the media and the intellectual world in general have focused, appropriately enough, on Nozick's persuasive critiques of the conventional wisdom, particularly the section devoted to examining Rawls' theory of justice, and to Nozick's defense of "capitalist acts between consenting adults," Libertarians have focused more on Nozick's frame of reference, the absence of a theory of rights (upon which much of the book tacitly rests its case), and the attack on anarchism.

It is obvious that any persuasive and comprehensive critique of this profound and complex work would have to be as long as the book itself. We aspire to no such grandiose heights here. What we shall do instead is to attempt to answer Nozick's main argument in defense of the "minimal state". Nozick begins with the Lockeian "state-of-nature" to show how, by means of a series of "invisible hand" processes which violate the rights of no one, a legitimate "minimal state" may arise. We shall, on the contrary, maintain that, beginning with a "minimal state," and moving through a series of stages (which process violates the rights of no one), we may properly arrive back at a state of anarchy. In short, we shall maintain that the only good minimal state is a dead minimal state, one which allows those processes to operate which would, if continued over a period of time, dissolve the minimal

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state into anarchism.

In clarifying this, we shall have to discuss Nozick's concept of "risk," his principle of "compensation," and his view that the explanation offered for the origin of the state *is* an "invisible hand" explanation. We shall see that, on the contrary, there is instead a very *visible* hand: in fact, a veritable iron fist.

Professor Nozick's defense of the minimal state unfolds in three stages. Firstly, he argues that, "given" an anarchistic system of competing protective associations within a free market, one *dominant agency* will emerge, through market procedures and by economic necessity. This "dominant agency" will in turn "evolve" into an *"ultraminimal state"* by an invisible hand process in a morally permissible way which violates the rights of no one. This "ultraminimal state" differs from the dominant agency in that it maintains a monopoly on force in a given geographical area (except that necessary in immediate self-defense). It therefore "excludes private (or agency) retaliation for wrong and exaction of compensation; but it provides protection and enforcement services *only* to those who purchase its protection and enforcement policies." Professor Nozick then shows how this ultraminimal state evolves into a *minimal state,* which is "equivalent to the ultraminimal state conjoined with a (clearly redistributive) Friedmanesque voucher plan, financed from tax revenues. Under this plan all people, or some (for example, those in need) are given tax-funded vouchers that can be used only for their purchase of a protection policy from the ultraminimal state." Professor Nozick holds that "the operators of the ultraminimal state are morally obligated to produce the minimal state," since "it would be morally impermissible for persons to maintain the monopoly in the ultraminimal state without providing protective services for all..."

This last is, of course, especially interesting. The successful transformation of the ultraminimal state into the minimal state is dependent upon the ultraminimal state's allegiance to Professor Nozick's principle of compensation. The ultraminimal state is obligated to "compensate" those whose risky activities they forcibly prohibit. Adequate compensation is taken to be, quite without reason, as we shall see, the provision of protective services. Professor Nozick grants that the ultraminimal state "might fail to provide this compensation," but he assumes that "generally people will do what they are morally required to do." This assumption, unfortunately, is *only* made by Professor Nozick in considering the actions of the state apparatus, not in pausing to consider the actions of competing protective associations. This naiveté is charming indeed, but not very heartwarming, reassuring or realistic. That such an assumption should find its way to make a crucially important bridge in Professor Nozick's argument is, in many ways, symptomatic of the book, and of much of contemporary philosophical discussion of the state.

Why must one "dominant agency" develop, within the free market system of competing protection agencies? "Initially," Professor Nozick writes, "several different protective associations or companies will offer their services in the same geographical area. What will happen when there is a conflict between clients of different agencies?" We learn that "only three possibilities are worth considering:"

> 1. In such situations the forces of the two agencies do battle. One of the agencies always wins such battles. Since the clients of the losing agency are ill protected in conflicts with clients of the winning agency, they leave their agency to do business with the winner.
> 2. One agency has its power centered in one geographical area, the other in another. Each wins the battles fought close to its center of power, with some gradient being established. People who deal with one agency but live under the power of the other either move closer to their own agency's home headquarters or shift their patronage to the other protective agency...
> 3. The two agencies fight evenly and often. They win and lose about equally, and their interspersed members have frequent dealings and disputes with each other. Or perhaps without fighting or after only a few skirmishes the agencies realize that such battling will occur continually in the absence of preventive measures. In any case, to avoid frequent, costly and wasteful battles the two agencies, perhaps through their executives, agree to resolve peacefully those cases about which they reach differing judgments. They agree to set up, and abide by the decisions of, some third judge or court to which they can turn when their respective judgments differ. (Or they might establish rules determining which agency has jurisdiction under which circumstances.) Thus emerges a system

of appeals courts and agreed upon rules about jurisdiction, and the conflict of laws. Though different agencies operate, there is one unified federal judicial system of which they are all components.

What is the significance of this? "In each of these cases," we are told, "all the persons in a geographical area are under some common system that judges between their competing claims and *enforces* their rights,"

"Out 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."

According to Professor Nozick, then, if competing protection associations make arrangements between themselves to settle disputes, we have a type of "federal judicial system," a variant of government. This is surely metaphorical and unjustified. Surely, if we take all the protective devices in use in a given society and lump them together, then the total has what some might call a "monopoly" on protection. Similarly, all farmers taken collectively have a "monopoly" on growing food. But this is tautological.

The real point which Professor Nozick wishes to make is that if either of these alternative courses result, then we have a "legal system" resulting. Now, no one has ever denied that there would indeed be a "legal system" under anarchism. Many prominent anarchists have claimed that they advocate that structures and processes (even content, in some cases), be *separated from* the state, and the state abolished entirely. If one is going to term *any* "legal system" in this broad sense a "state," then there is little point in pursuing the matter.

Discussion may proceed along more productive lines if we distinguish between two radically different *types* of legal systems: a "market legal system" and a "state legal system." A "market legal system" could be designated as a system of rules and enforcement procedures which arises from the processes of the market economy: competition, bargaining, legal decisions, and so forth; a legal system whose order is "spontaneous" in the Hayekian sense. A "state legal system" on the other hand, could be designated as a system of rules and enforcement procedures which are designed by the state apparatus, as a result of political procedures, and imposed by force upon the rest of society.

In a society with a "market legal system," the shape of the legal system is determined by the processes set in motion by the actions of a number of independent agencies whose plans may conflict, and therefore cause some adjustment in the means-ends structure of themselves and others. Independent agencies, then, can make agreements, reach decisions, set precedents, bargain and so forth, producing a legal "order" which is not designated by anyone. The resulting system is not a "federal system" in the traditional manner: we may have *ad hoc* decisions for individual disputes, procedures agreed upon in advance, such as drawing the names of arbitrators out of a hat, alternating arbitrators chosen by each agency, *ad infinitum.* We need not suppose that any *permanent,* distinct, appeals system has been erected. (If one had, it would not change our essential argument.) Anarchism, then, can have a legal system, a "market legal system" as opposed to a "state legal system." The analogy is to the distinction drawn between state-economic systems and unhampered market economic systems. Both are *systems,* but not of the same sort; they are built on different principles of organization and are the manifestations of different processes altogether. What we shall conclude, then, is that if the third of Professor Nozick's three alternatives results, then there will *not* be a state apparatus as the result.

Several other objections to this reasoning arise here; Professor Nozick's argument that "maximal competing protective services cannot coexist" lacks force, because he merely assumes that violent conflicts between agencies will be the norm. Now, if such conflicts do begin to develop, economics gives us every reason to assume that it will be more in the interest of competing parties to develop a means of arbitrating disputes rather than to engage in violent actions. Finally, there is no reason to regard the concept of "protective services" with holistic awe. An infinite variety of institutions can develop in society, concerned with as many different aspects of protection. Some institutions may patrol the neighborhood block, some might focus on copyrights, some on violations of contracts, some merely on insuring against crime, rather than on apprehending criminals (for cases where customers in society do not think that retribution or punishment is justified or worthwhile). Here again, there is no reason to expect a single agency to dominate the field.

The "invisible hand" has indeed gotten itself entangled in a very strong web. Let us examine the process by which the "dominant agency" would evolve into an "ultraminimal state," which is in turn morally obliged to become the "minimal state."

> "An ultraminimal state", writes Nozick, "maintains a monopoly over all use of force except that necessary in immediate self-defense, and so excludes private (or agency) retaliation for wrong and exaction of compensation; but it provides protection and enforcement services *only* to those who purchase its protection and enforcement policies."
>
> "The minimal (night watchman) state", on the other hand is, as he writes, "equivalent to the ultraminimal state conjoined with a (clearly redistributive) Friedmanesque voucher plan, financed from tax revenues. Under this plan all people, or some (for example, those in need), are given tax-funded vouchers that can be used only for their purchase of a protection policy from the ultraminimal state."

Professor Nozick assumes the existence of a dominant protection agency in a field of competitors, and shows how it might evolve into the ultraminimal state, which is in turn morally obligated to become the minimal state. The key question to ask is: how may the dominant agency act towards independents? To answer this, we must briefly consider the notions of risk, prohibition, and the principle of compensation.

In Professor Nozick's view, one is morally justified in prohibiting certain acts, provided one compensates those who are so prohibited. What actions may be prohibited? In *Anarchy, State and Utopia,* there is no clear and unambiguous line drawn between classes of human actions which one may justifiably prohibit, and those which one may not. One class can be identified, however: we may prohibit certain *risky* actions, providing those so prohibited are compensated. Which risky actions? It is not too clear, but the answer seems to be: those presenting "too high" a probability of harm to others. The dominant agency may justifiably prohibit enforcement procedures of independent agencies, by this reasoning, since these risk harming others, whether by punishing wrongly, using unreliable procedures, or anything else. In asking the question "How may the dominant agency act?" or "What...may a dominant protective association forbid other individuals to do?" Professor Nozick answers:

> "The dominant protective association may reserve for itself the right to judge any procedure of justice to be applied to its clients. It may announce, and act on the announcement, that it will punish anyone who uses on one of its clients a procedure that it finds to be unreliable or unfair."

This is based in turn on the notion of "procedural rights." "The person who uses an unreliable procedure, acting upon its results," he writes, "imposes risks upon others, whether or not his procedure misfires in a particular case." Nozick articulates the general principle that *"everyone* may defend himself against the unknown or unreliable procedures and may punish those who use or attempt to use such procedures against him," and does not in principle reserve this "right" to a monopoly agency. *However:*

> "Since the dominant protective association judges its own procedures to be both reliable and fair, and believes this to be generally known, it will not allow anyone to defend against *them*; that is, it will punish anyone who does so. The dominant protective association will act freely on its own understanding of the situation, whereas no one else will be able to do so with impunity. *Although no monopoly is claimed,* the dominant agency does occupy a unique position by virtue of its power... It is not merely that it *happens* to be the only exerciser of a right it grants that all possess; the nature of the right is such that once a dominant power emerges, it alone will actually exercise that right." (my emphasis)

Hence: a *de facto* monopoly. Ergo: the ultraminimal state.

It is at this point that the principle of compensation rears its ugly head.

Professor Nozick has stated that one has a right to prohibit certain excessively risky actions of others *provided they are compensated.* What constitutes "compensation"?

> "Something fully compensates a person for a loss if and only if it makes him no worse off than he other-

wise would have been; it compensates person X for person Y's action if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had not done A. (In the terminology of economists, something compensates X for Y's act if receiving it leaves X on at least as high an indifference curve as he would have been on, without it, had Y not so acted.)"

Professor Nozick then proceeds to "shamelessly" ignore certain key questions surrounding the central issues concerning the meaning of "compensation." His final formulation is as follows:

> "Y is required to raise X above his actual position (on a certain indifference curve I) by an amount equal to the difference between his position on I and his original position. Y compensates X for how much worse off Y's action would have made a reasonably prudent acting X."

This is the meaning, then, of "compensation". "The principle of compensation requires that people be compensated for having certain risky activities prohibited to them." What "risky" activities does Professor Nozick wish to prohibit? The enforcement procedures of the non-dominant protection agencies. That is, he wishes to prohibit us from turning to any of a number of competing agencies, other than the dominant protection agency.

What is he willing to offer us as *compensation* for being so prohibited? He is generous to a fault. He will give us nothing less than *the State*.

Should one wish to reject this admittedly generous offer, it would be responded that he *cannot* reject it. It is foisted upon one whether one likes it or not, whether one is *willing* to accept the State as compensation or not. It is *this* which should give us pause, and lead us to think a bit. Let us consider the nature of Professor Nozick's State, and then consider a few of the weak links in the chain of arguments which will, in the end, bind us to the State. With a good yank or two, perhaps we can snap some of these weak links, and save ourselves from what some of us, at least, regard as certain doom. In the meantime, though, let it be realized that we have arrived at the minimal state. The ultraminimal state arose when non-dominant agencies were prohibited from certain activities. The minimal state was reached when the ultraminimal state was combined with the extention of protective services to those who were so prohibited.

(We should note that the only thing binding the minimal state to pay such compensation is a moral principle. Professor Nozick "assumes" in this case, that they [those in the ultraminimal state] will act as they ought, even though they might not acknowledge this moral obligation.)

Consider the nature of the Nozickian state itself. The Randian "limited government" has a rather interesting economic form: it is in essence a consumer's co-op, with all coming under its power being "consumers," having the right to vote, and so on. ***But Professor Nozick's State is private property.*** It was, one recalls, a private firm, an agency, which developed by a series of specifiable steps, into a State. It remains private property, then, since nothing was done to change matters. Since it was once upon a time ago a dominant agency, and got that way through the free market, one is justified in assuming that its owners, the board of directors, (stockholders or whatever) are aggressive businessmen, driving towards "expansion" of their business. There is no question of a constitution, of course, merely the contracts with its clients, which in case of conflicts it alone can judge and interpret. There is no voting. There is no separation of powers, no checks and balances, and no longer any market checks and balances, either. There is merely a private agency, now with a monopoly on power, on the use of physical force to attain its ends.

This, we are told, is an agency which is going to follow certain moral principles and (a) extend protection to those whose risky activities are prohibited (or whose agencies were prohibited from functioning), and (b) stop with the functions of a "minimal state." What is to check its power? What happens in the event of its assuming even more powers? Since it has a monopoly, any disputes over its functions are solved exclusively by itself. Since careful prosecution procedures are costly, the ultra-minimal state may become careless without competition. Nevertheless, only the ultra-minimal state may judge the legitimacy of its own procedures, as Professor Nozick explicitly tells us.

One might find Nozick's argument as to why *this* should be taken as a less "risky" situation than that of competing agencies, less than totally convincing. Let us take up some of those weak links in the chain of reasoning, and see if they can be snapped.

The fact that, as we saw, we cannot reject the State's "protection" as justifiable "compensation" for being prohibited from patronizing competing agencies, should lead us to question Professor Nozick's view of compensation. A similar critical glance will lead us to re-examine his view of risk as well.

We are justified in prohibiting the actions of competing agencies because they are alleged to be "risky". How "risky" does an action have to be before it can be prohibited? Professor Nozick does not say. Nor does he give us any indication of how risk of the kind he deals with can be calculated. As Murray Rothbard wrote in *Man, Economy and State:*

> "'Risk' occurs when an event is a member of a class of a large number of homogeneous events and there is fairly certain knowledge of the frequency of occurrence of this class of events."

In his masterwork *Risk, Uncertainty and Profit,* Frank Knight uses the term "risk" to designate cases of *measurable uncertainty.* As applied to human action, this becomes very dubious indeed. In fact, it involves us in innumerable difficulties.

As Professor Knight writes, "We live only by knowing *something* about the future; while the problems of life, or of conduct, at least, arise from the fact that we know so little." This is why we cannot calculate the risks from future human actions. (We shall restrict the concept of "risk" to the cases of the probability of harm resulting from certain actions.) In dealing with questions of probability of consequences of human actions, our calculations must of necessity be vague and inexact. While in some cases, certainly, we can say that a probability is greater or less, a *quantitative* calculation is impossible. Not dealing with homogeneous units, or with accidents distributed throughout a large number of cases with some frequency, we lack the preconditions of quantitative calculation. This is particularly the case with such institutions as "competing protection agencies," since they may differ vastly in scope of activities, procedures, or any number of other attributes. If Nozick provided a criterion of what degree of "risk" was permissible, and what not, then we might be able to separate those agencies which are "too risky" from those which are not, prohibiting only the former. No criterion is given, however. Moreover, Nozick is not even simply concerned with "harm," but extends his concern to a much more subjective element, namely, *fear.* How much "fear" justifies what response is not discussed. It is very difficult, then, to see how one can arrive at any objective cut-off level. Not only can "fear" not be calculated or measured, it is so subjective that it cannot even be said to be a simple response to any one set of objective conditions. There may be psychological and ideological factors, as well. For instance, the person in question might at one time have had to live under a State apparatus, and that experience might have left deep fears in his subconscious.

Since man anticipates the future without knowing what will happen, since he modifies his plans and actions continually as new knowledge accumulates, how can anyone predict that competing agencies will automatically and inevitably supersede any given level of "risk" in society? Uncertainty and fear on some level seem to be an essential (or at least central) part of the human condition; Professor Nozick has given us no reason to believe that any one category of uncertainty, such as the risk of unjustifiable punishment, or unreliable enforcement procedures, should morally lead us to establish one set of institutions over another. Why isn't fear of tyranny an equally valid reason for prohibiting something? And who is to say that the procedures of the dominant protection agency are not among the most *unreliable?* Only *given* the *assumption* of reliability can we even begin to consider as "morally justifiable" any judgment and prohibition of the activities of others. Certainly a dominant agency whose procedures were among the least reliable would be in the same position as one with reliable procedures with respect to its *power* to prohibit other procedures and agencies. But we would not defend the *moral permissibility* of this prohibition. In the absence of criteria, Professor Nozick has given us few guides here.

Moreover, while there is an extent to which people can correctly anticipate the future in human actions, including the risk of harm, there is no means of objectively discovering, in the present, which people will *correctly* anticipate the future, and which not. The best chance we have of picking those whose expectations are likely to be most in harmony with future reality, in the area of "risk of harm," would be to look at objective tests. But in the realm of human action, the closest we can come is not any science of risk-calculation, but through a record of profit-making, that their expectations have been historically more in harmony with reality than those of other market participants. Entrepreneurship is the general category of such risk-taking in the area of producing goods and services in society. But even in the case of entrepreneurs, there is no way of predicting that those whose abilities in forecasting the future *have been* historically more accurate, *will be* more accurate in the future.

If we are concerned with risk and uncertainty, there is therefore no reason to focus our attention on the political channel of attaining ends. If, in a free society, there were sufficient concern with the risk imposed by some actions of members of a market economy (or market processes or market institutions), institutions would be developed to deal with and alleviate the fear and the risk. The insurance firm is one such institution. We know from market analyses that prices are more stable in those areas where futures markets exist than when they do not. Now "prices" are merely exchange ratios between buyers and sellers of a given commodity. Thus, insurance markets, and futures markets in related fields, would in an unhampered market economy most probably provide the greatest stability of the level of risk in a society, that is: risk as seen through the eyes of a participant of the market economy. Moreover, an unhampered market economy would provide for the optimal degree of present provision for future risk in society. Any intervention by a minimal state would, therefore, *increase* risk, and lead to a sub-optimal allocation devoted to provision for risk. It would lead to a shift *away from* the optimum societal provision for risk. The minimal state would thus create *discoordination* of resources in the vitally important market of provision for risk.

What we have seen here is that risk-calculation cannot be quantitative, but only qualitative: indeed, even then the concept is vague when we deal with the *possible* consequences of precisely *unknown future actions.* Moreover, insofar as there can be calculation of risks, entrepreneurs and other market participants are the only ones we have a right to expect to be successful in their expectations. The unhampered market economy is the only means of setting institutions and processes in society free, to deal effectively with risk and fear. Any movement away from the purely free market, from the choices and decisions of market participants, each with limited knowledge, learning through market processes, is a shift *away from* an optimal situation in the area of expectations of and provision for risk of future harm. In short, in the very process of forming a network of competing market agencies, differentiating each from the other, risk would be provided for tacitly, by the preferences and choices of market participants.

All of this gives us reason to believe that any attempt to prohibit certain actions of independent agencies is *not* morally permissible, and cannot be motivated by any concern with risk or fear.

The problems with the principle of compensation are much more difficult.

Professor Nozick's notion of compensation rests upon the concept of an "indifference curve". The "indifference curve" is one of the saddest plagues to hit economic science since the concept of "macroeconomics" first reared its ugly head. Indifference curve analysis is based on interviewing people about their relative preferences between two or more alternatives. Points of "indifference" between different quantities of certain goods or services are placed on a "map". When many such points of indifference are reached, all placed neatly on a map, the noble indifference curve analyst connects the points by a line, and applies the techniques of mathematics to analyzing varying things.

Very little of this has anything to do with reality. A person's value scale is a constantly fluctuating thing, ranks shifting constantly, sometimes violently. Even if some useful information were imparted by interviewing people in this way, it could not be the basis of any action or expectation on our part. We need not go into this further. Professor Nozick is a new Platonist or Rousseauean, and is really developing a new version of "real" or "rational" interests or values, to supplant our "actual" or concrete interests.

To "compensate" someone, we must place him, according to this view, at a point on his indifference curve at least as high as he would have been without any interference. The point should be made that we are talking about the individual's own view of things, about his evaluations, not any objective state of affairs. It is therefore not possible to judge what would constitute full compensation merely by looking at such states of affairs. We must look at the value hierarchies of the individuals involved.

Professor Nozick, however, does not look at the actual evaluations of individuals. Instead, he *assumes* that everyone prohibited from taking certain risky actions *may be compensated in the same way,* namely, by providing protective services for them through the minimal state. The basis for this assumption is hard to determine. *Why* does provision of protection constitute full compensation? Apparently, because Nozick thinks that it comes close to "copying" the initial situation (objective), where the oppressed victim of the minimal state could still buy alternative protection from independent agencies. But this is entirely unjustified.

What this actually amounts to is saying that *we* are to judge what makes a person "at least as well off," rather than the person himself, through choosing and acting. But this is *paternalism,* which Professor Nozick rejects elsewhere in *Anarchy, State and Utopia.*

If we take the point of view of the person whose actions are prohibited, then we can concern ourselves only with his own value scale. This places matters in a different light.

The only ways in which we could tell if someone was justly compensated then would be:

(1) If they will accept A in exchange for B, i.e. if they exchange one for the other on a free market. This exchange, if it occurs, tells us that A was worth at least as much as B to the relevant party. Obviously, this exchange needs to be made in the absence of force, violence, aggression, or threats of either.

(2) If, after the relevant agent has been aggressed against, he agrees to accept A as compensation from an aggressor or aggressor's agent. Again, this acceptance must be in the absence of force, violence, aggression or the threats of them.

Apart from these, there are *no* objective means of measuring justifiable or "full" compensation. The minimal state however makes both of these impossible, for it does threaten such violence or punishment. Moreover, the argument rests on a variant of the "just price" doctrine, applied to compensation. But this is not justified anywhere.

Let us see if we can arrive at the minimal state by some legitimate method of "compensation." In a market society, anyone would have the right to approach anyone who is a client of an independent agency, and buy him off, strike some sort of a bargain with him. A certain number, no doubt, would go along with this. But what of those who will not? We may see the problem by considering a supply and demand chart. In this case, let "S" represent the supply of a given service, namely, foregoing the use of independent agencies and accepting state protection instead. Let "D" represent the demand for this service. Consider that portion of a supply-and-demand chart below the point where exchanges of these sorts would occur. In this situation, *there is no exchange.* The suppliers (those who subscribe to independent agencies) are not willing to settle for anything the demanders (the dominant agency) are willing to offer. Ergo, there is no point of contact between them at which compensation would be both offered and accepted. Even in the absence of threats of force, there would be no settlement. Since there is nothing which the "S's" would accept *before* prohibition, why should one assume that compensation is possible *after* prohibition? If the supply and demand curves have not shifted, the dominant agency cannot offer more (or the non-dominant agencies accept less), than was offered before, and still there can be no meeting of the minds. How, then, can those whose risky activities are prohibited be compensated? How can they be raised to a situation equal in their eyes (on their own value scales) to that in which they would have found themselves without prohibition? It appears that we have reached a dead end.

(We should add that Professor Nozick makes things no less difficult by talking about compensating only those "disadvantaged" by the prohibition. The problems of compensation remain, and there is, to boot, no theory of "disadvantage" offered in *Anarchy, State and Utopia.*)

There are, in addition, other arguments which might be made against the principle of compensation. Professor Nozick does not deal with the problem of compensating those for whom the creation of the minimal state would be a vast moral and psychic trauma. What just compensation could be offered in *this* case? How could they be raised to a position equal to the situation they were in *before* the creation of the minimal state? Moreover, consider the case of the clients of the dominant agency, A. They may very well benefit (or perceive themselves as benefiting) from the existence of agencies B, C, D..., which they may perceive as a *probable check* on A's activities, fearing that A might supersede its contractual functions in the absence of B, C, D.... Must A, in the transition from dominant agency to minimal state, compensate its own clients after taking those actions which eliminate *this* benefit? If so, *what* compensation? If not, *why not?* Why aren't they as "disadvantaged" as anyone else?

If we cannot assume that providing protection[1] to clients of independent agencies constitutes full compensation, but suppose instead that compensation can be arrived at, perhaps, through higher costs to the agency, then consider the chain of events which begins.

If the minimal state must protect everyone, even those who cannot pay, and if it must compensate those others for prohibiting their risky actions, then this must mean that it will charge its original customers *more* than it would have in the case of the ultraminimal state. But this would, *ipso facto*, increase the number of those who, because of their demand curves, *would have chosen* non-dominant agencies B, C, D... over dominant agency-turned ultraminimal state-turned minimal state. Must the minimal state then protect *them* (or subsidize them) at no charge, or compensate them for prohibiting them from turning to other agencies?

If so, then once again, it must either increase the cost of its service to its remaining customers, or decrease its services. In either case, this *again* produces those who, given the nature and shape of their demand curves, *would have* chosen the non-dominant agencies over the dominant agency. Must *these* then be compensated? If so, then the process leads on, to the point where no one but a few wealthy fanatics advocating a minimal state would be willing to pay for greatly reduced 'services' of government. If this happened, there is reason to believe that very soon the minimal state would be thrown into the invisible dustbin of history, which it would richly deserve.

What would more likely happen is that the state would turn instead to its old friend, robbery — otherwise known as "taxation" (which is, incidentally, treated altogether too slightly in Professor Nozick's tome). Hence, one sees the sinister invisible hand leading us from a defense agency... to a dominant agency... to an ultra-minimal state...to a minimal state...to the first trappings of tyranny. Moreoever, it is a *private* tyranny, since the agency is privately owned. This being so, what can be our protection against a private company's monopoly on force in society? Surely the objective risks *here* are immensely greater than those which led to the hesitant creation of the minimal state.

The compensation principle, then, as is presently formulated, leads us into difficulties. Let us then make our remaining points quickly.

Is the process which led to the creation of a minimal state an "invisible hand" process? We maintain that it is not. The reason is that while the state may not be *intended* as the end result, the *state-like action* of prohibiting competition is still the outcome of a *specific decision.* The dominant agency must *decide* to prohibit the actions, and punish offenders. At each step lies an insidious but rather explicit decision. If this is an "invisible hand," it nonetheless packs a mean wallop, threatening to crush liberty in its grasp.

Finally, before we turn the Professor's argument around, what, in our view, *is* the dominant agency justified in doing? Nothing more than punishing those who can be shown to have initiated violence against its citizens or clients, and this only after the fact. Risks of harm in the case of human agencies cannot be calculated except by observing the actions of men (such as those who constitute competing protection agencies) over some considerable period of time. It is by means of their *policies* that we judge the reliability of their procedures, the threat that they do or do not constitute to innocent people, and thus decide how to respond to irresponsible or criminal agencies. There are difficult problems here, but there are more problems in assuming that a dominant agency is more virtuous, more reliable in its procedures or even, of all things, less threatening to the safety and liberty of the people than other agencies. Professor Nozick cannot even prove that those agencies which employ *reliable* procedures should be prohibited from acting along with those which do *not* employ such procedures.

But if that is the case, then the invisible hand returns:

Assume the existence of the minimal state. An agency arises which copies the procedures of the minimal state, allows the state's agents to sit in on its trials, proceedings, and so forth. Under this situation, it *cannot* be alleged that this agency is any more "risky" than the state. If it is still too risky, then we are also justified in saying that the state is too risky, and in prohibiting its activities, providing we compensate those who are disadvantaged by such prohibition. If we follow this course, the result is *anarchy.*

If we do not, then the dominant agency-turned minimal state finds itself competing against an admittedly watched-over-competing agency.

But wait: the competing, legally subordinate, spied upon, oppressed second agency finds that it can charge a lower price for its services, since the minimal state is guaranteeing "risk" and has to compensate those who would have patronized agencies using risky procedures. It also has to pay the cost of spying on the new agency, which constitutes a greater capital expenditure.

Since it is only *morally* bound to provide such compensation, it is likely to cease doing so under competitive pressure. This sets two processes in motion: those formerly compensated because they would have chosen agencies other than the state, rush to subscribe to the maverick agency, thus partially reasserting their old preferences.

Alas, another fateful step has also been taken: the once proud minimal state, having ceased compensation, reverts to a mere ultraminimal state.

But the process cannot be stopped. The maverick agency must and does establish a good record, to win clients away from the mere ultraminimal state. It offers a greater variety of services, toys with different prices, and generally becomes a more attractive alternative, all the time letting the state spy on it, bugging its offices, checking its procedures, processes and decisions. Other noble entrepreneurs follow suit. Soon, the once mere ultraminimal state becomes a lowly dominant agency. It finds that the other agencies have established noteworthy records, with safe, non-risky procedures, and stops spying on them, preferring less expensive arrangements instead. Its executives have, alas, grown fat and placid without competition; their calculations of who to protect, how, by what allocation of resources to what ends (gathering information, courts, buildings, prisons, cops, etc.) are adversely affected, since they have taken themselves out of a truly competitive market price system. The dominant agency grows inefficient, when compared to the dynamic, new, improved agencies.

Soon — lo! and behold! — the lowly dominant protection agency becomes simply one agency among many in a market legal system, or disappears altogether. The sinister minimal state is reduced, by a series of morally permissible steps which violate the rights of no one, to at best merely one agency among many. The evil black State apparatus dissolves into the utopia of anarchy. In short, the invisible hand strikes back. Justice is triumphant, and everyone lives happily ever after.

I should like to end with one quotation, from Benjamin R. Tucker, and one paraphrase, from Karl Marx, which express most clearly my own attitudes toward the matters we have been discussing. Tucker pointed to the anarchist definition of the State as the "embodiment of the principle of aggression".

> "...we see," he said, "that the State is antagonistic to society; and, society being essential to individual life and development, the conclusion leaps to the eyes that the relation of the State to the individual and of the individual to the State must be one of hostility, enduring till the State shall perish."

And, paraphrasing Marx, we may say that "traditional political philosophers have sought only to explain and justify the State. The point, however, is to abolish it."

NOTES

1. It is not clear whether this protection will be offered without cost or if the former customers will be forced to pay for it. My interpretation is that the "minimal state" can force clients to pay up to what they would have with another agency (what problems this raises in a world of shifting prices!). "Compensation" would then consist of picking up the tab for the *difference* between the cost with another agency and its own "price".

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THE FREE MARKET MODEL VERSUS GOVERNMENT: A REPLY TO NOZICK*

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Two objections have recently been made to the model of the free market without government. These objections suggest that the model may be self-defeating, in at least two different ways. The problems about to be discussed have been raised by Robert Nozick in his recent *Anarchy, State, and Utopia,* and have been used by him to argue against the model, and on behalf of what he calls the "minimal state".

The two objections are these: first, that the model is unstable — that it will inevitably lead back to the state: second, that without a certain "redistributive" proviso, the model is unjust. If either of these things is the case, the model defeats itself, for its justification purports to be that it provides a morally acceptable *alternative* to government (and therefore to the state).

Nozick's arguments represent the only serious attention that has been paid the free market model of societal organization in recent mainstream philosophy, and it is clear that Nozick knows the model well. His arguments are tough and somewhat complex. If the model can survive the criticisms of a thinker of Nozick's calibre, it will have passed a crucial test.

Nozick does not consider himself to be a statist. He does not believe that governments have any rights that individuals, singly or in combination, have not explicitly granted them[1]. In economics, for example, the government ought to keep its hands off the affairs of its citizens. In general, Nozick is a firm opponent of paternalism. His concern with the free market model has to do only with the business of protecting the rights of individuals.

*This article is adapted from John T. Sanders, "The Ethical Argument Against Government" (doctoral dissertation in philosophy, Boston University, 1977).

Attention is focused, therefore, upon the arrangement of private protection associations (or agencies) in the free market model. Nozick begins by outlining the arrangement, and then sketches the *apparent* differences between such a scheme, on the one hand, and a state, on the other. Since this contrast gives a fairly clear picture of what Nozick conceives to be at least *necessary* conditions for a state, it is worthwhile to quote him at some considerable length:

> There are at least two ways in which the scheme of private protective associations might be thought to differ from a minimal state, might fail to satisfy a minimal conception of a state: (1) it appears to allow some people to enforce their own rights, and (2) it appears not to protect all individuals within its domain. (*Anarchy, State, and Utopia,* pp. 22–23).
>
> For our purposes here we need focus only upon a necessary condition that the system of private protective agencies (or any component agency within it) apparently does not satisfy. A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly. (p. 23.)
>
> We may proceed, for our purposes, by saying that a necessary condition for the existence of a state is that it (some person or organization) announce that, to the best of its ability (taking into account costs of doing so, the feasibility, the more important alternative things it should be doing, and so forth), it will punish everyone whom it discovers to have used force without its express permission. (This permission may be a particular permission or may be granted via some general regulation or authorization.) This still won't quite do: the state may reserve the right to forgive someone, *ex post facto;* in order to punish they may have not only to discover the 'unauthorized' use of force but also prove via a certain specified procedure of proof that it occurred, and so forth. But it enables us to proceed. The protective agencies, it seems, do not make such an announcement, either individually or collectively. *Nor does it seem morally legitimate for them to do so.* So the system of private protective associations, if they perform no morally illegitimate action, appears to lack any monopoly element and so

appears not to constitute or contain a state. (p. 24.)

The second reason for thinking the system described is not a state is that, under it (apart from spillover effects) only those paying for protection get protected; furthermore differing degrees of protection may be purchased. External economies again to the side, no one pays for the protection of others except as they choose to; no one is required to purchase or contribute to the purchasing of protection for others. Protection and enforcement of people's rights is treated as an economic good to be provided by the market, as are other important goods such as food and clothing. However, under the usual conception of a state, each person living within (or even sometimes traveling outside) its geographical boundaries gets (or at least, is entitled to get) its protection. Unless some private party donated sufficient funds to cover the costs of such protection (to pay for detectives, police to bring criminals into custody, courts, and prisons), or unless the state found some service it could charge for that would cover these costs, one would expect that a state which offered protection so broadly would be redistributive. It would be a state in which some persons paid more so that others could be protected. And indeed the most minimal state seriously discussed by the mainstream of political theorists, the night-watchman state of classical liberal theory, appears to be redistributive in this fashion. Yet how can a protection agency, a business, charge some to provide its product to others? (p. 24–25.)

Thus it appears that [even] the dominant protective agency in a territory not only lacks the requisite monopoly over the use of force, but also fails to provide protection for all in its territory; and so the dominant agency appears to fall short of being a state. But these appearances are deceptive (p. 25).

It might appear, from these passages, that Nozick's specification of the necessary condition for the existence of a state includes *both* a claim by some person or organization of a monopoly over the use of force in a specified geographic area *and* a provision of protection, by that person or organization, to all in that area. If this were so, then his necessary condition would be compatible with, but stronger than, what we believe to be the only necessary condition of government: that for a person or organization to be a government, it must assume the right to coerce its own clients (or subjects). It would seem that Nozick's monopoly condition is roughly equivalent to this postulate, and that his redistribution condition, if it is to be included among the necessary conditions for states, is an *additional* necessary condition.

It would be a peculiar addition, however. It would make it inappropriate to call any organization that satisfied the monopoly condition, but failed to redistribute protective services, a state. A ruling clique that claimed (and had) a monopoly on the use of force, but which protected only its own members (against, perhaps, the unprotected and exploited masses) would fail to constitute a government, and the entire community, including the clique, would not be a state. That seems to exclude far too much. It is likely that the clique would be an *unjust* government, and the state an *unjust* state, but that is clearly quite different.

Nozick seems to be aware of this. In spite of appearances, it seems that the monopoly condition is the only necessary condition for the existence of a state that he discusses. His language is therefore in conformity with that of the present essay. The redistribution condition is, at most, a necessary condition for a *just* state (in his view), rather than for a state.

This becomes clear in the course of Nozick's discussion of the distinction between what he calls the "minimal state" and the "ultraminimal state". The former satisfies both the monopoly condition and the redistribution condition, while the latter satisfies only the monopoly condition (pp. 26–28). He regards both as states, although they differ in that the ultraminimal state is unjust, while the minimal state is just (as will become clear). *Since* he thinks of both as states, it is apparent that the redistribution condition is not a necessary condition for the existence of a state.

The passages quoted above do a fairly complete job of outlining the entire program for the first section of *Anarchy, State, and Utopia.* Nozick begins with private protection agencies, notes how they *seem* to differ from states (the passages are loaded with carefully placed qualifications such as "might be thought", "appears", "apparently", and the like), and thereby specifies a necessary condition for a state. He goes through all of this in some detail, but warns his reader, at the end, that "these appearances are deceptive". It is clear how the argument that follows is supposed to go. Nozick intends to show that the "scheme of private protective associations" does not really differ from states in the ways they may at first "seem" to.

In particular, Nozick will argue that an "invisible-hand" process (one which shows "...

how some overall pattern or design, which one would have thought had to be produced by an individual's or group's successful attempt to realize the pattern, instead was produced and maintained by a process that in no way had the overall pattern 'in mind''' (p. 18)) might (and perhaps would) lead to a smooth transition from a private protection scheme to the ultraminimal state, without violating anyone's rights. Thus the private protection scheme is unstable.

But since the ultraminimal state will turn out to be (in Nozick's view) unjust, it will be *morally* obligatory to make the transition from the ultraminimal to the minimal state.

The free market scheme is therefore unstable, and tends toward equilibrium at the ultraminimal state. The process by which the transition is made violates no one's rights, and is in that respect morally unobjectionable. But that rest state is morally objectionable for independent reasons, and an ideal equilibrium is achievable by making a further transition (which, of course, must itself violate no one's rights) to the minimal state.

It is now possible to proceed to an examination of the details of Nozick's argument.

Nozick begins with a Lockeian "State of Nature"; at the outset, he imagines that each individual person is responsible for protecting himself and his property against violations by others.

There are certain problems that seem likely to arise, however, from such a situation. For one thing, a system of private and personal protection and enforcement is likely to be biased: "...men who judge in their own case will always give themselves the benefit of the doubt and assume [in conflicts with others] that they are in the right. They will overestimate the amount of harm or damage they have suffered, and passions will lead them to attempt to punish others more than proportionately and to exact excessive compensation" (p. 11). Thus the dictates of "calm reason and conscience" are abandoned, and long-standing feuds seem to be the likely result.

Furthermore, there are likely to be differences in "station" between different people, and these may be great enough to make it practically impossible for some people adequately to protect themselves.

Especially in the light of this last possibility, but perhaps also because of the first, *groups* of people may get together to form mutual-protection associations, wherein all members commit themselves to answering the distress calls of any single member.

There are at least two obvious inconveniences to this solution of the problem. In the first place, everyone is always on call to come to the aid of members in distress, and this may make excessive demands on the time of members (especially if the group is a large one). Some arrangement must be made for rotating responsibilities, perhaps, such that appropriate, rather than excessive, responses are made. Perhaps the *modus operandi* of contemporary volunteer fire departments might provide some clues about how to overcome this inconvenience.

In the second place, however, there is a danger that *some* members might cry "wolf", dragging everybody out of bed at odd hours on false alarms. Or others may wish to use the association in aggressing on non-members, making false claims against their prospective victims. Or some members may get into squabbles with one another, *both* calling out the guard, raising some rather difficult problems for the protectors (rather like NATO's problem in the recent conflict between Greece and Turkey over Cyprus).

Either of these inconveniences may lead the members to decide to hire specialists to take charge of the protective function — might lead, that is, to the formation of private protection *agencies* (p. 13).

Nozick then asks "What will occur when there is a conflict between clients of different agencies?" (p. 15). There really is no problem if the two agencies happen to come to the same conclusion about the proper disposition of the case. But what if they differ? Nozick suggests three alternate possibilities:

(1) The two agencies do battle. One agency always wins. This leads to a general tendency for clients to abandon the losing agency, and to take their business to the winner.
(2) Each agency has a geographic power center. Each wins battles fought close to its own center. People living in the hazy border areas move closer to one

or another of the centers.

(3) The two agencies are well balanced. Either battles often occur, or battles are avoided (because of the cost of battling) and some principle of arbitration is agreed to by the agencies. This yields a sort of unified "federal system" under which clients of *both* agencies now live. Such a federation agreement is a likely end state for any type (3) situation.

In all three cases, Nozick argues, people wind up with a single common system within their geographic area. This system makes judgments about whom to protect and when, and it enforces its judgments (pp. 15–16). Especially in the light of Nozick's third alternative, it may be crucial to consider the issue: what happens on the free market in the event of a potential "monopolization" of the defense industry?

Now, it is not clear that Nozick has managed to list all of the reasonable possibilities. He thinks that only these three are worth considering (p. 16), but it is difficult to see why. It may be that Nozick has limited the likely possibilities by envisioning only a *pair* of agencies in competition with one another, within the geographic area in question. It is not obvious that he has done this, but why doesn't he consider:

(4) Agencies *A*, *B*, and *C* frequently squabble. Each agency has customers spread out fairly evenly throughout the area. *A* always beats *B*, *B* always beats *C*, and *C* always beats *A* (something like this was going on among Muhammed Ali, George Foreman, and Joe Frazier a couple of years ago)?

Will the three agencies make some sort of mutual arrangement about adjudicating disputes? Or will they keep on battling? If they decide to submit to some arbitration principle or another, will it be a single principle that all agree to? Or will *A* make one deal with *B*, and another with *C*? Why should *A* deal with *B* at all? Or *B* with *C*? Even if some complex arrangement is agreed to by all, why should it be thought of as a single unified judicial system, much less a single unified *federal* judicial system?[2] These problems may be compounded considerably if the number of agencies is large.

The answers to these questions do not just flow smoothly from the mere consideration of (4). And if there is a possibility that some relatively stable arrangement could result that could *not* plausibly be described as a single common system within the given geographic area, then the invisible-hand argument that Nozick is in the process of sketching will be somewhat weaker than it might otherwise be. It will not show that a state *must* arise from the anarchic situation — only that it *could* thus arise. Not that the free market model *is* unstable — only that it *might* be.

This is not a particularly damaging point against Nozick, however, since all that is necessary, to overcome anarchist moral objections to the state, is to show that the state *could* arise from anarchy without violating anyone's rights.

It is necessary, therefore, to follow the argument further.

Nozick's contention is that a representative geographic area would (or could) wind up with a single common system which has clear superiority in settling disputes. For simplicity, he calls this common system the "Dominant Protective Association", or DPA, of the area. It must be kept in mind, however, that the system *may* be a "federation" of several protection agencies.

The DPA is not yet a state. Or at least, Nozick has not yet shown that it satisfies his monopoly criterion. For that criterion was stated in this way: "a necessary condition for the existence of a state is that it (some person or organization) announce that, to the best of its ability...it will punish everyone whom it discovers to have used force without its express permission" (p. 24). All that Nozick has so far is a system that has evolved through *ad hoc* enforcements of claims in two-party disputes. No "announcement" of the kind needed to satisfy the monopoly requirement has been made by the DPA, *"Nor does it seem morally legitimate for [it] to do so.*[3].

Now Nozick begins to argue that this is mere appearance.

Under the scheme as outlined so far, every individual retains the right to protect person and property from violations by others. Some people have hired professional agencies to take care of this matter for them. In the course of time, one system, the DPA, comes to dominate the territory. But there still may remain a number of "independents", who have never contracted with the DPA. There may also be small mutual-protection associations, and possibly a few tiny agencies here and there, too small to attract the wrath of the DPA. For simplicity, call every person or group not affiliated with the DPA an "independent".

These independents live within the area of the DPA. They defend themselves, jointly or individually, against everyone else, *including* clients of the DPA. "The geographical territory covered by the protection association then might resemble a slice of Swiss cheese, with internal as well as external boundaries" (p. 54).

Given any "violation", every protector, whether individual, association, or agency, will have some procedure that it uses to determine who has committed the violation, and to determine what action should be taken. Consider, as an example, a case of stolen property.

Joe Bock comes home one day to discover that his valuable porcelain rocking chair has been stolen. Either Joe sets out to recover it himself, or he turns the matter over to his protection agency.

Assume that Joe is an independent. He has what he takes to be a perfectly reliable procedure for discovering who it was that stole the rocker: he reads tea leaves. Other people (or agencies) have different procedures that they take to be reliable — the Robert Nozick Agency, down the street from Joe, goes through all kinds of painful investigation, lengthy court procedures, and even then gives the accused the benefit of the doubt. Joe takes the Nozickian system to be quite pathetic. All that work to support a superstition! True, Nozick's clients really do believe in the Nozickian procedure, but it's obvious to Joe that tea leaves *know*.

Now, Joe would be perfectly content to leave the Nozick agency and its clients to its own silly procedure, if it weren't for the danger that it might, by chance, someday pick Joe out as being guilty of some crime or another. That is a risk, after all: several times Joe has, just for the fun of it, checked the findings of the Nozick procedure against the tea leaves, and most of the time the agency procedure was way off. It is really quite a dangerous business, living around people who use such an unreliable procedure for determining guilt.

Consider, now, the DPA. It, like all protectors, has its procedures. And for it, as for all protectors and protectees, there are *some* possible procedures — other than its own, of course — which pose serious risks of punishing the wrong person. This may pose risks, in particular, upon the clients of the DPA. How might the agency and its clients deal with independents who use unreliable procedures of justice?

The DPA, like any protection agency, has the obligation to protect its clients from harm, where it can. It may not violate the rights of independents to make the world safer for its clients, but short of that, it will try to *prevent* harm to clients rather than mop up after a violation has been committed. It would be bad for business to let too many clients get hurt.

What about independents who use unreliable procedures for determining guilt? May the DPA (or any agency) prevent these independents from using their unreliable procedures upon the clients of the agency?

Nozick argues that they may. He has two arguments to support this conclusion,[4] and is not sure which is the one that is correct, but one of them, he *is* sure, does the job (p. 107).

Either people have "procedural rights" — the right that, before they are punished for some alleged violation, their guilt be determined by some just procedure — or they do not. If they have such rights, then the DPA is acting within *its* rights (these are nothing more, after all, than the rights of the clients transferred) in defending its clients against those trying to violate this procedural right.

But even if people don't have procedural rights (they're awfully difficult to spell out adequately, whether people have them or not (p. 96)), then Nozick argues that the DPA may *still* stop independents who use unreliable procedures against its clients. It is true, he says, that *anyone* has a right to punish a wrongdoer — including independents. This is not some right reserved only to the DPA. But it is also true that anyone who punishes another without knowing that that other person is guilty of doing wrong, himself does wrong. For example, if *A* doesn't know that *B* is a thief, and *A* steals from *B* or otherwise "punishes" *B,* it would appear that *A* has done wrong (assuming that *A* is not punishing *B* for something else *B* has done wrong). Now, users of unreliable procedures do not know that the people their procedures pick out as guilty have really done wrong (since the procedures are unreliable). Thus they, like *A,* have themselves done wrong (if they punish those picked out by their procedures), although they, like everyone else, have a *right* to punish[5].

It is thus wrong, according to Nozick, to use unreliable procedures of justice, independently of whether, in some particular case, they happen to come up with the correct result, and it is permissible to punish users of such procedures.

So the conclusion is the same, whether people have procedural rights or not, says Nozick: in either case, "...a protective agency [like anyone else] may punish a wielder of unreliable or unfair procedure who (against the client's will) has punished one of its clients, independently of whether or not its client actually is guilty and therefore even if its client is guilty" (pp. 107–08).

What is more, anyone — and therefore the DPA, too — has a right to *resist* someone who is applying an unknown procedure against him. That is, if it is not known whether the procedure is unreliable or not, anyone has a right to resist the use of the procedure, at least until information about its reliability is provided (p. 102).

Now, since the DPA has the right to stop an independent from applying an unknown procedure, and to punish an independent who uses a procedure known to be unreliable, on any client of the DPA, it may announce that it *will* do these things if the occasion arises. Anyone could. But since the DPA is dominant in the territory, it can do what no other protector, whether individual or group, can do: it can act without fear of *itself* being punished by someone else for using an unreliable procedure. The DPA

> will act freely on its own understanding of the situation, whereas no one else will be able to do so with impunity ...But when it sees itself as acting against actually defective procedures, others may see it as acting against what it thinks are defective procedures. It alone will act freely against what it thinks are defective procedures, whatever anyone else thinks. As the most powerful applier of principles which it grants everyone the right to apply *correctly,* it enforces its will, which, from the inside, it thinks *is* correct. From its strength stems its actual position as the ultimate enforcer and the ultimate judge with regard to its own 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 by its own lights (pp. 108–09).

The DPA constitutes a *de facto* monopoly on the exercise of the right to stop others from using unreliable procedures against its clients. Or so Nozick says (p. 109).

But in fact, that's not quite correct. Not only is it true that *not* only the DPA has the right in question (for everyone has this right as the DPA admits), it is also the case that *not* only the DPA can (practically) exercise that right.

Nozick says "It is not merely that it *happens* to be the only exerciser of the right it grants that all possess; the nature of the right is such that once a dominant power emerges, it alone will actually exercise that right. For the right includes the right to stop others from wrongfully exercising the right, and only the dominant power will be able to exercise this right against all others" (p. 109).

This is a rather odd argument. Just because a DPA would be the only power that could exercise the right in question against *all* others, it doesn't follow that it alone will actually exercise the right. In fact, it doesn't even *happen* that the DPA will be the only exerciser of the right. Independents, in conflicts among themselves, can and (one would think) would exercise the right.

The rights of the DPA extend only to conflicts in which its clients are involved (with the exception of the right that everyone has to intervene to aid an unwilling victim whose rights are threatened — *if* the unwilling victim is willing to accept the aid). The DPA must allow people to enforce their own rights, if either (1) the conflict does not involve a client of the DPA, or (2) the people in question use a procedure that the DPA knows to be reliable (that is, an independent who uses the same procedure as the DPA must be allowed to wreak his vengence *even on a client,* if it is known to the DPA that the procedure is the same)[6]. So the DPA does not even have a *de facto* monopoly on the exercise of the right to defend against unreliable procedures, let alone a monopoly on the use of force.

Nozick notes that "Since no claim is made that there is some right which it and only it has [and it would be illegitimate for the DPA to make such a claim], no monopoly is claimed" (p. 108). The DPA does *not* say that only it may decide who may use force and under what conditions; it does *not* reserve to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; it does *not* claim the right to punish all those who violate its claimed monopoly. It does *none* of these things because, as Nozick sees, "The dominant protective agency's domain does *not* extend to quarrels of non-clients *among themselves*" (p. 109). The DPA *claims* no monopoly, and it *has* no monopoly, as was argued in the preceding paragraph.

Yet that means that Nozick's own "necessary condition" for the existence of a state, quoted early in the present article, is not met. That condition was: to be a state, some person or organization must announce that, to the best of its ability, it will punish everyone whom it discovers to have used force without its express permission. The DPA may not legitimately do that. If it did, it would be threatening to violate the rights of others, and acting upon the threat would be a violation. And Nozick's intent is clearly to establish that the transition from anarchy to ultraminimal state can be made without violating anyone's rights.

If the DPA makes such an announcement, it violates rights. If it stays within its rights, it fails to meet Nozick's own necessary condition for statehood. So earlier appearances were not so deceiving after all: state and protective agencies seemed to be different — and they are.

So even if one can agree with Nozick's entire argument regarding the rights that the DPA in fact has,[7] one will be disappointed in the end. For things still "seem" the same as when Nozick began his argument: he has not justified even an ultraminimal *state* by his "invisible-hand" argument from voluntary protection associations. The only thing that a DPA has a "monopoly" on — even on Nozick's terms — is the ability to exercise the right of punishing (or resisting) unreliable punishers, against all who use unreliable procedures of justice (or threaten to use them) *against its own clients*. Which is merely to say that it's the DPA.

Nozick recognizes most of this, apparently, and it seems that he is unsure as to what he should do about it. What he finally decides to do is somewhat peculiar. He abandons the "necessary" condition that he so carefully set out at the beginning of the argument. Thus he fails to do what he set out to do, and tacitly admits this failure.

Nozick abandons the necessary condition in favor of a comparison between anthropological descriptions of the state, on the one hand, and the characteristics of the territory we have been exploring, with its DPA, on the other[8]. He reveals his mixed feelings about the result in the following passage:

> We therefore conclude that the protective association dominant in a territory, as described, *is* a state. However, to remind the reader of our slight weakening of the [earlier] condition, we occasionally shall refer to the dominant protective agency as 'a statelike entity', instead of simply as 'a state'. (p. 118.)

So the argument that the state can evolve from the state of nature, without violating the rights of anyone, by an invisible-hand process, does not hurt the free-market model, since it turns out that the Nozickian argument survives only if the term "state" is used in a sense different from that set out at the beginning of his argument. It was necessary to discuss Nozick's argument, however, since it seemed at first that he was going to try to make his case using roughly the same characterization of the state that has been used in this paper. But it is clear that Nozick's argument is no serious threat to the free-market model; the purely contractual free-market society is *not* unstable, in the sense of leading ultimately to what it was designed to replace. It doesn't (and can't) do that, without violating people's "rights".

But is the situation so far portrayed, in which a dominant protection association evolves, with a right to punish independents who use unreliable procedures of justice against the association's clients, a *just* one? It may be that the DPA, while not being a state in the present sense, is unjust in its own special way. Nozick's second objection may still work against the free-market model, even though his first one didn't.

The second objection corresponds to the second feature of what Nozick thinks of as the illusion that the scheme of private protective associations differs from a minimal state. That is, it appears that the DPA would not protect all individuals within its domain. It was noted earlier that Nozick is probably not making the claim that "redistribution" of justice is a necessary condition for a state, but rather that justice demands that such redistribution be made. It is now possible to understand his argument for that conclusion.

The DPA prohibits the use, by independents, of unreliable procedures of justice *against its clients.* The determination that a given procedure is unreliable, in such cases, will be made by the DPA itself. What the independent thinks of the procedure does not make any difference.

So what happens if a client of the DPA commits some offense against an independent? The independent has his own procedure of determining guilt and deciding what to do about it, but if the DPA regards his procedure as unreliable, he will not be able to use it. For even if his procedure happens, in this case, to make the same determination that the DPA's own procedure makes, he is punishable, according to the DPA, simply because he uses the procedure.

So he won't use the procedure. Or if he tries, he will be stopped. Or even if he manages to punish the client, he will himself be punished by the DPA.

How, then, is the independent to defend himself, or to see that justice is done if someone violates his rights? He has the right to seek justice from those who have done him wrong, but the DPA seems to be standing in the way of his exercising that right. This situation seems to be unjust, for it appears to leave independents (at least those who are inclined to use procedures deemed unreliable by the DPA) effectively helpless against offenses committed by clients of the DPA:

> 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). (p. 110.)

Nozick argues that the resolution of this dilemma is to be found in his "Principle of Compensation":

> ...those who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others. (pp. 82–83.)

The principle relies itself upon Nozick's contention that "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" (p. 83). There is a middle ground, which allows us to go between the horns of the dilemma; there are *some* actions which people have a right to forbid, provided that they compensate those to whom the actions are forbidden. The use of unreliable procedures of justice by independents falls into this category, and a likely form of "compensation" in this case would be the provision, by the DPA, of protection services to those prohibited from protecting themselves.

It would appear that Nozick is correct at least in thinking that dealing with risk provides important problems for the model presently under discussion. It is not so clear, however, that Nozick's own solution is the right one.

One possible source of doubt is his emphasis, in the argument that leads up to the Principle of Compensation, upon response-policies — policies that guide the response of a protector *after* a violation has occurred — rather than upon prevention-policies — policies that guide the behavior of a protector in advance of violations. It is not that Nozick *ignores* prevention-policies; in fact, the Principle of Compensation itself evolves as a prevention-policy. But the trend of the discussion seems to play down the possibility that the DPA, for example, might efficiently protect its clients by way of armed guards, strong locks, and the like. It is not clear that *this* sort of prevention policy might not lower the risk of violations enough to avoid the necessity of forbidding the *risky* actions of others, since it keeps its attention focused on actual violations. It ought at least to have been more fully discussed.

Another possible problem is the link that Nozick seems to see between prohibition of an act, on the one hand, and punishment above and beyond mere restitution if the act is performed, on the other. It might be thought that restitution is all that it is *ever* legitimate to require of someone who has violated the rights of another. It would seem that any counter-argument would have to make use of some sort of deterrence theory, and it is never clear that Nozick is himself comfortable with deterrence as a justification for punishment (pp. 59–63).

Finally, there is the problem, which Nozick notes, of spelling out just what sorts of things constitute the relevant sorts of "disadvantages". In particular, there is a rather nasty problem of definite description involved with deciding which actions, if prohibited, would disadvantage people (p. 82). There is also, of course, the problem of specifying what "disadvantage" amounts to. Nozick doesn't have a theory of disadvantage, and the lack of it is a source of trouble for the Principle of Compensation (pp. 81–83).

It is not necessary for present purposes, however, to quarrel with Nozick about these points. What is important to note here is that, even if the whole argument for the Principle of Compensation goes through, the Principle does not have quite the effect one might think.

The present problem is the possibility that the protection agency scheme might be unjust. In the first place, if the Principle of Compensation is correct, then it may require a "redistribution" of protection services that would turn the DPA into a state.

There are two points to be made here.

First, the compensation required is not redistributive, as Nozick himself points out:

> We...see that such provision need not be redistributive since it can be justified on other than redistributive grounds, namely, those provided in the principle of compensation (p. 114).

The point is that to call an institution or practice "redistributive" implies something about the *reasons* for establishing the institution or practice — reasons different from those Nozick uses in arguing for an obligation on the part of those who prohibit unreliable procedures of justice to compensate those who are prohibited.

Second, and most important, the provision of protective services by the DPA is far from universal in the area it dominates. Once again, attention is directed to the passages quoted at the beginning of the chapter: "...under the usual conception of a 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). The Principle of Compensation requires nowhere near such broad coverage. It requires only that *those independents* who are inclined to use unreliable procedures of justice, and who are therefore prohibited from using them *against clients of the DPA,* must be themselves provided protection services by the DPA in squabbles *with clients.* The DPA need not provide protection to independents in disputes with other independents. Neither must it provide protection to independents who use reliable procedures. The only people protected by the DPA are its own clients and a certain class *among* the independents.

So the redistributive condition for statehood is not met by the DPA any more than the monopoly condition is. Even if every point in Nozick's chain of arguments be granted him, therefore, it *still* appears

> that the dominant protective agency in a territory not only lacks the requisite monopoly over the use of force, but also fails to provide protection for all in its territory; and so the dominant agency appears to fall short of being a state (p. 25).

Neither instability nor injustice lead to the collapse of the free market model of social organization. It has survived Nozick's criticisms.

NOTES

1. Although "A combination of individuals may have the right to do some action *C,* which no individual alone had the right to do, if *C* is identical to *D* and *E,* and persons who individually have the right to do *D* and the right to do *E* combine" (p. 89). "...the legitimate powers of a protective association are merely the *sum* of the individual rights that its members or clients transfer to the association" (p. 89).
2. I am indebted to David B. Suits for this last question.
3. Nor is it obvious even that it *could* do so. Under Nozick's third alternative, the DPA may very well be a rather elaborate network of agencies, linked by agreements regarding decision procedures for settling disputes. It is not at all clear that such a situation would involve *any* policy, whether it be one of making announcements or one of enforcing "rights", that would be common throughout the DPA. This complicates matters somewhat, since (1) the third alternative is

the most likely one; (2) it is not clear that the DPA would not suffer from internal jockeying for position among component agencies, which might make any agreements among them quite unstable; and (3) Nozick's argument seems to depend upon some common DPA policy. In spite of these problems, it will be fruitful to evaluate Nozick's argument without raising them in the text. It is assumed, then, that the DPA can and will have some common policy toward others.

4. There are other arguments, such as an argument from fear, that lend partial support to the same conclusion. These others are not sufficient, however, to establish the ultraminimal state. The main line of argument from state of nature (private protection agency scheme) to ultraminimal state is the one traced here in the text.

5. There seem to be reasons to have doubts about *both* of Nozick's arguments for the permissibility of punishing users of unreliable procedures. Procedural rights seem to be hopelessly vague, and it is not at all clear that the second argument is on the right track. If *A* thinks that *B* has done wrong, and is right, and he punishes *B* for doing wrong without over-doing it, it doesn't seem obvious that *A* should later be punished himself if it turns out that his procedure for determining guilt was faulty. Is it possible that distinguishing, among cases where *B* has done wrong, but *A* doesn't know it, between cases where *A thinks* that *B* has done wrong, on the one hand, and cases where *A* is simply aggressing, on the other, might clear up this source of confusion in Nozick's argument? If so, then what makes *A* culpable in some cases, innocent in others, may *not* have anything to do with his ignorance, and Nozick's case for punishing users of unreliable procedures may be spoiled.

6. Roy A. Childs, in a paper delivered before the Third Libertarian Scholars Conference ("The Invisible Hand Strikes Back", Third Libertarian Scholars Conference, New York City, 24–26 October, 1975), has suggested, on the basis of this point, that the Nozickian ultraminimal state is highly unstable. Childs argues that the clients of the DPA will be financially motivated to take their business to agencies which use precisely the same procedure as the DPA, but which are *not* obliged to cover certain costs that only the DPA will have. These special costs are related to Nozick's contention, to be discussed later, that the DPA has an obligation to finance protection for non-clients. But if Childs is correct, then no DPA will be able to maintain dominance for long. It will lose business simply *because* it is the DPA.

7. Three possible sources of controversy have been noted above: (1) it is still not clear that there is no relatively stable arrangement for dealing with inter-agency disputes that could *not* plausibly be described as a single common system within the given geographic area; (2) neither of Nozick's arguments for the permissibility of punishing users of unreliable procedures seem adequate; and (3) it is not obvious that the DPA would be able to have *any* unified and stable policy.

8. In fact, it's not at all clear that the DPA is any more similar to a state on the anthropological condition than it was on the earlier one.

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ROBERT NOZICK AND THE IMMACULATE CONCEPTION OF THE STATE*

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Robert Nozick's *Anarchy, State, and Utopia* (New York: Basic Books, 1974) is an "invisible hand" variant of a Lockean contractarian attempt to justify the State, or at least a minimal State confined to the functions of protection. Beginning with a free-market anarchist state of nature, Nozick portrays the State as emerging, by an invisible hand process that violates no one's rights, first as a dominant protective agency, then to an "ultra-minimal state," and then finally to a minimal state.

Before embarking on a detailed critique of the various Nozickian stages, let us consider several grave fallacies in Nozick's conception itself, *each of which* would in itself be sufficient to refute his attempt to justify the State.

First, despite Nozick's attempt (6–9) to cover his tracks, it is highly relevant to see whether Nozick's ingenious logical construction has ever indeed occurred in historical reality: namely, whether any State, or most or all States, have *in fact* evolved in the Nozickian manner. It is a grave defect in itself, when discussing an institution all too well grounded in historical reality that Nozick has failed to make a single mention or reference to the history of actual States. In fact, there is no evidence whatsoever that any State was founded or developed in the Nozickian manner. On the contrary, the historical evidence cuts precisely the other way: for every State where the facts are available originated by a process of violence, conquest and exploitation: in short, in a manner which Nozick himself would have to admit violated individual rights. As Thomas Paine wrote in *Common Sense,* on the origin of kings and of the State:

> "could we take off the dark covering of antiquity and trace them to their first rise, we should find the first of them nothing better than the principal ruffian of some restless gang; whose savage manners or pre-eminence in subtilty obtained him the title of chief among plunderers; and who by increasing in power and extending his depredations, overawed the quiet and defenceless to purchase their safety by frequent contributions"[1]

Note that the "contract" involved in Paine's account was of the nature of a coerced "protection racket" rather than anything recognizable to the libertarian as a voluntary agreement.

Since Nozick's justification of existing States— provided they are or become minimal — rests on their alleged immaculate conception, and since no such State exists, then none of them can be justified, *even* if they should later become minimal. To go further, we can say that, *at best,* Nozick's model can *only* justify a State which indeed did develop by his invisible hand method. Therefore it is incumbent upon Nozick to join anarchists in calling for the abolition of all existing States, and *then* to sit back and wait for his alleged invisible hand to operate. The only minimal State, then, which Nozick *at best* can justify is one that will develop out of a future anarcho-capitalist society.

Secondly, *even if* an existing State had been immaculately conceived, this would *still* not justify its present existence. A basic fallacy is endemic to all social contract theories of the State, namely, that *any* contract based on a promise is binding and enforceable. If, then, *everyone* — in itself of course a heroic assumption — in a state of nature surrendered all or some of his rights to a State, the social contract theorists consider this promise to be binding forevermore. A correct theory of contracts, however, termed by Williamson Evers the "title-

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transfer'' theory, states that the only valid (and therefore binding) contract is one that surrenders what is, in fact, philosophically *alienable,* and that *only* specific titles to property are so alienable, so that their ownership can be ceded to someone else. While, on the contrary, *other* attributes of man: specifically, his self-ownership over his own will and body, and the *rights* to person and property which stem from that self-ownership, are ''inalienable'' and therefore cannot be surrendered in a binding contract. If no one, then, can surrender his own will, his body, or his rights in an enforceable contract, *a fortiori* he cannot surrender the persons or the rights of his posterity. This is what the Founding Fathers meant by the concept of rights as being ''inalienable'', or, as George Mason expressed it in his Virginia Declaration of Rights:

> ''...all men are by nature equally free and independent, and have certain inherent natural rights, of which when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity''[2].

Or, as Evers writes, ''all philosophical defenses of human rights to life, liberty, and estates... are founded upon the natural fact that each human is the proprietor of his own will. To take rights like those of property and contractual freedom that are based on a foundation of the absolute self-ownership of the will and then to use those derived rights to destroy their own foundation is philosophically invalid''[3].

Thus, we have seen (1) that no existing State has been immaculately conceived — quite the contrary; (2) that therefore the only minimal State that could *possibly* be justified is one that would emerge *after* a free-market anarchist world had been established; (3) that therefore Nozick, on his own grounds, should become an anarchist and then wait for the Nozickian invisible hand to operate afterward, and finally (4) that *even if* any State had been founded immaculately, the fallacies of social contract theory would mean that no present State, even a minimal one, could be justified.

Let us now proceed to examine the Nozickian stages, particularly the alleged necessity as well as the morality of the ways in which the various stages develop out of the preceding ones. Nozick begins by assuming that each anarchist protective agency acts morally and non-aggressively, that is, ''attempts in good faith to act within the limits of Locke's law of nature'' (17).

First, Nozick assumes that each protective agency would require that each of its clients renounce the right of private retaliation against aggression, by refusing to protect them against counter-retaliation. (15) Perhaps, perhaps not. This would be up to the various protection agencies, acting on the market, and is certainly not self-evident. It is certainly possible if not probable that they would be outcompeted by other agencies that do not restrict their clients in that way.

Nozick then proceeds to discuss disputes between clients of different protection agencies. He offers three scenarios, on how they might proceed. But two of these scenarios (and part of the third) involve physical battles between the agencies. In the first place, these scenarios contradict Nozick's own assumption of good-faith, non-aggressive behavior *by each of* his agencies, since, in any combat, clearly at least one of the agencies would be committing aggression. Furthermore, economically, it would be absurd to expect that the protective agencies would battle each other physically; such warfare would alienate clients and be highly expensive to boot. It is absurd to think that, on the market, protective agencies would fail to agree in advance on private appeals courts or arbitrators whom they would turn to, in order to resolve any dispute. Indeed, a vital part of the protective or judicial service which a private agency or court would offer to its clients would *be* that it had agreements to turn disputes over to a certain appeals court or a certain abritrator or group of arbitrators.

Let us turn then to Nozick's crucial scenario 3, in which he writes that ''the two agencies... agree to resolve peacefully those cases about which they reach differing judgments. They agree to set up, and abide by the decisions of, some third judge or court to which they can turn when their respective judgments differ. (Or they might establish rules determining which agency has jurisdiction under which circumstances.)'' (16) So far so good. But then comes a giant leap: ''Thus emerges a system of appeals courts and agreed upon rules...Though different agencies operate, there is one unified federal judicial system of which they are all components." I submit that the "thus" is totally illegitimate, and that the rest is a *non sequitur.* The fact that every protective agency will have agreements with every other to submit disputes to particular appeals courts or arbitrators does *not* imply "one unified federal judicial system". On the contrary, there may well be, and probably would be, hundreds, even thousands, of arbitrators or appeals judges who would be selected, and there is no need to consider them part of one "judicial system." There is no need, for example, to envision or to establish one unified Supreme Court to decide upon disputes. Since every dispute involves only two parties, there need be only one third party appeals judge or arbitrator; there are in the United States, at the present time, for example, over 23,000 professional arbitrators, and presumably there would be many thousands more if the present government court system were to be abolished. Each one of these arbitrators could serve an appeals or arbitration function.

Nozick claims that out of anarchy there would inevitably emerge, as by an invisible hand, one *dominant* protection agency in each territorial area, in which "almost all the persons" in that area are included. But we have seen that his major support for that conclusion is totally invalid. Nozick's other arguments for this proposition are equally invalid. He writes, for example, that "unlike other goods that are comparatively evaluated, maximal competing protective services cannot exist"(17). Why *cannot,* surely a strong term? First, because "the nature of the service brings different agencies...into violent conflict with each other" rather than just competing for customers. But we have seen that this conflict assumption is incorrect, first, on Nozick's own grounds of each agency acting non-aggressively, and, second, on his own scenario 3, that each will enter into agreements with the others for peaceful settlement of disputes. Nozick's second argument for this contention is that "since the worth of the less than maximal product declines disproportionately with the number who purchase the maximal product, customers will not stably settle for the lesser good, and competing companies are caught in a declining spiral." But *why?* Nozick is here making statements about the economics of a protection market which are totally unsupported. *Why* is there such an "economy of scale" in the protection business that Nozick feels will lead inevitably to a near-natural monopoly in each geographical area? This is scarcely self-evident. On the contrary, all the facts — and here the empirical facts of contemporary and past history are again directly relevant — cut precisely the other way. There are, as was mentioned above, tens of thousands of professional arbitrators in the U.S.; there are also tens of thousands of lawyers and judges, and a large number of private protection agencies that supply guards, night-watchmen, etc. with no sign whatsoever of a geographical natural monopoly in any of these fields. Why then for protection agencies under anarchism?

And, if we look at approximations to anarchist court and protective systems in history, we again see a great deal of evidence of the falsity of Nozick's contention. For hundreds of years, the fairs of Champagne were the major international trade mart in Europe; a number of courts, by merchants, nobles, the Church, etc. competed for customers; not only did no one dominant agency ever emerge, but they did not even feel the need for appeals courts. For a thousand years ancient Ireland, until the Cromwellian conquest, enjoyed a system of numerous jurists and schools of jurists, and numerous protection agencies, which competed within geographical areas without any one becoming dominant. After the fall of Rome, various co-existing barbarian tribes peacefully adjudicated their disputes *within* each area, with each tribesman coming under his own law, and with agreed-upon peaceful adjudications between these courts and laws. Furthermore, in these days of modern technology and low-cost transportation and communication, it would be even easier to compete across geographical boundaries; the "Metropolitan", "Equitable", and "Prudential" protection agencies, for example, could easily maintain branch offices over a large geographical area.

In fact, there is a far better case for *insurance* being a natural monopoly than protection, since a large insurance pool would tend to reduce premiums; and yet, it is clear that there is a great deal of insurance competition and that there would be more if it were not restricted by state regulation.

The Nozick contention that a dominant agency would develop in each geographical area, then, is an example of an illegitimate *a priori* attempt to decide what the free market would do, and it is an attempt that flies in the face of concrete historical and institutional knowledge. Certainly, a dominant protective agency *could conceivably* emerge in a particular geographical area, but it is not very likely. And, as Roy Childs points out in his critique of Nozick, even if it did, it would not likely be a "unified federal system". Childs also correctly points out that it is no more legitimate to lump all protective services together and call it a unified monopoly, than it would be to lump all the food growers and producers on the market together and say that they have a collective "system" or "monopoly" of food production[4].

Furthermore, law and the State are both conceptually and historically separable, and law would develop in an anarchistic market society without any form of State. Specifically, the concrete *form* of anarchist legal institutions — judges, arbitrators, precedural methods for resolving disputes, etc. — would indeed grow by a market-invisible hand process, while the basic Law Code (requiring that no one invade any one else's person and property) would have to be agreed upon by all the judicial agencies, just as all the competing judges once agreed to apply and extend the basic principles of the customary or common law[5]. But the latter, again, would imply no unified legal system or dominant protective agency. Any agencies that transgressed the basic libertarian code would be open outlaws and aggressors, and Nozick himself concedes that, lacking legitimacy, such outlaw agencies would probably not do very well in an anarchist society (17).

Let us now assume that a dominant protective agency has come into being, as unlikely as that may be. How then do we proceed, without violation of anyone's rights, to Nozick's ultra-minimal state? On pages 55–56 Nozick writes of the plight of the dominant protective agency who sees the independents, with their unreliable procedures, rashly and unreliably retaliating against its own clients. Shouldn't the dominant agency have the right to defend its clients against these rash actions? Nozick claims that the dominant agency *has* a right to prohibit risky procedures against its clients, and that this prohibition *thereby* establishes the "ultra-minimal state", in which one agency coercively prohibits all other agencies from enforcing the rights of individuals.

There are two problems here at the very beginning. In the first place, what has happened to the peaceful resolution of disputes that marked scenario 3? Why can't the dominant agency and the independents agree to arbitrate or adjudicate their disputes, preferably in advance? Ahh, but here we encounter Nozick's curious "thus" clause, which incorporated such voluntary agreements into one "unified federal judicial system": In short, if every time that the dominant agency and the independents work out their disputes in advance, Nozick then *calls this* "one agency", then by definition he precludes the peaceful settlement of disputes *without* a move onward to the compulsory monopoly of the ultra-minimal state.

But suppose, for the sake of continuing the argument, that we grant Nozick his question-begging definition of "one agency". Would the dominant agency still be justified in outlawing competitors? Certainly not, even if it wishes to preclude fighting. For what of the many cases in which the independents are enforcing justice for their *own* clients, and have nothing to do with the clients of the dominant agency? By what conceivable right does the dominant agency step in to outlaw peaceful arbitration and adjudication between the independents' own clients, with no impact on *its* clients? The answer is no right whatsoever, so that the dominant agency, in outlawing competitors, is aggressing against their rights, and against the rights of their actual or potential customers. Furthermore, as Roy Childs emphasizes, this decision to enforce their monopoly is scarcely the action of an invisible hand; it is a *conscious,* highly visible decision, and must be treated accordingly[6].

The dominant agency, Nozick claims, has the right to bar "risky" activities engaged in by independents. But what then of the independents? Do not *they* have the right to bar the risky activities of the dominant? And must not a war of all against all again ensue, in violation of scenario 3 and also necessarily engaging in some aggression against rights along the way? Where, then, are the moral activities of the state of nature assumed by Nozick all along? Furthermore, as Childs points out, what about the risk involved in having a compulsory monopoly protection agency? As Childs writes: "What is to check its power? What happens in the event of its assuming even more powers? Since it has a monopoly, any disputes over its functions are solved and judged exclusively by itself. Since careful prosecution procedures are costly, there is every reason to assume that it will become less careful without competition and, again, only it can judge the legitimacy of its own procedures, as Nozick explicitly tells us"[7].

Competing agencies, whether the competition be real or potential, not only insure high-quality protection at the lowest cost, as compared to a compulsory monopoly, but they also provide the genuine checks and balances of the market against any one agency yielding to the temptations of being an "outlaw", that is, of aggressing against the persons and properties of its clients or non-clients. If one agency among many becomes outlaw, there are others around to do battle against it on behalf of the rights of their clients; but who is there to protect anyone against the State, whether ultraminimal or minimal? If we may be permitted to return once more to the historical record, the grisly annals of the crimes and murders of the State throughout history give one very little confidence in the non-risky nature of *its* activities. I submit that the risks of State tyranny are far greater than the risks of worrying about one or two unreliable procedures of competing defense agencies.

But this is scarcely all. For once it is permitted to proceed beyond defense against an overt act of actual aggression, once one can use force against someone because of his "risky" activities, then the sky is the limit, in short there is then virtually no limit to aggression against the rights of others. Once permit someone's 'fear" of the "risky" activities of others to lead to coercive action, then *any* tyranny becomes justified, and Nozick's "minimal" state quickly becomes the "maximal" State. I maintain, in fact, that there is no Nozickian stopping point from his ultra-minimal state to the maximal, totalitarian state. There is no stopping point to so-called preventive restraint or detention. Surely Nozick's rather grotesque suggestion of "compensation" in the form of "resort detention centers" is scarcely sufficient to ward off the specter of totalitarianism (142 ff). A few examples: Perhaps the largest criminal class in the United States today are teenage black males. The risk of this class committing crime is far greater than any other age, gender, or color group. Why not, then, lock up all teenage black males until they are old enough for the risk to diminish? And then I suppose we could compensate them by giving them healthful food, clothing, playgrounds, and teaching them a useful trade in the "resort" detention camp. If not, why not? Example: the most important argument for Prohibition was the undoubted fact that people commit significantly more crimes, more acts of negligence on the highways, when under the influence of alcohol than when cold sober. So why not prohibit alcohol, and thereby reduce risk and fear, perhaps "compensating" the unfortunate victims of the law by free, tax-financed supplies of healthful grape juice? Or the infamous Dr. Arnold Hutschneker's plan of "identifying" allegedly future criminals in the grade schools, and then locking them away for suitable brainwashing? If not, why not? In each case, I submit that there is only *one* why not, and this should be no news to libertarians who presumably believe in inalienable individual rights: namely that no one has the *right* to coerce anyone not himself directly engaged in an *overt* act of aggression against rights. Any loosening of this criterion, to include coercion against remote "risks", is to sanction impermissible aggression against the rights of others. Any loosening of this criterion furthermore, is a passport to unlimited despotism. Any state founded on *these* principles has been conceived, not immaculately without interfering with anyone's rights, but by a savage act of rape.

Thus, even if risk were measurable, even if Nozick could provide us with a cutoff point of when activities are "too" risky, his rite of passage from dominant agency to ultraminimal state would still be aggressive, invasive, and illegitimate. But, furthermore, as Childs has pointed out, there is no way to measure (the probability of) such "risk", let alone the fear, both of which are purely subjective[8]. The only risk that can be measured is in those rare situations — such as a lottery or a roulette wheel — where the individual events are strictly homogeneous, and repeated a very large number of times. In almost all cases of actual human action, this condition does not apply, and so there is no measurable cutoff point of risk.

This brings us to Williamson Evers' extremely useful concept of the "proper assumption of risk". We live in a world of ineluctable and unmeasurable varieties of uncertainty and risk. In a free society, possessing full individual rights, the proper assumption of risk is by each individual over his own person and his justly owned property. No one, then, can have the right to coerce anyone else into reducing *his* risks; such coercive assumption is aggression and invasion to be properly stopped and punished by the legal system. Of course, in a free society, anyone may take steps to reduce risks that do not invade someone else's rights and property; for example, by taking out insurance, hedging operations, performance bonding, etc. But all of this is voluntary, and none involves either taxation or compulsory monopoly. And, as Roy Childs states, any coercive intervention in the market's provision for risk shifts the societal provision for risk *away from* the optimal, and hence *increases* risk to society[9].

One example of Nozick's sanctioning aggression against property rights is his concern (55 *n*) with the private landowner who is surrounded by enemy landholders who won't let him leave. To the libertarian reply that any rational landowner would have first purchased access rights from surrounding owners, Nozick brings up the problem of being surrounded by such a set of numerous enemies that he *still* would not be able to go anywhere. But the point is that this is not simply a problem of landownership. Not only in the free society, but even now, suppose that one man is so hated by the whole world that no one will trade with him or allow him on their property. Well, then, the only reply is that this is his own proper assumption of risk. Any attempt to break that voluntary boycott by physical coercion is illegitimate aggression against the boycotters' rights. This fellow had better find some friends, or at least purchase allies, as quickly as possible.

How then does Nozick proceed from his "ultraminimal" to his "minimal" State? He maintains that the ultraminimal state is morally bound to "compensate" the prohibited, would-be purchasers of the services of independents by supplying them with protective services — and *hence* the "nightwatchman" or minimal state. In the first place, this decision too is a conscious and visible one, and scarcely the process of an invisible hand. But, more importantly, Nozick's principle of compensation is in even worse philosophical shape, if that is possible, than his theory of risk. For, first, compensation, in the theory of punishment, is simply a method of trying to recompense the victim of crime; it must in no sense be considered a moral sanction for crime itself. Nozick asks (57) whether property rights mean that people are permitted to perform invasive actions "provided that they compensate the person whose boundary has been crossed?" In contrast to Nozick, the answer must be no, in every case. As Randy Barnett states, in his critique of Nozick, "Contrary to the principle of compensation, all violations of rights are prohibited. That's what rights means." And, "while voluntarily paying a purchase price makes an exchange permissible, compensation does not make an aggression permissible or justified[10]!" Rights must not be transgressed, period, compensation being simply one method of restitution or punishment after the fact; I must not be permitted to cavalierly invade someone's home and break his furniture, simply because I am prepared to "compensate" him afterward[11].

Secondly, there is no way of knowing, in any case, what the compensation is supposed to be. Nozick's theory depends on people's utility scales being constant, measurable, and knowable to outside observers, none of which is the case.[12] Austrian subjective value theory shows us that people's utility scales are always subject to change, and that they can neither be measured nor known to any outside observer. If I buy a newspaper for 15 cents, than *all* that we can say about my value-scale is that, at the moment of purchase, the newspaper was worth more to me than the 15 cents, and that is all. That valuation can change tomorrow, and no other part of my utility scale is knowable to others at all. (A minor point: Nozick's pretentious use of the "indifference curve" concept is not even necessary for his case, and it adds still further fallacies: namely, that indifference is *never* by definition exhibited in action, in actual exchanges, and is therefore unknowable and objectively meaningless, and because an indifference curve postulates two commodity axes — and *what* are the axes to Nozick's alleged curve?)[13] But if there is no way of knowing what will make a person as well off as before any particular change, then there is no way for an outside observer, such as the minimal state, to discover how much compensation is needed. The Chicago School tries to resolve this problem by simply assuming that a person's utility loss is measured by the money-price of the loss; so if someone slashes my painting, and outside appraisers determine that I could have sold it for $2000, then that is my proper compensation. But first, no one really knows what the market price would have been, since tomorrow's market may well differ from yesterday's, and second and more important, my psychic attachment to the painting may be worth far more to me than the money price, and there is *no way* for anyone to determine what that psychic attachment might be worth: *asking* is invalid since there is nothing to prevent me from lying grossly in order to drive up the "compensation"[14].

Moreover, Nozick says nothing about the dominant agency compensating *its* clients for the shutting down of *their* opportunities in being able to shift their purchases to competing agencies. Yet their opportunities are shut off by compulsion, and furthermore, they may well perceive themselves as benefitting from the competitive check on the possible tyrannical impulses of the dominant agency. But *how* is the extent of such compensation to be determined? Furthermore, if compensation to the deprived clients of the dominant agency is forgotten by Nozick, what about the dedicated anarchists in the anarchistic state of nature? What about their trauma at seeing the far from immaculate emergence of the State? Are *they* to be compensated for their horror at seeing the State emerge? And *how much* are they to be paid? In fact, the existence of only *one* fervent anarchist who *could not* be compensated for the psychic trauma inflicted on him by the emergence of the State, is enough by itself to scuttle Nozick's allegedly non-invasive model for the origin of the minimal state. For that absolutist anarchist, no amount of compensation would suffice to assuage his grief.

This brings us to another flaw in the Nozickian scheme: the curious fact that the compensation paid by the dominant agency is paid, not in cash, but in the extension of its sometimes dubious services to the clients of other agencies. And yet, advocates of the compensation principle have demonstrated that *cash* — which leaves the recipients free to buy whatever they wish — is far better from their point of view than any compensation in kind. Yet, Nozick, in postulating the extension of protection as the form of compensation, never considers the cash payment alternative. In fact, for the anarchist, this form of "compensation" — the institution of the State itself — is a grisly and ironic one indeed. As Childs forcefully points out: Nozick "wishes to prohibit us from turning to any of a number of competing agencies, other than the dominant protection agency. What is he willing to offer us as *compensation* for being so prohibited? He is generous to a fault. He will give us nothing less than *the State*. Let me be the first to publicly reject this admittedly generous offer. But...the point is, we *can't* reject it. It is foisted upon us whether we like it or not, whether we are willing to accept the state as compensation or not[15]."

Furthermore, there is no warrant whatever, even on Nozick's own terms, for the minimal state's compensating every one uniformly, as he postulates; surely, there is no likelihood of everyone's value-scales being identical. But then *how* are the differences to be discovered and differential compensation paid?

Even confining ourselves to Nozick's compensated people — the former or current would-be clients of competing agencies: *who* are they? How can they be found? For, on Nozick's own terms, *only* such actual or would-be competing clients need compensation. But how does one distinguish, as proper compensation must, between those who have been deprived of their desired independent agencies and who therefore deserve compensation, and those who wouldn't have patronized the independents anyway and who therefore don't need compensation? By not making such distinctions, Nozick's minimal state doesn't even engage in proper compensation on Nozick's own terms.

Childs raises another excellent point on Nozick's own prescribed form of compensation — the dire consequences for the minimal state of the fact that the payment of such compensation will necessarily raise the costs, and therefore the prices charged, by the dominant agency. As Childs states:

> "If the minimal state must protect everyone, even those who cannot pay, and if it must compensate those others for prohibiting their risky actions, then this must mean that it will charge its original customers *more* than it would have in the case of the ultraminimal state. But this would, ipso facto, increase the number of those who, because of their demand curves, *would have chosen* non-dominant agencies...over dominant agency-turned ultraminimal state-turned minimal state. Must the minimal state then protect *them* at no charge, or compensate them for prohibiting them from turning to the other agencies?
>
> If so, then once again, it must either increase its price to its remaining customers, or decrease its services. In either case, this *again* produces those who, given the nature and shape of their demand curves, *would have* chosen the non-dominant agencies over the dominant agency. Must *these* then be compensated? If so, then the process leads on, to the point where no one but a few wealthy fanatics advocating a minimal state would be willing to pay for greatly reduced services. If this happened, there is reason to believe that very soon the minimal state would be thrown into the invisible dustbin of history, which it would, I suggest, richly deserve[16].

A tangential but important point on compensation: adopting Locke's unfortunate "proviso", on homesteading property rights in unused land, Nozick declares that no one may appropriate unused land if the remaining population who desire access to land are "worse off." (178 ff.) But again: how do we know if they are worse off or not? In fact, Locke's proviso may lead to the outlawry of *all* private ownership of land, since one can always say that the reduction of available land leaves everyone else, who could have appropriated the land, worse off. In fact, there is no way of measuring or knowing when they are worse off or not. And even if they are, I submit that that, too, is their proper assumption of risk. Everyone should have the right to appropriate as his property previously unowned land or other resources. If latecomers are worse off, well then that is their proper assumption of risk in this free and uncertain world. There is no more vast frontier in the United States, and there is no point in crying over the fact. In fact, we can generally achieve as much "access" as we want to these resources by paying a market price for them, but even if the owners refused to sell or rent, that should be their right in a free society. Even Locke could nod once in a while[17]!

We come now to another crucial point: that Nozick's presumption that he can outlaw risky activities upon compensation rests on his contention that no one has the right to engage in "non-productive" (including risky) activities or exchanges, and that therefore they can legitimately be prohibited[18]. For Nozick concedes that if the risky activities of others were legitimate, then prohibition and compensation would not be valid, and that we would then be "required instead to negotiate or contract with them whereby they agree not to do the risky act in question. Why wouldn't we have to offer them an incentive, or hire them, or bribe them, to refrain from doing the act?" (83–84). In short, if not for Nozick's fallacious theory of illegitimate "non-productive" activities, he would have to concede people's rights to engage in such activities, the prohibition of risk and compensation principles would fall to the ground, and neither Nozick's ultraminimal nor his minimal state could be justified.

And here we come to what we might call Nozick's "drop dead" principle. For his criterion of a "productive" exchange is one where each party is better off than if the other did not exist at all; whereas a "non-productive'' exchange is one where one party would be better off if the other dropped dead. Thus: "if I pay you for not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me." (84). Nozick's "principle of compensation" maintains that a "non-productive" activity can be prohibited provided that the person is compensated by the benefit he was forced to forego from the imposition of the prohibition.

Let us then see how Nozick applies his "non-productive" and compensation criteria to the problem of blackmail. Nozick tries to rehabilitate the outlawry of blackmail by asserting that "non-productive" contracts should be illegal, and that a blackmail contract is non-productive because a blackmailee is worse off because of the blackmailer's very existence (84–86). In short, if blackmailer Smith dropped dead, Jones (the blackmailee) would be better off. Or, to put it another way, Jones is paying not for Smith's making him better off, but for *not* making him *worse off*. But surely the latter is *also* a productive contract, because Jones is still better off making the exchange than he *would have been* if the exchange were not made.

But this theory gets Nozick into very muddy waters indeed, some, though by no means all of which, he recognizes. He concedes, for example, that his reason for outlawing blackmail would force him also to outlaw the following contract: Brown comes to Green, his next-door neighbor, with the following proposition: I intend to build such-and-such a pink building on my property (which he knows that Green will detest). I *won't* build this building, however, if you pay me x amount of money. Nozick concedes that this, too, would have to be illegal in his schema, because Green would be paying Brown for not being worse off, and hence the contract would be "non-productive". In essence, that Green would be better off if Brown dropped dead. It is difficult, however, for a libertarian to square such outlawry with any plausible theory of property rights. In analogy with the blackmail example above, furthermore, Nozick concedes that it *would* be legal, in his schema, for Green, on finding out about Brown's projected pink building, to come to Brown and offer to pay him not to go ahead. But why would such an exchange *be* "productive" just because Green made the offer? [19] What difference does it make *who* makes the offer in this situation? Wouldn't Green *still* be better off if Brown dropped dead? And again, following the analogy, *would* Nozick make it illegal for Brown to refuse Green's offer and *then* ask for more money? Why? Or, again, would Nozick make it illegal for Brown to subtly let Green know about the projected pink building and then let nature take its course: say, by advertising in a newspaper about the building and sending Green the clipping? Couldn't this be taken as an act of courtesy? And why should merely *advertising* something be illegal? Clearly, Nozick's case becomes ever more flimsy as we consider the implications.

Furthermore, Nozick has not at all considered the manifold implications of his "drop dead" principle. If he is saying, as he seems to, that A is illegitimately "coercing" B if B is better off should A drop dead, then consider the following case: Brown and Green are competing at auction for the same painting which they desire. They are the last two customers left. Wouldn't Green be better off if Brown dropped dead? Isn't Brown therefore illegally coercing Green in some way, and therefore shouldn't Brown's participation in the auction be outlawed? Or, *per contra*, isn't Green coercing Brown in the same manner and shouldn't *Green's* participation in the auction be outlawed? If not, why not? Or, suppose that Brown and Green are competing for the hand of the same girl; wouldn't each be better off if the other dropped dead, and shouldn't either or both's participation in the courtship therefore be outlawed? The ramifications are virtually endless.

Nozick, furthermore, gets himself into a deeper quagmire when he adds that a blackmail exchange is not "productive" because outlawing the exchange makes one party (the blackmailee) no worse off. But that of course is not true: as Professor Block has pointed out, outlawing a blackmail contract means that the blackmailer has no further incentive *not* to disseminate the unwelcome, hitherto secret information about the blackmailed party. However, after twice asserting that the victim would be "no worse off" from the outlawing of the blackmail exchange, Nozick immediately and inconsistently concedes that "people value a blackmailer's silence, and pay for it". In that case, if the blackmailer is prohibited from charging for his silence, he need not maintain it and hence the blackmail-payer would indeed be worse off because of the prohibition! Nozick adds, without supporting the assertion, that "his being silent is not a productive activity." Why not? Apparently because "His victims would be as well off if the blackmailer did not exist at all..." Back again to the "drop dead" principle. But then, reversing his field once more, Nozick adds — inconsistently with his own assertion that the blackmailer's silence is not productive — that "On the view we take here, a seller of such silence could legitimately charge only for what he forgoes by silence...includ(ing) the payments others would make to him to reveal the information". Nozick adds that while a blackmailer may charge the amount of money he would have received for revealing the information, "he may not charge the best price he could get from the purchaser of his silence." (85–86).

Thus, Nozick, waffling inconsistently between outlawing blackmail and permitting only a price that the blackmailer could have received from selling the information, has mired himself into an unsupportable concept of a "just price." *Why* is it only licit to charge the payment foregone? Why *not* charge whatever the blackmailee is willing to pay? In the first place, both transactions are voluntary, and within the purview of both parties' property rights. Secondly, *no one knows,* either conceptually or in practice, what price the blackmailer could have gotten for his secret on the market. No one can predict a market price in advance of the actual exchange. Thirdly, the blackmailer may not only be gaining money from the exchange; he also possibly gains psychic satisfaction — he may dislike the blackmailee, or he may enjoy selling secrets and therefore he may "earn" from the sale to a third party more than just a monetary return. Here, in fact, Nozick gives away the case by conceding that a blackmailer "who *delights* in selling secrets may charge differently." (86*n*). But, in that case, what outside legal enforcement agency will ever be able to discover *to what extent* the blackmailer delights in revealing secrets and therefore what price he may legally charge to the "victim"? More broadly, it is conceptually impossible ever to discover the existence or the extent of his subjective delight or of any other psychic factors that may enter into his value-scale and therefore into his exchange.

And fourthly, suppose that we take Nozick's worst case, a blackmailer who could not find any monetary price for his secret. But, if blackmail were outlawed either totally or in Nozick's "just price" version, the thwarted blackmailer would simply disseminate the secrets for free — would *give away* the information (Block's "gossip or blabbermouth.") In doing so, the blackmailer would simply be exercising his right to use his body, in this case his freedom of speech. There can be no "just price" for restricting this right, for it has no objectively measurable value[20]. Its value is subjective to the blackmailer, and his right may not be justly restricted. And furthermore, the "protected" victim is, in this case, surely worse off as a result of the prohibition against blackmail[21].

We must conclude, then, with modern, post-medieval economic theory, that the *only* "just price" for any transaction is the price voluntarily agreed upon by the two parties. Furthermore and more broadly, we must also join modern economic theory in labelling *all* voluntary exchanges as "productive", and as making both parties better off from making the exchange. Any good or service voluntarily purchased by a user or consumer benefits him and is therefore "productive" from his point of view. Hence, all of Nozick's attempts to justify either the outlawing of blackmail or the setting of some sort of just blackmail price (as well as for any other contracts that sell someone's inaction) fall completely to the ground. But this means, too, that his attempt to justify the prohibition of *any* "non-productive" activities — including risk — fails as well, and hence fails, on *this ground alone*, Nozick's attempt to justify his ultra-minimal (as well as his minimal) state.

In applying his theory to the risky, fear-inducing "non-productive" activities of independent agencies which allegedly justify the imposition of the coercive monopoly of the ultra-minimal state, Nozick concentrates on his asserted "procedural rights" of each individual, which he states is the "right to have his guilt determined by the least dangerous of the known procedures for ascertaining guilt, that is, by the one having the lowest probability of finding an innocent party guilty." (96). Here Nozick adds to the usual *substantive* natural rights — to the use of one's person and justly acquired property unimpaired by violence — alleged "procedural rights", or rights to certain procedures for determining innocence or guilt. But one vital distinction between a genuine and a spurious "right" is that the former requires no positive action by anyone except non-interference. Hence, a right to person and property is not dependent on time, space or the number or wealth of other people in the society; Crusoe can have such a right against Friday as can anyone in an advanced industrial society. On the other hand, an asserted right "to a living wage" is a spurious one, since fulfilling it requires positive action on the part of other people; as well as the existence of enough people with a high enough wealth or income to satisfy such a claim. Hence such a "right" cannot be independent of time, place, or the number or condition of other persons in society. But surely a "right" to a less risky procedure requires positive action from enough people of specialized skills to fulfill such a claim; hence it is not a genuine right. Furthermore, such a right cannot be deduced from the basic right of selfownership. On the contrary, everyone has the absolute right to defend his person and property against invasion. The criminal has no right, on the other hand, to defend his ill-gotten gains. But what *procedure* will be adopted by any group of people to defend their rights — whether, for example, personal self-defense, or the use of courts or arbitration agencies — depends on the knowledge and skill of the individuals concerned. Presumably, a free market will tend to lead to most people choosing to defend themselves with those private institutions and protection agencies whose procedures will attract the most agreement from people in society. People who will be willing to abide by their decisions as the most practical way of approximating the determination of *who*, in particular cases, are innocent and who are guilty. But these are matters of utilitarian discovery on the market as to the most efficient means of arriving at self-defense, and do not imply any such fallacious concepts as "procedural rights".[22]

Finally, in a scintillating *tour de force*, Roy Childs, after demonstrating that each of Nozick's stages to the State is accomplished by a visible decision rather than by an "invisible hand", stands Nozick on his head by demonstrating that the invisible hand, *on Nozick's own terms,* would lead straight back from his minimal State to anarchism. Childs writes:

> "Assume the existence of the minimal state. An agency arises which copies the procedures of the minimal state, allows the state to sit in on its trials, proceedings, and so forth. Under this situation, it cannot be alleged that this agency is any more 'risky' than the state. If it is still too risky, then we are also justified in saying that the state is too risky, and in prohibiting its activities, providing we compensate those who are disadvantaged by such prohibition. If we follow this course, the result is anarchy.
>
> If not, then the 'dominant agency'-turned minimal state finds itself competing against an admittedly watched-over competing agency. But wait: the competing, spied upon, oppressed second agency finds that it can charge a lower price for its services, since the minimal state has to compensate those who would have patronized agencies using risky procedures. It also has to pay the costs of spying on the new agency.
>
> Since it is only *morally* bound to provide such compensation, it is likely to cease doing so under severe economic pressure. This sets two processes in motion: those formerly compensated because they would have chosen other agencies over the state, rush to subscribe to the maverick agency, thus reasserting their old preferences. Also, another fateful step has been taken: the once proud minimal state, having ceased compensation, reverts to a lowly ultraminimal state.
>
> But the process cannot be stopped. The maverick agency must and does establish a good record, to win clients away from the ultra-minimal state. It offers a greater variety of services, toys with different prices, and generally becomes a more attractive alternative, all the time letting the state spy on it, checking its

> processes and procedures. Other noble entrepreneurs follow suit. Soon, the once lowly ultraminimal state becomes a mere dominant agency, finding that the other agencies have established a noteworthy record, with safe, non-risky procedures, and stops spying on them, preferring less expensive agreements instead. Its executives have, alas!, grown fat and placid without competition; their calculations of who to protect, how, by what allocation of resources to what ends...are adversely affected by their having formerly removed themselves out of a truly competitive market price system. The dominant agency grows inefficient, when compared to the new, dynamic, improved agencies.
>
> Soon — lo! and behold — the mere dominant protection agency becomes simply one agency among many in a market legal network. The sinister minimal state is reduced, by a series of morally permissible steps which violate the rights of no one, to merely one agency among many. In short, the invisible hand strikes back[23].

Some final brief but important points. Nozick, in common with all other limited government, *laissez-faire* theorists, has no theory of taxation: of how much it shall be, of who shall pay it, of what kind it should be, etc. Indeed, taxation is scarcely mentioned in Nozick's progression of stages toward his minimal state. It would seem that Nozick's minimal state could only impose taxation on the clients it *would* have had before it became a state, and not on the would-be clients of competing agencies. But clearly, the existing State taxes *everyone,* with no regard whatever for who they *would* have patronized, and indeed it is difficult to see how they could try to find and separate these different hypothetical groups.

Nozick also, in common with his limited government colleagues, treats "protection" — at least when proferred by his minimal state — as one collective lump. But *how much* protection shall be supplied, and at what cost of resources? And what criteria shall decide? For after all, we can *conceive* of almost the entire national product being devoted to supplying each person with a tank and an armed guard; or, we can conceive of only one policeman and one judge in an entire country. Who decides on the degree of protection, and on what criterion? For, in contrast, all the goods and services on the *private* market are produced on the basis of relative demands and costs to the consumers on the market. But there is no such criterion for protection in the minimal or any other State.

Moreover, as Childs points out, the minimal State that Nozick attempts to justify is a State *owned* by a private, dominant firm. There is still no explanation or justification in Nozick for the modern form of voting, democracy, checks and balances, etc.[24].

Finally, a grave flaw permeates the entire discussion of rights and government in the Nozick volume: that, as a Kantian intuitionist, he *has no* theory of rights. Rights are simply emotionally intuited, with no groundwork in natural law — in the nature of man or of the universe. At bottom, Nozick has no real argument for the existence of rights.

To conclude: (1) no existing State has been immaculately conceived, and therefore Nozick, on his own grounds, should advocate anarchism and then wait for his State to develop; (2) even if any State had been so conceived, individual rights are inalienable and therefore no existing State could be justified; (3) every step of Nozick's invisible hand process is invalid: the process is all too conscious and visible, and the risk and compensation principles are both fallacious and passports to unlimited despotism; (4) there is no warrant, even on Nozick's own grounds, for the dominant protective agency to outlaw procedures by independents that do not injure its own clients, and therefore it cannot arrive at an ultraminimal state; (5) Nozick's theory of "non-productive" exchanges is invalid, so that the prohibition of risky activities and hence the ultraminimal state falls on that account alone; (6) contrary to Nozick, there are no "procedural rights", and therefore no way to get from his theory of risk and non-productive exchange to the compulsory monopoly of the ultra-minimal state; (7) there is no warrant, even on Nozick's own grounds, for the minimal state to impose taxation; (8) there is no way, in Nozick's theory, to justify the voting or democratic procedures of any State; (9) Nozick's minimal state would, on his own grounds, justify a maximal State as well; and (10) the only "invisible hand" process, on Nozick's own terms, would move society from his minimal State back to anarchism.

Thus, the most important attempt in this

century to rebut anarchism and to justify the State fails totally and in each of its parts.

NOTES

1. *The Complete Writings of Thomas Paine,* ed. P. Foner (New York: Citadel Press, 1945), V.I., p. 13.
2. In Robert A. Rutland, *George Mason* (Williamsburg, Va.: Colonial Williamsburg, 1961), p. 111.
3. Williamson M. Evers, "Toward a Reformulation of the Law of Contracts" (unpublished MS.), p. 12. The great 17th century English Leveller leader Richard Overton wrote: "To every individual in nature is given an individual property by nature, not to be invaded or usurped by any: for everyone as he is himself, so he hath a self propriety, else he could not be himself...Mine and thine cannot be, except this be: No man hath power over my rights and liberties and I over no man's; I may be but an individual, enjoy myself and myself propriety." Quoted in Sylvester Petro, "Feudalism, Property, and Praxeology," in S. Blumenfeld, ed., *Property in a Humane Economy* (LaSalle, Ill.: Open Court, 1974), p. 162.
4. Roy Childs, "The Invisible Hand Strikes Back", *Journal of Libertarian Studies,* pp. 23–33.
5. Cf. Bruno Leoni, *Freedom and the Law* (Los Angeles: Nash Publishing, 1972), and F. A. Hayek, *Law, Legislation, and Liberty, Vol. I* (Chicago: University of Chicago Press, 1973).
6. Childs, "The Invisible Hand Strikes Back", pp. 23–33.
7. Childs, "The Invisible Hand Strikes Back", pp. 23–33.
8. Childs, "The Invisible Hand Strikes Back", pp. 23–33.
9. Childs, "The Invisible Hand Strikes Back", pp. 23–33.
10. Randy Barnett, "Whither Anarchy? Has Robert Nozick Justified the State?" *The Libertarian Forum* (December, 1975). p. 5.
11. Nozick, furthermore, compounds the burdens on the victim by compensating him only for actions that respond "adaptively" to the aggression (58).
12. Nozick explicitly assumes the measurability of utility (58).
13. I am indebted for this latter point to Mr. Roger Garrison of the economics department, University of Virginia.
14. Nozick also employs the concept of "transaction costs" and other costs in arriving at what activities may be prohibited with compensation. But this is invalid on the same grounds, i.e. that transaction and other costs are all subjective to each individual, and not objective, and hence are unknowable by any outside observer.
15. Childs, "The Invisible Hand Strikes Back", pp. 23–33.
16. Childs, "The Invisible Hand Strikes Back", pp. 23–33.
17. Nozick also reiterates Hayek's position on charging for the use of one's solitary waterhole (180).
18. See Barnett, "Whither Anarchy?", pp. 4–5.
19. Nozick doesn't answer this crucial question; he simply asserts that this "will be a productive exchange." (84, 340*n*16). Ironically, Nozick was apparently forced into this retreat — conceding the "productivity" of the exchange if Green makes the offer — by the arguments of Professor Ronald Hamowy: ironic because Hamowy has also delivered a devastating critique of a somewhat similar definition of coercion by Professor Hayek.
20. See Barnett, "Whither Anarchy?", pp. 4–5.
21. Nozick compounds his fallacies by going on to liken the the blackmailer to a "protection racketeer", pointing out that, whereas protection is productive, selling someone "the racketeers' mere abstention from harming you" is not (86). But the "harm" threatened by the protection racketeer is not the exercise of free speech but aggressive violence, and the threat to commit aggressive violence is itself aggression. Here the difference is not the fallacious "productive" vs. "non-productive" but between "voluntary" and "coercive" or "invasive" — the very essence of the libertarian philosophy. As Professor Block points out, "In aggression, what is being threatened is aggressive violence, something that the aggressor has no right to do. In blackmail, however, what is being 'threatened' is something that the blackmailer most certainly *does* have a right to do! To exercise his right of free speech, to gossip about our secrets..." Walter Block, "The Blackmailer as Hero", *Libertarian Forum* (December, 1972), p. 3.
22. For an excellent and detailed critique of Nozick's concept of "procedural rights", see Barnett, "Whither Anarchy?", pp. 2–4. Professor Jeffrey Paul has also shown that any concept of "procedural rights" implies a "right" of some other procedure to arrive at such procedures, and this in turn implies another set of "rights" for methods of deciding on *those* procedures, and so on to an infinite regress. Paul, "Comment on Barnett", (unpublished MS).
23. Childs, "The Invisible Hand Strikes Back", pp. 23–33.
24. Childs, "The Invisible Hand Strikes Back", pp. 23–33.

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TOWARD A THEORY OF STATE CAPITALISM: ULTIMATE DECISION-MAKING AND CLASS STRUCTURE*

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This paper represents the initial phase of a larger study which will present the outline of an analytical model of the structure and dynamics of the state capitalist system as it has evolved historically in the U.S. The model will attempt to synthesize the theoretical insights of Austrian economics and the concrete historical and sociological analysis of both Old Right and New Left critics of the status quo.

This initial paper focuses on two related problems: the identification of a key locus of ultimate decision-making within the state capitalist system and the presentation of an outline of the broader structural characteristics of this system. This paper in isolation offers a highly static, structural model of the system and our subsequent work in this field will focus on a description of the dynamic processes underlying the evolution of the system. This later work will involve a systematic application of the Misesian theory of interventionism and the Austrian theory of the business cycle in an attempt to understand how and why the state capitalist system evolves over time. Most importantly, this later analysis will reinforce our assertion, somewhat arbitrarily made at this point, that the state capitalist system is characterized by inherent instability.

In view of the broad scope of the problems covered, the analysis which follows will necessarily be highly summary, touching only on the basic outline of the argument, and the details will have to be supplied in lengthier studies which will follow this one.

I. THE CAPITAL MARKET AS A LOCUS OF ULTIMATE DECISION-MAKING

Introduction

The first half of this paper will focus on three fundamental propositions: (1) entrepreneurial decision-making constitutes a particularly important category of decision-making within any market system since it determines the nature and extent of structural transformations within the economic system over time; (2) as the market system evolves and becomes increasingly functionally specialized, the capital market will emerge as a significant locus of entrepreneurial decision-making; and (3) although this trend is inherent within the market system itself, the exogenous factor of state intervention in the capital market dramatically reinforces the capital sector's strategic position in the economy through cartellization and inflationary monetary policies. These propositions constitute our rationale for identifying the institutional embodiments of the capital market — and particularly the banking sector — as a locus of ultimate decision-making within the state capitalist system.

Entrepreneurial decision-making within market systems

One of the fundamental insights of the Austrian economists such as von Mises and Hayek — which emerged prominently in the historic debate with Lange and other economists over the merits of planning as an alternative to the market — was the essential role of the market system as a mechanism for gathering, transmitting and evaluating information[1]. The competitive market process originates in, and presupposes, the imperfect knowledge of its participants. Since the market process necessarily takes place over time, all the participants formulate their plans *ex ante* on the basis of the information then available to them and readjust these plans as subsequent events make additional information available to the market participants

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through the operation of the price mechanism.

Professor Israel Kirzner in his recent book *Competition and Entrepreneurship* has considerably enriched our understanding of the functioning of the market process by systematically focusing attention on the role of the entrepreneur[2]. Professor Kirzner identifies entrepreneurial activity as an alertness to previously unnoticed changes in the economic system as revealed through price discrepancies between particular products on the product market and the resources on the factor market required to supply the product. By acting on the basis of this alertness to price discrepancies, the entrepreneur captures entrepreneurial profits which alert other market participants to previously overlooked profit opportunities and provides them with the information necessary to provoke them to change their own plans so that they, too, might be able to share in these new profit opportunities.

Entrepreneurial activity is therefore the essential means by which the new information supplied by the operation of the price mechanism is disseminated among the participants of the market system. As a consequence of the dissemination of this new information, economic resources are shifted from existing uses to new ones as market participants seek to correct previous, mistaken decisions based upon imperfect information and attempt to coordinate their plans more effectively with other market participants on the basis of the new information available. Entrepreneurial activity therefore performs two related equilibrating functions within the market system: it disseminates new information and it stimulates a reallocation of economic resources. This reallocation of economic resources in the field of long-term capital investment results in the structural transformation of the market economies over time.

However, in order for entrepreneurship to be praxeologically significant, it must transcend mere mental alertness to new opportunities on the market. In order for price discrepancies to be really "seen", to be seen in a sense relevant for economic analysis, the entrepreneur must possess the means necessary to act upon this newly acquired information within the market. While Professor Kirzner, both in his book and in a subsequent paper on the same subject, stresses persistently that asset ownership is analytically *never* a condition for pure entrepreneurship[3], we believe that, for the purpose of "real world" economic analysis, entrepreneurial activity and asset ownership *are* inextricably linked — the former presupposes the latter. Exchange relationship, and particularly production activities, are firmly imbedded in time and the would-be entrepreneur must either possess, or acquire access to, the assets which he needs in order to act upon his alertness in the market. Either he already owns the capital necessary to act upon his alertness or else he must obtain the capital from some other source. In either case, capital ownership emerges as a critical dimension of entrepreneurial activity.

This additional dimension of entrepreneurial activity permits us to identify three characteristics which define entrepreneurship: (1) alertness to price discrepancies; (2) control, or ultimate decision-making, over the means required to act upon this alertness in the market; and (3) responsibility, or uncertainty-bearing, for the consequences of acting in the market on the basis of entrepreneurial alertness[4]. One implication of this analysis is that the entrepreneurial decision-maker — the one who decides to act upon a perceived price discrepancy — must, by definition, represent the ultimate decision-maker and must, similarly, reap the profit which results from superior alertness to price discrepancies on the market. Thus, entrepreneurial alertness cannot be hired since the employer, if he captures the profit which results from the superior alertness to price discrepancies in the market, himself becomes the only entrepreneur.

In the case of the individual alert to new entrepreneurial profit opportunities who must borrow the capital necessary to act upon his alterness, the lender, in deciding to risk his capital on the alertness of the borrower, in an important sense becomes a "partner" in entrepreneurial decision-making. The capital market must be conceptually distinguished from the labor market or any other factor market since the would-be entrepreneur does not confront an independently established, uniform market price for capital. In addition to the pure interest rate and the necessary adjustment for anticipated inflation, there is an additional variable component in the market interest rate which reflects the degree of uncertainty anticipated in each particular investment. The lender in the capital market, in the normal course of his affairs, questions prospective borrowers regarding the purpose of the requested loans. This line of questioning — what, why, how — immediately distinguishes in a non-trivial sense the capital lender from the supplier of any other factor of production.

The decision by the capital-owning lender regarding the degree of uncertainty involved in each investment is essentially an entrepreneurial decision and the consequent division of the entrepreneurial profit between the borrower and the lender supports the contention that both have become partners in the entrepreneurial decision-making process[5]. Frank H. Knight recognized this in the following excerpt from his book *Risk, Uncertainty and Profit:* "...it must often happen that entrepreneur ability will not be associated with a situation on the part of its possessor enabling him to make satisfactory guarantees of the contractual incomes promised. Under such circumstances it may be mutually profitable for him to enter into agreement with someone in a position to underwrite his employment contracts, but not himself possessed of the ability or disposition to undertake the direction of enterprises. The form of this partnership and conditions of division of the profit may be highly various"[6]. Since the capital-owning lender must make the ultimate decision whether to act upon the entrepreneurial alertness of the borrower and bears the uncertainty inherent in entrepreneurial activity, there is a strong *prima facie* case for believing that the lender in the capital market becomes the key entrepreneurial actor[7].

As Professor Kirzner points out, the concept of entrepreneurial activity is analytically distinct from the limited, Robbinsian image of the "economizing" market participant. The economizing market participant postulated by Lord Robbins acts to maximize goal satisfaction within a given ends-means framework whereas the concept of entrepreneurial activity recognizes the equally important function of identifying the relevant ends-means framework as an integral part of human activity. Although these two types of decision-making are quite distinct, each market participant acts in a wholly integrated manner, exhibiting both the decision-making characteristic of "economizing" activity as well as of "entrepreneurial" activity.

The capital market as a locus for entrepreneurial decision-making

The evolution of market economies, however, suggests that entrepreneurial activity may become increasingly concentrated within the capital market as the functional specialization of the economy becomes more pronounced. The natural inequality which distinguishes people from one another in every field of human endeavor, when combined with the varying location of natural resources, provide a powerful impetus towards specialization in any economic system. While a certain degree of specialization is possible even in primitive, barter economies, the emergence of money and a system of indirect exchange considerably widens the potential market available for every product and thereby vastly increases the scope for specialization and division of labor[8]. In particular, the emergence of a commonly accepted exchange medium gives rise to a variety of specialized institutions designed to facilitate the storage and handling of money[9].

As credit becomes an increasingly accepted method for financing commercial transactions, financial institutions possessing large accumulations of liquid capital gradually specialize in various forms of credit operations, including long, medium and short-term lending activity. The evolution of increasingly capital intensive production processes eventually gives rise to a new category of financial institutions — the investment banks — which specialize in raising the large sums of capital necessary to finance the expansion of production operations. Other financial institutions specialize in insuring large-scale commercial activities to minimize the risks to which corporations are exposed. In fact, one of the key integrative roles of the capital market within advanced market systems is to concentrate the burden of risk within specialized institutions which, because of the nature of their activities, are more capable of bearing it than other market participants. The entire complex of financial institutions constitutes an increasingly diverse capital market capable of servicing the changing financial needs of a highly specialized market economy.

Two distinct characteristics of this capital market enable its participants to assume an increasing degree of entrepreneurial activity within the economy as a whole. First, the capital market by its very nature provides a large reserve of readily mobilizable capital funds which increases the flexibility and efficiency of response to price discrepancies by the financial institutions. Perhaps even more importantly, however, the financial institutions in the capital market develop highly specialized capabilities for the accumulation and evaluation of vast amounts of information regarding market activities and trends.

Money is a medium of exchange for the entire economy; it provides a mode of integration among highly diversified products, markets and regions, molding them all into a single, interacting and interdependent system. The financial institutions which specialize in the handling of the exchange commodity are therefore precisely those institutions which are most predisposed to adopt a "systems" perspective transcending individual industries or markets. In order for them to perform their function effectively, they must integrate information from all sectors of the economy and develop the alertness to price discrepancies which provides the basis for entrepreneurial activity. Possessing both this highly specialized alertness and the means to act upon price discrepancies revealed by this alertness, the financial institutions in the capital market naturally emerge as an increasingly significant locus of specialized entrepreneurial activity within the market system. Since banks are precisely those institutions specifically designed to act as intermediaries in *all* monetary transactions occurring throughout the economic system, it is natural that they should acquire an influential coordinating position within the capital market itself.

At this point, it is essential to elaborate in some detail the precise sense in which financial institutions, and particularly banks, perform their entrepreneurial function. The ultimate decision-maker in the advancing of capital over time is necessarily the original owner of fixed or circulating capital who determines at any given time the amount of capital that will be available for investment. Once this initial decision is made to choose future consumption over present consumption, the capital owners must also decide among every gradation conceivable in the investment opportunities that are available to them. In making this decision, the individual investor will choose between investment opportunities which are relatively secure, offering the prospect of stable returns, and investments which require considerable risk but, in contrast, may produce much higher returns. Thus, an entire range of gradations in investment opportunities may be distinguished, extending from "passive" saving in banking institutions to "active" investment directly in highly speculative industrial or commercial ventures.

In the case of capital owners who choose to deposit their money in banking institutions, two subtly differentiated levels of ultimate decision-making become discernible. First, the capital owner remains as an ultimate decision-maker in a passive sense since his investment decision is characterized by an orientation towards future consumption, rather than production. He has chosen the security of a reasonably predictable future income stream which will accrue to him over time. In his decision-making, he therefore approaches the role of a pure capitalist concerned exclusively with returns on intertemporal exchange and not with potential entrepreneurial returns. While the passive saver is nevertheless still engaged in a limited form of entrepreneurial decision-making, he has effectively reduced it to a minimum. Of course, the passive saver at any time retains the option of withdrawing his funds (within possible constraints imposed by time deposits) and either devoting them to present consumption, transferring them to another bank or engaging in more "active" forms of investment activity. To this extent, he does retain a passive form of ultimate decision-making authority.

The bank, however, also emerges as an ultimate decision-maker, but in a much more active sense, since it is directly involved in the allocation of loans to specific industrial and commercial ventures. Its decision-making is explicitly oriented towards production activity and it is this form of decision-making which actively determines the parameters within which the economic system will evolve. Active planning control is thus delegated to the bank as a financial intermediary who exercises it subject to the constraint that the depositor may eventually withdraw his funds. Banks serve as an institutional risk-bearing device for minimizing uncertainty for individual savers and for the economy as a whole. In return for this service, the banks and not their depositors reap the entrepreneurial returns on their investments.

This loan activity by banking institutions in the capital market is dependent on two forms of ultimate decision-making exercised by distinct groups of individuals. The saver who deposits his money with the banks retains a passive form of ultimate decision-making over the allocation of funds but delegates a much more active form to the banks who employ this ultimate decision-making authority to determine which producers and consumers on the loan market will receive the available circulating capital.

This line of analysis is not inconsistent with our earlier emphasis that entrepreneurial activity and asset ownership are inextricably linked. On an unhampered market, banking institutions would hold both time deposits and demand deposits as well as its own separate equity capital. In competitive banking, individual banks will recognize the desirability of synchronizing their pattern of liabilities with their changing pattern of assets to assure their capability of responding to all foreseeable contingencies. As a consequence, banks will always be the owners of the funds which are utilized for loans and will thus reap the entrepreneurial returns from the investment of their own assets.

The importance of the financial institutions as a locus of ultimate decision-making within a market economy increases in direct proportion to corporate growth which has historically been accompanied by a growing dependence on external financing. The importance of this role of the financial institutions is also greater for specific industries which are characterized by capital intensive production processes and lengthy lead-times in production since it is precisely these industries which are most heavily dependent on external financing.

None of this analysis should be construed as postulating an insidious process of monopolization of decision-making power within non-state market systems. In the absence of politically imposed barriers to entry, the unhampered competitive market process will act to ensure that financial institutions, just as any other market participants, will be constrained by the prospect of increasing competitive activity if they fail to perform as efficiently as possible[10]. In addition, financial institutions are clearly precluded from establishing a monopolistic control over the commodity with which they deal since money necessarily pervades the entire economy. Would-be entrepreneurs who perceive actual price discrepancies and yet who are unable to obtain the necessary capital for a specific project from specialized financial institutions can turn to an almost limitless variety of private savers or industrial capitalists.

These market factors effectively preclude the possibility that entrepreneurial decision-making could ever be monopolized by financial institutions. However, the market system does concentrate entrepreneurial activity and decision-making within the capital market because of the considerable benefits which are rendered by a certain degree of specialization. This process of specialization continues until an optimum degree of concentration has been achieved which will maximize the allocative efficiency of the market price mechanism. The evolution of the specialized functions of the capital market within the economic system thus epitomizes Herbert Spencer's insight that the market process generates two complementary processes: differentiation and integration. The decision-making within the capital market operates within the severe constraints imposed by the competitive market process and these constraints ensure that the decision-making process contributes to the optimum allocation of economic resources within the system. Thus, the decision-making exercised within the capital market reinforces, rather than undermines, the operation of the market price mechanism.

Having said this, it is logical to assume that the specialized capital market, by the very nature of its integrative role within the market system, will emerge as a strategic locus of ultimate decision-making. Joseph Schumpeter, in somewhat exaggerated terms, nevertheless dramatically captured the essence of the role of the capital market:

> The money market is always, as it were, the headquarters of the capitalist systems, from which orders go out to its individual divisions, and that which is debated and decided there is always in essence the settlement of plans for further development. All kinds of credit requirements come to this market; all kinds of economic projects are first brought into relation with one another, and contend for their realisation in it; all kinds of purchasing power, balances of every sort, flow to it to be sold... Thus the main function of the money or capital market is trading in credit for the purpose of financing development[11].

While the process of concentration of entrepreneurial decision-making within the capital market is constrained by the competitive market process, banking institutions are nevertheless susceptible to a persistent temptation to expand their asset base by pursuing inflationary policies. Murray Rothbard's analysis of banking practices in pure market systems suggests that the competitive market will check this inflationary tendency within narrow limits and tend to preserve full reserve banking policies[12]. In particular, the attempt by individual banks to engage in fractional reserve banking practices will eventually be frustrated by the clearinghouse function performed by other banks. Any attempt to cartellize the leading banks will be exposed to the weaknesses characteristic of all cartels in pure market economies and will be further limited by the need to preserve customer confidence in the banking enterprises.

State intervention in the capital market: the Cartellization of banking

Banks have historically failed to achieve their inflationary objectives on a free market and, as a result, these financial institutions have ultimately turned to the political means embodied in the coercive state apparatus in order to implement their cartellizing and inflationary monetary policies. Historically, state intervention in the banking system has been one of the earliest forms of intervention in the market system.

In the U.S., this intervention initially involved sporadic measures, both at the federal and state level, which generated inflationary distortion in the monetary supply and cyclical disruptions of economic activity. The disruptions which accompanied the business cycle were a major factor in the transformation of the dominant ideology in the U.S. from a general adherence to laissez-faire doctrines to an ideology of political capitalism which viewed the state as a necessary instrument for the rationalization and stabilization of an inherently unstable economic order. This transformation in ideology paved the way for the full-scale cartellization of the banking sector through the Federal Reserve System. The pressure for systematic state intervention in the banking sector originated both among the banks themselves and from certain industries which, because of capital intensive production processes and long lead-times, sought the stability necessary for the long-term planning of their investment strategies. The historical evidence confirms that the Federal Reserve legislation and other forms of state intervention in the banking sector during the first decades of the twentieth century received active support from influential banking and industrial interests[13].

State intervention serves to reinforce considerably the inherent importance of the banking sector both within the capital market itself and within the economic system as a whole. Interventionist measures enforce cartel arrangements, insulate banks from the risks of failure and impose barriers to entry against potential competitors. One historian has perceptively summarized the consequences of the establishment of the Federal Reserve System in the U.S.:

> The trend in the national banking system until 1913 was toward a reduction in the bankers' balances and individual deposits in New York, and in favor of the relatively more rapid growth in the Midwest and the West. The Federal Reserve System, for the most part, stabilized the financial power of New York within the economy, reversing the longer term trend toward decentralization by the utilization of political means of control over the central money market[14].

Most importantly, however, cartellization of banking activity permits banks to inflate their asset base systematically[15]. The creation of assets made possible by these measures to a great extent frees the banking institutions from the constraints imposed by the passive form of ultimate decision-making exercised by their depositors. It thereby considerably strengthens the ultimate decision-making authority held by banks vis a vis their depositors. The inflationary trends resulting from the creation of assets tend to increase the ratio of external financing to internal financing in large corporations and, as a consequence, the ultimate decision-making power of banking institutions increase over the activities of industrial corporations. Since the capital market naturally emerges as a strategic locus of ultimate decision-making in market economies, it is reasonable to assume that, by virtue of their intimate ties with the state apparatus, banking institutions will acquire an additional function within the state capitalist system, serving as an intermediary between the leading economic interests and the state.

Banking institutions similarly preserve their integrative function within the state capitalist system, transcending the narrow "interest consciousness" characteristic of representatives of specific industries and promoting "system consciousness" and "class consciousness" among members of the ruling class. As a result of all these factors, the banking institutions significantly expand their role as ultimate decision-makers within the capital market and, more generally, within the economic system, and they emerge as a key locus of ultimate decision-making within the state capitalist system. This is the result of a dual process which occurs within the state capitalist system: there is a process of concentration of ultimate decision-making within the banking sector and, even more importantly, this is accompanied by an increasing insulation of this decision-making activity from the countervailing competitive pressures inherent in a free market.

Whereas the concentration of ultimate decision-making which occurs in a pure market system does not have any significant operational consequences since it merely serves to reinforce the allocational efficiency of the market price mechanism, the impact of state intervention in the capital market does have serious operational consequences. Not only does the scope of ultimate decision-making expand considerably, but the constraints which ensure that decision-making in a pure market system will be responsive to the market price mechanism are gradually abandoned. To the extent that the market price mechanism continues to operate as an effective constraint, the information flow which it regulates will be progressively more distorted as a consequence of political intervention in the capital market and elsewhere within the economic system. In fact, the market price mechanism is gradually replaced as an allocational device by an increasingly centralized and arbitrary (from the market point of view) system of political decision-making. The result, of course, is a systematic distortion in the allocation of economic resources. It is at this point that the precise locus of decision-making assumes decisive importance since it permits the social analyst to indentify in whose interests the alternative system of allocation will operate.

State capitalism and finance capitalism: a comparison of the analytical models

Since the preceding analysis stresses the role of financial institutions as an increasingly strategic locus of ultimate decision-making within the state capitalist system, it would perhaps be useful at this point to compare this model of state capitalism with the more orthodox Marxist model of "finance capitalism". Such a comparison would be useful in highlighting the differences and similarities between the two models while at the same time permitting a more detailed statement of certain characteristics of the state capitalist model. As an example of the Marxist model of finance capitalism, this paper will focus on a series of articles written by Robert Fitch and Mary Oppenheimer entitled "Who Rules the Corporations[16]?" since these articles offer a recent and systematic exposition of the model as applied to the U.S. The Fitch and Oppenheimer analysis concentrates on two central propositions: (1) that banking institutions exercise a growing amount of control over the activities of industrial corporations and (2) that there is an inherent antagonism between the interests of the banking institutions and the interests of the industrial corporations.

The first proposition may, without much difficulty, be translated into the contention made by this paper that the state capitalist system is characterized by an increasing concentration and consolidation of ultimate decision-making power by the banking institutions. Fitch and Oppenheimer present extensive empirical data confirming the existence of several trends: (1) the sustained expansion of the assets of the financial sector in comparison with the rest of the economy, (2) the increasing concentration and merger of enterprises within the financial sector, emphasizing in particular the growing importance of the bank holding company, (3) the increasing dependence of industrial enterprises on external financing, and (4) the role of stock ownership and interlocking directorates as reinforcing control mechanisms by the banking institutions.

The model of state capitalism presented in this paper diverges fundamentally from the Fitch and Oppenheimer model of finance capitalism with regard to the second proposition: that an inherent antagonism exists between banks and industrial corporations. Paul Sweezy and James O'Connor in later articles in response to the Fitch and Oppenheimer analysis persuasively rebutted the contentions made by Fitch and Oppenheimer in support of this second proposition, and those interested are advised to consult these articles [17]. As one of their leading arguments in support of this second proposition, Fitch and Oppenheimer place great importance upon the fact that banks promote "new modes of capital accumulation" by acting as intermediaries in facilitating the shift of capital from low profit industries to high profit industries. Whereas Fitch and Oppenheimer regard this as a "decadent and destructive" process[18], this argument in fact supports this paper's analysis of the banking sector's entrepreneurial role as an intermediary in the transfer of capital from one industrial sector to another and does not necessarily imply that antagonism between banks and industrial enterprises exists on a class level. This is not to deny the possibility that localized conflicts of interest may frequently emerge between particular banks and particular industrial corporations over the perception of profit opportunities. However, such conflicts are limited and sporadic and are not a systematic characteristic of state capitalism.

One insight which the state capitalist model shares with the Marxist model of finance capitalism, particularly as elaborated by Victor Perlo and S. Menshikov, concerns the tendency for distinct financial interest groups to emerge[19]. However, the state capitalist model treats these financial interest groups as a symptom of the general tension existing between old and new economic groups within society. Changing conditions and increasing information concerning those conditions provide the basis for the emergence of new economic groups which challenge the established position of older groups that rose to prominence under a different set of conditions. These older groups generally tend not to adapt as readily to these new conditions and tensions naturally result as their positions are increasingly eroded by the newer groups.

In the final analysis, the Marxist model of finance capitalism suffers from two profound weaknesses which stem from its flawed economic analysis: (1) it does not adequately account for the crucial role of state intervention in reinforcing the position of the banking sector within the state capitalist system nor does it recognize the role of state intervention in transforming the character of decision-making activity within the banking sector and (2) it fails to identify the true nature of the inherent instability of the system.

Perhaps the most important insight of Austrian economic theory with regard to an analysis of contemporary state capitalism is that cartellization of the banking sector and the subsequent inflationary policies are incapable of producing the stabilization and rationalization so urgently desired by the leading economic interests in the system. Instead, it creates an inherent instability characterized by increasingly widespread distortions in the pricing mechanism. Rather than attempting to remove the original causes of these distortions, the response of policy makers has been to expand state intervention in the market system, thereby aggravating the original distortions even further. The Misesian theory of interventionism suggests that the initial intervention in the monetary system sets in motion a process of retrogression from a relatively free market to a system characterized by an increasingly fascistic set of economic relationships. But, the dynamics of retrogression within state capitalist systems canot even begin to be outlined here and it will therefore have to wait until a later paper. For the moment, let it suffice to say: it cannot, it will not last.

II. THE CLASS STRUCTURE OF STATE CAPITALIST SYSTEMS

Introduction

The first part of this paper identified the capital market as a repository of ultimate decision-making within a market economic system and described the tendency for many key decision-makers to resort to extra-economic methods, i.e. state intervention, in an effort to minimize unpredictability and insulate economic decision-making from the constraints of competitive market pressures. The rest of this paper will present a sociological analysis of the class structures which emerge and crystallize during this process of interventionism and "rationalization" of the economic system.

The circulation of elites in market systems

Decentralized and private ownership of the means of production constitutes the essential, identifying characteristic of the market system of ownership and of the market solution to the economic problem of relative scarcity[20]. Since all factors of production, including labor services and the ability to anticipate the future, are unevenly distributed, the conditions for specialization, the division of labor and exchange are met, and the market process is set in motion[21]. The price system and the market mechanism then become the principal means of social coordination.

Since all owners of the factors of production are unequal both in natural talent and in the ability to adjust to changing conditions, and since all market activity is necessarily future oriented, it is inevitable that at any moment there will be people and groups of people who are more adept at responding to the various aspects of changing conditions than other members of the population[22]. As conditions continue to change, further adjustments will become necessary and there is no *a priori* reason to believe that the people and groups of people who best adapted to previous change will also be best suited in adapting to subsequent changes. Of course, some will prove themselves consistently over time and important elements of inherited meritocracy must be acknowledged, although care must be taken not to over-emphasize them. Change often occurs in the most unexpected areas in a decentralized market system. Innovators, in the Schumpeterian sense, constantly arise from the most obscure corners of society to initiate and adjust to change in all areas of human endeavor[23].

Because of the uneven distribution of ability, elites will tend to emerge from the ranks of the better qualified through a natural process of emerging hierarchy in all areas of human activity. In all areas there will be natural leaders whose legitimacy is based on natural expertise and authority[24]. Once again, in the Schumpeterian sense, there will be the innovators and the imitators (and even more distant followers who are even too dull to imitate, just followers). The free market society, then, is a society of evolving (ascending and descending) elites or, as Vilfredo Pareto put it, a "circulation of elites". Since change is the fundamental characteristic of the free market society, the emergence of elites and their continuing circulation is both natural and desirable for it promotes optimization of both economic efficiency and social harmony[25].

Just as Schumpeter[26] discusses innovation concerning the entrepreneur and the business firm as leading to the health and progress of the economy, so too must there be a process of both the growth of new elites and the decline of old elites in all institutions and areas of social intercourse. Such processes ensure the health and viability of society as a whole. The free market society is a system in which there are neither interventionistic barriers or aids to the process of social innovation, to the free and dynamic process of the birth and decay of natural elites. Of course, this process of the rise and decline of elites takes time, thus ensuring the continuity which is also necessary to preserve a viable social organization[27].

Political intervention as the source of class conflict

As in the case of monopolies[28], political intervention in the market process of innovation and adaptation constitutes the ultimate source of both stratified class relationships and the consequent economic exploitation of one class by the other[29]. Political intervention inevitably transforms the market system from a matrix of purely "economic means" for the acquisition and preservation of wealth to a system far more infused with the principles and institutions of the "political means". These terms — "economic means" and "political means" were coined by the German sociologist Franz Oppenheimer[30] and are defined as follows: (1) the "economic means" involve the acquisition of wealth through one's own labor and subsequent voluntary exchange relationship while (2) the "political means" covers all other means of acquiring wealth. The latter therefore encompasses the direct or indirect expropriation of previously produced wealth either through direct coercion or through the threat of coercion. The prevalent means of expropriation (and hence exploitation) is taxation. Taxation is also the source of most other indirect forms of intervention which, in turn, lead to even greater exploitation.

While a free market society represents the institutionalization of the economic means, Franz Oppenheimer has defined the state as the organization of the political means. The introduction of the political means into a market system creates a system of state capitalism or, in Gabriel Kolko's terms, political capitalism, i.e., a market oriented system with increasing elements of monopoly and class privilege incorporated within it[31]. The state is antithetical to the free market and statist intervention produces a hampered market system: a system of monopoly privilege and the systematization of exploitation, class antagonisms and socio-economic disharmony of interests.

In fact, as long as the application of the political means continues, social evolution will be shaped by a process of class conflict. The state, as the institutionalization of the political means, necessarily generates a process of continuing class conflict since the political means, by its very nature, creates a series of negative sum relationships — that is, one individual or group gains only at the expense of another. This is in comparison to the economic means characteristic of market systems where all exchanges necessarily lead *ex ante* to increases of utility for all participants entering into them (otherwise the exchanges would never have been consummated in the first place)[32]. Antagonistic interests therefore emerge from the application of the political means between those who gain from the use of the political means and those whose wealth is expropriated[33].

The class structures of state societies are defined by the relationships existing between specific groups of individuals and the two modes of acquisition of wealth in society — the economic means and the political means. For example, the net beneficiaries from the application of the political means in society may be designated, quite appropriately, as the political class. This class encompasses all those individuals or groups of individuals whose position in society is dependent on the institutionalization of the political means. While such a class is defined primarily in economic terms, the concept also incorporates the more subjective notion of status — a dimension which becomes increasingly important in the shift from a contract society to a status society that is characteristic of the evolution of political capitalism. Within the broad category of political class, there are numerous distinct subgroups which will be outlined later in this paper.

The designated class position of any given individual does not necessarily imply a full understanding by him of his own class position — that he has a close similarity or identity of interests with others in his class. However, it seems reasonable to assume that individuals sharing certain objective interests will tend toward an emerging and at least hazy common "class consciousness". This is particularly true for producers within each industry and net beneficiaries of state intervention rather than widely dispersed consumers and net losers from state intervention[34]. As a consequence, there tends to be an uneven development of class consciousness in which the political class attains a critical advantage by developing a much more clearly defined awareness of their own interests and this in turn tends to promote a broad consensus within these classes regarding the measures necessary to protect these interests[35].

It must be stressed that the beneficiaries of the political means in a market oriented economy are dependent on the existence of the economic means in order to survive and prosper. The political means presupposes the economic means since the political means alone is unproductive and parasitic whereas the economic means can exist and, in fact, thrives best in the absence of the political means[36]. In view of the dependence of the political means on the economic means, the optimal strategy for the political class to pursue will not be to maximize short-term returns, but rather to promote as productive a system as possible, consistent with the preservation of its exploitative position in that system. The contradictions inherent in such a strategy epitomize the profound contradictions underlying the entire political capitalist system.

This parasitic relationship cannot persist indefinitely, for the political means inevitably distorts the price mechanism necessary for the successful operation of the economic means in an advanced market economy. Distortion of the price mechanism produces market dislocations which necessitate one of two actions: either the initial intervention through the political means must be eliminated or additional intervention will be introduced in an effort to remove the existing dislocation. The latter option will simply result in further dislocations within the market system, once again confronting policy-makers with the same dilemma[37]. The political means is therefore both parasitic and expansionist and its institutionalization in the state apparatus generates an ultimately unviable system characterized by inherent instability and deepening contradictions[38].

In the absence of a strong, persistent and widely held libertarian ideology, the transition from a market system to an interventionistic system (that is, from a non-fixed class society into a stratified class society) appears all but inevitable. For, although the unhampered market is the "natural" system for the individual (in the sense that it maximizes material welfare in a manner consistent with a normative moral code based on natural rights), it does not necessarily follow that the individual will naturally receive a "natural" social system[39].

The interaction of two fundamental sociological laws in human action in fact persistently militate against the free market society. The first is the basic praxeological law of human action, that human action will be undertaken only if it is anticipated that the actor will be able to substitute a more satisfactory state of affairs for his present, and less satisfactory, condition[40]. While an important methodological insight, the "action axiom" alone represents an otherwise innocuous observation. However, when it is combined with the second insight, "Epstean's Law", one begins to discern a compelling tendency towards increasing intervention in the market place by some at the expense of others — once again, however, this assumes the absence of a strong libertarian ideology. Epstean's Law, as formulated by Albert Jay Nock, states that "man tends to satisfy his needs and desires with the least exertion". It follows that, since expropriation requires the least exertion, then systematized exploitation (the organization of the political means) will tend to become a prevailing social relationship[41].

Until, and unless, the intellectual elite within society fully understands and appreciates the fact that the economic means characteristic of market systems is in the long-run best interests of all individuals in society, we will be very unlikely to achieve anything approximating a truly unhampered market system. There is not good reason, therefore, to trust in the gradualism of social evolution to achieve a free market, classless society. Instead, it is necessary to improve our understanding of the interventionistic, exploitative and stratified class system of state capitalism, for it is the one within which we shall be living for the foreseeable future and it is, more importantly, the one which we shall have to change in such a manner that it will not re-emerge in the future.

A class within a class: the ruling class as ultimate decision-makers

In analyzing the stratified class structures of political capitalism, it is necessary to focus on the distinct sub-groups which comprise this much broader political class. In the following section, each of these sub-groups will be enumerated and discussed briefly in turn. First, however, a narrower category should be isolated within the political class encompassing those individuals who act as "ultimate decision-makers" within the state capitalist system. This smaller group will be designated the "ruling class". The ruling class in turn covers two separate elements: a "narrow" ruling class and a "broad" ruling class.

The "narrow" ruling class is restricted to a relatively small number of individuals and families[42] who are truly "ultimate decision-makers" in the sense that they seldom become involved in the day-to-day problems of current policy formation and implementation. Instead, they are primarily concerned with defining the parameters of economic and political formation, from the international level right down to the national, state and often even local levels. In so doing, they determine what is "acceptable" to the system[43]. For reasons which were outlined earlier, these individuals and families comprising the "narrow" ruling class are to be found predominantly in the financial/capital-owning sector.

These individuals only rarely seek elective political office, although they are often appointed, usually for only relatively brief periods, to serve on "blue-ribbon" advisory commissions or in government positions. Although these individuals occasionally occupy prominent government positions, they usually prefer to remain far from the political limelight while occupying their positions as ultimate *economic* decision-makers. The actual development of the broad outlines of political policy generally occurs in the various research planning associations and university institutes and departments which are sponsored and underwritten by the economic elite[44]. By such underwriting, the parameters for the formulation of political/economic policy are subtly established and academics soon become adept at identifying with the interests of their employers.

Although these individuals form the nucleus of the ruling class, there is also a broader definition of the ruling class encompassing a group of individuals defined primarily by wider sociological criteria[45]. It is within this wider group that the concept of family networks (both financial and sociological)[46], and highly exclusive socialization processes become most relevant. Prep schools, colleges, marriages, social clubs, exclusive resorts, etc. coalesce to inculcate in their participants a largely subconscious value system which integrates and reinforces the ruling class as a distinct and highly exclusive group[47]. A definite "we"/"they" view of the world is developed; a definite set of class interests become "second nature" during the socialization process. This category includes wives, relatives and close associates of the ultimate decision-makers who, while not actively participating as ultimate decision-makers, provide essential links within the family networks.

The taxonomy of the political class

The remaining sub-groups of the political class encompass a broad spectrum of all those, other than the ruling class, who derive and maintain their position in society from the institutionalization of the political means. None of these remaining sub-groups is an ultimate decision-maker within the state capitalist system, although they each represent subsidiary interest groups which help to establish certain social limits that the ruling class acknowledges in its decision-making. For instance, the ruling class would severely threaten its own stability if it sought to challenge the entrenched position of organized labor within the political/economic system. Although it will probably require some hard lessons during the course of consolidating its position within the political/economic system, the ruling class eventually learns that its position is best secured by preserving some flexibility, coopting "junior partners" who might otherwise threaten the stability of the system and generally perfecting the techniques of "repressive tolerance".

A prominent sub-group of the political class is the government bureaucracy. This group clearly derives both its position and its income from direct reliance on the political means and, while its influence in policy-making is often exaggerated, it does play an active and important role in articulating the policy options available to the ruling class. Although, over time, bureaucracies begin to acquire considerable autonomy and are eventually able to exercise substantial discretion in shaping the form, and occasionally even the substance, of specific policies[48], it is only rarely that the government bureaucracy will succeed in actually affecting the parameters of decision-making.

One particular branch of the government bureaucracy deserves special attention: the military. As virtually a state within a state, the military has emerged in the post-World War II period as a key intermediary between the state apparatus and the "private" sector. The sprawling military-industrial complex encompasses a broad range of corporations, and even entire industries, which retain their formal identity as "private" but which in fact are critically dependent on government subsidies and contracts for their continued existence. The influence of the military on ruling class policy-making has often been greatly exaggerated by the Left. While civilian control over the military remains effective, the military resembles any other bureaucracy which seeks to expand its position and it has developed powerful vested interests which it seeks to protect in the policy-making process. Thus, while the military has never successfully challenged the parameters of decision-making elaborated by the ruling class, the military has acquired an influential role in the formulation of specific policies designed to achieve the objectives of the national security paradigm of the ruling class.

To a somewhat lesser degree, the same conclusion regarding measure of influence applies to another sub-group in the political class: the politicians and the individuals who comprise the broad support structure for the politicians within the political parties. The prevailing pluralistic ideology insists that the elected politicians, within the broad constraints imposed by a democratic electorate and the Constitution, have considerable freedom in the formulation of government policy[49]. While there is an element of truth in this myth, it neglects the critical role of funding of both the political parties and specific political campaigns in determining who will get the various nominations and between whom the electorate is then permitted to choose.

While elected politicians have greater leverage in policy formation than the members of the bureaucracy, their success in the electoral arena is usually directly related to their ability to demonstrate at least a close similarity between their own ideology and the ideology of those who are funding their campaigns. Moreover, most politicians draw their policy ideas from the "establishment" policy research associations and universities, and their staffs are populated largely by those who have been trained in these various "think tanks" and who have proven their reliability in the past.

Another sub-group of the political class includes the owners and management of "private" corporations which derive a significant portion of income through reliance on the political means[50]. This reliance may occur in a variety of forms: either through government contracts or subsidies, state-enforced restrictions on competitive practices (tariffs, CAB, FTC and ICC regulation, etc.) or through the socialization of costs (government financed R & D, underwriting bankrupt corporations and banks, etc.)

One useful standard which may be employed in isolating and identifying this sub-group is the Calhoun criterion, i.e. determining which corporations are net tax payers and which are net tax consumers[51]. However, total reliance on this quantitative standard can be both inadequate and misleading. The criteria should be qualitative as well as quantitative so that instances of marginal assistance from the state may be identified which, although relatively minor in comparison with over-all income, nevertheless permit the firm in question to preserve or increase its competitive position on the market[52]. Since the criteria are necessarily qualitative as well as quantitative, the unique position of each corporation must be analyzed in detail to ascertain its precise position *vis a vis* the political means.

A further political class sub-group is that of organized labor. These unions critically depend on state-enforced arbitration legislation to maintain their privileged restrictive position in the labor market[53]. Of course, the role of minimum wage legislation in maintaining organized labor's position within the labor market has already been analyzed in detail[54]. Another less well-known, and yet highly important, device for strengthening the relationship between the labor movement and the state apparatus and the ruling class is government contracts, especially the highly lucrative construction contracts awarded at all levels of government[55].

The position of organized labor, while subordinate to the ruling class, is that of a junior partnership in much of political decision-making[56]. The evolution of this relationship between the ruling class and organized labor constitutes one of the central themes in the emergence of political capitalism both in the United States and in Europe where the position of organized labor is far more powerful than in the United States. In fact, in Europe and England the process of "demagogic plutocracy"[57] — the combination of rising democracy and falling old plutocracy consolidated in the form of a Social Democratic/Labor grand alliance — has dramatically strengthened the position of organized labor within the political/economic system. However, the labor unions in the United States have historically remained far more conservative than their European counterparts. They have focused their attention on narrowly defined economic issues concerning wages and working conditions and they have limited their participation in the political process to mobilizing rank and file support on behalf of "sympathetic" politicians through such political action organizations as COPE. The relatively conservative union leadership has been instrumental in containing the aspirations of the more radical rank and file minority, thereby assisting in the development of a relatively quiescent labor force and effectively forestalling any challenge to political capitalism from the Left.

Another sub-group of the political class covers the broad range of recipients of all state social welfare programs. While it is certainly true, on one level, that this group is dependent on the transfer of wealth through the political means, there is no *a priori* reason to be confident that welfare recipients, as a class, are necessarily net beneficiaries of the political means. At the very least, an unresolved ambiguity exists in this area and it is in fact possible that the position of the welfare recipient may deteriorate within the state capitalist system.

For example, minimum wage laws and restrictive labor legislation create a growing reserve of unemployed labor. This reserve naturally consists of the more disadvantaged groups in society — racial minorities, unskilled labor and youth in general. Thus, unemployed individuals who would presumably be employed on the free market are now "beneficiaries" of unemployment compensation and welfare programs designed to maintain their acquiescence. This is merely one example of the various policies which promote a growing dependency on government subsidy that has in turn led to the emergence of a distinct sub-society within the framework of state capitalism. This welfare sub-society is "serviced" by its own bureaucratic network which serves to reinforce dependency relationships within the society and the resulting system has appropriately been designated "welfare colonialism". Taxes, especially the more regressive types, are especially burdensome on the poorer strata of society so that the marginal aspirants trying to escape this welfare cycle are often pushed back down into the mire of disillusionment and dependency. This disincentive to seek and retain productive employment thus becomes very high[58].

The agents of ideological hegemony: legitimating the illegitimate

The final sub-group of the political class to be discussed in this paper performs a crucial intermediary role within the state capitalist system, coordinating and legitimating the social system. The term "agents of ideological hegemony" will be used to designate the members of an intricate network of intellectuals[59] both in a broad sense and a narrow sense[60]. These intellectuals are affiliated with a wide range of institutions — educational institutions, foundations, policy research associations and the media — whose primary function is the inculcation and reinforcement of the society's values and beliefs. Ultimately, these institutions are designed to ensure subservience to the prevailing authority by preserving the legitimacy of the ruling class.

Although the threat of coercion is inherent in the concept of the political means and therefore in the institution of the state[61], the stability and the success of the ruling class is critically dependent on the degree to which the population internalizes a "consensus" ideology compatible with the specific policies adopted by the ruling class. Such a consensus ideology maximizes "voluntary" support for various exploitative policies, thereby minimizing the reliance of the ruling class on physical coercion to attain its ends.

While it is necessary to avoid a mechanistic theory of crude economic determinism, it is nevertheless essential to stress that economic interest has been, and will continue to be, one of the central motivating factors throughout social history. After all, the concept of economic interest is an *idea*; it is an idea about how the individual relates both to nature and to society. The idea of economic interest and economic hegemony or exploitation is directly related to a sense of legitimacy and, as such, it is of key importance in determining all socio-economic and political relationships. Ultimately, the question of how individuals will relate to each other in economic matters and in the broader matrix of social organization (i.e., whether it will be exploitative or not) will be determined in this realm of ideas.

The agents of ideological hegemony are, thus, the critical variable in the transformation of class from the merely objectively defined socio-economic categories into cohesive groups acting on the basis of subjectively perceived identity of interests — from economic class to socio-political class. These intellectuals at once both clarify and mystify the idea of economic hegemony and stratified class relationship, adding both coherence and legitimacy to this idea of exploitative social relationship[62].

As the tasks of ideological hegemony become more complex and varied in a highly advanced industrial society, increasingly well defined hegemonic hierarchies emerge within the state capitalist system[63]. Thus, a very restricted network of institutions serves to reinforce the social and ideological cohesivesness of the ruling class itself while simultaneously preparing another generation of intellectuals to occupy positions within this network. Prep schools, Ivy League colleges, business research and policy institutions and periodicals such as *Fortune, Business Week*, etc. are just a few of the links in this network.

A distinct institutional network, benefitting from extensive socialization of costs, supplies the economy with a highly skilled and literate labor force inculcated with "technocratic" values. The evolution of the state-financed educational system has been profoundly influenced by the changing needs of the corporate economy and this intimate, if somewhat inefficient, relationship has been a prominent characteristic of state capitalist societies[64]. Compulsory education also inculcates a value system encouraging subservience and docility among unskilled labor and the lower strata of society[65].

While direct state and ruling class subsidies play an increasingly important role in sustaining this hierarchy of networks, intellectuals often derive a significant degree of "remuneration" in non-monetary psychic income. The "court intellectual" who articulates and propagates the values of the ruling class acquires a high status position as well as a sense of participation in the exercise of power within the state capitalist society. It is nevertheless also true that the "court intellectual" usually seems to be much better endowed financially than his colleagues outside the political class and it would seem unrealistic to attribute this to mere coincidence.

The agents of ideological hegemony within the state capitalist system represent a highly mobile class — they shift from academia to the foundations, to government positions, to business research associations, and often to Wall Street itself, then back to the university to begin once again. In all of these moves the intellectuals promote a vital sense of cohesion and ideological coordination among the various sectors of the socio-economy.

Social stratification within the state capitalist system

The emergence of a political class around its strategic decision-making core — the ruling class — fundamentally alters the dynamic and spontaneous circulation of elites. The free market is a synonymous term for the process which generates socially necessary institutions. This "spontaneous" adjustment to changing conditions tends to generate the institutions and associated elites necessary to optimize the socio-economic harmony at any given time[66]. In contrast, interventionism by the state on behalf of the ruling class disrupts and distorts this free market tendency towards social equilibrium. Interventionism causes social maladjustment, bottlenecks, and retrogressive distortion in the socio-economic mechanism.

The ruling class, as the wielder and principal beneficiary of the political means, naturally seeks to consolidate its position further, relying on the protective intervention of the state to prevent the previously unhampered circulation of elites[67]. Since any social system that departs from the free market is inefficient and retrogressive, there is an inherent tendency for state capitalist societies, in time, to retrogress into increasingly static "caste" systems characteristic of feudal and militaristic societies[68]. Real social progress depends on the freely moving circulation of elites and the state capitalist system therefore constitutes a retrogressive social phenomenon[69]. Stratified class societies represent a futile attempt to suppress change. Since change is both a fundamental reality and a necessity in any social system, interventionist policies designed to halt or divert natural social change are dysfunctional and ultimately disastrous for the entire social system.

The ruling class in state capitalist systems must somehow counteract the inherent tendencies within such systems towards increasing stratification, declining social mobility and, ultimately, stagnation throughout the socio-economic system. Social mechanisms must be devised to preserve the existence and privileges of the ruling class while simultaneously permitting limited recruitment and advancement into the class to avoid internal atrophy and incestuous decay. In the absence of such regeneration, ruling classes have historically collapsed either through a process of gradual decay or through a widespread loss of authority, resulting in revolution[70].

The historical dilemma confronted by all ruling classes has been identified by Pareto as the "Persistence of Aggregates": old and obsolescent classes have been unwilling to listen to, to learn from, and to give way to the newer classes. The efficient and enduring ruling classes are precisely those which have been able to accomodate to change and new ideas while maintaining a continuity of control.

The "Foxes" and the "Lions": tension within the ruling class

Pareto distinguished between two different psychological types within ruling classes. First, there are the "Lions" who are inherently conservative, valuing stability in a static sense, and who are therefore antagonistic to change and "newcomers". The term "Persistence of Aggregates" clearly refers to the psychological attitudes most characteristic of the "Lions". The "Foxes" represent a second type, encompassing speculators who seek out innovation, thrive on change and are masters of Machiavellian manipulation. The term "instinct for combination" describes the "mind-set" of the "Foxes"[71].

In the circulation of natural elites in market systems, the interaction between the "instinct for combination" and the "persistence of aggregates" generates an optimum of both change and continuity, resulting in the proper amount of socially desirable and necessary "progress". However, the introduction of artificial barriers to the natural circulation of elites, and thus to the proper flow of socio-economic activity, creates a maladjustment of socio-economic relations. At any particular moment, there will be either too much continuity (excessive "persistence of aggregates") or too much discoordinating change (excessive "instinct for combination").

The "Foxes" and the "Lions" differ fundamentally regarding appropriate methods of government. For example, the "Foxes" of ascendant ruling classes recognize the importance of the management of recruitment to permit marginal social mobility into the ruling class. Such a strategy would seek to coopt the natural elites of society both to strengthen the position of the ruling class and to eliminate potential opposition. In contrast, "Lions" would prefer to consolidate the ruling class as a self-perpetuating caste insulated from other social strata.

The process of recruitment, however, often sets in motion various contradictions which intensify the dynamics of intra-class rivalry. The inability to manage the process of recruitment within acceptable limits may lead to excessive change in the opinion of the conservative "Lions". The new recruits, occasionally with some of the old "Foxes", may form the nucleus of a new ruling class. The response of the "Lions" will be to adopt a defensive policy of retrenchment, seeking to dismantle the recruitment mechanisms which were responsible for increasing ruling class heterogeneity and thereby intensifying intra-class tensions. If fully successful, such policies will generate a widening gap between the ruling class and the natural elites within society which will be progressively barred from entry into the ruling class. Cut off from infusions of new talent, the atrophying ruling class will experience increasing difficulty in maintaining social control, particularly as the rising natural elites are driven into opposition movements in increasing frustration over the obstacles to social mobility.

If, on the other hand, the "Foxes" prevail, they will replace the older "Lions" who are unable to adjust to changing social institutions. As the ascendant "Foxes" succeed in consolidating their position within the ruling class, however, they will increasingly display the psychological traits of their "Lion" predecessors as they too seek to defend their privileged social position against the challenge of rising new elites within the social system. The ruling class ideally strives to promote an optimal balance between change and continuity within the social system but, since this objective can only be attained in unhampered market systems, the system of state capitalism will ultimately prove unable to duplicate the market process and the natural circulation of elites accompanying this process.

The institution of the state, in fact, virtually ensures that the collapse of the traditional elites and the emergence of new ones will be surrounded by violence, for the institutionalization of the political means inevitably creates coercive barriers to social mobility which reinforce stratification, stagnation and frustration, culminating in outbreaks of violence. When social mobility is no longer permitted through a process of evolutionary change, revolutionary violence increases in importance as a mechanism for social mobility. The politicizing of economic relationships which emerges as a prominent characteristic of state capitalist systems leads to a disharmony of interests that is manifested in constant tension, confrontation and finally violence.

As Hayek perceptively notes, in these confrontations between the political class and the rest of society, and between the "Lion" and "Fox" factions of the ruling class, those who are most adept in the use of the political means (ultimately brute, naked force) will tend to rise to the top[72]. Once at the top of the social pyramid, they tend to become increasingly defensive against new "Foxes". As the members of the ruling class become more preoccupied with the protection of their privileged social position, they become less concerned with ensuring the smooth and productive operation of the social system. They become more vulnerable and lose their sense of legitimacy. The demise of the existing ruling class will eventually occur but, as long as the state apparatus institutionalizes the political means within the socio-economic system, new ruling classes will be prepared to try where others have failed.

III. CONCLUSION

A detailed analysis of the process of social stratification which occurs in all state capitalist systems is essential for an understanding of the dynamics of our present social system. The mechanisms for the consolidation of both the ruling class and the broader political class and the contradictions within the state capitalist system which ultimately assure the disintegration of the ruling class require a much more careful scrutiny than has just been undertaken. It is our hope that the analytical framework which we have elaborated will contribute to a more comprehensive understanding of the state capitalist system, thereby strengthening our ability to transform the system into one which more nearly satisfies our hopes, our needs and our strong sense of justice. As a leading social analyst of the last century noted, "the philosophers have only interpreted the world, in various ways; the point, however, is to change it"[73]. We seek to interpret the existing state capitalist system in order to facilitate the final dismantling of that system.

NOTES

1. For a more detailed presentation of this analysis, see Friedrich Hayek, "Economics and Knowledge" and "Socialist Calculation III, the Competitive 'Solution'" in *Individualism and Economic Order,* Routledge and Kegan Paul (London, 1949) as well as the excellent collection of essays in Friedrich Hayek, ed., *Collectivist Economic Planning,* George Routledge and Sons (London, 1935). In addition to the article appearing in Hayek's edited collection, von Mises has developed his argument on economic calculation in market systems in his book *Socialism,* Yale University Press (New Haven, 1951) and *Human Action,* Henry Regnery (Chicago, 1966).
2. Israel Kirzner, *Competition and Entrepreneurship,* University of Chicago Press (Chicago, 1973). See also Professor Kirzner's paper entitled "Capital, Competition and Capitalism" which is reprinted in *Champions of Freedom,* Hillsdale College Press (Hillsdale, Michigan, 1974) and which explores in greater detail his assertion that pure entrepreneurship does not require capital ownership. Two earlier studies which provide important contributions to the theory of entrepreneurship in market economies are Joseph Schumpeter, *The Theory of Economic Development,* Harvard University Press (Cambridge, 1961) and Frank H. Knight, *Risk, Uncertainty and Profit,* University of Chicago Press (Chicago, 1921).
3. Israel Kirzner, *Competition and Entrpreneurship, op. cit.,* pp. 44–45, 48–49, and Kirzner, "Capital, Competition and Capitalism", *op. cit.,* pp. 7–8, 9, 10, 11.
4. Frank H. Knight, *op. cit.,* is particularly useful in his insistence that ultimate control and ultimate responsibility are inseparable.
5. One possible measure of the extent to which each partner has engaged in entrepreneurial activity might be to focus on the subsequent division of entrepreneurial profits. The relative shares of entrepreneurial activity may vary from the extreme case in which the borrower succeeds in capturing virtually the entire entrepreneurial profit to the equally extreme case in which the lender succeeds in capturing almost the entire entrepreneurial profit. However, regardless of the distribution of the entrepreneurial profits, both partners are engaged in entrepreneurial activity.
6. Knight, *op. cit.,* p. 289.
7. Contemporary bankruptcy laws perform an important function in shifting a large burden of the risk to the lender of capital and it would be relevant to inquire how this situation might be altered in a pure market system. Lawrence White, a student in the Economics Department at Harvard, has written an interesting paper on this subject from an Austrian perspective entitled "Bankruptcy and Risk", March 25, 1975.
8. For an analysis of the importance of indirect exchange and money in market economies, see Ludwig von Mises, *Human Action, op. cit.,* pp. 398–471; Ludwig von Mises, *The Theory of Money and Credit,* Henry Regnery (Chicago, 1953), pp. 29–37; and Murray N. Rothbard, *Man, Economy and State,* Van Nostrand (New York, 1962), pp. 160–200. See also Rothbard, "Egalitarianism as a Revolt Against Nature", *Modern Age,* Fall 1973.
9. Ludwig von Mises, *The Theory of Money and Credit, op. cit.,* pp. 261–277 discusses the functions performed by banking institutions in a market economy.
10. See G. J. Stigler, "Imperfections in the Capital Market", *Journal of Political Economy,* June 1967 for a refutation of a variety of conventional views regarding the imperfections believed to hamper the operation of the capital market.
11. Schumpeter, *op. cit.,* pp. 126–127.
12. Murray N. Rothbard, *What Has Government Done to our Money?* Pine Tree Press (Santa Ana, California, 1964), pp. 22–26. Rothbard also cites Amasa Walker, *The Science of Wealth,* Little, Brown and Co. (Boston, 1867), pp. 139–141, 126–232 for an excellent discussion of the problems of fractional reserve banking.
13. Four essential studies exploring the emergence of political capitalism and the leading role of business interests in the elaboration and implementation of this ideology are Gabriel Kolko, *The Triumph of Conservation,* The Free Press of Glencoe (New York, 1963); James Weinstein, *The Corporate Ideal in the Liberal State,* Beacon Press (Boston, 1968); Robert Wiebe, *The Search for Order, 1877–1920,* Hill and Wang (New York, 1967). A more recent collection of highly illuminating essays is available in Ronald Radosh and Murray Rothbard, *A New History of Leviathan,* Dutton (New York, 1972).
14. Gabriel Kolko, *op. cit.,* pp. 252–253.
15. For a brief discussion of the significance of the Federal Reserve System in permitting member banks to expand their asset base, see Murray N. Rothbard, *America's Great Depression,* Van Nostrand (Princeton, 1963), pp. 29–33. In his study, *What Has Government Done to Our Money? op. cit.,* pp. 36–38, Rothbard stresses the consequence of government intervention which permits banks to refuse to pay their obligations while continuing in operation. Sam Peltzman has published an interesting attempt to measure the impact of the Banking Act of 1935 in restricting entry into commercial banking in "Entry in Commercial Banking", *Journal of Law and Economics,* No. 8, October 1965, pp. 11–50. He concludes that without this regulation entry into commercial banking would have been 50–100% higher than it actually has been.
16. These articles appeared in a three part series in *Socialist Revolution,* Vol. 1, Nos. 4, 5 and 6, Summer 1970,

September-October 1970 and November-December 1970. This was followed by a "Reply" to various criticisms of the original series of articles which appeared in *Socialist Revolution,* January-February 1971.

17. James O'Connor, "Question: Who Rules the Corporations? Answer: The Ruling Class", *Socialist Revolution,* January–February 1971 and Paul Sweezy, "The Resurgency of Financial Control: Fact or Fancy" *Socialist Revolution,* March–April 1971.
18. Fitch and Oppenheimer, *op. cit.,* Part III, pp. 47–75.
19. Victor Perlo, *The Empire of High Finance,* International Publishers (New York, 1957) and S. Menshikov, *Millionaires and Managers: Structure of U.S. Financial Oligarchy,* Progress Publishers (Moscow, 1969).
20. Ludwig von Mises, *Socialism, op. cit.*
21. Murray N. Rothbard, "Freedom, Inequality, Primitivism and the Division of Labor", *Modern Age,* Summer 1971; Rothbard, "Egalitarianism as a Revolt Against Nature", *op. cit.*; Knight, *op. cit.*; Ludwig M. Lachmann, "The Role of Expectations in Economics as a Social Science", *Economica,* February 1943; L. M. Lachmann, "Professor Shackle and the Significance of Time", *Metroeconomica,* September 1959.
22. H. A. Hodges, *The Philosophy of Wilhelm Dilthey,* Routledge, and Kegan Paul (London, 1952); R. G. Collingwood, *The Idea of History,* Oxford University Press (London, 1946); and Ludwig von Mises, *Theory and History,* Yale University Press (New Haven, 1957).
23. Schumpeter, *op. cit.*; J. A. Schumpeter, *Capitalism, Socialism and Democracy,* Harper and Brothers (New York, 1942); and Kirzner, *Competition and Entrepreneurship, op. cit.*
24. S. E. Finer, "Pareto and Pluto-Democracy: The Retreat to Galapagos", *The American Political Science Review,* June 1968; S. E. Finer, *Pareto: Sociological Writings,* Praeger (New York, 1966); F. Kolegar, "The Elite and the Ruling Class: Pareto and Mosca Re-Examined", *Review of Politics*; J. H. Meisel, *Pareto and Mosca,* Prentice-Hall (Englewood Cliffs, N.J., 1965); J. H. Meisel, *The Myth of the Ruling Class: Gaetano Mosca and the Elite,* University of Michigan (Ann Arbor, 1962); Robert Michels, *Political Parties,* Collier Books (New York, 1962); and Gaetano Mosca, *The Ruling Class,* McGraw-Hill (New York, 1939).
25. Ludwig von Mises, *Human Action, op. cit.*
26. J. A. Schumpeter, *The Theory of Economic Development, op. cit.*
27. The circulation of elites over time is illustrated by the popular maxim: "from shirtsleeves to shirtsleeves in three generations".
28. Herbert Spencer, *Social Statics,* A. M. Kelley (New York, 1969); Isabel Paterson, *The God of the Machine,* Caxton Press (Caldwell, Idaho, 1943); Gabriel Kolko, *The Triumph of Conservatism, op. cit.*
29. Albert Jay Nock, *Our Enemy the State,* Free Life Editions (New York, 1973); Franz Oppenheimer, *The State,* Free Life Editions (New York, 1975); Murray N. Rothbard, "The Anatomy of the State", *Egalitarianism as a Revolt Against Nature and Other Essays,* Libertarian Review Press (Washington, 1974); and Murray N. Rothbard, *For a New Liberty* (New York, 1973).
30. Oppenheimer, *ibid.*
31. Gabriel Kolko, *op. cit.*
32. Carl Menger, *Principles of Economics,* Free Press (Glencoe, 1950) and Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics", in M. Sennholz, *ed., Freedom and Free Enterprise,* Van Nostrand (Princeton, 1956).
33. Rothbard, *ibid.,* and L. Robbins, *The Economic Basis of Class Conflict,* Macmillan (London, 1939).
34. L. Robbins, *ibid.*
35. Hilaire Belloc, *The Servile State,* T. N. Foulis (London, 1912).
36. It should be stressed that the elements of this analytical model are rarely encountered in their pristine purity in the "real world". Instead, historical class formations usually represent varying mixtures of the political means and the economic means. The historian and social researcher must resolve the empirical question of the extent to which a particular class in any given historical period relies on either of these two methods for the acquisition of wealth. It is useful, however, to isolate the distinct elements of this analytical model in their purest form in order to describe their unique characteristics and thereby achieve a deeper understanding of their interaction in various historical epochs.
37. The interventionist dynamic is occasionally disrupted, and even temporarily reversed, by certain crisis periods in which the contradictions inherent in earlier interventionist measures confront the ruling class with the necessity of repealing these earlier measures, e.g., the acute housing shortage resulting from New York's rent control legislation confronted policy makers with the option either of repealing this legislation or authorizing massive state intervention in the housing market in the form of public housing projects. The fundamental social transformations that would have resulted in the latter option made it unacceptable. Usually, however, policy makers will be reluctant to admit the mistake of their earlier intervention (mainly for political reasons) and instead will adopt further interventionist measures to "cure" the previously caused distortions.
38. For a more detailed investigation of the nature and effects of interventionism, see Walter Grinder and John Hagel, "From *Laissez-Faire* to *Zwangswirtschaft:* The Dynamics of Interventionism", delivered to the Austrian Economics Symposium, University of Hartford, June 1975. See also Ludwig von Mises, "The Middle of the Road Leads to Socialism", *Planning for Freedom,* Libertarian Press (South Holland, Illinois, 1962) and F. A. Hayek, *The Road to Serfdom,* University of Chicago Press (Chicago, 1944).
39. Of course, any system which interferes with the market process embodies inherent contradictions which progressively hamper the functioning of the social system over the long run. Hence reality is a strong teacher and market oriented reforms will probably accompany each cumulative crisis but, in the absence of a continuing libertarian ideology, even the harsh lessons of reality will soon be forgotten and the interventionist dynamic will resume its relentless course. F. A. Hayek, *Individualism and Economic Order, op. cit.*; Ludwig von Mises, "Economic Calculation in the Socialist Commonwealth" in Hayek, *ed., Collectivist Economic Planning, op. cit.*; and Murray N. Rothbard, "Lange, Mises and Praxeology: The Retreat from Marxism" in Hayek, Harper, *et. al., eds., Towards Liberty,* Institute for Humane Studies (Menlo Park, California, 1971).
40. Von Mises, *Human Action, op. cit.*; Ludwig M.

Lachmann, "On the Method of Interpretation", *The Legacy of Max Weber,* Glendessary Press (Berkeley, 1971); and Murray N. Rothbard, "Praxeology as the Method of Economics" in M. Natanson, *ed., Phenomenology and the Social Sciences,* Northwestern University Press (Evanston, Ill., 1973), Vol. II, pp. 311-339.

41. Albert Jay Nock, *Memoirs of a Superfluous Man,* Regnery (Chicago, 1964).
42. E. Digby Baltzell, *Philadelphia Gentlemen: The Making of a National Upper Class,* The Free Press (Glencoe, Ill., 1958); G. William Domhoff, *Who Rules America?* Prentice-Hall (Englewood Cliffs, N.J., 1968); G. William Domhoff, *The Higher Circles,* Vintage (New York, 1971); and Ferdinand Lundberg, *America's Sixty Families,* Vanguard Press (New York, 1937).
43. Gabriel Kolko, "The Men of Power", *Roots of American Foreign Policy,* Beacon Press (Boston, 1968) and G. William Domhoff, *The Higher Circles, op. cit.*
44. David Eakins, "Policy Planning for the Establishment" in Radosh and Rothbard, eds., *A New History of Leviathan, op. cit.*; David Eakins, "Business Planners and America's Postwar Expansion" in William A. Williams, *ed., Corporations and the Cold War,* Monthly Review Press (New York, 1968); and David Eakins, "The Development of Corporate Liberal Policy Research in the United States, 1885-1965", unpublished Ph.D. thesis, University of Wisconsin, Madison, 1966.
45. G. William Domhoff, *Who Rules America?* and *The Higher Circles, op. cit.*
46. Baltzell, *Philadelphia Gentlemen, op. cit.*; Stephen Birmingham, *The Right People,* Little, Brown and Co. (Boston, 1968); G. William Domhoff, *The Higher Circles, op. cit.*; Lundberg, *op. cit.*; S. Menshikov, *Millionaires and Managers, op. cit.*; and Victor Perlo, *op. cit.*
47. Cleveland Amory, *The Last Resorts,* Harper and Row (New York, 1952); Baltzell, *op. cit.*; Birmingham, *op. cit.*; G. William Domhoff, *The Bohemian Grove,* Harper and Row (New York, 1974); G. William Domhoff, *The Higher Circles, op. cit.*; C. Wright Mills, *The Power Elite,* Oxford University Press (New York, 1956).
48. Raymond Aron, "Max Weber", *Main Currents in Sociological Thought,* Basic Books (New York, 1965); J. A. Schumpeter, *Capitalism, Socialism and Democracy, op. cit.*; Max Weber, *The Theory of Social and Economic Organization,* Oxford University Press (New York, 1947); Ludwig von Mises, *Bureaucracy,* Yale University Press (New Haven, 1944).
49. J. H. Meisel, *The Myth of the Ruling Class, op. cit.* and G. W. Domhoff, *The Higher Circles, op. cit.,* especially chapter 9.
50. Seymour Melman, *Pentagon Capitalism,* McGraw-Hill (New York, 1969); Seymour Melman, *The Permanent War Economy,* Simon and Schuster (New York, 1974); Murray Weidenbaum, *The Modern Public Sector,* Basic Books, (New York, 1970); and H. L. Nieburg, *In the Name of Science,* Quadrangle (Chicago, 1966).
51. J. C. Calhoun, *A Disquisition on Government,* P. Smith (New York, 1943) and Murray N. Rothbard, *Power and Market,* Institute for Humane Studies (Menlo Park, 1970).
52. These broadened criteria are essential to isolate and define the precise relationship existing between the state and an ostensibly "private" corporation such as Dow Chemical Company which emphasized that its contracts for the manufacture of napalm account for less than 3% of its total revenue.
53. Sylvester Petro, *Labor Policy of the Free Society,* Ronald Press (New York, 1957) and Murray N. Rothbard, *Power and Market, op. cit.*
54. Yale Brozen, "Is Government the Source of Monopoly?" *Intercollegiate Review,* 1968; Milton Friedman, *Capitalism and Freedom,* University of Chicago Press (Chicago, 1961); J. M. Peterson and C. T. Stewart, Jr., "Employment Effects of Minimum Wage Rates", American Enterprise Institute pamphlet, Washington, 1969; and Murray N. Rothbard, *Power and Market, op. cit.*
55. Other prominent examples of government contracts include the interstate highway network, the Albany Mall, the World Trade Center Towers, etc., etc., *ad infinitum.*
56. Ronald Radosh, "The Corporate Ideology of American Labor Leaders from Gompers to Hillman", in James Weinstein and David Eakins, eds., *For a New America,* Random House (New York, 1970); Ronald Radosh, *American Labor and United States Foreign Policy,* Vintage (New York, 1970); and Murray N. Rothbard, *Power and Market, op. cit.*
57. S. E. Finer, *Pareto: Sociological Writings, op. cit.* and Vilfredo Pareto, *Mind and Society* (New York, 1935).
58. F. Piven and R. Cloward, *Regulating the Poor,* Pantheon (New York, 1971); Pechman, "The Rich, the Poor and the Taxes They Pay" *The Public Interest,* Fall 1969. Preliminary studies by an Institute of Policy Studies research group in low income areas in Washington, D.C. also indicate that these areas pay out more in taxes than they receive in welfare benefits. Of course, purely quantitative studies of transfers in this field suffer from the same limitations characteristic of such studies in other areas of the economy.
59. A. Gramsci, *The Modern Prince and Other Essays,* International Publishers (New York, 1957); Bertrand de Jouvenel, *On Power,* (Boston, 1969); and J. A. Schumpeter, *Capitalism, Socialism and Democracy, op. cit.*
60. F. A. Hayek, "The Intellectuals and Socialism", *University of Chicago Law Review,* Spring 1949.
61. De Jouvenel, *On Power, op. cit.*
62. Murray N. Rothbard, "Anatomy of the State", *op. cit.* and a brilliant but, as yet, unpublished manuscript by Murray Rothbard, "A Parable for Our Time".
63. James Gilbert, *Designing the Industrial State,* Quadrangle (Chicago, 1972) and G. William Domhoff, *The Higher Circles, op. cit.*
64. Joel Spring, *Education and the Rise of the Corporate State,* Beacon Press (Boston, 1971).
65. *Ibid.* and Edgar Z. Friedenberg, *Coming of Age In America,* Random House (New York, 1963).
66. Ludwig M. Lachmann, "On Institutions", *The Legacy of Max Weber, op. cit.*
67. This defensive role of political interventionism is best identified and explained by the "Brozen-Friedman-Kolko Thesis", an unified thesis which may be developed from the following works: Brozen, "Is Government the Source of Monopoly?", *op. cit.*; Milton Friedman, "Occupational Licensure", *Capitalism and Freedom, op. cit.*; and Gabriel Kolko, *The Triumph of Conservatism, op. cit.* See also Vilfredo

Pareto, *Mind and Society, op. cit.* and Gaetano Mosca, *The Ruling Class, op. cit.*

68. Herbert Spencer, *Social Statics, op. cit.*
69. A retrogressive social phenomenon is defined through a comparison between existing conditions and the conditions which probably would have prevailed had the intervention not taken place. It would be misleading to compare the present conditions with earlier conditions since, for other reasons, there in fact may have been an improvement on this level.
70. Gaetano Mosca, *The Ruling Class, op. cit.*
71. Raymond Aron, "Pareto" in *Main Currents in Sociological Thought, op. cit.* and S. E. Finer, *Pareto: Sociological Writings, op. cit.*
72. F. A. Hayek, *The Road to Serfdom, op. cit.*
73. Karl Marx, "Theses on Feuerbach", *The Economic and Philosophical Manuscripts of 1844,* International Publishers (New York, 1965).