4 Nozickian arguments for the more-than-minimal state

4.1 INTRODUCTION

The first and longest part of Robert Nozick's *Anarchy, State, and Utopia (ASU)* is substantially devoted to a defense of the minimal [nightwatchman] state against the challenge of the individualist anarchist. In this chapter I explore the contest between Nozick and the individualist anarchist by examining responses that Nozick offered, could have offered, or should have offered to the anarchist challenge. I conclude that the best Nozickian response to the anarchist challenge vindicates a state which is more than minimal because, although it provides only the service of rights protection, it funds the production of its services by *requiring* at least some of the recipients of those services to purchase those services. In this introductory section I will provide a sketch of the structure of this exploration.

Nozick begins *ASU* with the well-known proclamation that "[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights)" [p. ix]. He immediately adds: "So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?" [p. ix]. Pursuing these questions, the individualist anarchist maintains with considerable plausibility that, if one takes these individual rights as seriously as Nozick thinks one should, one must reject even the minimal state in favor of a system of competing private protective agencies. For even the minimal state – which is solely concerned with the protection of individual rights – must attain and maintain something like a monopoly over the protection of rights within its claimed territory simply in order to be a state. And, the
anarchist contends, the attainment or maintenance of this monopoly will violate certain of the rights that advocates of the minimal state believe should be respected and protected. The crucial right that the anarchist invokes is the right of individuals to act as executors of the law of nature – the right of individuals to act to protect and enforce their own rights and (even) to sell their services as rights protectors and enforcers to individuals who choose to purchase those services. The anarchist’s complaint is that “when the state monopolizes the use of force in a territory and punishes others who violate its monopoly ... it violates moral side constraints on how individuals may be treated” (p. 51). The individualist anarchist challenge to Nozick’s endorsement of the minimal state is particularly acute precisely because Nozick himself affirms the state of nature right of individuals to protect and enforce the first-order rights to life, liberty, and property.

Before proceeding further we must deal with a complication that Nozick introduces with his distinction between what he calls the “minimal state” and what he calls the “ultra-minimal state.” As Nozick defines these terms, the ultra-minimal state exercises a type of monopoly over the provision of rights protection in its territory, the minimal state in addition charges some people more than it otherwise would charge them for its protective services and with the difference extends those services to at least some further inhabitants of its territory. Nozick maintains that, along with objecting to the [ultra-minimal] state’s suppression of competing protection agencies, the anarchist objects to the [minimal] state’s “forcing some to purchase protection for others” (p. 51). On Nozick’s depiction, the anarchist holds that, whereas the ultra-minimal state is only guilty of illicitly establishing a monopoly on rights protection, the minimal state is also guilty of pressuring some individuals to pay for protection for others. This sets the stage for Nozick to assert that his principle of compensation [which I shall discuss in sections 4.2 and 4.3] elegantly provides an answer to both [purported] anarchist objections. For that principle is said both to justify the [ultra-minimal] state’s suppression of independent rights protectors and to require that the [minimal] state charge its paying customers more than it otherwise would to finance protection for some of those suppressed independents. However, the idea that a major concern of the anarchist is that states charge their paying clients more than they otherwise would so as to fund protection for others is a fiction created by Nozick so that the principle of compensation can be celebrated for killing two anarchist objections with a single blow.

The anarchist does, of course, object to the state forcing any purchases. Indeed, we shall see that as the archism–anarchism debate develops the permissibility of forced exchanges becomes the pivotal issue. However, no individualist anarchist specifically focuses on and complains about the “redistributive” feature that in Nozick’s terminology distinguishes the minimal from the ultra-minimal state. This is largely because what Nozick calls the minimal state is not on the radar screen of any individualist anarchist; it is not on that radar screen largely because it is not advocated by any known partisan of the minimal state. The theorists who the individualist anarchists think of as partisans of the minimal state and who think of themselves as partisans of it – for example, Auberon Herbert in the late nineteenth century and Ayn Rand in the mid and later twentieth century – endorse what Nozick calls the ultra-minimal state. So the justifiability of the feature that Nozick takes to distinguish what he calls the “minimal state” – namely, its charging its paying customers more in order to fund protective services to some non-payers – is at best a distracting side issue. For this reason, I follow all the other parties to the archism–anarchism debate by understanding the “minimal state” to be quite simply the state that maintains its monopoly on the provision of rights protection – albeit without forcing anyone to purchase the services it offers.

I begin this exploration with the main response that Nozick actually offers to the anarchist – the response that turns on the principle of compensation. I contend that this actual response is unsuccessful. I then move on to a response that can be readily extrapolated from the attenuation of rights that is supposed to underwrite the principle of compensation. I argue that this extrapolated response achieves a pyrrhic victory over the anarchist. The victory is pyrrhic because of the heavy philosophical costs that the minimal statist must sustain to achieve it. The least of these costs is that the deployment of the extrapolated response seems to vindicate a state that is more extensive than the minimal state because it taxes recipients of its protective services to fund the production of those services. In actuality, this extrapolated response and attenuation of rights on which this response is based may well support a state that
is even more extensive than the minimal taxing state. It may well support a state that engages in more than the protection of individuals' rights and that taxes the beneficiaries of these additional activities in order to finance them. Finally, the attenuation of rights that lies behind the extrapolated response seems to betray the core understanding of rights that characterizes Nozickian libertarianism. Because of the philosophical costs that are attached to the extrapolated response, I go on to explore whether a more constrained response is available to the archist that might meet the anarchist's challenge without incurring all of the philosophical costs that are incurred by the extrapolated response. I describe two versions of a constrained response and maintain that the second "anti-paralysis" version yields a victory for the archist that is markedly less pyrrhic than that won through wielding the extrapolated response. This victory is less pyrrhic because, although it lends support to the more-than-minimal minimal taxing state, it does not lead beyond the minimal taxing state to the even more extensive mutual advantage state; moreover, it does not seem to betray the core understanding of rights that characterizes Nozickian libertarianism.

Let us pause here to summarize the projected structure of the essay and to review our terminology. In section 4.2, we shall look at Nozick's actual response (AR) to the anarchist challenge. We shall see that the AR depends upon Nozick's appeal to a principle of compensation but that, even if this principle is accepted, its deployment fails to vindicate the minimal state (MS). In section 4.3, we shall pause to examine the shift in Nozick's understanding of the character of rights that is supposed to underwrite the principle of compensation. This shift in the conception of rights is the basis for the extrapolated response (ER) to the anarchist. In section 4.4, I describe ER and argue that it succeeds too well because it seems to vindicate not merely the minimal taxing state (MTS) but the even more extensive mutual advantage state (MAS). And, in section 4.5, we shall look at two versions of a constrained response (CR), each of which arguably succeeds to just the right extent by vindicating the MTS.

Of course in ASU Nozick sets out to vindicate the MS, not the MTS. So, how can it be said that from a Nozickian perspective the CR — which vindicates the MTS — is the response which succeeds to just the right extent? Part of the answer is that the Nozickian has to go where the best Nozickian argument takes him. If the CR is the response that it would have been reasonable for the Nozick of

ASU to make to the anarchist challenge and that response vindicates the MTS, then the endorsement of the MTS can be described as "Nozickian." Another part of the answer is supplied by noting that there is a shift in focus as the archist-anarchist debate develops. This shift is from the permissibility of a protective agency suppressing the provision of protective services by other agencies to the permissibility of a protective agency requiring individuals to purchase protective services from it. If the really important dispute between the archist and the anarchist is about the latter permissibility, then victory for the archist will be victory for the MTS rather than for the MS and the Nozickian responder to the anarchist challenge must reconcile himself to the MTS.

4.2 THE FIRST ROUND: NOZICK'S RESPONSE AND THE MINIMAL STATE

Nozick and his individualist anarchist interlocutor share a host of Lockeian state of nature premises. Individuals have natural rights to do as they see fit with their own persons and to acquire and exercise the rights of private property. Furthermore, through certain types of interaction with other agents — typically, contractual interaction — individuals can acquire particular rights against other agents to the delivery of specific goods or services. Indeed, all rights to the delivery of particular goods or services must be acquired through some form of rights-generating interaction. Since there are no natural, that is, original and unacquired, rights to the delivery of specific goods or services, there is no natural right to the delivery of protective services. Whether Josh's right against Bekah is a natural right against being beaten or an acquired right to some material object or a contractual right that Bekah perform some service for him, Josh's possession of that right provides no basis for affirming that he has a right against any third party that this party protect him against Bekah's violating the right he has against her. Mary's failing to come to Josh's defense when Bekah is about to beat him or deprive him of his rightful possession or fail to deliver a contracted service does not itself violate any right that Josh possesses against Mary unless Josh has acquired that right to protective services through some rights generating interaction with Mary. In the absence of such a rights generating interaction, Josh is, of course, at liberty to act as an executor of the law of nature. But he will have no claim on the
assistance of strangers – much less on the assistance of specialists in the business of rights protection.

So how is a state of nature individual like Josh to acquire rights to others providing him with the service of rights protection? The standard Lockean move is, of course, to postulate a social contract in which at least a significant percentage of individuals agree to authorize some common agent – for example, “political society” – to act on their behalf as the common executor of the law of nature. In return for this authorization and for the individual’s agreement to help fund this protective agency each social contractor acquires a right to protective services. However, anyone who, like Nozick and the individualist anarchist, is impressed with the virtues of competitive market provision of desired services will question the core presumption of this standard appeal to a social contract, namely, that all individuals who seek to purchase protective services will converge on the same supplier of those services or that people’s desires for such services are likely to be best satisfied if there is only one supplier for them to converge upon. The contrary presumption of those impressed with the market provision of goods and services and with the diversity among persons in the strength and focus of their preferences for rights protection is that consumers of protective services will be better served by competing suppliers.

However, a system of competing market providers of rights protection seems to be subject to the same inconveniences that Locke ascribes to individuals acting as self-protectors in the state of nature. Protective services (or what purport to be protective services) provided by particular independent suppliers may not accord with settled and known law, may not accord with the judgments of indifferent judges, and may not be backed by sufficient force (relative to the force which might stand in opposition to the offered services). Nevertheless, before abandoning market provision and jumping to a social contract,

[w]e also must consider what arrangements might be made within a state of nature to deal with these inconveniences ... Only after the full resources of the state of nature are brought into play, namely all those voluntary arrangements and agreements persons might reach acting within their rights, and only after the effects of these are estimated, will we be in a position to see how serious are the inconveniences that yet remain to be remedied by the state, and to estimate whether the remedy is worse than the disease. (pp. 10–11)

Since these are inconveniences for prospective customers of protective services, suppliers of these services will seek to make arrangements that allow them to offer more convenient protective services. So, for example, each supplier of protective services will seek to assure prospective clients that the client’s rights that it proposes to protect against clients of other suppliers will be recognized by those other suppliers. Each supplier will want to be able to assure its protective clients that procedures for the peaceful settlement of disputes between it and its competitors and its clients and the clients of its competitors are in place. And each supplier will include within its agreements with competing firms’ arrangements for the cooperative enforcement of the substantive and procedural claims on which they have converged and of the judgments that arise out of the procedures they have mutually endorsed. As the individualist anarchist will be especially eager to insist, if there is a market demand for known law, indifferent judges, and reliable enforcement of acknowledged rights, arrangements necessary to the satisfaction of that demand will be made by those who seek to profit from meeting that demand. Nozick, it seems, should join the anarchist in projecting the emergence of a complex network of articulated norms, jointly accepted procedures, arbitration institutions, and cooperative enforcement arrangements that would add up to a convenient legal order. Indeed, it seems to be precisely respect for the right of each supplier of protective services to bring its product to the competitive market that conduces to this convenient legal order. Similarly, effective arrangements for the suppression of “outlaw” agencies will be generated to the extent that the economic demand for protection of the peaceful enjoyment of life, liberty, and property exceeds the economic demand for aggression, enslavement, and predation. So Nozick’s proper reminder that one must explore the resources of the state of nature before placing one’s bet on some sort of social contract seems to vindicate the anarchist’s projection of a non-state regime of rights protective agencies and cooperative associations.

Nozick often seems to want to counter this perception of a more or less normal competitive market in protective services with the idea that monopoly in the provision of protective services is natural. Nozick asks: “Why is this market different from all other markets? Why would a virtual monopoly arise in this market without the
government intervention that elsewhere creates and maintains it?" 
[p. 17]. His answer seems to be that it is highly disadvantageous for 
an individual to depend for his protection on a small isolated pro-
tective agency or small isolated network of such agencies. It is much 
better for an individual to be hooked into a comprehensive network 
for the enforcement of commonly recognized norms and procedures 
than to face the prospect of violent conflict with those he transacts 
with; hence customers for protective services will only select pro-
tection agencies which are integrated into such a network. However, 
Nozick is mistaken in his belief that this means that "competing 
companies are caught in a declining spiral" (p. 17). This only means 
that competing companies that do not network with their competi-
tors are caught in such a spiral – as would a cell phone manufac-
turer that made cell phones that could only connect with other cell 
phones from that manufacturer.

Sometimes Nozick seems to want to leap from the modest con-
clusion that one can expect that each or almost each (surviving) 
protective agency will be connected to a more or less comprehensive 
network of protective agencies to the bolder conclusion that one can 
expect a minimal state (with a natural monopoly on the provision 
of protective services) to arise in the state of nature. For instance, 
Nozick declares that, "the self-interested and rational actions of per-
sons in a Lockean state of nature will lead to single protective agen-
cies dominant over geographical territories; each territory will have 
either one dominant agency or a number of agencies federally affili-
ated so as to constitute, in essence, one" (p. 118, emphasis added).3 
Yet surely a network of agencies that are affiliated in the ways we 
have just discussed but that compete with one another for custom-
ers on the basis of the particular packages of services they offer and 
the prices for those packages is not in essence a state. It would no 
more be a state than those competing (but coordinating) cell phone 
manufacturers would be a single firm.

Moreover, an appeal to the idea that rights protection lends itself 
to natural monopolization would not meet the anarchist challenge 
in the way that Nozick wants. The anarchist insists that for any 
agency to attain a monopoly in the provision of rights protection 
in a given territory it must impermissibly suppress competing sup-
pliers of protection. The natural monopoly response is that there is 
no impermissible suppression by the aspiring monopolist because 

there is no suppression; since this market is different, monopoly 
arises naturally without suppression. Nozick, however, wants to 
agree with the anarchist that suppression of competing suppliers is 
necessary for an agency to attain its monopoly position; hence, what 
he really has to challenge is the impermissibility of that necessary 
suppression. Against the claim of the anarchist that this suppression 
is impermissible, Nozick needs to argue that on closer inspection it 
is not. The prohibitions that an aspiring minimal state must engage 
in to arrive at and maintain its position as the monopoly supplier of 
protective services are not really violations of the rights of independ-
ent self-protectors or independent suppliers of protective services.

We have already noted the permissibility of prohibiting the activ-
ities of outlaw agencies that engage in or shield rights violating 
activities. Even in the absence of a satisfying philosophical account 
of this, it seems reasonable to understand this permissibility to 
extend to the prohibition of activities that pose a high risk of vi-
olating or shielding the violation of rights. In contrast, it seems that 
it is not permissible to prohibit activities that pose only a low risk 
of rights violation. This leaves unsettled the permissibility of the 
prohibition of activities that are less risky than high risk conduct 
but more risky than low risk conduct. Nozick’s AR proceeds by 
construing the anarchist as holding that only independent agencies 
engaged in rights violating activities or activities with a high risk of 
being rights violating may permissibly be suppressed and by coun-
tering this anarchist stance with an argument for the permissibility 
of suppressing mid-range risky activities as well. The permissibility 
of suppressing these mid-range risky activities turns on Nozick’s 
principle of compensation that asserts that "those who are disad-
vanaged 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). This 
principle – the basis of which will be explored in the next section –
do not merely say that, if possibly harmful actions are forbidden 
to an agent’s disadvantage, then compensation must be paid for that 
disadvantage. Rather, such prohibitions are permissible as long as 
compensation for disadvantages accompanies them.

Wielding this principle a protective agency (or set of “federally” 
affiliated agencies) that is already relatively strong will permis-
sibly prohibit competing agencies or self-protectors from engaging
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Recall how varied different customers’ preferences for protective services are. Some want comprehensive coverage; others want only catastrophic coverage. Some want the services of firms which specialize in protecting contractual rights; others are drawn to firms that specialize in protecting trade secrets. All sorts of contingencies of time and place will make patronage of one particular protective agency preferable to some individuals and patronage of another preferable to others (see Mack: 1978). Imagine one cell phone manufacturer enforcing certain performance standards on its competitors so that its customers will not face even mid-level risks of not being able to connect telephonically with the customers of these other manufacturers. Such enforcement (however justified or unjustified) would leave plenty of room for competition between the standard enforcing manufacturer and the monitored manufacturers – unless, of course, the monitoring firm would continually adjust its enforced standards so as to forbid effective competition (rather than forbidding riskiness) whenever competition threatens to occur. However, were the dominant protective agency so to adjust its constraint of its potential competitors, it would show itself to be an outlaw agency. Hence, the AR on behalf of the minimal state fails.

We should take note of another response by Nozick that seems to be independent of the principle of compensation. This response turns on the contention that state–of–nature individuals possess procedural rights against being subject to others’ mid-level risky rights protective activities; the dominant agency merely enforces these rights. The key premise for this contention is that an agent who employs procedures for determining the liability of another (to defensive, restitutive, or retributive measures) without knowing the reliability of those procedures acts wrongly. On the basis of this premise Nozick asserts that such actions are “wrong and impermissible” (p. 106), and from the impermissibility of those actions Nozick infers the recipient’s procedural right against their performance. “On this view, many procedural rights stem not from rights of the person acted upon, but rather from moral considerations about the person or persons doing the acting” (p. 107). Unfortunately, from the procedure being impermissible in some sense that is implied by its being wrongful, it hardly follows that the coercive suppression of the procedure is permissible. If it did follow, Nozick would be well on his way to the anti-libertarian position that there is no right to do wrong.
4.3 BETWEEN ROUNDS: NOZICK’S ATTENUATION OF RIGHTS

We need to pause here to examine the basis that Nozick offers for the principle of compensation. For this basis can also serve as a ground for the ER – which we will take up in section 4.4. Recall the basic structure of the debate between the libertarian archist and the individualist anarchist. The anarchist identifies some sort of conduct that seems necessary for an agency to become or maintain itself as a state and asserts that this conduct violates rights. The libertarian archist responds by claiming that, contrary to first appearances, this sort of conduct does not truly violate rights because the relevant rights are not as robust, not as demanding of constraint, as one might at first think. In the case of the AR, the principle of compensation embodies the idea that the independent’s right to engage in mid-level risky protective activities is not as robust, not as demanding of constraint, as one might at first think. However, the basis offered by Nozick for the principle of compensation involves a much more general attenuation of rights.

This more general attenuation of rights is developed in Chapter 4 of ASU on “Prohibition, Compensation, and Risk” (see Mack: 1981 and Arneson: 2005a). Near the beginning of this chapter Nozick poses the surprising question:

Are others forbidden to perform actions that transgress the boundary [that are defined by a person’s rights] or encroach upon the circumscribed area, or are they permitted to perform such actions provided that they compensate the person whose boundary has been crossed? (p. 57, italics in original)

This is surprising because the reader may well have thought that it follows from there being such a moral boundary that actions transgressing it are forbidden. Certainly that is the suggestion of both Nozick’s opening declaration of rights that may not be violated and his talk about rights as moral side constraints that mark the inviolability of persons (see pp. 30–33). In contrast, Nozick’s approach in “Prohibition, Compensation, and Risk” takes the essential content of an agent (say, Josh) having a right to X against another agent (say, Bekah) to be that it is impermissible for Bekah to deprive Josh of X if and only if Bekah fails to compensate Josh duly for the loss of X. Josh’s right to X does not pure and simple forbid Bekah’s depriving Josh of X; it merely requires that Bekah’s depriving Josh of X be accompanied by her duly compensating him for his loss of X. Josh’s right to X vindicates forbidding Bekah from taking X only if that right is conjoined with some special condition that makes problematic the determination of what the due accompanying compensation would be.

Nozick discusses two sorts of condition that render problematic the identification of what the due compensation for such a taking would be. First, the best measure of due compensation to Josh for the transfer of X to Bekah would be the exchange price for X that Josh and Bekah would settle upon were there antecedent negotiation and agreement between them concerning the transfer of X. This is by far the best way to determine what the division of the benefits of the exchange should be. (After all, Nozick’s basic critique of “distributive justice” is that there is no independent standard for what the division of the benefits of cooperative interaction ought to be.) If instead Bekah seizes X, the best that can be done to identify due compensation for Josh is to attempt to identify what Josh and Bekah would have settled upon had prior negotiation and agreement been required. Since this is a far inferior way of identifying due compensation, it makes much more sense to require prior negotiation and agreement. However, to require prior negotiation and agreement is to prohibit the taking. Thus, concern for due compensation recommends prohibiting the taking of X as long as prior negotiation and agreement are feasible. Where market transactions are feasible, concern for due compensation in effect elevates rights to markers of things that may not be done to people.

Second, if the taking or the boundary crossing is feared (or generates fear of further takings or boundary crossings), the prospect for subsequent due compensation for that taking or crossing is substantially diminished. If Josh fears having his arm broken, he may well refuse a payment for permission to break his arm that is large enough to leave him feeling duly compensated if he receives that payment after his arm is broken. Here too there seems to be no good substitute for prior negotiations for determining due compensation. Moreover, according to Nozick, the failure to prohibit feared takings or boundary crossings exacerbates problems of uncompensated fear – because non-prohibition will result in crossings being feared that will not in fact ever eventuate. Since these feared of crossings will not in fact eventuate, there will be no one from whom compensation for
that fear can reasonably be demanded. Where takings or crossings are feared, concern for due compensation in effect elevates rights to claims about what may not be done to individuals. In contrast, if neither of these two conditions are present, an agent's right remains in its default position, that is, it remains merely a claim to receive accompanying due compensation for the taking or crossing.

How does this apply to the permissibility of a dominant agency's suppression of mid-level risky actions on the part of independents? [Recall that, by hypothesis, these actions are not risky enough to count as straightforward rights violations.] The right of an independent protector to engage in such a risky activity remains the default position claim to be duly compensated for the loss imposed in precluding that activity. This is because in cases of this sort neither of the two types of difficulty in identifying accompanying due compensation obtain. Hence, there is no reason to insist that the dominant agency enter into prior negotiations with the independent protector in order to secure that protector's abstention from the risky activity. First, according to Nozick, there is no difficulty of determining what should be the division of the benefits of the exchange in which the clients of the dominant agency receive the independent's abstention from mid-level risky activity. Nozick supports this with the surprising contention that the independent protector's abstention from mid-level risky action does not benefit those clients. Since those clients do not benefit from this abstention by the independent protector, there is no need to identify the proper division of benefits from the transaction between the dominant and the independent agency. Second, the dominant agency's prohibition of these risky actions is not itself feared.11 Hence, the right of the independent remains in its default position and it may permissibly be infringed as long as due compensation accompanies this infringement. Since recipients of abstentions from others' mid-level risky actions do not benefit from those abstentions, the recipients do not in virtue of such benefit owe compensation to those who are forced not to engage in those risky actions. However, if those who are forced to forego risky actions which might well not have violated anyone's rights are disadvantaged by being subject to that force, then those on whose behalf that force was used owe the subjects of that force compensation for those disadvantages. Hence, the principle of compensation.

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Here we are primarily concerned with Nozick's overall suggestion that to have a right to X is in essence to have a right to due compensation if X is taken from one rather than with the principle of compensation itself. For, as we have seen, even given this principle Nozick's AR does not succeed against the anarchist and it is the general suggestion of "Prohibition, Compensation, and Risk" that provides the basis for the ER to the anarchist. Nevertheless, we should note one particular problem with Nozick's claim that the clients of the dominant agency do not benefit from the prohibition of the independent's mid-level risky activities (and, hence, that agency does not have to engage in prior negotiation with the independent so as to determine the proper division of benefits of exchange). According to Nozick, the clients of the dominant agency do not benefit from the independent's abstention if that abstention merely provides those clients with "relief from something that would not threaten if not for the possibility of an exchange to get relief from it" (p. 85). However, a standard, run-of-the-mill protective agency will not set itself to perform protective activities merely in order to sell its abstention from those activities; it will set itself to perform those activities in order to offer those activities to its current and prospective clients. Hence, if the dominant agency secures abstention from these activities, its clients are provided with relief from something, namely, those risky activities, that does not threaten merely because of the possibility of exchange to get relief from it. Thus, it is not true that the clients do not benefit. So, it seems, one should hold that the division of benefits argument for prior negotiation does apply to the dominant agency securing these abstentions and, therefore, the dominant agency must engage in prior negotiation with these independent agencies to secure their abstention from mid-level risky activities.12

4.4 ROUND TWO: THE EXTRAPOLATED RESPONSE AND THE MUTUAL ADVANTAGE STATE

The failure of Nozick's AR should lead the archist to revisit the premises of the archist–anarchist debate as it is depicted by Nozick. For that depiction may grant some crucial premise to the anarchist that the archist can profitably challenge. And there is indeed such a common premise. The premise is that there is no special problem
with the provision of the service of rights protection through voluntary market interaction; rights protection is just another service susceptible to market provision. To the extent to which individuals value their rights being protected, they will be willing to pay for this service and, hence, it will be produced and supplied to a suitable extent by some agent – or, better yet, by a confederation of competing agents – seeking payment in exchange for the delivery of rights protection. Rights protection is a marketable economic good comparable to laptop computers, fine meals at fancy restaurants, and haircuts. Clearly the individualist anarchist subscribes to this view. So too does the Nozickian minimal statist. For a striking feature of the minimal state is that it does not engage in forced exchanges of the services provided by it and payments from the recipients of those services. The MS derives all of its revenue from voluntary contracts for the sale of its protective services. It eschews taxation. In this way the minimal state is fundamentally a market and not a political institution. (Nozick, however, tends to underplay the non-political character of the minimal state. He skirts past the fact that the minimal state as it appears within ASU is essentially a firm with managers, employees, proprietors or stockholders, marketing strategies, and customers; it does not have a constitutional structure, legislative bodies, political parties, electoral campaigns, or citizens.4)

That rights protection is an ordinary marketable service is a premise that the anarchist may profitably challenge – on the familiar grounds that protective services have the crucial feature of public goods, namely, that if they are produced it is impossible or very costly to exclude individuals who have not themselves paid for the goods from benefitting from their production. More precisely, the relevant concern is not that the service will get produced and that some people will free ride upon those who voluntarily pay for the service’s production. Indeed, Nozickian libertarianism rejects a principle of fairness that requires that all riders pay (see pp. 90–95). Rather, the problem is that so many potential purchasers of protective services may seek to free ride on others’ voluntary funding of those services (or may judge that there is no point in joining the too small number of those agreeing to pay for those services) that those services will not get funded (or will be radically under-funded).

Of course many goods or services that non-payers cannot (feasibly) be prevented from enjoying do nevertheless get voluntarily funded. People dining in restaurants to which they will not soon be returning tip their waiters and thereby help fund the public good of there being enough well-disposed waiters even though those people would get no less service were they not to tip. Given appropriate conventions or contractual arrangements, a service from which persons cannot (feasibly) be excluded were they not to pay for it may nevertheless be voluntarily funded (to an acceptable extent) [see Mack: 1986]. Individualist anarchists will want to argue that, despite initial appearances, protective services – including even national-scale defense – will be supported without its beneficiaries being required to purchase them [cf. Schmidt: 1990a and Stringham: 2007]. If the anarchists succeed in making that difficult argument – and I for one wish them well – the common marketability premise of the archist versus anarchist debate as Nozick depicts it will be vindicated and there will be no room for the archist to shift the focus of that debate by challenging that common premise.

Nevertheless, because of their public goods features, it is sufficiently plausible that protective services would not be voluntarily funded (at more than very sub-optimal levels) for the Nozickian archist to press the anarchist about the stance he must take if those services would not be voluntarily funded (at more than very sub-optimal levels). The anarchist must then say that individuals have rights and in virtue of those rights they are not to be required to purchase protective services even if the alternative is that each individual will be subjected to more extensive infringements of his rights than would be involved in his being required to pay for those protective services. Although the greater yet infringement of rights that (by hypothesis) will occur if individuals are not required to purchase protective services will be a very discomforting prospect for the anarchist, he will still insist that forcing individuals to purchase these services is an impermissible violation of their rights. He will insist that the Nozickian archist must also reject mandatory purchase of protection services. However, this challenge provides the Nozickian archist with the opportunity to argue – in accordance with his general strategy against the anarchist – that what appears to be a violation of rights is on closer inspection not really a violation. To exploit this opportunity the Nozickian archist can turn to the overall attenuation of rights developed in Chapter 4 of ASU. What emerges is the ER.
Consider the right of an individual to those of her holdings that would be taken from her in exchange for protective services within a scheme of required payments for such services. According to the overall attenuation of rights, in its default position that right is a claim against her being deprived of those holdings without receiving due compensation for that deprivation. By itself the right does not prohibit this taking; the right is not violated if the taking is accompanied by due compensation. The right will in effect rise to a right that the holdings not be taken and will mandate prior negotiation and agreement only if some condition is present that makes the determination of due accompanying compensation problematic. But no such condition is present. First, the fear condition does not obtain. Such takings are no more feared by those subject to them than the suppression of mid-level risky protective services are feared by those who otherwise would provide these services. Second, the division of the benefits of exchange consideration in favor of prior negotiation and agreement does not come into play.

Recall that we are assuming that protective services cannot be successfully marketed. Given that assumption, requiring prior negotiation and agreement in order to determine the proper division of the benefits of exchange [of protective services and payment] will be futile – precisely because there will be no settled upon agreement. So, in these cases, attempting to identify what the recipient of protective services would have agreed to pay for those services if she had to pay to get those services in order to receive them is not a less apt way of determining the proper division of the benefits of exchange than requiring prior negotiation and agreement. If the public good feature of protective services does render the marketing of those services infeasible, then the case for requiring prior negotiation and agreement does not get off the ground and the individual's right to the relevant holdings remains in its default position. Hence, no right to the holding is violated if its seizure is accompanied by the provision of protective services as extensive as the holder would have bargained for in exchange for that holding. For that provision will be due compensation for the taking.

This vindication of requiring individuals to purchase protective services does not seem quite to get us to a vindication of the state. For it seems that no agency would have a monopoly over this liberty to require payment for its provision of protective services. However, only a dominant agency (or a dominant set of closely affiliated agencies) could plausibly claim to be exercising this liberty. For only such an agency (or network) will be collecting payments from a high enough percentage of individuals to raise the funds necessary for the production of the protective services the provision of which will duly compensate those individuals.¹⁹

The ER seems to vindicate the MTS, and for the Nozickian libertarian this may not be too much of a philosophical cost to pay for defeating the anarchist challenge. However, there are further and more difficult to bear costs that come with the ER and the attenuation of rights that underwrites the ER. To begin with, the argumentation takes us beyond the MTS to the MAS that also imposes taxes on individuals to fund non-protective goods and services insofar as such goods or services would not be funded through voluntary market agreements because of their public goods character. For such takings of holdings from individuals are presumably not feared and the goods or services provided to each individual will duly compensate her for the taking (as long as each individual would have voluntarily agreed to the payment that is fact assigned to her if she would have faced exclusion from enjoying that good or service had she not agreed to pay for it). The Nozickian archivist will typically join the anarchist in arguing that many goods and services that are proclaimed to be public goods and not susceptible to voluntary market funding can in fact be financed through voluntary agreement. Nevertheless, if the archivist can demand that the anarchist take seriously the possibility that protective services will not be susceptible to voluntary market funding, the archivist must take seriously the possibility that some non-protective goods or services will not be susceptible to such voluntary funding. The Nozickian archivist who appeals to the ER and its underlying attenuation of rights may find himself committed to taxation to finance mosquito abatement (with dispensations for individuals who like mosquitoes).

Worse yet from the perspective of Nozickian libertarianism, the ER and the associated attenuation of rights requires the rejection of principled anti-paternalism, namely, the view that individuals must be allowed to live their own lives in their own chosen way even when boundary-crossing interference with their choices would genuinely benefit them.¹⁶ At least the prohibition on non-feared and genuinely beneficial interference must be dropped – because the gain to the
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be sure that a slave is receiving at least as much compensation as would have induced him to agree to enslavement, we could be confident that this enslavement is permissible.

What ultimately matters on the less robust, less constraining, liability rule conception of rights is whether a boundary-crossing on net moves its subject below a certain level of wellbeing or utility. Boundary-crossing is morally problematic solely because it tends to depress the level of wellbeing or utility of the subject of the crossing. On this less robust conception, it seems that it must be the value of the prospective subject being at the specified level of wellbeing or utility that grounds that individual’s right. In contrast, on the more robust conception of rights that Nozick proclaims at the outset of _Anarchy, State, and Utopia_, a non-consensual boundary-crossing is morally problematic because it is up to the right-holder to decide whether that boundary will be permissibly crossed—whatever the effects of that boundary-crossing will be on her level of wellbeing or utility. To possess a right is to have this choice, this jurisdiction, over the domain defined by the right. This focus on the subject’s choice or jurisdiction and the wrongfulness of overriding this choice or trespassing on this jurisdiction—whatever the value of the upshot of the overriding or trespass—is essential to the deontic character of rights that Nozick seeks to articulate in the language of inviolability and side constraints. On this deontic understanding of rights, due compensation for the harm that results from a boundary-crossing does not negate the wrong done in overriding the right-holder’s choice or jurisdictional authority. It is to block this wrong that boundary-crossings are prohibited. The abandonment of this understanding of rights is the philosophically deepest cost of responding to the anarchist challenge by invoking the ER and the associated overall attenuation of rights.

4.5 ROUND THREE: CONSTRAINED RESPONSES AND THE MINIMAL TAXING STATE

Can the Nozickian offer a more constrained response to the anarchist’s challenge with respect to the forced purchase of protective services—a response that has significantly lower philosophical costs from the Nozickian perspective? Two possibilities are worth considering. The first basically accepts the basic apparatus of “Prohibition, Compensation, and Risk” and merely seeks to constrain what counts as due compensation for boundary-crossing. The
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injury she undergoes. Thus, on the basis of this constraint on due compensation for boundary crossings, standard paternalist interventions are not justified. The exceptions to this anti-paternalism are those cases in which interference with the subject prevents her from exposing herself to more extensive (non-consensual) boundary crossings. Notice, however, that these permissible paternalistic boundary crossings are simply variants upon what the MTS already does in requiring persons to purchase protective services. For what the MTS already does can be described as paternalistically preventing people from exposing themselves to more extensive violations of their rights through their too clever attempts to be free riders on others’ payment for protective services.

Still, the commensurate compensation version of the CR does incur the deeper philosophical costs involved in taking rights at their core to be claims that are merely protected by liability rules rather than property rules and to be protective of the right-holder’s wellbeing or utility rather than the right-holder’s choice or jurisdiction. Indeed, the overall attenuation of rights from which the ER proceeds may itself exclude the plausible-sounding constraint that we have been considering. For that constraint depends on the idea that boundary crossing involves a special sort of injury that is distinct from merely setting back the wellbeing or utility of the subject of the crossing. However, if boundary crossing is wrong simply in virtue of its setting back the wellbeing or utility of its subject, then it seems that boundary crossing will be permissible whenever the injury it inflicts will be accompanied by a sufficiently extensive countervailing enhancement of the subject’s wellbeing or utility.

Perhaps, however, the Nozickian can offer a version of the CR against the individualist anarchist without building upon the general attenuation of rights developed in “Prohibition, Compensation, and Risk.” Perhaps the Nozickian can make room for the permissibility of takings if they are necessary for the funding of protective services for those subject to the takings without abandoning the conception of rights embodied in ASU’s opening proclamation of rights, that is, a conception according to which in their default position rights are claims protected by property rules. The basic strategy, in contrast to that employed in “Prohibition, Compensation, and Risk,” would be to explain why in certain special circumstances specific rights take a more attenuated—perhaps a much more attenuated—form

second version does not seek to build upon that apparatus. Rather, it proposes a constrained specification of persons’ property rights such that, if it is true that persons’ rights (including their property rights) will be more extensively infringed unless they are subject to some non-consensual takings of their holdings, their property rights do not include rights against those takings.

For the Nozickian rights constitute a special dimension of morality that protects individuals from non-consensual interference by other agents. To engage in such interference is to inflict a special sort of wrong upon right-holders—a wrong that is quite distinct from merely setting back their interests. So, for example, Bekah may set back the interests of her business competitor Josh by attracting his customers without at all infringing the special sort of wrong involved in rights violation. The special character of the injury involved in rights violation suggests a constraint on what sort of compensation is due for rights infringing action. If the injury is in the currency of a boundary crossing, the compensation must consist in the prevention of boundary crossing. Only then will the purported compensation be commensurate with the injury. Due compensation for an infringement upon Josh’s rights must then take the form of an offsetting prevention of a more extensive violation of Josh’s rights.

This “commensurate compensation” version of the CR seems to work out very nicely for the libertarian archist. It does get the archist to the MTS rather than the MS. Still, it is true that in the absence of forced purchases of protective services, those services would not be funded (or would be substantially under-funded) — that is to say, if it is true that a [non-taxing] MS would fail to provide the services that the advocate of the MS anticipates — the archist may quite reasonably take arrival at the [taxing] MTS to be a philosophical bonus. Moreover, the commensurate compensation response does keep the door shut against takings to finance non-protective public goods. For the enjoyment of non-protective goods will not constitute commensurate compensation. Furthermore, the commensurate compensation constraint for boundary crossings allows the archist to retain principled anti-paternalism (with a class of exceptions to be mentioned). For, in the standard case of paternalist interference, the injury from which the subject is protected is not an infringement of the subject’s rights. Hence, what the subject gains from standard paternalist interference is not commensurate with the sort of
than rights take in their default position. One approach within this strategy would proceed in terms of what we may call the “anti-paralysis postulate.” According to this postulate, when working out the detailed specification of person’s rights, one is to avoid specifications that systematically morally preclude individuals from exercising their rights or from conducting their lives in ways that a specification of their rights is supposed to protect. The intuitive idea that the detailed specification of rights – insofar as that is the job of philosophical reasoning – must be guided by the purpose for which rights are to be recognized as a crucial dimension of morality.

Here are three instances of the anti-paralysis postulate at work. First, suppose we are considering whether an agent’s rights over her own person and (legitimately acquired) possessions remain fully intact if she is in the process of violating the rights of others. If we hold that they do remain fully intact, then we must deny that others have rights of self-defense and we must hold that in many circumstances individuals under attack must submit to the violation of their rights. To avoid a specification of rights that yields this conclusion, we must hold that the aggressor’s rights do not remain fully intact. But note that it does not follow that the aggressor’s rights totally disappear. The aggressor may, for example, still have rights against defensive force which is not necessary to defeat his aggression.

Second, suppose we are considering what (if anything) persons’ original equal right to natural material comes to – or, more particularly, whether individuals possess original joint-ownership in the earth. If we hold that they do, we will have to conclude that no individual will permissibly do anything with any natural material without everyone else’s permission. Since such universal permission will never be obtained, no individual will ever permissibly do anything with any natural material. Original joint-ownership would render nugatory any right to use or acquire natural material. The anti-paralysis postulate tells us that these consequences are reasons for rejecting original joint ownership of nature. Actually, we should note a helpful complication here. Strictly speaking, the anti-paralysis argument I have just given is only an argument against persons possessing original joint rights to the earth which are protected by property rules. For only such rights forbid all individuals from doing anything with any portion of the earth without everyone else’s consent – even if such an individual duly compensates others for her use of their natural material. So a further argument would be needed to rule out an original joint right to the earth that was merely protected by a liability rule.9

Third, suppose we are considering whether persons are to be understood as having rights against others performing actions that pose any risk – however low – of violating those persons’ rights. Such a specification of persons’ rights would also be paralyzing. Rather than enhancing persons’ peaceful enjoyment of their rights, this specification would systematically diminish each person’s sphere of permissible and morally protected action; it would systematically morally preclude individuals from activities that rights are supposed to protect. The anti-paralysis postulate tells us, then, that individuals are not to be understood as having rights against all low-risk activities by others.

To apply this pattern of reasoning to the archist–anarchist dispute, suppose (again) that, in virtue of the public goods feature of rights protection, rights-bearers would be substantially less able to coordinate so as to protect their rights if their rights are understood to preclude their being required to contribute to the funding of protective schemes. If that is the case, a plausible specification of their rights would not include a right protected by a property rule against being required to contribute to such a scheme. For, given our supposition, a specification that includes a right protected by a property rule against being required to contribute would systematically diminish the prospects for the non-violation of each of those rights-bearers’ rights. So, “anti-paralysis” considerations support a limited attenuation of these rights-bearers’ property rights. If a forced exchange is really needed for the funding of needed protective services (which will more extensively protect each individual from rights violations than the forced exchange itself will infringe), then the right of each of those individuals against being subject to the projected taking shifts downward from a right protected by a property rule to a right protected by a liability rule. Hence, a provider of protective services may require recipients of its services to pay for those services – as long as such a system of forced exchanges is really necessary for the financing of [more than sub-optimal] protection of individuals’ rights and the extent of protection provided to each such individual fulfills the provider’s liability to provide compensating protection. (If any of these conditions are not met, the coercive taker violates the rights of those individuals.)
In this way, the MTS archist can defeat the anarchist’s contention that the minimal state violates individuals’ rights when it requires individuals to purchase its protective services. Note further that this anti-paralysis CR does not undercut libertarian anti-paternalism. For rights (taken as claims protected by property rules) are not better served by allowing beneficial (but unchosen) interferences with persons’ lives. More fundamentally, the anti-paralysis CR avoids the overall attenuation of rights – from claims protected by property rules to claims protected by liability rules – that Nozick seems to commit himself to in “Prohibition, Compensation, and Risk.” The anti-paralysis approach seeks to spot islands of rights attenuation within a sea of robust rights rather than islands of robust rights within a sea of attenuated rights. For this reason, the anti-paralysis CR is the best Nozickian response to the anarchist challenge even though it takes the Nozickian one step beyond the minimal state.

NOTES

I have benefited from presenting this essay at a conference on Reappraising Anarchy, State, and Utopia at King’s College London and at the University of Virginia. I especially thank Alexander Cohen, Loren Lomasky, and John Simmons for pressing me on my apostate acceptance of certain forced takings.

1. Nozick seeks to bolster his proposal that what everyone else calls the “minimal state” should be seen as merely the “ultra-minimal state” by claiming that a necessary condition of an institution being a state is that “it protect[s] the rights of everyone in the territory” (p. 113). But surely this is a strange claim. If it were true, it would follow that no state has ever slaughtered its own subjects – because if that agency did slaughter its own subjects it would not be a state!

2. On the natural right to acquire property, see Mack: 2010.

3. See Locke: 1960, sections 88 and 130.

4. Nozick is also eager to challenge the social contract account because it involves a visible hand explanation of the state whereas invisible-hand explanations have more charm.


6. What is projected is not the most reliable system of rights enforcement that money can buy, for people will be interested – to different degrees – in spending money on competing goods and services.

7. Note also the problematic use of “federally” to describe the nature of the affiliation. See also the use of “federal” on p. 16.

8. More precisely, these prohibitions will not be violations of rights if they do not disadvantage those subject to them or if those subject to them are compensated for any disadvantages that are engendered.

9. It is not that only this agency may permissibly suppress mid-level risky activity; it is that only the already strong ("dominant") agency will permissibly do so (see pp. 108–110).

10. This is not merely for the reason – acknowledged by Nozick – that the dominant agency would not seek to monitor and constrain the packages of services offered to its non-clients for their protection against other non-clients (cf. pp. 109–110).

11. Surely Nozick needs this claim – albeit I cannot find an explicit statement of it.

12. Nozick recognizes that in the standard case the independent “does have some motive other than selling abstention.” Still, this independent’s abstention leaves the dominant agency’s clients no better off than they would be if the independent “didn’t exist at all.” Nozick holds that the satisfaction of this latter condition combines with the mid-level riskiness of the independent’s activity to vindicate the suppression of that activity (with compensation for disadvantages imposed, if any) (cf. p. 86). There is no explanation of how these two conditions combine to yield this vindication.

13. The minimal statist will argue that the permissible suppression of independent rights protective activity does not render individuals’ purchases of its protective services non-voluntary.

14. There is a sense, therefore, in which a state that does no more than Nozick’s minimal state but which has a political–constitutional structure is more of a state than Nozick’s minimal state; it is more state-like.

15. In the early 1980s I laid out this argument to Nozick and asked him if he had anything like it in mind when he developed the attenuated understanding of rights in chapter 4 of ASU. He said that he had not.

16. In his preface, Nozick tells us that one of the two noteworthy implications of his doctrine is that the state may not use force “in order to prohibit activities to people for their own good or protection” (p. ix).

17. Nozick seems to be drawn to this essentially interest conception of rights by his [surprising] tendency to think that in the final analysis wrongness in action has to be accounted for by the disvalue – indeed, the disutility – associated with that action. See Gaus: 2002.

18. And, perhaps, boundary-crossings are punished in order to negate this wrong.

19. Perhaps no argument is really needed to rule out any original right to the earth if no argument can be found to rule in any such right.