PREFACE

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In the wake of Watergate, there has been increasing attention devoted by American philosophers and jurisprudentialists to the problem of what constitutes the moral state. The solutions have varied according to the underlying definitions of justice and individual rights. The just and moral state has accordingly been conceived to have a myriad of different forms by the people who have attempted to formulate its foundations. What constitutes the just and moral state also has great significance for the Anglo-American legal system itself.

Lawyers and courts are presently involved in a continuing battle to define the scope of the individual right of privacy.[1] In essence, this controversy over the right of privacy is the legal epitome of the philosophical search for the moral state, since it involves defining the justified power of the state vis-à-vis the individual. In no other setting do the concepts of justice and morality have a more dramatic impact than in determining how far the state's police power may extend in a democratic, libertarian society.[2] As questions concerning civil rights and government abuses gain more recognition, it becomes the duty of the law to establish the foundation upon which the just and moral state becomes a functional concept.

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1. The legal battle over the right of privacy has been accelerating ever since Griswold v. Connecticut, 381 U.S. 479 (1965). Nevertheless, the United States Supreme Court has recognized only specific zones of privacy entitled to legal protection. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion decision); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Stanley v. Georgia, 394 U.S. 557 (1969) (pornographic material within the home). However, despite these constrained interpretations of the right of privacy, the argument over increasing its scope is not over, since, as the Supreme Court has noted, the right of privacy cases "defy categorical description." Paul v. Davis, 424 U.S. 693, 713 (1976).

2. *See* Note, *The Right to Decide—Individual Liberty Versus State Police Powers*, 18 ARIZ. L. REV. 207 (1976).

With the apparent goal of providing a framework for the just and moral state, Robert Nozick wrote and has recently published *Anarchy, State, and Utopia.*[3] Nozick builds upon the fundamental idea that there are natural rights possessed by individuals which are inviolate. Accordingly, Nozick perceives any just governmental institutions as arising solely for the purpose of protecting individual rights. Any more extensive governing authority is not justified, and no distribution of benefits may be made merely to alleviate inequalities within the society. In fact, *Anarchy, State, and Utopia* is, in part, Robert Nozick's answer to John Rawls' *A Theory of Justice*,[4] which advocated a guaranteed distribution of assets to those in need. Nozick argues that such an allocation of a person's assets is an unjustifiable infringement of the individual's right to the products of his labor. Thus, Nozick conceives that only the most minimally protectionist state beyond anarchy is justified.

In order for the state to arise, Nozick contends that each stage leading to the formation of a protectorate entity must be from justifiable steps. Therefore, each progression toward the minimal state must not infringe upon any other individual's natural rights.[5] It is through the desire of individuals to secure their rights from infringement that the minimal state will arise—what Nozick calls "the invisible-hand" approach to the establishment of the state.[6] In other words, individuals do not come together with the intention of forming a state; the state simply arises from a series of self-protective actions taken by individuals.

In formulating a functional concept of a morally justified state, Nozick utilizes doctrines from many different disciplines—law, political science, economics, sociology, and, of course, philosophy. Thus, a dissection of Nozick's argument is only possible with analysis from these different disciplines, which is what this Symposium presents.

The lead Article is written by the well-known defender of philosophical anarchism—Robert Paul Wolff. He analytically critiques the first part of *Anarchy, State, and Utopia*, which details those steps that lead to the morally justified state. Wolff finds problems with Nozick's attempt to use an anarchic methodology to justify the state, and argues

3. R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
4. J. RAWLS, A THEORY OF JUSTICE (1971).
5. Nozick adopts John Locke's theory about natural rights, and utilizes the concept in the following way: "A line (or hyper-plane) circumscribes an area in moral space around an individual. Locke holds that this line is determined by an individual's natural rights, which limit the action of others." R. NOZICK, *supra* note 3, at 57.
6. *See id.* at 18-22.

that it leads to internal theoretical inconsistencies. Wolff's position as the traditional anarchist is utilized by law professor George Christie in the next Article to contrast the basic assumptions and suppositions of Nozick's commitment to moral autonomy. Christie concludes that even the minimal state is inconsistent with the absolute primacy of moral autonomy, since the individual's autonomy must be subverted by the functional status of the state.

Philosophy Professor Judith Jarvis Thomson examines Nozick's argument that the state is never justified in infringing upon another's rights. Utilizing counter-examples and fundamental conceptions of justice, she attempts to demonstrate that Nozick's state would not necessarily be either just or moral, because it would allow basic injustices to flourish in the name of preserving absolutely inviolate the rights of individuals. Joshua Rabinowitz expands this type of moralistic argument arguing that even when we accept Nozick's account of our clearest moral beliefs, we are not compelled to accept his solutions to the difficult moral problems which emerge from those beliefs. Even when we search for principles that characterize the just state by focusing on moral problems in a preinstitutional state of nature, Rabinowitz asserts that we end up with the view that some of the main problems of justice are problems of institutional design.

In the next Article, Nell Walton Senter shifts the scope of inquiry. She analyzes Nozick's entitlement principles to demonstrate their inconsistency with his absolute ban on violating another person's rights. Economist Elisha Pazner also focuses on Nozick's entitlement principles and contrasts these ideas against Rawls' theory of distributive justice. Pazner finds that despite the conflicting outcomes, the methodologies of both theories basically are compatible—focusing upon pure procedural justice.

Sociologist James S. Coleman next examines Nozick's priority on individual rights, and theorizes that any state built on such a foundation would be virtually powerless and ineffective. Thus, some balance must be made between individual and collective rights to construct a functional state. However, such a balance counters Nozick's basic theoretical construct of individual moral autonomy.

Political science professor Lawrence Scaff approaches *Anarchy, State, and Utopia* from a completely different perspective, criticizing Nozick's method of writing political theory, and claiming that it fails to present any cohesive and coherent position. Basically, Scaff disapproves of Nozick's use of techniques designed to accomplish only a particular theoretical purpose—to support his end result of a minimal state.

The final group of Articles in the Symposium deals with the concept of "rights"—what they entail and their effect on Nozick's state. Philosopher John Hodson claims that Nozick is defending the libertarian view of the legitimate state, which denies any legitimacy to governmental interference with individual or property rights. However, Hodson argues that the rights Nozick recognizes entail the justifiable exercise of a state more extensive than the libertarian is prepared to accept. Thus, Nozick has created the justification for a more than minimal state.

Philosophy Professor Jeffrie Murphy classifies distinguishing characteristics of groups of rights as applied to borderline or arguable rights claimants. Murphy grafts certain claims by Nozick onto a generally Rawlsian account of how to deal with those borderline cases. This Symposium is concluded by the work of two student authors, in a Note which explores one of those groups of borderline rights claimants—animals. Peter Hill and Robert Hanula initially explore sources and concepts of having rights, and then devise a metaright theory which accords rights to animals. Animal rights within the present Anglo-American legal system are then explored and compared with the mandates of Nozick's state. The Note concludes with an attempt to propose a functional system which recognizes rights for animals within the context of the minimal state. This process of according rights to animals in Nozick's state also serves to illustrate unpalatable consequences which result from an implementation of that state.

Through the diverse viewpoints and reference topics displayed in the Articles that follow, a critical appraisal of the feasibility and consistency of Nozick's theory of the state, as set forth in *Anarchy, State, and Utopia*, is presented. The Symposium also reflects the disagreement inherent in any society, as to what constitutes the "just and moral state."