

# THE BALANCE BETWEEN RIGHTS INDIVIDUALLY HELD AND RIGHTS COLLECTIVELY HELD

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Robert Nozick has written a book<sup>1</sup> which, like that of John Rawls<sup>2</sup> before him, has excited the attention and intense interest of non-philosophers. This is an unusual situation for moral philosophers to find themselves in, and it is useful to ask why the sudden interest and attention. Moral philosophy has addressed two fundamentally different kinds of questions. One is the question of what actions are moral: what kind of criterion can one use to judge the morality of an action. The Golden Rule is one such moral principle for action; Kant's Categorical Imperative is another.<sup>3</sup> The second question, however, is at a completely different level than the first. It asks what is a moral, or just *society*. Thus, the second question is not concerned with individual actions, but social policy and the nature of the state.

When moral philosophy confines itself to the first question, those ordinary persons not enmeshed in philosophical debate are unlikely to be roused into defense of or attack upon the new principle. However, when moral philosophy addresses the second question, it is not merely offering to the ordinary person a criterion by which he can judge his own action. It is also offering a prescription which, if it is accepted and put into practice by others, affects the organization of society and of the state within which the ordinary person must live. When the principle advanced concerns the rights that various parties have to portions of individual or social products,<sup>4</sup> the social acceptance of those theories is of direct and central interest to the ordinary person. He is no longer indifferent to the reaction of others to the principle, for

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1. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

2. J. RAWLS, *A THEORY OF JUSTICE* (1971).

3. I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* 33, 38 (T. Abbott ed. 1949).

4. See R. NOZICK, *supra* note 1, at 149-231; J. RAWLS, *supra* note 2, at 258-332.

their reactions may affect him. Moral philosophy has moved out of the closet, and into the arena of political philosophy and political debate.

Basically, Nozick's book concerns the question of the kind of a state, if any, to which rational self-interested men, endowed with a set of natural rights, will agree. However, the central portion of the book addresses itself to the question of what constitutes justice, and how a just society is derived.<sup>5</sup> Nozick here enters the broad political debate on distributive justice and inequality, or, rather, the balance between equality and liberty, which has recently occupied the attention of philosophers as well as social scientists. It is this portion of Nozick's work that I intend to examine.

Nozick fastens upon John Rawls as a prototype of an "end-result" theorist of distributive justice, who evaluates the justice of a social system<sup>6</sup> on the basis of the distribution of desired goods among its members. Nozick places "historical" theories in opposition to the end-result theories.<sup>7</sup> A "historical" theory bases justice not on any distribution, but on the justice of the process by which such a distribution came about.<sup>8</sup> Nozick thus arrives at his own theory, an entitlement theory, which he outlines only skeletally, in which each person is entitled to what he acquires so long as it is acquired through a just process.<sup>9</sup>

Nozick argues, in opposition to the end-result theorists, that any rational self-interested person will not choose to have a portion of his product expropriated and redistributed to others.<sup>10</sup> Such an argument would have no force against the utilitarians, but does have force against those theorists of distributive justice who, like Rawls, attempt to base their theories on the assent of rational self-interested persons.<sup>11</sup> As Nozick asserts: "End-state and most patterned principles of distributive justice institute (partial) ownership by others of people and their actions and labor. These principles involve a shift from the classical liberals' notion of self-ownership to a notion of (partial) property rights in *other* people."<sup>12</sup>

Rawls' response to such an argument would rest on his conception of a social contract made behind a veil of ignorance. Rawls' rational self-interested person standing behind a veil of ignorance concerning

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5. R. Nozick, *supra* note 1, at 149-294.

6. Nozick may be evaluating the justice of a state rather than that of a social system, but he does not make this clear.

7. R. Nozick, *supra* note 1, at 153-60, 199-204.

8. *Id.* at 153-55.

9. *Id.* at 153.

10. *Id.* at 158-60.

11. See J. Rawls, *supra* note 2, at 17-22.

12. R. Nozick, *supra* note 1, at 172 (emphasis in original).

what the future may hold for him, and recognizing that he may face periods of destitution as well as of plenty, will choose to tax himself when he is well-off, to insure his well-being when he is badly-off.<sup>13</sup> Since all persons stand behind such a veil of ignorance about the future, all will agree upon redistribution to reduce the degree of inequality. The particular rule concerning inequalities that, according to Rawls, rational persons will choose, is that only those inequalities are just which make the least well-off in society better off, in absolute terms, than if the inequality did not exist.<sup>14</sup> As Nozick notes, this particular rule is especially vulnerable, because it supposes, in game theoretic language, that rational persons will choose according to a minimax principle: that they will attach complete weight to the worst possible condition they might face, and none at all to other conditions.<sup>15</sup> Such a principle may be rational in a zero-sum game with an intelligent opponent, but not in a game against nature, which is the appropriate conception here.

Nozick's objection to this approach is more fundamental, however. He argues that choice in the original position behind a veil of ignorance *must* lead to end-result principles of justice, and cannot result in a principle that bases justice on the processes by which the distribution was reached. He expresses it in this way: "A procedure that founds principles of distributive justice on what rational persons who know nothing about themselves or their histories would agree to *guarantees that end-state principles of justice will be taken as fundamental*."<sup>16</sup> Because such a procedure automatically excludes process principles, such as the entitlement principle which Nozick presents, it cannot be, Nozick argues, an appropriate procedure for arriving at distributive justice by rational persons with natural rights.<sup>17</sup> Nozick states: "For people meeting together behind a veil of ignorance to decide who gets what, knowing nothing about any special entitlements people may have, will treat anything to be distributed as manna from heaven."<sup>18</sup>

To illustrate his point that only end-state principles will be chosen behind a veil of ignorance, Nozick constructs an example:

Suppose there were a group of students who have studied during a year, taken examinations, and received grades between 0 and 100 which they have not yet learned of. They are now gathered together, having no idea of the grade any one of them

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13. J. RAWLS, *supra* note 2, at 14-15.

14. *Id.* at 95-100.

15. R. NOZICK, *supra* note 1, at 190.

16. *Id.* at 198-99 (emphasis in original).

17. *Id.* at 202-03.

18. *Id.* at 199 (footnote omitted).

has received, and they are asked to allocate grades among themselves so that the grades total to a given sum (which is determined by the sum of the grades they actually have received from the teacher). First, let us suppose they are to decide jointly upon a particular distribution of grades; they are to give a particular grade to each identifiable one of them present at the meeting. Here, given sufficient restrictions on their ability to threaten each other, they probably would agree to each person receiving the same grade, to each person's grade being equal to the total divided by the number of people to be graded. Surely they would *not* chance upon the particular set of grades they already have received. Suppose next that there is posted on a bulletin board at their meeting a paper headed ENTITLEMENTS, which lists each person's name with a grade next to it, the listing being identical to the instructor's gradings. Still this particular distribution will not be agreed to by those having done poorly. Even if they know what "entitlement" means (which perhaps we must suppose they don't in order to match the absence of moral factors in the calculations of persons in Rawls' original position), why should they agree to the instructor's distribution? What self-interested reason to agree to it would they have?

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The nature of the decision problem facing persons deciding upon principles in an original position behind a veil of ignorance limits them to end-state principles of distribution. The self-interested person evaluates any non-end-state principle on the basis of how it works out for him; his calculations about any principle focus on how he ends up under the principle.<sup>19</sup>

This hypothetical example, except for the fact that the choice should have been made at the beginning of the course, conforms to Rawls' "original position" ideas exactly. Yet it is with this argument that Nozick's position falters. It is true that the decision problem *as Rawls has conceived it* must lead to an end-result principle, and cannot lead to a process principle. But Nozick has too quickly adopted Rawls' conception of the decision problem. As he puts it in his example, "They are now gathered together, having no idea of the grade of any one of them has received, and *they are asked to allocate grades among themselves*. . . ."<sup>20</sup> Nozick, by posing the problem in this fashion, has forced a narrow choice upon the students, and has thus forced his conclusion. The students have no opportunity to choose not to have collective authority over the grades of each. He did not ask them, behind this

19. *Id.* at 199-201 (emphasis in original; footnote omitted).

20. *Id.* at 199 (emphasis added).

veil of ignorance, the prior question of what rights they choose to continue to hold individually, and what rights they choose to allocate to themselves as a collective body.<sup>21</sup> Yet before they have the right, as a collective body, to make a decision of the sort Nozick poses for them, they must decide whether they want to hold these rights as a collective body. Nozick has, by the question he posed to them, done precisely what he shows that Rawls' difference principle does: he has taken from them individual rights and given those rights to the collectivity. There is nothing inherent in the procedure of choice behind a veil of ignorance which leads to that. In fact, it seems likely that if, at the beginning of the course, students were asked to draft a constitution governing the conduct of the class and the allocation of grades, they would choose to retain to themselves, as individuals, the right to demonstrate performance, and would allocate to the instructor or another outside observer the right to assign grades on the basis of these performances.<sup>22</sup>

The statement can, in fact, be made stronger. If at the outset, persons have natural rights held individually, in accord with Nozick's basic theory, then the only kind of choice they *can* make is a choice about which of those rights to retain individually, and which to give up, either to themselves as a collective body, or to another party outside themselves. Because they hold such rights individually, any decision to give up a portion of them to the collectivity must be a unanimous decision. If instead they made a decision as to how the grades are to be divided up among them, any one of them could correctly object that the collective had no right, as a collective, to make that decision.<sup>23</sup> This is not a problem for Rawls, since he implicitly assumes that the social product *is* collectively held.<sup>24</sup> Thus, in Rawls' scheme, the collective does have the right to decide collectively how the social product is to be divided. Rawls would not want to admit this, of course, because

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21. This seems to have occurred in an oblique way to Nozick, for in a footnote he asks: "Do the people in the original position ever wonder whether they have the *right* to decide how everything is divided up?" *Id.* at 199n. (emphasis in original). Of course, if they begin with individual natural rights, they do not, collectively, have such a right, unless they have first given it to themselves as a collectivity. Nozick here fails to distinguish what he brilliantly distinguishes elsewhere in his critique of Rawls: the difference between rights of a collectivity and individual rights held by members of the collectivity.

22. A sociologist colleague of mine has conducted such a class, and finds indeed that the collective decisions made at the outset of the class concerned allocations of rights and obligations between class and instructor, which precluded their having the collective right to assign grades. Personal communication from Benjamin Zablocki.

23. Of course, in a classroom, a teacher could arbitrarily give that right which he held to a collective group of students. But in a social system, the analogous right is held individually, as one of the natural rights with which each individual begins. See J. LOCKE, *TWO TREATISES ON GOVERNMENT* (Laslett ed. 1965).

24. See J. RAWLS, *supra* note 2, at 274-84.

this assumption of a collectively held social product is introduced implicitly, and is not one he would defend.

What Nozick fails to recognize is that this assumption is not at all inherent in the notion of a social contract made behind a veil of ignorance. Thus, it is not this procedure which is incompatible with a process principle of justice; it is the assumption that all resources are collectively held. Because of his use of Rawls' conception of the problem with which rational persons behind a veil of ignorance are confronted, Nozick rejects Rawls' procedure for the wrong reason: it can lead only to end-state principles of justice, and excludes process or historical principles. The problem which Rawls poses to rational people behind a veil of ignorance should be rejected, from a natural rights perspective, because it gives the collective body a set of rights that they do not hold collectively—the right to decide as a collective body how goods in society are to be allocated.

There is an objection which Nozick might still make. The set of natural rights with which persons are endowed may be arranged in two sets: One set held by all persons equally—for example, the right to free speech, or the right to the fruits of one's labor; and a second set, held by persons differentially—those arising from natural abilities, the accident of being born to an attentive mother, or differing material goods. The second set of natural rights ordinarily constitutes what we conceive of as resources rather than rights, so I will call the first set "rights" (equally held) and the second, "resources" (differentiality held). If we conceive of the natural rights with which persons are endowed as only the first set, then the notion of a social contract behind a veil of ignorance is compatible with knowledge of one's natural rights. All persons begin with individually held natural rights, yet have no idea of their future position, because they have no differential resources. Thus, the veil of ignorance is opaque. The social contract *could* be made; it *would* concern the question of what rights were to remain in individual hands, and what rights were to be given over to the collectivity. It *would* also achieve the goal at which Rawls aimed: to transform interpersonal comparisons into intrapersonal ones, and thus arrive at a state in which the collective would have rights by which it could bring about some sharing by the rich with the poor. This occurs because, at the time of the contract, each person would balance off the utility of having goods taken from him if he was rich, against the benefit of having goods given to him if he was poor. The principle arrived at would of course not be Rawls' difference principle. Instead, it would more likely be some modification of Nozick's entitlement principle,<sup>25</sup>

25. Basically, Nozick's entitlement theory states that the holdings of a person are

weakened by giving the state some right to redistribute a portion of that entitlement.

Suppose, in accord with Nozick's position, that the natural rights with which persons begin are not merely those which they all hold alike merely by virtue of being persons, but include also the second set, the resources which each person holds differentially.<sup>26</sup> Then, when they come to make a social contract, they will not be behind a complete veil of ignorance about their future positions. Knowing the extent and nature of their resources, the individuals' self-interested calculations will not lead to consensus on the rights to be held individually and those to be held collectively. Those persons who expect to be well-off in the future will want to retain more individual rights, to secure their liberties, and those who expect to be poorly-off in the future will want to have more rights collectively held, to give the collectivity greater power to aid them. In this way, the achievement of a just allocation of rights through the consensus of self-interested persons dissolves, and we are back in a situation of interpersonal conflict—Hobbes' war of all against all.<sup>27</sup>

But what is an appropriate starting place, if we assume a natural rights position, as Nozick does? If we are concerned with a normative theory of justice, we are not necessarily constrained to begin with the total set of rights and resources that are actually found in society. We are completely at liberty to abstract from real persons and ask the following question: At what allocation of rights to the collective would rational, self-interested persons, equally endowed with a set of natural rights, arrive? That such a scenario is a fiction never to be realized does not deprive the result of its moral force. Such an abstraction is possible, and appropriate, if persons (actual persons in society) can

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just if he (or she) is entitled to them by the principles of justice in acquisition and transfer. See R. Nozick, *supra* note 1, at 150-53.

26. The question of who is a "person" eligible to hold these natural rights of possession is not a simple one. In medieval times, there was a whole set of differentiated rights for persons of different estates (under Anglo-Saxon law). See 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 9 (1968). Traditionally, the Anglo-American legal system has accorded limited rights to certain classes of persons—children, convicted criminals, and the mentally incapacitated. See C. STONE, *SHOULD TREES HAVE STANDING?* 4 (1974). However, the United States Supreme Court recently has determined that rights do not "magically" come into being at a certain predetermined age. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). In a much celebrated case, regarding the right of a parent to assert his incapacitated daughter's right of privacy, the New Jersey Supreme Court found that incapacity did not lessen an individual's basic rights. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976). Thus, the separated qualifications of select rights appertaining to certain classes of individuals may be subject to question. In fact, substantial questions may be raised as to the delegation of rights solely to human beings. See P. SINGER, *ANIMAL LIBERATION* (1976); Note, *Using Metaright Theory to Ascribe Kantian Rights to Animals Within Nozick's Minimal State*, 19 ARIZ. L. REV. 242 (1977).

27. See T. HOBBS, *LEVIATHAN* 183-88 (MacPherson ed. 1968),

agree that the premises (equal natural rights) are appropriate, or perhaps just.<sup>28</sup> Then they must agree that the resulting allocation of rights that such fictional people would arrive at is itself appropriate, or just.

It is not at all clear, if such a fictional scenario is established, what allocation of collective rights would ensue. It is clear that rational self-interested persons would enter into some sort of social contract in which they give over some rights to be collectively held.<sup>29</sup> It is equally clear that the contract would neither be one in which the total social product and all rights are held collectively, as envisioned explicitly by Rousseau<sup>30</sup> and implicitly by Rawls,<sup>31</sup> nor would it be Nozick's full entitlement scheme, in which the full rights to the total product of a person's labors remained with him.<sup>32</sup> Each person would agree, in Nozick's terms, to institute partial ownership by others of his actions and labor, as an insurance premium for the partial ownership of others' actions and labor. I will return shortly to the question of just what considerations might go into this rational decision behind a veil of ignorance.

First, suppose that persons in society cannot agree that an appropriate starting point for a theory of natural rights is the set of equally held rights, but instead contend that the starting must be the *total* set—the resources differentially held as well as the rights equally held. Then we are constrained to begin with this total set of rights and resources, and must address the more difficult task of distributing rights between individual and collectivity when persons are behind only a partial veil of ignorance. Such persons accordingly will not arrive at a social contract in which all desire exactly the same allocation of rights to the collectivity—the state. Yet they will still, if they are rational, want to engage in some sort of social contract, with the same reasons as before, under the equal rights starting point.<sup>33</sup> That the existence

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28. It is important to note that the assumption of equal natural rights does not imply equality among all resources. It implies only that those rights which are regarded as "natural rights," such as entitlement to the product of one's labor, are, at the starting point, held equally by all. The abstraction involved in the mental experiment which gives rise to the social contract behind an opaque veil is one which includes these rights, but not the other, unequally distributed resources. See J. LOCKE, *TWO TREATISES ON GOVERNMENT* 309-18 (Laslett ed. 1965).

29. Their calculation would balance the utility gain to be expected from rights held collectively (for example, the utility that results from the security of combined forces, which are more powerful than the sum of their individual components, and smoothing out, through redistribution, the resource fluctuations each might experience) against the utility loss which results from loss of full control over rights otherwise held individually. See T. HOBBS, *supra* note 27, at 226-28; J. LOCKE, *supra* note 28, at 367-69.

30. J. ROUSSEAU, *THE SOCIAL CONTRACT* 64-65 (Cranston ed. 1968). It is this allocation of all rights to the collectivity by Rousseau which leads J. Talmon to describe him as the father of modern totalitarian socialism. See J. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* (Norton ed. 1970).

31. See generally J. RAWLS, *supra* note 2, at 11-16.

32. R. NOZICK, *supra* note 1, at 174-82.

33. See discussion note 29 *supra*.



of differential resources partially lifts the veil of ignorance does not mean that the veil is completely removed. Persons remain uncertain about their futures, despite their knowledge of their resources, and even despite their knowledge of others' resources. Each person, no matter how well or poorly endowed, will want to reserve for himself certain natural rights with which he begins, in order to use his resources and enjoy the product of his labors without undue constraint. Each person will also want to give over some of those rights to the collective, so that it may use its inherent power when he is in need. Thus, there will be some degree of consensus. The desired division of rights between those individually held and those collectively held will of course differ, and the difference will be related to the resources different persons hold. It will also be related to their differing degrees of self-confidence, their degrees of risk aversion, their capacities for envy, and their desires for freedom versus equality. Accordingly, interpersonal differences will have been narrowed: The maximal rights to be held collectively (as desired by those who have few resources, little self-confidence, high risk aversion, a high capacity for envy, and a taste for equality) will be something short of complete. The minimum rights to be held collectively (by those who have many resources, high self-confidence, no risk aversion, no envy, and a strong taste for freedom) will be something greater than zero. There will remain some interpersonal conflict of interest; a state, which is everyone's ideal, will not be formed. However, the extent of opposing interests will have been reduced. The uncertainty about the future on the part of these rational self-interested persons will have placed upper and lower bounds on the amount of rights to be collectively held.

Can we go beyond this, to say, within these bounds, what social contract will be made, if one will be made at all? This can be answered by envisioning the following procedure. Consider a proposal for a particular allocation of rights to the collective, in which each person must make the following calculation in deciding whether it is beneficial for him to assent to such an allocation. In light of the distribution of future situations which he expects to confront, he must weigh the benefit to be expected from full control over his small set of individual rights against that expected from partial control over the larger set of collective rights that he would share as a member of the collective. If the latter benefit is larger, then he would rationally assent to a collective with such powers. The process could be imagined as follows: Each person, endowed with natural rights and resources, some of which are differentially distributed, is asked to accept or reject allocation of a

minimal set of rights to a collectivity. This process is continued, increasing the collectively held set beyond this minimum so long as there is unanimous acceptance of a collective with such an allocation. When the collectively held rights have been increased to the point where unanimity no longer holds, the process stops, and a collective is formed, with the maximum set of rights, or power, that all potential members find to their benefit.<sup>34</sup> This maximum would, of course, be the lower level described earlier. The state will have exactly the set of rights desired by the most libertarian, and a smaller set of rights than those desired by those more egalitarian. Nevertheless, they would agree to this state, because they prefer it to any of the more individualistic states assented to by the most libertarian. Why the asymmetry? Because there is an asymmetry in starting point: We begin with rights *individually held*, and move as far toward collectively held rights as unanimous consent will carry us. If we had begun with rights wholly collectively held, we would have moved in the opposite direction, away from collective rights, until we had reached the upper bound, which is as far as we could go with unanimous consent. The region between upper and lower bounds is not one that could be reached by unanimous consent.<sup>35</sup> Those who are more libertarian than this would not opt out, because they would hold no resources individually if they did so.

The reason for beginning with individual rights, according to Nozick, is the normative priority accorded to individual rights. If Nozick's premise as to the inviolability of individual rights is accepted,<sup>36</sup> then any social contract, whether it begins with equal rights or unequal rights, must begin with the assumption of rights individually held.

34. We might envision the process continuing: When the level is reached at which one person dissents, then the others decide collectively whether his contribution to the others' resources is sufficiently great that the collectivity is better off with him and with the agreed upon allocation of rights, or without him and with a greater allocation of rights to the collectivity. If the latter, the process goes on without him, until a level of collective rights is reached such that the remaining members would find themselves worse off if they continued without the member who has reached his optimum than by stopping at this point and including him.

35. There is, however, a further complication. If we began with rights wholly collectively held, then persons choose from behind Rawls' complete veil of ignorance, since they no longer begin differentially endowed with resources. In this case, the only source of nonconsensus lies in different tastes for liberty and security, and as a result, the contract would be at an upper bound below the upper bound described earlier.

Still another complication lies in the fact that if we begin with rights collectively held, then it is anomalous, if not completely inconsistent, to assume individual voting rights in the formation of a constitution.

36. "Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far reaching are these rights that they raise the question of what, if anything, the state and its officials may do." R. Nozick, *supra* note 1, at ix.

WHAT CONDITIONS AFFECT THE DECISIONS OF RATIONAL  
PERSONS CONCERNING INDIVIDUAL VERSUS COLLECTIVE RIGHTS?

Whether a social contract is made behind a veil of complete ignorance or a veil of partial ignorance, another question can be asked: Will rational persons' choices be affected by the social conditions surrounding them, and if so, how? Although they are behind a veil of ignorance, partial or complete, about their own position in the future, they are not ignorant of the kind of society in which they would find themselves.

The first and most obvious element that would lead rational persons to allocate greater portions of their rights to the state is the existence of collective threats, whether from the natural environment or from external enemies. Eskimos treat many of their resources collectively during the winter months. Similarly, the Essenes in the desert near the Dead Sea 2,000 years ago maintained a largely communal existence. Modern Zionists, resettling the agricultural lands of Palestine, created collective Kibbutzim and cooperative Moshavim to confront both the natural and human environment. Insofar as there can be a reallocation of rights at different times within a state, we see the same thing: In time of war, citizens voluntarily submit themselves to greater central direction and greater taxation than in times of peace.<sup>37</sup>

Somewhat more subtle is the difference between a largely agrarian economy and an industrial economy. In an agrarian subsistence economy, most of a person's essentials are directly satisfied by his own efforts: He grows most of his own foodstuffs, and builds his own shelter. There are good times and bad, but they vary in continuous gradation, for there is no concept of a "full-time job." In an industrial economy, on the other hand, most of his essentials are provided by exchange for money obtained from his labor in a "full-time job." In good times, he has a job; in bad times, he does not. He cannot subsist by the direct fruits of his own labor in the absence of the job, but must receive aid from some source, or migrate to a place where he can subsist. In addition, the interdependence of the economy would suggest that bad times would be likely to hit many persons at once, and one would be less likely to fall back on resources held by others especially close to him.

Thus it is reasonable to expect that rational persons behind a veil of ignorance about their own position, but knowing the character of the economy, would agree to reserve a larger portion of their product for

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37. In an analogous vein, the United States Supreme Court has recognized that wartime conditions may justify a greater infringement of first amendment freedoms than would ordinarily be acceptable in times of peace. *See Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

insurance, perhaps agreeing to a larger tax (and perhaps even a more progressive one), if their economy were an industrial and highly interdependent one, than if it were an agricultural subsistence economy. Furthermore, this rational allocation of resources for collective use would carry with it the rights to use the resources not merely for common defense, but for redistribution to the needy and destitute.

### THE DANGER OF THE STATE

There is one final point that should not be overlooked. When certain rights are allocated to the state, one of the rights that constitutes Nozick's definition of a minimal state, as well as a central portion of any definition of the state in political science, is a monopoly over the use of coercion or violence. By virtue of this right, the state, and whatever faction, majority or minority, gains control of it, gains the power to garner other rights to itself, without the impediment of unanimous consent. It can employ coercion, imposing policies on unwilling citizens, because of its monopoly over coercion. Thus, if there is to be an allocation of rights in a just society, there must also be, within this allocation, some means of protecting against the progressive expansion of rights by the state—an expansion that would create an unjust society from one that was initially just.

It may be that the most fruitful way of looking at these matters is somewhat different. Suppose we begin with a set of persons with natural rights, setting aside for now the question of whether we include only equally held rights or differentially held resources. When these individuals create a state by giving over certain of their individual rights to be held collectively, they create a new "person," of a different sort, with a derived set of rights. The state is a legal person, with a certain set of rights before the law.<sup>38</sup> Accordingly, the state *acts* as a person, through a set of agents pursuing purposes or goals of the state, just as natural persons pursue their goals.

Similarly, when any group of persons within the state creates another collectivity by giving over certain of their rights or resources to be collectively held, another "legal person" is created within the state. This may be a profitmaking corporation, a trade union, or an association of some other kind.

A society at any point in time will consist not only of individuals

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38. This concept is analogous to the concept of the corporation as a "person" under Anglo-American common law. See H. HENN, *CORPORATIONS* § 80 (2d ed. 1970). Corporations, although recognized as persons under the law, have specifically designated rights, which are more limited than those rights accorded a natural person. *Id.*

(natural persons), but also of the state (which may have various coordinate parts, such as the executive and legislative branches of the United States government), and of other legal or corporate persons. Conceiving of the society in this way, we can say that one of the principal tasks of natural persons in the society—from whom all rights originate—is to so allocate those rights to corporate bodies that the various corporate bodies and natural persons are able to prevent any one of their number using its rights to acquire further rights without the assent of the owners of those rights. If such acquisition of rights goes unchecked, then all the rights end in the hands of one natural or legal person, which can do as it will to satisfy its interests alone. Within this system, there is nothing to prevent the continual and gross subversion of justice.<sup>39</sup> One hundred years ago in the United States, this danger existed with the greatest force in regard to the emerging and developing corporations. Today, it exists with greatest force in the expanding and aggrandizing state—an infinitely more dangerous problem.

### CONCLUSION

It has been shown that Nozick's theory could accommodate collective rights of an entity to institute certain courses of action. In fact, individuals in Nozick's state might even be willing, in certain circumstances, to allow the collective entity the right and power to infringe their own natural rights. However, any agreement to that effect must be necessarily self-restrictive, or the intended beneficiaries of the "just system" will instead become its victims.

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39. A central defect of both Rawls' and Rousseau's conceptions of a social contract is the implicit (in Rawls' case) or explicit (in Rousseau's case) vesting of all rights in the state. The closest practical realization of the Rousseau conception is probably exemplified by the Soviet Union. The hundreds of thousands of political prisoners in that state are a reminder that no assurance of justice can remain when rights are so fully held by one person, in this case, the state.