

# HOW NOT TO DO POLITICAL THEORY: NOZICK'S APOLOGY FOR THE MINIMAL STATE

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Theorizing, Karl Marx once observed, is itself a form of action and not simply a disinterested speculative exercise. Like all important human action, it requires symbolic construction of the world, and it is guided by intentions, awarded meaning from a social context, and invested with a need for memorable achievement. On occasion the traditional *vita contemplativa* may still try to understand its commitments in different terms, as disclosure *in foro interno*, so to speak, but such a view should be called mere Senecan delusion. In the modern idiom, action divorced from theory is blind, while theory detached from action is empty.

The disciplines that study political and social matters—where one might expect the highest degree of critical self-understanding—have often appeared ignorant or unimpressed by this insight. In the last decade, however, the intellectual climate has changed. In political philosophy the academic worry about a “withering away” of its subject matter has been replaced by new linguistic and conceptual “therapy,” which has now in turn become the basis for bold substantive theorizing about human society. Having forged and polished new analytic tools, the avant-garde has begun an assault on some of the most fundamental and recalcitrant controversies in political life: What is the nature of the just society and state? What action is appropriate for achieving basic human rights and sustaining individual liberty?

Robert Nozick's *Anarchy, State, and Utopia*,<sup>1</sup> an apology for the so-called “minimal state,” is intended as a contribution to that recent

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

genre of political philosophy. It quite naturally investigates a wide range of problems dealing with justice, punishment, liberty, rights, and equality in modern polities. At the same time, Nozick's work contains a proposal about the nature of political theory itself. In this Article, I want to explore and criticize this proposal for theorizing about the modern state—for "doing" political theory. My central query is: What is meant by "theory" in *Anarchy, State, and Utopia*, and what criteria are postulated to identify evidence for verifying or falsifying the "theory" of the minimal state defended in the book? Answering this kind of question requires an analysis of what might be designated the "form" of Nozick's presentation. Substantive issues are important only insofar as they are illuminated by the intellectual choices that constitute the appropriate form of thought. The general theme of my critique can thus be understood as an exposition of the way in which substance is affected by form. I shall argue that Nozick's ideas about "theory" are peculiarly appropriate for the substantive conclusions concerning politics that he wants to defend.

Specifically, my contention is that Nozick's theory of politics in the modern state is flawed, meager, misleading, and sometimes nothing short of bizarre. However, Nozick's work is not without redeeming merit. Much can be learned from others' well meant errors, particularly when they are palpable and audacious. Nozick's flashy, playful theorizing is often entertaining—dancing through philosophical problems with Nietzschean delight—even if without plausible grounding in social and political realities. My arguments do not constitute a definitive refutation of the "minimal state" theory. However, given Nozick's candid admission that his work "does not present a precise theory of the moral basis of individual rights,"<sup>2</sup> and that much of it "rests upon or uses general features that I believe such theories would have were they worked out,"<sup>3</sup> I fail to see how such a refutation could be possible in any case. At most, I intend to search out and criticize the baneful consequences of theorizing in the Nozickian mode. I hope that this analysis will lead to a clearer understanding of how theory *ought* to proceed in political matters.

### NOZICK'S POSITION

Nozick's own views about theory are scattered throughout *Anarchy, State, and Utopia*. It would be possible to compress these views into a coherent whole, set them alongside what I consider to be a cor-

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2. *Id.* at xiv.

3. *Id.*

rect understanding of theory, and then demonstrate how they fall short of the postulated standard. A more convincing and interesting critique requires starting from within Nozick's assumptions, reconstructing them in a critical form, and then working toward the preferred alternative. I shall adopt the latter approach.

The problem of interpretation can be simplified initially by observing that some of Nozick's remarks illustrate *techniques* which are considered theoretically useful, while other remarks are addressed to the *tasks* thought to be appropriate for political theory. Among the former, reliance upon "elaborate arguments, . . . unlikely counterexamples, surprising theses, puzzles, abstract structural conditions, . . . startling conclusions, and so on" is acknowledged.<sup>4</sup> Accordingly, the discussion is often infused with the style of a debate, aspiring to accumulate points against the opposition. In a more serious vein, Nozick uses certain "advanced" techniques<sup>5</sup>—principally drawn from philosophical logic, economic modeling and game theory—intended as illustrative and argumentative devices for carrying out certain tasks. Despite their instrumental character, these techniques have qualitative and substantive implications, similar to analogies and metaphors in language. Thus, they become an integral part of the intentions informing Nozick's work and must be viewed as important cogs in the theoretical machinery.

As for the theoretical tasks themselves, Nozick insists on a particular, narrowly-defined starting point: "The fundamental question of political philosophy, . . . one that precedes questions about how the state should be organized, is whether there should be any state at all. Why not have anarchy?"<sup>6</sup> This is a "fundamental" question claimed to arise in any theory explaining political phenomena,<sup>7</sup> a presumed feature of Nozick's work. Why is this the case? Why should one agree that political theory ought to begin here?

Consider a reasonable objection: Since the state (and nation-state) has developed historically and does exist, one might suppose that political theory's main purpose, broadly conceived, is to investigate the causes of this development, understand its political and social consequences, and criticize its defects. Of course, these topics have been at the heart of writing on politics at least from Machiavelli's *Discorsi*<sup>8</sup>

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4. *Id.* at x.

5. By "technique" I mean here nothing more than a specific rationalized procedure considered useful for accomplishing a particular theoretical purpose.

6. R. NOZICK, *supra* note 1, at 4.

7. *See id.* at 3.

8. N. MACHIAVELLI, *DISCOURSES ON LIVY* (Modern Lib. ed. 1940).

to Max Weber's *Staatssoziologie*<sup>9</sup> in this century.<sup>10</sup> Nozick will have none of these realistic plausibilities, however, because of his logician's conviction that the most adequate rational account of politics must proceed from its nonpolitical opposite; namely, the time honored concept of a "state of nature," in which the condition of full individual autonomy is most closely approximated. If such a condition is acceptable, then further questions about politics and the state become irrelevant. On the other hand, if the natural state turns out to be defective, then presumably it can be used to explain more thoroughly the nature and extent of individual rights, political authority, and state-like institutions.

Setting aside explanatory problems for the moment, one might respond to this proposal by suggesting that a political theory first needs a conception of its subject matter—"politics," a term Nozick continually confuses with "state." If one believes that this conception can only be developed dialectically, through opposition and contradiction, then why not assume that the relevant nomenclature is not binary (politics versus anarchism), but rather political rule distinguished from both anarchism and despotism. Could the fundamental question then become: "Why not have despotism?" Such reasoning may seem merely disingenuous, but what I have in mind is the tripartite distinction in Greek thought between the political, anarchic, and despotic conditions.<sup>11</sup> The *polites*, the free citizen who had the right to share in "ruling and being ruled" was distinguished precisely from the *despotes*, the master whose right of domination was based on force and violence.<sup>12</sup> In this sense, the *bios politikos* was contrasted not only to stateless and anomic existence, but also to the *bios despotikos* characteristic of prepolitical societies. Why not count this triadic statement as a higher synthesis for inquiry into these matters?

Finding this argument persuasive, one might well be led to Hobbes' state of nature<sup>13</sup> rather than that of Locke,<sup>14</sup> or to Hume's refutation of both of these predecessors.<sup>15</sup> If one remains captivated by the charms of hypothetical political anthropology, perhaps the appropriate starting point would be Durkheim's primitive society, for which the despotism of the "collective conscience" and "repressive law" was com-

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9. M. WEBER, *ECONOMY AND SOCIETY* (G. Roth and C. Wittich ed. 1968).

10. It seems odd that Nozick should be willing to use Weber's definition of the "state," conceived within this realist tradition of discourse, yet ignore, much less refute, the accompanying criteria for a theory of the state.

11. See generally P. CHANTRAINE, *DICIONNAIRE ETYMOLOGIQUE DE LA LANGUE GRECQUE* (1968-70).

12. ARISTOTLE, *POLITICS* Bk. III (E. Barker ed. 1962).

13. See T. HOBBS, *LEVIATHAN* 183-88 (C.B. MacPherson ed. 1968).

14. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 4-15 (P. Laslett ed. 1965) (Second Treatise).

15. See D. HUME, *OF THE ORIGINAL CONTRACT* (1854).

plete,<sup>16</sup> or even Freud's mythical "primal horde" ruled by rapacious instinct.<sup>17</sup> Why not assume that the political cosmos begins as an undifferentiated, sociocentric mass, and that only at an advanced stage can it become possible to question how much room individual rights leave for the state?<sup>18</sup> Of course, Nozick shunts these conjectures to one side. His atavistic program adheres doggedly to Locke and the assumptions of the seventeenth century, for it favors theorizing about "a nonstate situation in which people generally satisfy moral constraints and generally act as they ought."<sup>19</sup> The reason for using this assumption of a settled, pacific human condition is not that it is closer to "human nature," but, rather, that it is used as the best form of anarchy that could be hoped for and to refute it would justify the state.<sup>20</sup>

In short, political theory's tasks are set forth as explanation, justification, and recommendation. Nozick makes little attempt to maintain a tight separation between them. Giving a rational account of phenomena blends into their defense and vindication, which easily turns into prescriptions for action. Each of these tasks is given a specific definition by Nozick. The resulting claim is that theorizing in the designated form will provide more powerful explanations, more persuasive justifications, and more attractive recommendations than the alternatives. This comparative claim merits close scrutiny.

#### FROM EXPLANATION TO JUSTIFICATION

The discussion of explanation is one of the most dense and elusive aspects of Nozick's work, for it depends heavily upon some abstruse arguments in the philosophy of science. These arguments can be reduced to two: First, the most complete (fundamental) explanation of any realm of activity, including the political, can be gained by using explanatory language and principles drawn from *outside* that realm. Thus, Nozick affirms the desirability of "explanations of the [political] realm in other terms"<sup>21</sup> and "deriving" political characteristics of a society from nonpolitical description<sup>22</sup>—an intellectual exercise that would require reasoning by deductive inference. This might be called explanation by extension; that is, fully established intelligibility in one (non-political) realm becomes the basis for completing our understanding of another realm. Of course, one might wonder about the precise content selected for the nonpolitical realm. Is it *everything* else, or just a par-

16. See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (G. Simpson ed. 1964).

17. See S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (J. Strachey ed. 1962).

18. R. NOZICK, *supra* note 1, at ix.

19. *Id.* at 5.

20. See *id.*

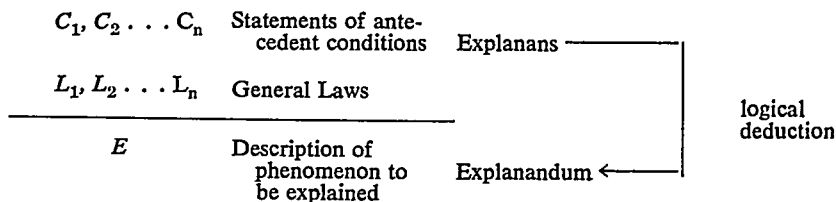
21. *Id.* at 19.

22. *Id.* at 7.

ticular aspect of the remaining nonpolitical world? For Nozick, economic language and categories are the determining factors.

Nozick's second argument emerges in response to the question: What does it mean to explain something in other terms? One particular kind of explanation is thought to be especially suited to the above requirement: "invisible-hand explanations."<sup>23</sup> Aside from the aesthetic appeal of such explanations, they are advantageous for preserving the assumption of individual autonomy and providing access to a non-political language. That is, the invisible-hand avoids explanation of the overall character of the political realm in terms of intentions, goals, beliefs, or desires. Particular actions within this realm may still be explained by actors' individual intentions, but the political realm as a whole (and the state) cannot be regarded as the effect of anyone's conscious design. According to this view, even though the individual always acts so as to maximize his own advantage, he nevertheless promotes a larger pattern of ordered relationships. Invisible-hand explanations are also fundamental explanations in this technical language, which "minimize the use of notions constituting the phenomena to be explained."<sup>24</sup> In addition, both are acknowledged to be "potential" explanations, as distinct from "real" causal explanations. In other words, as Nozick admits, they may contain—indeed they *do* contain—antecedent factual conditions and law-like generalizations that are *false*. This final concession is important because it underlines the truly hypothetical nature of Nozick's remarks and their overriding stress on logical impeccability, even at the expense of theoretical adequacy.

The source of Nozick's ideas about explanation is to be found in Hempel's well-known work on the subject,<sup>25</sup> particularly his elaboration of the deductive-nomological model. Because of Nozick's commitment to deductive theorizing and the the Hempelian construal of "potential" explanation, it is accurate to assert that he adopts this model as the standard for rational explanation. The following representation then applies:



23. *Id.* at 18-22. Such explanations are said to "show how some overall pattern or design, which one would have thought had to be produced by an individual's or group's successful attempt to realize that pattern, instead was produced and maintained by a process that in no way had the overall pattern or design 'in mind'." *Id.* at 18.

24. *Id.* at 19.

25. C. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS (1965).

Paraphrasing Nozick, one might say that the explanandum generally will read: "The minimal state arises from a state of nature without violating anyone's rights and is therefore just."<sup>26</sup> For any political theory, the relevant "antecedent conditions" and "general laws," if any, are exceedingly difficult to pinpoint, and it would be unfair to hold Nozick accountable for them. Obviously it is these features of the overall explanation that are most contestable. Nearly every political disagreement involves a dispute over "antecedent conditions," for one can deduce *any* explanandum, however foolish and fanciful, given the properly selected set of conditions and laws.

The question then becomes, what logical and empirical conditions must be met in order for an explanation to be "adequate"? Hempel's statement of these conditions is quite precise and bears paraphrasing: (1) The explanans must contain general laws that are actually required for deprivation of the explanandum; (2) the explanans must be capable in principle of test by experiment or observation; and (3) the statements constituting the explanans must be factually correct.<sup>27</sup> These requirements, one empirical and two logical, cover the top of the model, the explanans. As for the explanandum, Hempel adds: (4) It must be logically deductible from information provided in the explanans.<sup>28</sup>

My point here is quite simple: Nozick's fundamental, invisible-hand, potential explanatory theory cannot possibly hope to satisfy such precise conditions for adequate explanation. For instance, in the case of (2) and (3) above, criteria for verification or falsification of explanation in the sense intended by Hempel are not just weakly articulated but are missing altogether. Nozick reminds us that "the fruitfulness, interest, and far-reaching implications of the theory that results" is the true test of merit,<sup>29</sup> and that much is learned "by seeing how the state could have arisen, even if it didn't arise that way."<sup>30</sup> These appeals to utility and the innate interest in comparisons between the actual and hypothetical simply will not pass critical scrutiny. After all, what is being explained? Nothing more than an imaginary, abstract, generalized "state" is offered for perusal. I have nothing against imagination, abstraction, or generalization: All theories should possess these qualities. But one would hope that the actual state or actual political relationships, illustrated with examples drawn from political experience, would enter the theorist's vision as objects of contempla-

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26. See R. NOZICK, *supra* note 1, at 118-19.

27. C. HEMPEL, *supra* note 25, at 247-49.

28. *Id.*

29. See R. NOZICK, *supra* note 1, at 3.

30. *Id.* at 9.

tion. The empirical basis of Nozick's explanations is meager. Nowhere is the pure instrumentalism of the theory more evident. In this context, explanatory theory is only a manipulable tool; no question of its empirical reference ever penetrates the pacifying mists of ratiocination.

However, an alternative strategy at this juncture would be to demonstrate that Hempel's conditions are far too stringent for any imaginable political theory. In fact, many have argued that Hempel's deductive-nomological account of explanation is not applicable in political theory, at least without serious qualification and revision.<sup>31</sup> If this criticism were to prove correct, then one might only label Nozick's choice for intellectual support an unfortunate one, to which he need not be committed. But if this were so, then what *alternative* pattern of explanation of the state could he be using—historical, functional, teleological, voluntaristic, dialectical? Disregarding Nozick's misleading use of the term "historical," it must be acknowledged that he shows no interest in any of these explanatory possibilities. He even tends to minimize the variety and plausibility of such alternatives for political theory by shrewdly calling the opposite of invisible-hand explanation a "hidden-hand" explanation, evidenced in "conspiracy theories."<sup>32</sup> This is equivalent to reducing the demand for equality to "envy."<sup>33</sup> In an analogy to a sport, like wrestling, this would be called a "foul." Surely the most important alternative explanatory pattern would be visible; it would emphasize purposes, ends, wants, needs, beliefs, and so forth, as categories for explaining the nature of the state.

Regardless of such alternatives, at least one task for any explanatory theory is to provide tests or rules for its validation. If the theory cannot in principle be verified or falsified, and one appeals only to its fruitfulness or intuitive interest, then what importance can it have as an explanation? I would submit that it has none. My conclusion is that Nozick's theory is explanatory in only a weak and misleading sense. It presents a rational defense of the minimal state by arguing that, given certain contingencies, a preferred outcome for the state would be rationally credible. Following Hempel again, one must distinguish between explanation-seeking questions, which try to make statements intelligible, and reason-seeking questions, which aim for credibility.<sup>34</sup> Nozick is really asking the second kind of question—what reasons are there for believing that the minimal state would be just?—and not, as

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31. For recent discussions, see R. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* (1976); J. GUNNEL, *PHILOSOPHY, SCIENCE, AND POLITICAL INQUIRY* (1975).

32. R. NOZICK, *supra* note 1, at 19.

33. See *id.* at 239 & n.

34. C. HEMPEL, *supra* note 25, at 334-35, 487-88.



he suggests, the truly explanatory question—why is it the case that the minimal state is just?

In sum, the secret of Nozick's theory is that it *explains* nothing. All of the talk about explaining something is merely rhetorical and masks the language that emerges in references to presenting an "argument," a "hypothetical description," a "philosophical exploration," and a "justification." Explanation gives way to moral *justification* in Nozick's work. It is an attempt to produce adequate reasons or grounds for believing certain assertions about the state, and, one hopes, about politics. Approaching the theory from this angle, one can then see that Nozick's version of explanation functions to exclude certain undesirable features of social contract theory, even the version approved by Locke. That is to say, the account of explanation is not trivial, only sophistical. It must be included because Nozick wants to rule out certain ideas about human sociability and politics, particularly the vision of the political realm as a "constructed" sphere of action, dependent on cultivating norms appropriate for a *res publica*. Some might even say that he wants to rule out politics altogether.

### ECONOMIZING POLITICS

The most important consequence of attempting to justify the minimal state and explain politics in the aforementioned manner is the wholesale introduction into political theory of an economic vocabulary and perspective. Recalling Hempel's fourth condition for adequate explanation,<sup>35</sup> it will be evident that the language constituting the explanans, and the perspective adopted there, must infiltrate the explanandum in order for logical deduction to occur. The latter cannot be quarantined, but is necessarily infected by the explanatory starting point. Thus, to attempt a fundamental explanation, a justification, of the political realm in nonpolitical terms, is to depoliticize the political realm itself. When the nonpolitical language is economic, as is true in the present case, then political action and relationships will look like economic transactions, to be understood in the marketplace terminology of supply and demand, costs and benefits, losses and gains. Political thinking recedes behind the pecuniary rationality of *homo economicus*.

Borrowing this metaphor from "exchange theory" requires a point-by-point translation of political into economic concepts: The citizen becomes a client, a buyer and seller; the statesman finds himself described as a business executive or an entrepreneur; the state is simply

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35. See text & note 28 *supra*.

a "protective agency," about as winsome as any enterprise governed by the profit motive. Locke's idea of individual consent to be governed means nothing more than "a process whereby individuals in an area separately sign up for personal protection with different business enterprises which provide protective services."<sup>36</sup> The categories for theorizing are appropriately altered as well: liability insurance, protection policies, guarantees, compensation, risk, floating debts, free riders, boundary crossings, exchange prices, package deals, transaction costs, holdings, assets, and so on. Such categories figure prominently in Nozick's attempts to solve the political problems of obligation, membership, liberty, equality, justice, and the like. In this kind of analysis the images of early capitalist economic life, always implicit in contractual thought, are finally carried to their logical extreme.

This kind of theorizing is replete with analogy and metaphor, and is guided by them. Clearly the relevant question to ask is not whether it is correct or incorrect, but rather what are its consequences for understanding politics. My contention that this type of theorizing is unenlightening and pernicious is demonstrated by its implications for moral theory. A consideration of moral problems is important, since Nozick contends: "Moral philosophy sets the background for, and boundaries of, political philosophy."<sup>37</sup> Moral theory actually has priority in these political discussions. However, if one looks behind this confident assertion to the language of Nozick's moral theory, one discovers that it consists of economic terms, calculations, categories, and assumptions. Moral discourse is suffused with cost-benefit analysis. Thus, even in the realm of morality, all values carry a price tag. If moral theory means "the attempt to describe our moral capacity . . . or . . . our sense of justice,"<sup>38</sup> I seriously doubt that Nozick's metaphors can keep from doing violence to our language and convictions. If all human acts, relations, and qualities are commodities, how can one possibly observe the Kantian ethic, approved by Nozick, of treating people as ends, never as means? Is it so surprising that in Nozick's "utopia," individuals may sell themselves into slavery?<sup>39</sup> Is it a jest, or is this plainly a case of "the bewitchment of our intelligence by means of language"?<sup>40</sup>

Turning to politics itself, one is tempted to reply to such extravagance with Burke's celebrated protest that "the state ought not to be

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36. See R. NOZICK, *supra* note 1, at 132.

37. *Id.* at 6.

38. J. RAWLS, *A THEORY OF JUSTICE* 46 (1971).

39. See R. NOZICK, *supra* note 1, at 331.

40. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 109 (G. Anscombe ed. 1968).

considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco . . . to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties."<sup>41</sup> The political identity of a society is at stake in criticisms like this one. No one would deny that individualistic, egocentric, acquisitive motives can be found in human associations, but a strong complaint should be registered when this form of rationality is interpreted as the whole of political rationality. Something is lost on both sides of the analogy: Elements of community, shared norms, and public commitments are omitted from politics, while the most vicious aspects of exploitation, manipulation, and coercion are left out of the idealized economic relationships.

The asocial and apolitical implications of all of this should be obvious.<sup>42</sup> In Nozick's *Weltanschauung* or world view, they are certainly far-reaching. For instance, the radically atomistic premises simply rule out any concept of social or public interest: "[T]here is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives."<sup>43</sup> Correspondingly, Locke's idea of a "social compact" is eliminated, together with his derivative language for describing political society as a single unified body; language describing law as "a standing Rule to live by, common to every one of that Society";<sup>44</sup> and language describing majority rule as "the act of the whole, and of course determin[ing], as having by the Law of Nature and Reason, the power of the whole."<sup>45</sup> Although Locke wins high praise initially, Nozick systematically denies his *political* arguments, tempting us instead to think that the political state "exists *within* a state of nature and hence is compatible with [it]."<sup>46</sup> Thus, political man, seduced by gentle nature, finds his corruption complete. This is instructive because we now can account not only for corruption's rationality, but also for rationality's corruption. Of course, Locke reasoned that the "compact" and its politi-

41. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 101 (T. Mahoney ed. 1955).

42. See K. Johnson, *Government by Insurance Company: The Antipolitical Philosophy of Robert Nozick*, 29 W. POLITICAL Q. 177-88 (1971); Spitz, *Justice for Sale*, DISSENT 72-89 (Winter 1976); Wolin, Book Review, N.Y. Times, May 11, 1975, at 30-32 (Book Review section).

43. R. NOZICK, *supra* note 1, at 32-33. Although certainly unintended by the author, passages like this remind one of Rousseau's presocial man, described as "satisfying his hunger under an oak, quenching his thirst at the first stream, finding his bed at the foot of the same tree that furnished his meal; and therewith his needs are satisfied." J. ROUSSEAU, DISCOURSE ON THE ORIGIN OF INEQUALITY 105 (R. Masters ed. 1964). Is there reason to believe that Nozick's individual has any needs that extend beyond the self? Does he need society at all?

44. J. LOCKE, *supra* note 14, § 22.

45. *Id.* at § 96.

46. R. NOZICK, *supra* note 1, at 133 (emphasis added).

cal effects were indispensable for completing our knowledge of political society. It took an American writer, socialized into the values of possessive individualism, to imagine otherwise.<sup>47</sup>

These apolitical impulses are woven through Nozick's book, and examples of them could be multiplied at will. Nozick displays a naive, undernourished comprehension of the social background and support for certain practices, such as specialized education in medicine, law, and science.<sup>48</sup> A normal understanding of individual feelings is also distorted, as when self-esteem is treated as a kind of capitalized snobbery, which cannot be shared, rather than as a sense of human dignity and worth.<sup>49</sup> When questions about social cooperation are broached, they lead to a disjointed discussion of how cooperation *creates* the problem of distributive justice.<sup>50</sup> Finally, it becomes impossible to give any adequate conception of political legitimacy and obligation. In one memorable passage, for example, Nozick explains that the "dominant protective agency" is like a restaurant that we patronize, and should be treated to the same practical expectations.<sup>51</sup>

Similar arguments always appear in Nozick's work when the abstract, single, isolated ego is confronted with the surrounding *Lebenswelt* of others. As Carlyle predicted long ago, the inevitable terminus of the egoistic premise, untempered by even a Lockian commonality, is an association characterized by "anarchy plus a constable."<sup>52</sup> He was referring to the anarchy of production and consumption, sheltered from knowledge of its inhuman excesses by a nightwatchman enforcer. Students of social Darwinism will quickly identify the import of these views. The nineteenth century may have found them natural enough, but I should like to think that today we have learned the danger of awarding individuals "rights against humanity."<sup>53</sup>

As much as we may object to this impoverished public philosophy, perhaps one contribution we can expect from it is a more precise isolation of the inadequacies and question-begging assumptions in economic theory. The model of perfect competition, the ideal non-exploitative exchange process, the assumption of individual ownership, and the expectation for rational control and innovation by compas-

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47. The idea of "possessive individualism" is taken from C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263-64 (1962). See also C. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* (1973).

48. R. NOZICK, *supra* note 1, at 234.

49. See *id.* at 240-44.

50. See *id.* at 185.

51. See *id.* at 134.

52. T. Carlyle, *The French Revolution, A History*, in *WORKS* (1969).

53. See Lyons, *Rights Against Humanity*, 85 *PHILOSOPHICAL REV.* 208-15 (1976).

ate captains of industry are all a part of the mystification of politics—and economics. The actual development of “free enterprise” in America plays a miniscule role in this storybook tale of progress and success à la Horatio Alger.<sup>54</sup> When all of the philosophical proprieties are untangled, Nozick seems to be saying that “if only the political condition were like *that* old myth, how admirable it would be.” Having pushed the economic imagery for this “justification” to the foreground, we can see how glaring its defects are and how fruitless the depoliticized language actually is.

### THE USES OF “GAME THEORY”

It is a short step from the assumptions about rationality in economic theory to the mathematical manipulations of so-called “game theory.” The logic of games can be considered useful in Nozick’s arsenal of techniques because it is also capable of viewing politics as a realm constituted by market generated preferences, and its individualistic assumptions can closely approximate the Nozickian “state of nature.” Furthermore, applications here hold out the usual promise of a defense of the “minimal state” that is precise, parsimonious, and incontestable because mathematically grounded.

In the clearest specification of this new and popular technique, we are invited to view the relationship between two individuals in the state of nature. After various qualifications are made, it is suggested that they are confronted with a choice between two alternatives: to join a protective association (a political society) and prevent the other person from joining another like association; or not to join this association, but allow the other person to do so.<sup>55</sup> The situation is a two person, non-zero-sum, noncooperative game (the so-called “prisoners’ dilemma”), and can be expressed in the following form:<sup>56</sup>

		Person II	
		$a'$	$b'$
Person I	$a$	5, 5	10, 0
	$b$	0, 10	$x, x$

Nozick deliberately leaves an undefined value in the matrix in order

54. For an especially revealing example of Nozick’s naivete, see Nozick, *Free Enterprise in America*, BRITANNICA BOOK OF THE YEAR 14-16 (1976).

55. See R. NOZICK, *supra* note 1, at 120-25.

56. That is, one assumes the game is played by two persons, unable to communicate with each other and reveal their choices, yet compelled to adopt a strategy that will maximize their individual interests. But the two players’ interests are not absolutely, diametrically opposed: A “victory” for player I does not necessarily mean a “defeat” for player II. The numerical values assigned to each strategy show that there are some shared interests.

to maximize interpretative options. If  $x$  equals 1, for instance, we end up with political society; if, however, its value is 8, individuals should rationally choose the state of nature.

What is important here is not so much what Nozick says about this technique, but rather what he fails to say. The free-floating  $x$  value tends to obfuscate the dilemma of rational choice that this game is designed to clarify. The true prisoners' dilemma situation should be represented as follows:

	Person II		
Person I	$a$ (not confess)	$a'$ (not confess)	$b'$ (confess)
	$b$ (confess)	2, 2 1, 10	10, 1 6, 6

Stated in this form (with numbers standing for years of punishment), it becomes quite clear that action which appears rational from an egoistic point of view, such as the tendency to confess in order to receive a 1 year sentence, actually produces a more detrimental overall result of 6 years punishment for both prisoners. Self-seeking will lead to the worst possible situation. Both individuals would be better-off not confessing, but of course this will require cooperation and agreement (a compact) and an agency for promoting and enforcing a fair resolution of conflicting interests (the state). The game accordingly will justify intervention by political devices and institutions.

Thus, the prisoners' dilemma, properly understood, illustrates the disparity between individual, egoistic rationality and collective, cooperative rationality. It identifies a non-Nozickian case in which egoistic choice is irrational, in which the virtues of sacrifice (2 years rather than 1) become apparent. This is a serious anomaly for Nozick's attempted justification. Here collective rationality rather than individual rationality obviously fulfills the condition of pareto optimality (making everyone better-off), thereby justifying concepts like public interest, common good, and general will—not to mention the state itself. Such conclusions must have an unsettling effect on Nozick's argument.

Several replies can be put forward at this point. One might suppose that even though a state can be seen to result from this game, it is still only an enforcer of specified rules and is in no way different from Nozick's nightwatchman state. However, as Runciman and Sen have demonstrated, the prisoners' dilemma will easily lead to a Rousseauian solution to the problem of rational egoism.<sup>57</sup> That is, it

57. See Runciman & Sen, *Games, Justice and the General Will*, 74 *Mind* 554-62 (1965).

is able to justify the rationality not merely of a summation of prudent self-interested calculations, as favored by Locke, but of a general will which in Rousseau's words "is always right and tends to the public advantage."<sup>58</sup> It makes sense out of Rousseau's contention that the individual who acts irrationally, who by confessing destroys overall social benefits, should necessarily "be forced to be free."<sup>59</sup> According to the message of this game, citizens will self-consciously and consistently act so as to promote common interests. More precisely, individuals' commitments will merge with those of the state—an outcome that Nozick would view with alarm.

Nozick may have misread the implications of the prisoners' dilemma game, but frankly this is quite irrelevant to the larger issue of the technique's value for political theory. As with exchange theory, the game technique's success depends on its capacity to restate in different terms something we have known all along. The question to ask is whether such a restatement is worthwhile, or, forgetting philosophical manners: So what? In my judgment, its contribution is marginal, and I find it a poor substitute for theorizing about politics. A great deal is already known about the liabilities of Nozick's premises about rationality from other theories; this new technique simply provides another tool for boring into them. Without the technique we could still confront Locke with Rousseau, or Locke with himself, as has been done in this Article, and our understanding would prosper.

#### RECOMMENDATION AND UTOPIA

Most theories of politics that appeal to a large audience and are remembered as significant achievements try to do more than explain and justify; they attempt to recommend a course of action. The link between theory and action, which is encouraged by Marx, is nowhere more apparent. It avoids particular concerns over possible distinctions between "is" and "ought," description and prescription, facts and norms. Nozick is to be commended for sidestepping the quagmire of these issues and instead telling us what we *should* do about the modern Leviathan. However, in setting forth "the minimal state as the end of political philosophy,"<sup>60</sup> he appears fearful that his work will be classified as just another libertarian tract spilling out moral intuitions for public inspection. Therefore, Nozick's views eventually take the form of a tale about *demoktesis* (ownership by the people) and an explication

58. J. ROUSSEAU, *THE SOCIAL CONTRACT* 26 (G. Cole ed. 1950).

59. *Id.* at 18.

60. R. NOZICK, *supra* note 1, at 297.

of a desirable "framework for utopia." Finding these accounts somewhat whimsical, I am gratified by his straightforward admission: "What I say in this book is, I think, correct."<sup>61</sup>

Accepting this conviction at face value, Nozick's recommendations can then be understood in two ways. First of all, there is the attempt to proselytize, answering the question whether the minimal state can "thrill the heart or inspire people to struggle or sacrifice? Would anyone man barricades under its banner?"<sup>62</sup> Ideological inspiration is needed, and Nozick is certain that it can be found. He believes that the minimal state will yield the "best of all possible worlds,"<sup>63</sup> which seems to imply that it will permit the operation of a "free enterprise" system which will be productive, beneficial, and just. As Nozick has stated: "Governments have no moral right to prohibit capitalist acts between consenting adults."<sup>64</sup> Furthermore, he suggests that free men and women in a free society owe only minimal duties to each other. The essence of this view is captured in W. G. Sumner's blunt remark: "Every man and woman in society has one big duty. That is, to take care of his or her own self."<sup>65</sup>

Our historical memory and moral intelligence should be sufficiently alive to grasp the grotesque character of such inspirational counsel. However, remaining consistent with the purposes of this Article, I reluctantly pass over the polemical possibilities here and accordingly turn to the utopian device that Nozick chooses as intellectual support for this exercise in political suasion. Utopian ideas enter the picture because they promise to motivate action and Nozick believes that a framework for utopia can be articulated which "is equivalent to the minimal state."<sup>66</sup> The framework restates previous arguments, but in more recommendatory guise.

Short of completely repudiating utopianism, as many theorists have, it is important to inquire into the particular version of utopia advocated by Nozick. What is the theoretical status of his framework? Two particular forms of utopia should be mentioned from among the many variations within this tradition of theorizing. One group of

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61. *Id.* at xiii.

62. *Id.* at 297 (footnote omitted).

63. *See id.* at 298, 332.

64. Nozick, *supra* note 54, at 16.

65. Sumner, *What Social Classes Owe to Each Other* in DIRECTIONS IN AMERICAN POLITICAL THOUGHT 239 (Dolbeare ed. 1969). Nozick's ideological intentions and his failure to control the political consequences of his reasoning encourage the critic to associate his message with writers like Sumner, or more recently with the spirit of Richard Nixon's admonition: "Ask not just what will government do for me, but what can I do for myself." (Inaugural Address by President Richard M. Nixon (Jan. 21, 1973)).

66. R. Nozick, *supra* note 1, at 333.



writers has projected current social, industrial, technological, and scientific trends, thus imagining a possible future world in which selected aspects of the present are pushed to a logical extreme. Bellamy followed this approach in *Looking Backward*,<sup>67</sup> an immensely successful work that spawned a large cult of followers and contributed to the growth of Populism in the 1890's. Other theorists have emphasized the critical function of utopian thought and have focused their attention on a dissection of practical problems, to which utopia provides a rational response. Theorizing unmasks the pretensions, absurdities, and evils of the world; it exposes social reality and its alleged trends, often in vehement terms. In one special sense, More's *Utopia*<sup>68</sup> belongs here, for although its main plot is inspired by a "dispenser of nonsense," it begins with a sharp attack on the evils of enclosure and the injustices of the English criminal code.<sup>69</sup> Recently, more apt examples may be found in the writings of Fromm<sup>70</sup> and Marcuse.<sup>71</sup>

A different classification is necessary for Nozick's utopia. Unlike the two other forms, the trends of modernity threaten to render it obsolete, and aside from a generalized antipathy toward more extensive modern states, Nozick's framework contains no sustained political criticism. It is a "fantasy."<sup>72</sup> One might add that it is at least a consistent fantasy, spun out with the precision of symbolic logic. It permits not only variety and change, but a panoply of possible communities, value systems, styles of life, and so forth. Unfortunately, it is about as realizable as the land of Oz.

Of course, no utopia is fully realizable. Nevertheless, in this tradition of theorizing, matters of degree are important. The basic question is always: What is the relationship between political reality and the utopian form of thought? Nozick is alert to this question and proposes a levelheaded answer. He argues that to conceive of the utopian framework as a fantasy is relevant to actual experience, giving the following justification:

One cannot know how satisfied we shall be with what we achieve among our feasible alternatives without knowing how far they diverge from our fantasied wishes: and it is only by bringing such wishes, and their force, into the picture that we shall under-

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67. E. BELLAMY, *LOOKING BACKWARD* (1887).

68. T. MORE, *UTOPIA* (E. Surtz ed. 1964).

69. *Id.* at 20.

70. See E. FROMM, *THE REVOLUTION OF HOPE* (1968); E. FROMM, *THE SANE SOCIETY* (1955).

71. See H. MARCUSE, *AN ESSAY ON LIBERATION* (1969); H. MARCUSE, *ONE-DIMENSIONAL MAN* (1964).

72. See R. NOZICK, *supra* note 1, at 307-08.

stand people's efforts toward expanding the range of their currently feasible alternatives.<sup>73</sup>

This is a serious reply, albeit a vague and uncertain one. It suggests that political action is a matter of expressing desires rather than interests, ideals, or public commitments. But what *are* our "fantasied wishes"? Nozick opts for the pluralist solution: Everything counts. If this is the case, it becomes impossible to measure the gap between the feasible and the desirable in any politically relevant way. The central difficulty with this aspect of Nozick's recommendations is not so much that it is utopian in some sense, but that it draws upon the most feeble, vulnerable, and useless of the utopian forms. Nozick's framework for utopia is a pipe dream; a chimerical indulgence. As the word itself suggests, this vision of utopia leads nowhere.

### CONCLUSION

Many would agree that the modern American state presents us with a crisis. Too often in recent years bureaucratic control has destroyed public accountability. Corruption and deceit have invaded institutions, expedient rationalizations have subverted human rights and civil liberties, and disillusionment and violence have displaced political action. In the face of these challenges our public responses have often been alarmingly timid and haphazard. Because of the enormous range of powers at the government's command, and the seeming impotence of its citizenry, this crisis may well be unprecedented in American experience.

Political theorists typically leap to action at the moment of crisis, treating it as an opportunity for theorizing. Nozick is no exception: He has designs on our minds and bodies, our words and deeds. But there is something distinctly odd about his summons, even something missing from it. By contesting conventional wisdom about the liberal, bureaucratic state, Nozick's theory *appears* critical and seems to be in tune with our most searching and acute political analysis. In actuality, however, the choices made about the nature of theory are firmly embedded in the most hidebound Lockeanism, and the source of Nozick's substantive ideas is a thoroughly regressive set of principles. Once we understand the function of the disarming transposition of language in this work, it becomes impossible to avoid the eerie feeling that the clock has been turned backward. Confining our attention to the American

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73. *Id.* at 308.

tradition, it is as though Croly,<sup>74</sup> Beard,<sup>75</sup> Veblen,<sup>76</sup> and Dewey<sup>77</sup> never wrote, as though social and political development from the period of President Wilson onward has suddenly disappeared. Instead of giving us theoretical guidance for assessing political experience in this century, Nozick's approach invites us to forget. Failing to educate politically, it can only allow us to repeat our mistakes.

The best way to insure that the worst excesses of the modern bureaucratic state are not contested and rectified is to resort to inappropriate techniques, misleading metaphors, and utopian alternatives that are bizarre, simplistic, and silly. This kind of theorizing will guarantee the denigration and eventually the denial of political problems that are in fact exceedingly serious and momentous. We now need philosophically informed criticism plus political knowledge. Other recent work, such as that of Rawls<sup>78</sup> or, from a quite different intellectual perspective, Hannah Arendt,<sup>79</sup> has forged this combination. Lamentably, Nozick has not. More thought about these problems is vital, but I should expect that Nozick's proposal for political theory will remain, like Locke's misguided citizen, more tolerated than imitated.

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74. H. CROLY, *THE PROMISE OF AMERICAN LIFE* (1909).

75. C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

76. T. VEBLEN, *THE THEORY OF THE LEISURE CLASS* (1899).

77. J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

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

79. See H. ARENDT, *CRISES OF THE REPUBLIC* (1972); H. ARENDT, *THE HUMAN CONDITION* (1958).