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Robert Nozick and the Libertarian Paradox

JOHN R. DANLEY

Is there a paradox at the heart of libertarianism? Robert Nozick is not only convinced that there is one, at least *prima facie*, but devotes almost two chapters in *Anarchy, State, and Utopia*¹ to resolving the apparent difficulty. Geoffrey Sampson,² however, following the more traditional defence of libertarianism ('political liberalism') developed by F. A. Hayek,³ charges that Nozick does a poor job of solving a problem which does not even exist. According to Sampson, there is no paradox.

Is there a paradox at the heart of libertarianism? The question is of more than merely academic interest for those who, like myself, are not numbered among the libertarian ranks, because the issue revolves around the justification and construal of the harm principle, i.e., a principle central to social-political philosophy in general. Consequently, I would like to explore this issue in some detail. Analysis reveals that, indeed, there is a serious problem for the libertarian.

I

Sampson is convinced that Nozick commits a 'serious error' which, he fears, might be used as ammunition by critics of libertarianism. The 'serious error' is Nozick's claim that there is a *prima facie* paradox inherent in classical liberal theory. Nozick's error lies not merely in the fact that his argument to overcome the paradox fails, Sampson alleges, but in the belief that there is a problem to solve at all.

If Nozick's argument were necessary in order to rescue liberalism from paradox, then liberalism would certainly stand condemned. But it is not necessary. Nozick's claim that the classical liberal state is *prima facie* redistributive is simply false (*ibid.* p. 95).

How could Nozick be so fundamentally mistaken? I think that he is not. As Nozick sees it the paradox involves the libertarian stand on redistribution and the nature of the night-watchman state. On the one hand the libertarian accepts the idea that no one, no state, has a moral right to enforce a redistribution of wealth or property. Yet, on the other hand, even the night-watchman state appears redistributive in so far as that state provides protective services for everyone within its territory through a general tax. Not only is that paradoxical but it appears to begin the slide down the slippery slope to the welfare state. If the state can force individuals to pay for a security system which benefits all, why not

1 Basic Books: New York, 1974.

2 'Liberalism and Nozick's "Minimal State"', *Mind*, lxxxvii, no. 345 (January, 1978), 93-97.

3 *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).

institute taxes for nationalized medicine, welfare payments, etc.? That, of course, is anathema. Nozick puts the problem in this way:

[The] proponents [of libertarianism] must explain why this redistributive function of the state is unique. If some redistribution is legitimate in order to protect everyone, why is redistribution not legitimate for other attractive and desirable purposes as well? What rationale specifically selects protective services as the sole subject of legitimate redistributive activities? (*Anarchy, State and Utopia*, p. 27).

The connection with the harm principle can be demonstrated by recalling the reason offered by libertarians for the stance against any redistributive function of the state. For them the central moral consideration is what Nozick refers to as the 'libertarian constraint'. According to this idea, one is free to do anything with one's life, liberty, health, property and possessions, as long as one does not harm another in their life, liberty, health, property and possessions (without their consent). Coercion in this scheme can be justified only for the prevention of harm (or to compensate or punish an individual who has harmed another).

This is but another way of saying that the harm principle defines the scope of justified coercion by the state (or by anyone). Crucial to the principle is the harm/non-benefit distinction. There are a number of ways, for example, that Jones can act with respect to Smith. He could give Smith the money for that extra car which would make Smith happy, i.e., benefit him. He could withhold the money and spend it upon himself. In this case Jones is merely failing to benefit Smith, an instance of non-benefiting. Jones is free, according to the harm principle, to do either. He cannot be coerced to do either. Jones is not free to break into Smith's home and steal the money however. That is an instance of harm.

A further distinction is usually drawn between the private and public versions of the harm principle. Although difficult to capture, the distinction is important. Feinberg draws the distinction¹ so that the private harm principle could justify 'restriction of one person's liberty to prevent injury to other specific individuals'. Restriction is justified only when one poses a clear and present danger of harm to a specific individual. The public harm principle, however, is invoked 'to justify coercion on the distinct ground that it is necessary to prevent impairment of institutional practices that are in the public interest'.

That the private harm principle states at least one of the acceptable conditions for coercion is, as Feinberg notes, 'virtually beyond controversy'. The principle makes criminal such conduct as wilful homicide, assault and battery, and robbery, to mention only a few. But what of things like tax evasion or smuggling? These might not injure any specific individual except in so far as the practice tended to weaken public institutions designed to protect the public interest. These kinds of

1 Joel Feinberg, *Social Philosophy* (Prentice-Hall: Englewood Cliffs, New Jersey, 1973), p. 25.

things cannot be prohibited by the private harm principle but could in many instances be prohibited by appeal to the public harm principle.

What makes Nozick's argument for a minimal state interesting, unusual and difficult, is his rejection of the public harm principle. Indeed, without appealing to that principle, it is extremely difficult to see how one can justify the extension of protective services to everyone within a territory, as in the night-watchman state. The difficulty can be seen by considering the following situation. Suppose a number of individuals have joined together freely for protection against those who might violate their rights. These individuals form some sort of protective system and each pays for the service. Why should these individuals pay to provide protective services for those independents located within the general territory of the protective service system? That is precisely what advocates of the night-watchman state would have them do.

Given only the private harm principle, the use of coercion to force the members to pay for protection of the independents does appear, at least *prima facie*, to be unjustified. That is the paradox Nozick sees. By not providing protection to the independents, it can be argued, one is not harming them; one is merely failing to benefit them. That is Nozick's argument when he writes that 'not providing the independents' with things they 'need greatly', protective services for example, 'does not itself violate . . . rights, even though it avoids making it more difficult for someone else to violate them (*ibid.* p. 30). In short, not extending protection merely fails to benefit them—it does not harm them. Since it harms no one, by the private harm principle one cannot be forced justifiably into providing protection for them.

This explains, then, why the night-watchman state appears paradoxical. But it is also possible now to understand why that situation does not appear paradoxical to others, like Sampson and Hayek. The extension of services through taxation is justified in their eyes by the public harm principle. It is granted that the extension will benefit independents, but beneficence is not the justification for the extension. The extension is 'justified in terms of protecting the market as a whole, rather than the several participant in the market' (Sampson, p. 95). Or, as Sampson puts it later, failure to provide protection against murder, for example, might encourage murder, thereby reducing every citizen's security. Not providing medical care, it is claimed, does not similarly damage the public interest.

It is tempting to conclude at this point that both Nozick and his critic are correct, although operating at different levels. By rejecting the public harm principle a paradox does arise for Nozick. By adopting the public harm principle, indeed, that paradox does not arise. Such a conclusion, however, fails to come to grips with the more fundamental issue of whether the public harm principle is itself morally justified, or at least whether it is an attractive principle for a libertarian.

Theorists like Hayek and Sampson would at this juncture probably appeal to some kind of utilitarianism in an attempt to justify both versions of the harm principle. As a natural rights theorist who begins with only the libertarian constraint, and the right of compensation and punishment,

Nozick has no moral foundation upon which to erect the public harm principle. He attempts instead to develop the more modest *principle of compensation* which he believes will justify extension of services to independents but on grounds distinct from the public harm principle.¹ Thus, it might be attractive to conclude that the paradox perceived by Nozick is a function of his particular deontological framework, and that within an alternative framework, say that of utilitarianism, the paradox does not arise because it is possible to justify the public version of the principle. This may ultimately be the case, but again it will be wise to look deeper, for the public harm principle itself gives rise to paradox.

II

Nozick's rejection of the public harm principle is not solely a consequence of his very narrow construal of natural rights. Independent reasons are suggested in *Anarchy, State, and Utopia*. There Nozick demonstrates that the acceptance of the public version likewise creates an apparent paradox. Adoption of both versions yields results inconsistent with one another. This is evident in Nozick's treatment of the problem associated with risky actions, like those involving epileptic drivers.

The threat posed to me (or to any specific individual) by an individual epileptic driver is relatively insignificant. Not constituting a clear and present danger of harm, one cannot, by appeal to the private harm principle, justifiably prohibit the epileptic from driving. But this consequence has unattractive features. If a significant number of epileptics are on our streets and highways, then the threat of harm increases proportionally to such a degree that when the number of drivers reaches say, n , then I am confronted with a clear and present danger. Note that no particular driver constitutes the threat but that the totality of such drivers does so.

Situations like these, in which the private version remains inapplicable, have supported the intuition that the adoption of the public harm principle is certainly desirable. The situation is very analogous to that one alluded to earlier involving murderers being allowed to prey upon independents. One might argue that the public interest here would best be served by banning epileptics from driving. But the consequences are worth examining. The ban on driving imposes a real burden upon the epileptic. The epileptic is made much worse off and, in many cases in which alternative modes of equally convenient transportation are not available at comparable cost, he is seriously harmed. Thus, the public harm principle appears too strong for any libertarian since it justifies harming particular individuals who do not themselves constitute any clear and present threat of immediate harm. That is contradictory to the fact that according to the private principle one has a duty not to harm. Hence, the attempt to save the private harm principle by supplementing it, results in its usurpation.

This is the paradox which Nozick avoids by refusing to endorse that

1 Further, Nozick believes this constitutes a rationale for extending protective services which does not actually involve redistribution.

principle. The point is not that the paradox is irresolvable, but only that there is at least as much of a problem here as there is when one chooses Nozick's alternative. Here one must tidy up what has become an unwieldy theoretical admixture. For instance, in situations of conflict, which of the two versions of the principle should take precedence? Do these theorists propose some kind of lexical ordering of the principles? Should the utilitarian libertarian opt for that version of the principle which maximizes value in that situation?

There are at least two reasons which suggest that theorists like Hayek can not adequately resolve the paradox. The first has to do with the anti-rationalistic argument which plays such a prominent role in Hayek's conventional utilitarianism. That argument is directed primarily against reformist minded utilitarians who would replace conventional moral rules with ones which would better serve to maximize utility. The claim by the anti-rationalist is that society is so very complicated that with our limited knowledge we are not capable of adequately assessing the consequences of proposed reforms.¹ But, if this is the case, then it would also be impossible to determine now which of the two versions of the harm principle would maximize utility in any given situation of conflict.² Furthermore, the conventional bias should favour selection of the private principle whenever there was any doubt. It is after all much more difficult to assess the consequences of a general rule, say banning epileptics, than it is to determine whether any particular individual constitutes a clear and present danger of harm.

Secondly, one might plausibly argue that the adoption of the public version of the principle constitutes a dramatic step away from the kind of free society envisioned by the libertarian. The public version is potentially very restrictive given the enormous number of risky activities which might justifiably be banned under the public harm principle.³

Thus, it is at least doubtful that theorists like Hayek or Sampson can readily overcome this difficulty. If that is so, then Nozick can hardly be criticized by his fellow libertarians for rejecting one difficulty while wrestling with another. There is in any case a paradox at heart of the matter. Nozick has merely taken the bull by the other horn.

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- 1 '(The) case for individual freedom rests chiefly on the recognition of the inevitable ignorance of all of us concerning a great many of the factors on which the achievement of our ends and welfare depends' (Hayek, p. 29).
- 2 'Only the eventual results can show whether the ideals which guide a group are beneficial or destructive' (Hayek, p. 67).
- 3 Feinberg interprets Patrick Devlin's case in *The Enforcement of Morals* (Oxford University Press: London, 1965) as resting, at least in part, on the public harm principle. If this is correct then Nozick's concern about the potentially repressive nature of the principle is further supported. One might respond, however, in defence of the public harm principle, that Devlin has erred in his assessment of effects of attempting to legislate against homosexuality. For example, one might claim that such legislation would actually cause more harm than not having any. This response, however, concedes the earlier point, i.e., that it is more difficult to assess public harm and the effects of general rules and laws, than particular instances of clear and present danger to individuals.