

5-1-1998

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Mark S. Stein

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Suggested Citation

Mark S. Stein, Nozick: A Utilitarian Reformulation, 18 N. Ill. U. L. Rev. 339 (1998).

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Nozick: A Utilitarian Reformulation

MARK S. STEIN*

I. INTRODUCTION

Robert Nozick's *Anarchy, State, and Utopia*¹ is a forceful libertarian polemic against income redistribution.² One striking aspect of this famous book is that it purports to rely not at all on considerations of social utility.³ I will contend, however, that Nozick's polemic can usefully be seen as a utilitarian response to arguments for redistribution, and in particular as a utilitarian response to the utilitarian case for redistribution.⁴

The utilitarian case for redistribution is founded on the diminishing marginal utility of money.⁵ The poor, it is argued, need money more than the rich do. Moreover, it is claimed, the poor gain more in well-being from redistribution than the rich lose.⁶ Therefore, redistribution increases aggregate well-being, at least up to a point.⁷

* Ph.D. Candidate, Yale University, Department of Political Science. J.D., 1983, University of Michigan.

1. Robert Nozick, *ANARCHY, STATE, AND UTOPIA* (1974).

2. Nozick, like his fellow political philosophers Rawls and Dworkin, has had a significant impact on the legal academy. See, e.g., Donna M. Byrne, *Progressive Taxation Revisited*, 37 *Ariz. L. Rev.* 739, 782-86 (1995); John Stick, *Turning Rawls into Nozick and Back Again*, 81 *Nw. U. L. Rev.* 363 (1987); Richard A. Posner, *Utilitarianism, Economics and Legal Theory* 8 *J. LEGAL STUD.* 103, 131 (1979).

3. Indeed, in responding to Richard Epstein's claim that natural-rights theories owe a considerable debt to utilitarianism, Erick Mack has pointed to Nozick as a theoretician who owes little if anything to utilitarianism. See Erick Mack, *Comment: A Costly Road to Utilitarianism*, 12 *Harv. J.L. & Pub. Pol'y* 753, 755 (1989); Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 *Harv. J.L. & PUB. POL'Y* 713 (1989).

4. Utilitarianism seeks to maximize the aggregate well-being or happiness in society. For a fuller definition of utilitarianism, from one of its most astute critics, see Amartya Sen, *ON ETHICS AND ECONOMICS* 39 (1987).

5. For a classic modern statement of this case, see Abba P. Lerner, *THE ECONOMICS OF CONTROL* 26-32 (1944).

6. Some have denied that money has diminishing marginal utility. See Walter J. Blum & Harry Kalven Jr., *The Uneasy Case for Progressive Taxation*, 19 *U. Chi. L. Rev.* 417 (1952). I do not find this position persuasive. See Mark S. Stein, *Diminishing Marginal Utility of Income and Progressive Taxation: A Critique of the Uneasy Case*, 12 *N. Ill. U. L. Rev.* 373 (1992).

7. The negative incentive effects of redistribution must also be considered, such as its effect on the work effort of both poor and rich.

This essay discusses the means by which Nozick implicitly denies the conclusion that redistribution increases aggregate well-being. Part I shows how Nozick exaggerates the burden that redistribution places on the rich. Part II shows how he minimizes the needs of the poor, and further minimizes the suffering his system could cause.⁸ Part III compares Nozick's implicit utilitarian arguments against redistribution with Jeremy Bentham's explicit reservations about redistribution.

Of course, Nozick is not a utilitarian. He would object to redistribution even if it relieved enormous suffering among the poor and imposed only the most negligible of burdens on the rich. But Nozick does not describe redistribution in these terms, even hypothetically. He describes it instead as immensely burdensome and as not providing very great benefits. He thus tries to enlist utilitarian sentiments in support of his polemic, even while abjuring and indeed attacking utilitarianism.⁹

It is a tired conceit of philosophers that the views of others must implicitly conform to their own views in order to have any appeal.¹⁰ As I will be indulging this conceit with respect to Nozick and my own utilitarian views, I should perhaps offer something by way of justification. First, Nozick does not tell us the origin of the stringent rights on which he relies; he admits in his preface that he "does not present a precise theory of the moral basis of individual rights."¹¹ The closest Nozick comes to a statement of the origin of rights is a brief and vague passage in which he suggests that constraints against ill-treatment are "connected with that elusive and difficult notion: the meaning of life."¹² Nozick's failure to tell us the origin of his rights opens the door somewhat to an argument that the appeal of those rights is ultimately based on considerations of aggregate well-being.

8. The world is not divided into rich and poor, but this essay is so divided, for the sake of simplicity.

9. Interestingly, Nozick makes scant reference to the negative incentive effects of redistribution. His implicit utilitarian repudiation of redistribution is more fundamental.

10. Dworkin has previously claimed that Nozick's theory has intuitive appeal only to the extent that it approximates Dworkin's own conception of equality of resources. See Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. AND PUBLIC AFFAIRS 283, 336 (1981). But Dworkin offers little more than bald assertion in support of his claim. I will try to offer arguments in support of mine.

11. NOZICK, *supra* note 1, at xiv.

12. *Id.* at 50. If Nozick means here that rights exist because they serve or promote meaningful lives, his argument is unpersuasive: will the rich be unable to lead meaningful lives if some part of their superfluities are redistributed to the poor? And if Nozick does not mean that rights serve or promote meaningful lives, it is unclear how the capacity to live a meaningful life generates rights.

Second, Nozick himself is willing to look behind the explicit arguments of his opponents. Nozick claims that envy is at the root of egalitarian theories,¹³ and in particular John Rawls' theory.¹⁴ To those who say that egalitarian principles are "separately justifiable" without regard to "disreputable psychology," Nozick replies in part by noting the "great ingenuity with which people dream up principles to rationalize their emotions . . ." ¹⁵ As Nozick is willing to find hidden elements in opposing theories, he cannot in principle complain when I do the same to his theory. And I am more charitable than Nozick. He considers the imputation of envy to be an insult; I consider the imputation of concern with aggregate well-being to be a compliment.

II. EXAGGERATING THE BURDENS OF REDISTRIBUTION

A. WHAT DO THE RICH LOSE?

Nozick subscribes to what he calls the "classical liberal" view that the right of people to control their own bodies and actions is a property right, the right of self-ownership.¹⁶ He claims that a redistributive system invades that right, making others "a *part-owner* of you . . .giv[ing] them a property right in you."¹⁷ A redistributive system, according to Nozick, institutes partial "ownership by others of people and their actions and labor."¹⁸ In a similar vein, Nozick argues that taxation of labor income is "on a par with forced labor."¹⁹

The idea of self-ownership, as conventionally understood, has two important and related connotations: self-ownership is very valuable, and it is not easily divisible.²⁰ Because of these powerful connotations, Nozick's claim that redistribution violates self-ownership poses an implicit utilitarian challenge to the utilitarian case for redistribution outlined above. The utilitarian case for redistribution assumes something like a hierarchy of value in property, with respect to the contribution that property makes to well-being. The least valuable property, dollar for dollar, is money that represents the superfluities or luxuries of the rich. Higher in value per

13. *Id.* at 240.

14. *Id.* at 229.

15. *Id.* at 240.

16. *Id.* at 171-72.

17. *Id.* at 172.

18. *Id.*

19. *Id.* at 169.

20. Nozick does not necessarily accept these connotations, but he makes use of them through his imagery.

dollar are the comforts of the middle class, and still higher are the basic necessities of people who are poor, but living above subsistence level. Highest of all in value are the material resources needed for subsistence. The consequence, of course, is that redistributing income from rich to poor takes from the rich what is low in value and gives to the poor what is high in value.

But what is the place of self-ownership in this hierarchy of value in property? Under a conventional conception, its place is very high. Some might even value self-ownership more than a subsistence income; presumably, this ranking of preferences would be revealed by their refusal to sell themselves into slavery in order to survive. In any case, it seems that self-ownership would be among the most valuable of property rights.

In claiming that redistribution violates self-ownership, therefore, Nozick attempts to telescope the hierarchy of value in property that supports the utilitarian case for redistribution. Instead of taking from the rich the least valuable type of property, he implies, redistribution takes from them what is most valuable. Redistribution does not impose only a minor burden on the rich, it strikes at the core of their being.

1. Redistribution of Spouses

In aid of his attempt to show that redistribution of income takes something very valuable from the rich, Nozick compares income redistribution to other, more fanciful types of redistribution that would in fact take something very valuable. One of Nozick's favorite examples, which he uses no less than four times, is the redistribution of spouses, or of the right to choose one's spouse.²¹ Redistribution of spouses would have the features that Nozick would like to impute to redistribution of money. Such redistribution would take from each spouse something of very high value: there is no greater tragedy, for many, than to lose one's wife or husband. Redistribution of spouses would also subject the redistributed spouse to a kind of slavery, forcing him or her into the most intimate of relationships. And of course, spouses are not readily divisible; it is hard even to conceive of taking the least valuable part of a spouse and redistributing that part to someone who needs it more. It is easy to see why Nozick would like to use the redistribution of spouses as a model for the redistribution of money. One begins to have visions of money, when it is separated from its former rich owner, declaiming, "Unhand me, you fiend, . . . I swear, I will someday be reunited with my beloved!"

21. NOZICK, *supra* note 1, at 237, 263, 269, 282.

2. *First Money, Then Spouses and Body Parts*

Nozick's repeated references to the redistribution of spouses also point to another element of his portrayal of redistribution. He attempts to fan insecurity about redistribution by suggesting that even if the money a redistributive system takes from the rich taxpayer is not enormously valuable to him, theories of distributive justice that permit redistribution of money could also permit redistribution of more valuable things, such as spouses. Thus, if redistribution of property is allowed, as under a Rawlsian system, there is no security against "forceable redistribution of bodily parts."²² Or again, if we allow interpersonal utility comparisons to argue for redistribution, we all risk being sacrificed in the maw of "utility monsters," those "who get enormously greater gains in utility from any sacrifice of others than these others lose."²³ These horrific images can be seen as the second line of an implicit utilitarian defense against redistribution. Despite Nozick's other arguments, we might still be convinced that we should redistribute money from the rich, who do not really need it, to the poor, who really do need it. But we had best not attempt any such redistribution, lest the utility monster gobble us all up.

B. MISTREATING WILT CHAMBERLAIN'S FANS

Yet another way in which Nozick portrays redistribution as decreasing aggregate well-being is by suggesting that it frustrates the desires not only of the rich taxpayer, but also of those who have chosen to transact with the rich taxpayer. In his famous Wilt Chamberlain example, Nozick asks the proponent of redistribution to imagine a distribution of holdings that comports with justice. Against the background of this distribution, Nozick continues, imagine that Wilt Chamberlain has a contract with his team under which fans must pay twenty-five cents out of each admission ticket directly to him. Suppose that one million fans cheerfully pay this quarter directly to Wilt Chamberlain, "and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has."²⁴ Under these circumstances, Nozick asks, isn't the new distribution just? Moreover, he means to ask, wouldn't it be unjust to redistribute money from Wilt Chamberlain to poorer citizens? After all, Nozick observes:

22. *Id.* at 206.

23. *Id.* at 41.

24. NOZICK, *supra* note 1, at 161.

[e]ach of [the fans] chose to give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of *Dissent* magazine, or of *Monthly Review*. But they all, at least one million of them, converged on giving it to Wilt Chamberlain in exchange for watching him play basketball.²⁵

Nozick intends the Wilt Chamberlain example as a refutation of what he calls "patterned" conceptions of distributive justice, including utilitarianism. The example itself, I believe, does not actually undercut the utilitarian case for redistribution. To the utilitarian, just social rules are those that tend to maximize well-being. A rule permitting private exchange is just because private exchange promotes well-being. Even better, however, is a system that combines private exchange and some degree of redistribution. Thus, the redistribution of a percentage of Wilt Chamberlain's income is fair and just for precisely the same reason that the exchanges that increased Wilt Chamberlain's income are fair and just: both are effected pursuant to social rules that increase well-being.

Although the Wilt Chamberlain example does not undercut the utilitarian case for redistribution, it does have a certain force. I believe its force partly derives from Nozick's suggestion that by taxing Wilt Chamberlain, the government is harming not merely him, but the people who have transacted with him. Nozick somehow makes it seem as though Wilt Chamberlain's fans have not only chosen to pay him to see him play basketball, but have also chosen that the money they pay him will not be redistributed to the poor. He somehow makes it seem as though taxing Wilt Chamberlain would interfere with the relationship between Wilt Chamberlain and his fans, not merely the relationship between Wilt Chamberlain and his money. This is once again a reversal of the conventional utilitarian conception of redistribution. Under the conventional conception, redistribution can help many more people than it hurts. The tax receipts from one millionaire can feed hundreds of hungry people. Nozick would like to suggest that it is the other way around: redistribution hurts more people than it helps.

II. MINIMIZING THE NEED OF THE POOR

The implicit utilitarianism of Nozick's argument against redistribution can also be seen when we move to the other side of the redistribution

25. *Id.*

ledger. Not only does Nozick portray the harm done to the rich taxpayer as monumental, he also minimizes the need of the poor. Further, he minimizes the misery his own system could permit.

A. STARVATION

The question that comes immediately to mind when one learns of Nozick's absolute opposition to redistribution is whether Nozick is prepared to see people starve to death. Evidently, Nozick is indeed prepared to tolerate starvation if the only alternative is redistribution, but he does not squarely confront this issue. The closest he comes is a glancing reference to starvation in the midst of a fable about Robinson Crusoes:

If there were ten Robinson Crusoes, each working alone for two years on separate islands, who discovered each other and the facts of their different allotments by radio communication via transmitters left twenty years earlier, could they not make claims on each other, supposing it were possible to transfer goods from one island to the next? Wouldn't the one with least make a claim on ground of need, or on the ground that his island was naturally poorest, or on the ground that he was naturally least capable of fending for himself? Mightn't he say that justice demanded he be given some more by the others, claiming it unfair that he should receive so much less and perhaps be destitute, perhaps starving?... Rather than its being the case that no one *will* make such claims in the situation lacking social cooperation, perhaps the point is that such claims clearly would be without merit.²⁶

Nozick is arguing here against Rawls. He is taking the position that social cooperation does not "*create* the problem of distributive justice."²⁷ It is revealing, however, that Nozick is only willing to consider the possibility that someone will starve for want of redistribution after he has thoroughly stacked the deck against redistribution. In the Robinson Crusoe fable, there is no state in existence, not even the minimal state favored by Nozick. It is unclear how redistribution can be effected, by whom and at what cost. Therefore, it is hard to conceive of redistribution as a solution for starvation and need. Nevertheless, even with the deck thus stacked, Nozick is not at all successful, as I see it, in extinguishing the utilitarian intuition that

26. *Id.* at 185.

27. *Id.*

redistribution, if it could somehow be accomplished, would be justified to prevent one of the Robinson Crusoes from starving.

B. SLAVERY AND WORSE

Nozick is similarly understated in confronting two other miserable consequences that could plausibly result from his system: slavery and horrific debt collection practices. The casual reader of *Anarchy, State and Utopia* will notice that Nozick believes that redistribution, in some metaphorical sense, is akin to slavery. The casual reader may not notice, however, that Nozick is prepared to tolerate *real* slavery, as long as the slave has contracted to be a slave.²⁸ Nozick believes that people own themselves fully. It follows, according to Nozick, that people can sell themselves into slavery, possibly in exchange for food, and that the state should enforce such contracts. But Nozick does not explicitly announce his condonation of contractual slavery until page 331 of *Anarchy, State and Utopia*, in a digression from his discussion of utopia. Even then, he sugar-coats the message:

The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would. (*Other writers disagree.*) It also would allow him permanently to commit himself never to enter into such a transaction.²⁹

Note how Nozick diverts attention from his condonation of slavery by implying that the reader can reject that particular position while accepting all of the rest of Nozick's arguments.

Actually, slavery may not even be the most horrible contractual relationship that Nozick condones. He evidently would also accept loan agreements in which the creditor has the right to do unspeakable things to the debtor if the debtor does not and cannot pay.³⁰ That is the upshot of a footnote in which Nozick makes an elliptical reference to Shakespeare's *Merchant of Venice*:

Lacking other avenues of redress, one may trespass on another's land to get what one is due from him or to give him what he deserves, provided that he refuses to pay or

28. *Id.* at 58-59, 331. For a striking example of the type of contractual slavery permitted under Nozick's system, see THOMAS W. POGGE, *REALIZING RAWLS* 49-50 n. 50 (1989).

29. NOZICK, *supra* note 1, at 331 (emphasis added).

30. *Id.* at 55.

to make himself easily available for punishment. B does not violate A's property right in his wallet by touching it, or by opening its seal if A refuses to do so, in the course of extracting money A owes him yet refuses to pay or transfer over; A must pay what he owes; if A refuses to place it in B's possession, as a means to maintaining his rights, B may do things he otherwise would not be entitled to do. Thus the quality of Portia's reasoning is strained in holding that Shylock is entitled to take exactly one pound of flesh but not to shed a drop of Antonio's blood as is the quality of her mercy as she cooperates in requiring that to save his life Shylock must convert to Christianity and dispose of his property in a way hateful to him.³¹

Evidently, then, Nozick is prepared to see the creditor take a pound of flesh from his debtor, or boil the latter in oil, or do whatever else the loan agreement may provide as a remedy for nonpayment. But this view is cached in a convoluted sentence of an obscure footnote, and might therefore escape the casual reader.

In the Preface to *Anarchy, State, and Utopia*, Nozick writes that "intellectual honesty demands that, occasionally at least, we go out of our way to confront strong arguments opposed to our views."³² In his discussion of Rawls, Nozick insists that we "try out principles in hypothetical microsituations."³³ Nozick appears to violate both of these strictures. He goes out of his way to conjure up fantastical counterexamples to *opposing* theories. However, he fails to confront squarely the suffering that plausibly could exist under his system, as the result of starvation, slavery and horrific debt collection practices.

III. LOSS AND INSECURITY IN BENTHAM AND NOZICK

The foregoing may suggest that while Nozick presents an implicit utilitarian response to the utilitarian case for redistribution, that response is completely false. Nozick is simply wrong, it may be thought, to pretend that the rich lose more from redistribution than the poor gain. In fact, Nozick's account, while grossly exaggerated, draws on the force of *valid* utilitarian reservations about redistribution.

31. *Id.* at 55 (2nd footnote).

32. *Id.* at x.

33. *Id.* at 204.

Jeremy Bentham, the father of modern utilitarianism, was not a big fan of income redistribution. Bentham accepted, of course, that money has diminishing marginal utility. However, Bentham was concerned about two aspects of the redistributive experience which suggested to him that those whose property is taken to support the poor might nevertheless lose more than the poor gain. First, losses hurt more than gains help. Second, and more importantly, redistribution attacks security. In view of these aspects of redistribution, as well as its negative effect on work incentives, Bentham thought that support for the poor should be limited to providing them with the means of subsistence.³⁴

In redistribution, the rich lose while the poor gain. Therefore, Bentham realized, it is not enough to compare the utility a richer individual derives from a dollar possessed with the utility a poorer individual derives from a dollar possessed; we must compare the utility a richer individual loses from a dollar lost with the utility a poorer individual gains from a dollar gained. Bentham believed that losses are more salient in their effect on happiness than are gains. All else being equal, "[i]t is worse to lose than simply not to gain."³⁵ In recent years this insight of Bentham's has found empirical validation in the work of experimental psychologists. Experiments have shown that people are more concerned with avoiding losses than with obtaining gains, beyond even what the diminishing marginal utility of money would suggest.³⁶

In describing the "pain of loss," Bentham foreshadows Nozick's image of redistribution as an invasion of bodily integrity:

Every thing which I actually possess, or which I ought to possess, I consider in my imagination as about to belong to me for ever: I make it the foundation of my expectation – of the expectation of those who depend upon me, and the support of my plan of life . . . our property may become, as it were, part of ourselves, and cannot be taken from us without wounding us to the quick.³⁷

34. JEREMY BENTHAM, *Principles of the Civil Code*, in THE WORKS OF JEREMY BENTHAM (John Bowring ed., Edinburgh, 1838-43)[hereinafter BOWRING], vol. I at 316. In his famous Panoptican project, Bentham would have provided more than simple subsistence, but the Panoptican residents would have been required to work. Panoptican is not an example of redistribution from rich to poor, so it is not treated here.

35. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, preface at 3 (J.H. Burns & H.L.A. Hart eds., 1996).

36. Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. OF BUS. S251, s258 (1986).

37. BENTHAM, *supra* note 34, vol. 1 at 310.

The greater salience of losses over gains is a reason to be cautious in the redistribution of income. A related and even more important reason for caution, in Bentham's view, is that redistribution attacks security. Bentham thought that if the rich were subjected to redistributive taxation beyond what was necessary to provide subsistence to the poor, the rich would be consumed with fear that their entire fortunes would be confiscated. In a manner that again foreshadows Nozick, Bentham raises the specter of constant and unsettling state intervention to achieve redistribution:

In consulting the grand principle of security, what ought the legislator to direct with regard to the mass of property which exists?

He ought to maintain the distribution which is actually established For how shall a different distribution be made, without taking from some one what he possesses? How shall one party be stripped, without attacking the security of all? When your new distribution shall be disarranged, which it will be the day after its establishment, how will you be able to avoid making a second? Why should you not correct this also? and, in the meantime, what becomes of security? of happiness? of industry?³⁸

The modern experience of the welfare state has shown Bentham's concerns about redistribution to be somewhat overblown. Tax rates are relatively predictable; they vary from year to year only within a narrow range. The rich in developed countries face no real risk of losing their entire fortunes (to the government, at any rate), and they know it. And one should also not ignore the extent to which welfare-state redistributive programs have provided additional security to the poor and the middle class.

However, it is one thing to conclude that concerns about loss and insecurity are overblown, or have been successfully addressed by the welfare state, and quite another to ignore such concerns altogether. Unfortunately, modern utilitarian economists sometimes convey the impression that security is not even a value, that the only considerations relevant to achieving

38. *Id.* at 311. Kelly argues that this passage is "not representative of Bentham's considered opinions," P.J. KELLY, UTILITARIANISM AND DISTRIBUTIVE JUSTICE: JEREMY BENTHAM AND THE CIVIL LAW 159 (1990). To the extent that the passage suggests an absolutist opposition to all redistribution, Kelly is of course correct. However, it is representative in the sense that Bentham always sees security as a powerful consideration militating against redistribution. See, e.g., JEREMY BENTHAM, *Pannomial Fragments*, in BOWRING *supra* note 34, vol. III at 230.

optimum income redistribution are the diminishing marginal utility of money and the incentive effects of taxes and transfers.³⁹ This approach gives false appeal to natural-rights theories of distributive justice such as Nozick's. To the extent that utilitarianism appears to abandon security as a value, natural rights theories that appear to safeguard security can have a free ride on utilitarian intuitions.

CONCLUSION

Previous commentators have observed that Nozick's apocalyptic depictions of redistribution are strained.⁴⁰ It is not often recognized, however, that one conclusion toward which Nozick seems to be straining is that redistribution *decreases* aggregate well-being.⁴¹ This implicit utilitarian argument against redistribution pervades Nozick's examples, whether he is exaggerating the burdens of redistribution or minimizing the pain that a rule against redistribution could cause. Nozick is not a utilitarian, but he deceptively draws on the intuitive appeal of utilitarianism in constructing his anti-utilitarian political philosophy.

39. See Joel Slemrod, *Optimal Taxation and Optimal Tax Systems*, 4 J. ECON. PERSPECTIVES 157 (1990) (survey of optimal tax theory). One major economist has even suggested, on utilitarian grounds, that a random element be introduced into the tax rate schedule, an idea that surely sent Bentham spinning in his grave. See Joseph E. Stiglitz, *Utilitarianism and Horizontal Equity: The Case for Random Taxation*, 18 J. PUB. ECON. 1 (1982).

40. See, e.g., THOMAS SCANLON, *RIGHTS, LIBERTY, AND PROPERTY*, in *READING NOZICK: ESSAYS ON ANARCHY, STATE AND UTOPIA* 111 (Jeffrey Paul Ed., 1981). "Nozick tries to make such measures seem more alarming to us by tying them to more extreme forms of intervention." *Id.*

41. Positions somewhat similar to mine, but considerably more moderate, are expressed in IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 151-203 (1986), and P.J. KELLY, *supra* note 38, at 9.