

EMERGENT PROBLEMS AND OPTIMAL SOLUTIONS:  
A CRITIQUE OF ROBERT NOZICK'S ANARCHY, STATE AND UTOPIA

by

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ABSTRACT

In Anarchy, State, and Utopia Robert Nozick offers a solution to the problem of when it is permissible to use force to prevent a person from doing a non-aggressive risky act. In this thesis I argue that Nozick's solution to the problem of non-aggressive risky acts is radically mistaken and that the reasons why it is mistaken reveal the limitations of his state of nature approach to the problem of what principles characterize the just state.

In Chapter One I introduce the concepts which I use to state my argument against Nozick's solution. Most importantly, I explain what each of the following is: 1) an emergent problem, 2) an emergent constraint, 3) an optimal solution to an emergent problem, 4) the libertarian side constraint against aggression, 5) a law bound principle, 6) the natural position, 7) the force principle, and 8) the independence principle.

In Chapter Two and Chapter Three I examine the arguments which Nozick uses to defend his commitment to the libertarian side constraint against aggression. Most importantly, I explain how his commitment is related to his beliefs that each person is separate, inviolable, and not a resource for any other person. In Chapter Four I establish that the problem of non-aggressive risky acts is an emergent problem relative to the clear beliefs which lead Nozick to accept the libertarian side constraint against aggression.

In Chapter Five I argue that Nozick does not offer any

compelling reasons to justify his crucial belief that we must adopt the force principle and the independence principle as constraints on solutions to the problem of non-aggressive risky acts. This belief is crucial because it leads Nozick to the further belief that the correct solution must view each non-aggressive risky act as an isolated act in which one person subjects another to a risk. Consequently, he defends a solution which is in sharp contrast with solutions which interpret the problem of non-aggressive risky acts as a problem which concerns all of the people in an area and which takes account of the fact that in the normal course of events each person is both a risk bearer and a risk creator. A person who interprets the problem in this way will almost certainly solve it by appealing to a law bound principle, i.e., a principle which a) specifies an end result and b) is used to evaluate enforceable public rules assigning entitlements to perform non-aggressive risky acts according to how close compliance with the rules comes to achieving the end result. Furthermore, a person who appeals to law bound principles will almost certainly also accept the natural position, i.e., the position that law bound principles create the need for special principles, perhaps democratic principles, for evaluating procedures which select the people who alone have the right to publish, interpret, and enforce the public rules which are needed to satisfy the law bound principles. Once we see that Nozick cannot defend his commitment to the force and independence principles, we must ask whether there are any reasons to prefer his solution to the problem of non-aggressive risky acts to a solution which appeals to law bound principles and the natural position.

In Chapter Six I examine Nozick's solution and argue that it has many counter-intuitive implications. In Chapter Seven I identify an emergent constraint and argue that a solution to the problem of non-aggressive risky acts which appeals to law bound principles and the natural position satisfies this constraint to a higher degree than Nozick's solution. This permits me to conclude that Nozick's solution is not the optimal solution.

Thesis Supervisor: Judith Jarvis Thomson

Title: Professor of Philosophy

To my mother, Rachel,  
and to the memory of my father, Abraham

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## INTRODUCTION

In Anarchy, State, and Utopia Robert Nozick offers a solution to the problem of when it is permissible to use force to prevent a person from performing a non-aggressive risky act. Non-aggressive risky acts are, roughly speaking, acts which are done for legitimate purposes and which create risks of harm to others. In most cases where people drive automobiles they perform non-aggressive risky acts. When an epileptic drives he performs a very risky non-aggressive act. Non-aggressive risky acts also include many acts which pollute the environment. In this essay I am going to argue that Nozick's solution to the problem of non-aggressive risky acts is radically mistaken. Furthermore, I am going to argue that the reasons why it is mistaken reveal the limitations of his state of nature approach to the problem of what principles, if any, characterize the just state.

Nozick interprets state of nature theory to consist of an account of what moral principles apply in a nonstate situation in which people's moral relations have not been complicated by prior state action, and a discussion of whether a state would naturally arise from this situation by morally permissible means.<sup>1</sup> He believes that a demonstration that a state would naturally arise amounts to a justification of the state and that the principles which characterize the state

which arises are the principles which characterize the just state.<sup>2</sup> Furthermore, he believes that the study of state of nature theory will lead to three important conclusions. The first is that we must take seriously the anarchist's doubts about the possibility of providing a justification of the state.<sup>3</sup> The second is that it is possible to overcome the anarchist's doubts and to provide a justification of the state.<sup>4</sup> The third and most important conclusion is that it is not possible to provide a justification of a state which is more extensive than the night-watchman state of classical liberal theory which is "limited to the functions of protecting all its citizens against violence, theft, fraud, and to the enforcement of contracts, and so on."<sup>5</sup> Nozick believes that the just state is not permitted to use force in the pursuit of any paternalist, perfectionist, or egalitarian goals.

Clearly, Nozick's beliefs about whether it is possible to provide a justification of the state and what principles characterize the just state depend upon the moral principles which he accepts. Therefore, the heart of Nozick's position is his defense of those principles. My aim is to show that Nozick does not and cannot defend the moral principles which he uses to solve the problem of non-aggressive risky acts. One obstacle to accomplishing this aim is Nozick's concession that he does not adequately defend nor even completely state the moral theory to which he appeals.<sup>6</sup> Furthermore, he

specifically concedes that there may be problems with his statement and defense of the principle which he uses to solve the problem of non-aggressive risky acts.<sup>7</sup> He insists, however, that "something like it will do."<sup>8</sup> I will argue that his solution is radically mistaken and that nothing like the principle which he uses will do.

One of the significant features of Nozick's solution is its assumption that any principle which is used to solve the problem must be a principle which any person acting alone in the state of nature is entitled to enforce.<sup>9</sup> Another significant feature of his solution is its assumption that we must view each risky act as an isolated act in which one person subjects another to a risk.<sup>10</sup> That is, we must abstract from the facts that a) a risk bearer must often bear the risks of more than one person at a time and b) in the normal course of a person's life he will be both a risk bearer and a risk creator. These assumptions put his solution in sharp contrast with solutions which assume that the problem is properly interpreted as a problem which concerns all of the people in an area and takes account of the fact that in the normal course of events each person is both a risk bearer and a risk creator. A person who makes this assumption will almost certainly adopt a solution appealing to a principle which a) specifies an end result and b) evaluates enforceable public rules assigning entitlements to perform risky acts

on the basis of how close they come to achieving this result. We will call a principle of this type "a law bound principle" and we will say that a public rule satisfies a law bound principle when compliance with its requirements achieves the end result. It is counter-intuitive to claim that any person acting alone in the state of nature is entitled to publish and enforce the public rules which are needed to satisfy a law bound principle. Therefore, a person who believes that there are law bound principles faces the problem of determining who is entitled to publish and enforce these public rules. A natural solution is to posit special principles, perhaps democratic principles, whose purpose is to evaluate procedures which select the people who alone have the right to publish and enforce them. I will argue that the optimal solution to the problem of non-aggressive risky acts is one which appeals to both law bound principles and democratic principles.

My argument that a solution which appeals to these types of principles is preferable to Nozick's solution does not, by itself, threaten Nozick's principal conclusion that the only just state is the night-watchman state. It only forces him to accept the more specific conclusion that the night-watchman state is just only if it uses democratic procedures to determine which people are specially entitled to publish and enforce the public rules required by acceptable

law bound principles. Additional arguments are needed to force Nozick to retreat from his claim that the just state is not permitted to use force in the pursuit of any paternalist, perfectionist, or egalitarian goals. Although I believe that these arguments can be given, I will not attempt to give them here.

The argument which I will use to show that Nozick's solution to the problem of non-aggressive acts is unacceptable will be quite complex. One reason why it is complex is that Nozick's book is complex. It contains many different themes and it is not always clear how they are related to each other. I have made a serious attempt to show how they form a coherent whole. This attempt forces me to commit Nozick to theses which he does not explicitly accept in the text. Those who are attracted to Nozick's view will be skeptical about whether a person who intends to criticize Nozick can be trusted with the delicate task of discovering the real structure of his theory. To them I can only say that I have tried to be fair and that I have given them the opportunity to clarify and defend his theory by showing where I have gone wrong.

In Chapter One I will introduce the concepts which I need to state my criticisms of Nozick's solution to the problem of non-aggressive risky acts. Most importantly, I explain a) what an emergent problem is, b) what the optimal

solution to an emergent problem is, c) what Nozick means by "the libertarian side constraint that prohibits aggression against another,"<sup>11</sup> and d) how Nozick's solution to the problem of non-aggressive risky acts differs from solutions which appeal to both law bound and democratic principles. In Chapters Two through Four I examine the beliefs which lead Nozick to accept the libertarian side constraint against aggression and I show that the problem of non-aggressive risky acts is an emergent problem relative to those beliefs. In Chapters Five through Seven I argue that the optimal solution to the emergent problem of non-aggressive risky acts is one which appeals to both law bound and democratic principles. Insofar as my criticism of Nozick's solution takes as given his commitment to the libertarian side constraint against aggression, it can be interpreted as an internal criticism of his theory. Therefore, it should be of special interest to those who take libertarian views seriously.

## THE BASIC CONCEPTS

1.1 The Initial Simplifying Assumptions: Nozick believes that we should construct a moral theory around our clearest moral beliefs. In fact, one of his reasons for studying state of nature theory is his belief that our clearest moral beliefs include our beliefs about how to resolve conflicts which arise in a pre-institutional state of nature. More specifically, he appears to believe that we have very clear beliefs about how to resolve many conflicts which arise between people, when we make the following assumptions about the context in which these conflicts occur:

1. There has been no prior state action.
2. There is an abundance of natural resources.
3. There have been no public announcements that certain acts are prohibited and that those who do them will be punished.

I will refer to these assumptions as Nozick's "initial simplifying assumptions." Nozick believes that when we focus on conflicts which arise in the simplified world characterized by these assumptions we will often arrive at clear beliefs about what principles should be used to solve them and what "root ideas,"<sup>1</sup> to use Nozick's own expression, justify

using those principles. These principles will include a list of rights which are natural rights because they are held by people in a pre-institutional state of nature.

Nozick's list of natural rights certainly includes:

1) a natural right to one's body,<sup>2</sup> 2) a natural right to one's labor,<sup>3</sup> 3) a natural right to what one has legitimately acquired,<sup>4</sup> 4) a natural right to make contracts,<sup>5</sup> 5) a natural right to pursue one's life plan,<sup>6</sup> and 6) a natural right to enforce one's natural rights.<sup>7</sup> Furthermore, he believes that the best explanation for why people have these rights must appeal to the following root ideas:

1. No person may be sacrificed for the benefit of any other person.<sup>8\*</sup>
2. Each person must always be treated as an end and never merely as a means.<sup>9</sup>
3. No person is a resource for any other person.<sup>10</sup>
4. Each person is individually responsible for choosing his life plan.<sup>11</sup>

Finally, Nozick would insist that these root ideas also put constraints on how we should resolve i) the pre-institutional conflicts about which we do not have clear beliefs and ii) the conflicts which will emerge when we drop each of the three initial simplifying assumptions.



When Nozick concedes that his book "does not present a precise theory of the moral basis of individual rights"<sup>12</sup> he is conceding that he has not established either a) that his root ideas, as he interprets them, constitute the best foundation for a correct moral theory, or b) that there are valid arguments in which his root ideas appear as premises and his moral principles, including his account of natural rights, appear as conclusions. In this essay I will, for the purpose of argument, accept his root ideas and assume that they can be used to establish his account of what rights people have in a world characterized by the initial simplifying assumptions. In fact, I will attempt to explain how to interpret them so that they can be used to establish some of the conclusions he wants to defend. I will argue, however, that they cannot be used to establish his solution to the problem of non-aggressive risky acts. Now I will turn to the task of explaining why Nozick makes each of the three initial simplifying assumptions.

It is essential to understand the role which each of the simplifying assumptions plays in the development of Nozick's theory. We must ask why he makes each and what problems emerge when he drops it. He would defend the first simplifying assumption by claiming that a) the correct account of how prior state action complicates people's moral relations almost certainly presupposes an account of what is and

is not legitimate state action, b) we do not have particularly clear beliefs about what is and is not legitimate state action, and c) one aim of studying state of nature theory is to throw light on what is and is not legitimate state action. Furthermore, the assumption enables us to postpone the difficult question of whether the state might be necessary (as at least a temporary measure) to assure that those who had been victims of illegitimate state action were properly compensated.

Nozick would defend the second simplifying assumption by claiming that it is necessary to bring our attention to our clear beliefs about how to evaluate distributions of natural resources and the benefits which result from their use when natural resources are abundant.<sup>13</sup> There is an abundance of a natural resource when one person's appropriation of a bequeathable property right in some of that resource leaves, in the words of Locke, "enough and as good left in common for others."<sup>14</sup> Conditions of abundance are not conditions in which every desire of every person can be satisfied. Even in conditions of abundance a person may have a desire to use another's body, to benefit from another's labor, or to receive another's affection which conflicts with the other's desire. Conditions of abundance are not even conditions in which every person may satisfy his desires for natural resources. Some natural resources may be situated

in places which are only accessible to the strong, the swift, or the smart. Consequently, we can see that even in conditions of abundance those who are unwilling or unable to appropriate these resources may make claims on those who have them or have the ability to get them. It should be clear that even in conditions of abundance people will put forward conflicting claims on natural resources and the benefits which result from their use. Therefore, we need a theory to resolve these conflicts.

Nozick believes that the theory which applies to the problem of evaluating distributions of natural resources and the benefits which result from their use in conditions of abundance is transparently clear. He would, for instance, say that each of the following is transparently clear: a) a person owns his body and his labor, b) a person owns whatever unappropriated natural resources he appropriates by non-aggressive means, c) a person owns what others, who previously owned it, voluntarily give him, and d) a person owns whatever he makes from the natural resources and other things which he owns. These considerations must lead Nozick to conclude that a) in conditions of abundance a distribution is just whenever each of the steps which led to it was itself just, b) we can determine whether any step is just without appealing to an established set of public rules which imply that it is just and, therefore, c) in conditions of

abundance there are no special principles for evaluating distributions which give a central authority the right to take what some have legitimately acquired for the purpose of satisfying some desirable pattern or some desirable end state.

Nozick is aware that we do not live in a world in which there is an abundance of natural resources. When people appropriate natural resources in our world there comes a time when there is no longer "enough and as good left in common for others." Some people's appropriations will eventually make others worse off either by depriving them of the opportunity to appropriate bequeathable property rights in resources of that kind or, more weakly, depriving them of the right to use resources of that kind freely. When we change our focus from conditions of abundance to conditions of non-abundance we can justify a system which permits the appropriation of bequeathable property rights in natural resources only if we can establish that it is justifiable to make others worse off in these ways. In conditions of abundance the appropriations of some did not, by hypothesis, make others worse off in these ways. The emergent problem of non-abundance is the problem of how to evaluate distributions of natural resources and the benefits which result from their use when we drop the assumption of abundance. Nozick appears to believe that the correct solution

must attempt to simultaneously satisfy two constraints: a) it must assure that those who are made worse off in the specified ways are compensated for their losses and b) it must preserve the root idea of the clear theory for conditions of abundance - the idea that each person owns his labor. We can now see why Nozick makes the second simplifying assumption: it brings our attention to the constraints we must adopt in solving the problem of how to distribute natural resources and the benefits which result from their use in conditions of non-abundance and it postpones the difficult task of solving this problem.

The reason why the task is difficult is that it may not be possible to defend a solution which assures adequate compensation to those who are made worse off in the specified ways without compromising the idea of self-ownership which Nozick finds in the clear theory for abundance. In conditions of abundance self-ownership implies that no person is required to aid another whom he has not consented to aid. In conditions of non-abundance, however, it may be impossible to provide adequate compensation to all in a manner that is fair to all without requiring some contribution from each. Assuring adequate compensation to all will be viewed as a joint undertaking which each person is required to participate in regardless of his consent. I will not attempt to state and evaluate Nozick's solution to the emergent problem

of non-abundance. I will, however, bring the reader's attention to the relation between his solution to this problem and his claim that the only just state is the night-watchman state. He can defend this claim only if he can defend a solution which does not appeal to principles whose satisfaction depends upon the establishment of a central authority with the right to sometimes take what people have legitimately acquired in order to aid others whom they have not consented to aid.

We now come to the third simplifying assumption. It may, at first sight, appear to be an odd assumption. If an act is forbidden and punishable how does it complicate matters if a person makes a public announcement that it is forbidden and punishable? The answer is that it doesn't. The purpose of the assumption is to bring our attention to our clearest beliefs about which acts are forbidden and punishable. Nozick appears to believe that we can arrive at these beliefs by asking the following question: When is it permissible to punish a person for doing A in the absence of a warning that he will be punished for doing A? We should be clear about the answer to this question before we approach the more difficult question about whether there are any acts which are wrong and punishable only when they are preceded by a public announcement that they are prohibited and that those who perform them will be subjected to punishment. Furthermore,

our clear beliefs about how to answer the first question will put constraints on what we can accept as an answer to the second question in the same way that our clear beliefs about how to evaluate distributions in conditions of abundance put constraints on how we can solve the emergent problem of non-abundance.

What problems do we postpone by making this final simplifying assumption? One problem which we postpone is the problem of non-aggressive risky acts. We can reach this conclusion from two different directions. First, we will discover that Nozick does not include non-aggressive risky acts among the types of acts which are clearly punishable in the absence of a warning that they are forbidden. Once we have an account of which types of acts are punishable in the absence of a warning, then we must consider whether there are any pressing problems which can only be solved by appealing to additional rights to punish. It turns out that serious problems do emerge in a world in which there are no rights to punish non-aggressive risky acts. A second way to reach this same conclusion is to note straightaway that the third simplifying assumption postpones the problem of whether people are ever collectively responsible for producing certain results. If people are collectively responsible for producing some result, then we need public rules which coordinate their behaviour so that they produce this result. A

person will usually be liable to punishment for failing to do his share in producing the result only when there is an established set of public rules which is designed to coordinate people's behaviour to produce this result and he has been warned that he is liable to punishment for failing to do what the rules require. One aspect of the problem of non-aggressive risky acts is the problem of cumulative risk: the problem of how to coordinate the non-aggressive risky activities of many people so that they do not collectively subject any person to a serious risk. For each of these reasons we can conclude that the problem of non-aggressive risky acts is an emergent problem relative to our clear beliefs about when it is permissible to punish a person in the absence of a warning that his act is forbidden and he will be punished for doing it.

### 1.2 Emergent Problems and Optimal Solutions:

I have introduced the concept of an emergent problem by giving examples of problems which Nozick would recognize as problems which are emergent relative to problems about which we have clear beliefs.<sup>15</sup> We can generalize from these examples and adopt the following definition:

A problem M is emergent relative to a problem N and a set of principles P for a theorist T if



and only if a) T accepts P, b) P is sufficient to solve N, and c) T's belief that P is sufficient to solve N is not based on a prior belief that P must also be sufficient to solve M. When M is emergent relative to N and P for T it is because T either needs additional principles to solve M or additional arguments to establish that P is sufficient to solve M.

The reader should not be alarmed by this apparently complex definition. The concept of an emergent problem is a simple concept once we understand the approach to theory construction with which it is associated. The essential feature of this approach, which I will call "the intuitionist approach," is that in constructing a moral theory we should be guided by our intuitive belief that there are compelling theoretical reasons why some moral problems merit their own principles. It is not difficult to find people who have argued that special principles are appropriate for each of the problems of: punishment, preventive detention, compensating the victims of injustice, distributing the costs of accidents, distributing natural resources and the benefits which result from their use, paternalism, free speech, political obligation, and evaluating procedures for selecting public officials. This list could certainly be expanded. Let us call a theory for a particular problem, or domain, "a local theory." A local theory consists of a set of principles

which can be used to solve problems in its domain and an explanation for why it is appropriate to use those principles to solve the problems. A person who develops a local theory for one domain does not believe that those principles must be used to solve the problems in some other domain: a person who develops a theory of free speech does not believe that its principles must be used to solve problems of reparations; a person who develops a theory of punishment does not believe that its principles must be used to solve problems of paternalism; and a person who develops a theory about how to distribute the costs of accidents does not believe that its principles must be used to solve problems concerning how to treat non-human animals. All of this is obvious. It is intended to make the obvious point that when a person develops a local theory for one of the domains listed above he recognizes the problems in other domains as emergent problems.

In order to avoid misunderstandings, I will bring the reader's attention to four facts about the intuitionist approach. The first thing to note about the intuitionist approach is that the only theorists who appear to reject it -- and, therefore, to have no use for the concept of an emergent problem -- are the ones who believe that a moral theory is coherent only if it contains one principle, or one set of principles, which can be used to solve all moral problems. A person who accepts the act utilitarian principle falls into

this category as does the person who believes that the act utilitarian principle is objectionable only because it must be supplemented by an equal distribution principle. On their view there are no problems which merit special principles. An act utilitarian will, for instance, say that a law is right if and only if it maximizes utility, a person ought to obey a law if and only if it maximizes utility to obey it, and a person ought to be punished if and only if it maximizes utility to punish him. The principle which he defends as appropriate for solving one moral problem, he intends as appropriate for solving every other moral problem.

The second thing to note about the intuitionist approach is that people who agree that it is the correct approach may disagree over which problems merit their own principles. Although Rawls and Nozick agree that it is the correct approach, they disagree over which problems merit their own principles. That Rawls believes it is the correct approach is beyond dispute. Most of his efforts in A Theory of Justice are devoted to solving the problem of what principles characterize the basic structure of a perfectly just society under favorable economic conditions.<sup>16</sup> He is well aware that once he solves this problem he will need additional principles to solve the difficult emergent problems which remain. These include: 1) the problem of political obligation,<sup>17</sup> 2) the problem of justice between generations,<sup>18</sup>

3) the problem of how to distribute the costs of compensating people who have been victims of unjust institutions,<sup>19</sup> and 4) the problem of weighing one form of institutional injustice against another.<sup>20</sup> Although Nozick also accepts the intuitionist approach he certainly disagrees with Rawls's claim that the problem of what principles characterize the basic structure of a perfectly just society under favorable economic conditions merits its own principles. In fact, part of his reason for studying state of nature theory is to establish that we can do without these special principles.

A third thing to note about the intuitionist approach is that it involves two types of simplifying assumptions and, therefore, gives rise to at least two types of emergent problems.<sup>21</sup> First, it involves isolating a type of problem which there is reason to believe merits its own principles. A person may, for instance, believe that there are compelling reasons why the problem of punishment merits its own principles and, therefore, view the problems of paternalism and how to distribute natural resources and the benefits which result from their use as emergent relative to it. Similarly, a person may believe that this latter problem merits its own principles and view the problems of paternalism and punishment as problems which are emergent relative to it. Once a person decides that a certain type of problem merits its own principles, however, he may then make simplifying assumptions

whose purpose is to direct our attention to aspects of that problem about which we have clear beliefs. After we have isolated these clear beliefs, we can drop the simplifying assumptions and use the clear beliefs to aid us in solving the other aspects of the problem which emerge. Nozick's assumption that there is an abundance of natural resources provides an example of this second type of focusing. Its purpose is to direct our attention to our clearest beliefs about how to solve the problem of how to evaluate distributions of natural resources and the benefits which result from their use. Once we have isolated these clear beliefs we must use them as constraints on how to solve the difficult emergent problem of non-abundance. Other examples of the second type of focusing are easy to provide. A person who is constructing a theory of punishment may, for instance, make the simplifying assumption that there are no monetary costs associated with punishing people. This postpones the difficult emergent problem of how to weigh the benefits of increased deterrence against other benefits, such as better schools, which also cost money to provide. Similarly, a person who is constructing a theory about how to distribute the costs of accidents may begin by assuming that there are no monetary costs involved in identifying the victims of accidents and making payments to them or in identifying the people who caused the accidents and collecting payments from

them.<sup>22</sup> This postpones the difficult emergent problem of how we should respond to the distortions which are created by high transaction costs.<sup>23</sup>

It is easy to show that Nozick makes use of both types of simplifying assumptions in the development of his theory. We can do this by bringing attention to how he develops and defends his theory of property rights. He believes that a person's rights to his property establish a boundary in moral space around the property which give the person claims against those who cross the boundary.<sup>24</sup> He would say that a complete theory of property must include solutions to each of the following problems:

1. How do we determine whether something is one person's property rather than another person's? We will call this "the problem of who owns what."
2. How do we determine what boundary a person's property rights establish around the property? We will call this "the problem of what constitutes a crossing."
3. How does one person's right to his property limit the liberty of another person? We will call this "the problem of how property rights limit liberty."

It is obvious what judgments we are able to make when we have a solution to the problem of who owns what: this is

John's land, that is Mary's book, Smith owns two hours of Jone's labor, and the state owns 20% of Brown's income. Nozick believes that the solution to the problem of who owns what is given by the solution to the problem of how to evaluate distributions of natural resources and the benefits which result from their use. He believes that this problem merits its own principles and that these principles are included in the solution to the emergent problem of non-abundance. Once we have solved that problem, however, we must solve the problems which are emergent relative to it. The problems of what constitutes a crossing and how property rights limit liberty fall into this category.

It may be less obvious what judgments we are able to make when we have a solution to the problem of what constitutes a crossing. These judgments will include judgments of the following types: 1) Smith's act crossed the boundary established by Brown's property right in his land, 2) Green's act is certain to cross the boundary established by White's property in his labor, and 3) Larson's act is likely to cross the boundary established by Gray's property right in his body. In many cases we have clear beliefs about what constitutes a crossing. It is, for instance, clear that I cross the boundary established by your property right in your sewer pipe when I ignore your wishes and break it with a sledge hammer. It is also reasonably clear that I cross the boundary when

I do blasting on my property which causes earth tremors which shatter the pipe. It is not so clear, however, that I cross the boundary when I plant a tree on my property whose spreading roots destroy your pipe.

A solution to the problem of what constitutes a crossing tells us when one person's act crosses the boundary established by another's property rights. It does not, however, tell us how property rights limit liberty. There are many possibilities.<sup>25</sup> One possibility is that others are forbidden to cross the boundary even when the person gives his consent to the crossing. When a right establishes a boundary of this type we say that it is inalienable. Nozick denies that there are any inalienable rights.<sup>26</sup> His denial follows from his belief that the natural right to make contracts includes the absolute right to permit others to cross the boundaries established by your rights. A second possibility is that others are forbidden to cross the boundary without the consent of the person whose boundary it is. A third possibility is that others are permitted to cross without consent provided that they compensate the person whose boundary it is for the harm caused by the crossing. All that we can conclude from the fact that A's act crosses the boundary established by B's right to his property is that this crossing gives B some claim against others. In order to determine what this claim is we must solve the



emergent problem of how property rights limit liberty. Clearly, the problem of non-aggressive risky acts is one aspect of the problem of how property rights limit liberty. Furthermore, we shall see that Nozick regards the problem of non-aggressive risky acts as a problem which is emergent relative to our clear beliefs about how property rights limit the aggressive behaviour of another.

What problems remain after we have a solution to the problem of how property rights limit liberty? The solution to this problem enables us to determine which acts which threaten the boundary established by another's property rights are permitted and which are forbidden. Furthermore, it will enable us to distinguish between acts which are merely permitted and acts which a person has a right to do. An act is permitted when a person does not act wrongly in doing it. He has a right to do it, and is not merely permitted to do it, when he is permitted to do it and others are obligated not to interfere with his doing it. If we conclude that a person has a right to do it then, like an ordinary property right, it establishes a boundary around the person which gives him claims against others when it is crossed. If we conclude that an act is forbidden, then we must solve the emergent problem of how people are permitted to respond to forbidden acts. Nozick denies that we can go straight from the fact that an act which threatens

the boundary established by another's property rights is forbidden to the conclusion that it is permissible to use force to prevent it or to punish the person who did it.<sup>27</sup> It is an important feature of his theory, however, that the right to enforce one's natural rights includes the right to use force to prevent one from doing a forbidden act as well as the right to use force to punish a person for doing such an act.<sup>28</sup> Furthermore, it is an important feature of his theory that the right to use force to prevent a forbidden act includes the right to use force to take compensation from a person who has crossed the boundary established by your property rights without your consent. This follows from his belief that it is never permissible to cross the boundary established by another's property rights without his consent and to refuse to pay compensation.<sup>29</sup> Finally, the solution to the problem of when it is permissible to use force to respond to forbidden acts will include a solution to the problem of how severely we are permitted to punish a person for doing a forbidden act. In summary, Nozick believes that a solution to the problem of how property rights limit liberty still leaves us with the complex emergent problem of when it is permissible to use force to respond to forbidden acts which threaten the boundaries established by another's property rights.

This brief discussion of the structure of Nozick's

theory should leave no doubt that Nozick makes ample use of the first type of simplifying assumption. There is overwhelming evidence that he believes that different problems merit their own principles. This discussion should also give the reader some sense of how complex the structure of Nozick's theory is and, therefore, help the reader to identify exactly where the problem of non-aggressive risky acts fits into that structure. The evidence that Nozick uses the second type of simplifying assumption is also compelling. Our discussion of how he approaches the task of solving the problem of who owns what has already provided dramatic evidence that he uses it. We will see further evidence that he uses it when we discuss his solution to the problem of non-aggressive risky acts. He appears to believe that we can arrive at our clearest beliefs about how to solve this problem by considering it as it arises in a world in which there are no transaction costs.<sup>30</sup> It is only after we have solved it as it arises in this simpler world that we should drop the assumption of no transaction costs and attempt to solve it as it arises in the world in which we live.

A final thing to note about the intuitionist approach is that a person who uses it must eventually defend solutions to the problems he recognizes as emergent problems. Let us assume that a person believes that a certain domain merits its own principles. Let us further assume that he approaches

the problem of constructing a theory for that domain by making use of a simplifying assumption which brings our attention to what he believes are our clearest beliefs about how to solve problems in that domain. When we drop the simplifying assumption we must solve the problems in that domain which emerge. How do we decide from among all of the possible solutions to one of these emergent problems which the optimal one is? There is no problem when the root ideas which we arrived at by means of the simplifying assumption are sufficiently powerful to entail a solution to the emergent problem. When this is the case we simply accept the solution which is entailed as the optimal solution. When it is not the case, then we must look for an emergent constraint which can be used to compare the competing solutions.<sup>31</sup>

A natural place to look for emergent constraints is in other local theories. Perhaps the root ideas of one local theory put constraints on how we can develop another local theory. A complete moral theory is, after all, no more than a coherent combination of local theories. A person who uses the intuitionist approach must, therefore, be prepared to answer the following types of questions:

1. Are some problems completely independent from other problems so that the theory which we adopt for one has no implications for the theory

we adopt for the other?

2. Are some problems completely dependent on other problems so that the theory we adopt for one forces us to adopt a particular theory for the other?

3. Are some problems partially dependent upon other problems so that the theory we adopt for one puts some constraints on what theory we can adopt for the other but does not force us to adopt a particular theory?

Is the problem of who owns what completely independent of the problem of free speech? Is the problem of how property rights limit liberty partially dependent upon the problem of who owns what? Is the problem of paternalism partially dependent upon the problem of free speech? Is the problem of how to distribute the costs of accidents completely dependent upon the problem of punishment? It is impossible to answer these questions in the abstract. We must have particular local theories at hand. As I explain and criticize Nozick's solution to the emergent problem of non-aggressive risky acts I will often raise these types of questions.

What happens, however, if all of the root ideas from all of the local theories do not force a conclusion as to what the optimal solution to the emergent problem is? In this case we must defend a new emergent constraint which a) is consistent with all of the root ideas which are included

among our clearest beliefs, b) identifies a property which it is desirable to have in a solution when the problem is examined from an impartial point of view, and c) can be used to rank competing solutions. The solution which satisfies this property to the highest degree is the optimal solution. In order to establish that Nozick's solution to the emergent problem of non-aggressive risky acts is not the optimal solution I must, therefore, do three things. First, I must establish that the root ideas of the theory which he defends do not entail the solution which he proposes. Second, I must defend an emergent constraint which can be used to evaluate the solutions which are compatible with his root ideas. Finally, I must establish that there is an alternative solution which satisfies the emergent constraint to a higher degree than Nozick's solution.

In the first two sections of this chapter I have made some general comments about Nozick's approach to theory construction. I have discussed how Nozick's initial simplifying assumptions are intimately connected to his task of constructing a complete moral theory, including a theory of the just state, by focusing on people's moral relations in a pre-institutional state of nature. Furthermore, I have explained what an emergent problem is and have given examples of problems which Nozick must regard as emergent problems at different stages in the development of his theory. Finally,

I have explained what is involved in claiming that a solution to an emergent problem is the optimal solution. In the remaining sections of this chapter I hope to accomplish three things. First, I will give a more precise account of why Nozick must view the problem of non-aggressive risky acts as an emergent problem by showing how it is related to the libertarian side constraint against aggression, which he defends. Second, I will explain the important contrasts between the solution to the problem of non-aggressive risky acts which Nozick defends and a solution which I believe is certainly preferable. Finally, I will summarize the argument which I develop in the remainder of this essay for the conclusion that Nozick's solution to the emergent problem of non-aggressive risky acts is not the optimal solution.

### 1.3 The Libertarian Side Constraint Against Aggression:

Nozick's most detailed discussion of the problem of how property rights limit liberty occurs in Chapter Four. Near the beginning of his discussion he writes:

A line (or hyper-plane) circumscribes an area in moral space around an individual. Locke holds that this line is determined by an individual's natural rights, which limit the actions of others. Non-Lockeans view other considerations as setting the position and contour of this line. In any case

the following question arises: Are others forbidden to perform actions that transgress the boundary or encroach upon the circumscribed area, or are they permitted to perform such actions provided that they compensate the person whose boundary is crossed?<sup>32</sup>

This quote should bring our attention to two important features of Nozick's discussion. The first is that he clearly assumes that the solution to the problem of how property rights limit liberty presupposes solutions to the problems of who owns what and what constitutes a crossing. I will, for the most part, avoid asking how Nozick believes we can arrive at solutions to these prior problems. When I discuss his solution to the problem of non-aggressive risky acts I will simply assume, as he does, that we have solutions. At times, however, I will raise the question of whether it is reasonable to believe that we can always solve these prior problems by appealing to a person's natural rights. The alternative position is that we must sometimes appeal to established public rules which satisfy law bound principles.<sup>33</sup> The reason why I will sometimes raise this question will become apparent.

This quote also brings our attention to the fact that Nozick believes that rights are absolute in the following sense: it is never permissible to cross the boundary established by a person's rights without his consent and to



refuse to pay him compensation for the harm caused by the crossing.<sup>34</sup> I will call the thesis which asserts that rights are absolute in this sense "weak absoluteness." Nozick's discussion of the problem of how property rights limit liberty leaves almost no doubt that he believes that the solution will reveal that rights are also absolute in the much stronger sense given by the libertarian side constraint against aggression.

Unfortunately, Nozick never explicitly says what principles are included in the libertarian side constraint against aggression, and he never offers a precise account of what constitutes aggression. The following remarks, which appear in Chapter Three, should give the reader an idea of the position which Nozick wants to defend:

Political philosophy is concerned only with certain ways that a person may not use others; primarily physically aggressing against them. A specific side constraint upon action towards others expresses the fact that others may not be used in the specific ways the side constraint excludes. Side constraints express the inviolability of others in the ways they specify.<sup>35</sup>

This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints, but it also, I believe,

leads to a libertarian side constraint that prohibits aggression against another.<sup>36</sup>

Anyone who rejects that particular [the libertarian] side constraint has three alternatives: (1) he must reject all side constraints; (2) he must produce a different explanation of why there are moral side constraints rather than simply a goal directed maximizing structure, an explanation which does not itself entail the libertarian side constraint; or (3) he must accept the strongly put root idea about the separateness of individuals and yet claim that initiating aggression against another is compatible with this root idea. Thus we have a promising sketch of an argument from moral form to moral content: the form of morality includes F (moral side constraints); the best explanation of morality's being F is p (a strong statement of the distinctness of individuals); and from P follows a particular moral content, namely, the libertarian constraint.<sup>37</sup>

What is the relation between these brief descriptions of and arguments for the libertarian side constraint against aggression and the later arguments, which appear in Chapter Four, concerning which actions are forbidden and which are permitted provided that compensation is paid? Nozick never tells us. It seems fair to say, however, that the later arguments are intended to supplement the earlier argument, the one from moral form to moral content, for the libertarian side

constraint. We should expect Chapter Four to throw additional light on what the libertarian side constraint requires and why we should accept it.

In order to explain what theses Nozick includes in the libertarian side constraint against aggression and to explain how he defends those theses by appealing to his root ideas, we must first have an account of what Nozick means by aggression. It will not do to say that aggression is the impermissible use of force. One reason is that any moral theorist, from libertarian to utilitarian, could agree that impermissible uses of force are forbidden. The substantive issue is which uses of force are impermissible. Another reason is that there may be aggressive acts which do not involve the use of force. Although a thief does not use force it is reasonable to claim that he acts aggressively. One of my aims will be to extract the account of aggression which is implicit in Anarchy, State and Utopia. I will use this account of aggression to state the principles which Nozick certainly includes in the libertarian side constraint against aggression and to explain how these principles are related to Nozick's root ideas. We will be able to see why a person who is committed to Nozick's root ideas will insist that all aggressive acts which threaten to cross the boundary established by another's property rights are forbidden. Now, however, I will give a non-theoretical account of which

principles Nozick appears to include in the libertarian side constraint against aggression.

The clearest case of an aggressive act which crosses another's boundary is an act which involves the forceful taking of a person's property without his consent. A person who accepts the libertarian side constraint against aggression certainly accepts the following principle:

P1. It is never permissible to use force to take another's property without the other's consent.

This is a very powerful principle which takes us way beyond weak absoluteness. It implies that it is not permissible to forcefully take another's property even in cases where the crossing will produce a great amount of good and the person whose property will be taken is offered more than full compensation for the harm which he will suffer as a result of the taking. It implies that a forceful taking is not even permissible in a case where it is a necessary means to minimize the number of aggressive acts which will take place in the future.<sup>38</sup> Forceful takings include the obvious cases of using force, or the threat of force, to get a person's material property such as his money or his car. They also include the use of force to get a person to provide labor which he has not consented to provide and is not otherwise

morally bound to provide.

The libertarian side constraint will also apply to forceful crossings which are not takings. So, for instance, in cases of battery there is a forceful crossing but nothing which can be called a taking. The principle which Nozick would appeal to in order to explain why battery is forbidden would be the following principle which entails P1 but is not entailed by it:

P2. It is never permissible to forcefully cross the boundary defined by another's rights without his consent.

I suspect that Nozick would also say that there are times when a person aggressively crosses the boundary defined by another's rights even though he does not forcefully cross it. He might, for instance, say that both the person who steals and the person who defrauds act aggressively even though they do not use force. What makes their acts aggressive is the fact that each intends to make another worse off. Nozick might explain why these acts are forbidden by appealing to the following principle:

P3. It is never permissible to cross the boundary defined by another's rights with the intent to make the other worse off.

We should note that this principle follows directly from a commitment to weak absoluteness. Therefore, it is a weaker principle than either of the previous principles which constitute the libertarian side constraint. Those principles forbid acts where the agent is willing to pay more than full compensation to the person whose boundary he will cross and, therefore, clearly does not intend to make that person worse off.

We have isolated three types of acts which threaten to cross the boundary defined by another's rights and which Nozick would classify as aggressive. Furthermore, for each type we have identified a principle which says that that type of act is forbidden. It appears that Nozick also believes that there are some aggressive acts which do not threaten to cross the boundary defined by another's rights but which are, nonetheless, forbidden. His discussion of blackmail suggests that he would classify any act which is done for the sole purpose of making another worse off as an aggressive act and would accept the following principle:<sup>39</sup>

P4. It is never permissible to do an act, regardless of whether the act threatens the boundary defined by another's right, when the sole purpose for doing the act is to make another worse off.

In fact, it is his discussion of blackmail which suggests that he intends the libertarian side constraint against aggression to apply to a wider class of acts than those which he would classify as impermissible uses of force.

Finally, we come to the last clear aspect of the libertarian side constraint against aggression: forbidding the use of force for paternalist or perfectionist purposes.<sup>40</sup> The person who uses force for these purposes intends to benefit the person against whom he wields the force. Therefore, we cannot get the conclusion that these uses are forbidden directly from P3. In order to get the conclusion we must explicitly posit a right to choose one's life plan and the means for achieving it. Once we posit this right we can get the conclusion that those uses of force are forbidden by appealing to P2. Similarly, once we determine that people have rights to use force, then those rights function like property rights and are protected by P1 and P2.

Now that I have stated the principles which are included in the libertarian side constraint against aggression I want to a) explain how Nozick's commitment to the libertarian side constraint leads him to take seriously the anarchist's doubts about the possibility of providing a justification of the state and b) elaborate on how the libertarian side constraint is related to the solution to the problem of non-aggressive risky acts. The anarchist believes

that there are two features of the state which make it impossible to provide a justification of the state. The first is its prohibition on the private enforcement of rights.<sup>41</sup> So long as we believe that each person has a right to enforce some of his rights and we accept the libertarian side constraint against aggression, then we will also have to accept that prohibiting private enforcement of these rights is forbidden. This is because prohibiting private enforcement involves the use of force to cross the boundary established by another's rights without his consent. It is important to notice that this doubt about the possibility of providing a justification of the state only depends upon the belief that people have some rights to enforce their rights. It is consistent with the claim that there are some rights to use force which are possessed by justly selected officials and by nobody else. Recall that a person who accepts the libertarian side constraint assumes that we already have a solution to the problem of who owns what. This person might claim that we can solve this problem only by appealing to established public rules which satisfy a traditional principle of distributive justice. In this case he will almost certainly also claim that the only people who have the right to enforce this rule, a rule which permits the forceful taking of what some have legitimately acquired for the purpose of satisfying the principle, are justly selected officials.



Alternatively, he will claim that a central authority has the right to prohibit the private enforcement of this rule. It is only after the problem of who owns what has been solved that the libertarian side constraint comes into play. The person who accepts it will insist that each person has the right to punish those who do the acts which it forbids and, therefore, that a prohibition on this right to use force is also forbidden. This discussion establishes that a person who accepts the libertarian side constraint against aggression may consistently claim both a) that there are some rights to use force which are held by justly selected officials and by nobody else and b) that it is impossible to provide a justification of the state. The reason why he can consistently claim both follows from the way I have defined the libertarian side constraint against aggression: as a thesis which is independent of the thesis that there are no rights to use force which are held by justly selected officials and nobody else. Although we will see that Nozick accepts both, he only needs the former to explain why he takes the anarchist's doubts seriously.

The second feature of the state which the anarchist objects to is its provision of protective services to all of the people within its boundaries including those who do not have the resources to pay for the protection which they receive and those who would choose to do without the

protective services.<sup>42</sup> How can the state raise the money to pay for these protective services? If it raises the money through voluntary contributions, then there are no apparent rights violations. The other methods of raising the money, however, will appear to involve violations of the libertarian side constraint. Let us assume that it raises the money for providing protection to the needy by taxing the rich. This taxation appears to be a forceful taking of the wealthy person's property without his consent. Therefore, it appears to be a violation of the libertarian side constraint. It even appears to be a violation of weak absoluteness insofar as the crossing is not accompanied by any compensation to the person whose boundary is crossed. We might attempt to avoid the conclusion that this use of force is a violation of the libertarian side constraint by claiming that each person has a legitimate claim on every other person to aid him in preventing violations of his rights. These may include claims to another's aid which do not depend upon the existence of established public rules as well as claims to another's aid in supporting established public rules which are designed to prevent rights violations. If we believe that people have these legitimate claims, then we will deny that enforcing them is a violation of the libertarian side constraint. Instead we will say that enforcing them is forcing a person to do what he has no right to refrain from doing. Nozick

denies that a person has a legitimate claim to another's aid in preventing violations of his rights.<sup>43</sup> He takes the view that we do not violate a person's rights when we refrain from aiding him in protecting his rights. Therefore, he concludes that these uses of force are violations of the libertarian side constraint.

There is also the problem of how to raise money to provide protection to those who are not needy but who do not choose to pay for protective services. If the money is raised by taxing others, then we have the same violations of the libertarian side constraint as above. Do we also violate the libertarian side constraint when we raise the money by taxing those who choose not to buy protective services? Does a person violate the libertarian side constraint when he uses force to make a person move from a situation in which he does not receive protective services and does not pay to one in which he receives protective services and pays? If this move involves forcefully preventing a person from enforcing his own rights, then we can certainly conclude that there is a violation. Even if it does not involve this prohibition it still involves a violation of the libertarian side constraint. This is because it involves forcefully taking some of what a person owns without his consent. We can conclude that a person who accepts the libertarian side constraint will object to the state's practice of providing

protection to all of the people within its boundaries and will share the anarchist's second doubt about the possibility of providing a justification of the state.

We have seen how Nozick's commitment to the libertarian side constraint is related to his belief that we must take seriously the anarchist's doubts about the possibility of providing a justification of the state. We can now see why it forces him to reject a principle which he calls "the enforceable fairness principle." The reasons why he rejects this principle enable us to clearly see why the libertarian side constraint is both a very strong and a very limited thesis. The fairness principle states:<sup>44</sup>

Whenever a group of people G voluntarily cooperate by conforming their behaviour to a set of public rules, then every person P, regardless of whether he is a member of G, has an obligation to follow the rules provided that: a) the rules are intended to apply to him, b) he has been informed of their requirements, c) he receives the benefits of the cooperation of others, and d) he is better off in the situation in which he receives the benefits of other's cooperation and cooperates than he would have been in the situation in which he does not receive the benefits and does not cooperate.

The enforceable fairness principle is the fairness principle

with the rider that justly selected representatives of G are permitted to enforce the obligations created by the fairness principle. These obligations will be obligations to do (or refrain from doing) actions which one had a right to refrain from doing (or to do) prior to the establishment of the rule. They may include: refraining from privately enforcing your rights, permitting others to use your property without your consent, paying for services which you never consented to pay for, or refraining from doing a risky act.

The fairness principle and the libertarian side constraint both presuppose solutions to the problems of who owns what and what constitutes a crossing. The fairness principle, however, also presupposes solutions to the problems of how property rights limit liberty and when a person is permitted to use force to respond to forbidden acts. In fact, it presupposes information about what all of a person's rights are. This is because we need this information to determine whether condition d) of the fairness principle has been satisfied. This condition requires us to compare a person's well-being in the situation in which all are required to obey the rule with his well-being in the situation in which none are required to obey the rule. We cannot say very much about how well off he would have been in the latter situation unless we know what rights people have in it. We can conclude that the fairness principle is a principle

which can only be used to change the boundaries established by people's rights in ways which make none worse off. Once we see this it is easy to see why a person who accepts the libertarian side constraint must reject the enforceable fairness principle. The proponent of the libertarian side constraint believes that no person is permitted to forcefully cross the boundary established by another's rights without the other's consent. In fact, he believes that no person is permitted to cross without consent even when he guarantees the other more than full compensation for the harm caused by the crossing and the crossing is a necessary means for minimizing the number of rights violations. The person who accepts the enforceable fairness principle must give up each of these beliefs. He must concede that some forceful crossings of a person's boundary without his consent are permitted. They will be just those crossings which are permitted by established public rules which satisfy conditions a) through d). Furthermore, in the cases where crossings are permitted without consent the person whose boundary is crossed is not even guaranteed full compensation for the harm caused by that crossing. Condition d) only requires that the person is better off than he would have been in the situation in which there was no rule. It can be satisfied even though the person is not compensated each time his boundary is crossed without his consent. All that is

required is that he gains more from the times when he and others are permitted to cross without consent and without paying compensation than he loses from the times when others are permitted to cross his boundary without consent and without paying compensation.

The relationship between the enforceable fairness principle and the anarchist's doubts about the possibility of providing a justification of the state is illuminating. Nozick is aware that a person who accepts the enforceable fairness principle can provide a justification of the state. It is easy for this person to show that an established public rule which prohibits private enforcement of rights, provides each person with a right to protective services, and requires payment from each for the cost of providing him with these services, will satisfy conditions a) through d) of the enforceable fairness principle. The argument that d) will be satisfied will appeal to the following liabilities of private enforcement which Nozick recognizes: it is expensive, it is time consuming, it often leads to constant feuds, and it causes people to suffer fear of being victims of the unreliable procedures for determining guilt which others might use.<sup>45</sup> A central authority which published a rule like the one sketched above, used reliable procedures for determining guilt, and charged a reasonable price for its protective services could certainly say to each of the people who was

subjected to the rule that he is better off in the situation in which he obeys the rule and benefits from the cooperation of others than he would have been in the situation in which there was no rule at all. In order to stop this quick justification of the state Nozick must show that the principle to which it appeals, the enforceable fairness principle, is unacceptable. One way for him to show this is by showing that it is inconsistent with a commitment to the libertarian side constraint. We will see that he has other reasons for rejecting the enforceable fairness principle. It appears to conflict with his beliefs, which we will examine in the next section, that there are no rights to use force which are held by justly selected officials and nobody else and that no new rights emerge at the group level. It is important to see, however, that a person who accepts the libertarian side constraint against aggression does not have to appeal to these additional beliefs to establish that the enforceable fairness principle is unacceptable. This suggests that a commitment to the libertarian side constraint is one thing and the commitment to those beliefs is quite another.

The fact that a person who accepts the libertarian side constraint can use it to support the anarchist's doubts about the possibility of providing a justification of the state and to reject the enforceable fairness principle shows



that it is a strong thesis. Now we should see why it is a limited thesis. First, it presupposes solutions to the problems of who owns what and what constitutes a crossing. Nothing we have said establishes that a person who accepts the libertarian side constraint cannot also accept solutions to these problems which sometimes appeal to established public rules which satisfy law bound principles. Furthermore, nothing we have said suggests that we can never defend a law bound principle as the appropriate principle for solving one of these problems on the ground that it will give "the fairest solution." When Nozick rejects the enforceable fairness principle he rejects a principle which says that once we have established what boundaries are established by a person's rights we cannot appeal to the enforceable fairness principle to change those boundaries without the person's consent. It is a completely different question whether we can appeal to what we intuitively consider to be considerations of fairness when we first establish what those boundaries are. Second, the libertarian side constraint leaves us with the problem of when it is permissible to forcefully prohibit non-aggressive acts including non-aggressive risky acts. Again, we should note that nothing we have said suggests that a person who accepts the libertarian side constraint cannot appeal to considerations of fairness to solve this problem. Furthermore, nothing we have said suggests that a person who accepts

the libertarian side constraint cannot appeal to law bound principles to solve this problem. With these facts in mind I will now explain the significant contrasts between Nozick's solution to the problem of non-aggressive risky acts and a solution which I will argue is preferable.

#### 1.4 The Natural Position:

One of the significant features of Nozick's solution to the emergent problem of non-aggressive risky acts is that it does not appeal to law bound principles. That is, he believes that we can always solve the problem of whether or not a person is permitted to perform a non-aggressive risky act without appealing to an established public rule which satisfies a law bound principle. We have defined a law bound principle as a principle which a) specifies an end result and b) is used to evaluate enforceable public rules on the basis of how closely compliance with them achieves that end result. We will say that a public rule satisfies a law bound principle when compliance with it achieves the specified end result, and that a public rule is intended to satisfy a law bound principle when those who publish the rule believe that it will satisfy the principle.

A person may believe that law bound principles are sometimes needed to solve the problems of who owns what, what constitutes a crossing, and how property rights limit liberty.

Most theories of distributive justice appeal to law bound principles to solve the problem of who owns what. Examples include:

A distribution of income and wealth is right if and only if it maximizes utility.

A distribution of income and wealth is right if and only if the share which each receives makes an equal proportionate contribution to the best life each is capable of achieving.

A person who accepts either of the above will almost certainly believe that only justly selected officials have the right to publish and enforce the laws which are needed to achieve the end result which it specifies.

A person may also believe that law bound principles are sometimes needed to solve the problem of what constitutes a crossing. We have already raised the question of whether I cross the boundary established by your property right in your sewer pipe when I plant a tree whose roots destroy the pipe. If you believe that the appropriate way to answer this question involves evaluating the hypothetical consequences of hypothetical public rules which tell us what constitutes a crossing, then you believe that we must sometimes appeal to law bound principles. You will believe that it certainly is a crossing when the established public rule

says that it is a crossing and the established public rule is the rule which has "the best" consequences.

Finally, a person may believe that law bound principles are sometimes needed to solve the problem of how property rights limit liberty. A person who accepts the libertarian side constraint against aggression believes that we can solve some aspects of this problem without appealing to any law bound principles in addition to those which might be needed to solve the problems of who owns what and what constitutes a crossing. That is, he believes that once we have solutions to these problems we can a) say that a person is forbidden to do an aggressive act which threatens to cross the boundary established by another's rights, and b) determine which acts are aggressive without appealing to any additional law bound principles. Another person might insist that once we have solutions to the problems of who owns what and what constitutes a crossing we should adopt the following solution to the problem of how property rights limit liberty: a person is permitted to cross the boundary established by another's property rights without his consent provided that his act is permitted by an established set of public rules which a) requires him to compensate the person whose boundary he crosses and b) causes greater social utility than any alternative set of public rules which forbids the crossing would cause. This person clearly believes that we must

sometimes appeal to additional law bound principles to solve the problem of how property rights limit liberty. The question which we will eventually have to answer is whether a person who accepts the libertarian side constraint against aggression as the solution to one aspect of the problem of how property rights limit liberty must say that the solutions to all aspects of that problem, including the problem of non-aggressive risky acts, must never appeal to additional law bound principles.

A person who believes that there are law bound principles must answer each of the following questions:

- 1) Which people are entitled to publish, interpret, and enforce the public rules which are needed to satisfy law bound principles?
- 2) How do we determine when a person is morally bound to obey the requirements of a public rule which is intended to satisfy a law bound principle?
- 3) How should we distribute the costs of publishing, interpreting, and enforcing the public rules which are needed?

I will say that a person accepts the natural position when he believes both a) that there are law bound principles, and b) that law bound principles create the need for the following special principles:

1. Special principles for evaluating procedures which select the people who alone have the right to publish and interpret the public rules which are needed to satisfy law bound principles.<sup>46</sup> We will call procedures which satisfy these special principles "just publication procedures."

2. Special principles for evaluating procedures which select the people who alone have the right to enforce the public rules which are needed to satisfy the law bound principles. We will call procedures which satisfy these principles "just enforcement procedures."

3. Special principles which can be used to determine when a person is morally bound to obey the requirements of public rules which are intended to satisfy law bound principles. We will call these special principles "principles of political obligation."

4. Special principles for evaluating policies of distributing the costs of maintaining the just procedures and the costs of publishing, interpreting, and enforcing the laws which are needed to satisfy law bound principles. We will call policies which satisfy these principles "just policies of distributing the costs of maintaining just institutions."

5. Special principles for evaluating procedures for selecting the people who alone have the right to enforce just policies for

distributing the costs of maintaining just institutions. We will also call procedures which satisfy these principles "just collection procedures."

Finally, a person who accepts each of the special principles listed above will also insist that there is a natural right to just institutions: a right to the cooperation of others in establishing and maintaining the just publication, enforcement, and collection procedures. It is this natural right, along with its correlative natural duty, which assures that just institutions will emerge from a pre-institutional state of nature by morally permissible means.

A person who wants to defend the natural position must first establish that the correct moral theory includes some law bound principles. He can do this by showing that the solutions to the problems of who owns what, what constitutes a crossing, and how property rights limit liberty sometimes appeal to law bound principles. In this essay I will examine whether a person who accepts the libertarian side constraint against aggression can defend a solution to the problem of non-aggressive risky acts which appeals to law bound principles. The reader will recall that the problem of non-aggressive risky acts is one aspect of the problem of how property rights limit liberty. Once a person establishes

that there are law bound principles, then he must also establish that the solutions to the special problems created by them must appeal to the special principles included in the natural position. So, for instance, he might offer the following argument for his claim that law bound principles create the need for special principles for evaluating publication procedures:

1. Only one set of enforceable public rules is needed to satisfy a law bound principle.
2. Distinct sets of enforceable public rules may yield conflicting directives or lead to excessive restriction of liberty.

therefore,

3. We need some mechanism for selecting the people who alone have the right to publish the enforceable public rules which are needed to satisfy the law bound principles.

and

4. The mechanism will be acceptable to those who are bound to obey the requirements of the enforceable public rules only if it meets the requirements of what they believe are acceptable principles.

A similar argument can be given for why we need just procedures for selecting the people who alone have the right to interpret the laws which are intended to satisfy law bound



principles.

Once we recognize that there are principles which can only be satisfied through the establishment of public rules we must face the problem of when people are bound to obey the rules which are intended to satisfy those principles. We cannot adopt the view that a person is bound to obey the rules only when he has consented to obey them. This is because the public rules which satisfy law bound principles sometimes establish what people's rights are in the following strong sense: in the absence of the rule we cannot say what a person's rights are. This would certainly seem to be true for law bound principles which are used to solve the problems of what constitutes a crossing and how property rights limit people's rights to perform non-aggressive risky acts. Therefore, accepting the view that a person is bound to obey public rules which satisfy law bound principles only when he has consented to obey those rules amounts to accepting the untenable view that a person is morally bound to respect another's rights only when he has consented to respect those rights.

What special principles should we adopt for determining when people are morally bound to obey public rules which are intended to satisfy law bound principles? The answer would be straightforward if we lived in a world in which people

always agreed about which public rules should be used to satisfy law bound principles. We could get by with one principle: a person is always bound to obey the public rules which satisfy law bound principles. In fact, however, there is usually reasonable disagreement about which public rules should be used. This fact provided part of the rationale for why we need special principles for evaluating procedures which select the people who alone have the right to publish and interpret the public rules needed to satisfy law bound principles. It also creates the need for principles which enable people to determine when they are morally bound to obey laws which they do not believe satisfy acceptable law bound principles. Furthermore, we need principles which enable people to determine when they are morally bound to obey laws, even laws which they believe satisfy law bound principles, which were not published by justly selected officials. These are the traditional problems of political obligation as they arise within a theory which accepts that there are law bound principles and that law bound principles create the need for just institutions. I will offer brief arguments for each of the other special principles included in the natural position in the next section.

1.5 The Force Principle, the Independence Principle, and Nozick's Solution:

There is absolutely no evidence in Anarchy, State and Utopia that Nozick accepts the natural position. Is it because he would deny that there are any law bound principles? Or, is it because he would accept some law bound principles but deny that they create the need for the special principles included in the natural position? The fact that he does not accept it is of special interest because the natural position is a weak thesis which appears to be neutral among conflicting accounts of what principles characterize the just state. Two people can disagree about which law bound principles are correct but agree on their commitment to the natural position.<sup>47</sup> There does not appear to be any reason why a person who believes that the only just state is the night-watchman state cannot also believe that the night-watchman state is just only if it uses the just procedures which the natural position insists upon. This person will insist that the state is not permitted to use force in the pursuit of any paternalist, perfectionist, or egalitarian goals. He may believe, however, that law bound principles are sometimes needed to solve the problems of what constitutes a crossing and how property rights limit liberty and that these law bound principles create the need for the special principles included in the natural position. Why, then, does Nozick

not accept the natural position? More specifically, why does he defend a solution to the problem of non-aggressive risky acts which is incompatible with the natural position?

One reason why Nozick may not be willing to accept the natural position can be traced to his commitment to an abstract principle which I will call "the force principle" or "F":

The Force Principle: Any principle which is used to establish that a person, including an agent of the state, is permitted to use force against another person must be a principle which any person acting alone in the state of nature may use to establish that he is permitted to use force against another person.

A person who accepts F will insist that there are no rights to use force which are held by justly selected officials and by nobody else. A person who accepts the natural position believes that there are two types of rights to use force which are held by justly selected officials and by nobody else: the right to enforce the public rules which satisfy law bound principles, and the right to enforce the just policies for distributing the costs of maintaining just institutions. Therefore, Nozick's commitment to F explains why he does not accept the natural position. A question

which we will have to examine is whether Nozick can defend his commitment to F.<sup>48</sup>

The evidence that Nozick accepts F includes these remarks:

The rights possessed by the state are already possessed by each individual in a state of nature.<sup>49</sup>

No new rights or powers arise; each right of the association is decomposable without residue into those individual rights which are held by distinct individuals acting alone in the state of nature.<sup>50</sup>

... no new rights "emerge" at the group level,  
... individuals in combination cannot create new rights which are not the sum of preexisting ones.<sup>51</sup>

Although these quotes appear to be about all types of rights, the contexts from which they are taken only establish that Nozick intends them to be about rights to use force. They certainly establish that he accepts F. In fact, they suggest that he accepts a thesis that is stronger than F in the sense that it is even more radically opposed to law bound principles and the natural position than is F.

The stronger thesis is the thesis that no new rights emerge at the group level. In order to see that it is a

stronger thesis we should ask the following question: Is it consistent to claim both a) that there are law bound principles, and b) that law bound principles create the need for all of the special principles which are included in the natural position except those which are inconsistent with F? The natural position includes special principles for evaluating procedures for selecting people who alone have the right to a) publish the enforceable rules which are needed to satisfy the law bound principles, b) enforce those rules, and c) enforce the just policies for distributing the costs of maintaining just institutions. It would appear that a person could accept that we need special principles for a) but deny that we need special principles for b). He might accept our argument that there must be just publication procedures but deny that only justly selected officials have the right to enforce the published rules. Instead, he might claim that the right to enforce them is held by each person. This position is not inconsistent. Whether or not it is a plausible position which anybody would ever defend depends upon what law bound principles are under discussion.

It is not a plausible position for the law bound principles which people usually defend as the principles of distributive justice. Nozick concedes as much.<sup>52</sup> This position may, however, be plausible for law bound principles which are used to solve the problems of what constitutes a

crossing and of how property rights limit liberty. Here it is not completely implausible to view the right to enforce the rules as an extension of the natural right to enforce one's rights. A person who believes that we sometimes need law bound principles to solve the problems of what constitutes a crossing and of how property right limit liberty might, therefore, cling to F and claim that each person has the right to enforce the rules which are published by justly selected officials. Nozick might make this claim if he were to concede that there are some law bound principles which create the need for just publication procedures. He might acknowledge that a system in which all exercised their rights of private enforcement would be very inconvenient and note that people could use their natural right to make contracts to remove the inconvenience. He would insist, however, that no person or group was permitted to prohibit another's enforcement of his rights without his consent because the prohibition would be a violation of the libertarian side constraint.

The person who accepts the natural position will take a radically different view on who has the right to enforce the rights which are created by the public rules which satisfy law bound principles. He will say that the task of protecting these rights is properly interpreted as a joint task which gives each person to whom the rules apply some claims on every other person to whom they apply. His

reasons go beyond the recognized inconveniences of the system of private enforcement. They also appeal to the facts that the protection of his rights is something that each person desires and that the protection of people's rights has the features of a public good: it is impossible to provide (some aspects of) the protection to some people without providing it to all. When some assume the costs of catching, prosecuting, and punishing rights violators they will almost certainly provide all of the people in the area with the benefits of a safer environment through increased deterrence of rights violations. The proponent of the natural position will insist that the fairest way to provide these benefits to all is to establish just enforcement and collection procedures which are used to select the people who alone have the rights to catch, prosecute, and punish people and to select the people who alone have the right to enforce just policies for distributing the costs of providing these protective services. We have noted that Nozick would probably reject this position in favor of preserving F and denying that the protection of people's right is ever properly interpreted as a joint task.

Nozick would find it much more difficult, however, to preserve F and to deny that there are any joint tasks, when he faces the problem of who has the right to enforce the just policies for distributing the costs of publication and



of maintaining the just publication procedures. It seems just as implausible to claim that this right to use force is held by each person acting alone in the state of nature as it does to claim that each person acting alone in the state of nature has the right to enforce the public rules which are needed to satisfy a traditional principle of distributive justice. It is not inconsistent to claim that this right is held by each person acting alone in the state of nature -- it is simply implausible. The implausibility can be traced to the fact that the force is used to take some of what a person has legitimately acquired for the purpose of making him do his share in what is interpreted as a joint task. It must be clear to the person against whom the force is wielded that the person who wields it will use what he takes for the purpose of accomplishing the task. The only reasonable way to assure this is to give this emergent right to use force to justly selected officials and nobody else.

The joint task we are discussing is the combined task of a) publishing the public rules which are needed to satisfy law bound principles and, at the same time, establish what people's rights are and b) maintaining just publication procedures. Even a person who steadfastly holds, as Nozick and the anarchist do, that the task of providing protection for people's rights is not properly interpreted as a joint task, will have difficulty explaining why the prior task of

establishing what people's rights are is not properly interpreted as a joint task. Once we recognize that the task of establishing what people's rights are is a joint task we must face the problem of how to distribute the costs of accomplishing this task. Nozick cannot, without further argument, say that the use of force for this purpose is unacceptable. He cannot simply say that it involves forcefully taking some of what a person has legitimately acquired and, therefore, is a violation of the libertarian side constraint. The libertarian side constraint forbids the use of force to take what a person owns. It is a separate issue whether a person owns all that he has legitimately acquired. The answer depends in part on how we solve the problem of who owns what. It also depends in part on whether we recognize any joint tasks -- any states of affairs which people are collectively responsible for producing. If we recognize some joint tasks, then every person has a prior claim on every other person for his cooperation in accomplishing the task. The use of force to assure that person's cooperation is not a violation of the libertarian side constraint. Although this use of force takes some of what the person has legitimately acquired it does not also take what he owns. He can only claim to own what he has legitimately acquired after he has done his share in accomplishing joint tasks.

Our discussion of why a person who accepts law bound

principles which create the need for just publication procedures must eventually give up F puts us in a position to clearly see why a person who claims that no new rights emerge at the group level is even more radically opposed to law bound principles and the natural position than is the person who accepts F is. A person who claims that no new rights emerge at the group level will have to either deny that there are law bound principles or deny that law bound principles create the need for special principles for evaluating publication procedures. If he conceded that there were law bound principles which created the need for such special principles, then he would also have to concede that new rights, including rights to use force, emerge at the group level. We can show that he must make this concession by showing that the rights which are established by the public rules needed to enforce the law bound principles and the rights to enforce these public rules are rights which emerge at the group level. Clearly, they are not rights which people have in a pre-institutional state of nature. Furthermore, no person acting alone in the state of nature has the right to publish the enforceable public rules which are needed to satisfy the law bound principles which the proponent of the natural position accepts. Finally, it is only after a) the group has established just institutions and b) the justly selected officials have

published rules which satisfy law bound principles, that the new rights which are established by the public rules emerge. A person who accepts F can try to make these emergent rights compatible with F by insisting that the emergent rights to use force are held by each person acting alone in the state of nature. The person who claims that no new rights emerge at the group level must straightaway deny that there are law bound principles which give rise to rights of this type. Therefore, we can conclude that a person who claims that no new rights emerge at the group level accepts a thesis which is stronger than F.

A person who accepts the thesis that no new rights to use force emerge at the group level does not, however, have to claim that there are no law bound principles. He might accept the following principle: each person has the right to be free from risks of harm above a specified level; in particular, he has the right to publish and enforce the rules needed to coordinate the behaviour of others so that they do not collectively subject him to a level of risk above the specified level. This hypothetical law bound principle is different from most in that a person who accepts it can plausibly claim that each person acting alone in the state of nature has the right to publish and enforce the rules needed to satisfy it. It is not plausible to make this claim about most law bound principles. Those which are

needed to solve the problems of who owns what and what constitutes a crossing are used to establish what each person's rights are. There is no basis for any person to claim that the rule which he publishes to satisfy the principle should be the enforceable one. With regard to our hypothetical principle, however, there is an obvious answer to the question of why the person who publishes the rule should have the right to publish it: the rule is intended to protect him and nobody else.

The hypothetical principle which we introduced above is consistent with both F and the stronger thesis that no new rights emerge at the group level. It turns out, however, that Nozick rejects it as part of the solution to the problem of non-aggressive risky acts. His rejection appears to follow from his commitment to another abstract principle which I will call "the independence principle" or "I":

The Independence Principle: It is permissible to use force (or the threat of force) to prevent a person from doing an act or to punish him for doing an act only when his act is serious enough to warrant interference when it is considered as an isolated act in a pre-institutional state of nature.

We consider a person's act as an isolated act when we

consider it independently of the acts of others who are acting independently of him. Two people certainly act independently of each other when neither knows what the other is doing. They also act independently of each other when each has a sufficient reason for doing his act which does not depend upon how the other will act. Nozick's commitment to I would also lead him to say that there are times when one person acts independently of others who are acting independently of him even though the first person's reason for acting is dependent upon how the others act. He is acting independently provided that he did not voluntarily agree to coordinate his behaviour with the others. We can conclude from Nozick's rejection of the fairness principle that the free rider acts independently of those whom he takes for a ride.<sup>53</sup> Two people are not acting independently of each other in cases where they have not voluntarily agreed to coordinate their behaviour.

It should be clear that our hypothetical principle is inconsistent with a commitment to I. A person who accepts our hypothetical principle will say that it is justifiable for any person to publish an enforceable public rule which will coordinate the risky activities of others so that they do not collectively subject him to a risk above a specified level. A consequence of this rule will be that some people will be prohibited from doing non-aggressive risky acts

which are not serious enough to warrant interference when they are considered as isolated acts in a pre-institutional state of nature. Clearly, some of the people whose acts are prohibited can complain that their acts are not serious enough to warrant interference when they are considered independently of the acts of the others who are acting independently of them. They will use their commitment to I to establish that the public rule prohibits more acts than it is justifiable to prohibit.

The evidence that Nozick accepts I as a constraint on solutions to the problem of non-aggressive risky acts is found in his discussion of the problem of cumulative risk.<sup>54</sup> This problem arises when a) the result of many person's non-aggressive risky acts is to subject a person to a risk which is so great that it would be permissible to prohibit any single person from subjecting him to a risk of that magnitude, and b) none of the non-aggressive risky acts is serious enough to warrant interference when it is considered as an isolated act. Nozick offers a detailed discussion of one aspect of the problem of cumulative risk. He asks us to consider a pre-institutional situation in which a group of people agree to give a central authority, or protective association, the rights to a) be the final judge of when one of them has violated the rights of another, b) determine

what punishments are appropriate for different violations, and c) impose the punishments which are appropriate.<sup>55</sup> He then asks us to imagine that there are a large number of people, whom he calls "independents," who refuse to give the protective association these rights.<sup>56</sup> Instead, the independents insist on retaining their natural rights to interpret and enforce their rights. Nozick then assumes that the procedures which they use to determine who has violated their rights are more likely to find an innocent person guilty than the procedures which the protective association uses.<sup>57</sup> This enables him to classify an independent's exercise of his right to enforce his rights as a risky act. Finally, he assumes that the cumulative effect of these risky acts is a risk of such magnitude that it would be permissible to prohibit any person from imposing a risk of that magnitude on any other person. This leads him to ask whether a representative of the protective association, or any member of the association acting on his own, is permitted to prohibit independents from privately enforcing their rights.

His answer reveals his commitment to I:

If there were many independents who were all liable to punish wrongly, the probabilities would add up to create a dangerous situation for all.



Then, others would be entitled to group together and prohibit the totality of such activities. But how would this prohibition work? Would they prohibit each of the individually non-fear-creating activities? Within a state of nature by what procedure can they pick and choose which of the totality is to continue, and what gives them the right to do this? No protective association, however dominant, would have this right. ... No person or group is entitled to pick who in the totality will be allowed to continue. All of the independents might group together and decide this. They might, for example, use some random procedure to allocate a number of (sellable?) rights to continue private enforcement so as to reduce the total danger to a point below the threshold. The difficulty is that, if a large number of independents do this, it will be in the interests of an individual to abstain from this arrangement. It will be in his interests to continue his risky activities as he chooses, while the others mutually limit theirs so as to bring the totality of acts including his to below the danger level. For the others probably would limit themselves some distance away from the danger boundary, leaving him room to squeeze in. Even were the others to rest adjacent to the line of danger so that his activities would bring the totality across it, on which grounds could his activities be picked as the ones to prohibit? Similarly, it will be in the interests of any individual to refrain from otherwise unanimous agreements in the state of nature: for example, the agreement to set up a state. Anything an

individual can gain by such a unanimous agreement he can gain through separate bilateral agreements. Any contract which really needs almost unanimity, any contract which is essentially joint, will serve its purpose whether or not a particular individual participates; so it will be in his interests not to bind himself to participate.<sup>58</sup>

This quote leaves almost no doubt that Nozick accepts I as a constraint on solutions to the problem of non-aggressive risky acts. In fact, it appears to establish that he accepts the stronger position that there are no tasks which are properly interpreted as joint tasks and, therefore, that he accepts I as a more general constraint.

I am not going to claim that Nozick accepts I as a general constraint on solutions to all problems concerning when it is permissible for one person to use force against another. There is ample evidence, however, that he uses it as a constraint on solutions to problems besides the problem of non-aggressive risky acts. It is implicit in his arguments against the claims that people have enforceable rights to such things as the satisfactions of their needs,<sup>59</sup> equality of opportunity,<sup>60</sup> and meaningful work.<sup>61</sup> These claims are most plausible as claims that people have enforceable rights to the cooperation of others in producing these results. Therefore, a person who accepts one of these

claims believes that we must sometimes determine whether it is permissible to use force to interfere with another's act by asking whether his act is in violation of an established rule which coordinates people's behaviour so that they collectively produce the result. Acts which are in violation of the rule will often be acts which are not serious enough to warrant interference when they are considered as isolated acts in a pre-institutional situation. We can conclude that a person who accepts one of these claims gives up I. One of Nozick's arguments against these claims, however, is that when we focus on situations in which there are no established rules which coordinate people's behaviour to produce these results, we do not find any rights to use force to produce these results.<sup>62</sup> Regardless of whether Nozick is right about what we find, one explanation for why he finds this type of argument convincing is that he accepts I.

Furthermore, the assumption that Nozick accepts I can be used to explain why he accepts a retributive theory of punishment which includes the principle that the amount of punishment a person deserves puts an upper limit on the amount he may receive but does not include any principles of comparative justice.<sup>63</sup> A principle which said that the amount of punishment we may impose on one person depends upon the amount which we have imposed on another of equal

desert would conflict with I. If we could establish that Nozick accepts I as a general constraint, then we could establish that he must reject all law bound principles which can only be satisfied through the establishment of public rules which coordinate people's behaviour so that they collectively produce some end result. The problem with claiming that he accepts I as a general constraint is that he appears to give it up when he attempts to solve the emergent problem of non-abundance.<sup>64</sup> Therefore, I will refrain from making the claim that he adopts it as a general constraint. I will only claim that he adopts it as a constraint on solutions to the problem of non-aggressive risky acts. Furthermore, I will note that he must either accept it as a general constraint or explain why it is appropriate as a constraint in some cases but not others. Failure to do this leads to the charge that he has not combined local theories in a coherent manner.

Although the long quote which we examined leaves little doubt that Nozick accepts I as a constraint on solutions to the problem of non-aggressive risky acts, it does not bring attention to all of Nozick's reasons for accepting I. While discussing the general problem of cumulative risk, as opposed to the more specific problem of cumulative risks which are created by independents who use risky procedures to enforce their rights, Nozick writes:

How is it to be decided which below-threshold subsets of such totalities are to be permitted? To tax each act would require a central or unified taxation and decision-making apparatus. The same could be said for social determination of which acts were valuable enough, with the other acts forbidden in order to shrink the totality to below the threshold. For example, it might be decided that mining or running trains is sufficiently valuable to be allowed, even though each presents risks to the passerby no less than compulsory Russian roulette with one bullet and n chambers (with n set appropriately), which is prohibited because it is insufficiently valuable. There are problems in a state of nature which has no central or unified apparatus capable of making, or entitled to make, these decisions.<sup>65</sup>

Nozick wants to bring our attention to two facts. The first is that if we give up I as a constraint on solutions to the problem of cumulative risk, then we will need some means of evaluating the relative social worth of the different non-aggressive risky acts which create the problem of cumulative risk. The second is that there is no person in a pre-institutional state of nature who is entitled to enforce his judgments about the relative social worth of these acts. Nozick appears to take these facts as grounds for retaining I. The person who accepts the natural position has a radically different response. First, he gives up I and defends law bound principles which enable us to determine

the relative social worth of different non-aggressive risky acts. Second, he gives up F and defends the view that people are collectively responsible for establishing and maintaining just publication, enforcement, and collection procedures.

Nozick's commitment to F and I leads him to adopt the following principle, which he calls "the principle of compensation,"<sup>66</sup> for solving the problem of non-aggressive risky acts:

The Principle of Compensation: A person is permitted to prohibit another's non-aggressive risky act only if that act creates a risk of sufficient magnitude that others fear being its victims. A person who chooses to prohibit another's non-aggressive risky act must, however, compensate the other for any disadvantages which result from the prohibition.

We must explain what Nozick means when he claims that one person is disadvantaged by another's prohibition of his non-aggressive risky act. For our present purposes it is sufficient to say that the prohibition prevents the person from pursuing an activity which is essential to pursuing a normal life and causes him to be "disadvantaged relative to the normal situation."<sup>67</sup> Nozick regards the principle of compensation as the appropriate resolution of a conflict between

two types of rights: rights to property and rights to pursue one's life plan in a non-aggressive manner. It should be clear to the reader that the principle of compensation is compatible with both F and I. Furthermore, the reader should note that a person who accepts it as the only principle which can be used to solve the problem of non-aggressive risky acts must view the problem of cumulative risk as an inconvenience of remaining in the state of nature. It provides each person who finds himself in a pre-institutional state of nature with a reason to establish a central authority with the right to publish, interpret, and enforce the public rules which are needed to solve the problem. Most people will, in the pursuits of their self-interests, use their natural rights to make contracts to establish a central authority with these rights. There are no special principles which can be used to evaluate the procedures which select the central authority and there are no special principles which can be used to evaluate the rules which it publishes. Whatever procedures and principles people agree to are acceptable. Furthermore, the rules which are published are only enforceable against those who have agreed to them. Those who have not agreed must be treated according to the requirements of the principle of compensation.

Can Nozick defend his solution to the problem of non-aggressive risky acts? In order to do this he will have

to defend his commitment to F, which is a commitment to the view that all rights to use force are held by individuals qua individuals, and his commitment to I, which is a commitment to the view that all rights to use force are held against individuals qua individuals. F and I represent the extreme individualism which is an essential part of the libertarian position. I am going to argue that even if we grant Nozick his account of the root ideas of moral theory which lead him to accept the libertarian side constraint against aggression, we do not also have to grant him F and I as constraints on solutions to the problem of non-aggressive risky acts. Furthermore, I will argue that a solution which appeals to the following principle and to the special principles included in the natural position is certainly preferable to his solution:

We must evaluate public rules which assign rights to perform non-aggressive risky acts on the basis of how well they achieve the following results: 1) they assure that no person is subjected to a risk of having his boundary crossed which is above a specified level, 2) they assure that each person whose boundary is crossed by another's non-aggressive risky act receives compensation for the harm caused by the crossing, and 3) they assure that each person who is disadvantaged by a



prohibition of his non-aggressive activities is compensated for the disadvantages. Furthermore, we are to evaluate rules which achieve all of these results on the basis of how well each achieves the further result of maximizing utility.

The reader should understand my critique of Nozick's solution in the light of Nozick's own critique of utilitarianism. One of his objections to utilitarian theories is that they prevent us from giving the right reasons for many of the conclusions which we accept.<sup>68</sup> This is because utilitarian theories do not adequately represent what Nozick believes are the root ideas of the correct moral theory. After giving examples which show that a commitment to utilitarianism involves a commitment to outrageous accounts of how to solve certain moral problems, he writes:

Clearly, a utilitarian needs to supplement his view to handle such issues; perhaps he will find that the supplementary theory becomes the main one, relegating utilitarian considerations to a corner.<sup>69</sup>

It is one thing to relegate utilitarian or, more broadly, consequentialist considerations to a corner and quite another to claim that they are never relevant. Nozick's commitment

to F and I is a commitment to the view that there are no law bound principles and, therefore, that consequentialist considerations are never relevant. I will argue against Nozick that even after we accept his account of what the root ideas of moral theory are, we will still be able to defend law bound principles and the relevance of consequentialist considerations to solving problems in at least one corner of moral theory -- the corner which must generate a solution to the problem of non-aggressive risky acts.

#### 1.6 Summary of the Argument:

In the next six chapters I am going to argue that Nozick's solution to the emergent problem of non-aggressive risky acts is not the optimal solution. In Chapters Two and Three I will examine Nozick's defense of the libertarian side constraint against aggression. I will warn the reader that the discussion in these chapters will often be tedious. This is due to the fact that I attempt to attribute a consistent and theoretically interesting defense of the libertarian side constraint to Nozick. In order to do this I must pay very careful attention to the text in order to explain away some apparent inconsistencies. The major conclusion of these chapters is that the link between Nozick's account of the root ideas of moral theory and the libertarian side constraint against aggression is found in

what he considers to be the important concepts of productive exchange and unproductive exchange. I will show that the principles which constitute the libertarian side constraint against aggression can be used to resolve conflicts which arise in situations of productive and unproductive exchange and that we can explain why it is appropriate to use these principles by appealing to Nozick's root ideas. The discussion in Chapters Two and Three will prepare the way for a precise statement in Chapter Four of why Nozick must consider the problem of non-aggressive risky acts to be an emergent problem.

In Chapter Five I will consider whether Nozick can offer any compelling reasons why we should accept F and I as constraints on solutions to the problem of non-aggressive risky acts and I will argue that he cannot. In Chapter Six I will consider Nozick's solution on its own merits and argue that it has many counter-intuitive implications. In Chapter Seven I will identify an emergent constraint and argue that solutions which appeal to law bound principles and the natural position satisfy this constraint to a higher degree than Nozick's solution. This will enable me to conclude that Nozick's solution is not the optimal solution to the emergent problem of non-aggressive risky acts.

## ASSAULT AND THE PRINCIPLE OF PRODUCTIVE EXCHANGE

### 2.1 Aims:

Assault is a paradigm case of an act which threatens to cross the boundary established by another's natural rights. In this section I will examine Nozick's account of why assault is forbidden. I will argue for each of the following:

1. Nozick must concede that an argument which I will call "the argument from compensated-for-fear" is not, in spite of the importance which he attaches to it, needed to justify the prohibition on assault.
2. Nozick must justify the prohibition on assault by appealing to the principle, which I will call "the principle of productive exchange," that it is never permissible to use force to make one person serve another productively.
3. The principle of productive exchange is a formal interpretation of Nozick's root ideas that each person is separate, inviolable, and not a resource for any other person.
4. Nozick must draw a distinction between cases where it is permissible to punish a person for doing an act regardless of whether he was warned that he would be punished for doing it and cases where it is permissible to punish him only after he has been warned.

Nozick does not explicitly accept each of the positions which I will attribute to him. I believe, however, that he would, on reflection, accept each. My aim in this section is not to criticize Nozick. It is to isolate those aspects of the problem of how property rights limit liberty about which he believes we have clear beliefs. We must examine Nozick's solutions to these aspects of the problem before we can examine his solutions to the aspects of the problem which he concedes are more difficult, including the problem of non-aggressive risky acts. Throughout this discussion we will assume that we have solutions to the prior problems of who owns what and what constitutes a crossing.

## 2.2 Initial Grounds for Prohibiting Assault:

Assault is the use of force to cross the boundary established by another's right to his body without his consent. Nozick's discussion of why it is permissible to prohibit assault, rather than permit it provided that compensation is paid, arises during a discussion of the more general problem of why it is ever permissible to prohibit an act that "the agent knows will or might well impinge across someone's boundary."<sup>1</sup> First, he notes that we must at least prohibit the joint act of crossing another's boundary and refusing to pay compensation for the crossing.<sup>2</sup> This prohibition is necessary to assure that the requirement of weak absoluteness is met.

His commitment to this prohibition implies a commitment to P3 which says that it is never permissible to cross the boundary established by another's rights with the intent to make another worse off.<sup>3</sup> A person who certainly intends to act contrary to the requirements of this prohibition is the person who crosses another's boundary with the intent to make him worse off. The thief and the swindler act with this intent. Second, he notes that we must also prohibit in those cases where we have good reason to believe that the compensation will not be paid. These include cases where the injury which results from the crossing is irreversible and non-compensable and cases where the person who causes the injury is too poor to adequately compensate his victim.<sup>4</sup> These reasons do not support a prohibition on all assaults. Some assaults create only a minimal risk of irreversible and non-compensable injury and many people who desire to assault others are in a position to adequately compensate their victims. How can we justify a prohibition on these remaining assaults?

This brings us to Nozick's third reason. He claims that to permit assault provided that full compensation is paid to the victim would lead to an unfair and arbitrary distribution of the benefits of exchange.<sup>5</sup> He offers the following account of full compensation:

Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates a person X for a person Y's action A if X is no worse off receiving it, Y having done A, than X would have been without receiving it if Y had not done A.<sup>6</sup>

When one person assaults another he crosses the boundary established by the other's right to his body. There is some highest price  $m$  which he would pay for the right to cross and there is some lowest price  $n$  which the owner of the right would accept as compensation for the crossing. Full compensation for the crossing would be  $n$ . If the two are given an opportunity to negotiate and if  $m$  is greater than  $n$ , then they will arrive at a mutually beneficial price which is between  $m$  and  $n$ . Nozick calls this price "market compensation."<sup>7</sup> He notes that to permit assaults provided only that full compensation was paid would distribute the benefits of exchange in a way which is maximally advantageous to the buyer (the assaulter). He objects that this is unfair to the seller and that it is arbitrary.

Furthermore, he believes that permitting all border crossings, including all assaults, provided only that full compensation is paid would deprive all of the benefits of the market system of exchange. He writes:

Consider further how such a system [one that permits all border crossings provided that full compensation is paid/allocates goods. Anyone can seize a good, thereby coming to "own" it, provided he compensates its owner. If several people want a good, the first to seize it gets it, until another takes it, paying him full compensation. (Why should this sort of middleman receive anything?) What amount would compensate the original owner if several persons wanted a particular good? An owner who knew of this demand might well come to value his good by its market price, and so be placed on a lower indifference curve by receiving less. (Where markets exist, isn't the market price the least price a seller would accept? Would markets exist here?)<sup>8</sup>

Nozick seems to be right when he claims that a system which permitted all border crossings, including assaults, provided that full compensation was paid would deprive all of the benefits of the market system as the main system for determining prices. The relevance of this claim for the problem of whether it is permissible to prohibit all assaults is not, however, clear. First, we should note that a solution to the problem of whether it is permissible to prohibit assault which appeals to the consequences of adopting a general system in which all assaults are prohibited does not solve the problem of whether to prohibit a particular assault by examining it as an isolated act in a



pre-institutional situation. Instead, it solves the problem by showing that the consequences of permitting all assaults would be detrimental. Although this solution does not appeal to an established public rule which satisfies a law bound principle; it is inconsistent with I, nonetheless.<sup>9</sup> Does Nozick want to give up I, which he accepts as a constraint on the solution to the problem of cumulative risk, as a constraint on the solution to the problem of when it is permissible to prohibit assault? I do not believe that he does. Second, it is not clear that we must prohibit all acts which "will or might well impinge across someone's boundary," including all assaults, in order to assure ourselves of the benefits of the market system as the main system for determining prices. In fact, it would seem that a) all that is necessary to preserve the market system as the main system for determining prices is a general system which prohibits most unconsented to crossings and b) we could certainly improve upon the consequences of the general system which prohibits all unconsented to crossings by permitting a select group of unconsented to crossings, including some assaults. In order to firmly establish these points, however, we must examine the consequences of adopting alternative general systems. Our examination will eventually lead us to the conclusion that Nozick does not want to give up I by saying that we must solve the problem of when it is permissible to

prohibit an unconsented to crossing by comparing the consequences of adopting a general system which prohibits the crossing with the consequences of adopting a general system which permits it.

### 2.3 Mutual Aid and the Relevance of Consequences:

In order to explain why Nozick does not want to give up I we must discuss the following example:

John is at the beach with his daughter Mary. Suddenly he sees that she is in distress. The least risky way to save her is to throw her a rope. He notices that Sam, the fisherman, has a rope in his boat. He tells Sam that his daughter is drowning and that he needs the rope. Sam says that he can use the rope for \$4,000. He notes that Mary's life is certainly worth more than \$4,000 to John and, therefore, that John should be grateful that he is on the scene to make this offer. John says that he has the right to take the rope provided that he pays Sam full compensation for the use of the rope and that if Sam makes any attempt to prevent him from taking it and using it he will forcefully, and rightfully, take it.

I will assume that it is a fixed point of libertarian thought that Sam is right and that any use of force by John to take the rope is a violation of the libertarian side constraint

that prohibits aggression.<sup>10</sup> Sam can defend his position by appealing to the principle which we have called P1: it is never permissible to use force to take another's property without his consent. How can Nozick justify P1 and establish that Sam is right?

None of the reasons which Nozick has so far offered for why we should prohibit an act, rather than permit it provided that compensation is paid, force the conclusion that Sam is right. Why isn't John permitted to take the rope, regardless of whether Sam consents, provided that he pays Sam full compensation for his use of the rope? John's use of the rope will not cause Sam to suffer an irreversible and non-compensable injury. Furthermore, there is little doubt that John can compensate Sam for his use of the rope. We are, after all, talking about a rope which can be bought for a nominal fee at any fishing equipment store. Is it unfair to distribute the benefits of exchange in this case so that they are maximally beneficial to John? It may be slightly unfair for the benefits of exchange to go completely to John. Using ordinary notions of fairness, however, it would also be unfair to require John to pay market compensation to a person who is willing to exploit his misfortune. It would appear, therefore, that the argument from fairly dividing the benefits of exchange does not support Sam's position. At most it requires that John must pay Sam

something more than full compensation for the use of his rope.<sup>11</sup>

Finally, we must ask whether a general system which permits John to take the rope provided that he pays Sam full compensation will threaten the market system as the principal means for determining prices. It seems clear that it will not. In fact, it seems clear that the public adoption of the following general system, which we will call "MA" for "Mutual Aid," will not create any threat to the market system and will have better consequences than the general system which prohibits all unconsented to crossings:

MA: A person has a right to cross the boundary established by another's rights, regardless of whether the other gives his consent, provided that a) it is clear that his reason for crossing is to prevent a serious irreversible injury, b) he provides the person whose boundary is crossed with full compensation for any harm which results from the crossing, and c) the amount of harm which results from the crossing is negligible so that it is reasonably certain that compensation can be paid.<sup>12</sup>

If MA is correct, then John has a right to take Sam's rope regardless of whether Sam consents. Sam can complain only if John fails to pay him full compensation for his use of the rope. MA recognizes that Sam's right to his rope is

absolute in the weak sense that it is never permissible to cross the boundary which it establishes without compensating Sam for the crossing. It also recognizes, however, that in the circumstances we have described John has a right, regardless of Sam's consent, to use Sam's rope. Although Nozick's initial list of rights does not include a right to be given aid we have used an argument which Nozick appears to accept to generate an emergent right to be given aid which is consistent with the requirements of weak absoluteness, and, therefore, with the claim that it is never permissible to use force for redistribution purposes. The method we have used to generate the right to aid is the following: A person has a right to cross the boundary established by another's rights without his consent provided that a) he compensates the other for the harm caused by the crossing and b) the crossing is permitted by a general system whose adoption leads to better consequences than the adoption of any alternative system which prohibits the crossing or the adoption of any alternative system which permits the crossing but does not impose a duty of non-interference on the person whose boundary is threatened. According to MA John is not merely permitted to cross the boundary established by Sam's right to his rope. MA says that John has the right to cross that boundary. Therefore, Sam has a duty not to interfere with the crossing. The only reasonable way

to interpret the duty of non-interference which is correlated with the right to cross is as a duty to cooperate with the crossing. Furthermore, if this right has the same properties as other rights which Nozick accepts, then it establishes a boundary around John which gives him claims when it is crossed. In fact, it would appear that if Nozick says that John has the right to take the rope, then he would also have to say that any attempt by Sam to interfere with John's exercise of this right would make Sam liable to punishment for crossing John's boundary and liable to pay compensation for any harm which results from the crossing.<sup>13</sup> Nozick does not want these conclusions. He wants to deny that John has a right to take the rope and to assert that any use of force to take the rope from Sam amounts to a violation of the libertarian side constraint against aggression. How can Nozick get these conclusions?

#### 2.4 The Root Ideas and the Principle of Productive Exchange:

Perhaps Nozick can get these conclusions by appealing to the root ideas of his theory. He offers the following additional reason for why we should not permit all boundary crossings provided that compensation is paid:

... a system permitting boundary crossings, provided compensation is paid, embodies the use of persons as

means; knowing that they are being so used, and that their plans and expectations are liable to being thwarted arbitrarily is a cost to people; ...<sup>14</sup>

The idea that it is never permissible to use another as a means is only one of the root ideas which Nozick appeals to. I will examine each of the root ideas which appear to be relevant to the dispute between Sam and John in order to do three things. One is to consider whether they force the conclusion that Sam is right. Another is to establish that if they force the conclusion that Sam is right, then they also force the conclusion that it is permissible to prohibit assault. If he claims that they do not force the conclusion that Sam is right, then he needs an additional argument, since his argument from uncompensated-for-fear will not work, for the conclusion that Sam is right. If he claims that they force the conclusion that Sam is right, then he must concede that his argument from uncompensated-for-fear, which he appears to believe is a very important argument, is not needed to justify the prohibition on assault. In either case the argument from uncompensated-for-fear is not as important as Nozick leads us to believe. This is as it should be since the argument is, as we shall see, inconsistent with his commitment to I.

The root ideas which appear to be relevant to the

dispute between Sam and John and to the problem of whether it is permissible to prohibit assault are the following:

- 1) No person may be sacrificed for the benefit of any other person.
- 2) Each person must be treated as an end and never merely as a means.
- 3) No person is a resource for any other person.

I do not claim, nor would Nozick, that it is transparently clear what each of these means. We can, however, apply them in an intuitive way to see if they help us to solve the dispute between Sam and John. Furthermore, we will ask whether they help us to solve the dispute between a would be assaulter, whom we will call "Bob," and his would be victim, whom we will call "Jim." I will argue that to whatever extent they provide support to Sam's position, they provide at least as much support to Jim's position which is that it is not permissible for Bob to strike him without his consent. Just as Sam can justify his position by appealing to P1 of the libertarian side constraint, Jim can justify his position by appealing to P2 which says that it is never permissible to forcefully cross the boundary established by another's rights without his consent. My aim is to show that if Nozick's root ideas are sufficiently



powerful to justify P1 and support Sam's position, then they are also sufficiently powerful to justify P2 and support Jim's position. If they are sufficiently powerful to support Jim's position, however, then Nozick's appeal to the argument from uncompensated-for-fear to justify the prohibition on assault is superfluous.

Can Sam plausibly claim that he is being sacrificed to John's interests when John takes his rope, in spite of his refusal to give it, and provides him with full compensation? How can he say that he has been sacrificed when he is left no worse off than he would have been if John had nothing at all to do with him? It seems more plausible for Jim to claim that he is being sacrificed to Bob's interests when, in spite of his refusal to permit the assault, Bob assaults him and provides him with full compensation. Even here, however, there is a puzzle. How can Jim complain that he has been sacrificed when he receives full compensation and is left no worse off than he would have been if Bob had nothing to do with him? For now, we need only note that this first root idea supports Jim's position at least as much as it supports Sam's.

Can Sam claim that John is using him merely as a means when he takes his rope in spite of his refusal to give it? Here we are inclined to turn the question back on Sam. Can't

John complain that Sam's refusal to give it for anything less than \$4,000 amounts to using John's misfortune as a means to his ends? Doesn't the intuitive idea that it is never permissible to use another merely as a means lead us to accept a moral principle which says that it is not permissible to exploit another's misfortune? Jim appears to have a much sounder complaint than Sam. It would strike us as outrageous for Bob to claim that permitting Jim to hold out for market compensation, which is what we do when we prohibit assault, amounts to permitting Jim to exploit Bob's desire to assault him as a means to Jim's enrichment. Again we can confidently say that Nozick's root idea provides at least as much support for Jim's position as it does for Sam's.

Finally, can Sam claim that John is using him as a resource when he takes his rope in spite of his refusal to give John the rope? Can he complain that permitting John to take the rope amounts to making John partial owner of his body or his labor? There is something to Sam's complaint. If John has the right to take the rope provided only that he compensates Sam for the taking, then John is a partial owner of Sam's labor and the fruits of his labor. This partial ownership is, however, extremely innocuous. It in no way interferes with Sam's long range planning of his life or with his chances for successfully executing his long range plan.<sup>15</sup> Whatever complaint he has would be minor

compared to the complaint that Jim would have were Bob permitted to assault him without his consent. Jim might lose his desire to plan if he knew that at any moment another might, for whatever reasons, assault him provided only that he compensated him for the harm which resulted from that assault. Again we can say that Nozick's root idea provides at least as much support for Jim's position as it does for Sam's. It follows, therefore, that if these root ideas force the conclusion that Sam is right, then they must also force the conclusion that Jim is right. If they force this conclusion, however, then there is no need for an additional argument to justify the prohibition on assault: the argument from the root ideas would be sufficient.

In fact, I do not believe that Nozick needs an additional argument to justify the prohibition on assault. More specifically, I believe that he can, and should, resolve the disputes between Sam and John and between Jim and Bob by appealing to a principle which I will call "the principle of productive exchange" or "PE." Furthermore, I believe that it is reasonable to view the principle of productive exchange as a formal interpretation of Nozick's root ideas that each person is separate and inviolable and no person is a resource for any other person.

Let us say that X serves Y productively if and only if Y is better off as a result of his exchange with X than he

would have been if X did not exist at all or had nothing to do with him.<sup>16</sup> The principle of productive exchange, or PE, says that it is never permissible to use force to make one person serve another productively. It presupposes that each person has a right to refuse to serve another productively. This right of refusal is an expression of the fact that each person is separate and no person is a resource for any other person. Furthermore, when a person P acts on his right of refusal he leaves no person worse off than he would have been in the situation in which P had nothing to do with him or did not exist at all. On what grounds, therefore, can any person (who believes that no person, including P, is a resource for any other person) complain? Finally, the fact that no person can be forced to serve another productively expresses the fact that each person is inviolable. The use of force to make one person serve another productively is, for the libertarian, the paradigm case of aggression.

PE has straightforward implications for the disputes between Sam and John and between Jim and Bob. It should be clear that Sam serves John productively when he exchanges his rope for whatever John is willing to offer and that Jim serves Bob productively when he exchanges the use of his body for whatever Bob is willing to offer.<sup>17</sup> Therefore, a person who accepts PE will claim that it is not permissible to force Sam to enter the exchange with John and it is not permissible

to force Jim to enter the exchange with Bob. We appear to be committed to the view that the use of force is permissible in each case, however, when we say that John has the right to take the rope provided that he pays Sam full compensation for its use and that Bob has the right to inflict bodily harm on Jim provided that he pays Jim full compensation for the harm he inflicts. The only way to avoid this view is by saying that although each of John and Bob have the right to cross provided that he pays full compensation for the harm caused by his crossing, neither has the right to enforce his right. In the case of Bob's crossing, which necessarily involves the use of force, this does not even make sense. In the case of John's crossing we would have an isolated and unexplained case where Nozick retreats from the view that a person has the right to enforce his rights.

We can conclude that PE gives us the conclusions that Sam and Jim are right. Furthermore, it enables us to go straight from Nozick's root ideas to these conclusions and it is consistent with Nozick's apparent commitments to F and I. We should, therefore, expect Nozick to welcome it. In fact, however, he never explicitly states the principle. Furthermore, he appears to believe that his root ideas do not even force the conclusion that assault should be forbidden rather than permitted provided that full compensation is paid. This is evidenced by his appeal to an additional

argument, the argument from uncompensated-for-fear, to supplement the argument from his root ideas. I now turn to his argument from uncompensated-for-fear. It is an argument which he appears to believe is very important but which I believe is simply irrelevant to the problem of whether each person has a natural right to prohibit assault.

### 2.5 The Argument From Uncompensated-for-Fear:

Nozick asks us to imagine a general system in which all assaults are permitted provided that the victims receive full compensation for the injuries which result from the assaults.<sup>18</sup> The joint act of assaulting and failing to provide compensation is prohibited. Nozick notes that it is an important fact about humans that there are some acts which they fear even when they are guaranteed that they will be fully compensated for the injuries which those acts cause.<sup>19</sup> Assault is one of these acts. People who lived in a general system which permitted assaults would be extremely nervous and jumpy and in constant fear that they may be assaulted next. People may lose their desire to make long range plans when they know that others may assault them and interrupt those plans at any time. If a person makes plans which are frustrated by another's assault, then he receives full compensation. If he falls into apathy and gives up planning, however, there is no person who caused this and who must

compensate him. Nozick's claim that a general system which prohibits assault is preferable to one which permits it provided that compensation is paid appears to be sound. The latter almost certainly leads to a tremendous amount of uncompensated-for-fear which does not appear in the former.

Nozick then considers a general system which permits assaults but requires each person who assaults to compensate his victim for the injuries which the assault causes and for the fear which he has suffered as a result of living in the system. Nozick offers two objections to this system. One is that it still leaves those who are not victims of assaults with uncompensated-for-fear.<sup>20</sup> The other is that it is not fair to make an assaulter compensate his victim for the fear which the system caused because his particular assault did not cause that fear.<sup>21</sup> Nozick is appealing to a variation of I. The assaulter's act did, when it is considered by itself, amount to a violation of another's right. Therefore, it is permissible to use force to make him compensate his victim for the injuries which his act caused. We cannot, however, make him pay for injuries which his act, when it is considered as an isolated act, did not cause. Nozick concludes that the system which prohibits assault is preferable to this system.

Nozick then turns to a system which permits assault provided only that those who assault immediately compensate

their victims and bribe them to keep quiet.<sup>22</sup> It might appear that in this system, since people would not be aware of how many assaults were taking place, there would be no problem of uncompensated-for-fear. Nozick realizes that appearances are deceptive:

The difficulty is that knowledge that one is living under a system permitting this, would itself produce apprehension. How can anyone estimate the statistical chances of something's happening to him when all reports of it are squelched? Thus even in this highly artificial case it is not merely the victim who is injured by its happening in a system that is known to allow it to happen. The widespread fear makes the actual occurrence and countenancing of these acts not merely a private matter between the injurer and the injured party.<sup>23</sup>

Nozick concludes that this new system, which also creates a significant amount of uncompensated-for-fear, is less desirable than the system which prohibits assault.

Nozick examines one final system. It is a system which prohibits assault but which permits any individual to opt out by making a public announcement that "he would do a certain act at will, and not only would he compensate all his victims, if any, but he would also compensate everyone who felt fear as a result of his announcement, even though



he had not actually done the act to them."<sup>24</sup> Nozick notes that the amount of compensation which would be required would be so great as to be beyond the means of almost everyone.<sup>25</sup> This is a practical consideration, however. It leaves open the possibility that some very rich person would be permitted to assault others provided only that he paid them full compensation. In addition to this practical consideration Nozick offers two arguments against this system which permits opting out:

First, persons might have free floating anxiety about attack, not because they have heard some particular announcement, but because they know the system permits those attacks after announcement, and so worry that they have not heard some. They cannot be compensated for any they have not heard of, and they will not file for compensation for the fear these caused. No particular announcement caused such fear without a specific announcement as its subject, so who should compensate for it? Thus our argument is repeated one level up; but it must be admitted that at this level the fears may be so attenuated and insubstantial as to be insufficient to justify prohibiting such announcements. Secondly, in line with our earlier discussion of fair exchange prices, one might require someone who makes such an announcement to make not merely full but market compensation.... Since fear looks very different in hindsight than it does while being undergone or anticipated, in these cases it will be almost impossible

to determine accurately what is the amount of market compensation, except by actually going through the negotiations.<sup>26</sup>

The first argument notes that a public understanding that people are, under the specified conditions, permitted to opt out of the prohibition on assault will cause some people to suffer fear which they will not be compensated for. Nozick concedes, however, that this fear may be insufficient to justify prohibiting a person from opting out when he is willing to pay for the fear which his opting out causes. We are, therefore, still without an argument for why a very rich person is not, in principle, permitted to opt out of the prohibition on assault.

This brings us to Nozick's second argument which in turn brings us back to his discussion of fair exchange prices.<sup>27</sup> There are two interpretations of his earlier discussion of fair exchange prices. Each assumes that in cases of productive exchange it is unfair for the benefits of exchange to go completely to the buyer. According to the weaker interpretation there is, in principle, no objection to forcing one person to serve another productively provided that the person whose boundary is forcefully crossed is paid fair compensation, which will be more than full compensation, for the harm caused by the crossing. According to this

interpretation we cannot go straight from the fact that full compensation for the crossing is unfair to the conclusion that we must rely on the market (i.e., voluntary exchange) to determine what is fair. So, for instance, a person who adopts this interpretation has no principled objection to the position that Sam must give John the rope provided that John pays him fair compensation for his use of the rope. He also has no principled objection to the position that a person is permitted to opt out of the prohibition on assault provided that he pays fair compensation to those he assaults. He can only object to permitting a person to opt out on the practical ground that there is no reasonable way to determine what constitutes fair compensation. I cannot believe that Nozick wants to say that there is no principled reason for prohibiting a person from opting out of the system which prohibits assault.

According to the stronger interpretation there is a principled reason for objecting to permitting a person to opt out of the prohibition on assault. The stronger interpretation gives up the search for the fair price and simply asserts that the just price is the price, if any, which people voluntarily agree upon. It accepts PE as an interpretation of the root ideas that each person is separate, inviolable, and not a resource for any other person. Permitting a person to opt out of the prohibition on assault

without the consent of his possible victims is inconsistent with PE and, therefore, is forbidden. A person who accepts PE can explain why assault is forbidden directly. He does not have to appeal to the bad consequences which would result from adopting the alternative policy of permitting assault provided that fair compensation was paid. There are two reasons why Nozick should avoid justifying the prohibition on assault by appealing to the bad consequences associated with adopting this alternative policy. One is that this justification is inconsistent with I. When we decide whether to prohibit a particular assault we do not examine the act as an isolated act but, instead, examine it as part of a general system. The other is that this justification of the prohibition on assault will not lead to a parallel justification of Sam's position in his dispute with John. It will not justify the position that John is forbidden to take Sam's rope when Sam has refused to let him use it. Nozick can get the conclusion that Sam is right by appealing to PE. In the next section we will see that he cannot get it by appealing to the uncompensated-for-fear, or other bad consequences, which people would suffer in a general system which permits the crossings which are permitted by MA. Since a) Nozick wants to defend the libertarian position that Sam is right and b) he cannot defend it by appealing to the good consequences of the general system which supports it, he

will owe us an explanation of the relevance of his argument for prohibiting assault which appeals to the bad consequences, the uncompensated for fear, created by a general system which permits assaults. It will become increasingly clear that the only argument Nozick needs and wants for the conclusion that assault is forbidden in a pre-institutional state of nature is the argument which appeals to PE and, more basically, the root ideas.

#### 2.6 More on Mutual Aid and the Relevance of Consequences:

Let me retrace some of my steps. First, I argued that if the root ideas of Nozick's theory force the conclusion that Sam is right, then they also force the conclusion that Jim is right. Alternatively, if they do not force the conclusion that Jim is right, then they do not force the conclusion that Sam is right. Second, I argued that it is reasonable to view PE as a formal interpretation of some of the root ideas of Nozick's theory and that by doing this Nozick can get the conclusions that Sam and Jim are right without giving up I. Third, I noted that Nozick appears to reject PE. This follows from his apparent belief that the root ideas do not force the conclusion that Jim is right which in turn follows from his apparent belief that he needs an additional argument, the argument from uncompensated-for-fear, to establish that Jim is right. But if an additional

argument is needed to establish that Jim is right, then an additional argument is also needed to establish that Sam is right. I am going to consider whether the argument from uncompensated-for-fear, which Nozick uses to support Jim's position, will provide any support for Sam's position. I will do this by examining the consequences of the public acceptance of MA:<sup>28</sup> the consequences of adopting a general system which permits the crossings which are permitted by MA. Sam's position is right only if MA is wrong. We have already noted that the public acceptance of MA will not threaten the market system as the principle system for determining prices. We will now consider whether its public acceptance will lead to uncompensated for fear. If the answer is "no," then Nozick will not, unless he accepts PE, have any argument for Sam's position. This will be extremely embarrassing since Sam's position is the libertarian position.

Can Sam argue against MA on the ground that its public acceptance will lead to a substantial amount of uncompensated for fear? We can answer this question by comparing the consequences of the public acceptance of MA with the consequences of the public acceptance of PE which supports Sam's position. It seems clear to me that the public acceptance of MA will not lead to any significant amount of uncompensated for fear. This would appear to be Nozick's own position. While discussing the uncompensated-for-fear which a person

would suffer in a system which permitted assault he writes:

Not every kind of border crossing creates such fear. If told that my automobile may be taken during the next month, and I will be compensated fully afterwards for the taking and for any inconvenience being without the car causes me, I do not spend the month nervous, apprehensive and fearful.<sup>29</sup>

If we further believe that our automobiles will only be taken in cases where it is needed to prevent a serious irreversible injury to somebody we will probably not suffer any fear at all.

If Nozick's position is that we cannot choose between MA and PE by appealing to either the root ideas of his theory or to the argument from uncompensated for fear, then how can we choose between them? It would appear that what we must do is examine the other advantages of each. But when we do this MA is clearly preferable. Its public acceptance has two very valuable consequences:

1. It increases each person's security by lowering the probability that he will find himself in a situation in which he will suffer a serious irreversible injury.
2. It leads to a common understanding that each moral person in the society must show a minimal

concern for every other person's well being.

It is obvious why the public acceptance of MA will have the first consequence listed. It should also be clear that it will have the second consequence. Part of being a moral person is having a disposition to act according to the requirements of the correct moral principles. If we assume that MA is a correct moral principle, then we can conclude that a moral person will be disposed to act according to its requirements. These requirements include permitting another to cross the boundary established by his rights in many cases where the crossing is needed to prevent the person who wants to cross or other persons from suffering serious injuries. Sometimes another will be permitted to cross the boundary established by the moral person's right to his material property and sometimes he will be permitted to cross the boundary established by the moral person's right to his labor. The moral person's willingness to permit others to cross in these cases amounts to a show of concern for the well being of those who are threatened with serious injury and a common understanding that people can count on each other to show this concern is certainly a good thing. Does MA have any disadvantages when compared to PE? It has the minimal disadvantage that it might sometimes commit you to cooperate in aiding a person whom you would rather see



suffer. It also has the minimal disadvantage that the person whom you must aid might not be able to pay the compensation to which you are entitled for your aid. These are small prices to pay to increase the likelihood that you will not be a victim of a serious irreversible injury. It would appear that MA is clearly preferable to PE and, therefore, that John has a right to use Sam's rope provided that he pays Sam full compensation for his use.

Can Sam save his position by saying that we are only supposed to examine the consequences of adopting competing general systems for the purpose of establishing a presumption in favor of one? Once we have established a presumption we are then supposed to ask whether it is permissible to prohibit a person from opting out of its scheme of rights and duties. This appears to be the approach which Nozick took in his discussion of assault. First, he compared the consequences of adopting the general system which prohibits assault with the consequences of adopting the general system which permits assault provided that compensation is paid. He did not, however, consider the issue settled with the conclusion that the system which prohibits is preferable. He went on to consider a system which permitted any person to opt out of the prohibition on assault provided that he compensated all those who suffered injuries as a result of his announcement that he would opt out.

Will this approach help Sam? There appear to be good reasons for prohibiting Sam from making and acting on the following announcement:

Nobody is permitted to cross the boundary defined by my rights without my explicit consent. It does not matter that a consequence of my refusal is that some people will suffer serious irreversible injuries. Nor does it matter that the people who want to cross recognize a duty to pay me full compensation for whatever harms I suffer as a result of their crossings. To show my good faith in this matter I explicitly give up my right, as defined by MA, to cross another's boundary to prevent a serious irreversible injury to myself.

The presumption establishes that MA is the benchmark since it is the optimal system. But if we consider MA to be the benchmark, then it is clear that a person who makes the above announcement makes others worse off. He may even cause others to suffer uncompensated-for-fear. This is because people may suffer fear when they realize that their chances of suffering serious irreversible injuries have increased. Should we make him compensate every person who suffers this fear? Even if we make him compensate those who suffer fear as a result of his announcement, there is still the problem of those who suffer fear because they know that they live in a system which permits such announcements

and can never be sure that they have heard each one. Who will compensate them? Once we accept MA as the benchmark, there appear to be compelling reasons for prohibiting people from opting out of its requirements.

Nozick might attempt to distinguish the problem of permitting people to opt out of MA from the problem of permitting people to opt out of the general system which prohibits assault by saying:

Note that not every act that produces lower utility for others generally may be forbidden; it must cross the boundaries of another's rights for the question of prohibition to even arise.<sup>30</sup>

He might want to say that a person who opts out of MA does not threaten to cross the boundary defined by another's rights while the person who opts out of the prohibition on assault does. Similarly, he might want to say that the fear created by a person who opts out of MA is not associated with an increased likelihood that some person's boundary will be crossed while the fear created by a person who opts out of the prohibition on assault is associated with an increased likelihood that some person's boundary will be crossed. This attempt at distinguishing the cases will only work, however, if Nozick has already established that MA is unacceptable. This is because it presupposes, contrary to

what MA implies, that a person who opts out of MA does not threaten to cross the boundary established by any other person's rights. MA asserts that a person sometimes has the right to cross the boundary established by another's rights without his consent. In these cases it is a violation of that person's right to cross to interfere with his crossing. A person who opts out of MA expresses his intention to interfere with these crossings. Therefore, he threatens to cross the boundary established by another's rights in the same way that a person who opts out of the general system which prohibits assault threatens to cross the boundary established by another's rights.

Nozick can, of course, go straight to the argument that we must permit the person to opt out of MA since his opting out does not leave any other person worse off than he would have been in the situation in which the person who opted out did not exist at all or had nothing to do with him. There are two things to note about this argument. One is that it is not outrageous to claim that a person is better off living in a society in which all  $n$  members accept MA than living in a society of  $n + 1$  members in which only  $n$  members accept MA.<sup>31</sup> The other is that to invoke the argument is to concede that PE is acceptable. To concede this, however, is to concede that the argument from uncompensated-for-fear is not necessary to get the conclusions that Jim and

Sam are right. I have been arguing that Nozick should, on reflection, be willing to make this concession. He should concede that the argument from uncompensated-for-fear is not relevant to establishing what Sam's and Jim's rights are in a pre-institutional state of nature. We will see, however, that it may be relevant to the explanation of why Jim and Sam would use their natural right to make contracts to change the boundaries established by their other natural rights in some ways rather than others.

#### 2.7 The Relevance of the Argument from Uncompensated-for-Fear:

Nozick has some second thoughts about the argument from uncompensated for fear. He writes:

Is our argument too utilitarian? If fear isn't produced by a particular person, how does it justify prohibiting him from doing an action provided he pays compensation? Our argument goes against the natural assumption that only the effects and consequences of an action are relevant to deciding whether it may be prohibited. It focuses also on the effects and consequences of its not being prohibited. Once stated, it is obvious that this must be done, but it would be worthwhile to investigate how far reaching and significant are the implications of this divergence from the natural assumption.<sup>32</sup>

The argument is too utilitarian for Nozick if it turns out to be incompatible with I. I requires that we view each problem of when it is permissible for one person to use force against another as a problem between two isolated persons in a pre-institutional state of nature. To the extent that the argument from uncompensated-for-fear appeals to the uncompensated-for-fear created by alternative general systems it certainly appears to be incompatible with I. It does not rest the conclusion that Bob is forbidden to assault Jim on the fact that permitting Bob to assault Jim would cause Jim uncompensated-for-fear. The fear it causes Jim can, in principle, be handled by charging Bob. Instead, it rests its conclusion on the fact that the general system which permits assault leads to fear which cannot, in principle, be handled. This is because there is no person who caused this fear and, therefore, no person who can be held liable to pay for it.

What happens when we consider the problem of assault as a problem between two persons acting alone in the state of nature? We must answer the following question:

Is it permissible for A, when he considers B's assault as an isolated act in a pre-institutional state of nature, to prohibit B from assaulting him?

If the answer to this question is "yes," then Nozick can claim that any person acting alone in the state of nature is permitted to punish and enforce a rule which prohibits any assault which does not receive the prior consent of its victim. This is not, however, because the alternative public rule, the one which permits assaults provided that compensation is paid, will lead to uncompensated-for-fear. It is, instead, because Nozick adopts the view that if it is permissible for one person acting alone in the state of nature to punish a person for doing an act, then it is permissible for any person acting alone in the state of nature to punish that person.<sup>33</sup>

Is the argument from uncompensated for fear necessary to explain why A is permitted to prohibit B from assaulting him? Let us consider a case where B approaches A and announces that he will assault A at will and provide him with full compensation for the injuries which result from each assault. A will almost certainly insist that full compensation for the injuries which result from each assault does not amount to full compensation because it does not cover compensation for the fear which A will suffer knowing that his plans will be interrupted at any time. He might go on to say that once we take account of this fear it is clear that B is in no position to pay the amount of compensation which he is entitled to. This will be true even if B

promises, and A believes that his promise is sincere, that B will never impose an irreversible and noncompensable injury on A such as death. It would appear, therefore, that considerations of uncompensated-for-fear turn the case of assault into a case where it is permissible to prohibit a border crossing because the person who wants to cross is not in a position to compensate his victim. Does this show that considerations of uncompensated-for-fear are necessary to justify the prohibition on assault? I do not believe that it does.

Let us change the case so that A and B have never met and, therefore, have never discussed the question of what people's rights are in assault situations. Let us further assume that B simply approaches A in his sleep and pummels him. The next morning he offers to pay A full compensation. He explains that he always wanted to pummel a defenseless person and could not resist the golden opportunity he had the previous night. His offer of compensation is high and his promise to never again assault A is unquestionably sincere. Is A permitted to punish B for his assault? I am certain that Nozick would say that he is. Whatever reasons he gives cannot, however, be reasons which appeal to the uncompensated-for-fear which A suffered. A suffered a terrible beating but he did not suffer any fear prior to B's attack and does not suffer any fear that B will attack him again. B is, after



all, an honest person who reported his attack and offered to pay compensation.

Perhaps Nozick wants to say that A must be entitled to punish B so that he can warn others that they are not permitted to assault him without his consent. Unless he makes an example of B he will be less certain that others will refrain from assaulting him and, therefore, will suffer uncompensated-for-fear. To say this, however, is to give up I. It is to make a decision about when it is permissible to use force against B by appealing to information about how other people, who are acting independently of B, will act.<sup>34</sup>

Finally, we should note that it will not do for Nozick to say that uncompensated-for-fear enters because other people will want to punish B to provide themselves with protection from actions like B's. Other people have the right to punish B if and only if A has the right. Once we determine that A has the right, then there is an easy explanation for why other people have an interest in seeing that B is punished. We can understand why others might choose to punish B even if A chooses to forgive him. It is because they want some assurance that B and others like him will not satisfy their one time desire to pummel a defenseless person. These considerations only enter, however, after we have determined that A has the right to punish B. We can make this point more forcefully by going back to the dispute

between Sam and John. If Sam has the right to punish John for forcefully taking the rope without consent, then any person acting alone in the state of nature has the right to punish John. Others may not, however, have any desire to exercise this right since John's act is not considered threatening to them. They are, after all, good people who permit others to use their property in cases where it is needed to prevent a serious injury and they are guaranteed full compensation for its use. They may even believe that Sam's refusal to give John the rope was such a heinous act that they will boycott his business should he dare to punish John. These considerations should make it clear that it is one thing to ask whether people have the right to punish and another to ask whether they have compelling reasons for exercising that right. Considerations of uncompensated-for-fear will help Nozick answer the latter question but will not help him answer the former. Furthermore, they will enable him to explain why people will use their natural right to make contracts to change some of the boundaries established by their natural rights but not others. People might believe that the (partial) solution to the problem of how property rights limit liberty which is given by PE leaves them with extremely inconvenient rights. Each might believe that he will improve his situation if he contracts into a mutual aid society in which each member agrees to permit

just those crossings which are permitted by MA.<sup>35</sup> By doing this each will decrease the likelihood that he will suffer serious irreversible injury without creating any uncompensated-for-fear. People will be extremely hesitant, however, to use their natural right to make contracts to change their boundaries in ways which will subject them to uncompensated-for-fear. This is because few benefits are worth the major cost associated with the creation of uncompensated-for-fear; the loss of will to plan one's life due to the fear that others may arbitrarily interfere with your attempt to carry out your plans.

#### 2.8 Additional Evidence that Nozick Accepts the Principle of Productive Exchange:

I have suggested that Nozick wants the conclusion that Jim and Sam are right and I have argued that he can get both conclusions, without giving up I, by appealing to PE. I have also shown that Nozick's appeal to the argument from uncompensated-for-fear suggests that he rejects I, PE, and the conclusion that Sam is right. What is Nozick's position? I have already given evidence that he accepts I. Now I will give evidence that he accepts PE and the conclusion that Sam is right. The availability of this evidence makes me more comfortable in attributing these positions to him and in concluding that he would concede that his argument from

uncompensated-for-fear is irrelevant to his project of establishing what people's pre-institutional rights to liberty are.

More specifically, we will see that he accepts the following, stronger, version of PE:

It is never permissible to use force to make one person serve another person productively. Furthermore, whenever a) one person desires to cross the boundary established by another's rights and b) an exchange in which he bought the right to cross would be an exchange in which he was served productively, then he must attempt to obtain the consent of the person whose boundary he desires to cross unless it will be impossible or very costly to locate the person whose consent is needed. A person who fails to make this attempt and crosses without obtaining consent is liable to punishment for his crossing.

The following provides evidence that he accepts this principle:

Any border crossing act which permissibly may be done provided that compensation is paid afterwards will be one to which prior consent is impossible or very costly to negotiate (which includes, ignoring some complications, accidental acts, unintentional acts, acts done by mistake, and so on). But not vice versa.<sup>36</sup>

One might object that this does not commit him to PE and to the conclusion that Sam is right because one of the costs which John faces in negotiating with Sam is the increased likelihood that his daughter will drown. It seems clear, however, that Nozick would not count this as a relevant cost. Consider the following discussion of when the costs of negotiation are too great:

Shouldn't those who have not gotten their victim's prior consent (usually by purchase) be punished? The complication is that some factor may prevent obtaining this prior consent or make it impossible to do so. (Some factor other than the victim's refusing to agree.) It might be known who the victim will be, and exactly what will happen to him, but it might be temporarily impossible to communicate with him. Or it might be known that some person or other will be the victim of an act, but it might be impossible to find out which person. In each of these cases, no agreement gaining the victim's permission to do the act can be negotiated in advance. In some other cases it might be very costly, though not impossible, to negotiate an agreement. The known victim can be communicated with, but only by first performing a brain operation on him or finding him in an African jungle, or getting him to cut short his six-month sojourn in a monastery where he has taken a vow of silence and abstinence from business affairs, and so on; all very costly.<sup>37</sup>

The reasons which Nozick gives for concluding that it would be too costly to negotiate an agreement are quite different from the reason which is available to John. Furthermore, Nozick explicitly says that the reason must be "Some factor other than the victim's refusing to agree." It is now beginning to appear that Nozick accepts PE and the conclusion that Sam is right.

For those who are still sceptical we can turn to Chapter Seven where Nozick discusses the general problem of when a person is morally bound to give something that he owns for the purpose of saving another's life. He writes:

The fact that someone owns the total supply of something necessary for others to stay alive does not entail that his (or anyone's) appropriation of anything left some people (immediately or later) in a situation worse than the baseline. A medical researcher who synthesizes a new substance which effectively treats a certain disease and who refuses to sell except on his own terms does not worsen the situation of others by depriving them of whatever he has appropriated.<sup>38</sup>

The medical researcher has the right to sell on his own terms. If you cannot meet his terms, then you must accept the consequence. In this case the consequences are that people must suffer the consequences of having a certain disease.

Similarly, Sam has the right to sell on his own terms. If John cannot meet his terms, then John must suffer the consequences. In this case the death of his daughter. This additional evidence seems to indicate that Nozick believes that PE is acceptable and that Sam is right.

Finally, consider the following quote which arises during a discussion in which Nozick objects "to speaking of everyone's having a right to various things such as equality of opportunity, life, and so on, and enforcing this right:"<sup>39</sup>

Other people's rights and entitlements to particular things (that pencil, their body, and so on) and how they choose to exercise these rights and entitlements fix the external environment of any given individual and the means which will be available to him. If his goal requires the use of means which others have rights over, he must enlist their voluntary cooperation. Even to exercise his right to determine how something he owns is to be used may require other means he must acquire a right to, for example, food to keep him alive; he must put together, with the cooperation of others, a feasible package.<sup>40</sup>

If John's goal of saving his daughter's life requires the use of means which Sam has rights over, then John must enlist

Sam's voluntary cooperation. Just as Nozick is willing to say that some will die because they cannot enlist other's voluntary cooperation in giving them food, it seems clear that he will be willing to say that John's daughter will have to die because Sam will not voluntarily give over his rope. All of this evidence at least establishes that the burden of proof is on the person who denies that Nozick accepts PE and the conclusion that Sam is right.

#### 2.9 The Principle of Productive Exchange, Publicity, and Punishment:

The modified version of PE which I have attributed to Nozick only applies to the problem of how property rights limit liberty when we make the following simplifying assumptions:

1. the act is certain, or reasonably certain, to cross the boundaries established by another's rights.
2. the exchange to buy the right to do the act would be an exchange in which the seller serves the buyer productively.
3. it is neither impossible nor very costly to determine whether the person whose boundaries are threatened by the act will give his consent to the performance of the act.

Nozick's commitment to PE is a commitment to the beliefs that



(1) it is wrong for the person to do the act without the consent of the person whose boundary is threatened, (2) it is permissible for the person whose boundary is threatened to use force to prevent the performance of the act,<sup>41</sup> and (3) the use of force to do the act constitutes aggression and is a violation of the libertarian side constraint. It is a violation of P1 when it involves forcefully taking another's property and a violation of P2 when it involves a forceful crossing which is not a taking. Furthermore, I believe that it is best to interpret Nozick as believing that PE follows directly from his root ideas that each person is separate and inviolable and no person is a resource for any other person. The question still remains, however, concerning how we are to solve the problems which emerge when we drop one or more of the simplifying assumptions listed above. In the remainder of this section I will explain what I believe must be Nozick's position on how to solve the problems which emerge when we drop assumption 3) above. Nozick's solutions to the problems which emerge when we drop assumptions 1) and 2) will be discussed in detail later.<sup>42</sup>

We are interested in cases where i) an act is certain to cross the boundary established by another's rights, ii) an exchange to buy the right to do the act would be one in which the seller served the buyer productively, and iii) it is impossible or very costly to locate the person whose

boundary is threatened. A case which might fall into this category which is not as bizarre as the cases which Nozick offers, is the following:

John is in the same predicament as before. This time, however, Sam is nowhere near his boat. If John attempts to find Sam it is certain that his daughter will drown. He takes the rope and saves her. He locates Sam later that day and offers to pay him full compensation for the use of the rope.

Is Sam permitted to punish John? I believe that Nozick would say "no." It would simply be too counterintuitive, especially when we recall Nozick's belief that if Sam is permitted to punish John then any person is permitted to punish him, to claim that Sam is permitted to punish John. Does Nozick want to say that any sadist or any enemy of John can use his commendable act as an opportunity to injure John?<sup>43</sup> Since Nozick rejects the views that the right to punish and the right to grant mercy reside solely in the victim, he would have to say that they do.<sup>44</sup>

If Sam is extremely concerned about others using his property without his consent he can put a large sign on his boat which reads "NO PERSON IS PERMITTED TO USE THE CONTENTS OF THIS BOAT WITHOUT THE EXPLICIT CONSENT OF SAM." By affixing this sign to his property Sam defeats the presumption

that any person is entitled to use his property, provided that he compensates Sam for its use, in cases where a serious harm may be prevented by using the property and consent is very difficult to obtain. In the absence of the sign John is permitted to use Sam's rope when Sam's consent is difficult to obtain. He is liable to punishment, however, should he use the rope and then attempt to avoid paying Sam compensation for its use.

The conclusion which I want to draw is that Nozick must accept a distinction between (1) acts which are forbidden and punishable even though those who are liable to punishment for doing them were never warned that they would be punished for doing them and (2) acts which are forbidden and punishable only when those who are liable to punishment were warned that they would be punished for doing them. Assault would fall into the first category while John's act of taking the rope when Sam was nowhere near his boat would fall into the second. The boundaries of this distinction may not always be clear. Those who are bothered by the vagueness of this distinction can remove it by simply affixing signs to their property specifying exactly when others may use it without their explicit consent.

It may appear to the reader that I am misrepresenting Nozick's position. I appear to be saying that any person is, provided that he puts a warning on each piece of his

property, permitted to punish any person who uses his property without his consent. Therefore, I appear to be committing him to the view, which he explicitly rejects, that it is always permissible to prohibit. He tells us that we must sometimes permit acts which threaten to cross our boundaries when the following conditions are satisfied:<sup>45</sup>

1. It will be impossible or very costly to find the person whose boundary will be crossed to determine whether he will give his consent.
2. The benefits of permitting the crossings far outweigh, either in terms of harm prevented or good produced, the costs of providing full compensation to those whose boundaries are crossed.
3. Permitting the actions will not lead to uncompensated for fear.
4. The compensation to those whose boundaries are crossed is more than full compensation.

In order to see that the position which I have committed Nozick to is consistent with his belief that it is not always permissible to prohibit we must recall the simplifying assumptions. I am only committing Nozick to the view that it is always permissible to prohibit, by the method of affixing signs to one's property, in cases where 1) an act is certain to cross the boundary defined by another's rights and 2) the

exchange to buy the right to do the act would be an exchange in which the seller serves the buyer productively. When we drop assumptions 1) and 2) , Nozick no longer believes that it is always permissible to prohibit an act which threatens to cross another's boundary. We will discuss his solutions to the problems which emerge when we drop 1) and 2) in the remaining chapters.

We have just noted that a person who accepts PE will almost certainly acknowledge that the right to punish sometimes depends upon having made a prior announcement that an act is prohibited and that any person who does it will be punished. It is important for the reader to see that this is consistent with Nozick's claim that the establishment of public rules which conflict with the requirements of PE and are accompanied by a warning that those who disobey them will be punished can never create a right to punish. Recall our discussion in which we noted that people who believed that the boundaries established by their natural rights were inconvenient could use their natural right to make contracts to remove the inconveniences.<sup>46</sup> We noted that they might voluntarily join a mutual aid society in which all accept the duties which MA, or some similar public rule, imposes. The mutual aid society will provide its members with added security and a sense of community which they did not have when they conducted their relations according to the

requirements of PE. The members of the society may not, however, impose its requirements on those who are not members. They may sometimes provide non-members with the benefits to which members are entitled in order to show them the benefits of membership. The provision of these benefits will not, however, give them the right to impose the duties of membership on others. Members of the society may not provide these benefits to non-members and then appeal to the enforceable fairness principle to establish that non-members are bound to obey the requirements of the public rules which members have voluntarily agreed to obey. Nozick would insist that no new rights to use force emerge at the group level, that the enforceable fairness principle is unacceptable, and that the members of the mutual aid society must respect the boundaries established by the pre-institutional rights of non-members. Each of these is consistent with the claim that in some pre-institutional situations the right to punish a person for doing A depends upon a prior warning that he will be punished should he do A.

## UNPRODUCTIVE EXCHANGES AND BLACKMAIL

### 3.1 Aims:

In our discussion of the disputes between Sam and John and Jim and Bob we considered two possible assignments of entitlements:

1. The person whose boundary is threatened by the performance of A has the right to prohibit the performance of A. If a person wants to perform A he must pay market compensation for the consent of the person whose boundary is threatened.
2. A person who wants to perform A has the right to perform A provided that he pays the other full compensation for the harm which A causes the other. If the other wants to be free from the consequences of A, even though he is guaranteed full compensation should A be performed, then he must pay market compensation for this freedom.

Nozick's commitment to PE commits him to the entitlements described in 1). We should note, however, that either assignment of entitlements in the disputes between Sam and John and between Jim and Bob would satisfy the following condition:

No person can complain, when the other acts within his rights, that he is made worse off than he would have been in the situation in which the other did

not exist at all or had nothing to do with him.

This shows that PE is an extremely powerful principle. It implies that it is never permissible to force one person to serve another productively even when he is guaranteed more than full compensation for serving him productively.

PE only applies, however, in cases where an exchange to buy the right to do A is an exchange in which the seller serves the buyer productively. There are two other cases which will be of interest to us. One is the case where either assignment of entitlements sketched above will leave at least one party with the complaint that he is worse off than he would have been in the situation in which the other did not exist at all. We will see, in Chapter Four, that the problem of non-aggressive risky acts is a difficult problem for Nozick because each of the natural assignments of entitlements leaves at least one person worse off than he would have been in the situation in which the other did not exist at all. The natural assignments are: 1) the risk creator is entitled to perform the act provided that he compensates the risk bearer when his act actually crosses the boundary established by the risk bearer's rights and 2) the risk bearer is entitled to prohibit the act. Now, however, we will turn to the case where one assignment of entitlements leaves one person with the complaint that he



is worse off than he would have been in the situation in which the other did not exist at all while the other assignment leaves no person with this complaint. Shouldn't we adopt the assignment which leaves no person with this complaint? My aim in this chapter is to examine Nozick's answer to this question. The key to his answer is found in his discussion of blackmail to which I will now turn.

### 3.2 The Principle of Unproductive Exchange and an Apparent Inconsistency:

We will, following Nozick, say that A blackmails B when i) A offers to withhold information which B wants withheld and ii) A's sole motive for threatening to reveal the information is to get B to pay him not to reveal it.<sup>1</sup> If A is permitted to blackmail B, then B can complain that he would have been better off in the situation in which A did not exist at all or had nothing to do with him.<sup>2</sup> If, however, we permit B to prohibit A's revealing the information, then A has no complaint. He is not made worse off than he would have been in the situation in which B did not exist at all or had nothing to do with him because his sole motive for threatening to reveal the information is, by hypothesis, to get B to pay him not to reveal it. It might appear, therefore, that Nozick should permit B to prohibit A from revealing the information. There is one problem with this. A's act

of revealing the information does not threaten to cross the boundary established by any one of B's natural rights.<sup>3</sup>

Therefore, Nozick can claim that it is permissible to prohibit blackmail only if he is willing to give up his earlier claim:

Note that not every act which produces lower utility for others generally may be forbidden; it must cross the boundary of others' rights for the question of prohibition to arise.<sup>4</sup>

It appears that Nozick is willing to retreat from his earlier position to the position that in special cases it is permissible to prohibit acts which do not threaten to cross the boundary established by another's rights. He writes:

Our earlier discussion of dividing the benefits of voluntary exchange, thus, should be narrowed so as to apply only to those exchanges where both parties do benefit in the sense of being recipients of productive activities. Where one of the parties does not so benefit and is unproductively "served," it is fair that he merely barely compensates the other, if any compensation is due the other party at all.<sup>5</sup>

When B prohibits A's revealing the information, an act which does not threaten to cross B's boundary, B crosses A's

boundary. In this case, unlike cases of productive exchange, B is permitted to cross, regardless of whether A consents, provided that he compensates A for the crossing. It is the blackmailer's borders which are crossed and, therefore, it is the blackmailer who is entitled to compensation.

In order to state the principle which Nozick apparently appeals to we must explain when one person serves another unproductively:

X serves Y unproductively when a) Y is not better off as a result of his voluntary exchange with X than he would have been in the situation in which X did not exist at all or had nothing to do with him, b) the exchange is one in which Y buys X's abstention from doing an act, and c) X's sole motive for threatening to do the act is get Y to pay him not to do it.<sup>6</sup>

The blackmailer serves his client unproductively and those who operate a protection racket serve their clients unproductively. Nozick can explain why it is permissible to prohibit a person from operating a protection racket by appealing to PE. The acts which an operator of a protection racket threatens to do are acts which others may prohibit by appealing to PE and, therefore, are acts which he has no right to do.<sup>7</sup> When others prohibit his operation of the protection racket they

do not have to pay him compensation since they have not crossed his boundary. In order to explain why it is permissible to prohibit blackmail, however, Nozick must appeal to a new principle which we will call "the principle of unproductive exchange" or "UP:" It says:

The Principle of Unproductive Exchange: It is permissible for Y to prohibit X's doing A when X's doing A does not threaten to cross Y's boundary provided that (1) Y would be served unproductively in an exchange in which he pays X not to do A, and (2) Y properly compensates X.

It should be obvious to the reader that UP is compatible with F and I. It should also be clear that UP must be supplemented by an account of what counts as proper compensation. Nozick believes that in some cases full compensation is required while in others no compensation is required at all.<sup>8</sup>

We have noted that one reason why Nozick's position on blackmail is problematic is that it is inconsistent with his earlier claim that the question of prohibition only arises in cases where an act threatens to cross another's boundary. Nozick makes his position consistent by dropping the earlier claim and appealing to UP. There are, however, other problems with his position.

### 3.3 Nozick's Applications of the Principle of Unproductive Exchange:

Before we examine whether UP is a reasonable principle we should note that Nozick appears to believe that it is sometimes permissible to prohibit revealing information in cases where UP will not justify a prohibition. He writes:

... someone writing a book, whose research comes across information about another person which would help sales if included in the book, may charge another who desires that this information be kept secret (including the person who is the subject of the information) for refraining from including the information in the book. He may charge an amount of money equal to the expected difference in royalties between the book containing this information and the book without it, he may not charge the best price that he could get from the purchaser of the silence.<sup>9</sup>

As Nozick describes the case it is not true that the person's motive in publishing the new information is to get the other to pay him not to do it. An exchange to pay him not to publish could not, therefore, be an unproductive exchange. Nozick appears to believe, however, that it is permissible to prohibit his publication of the information provided that he is paid full compensation for the losses which he suffers as a result of withholding the information. The apparent

difference between this case and one where a person's sole motive in threatening to reveal the information is to sell his silence is the amount of compensation that is appropriate.

Does Nozick really want to claim that any person is permitted to prohibit the publication of any information by any other person, no matter what the other's reasons for publishing the information are, provided that he pays the other full compensation for the harm he will suffer as a result of the prohibition? Let us assume that the author in Nozick's example came across information that a famous corporation president reached the presidency through blackmailing others and masterminding a great fraud which catapulted the corporation to its commanding market position. Is Nozick's position that this wealthy chap is permitted to approach the author and say "I prohibit your publication of that information. Here is an amount of money which will more than compensate you for what you will lose by not publishing it?" It is outrageous to say that the author must accept the money and shut up. It would also be outrageous to say a) he is permitted to refuse all offers and publish but b) if he accepts any offer it must be for no more than full compensation. What happens if he is willing to remain silent only on the condition that he receives more than full compensation and somebody is willing to pay his price? It is not like Nozick to keep people from reaching mutually beneficial agreements which do not cross others'

boundaries.<sup>10</sup>

Nozick's position on what the author may charge is problematic for another reason. Unless there is something special about speech, and Nozick never argues that there is,<sup>11</sup> there does not appear to be any difference between the author and the next door neighbor in the following example:

If your next door neighbor plans to erect a structure on his land, which he has a right to do, you might be better off if he didn't exist at all. (No one else would erect that monstrosity.) Yet purchasing his abstention would be a productive exchange.<sup>12</sup>

Nozick believes that in this case you must pay your neighbor market compensation, unless his sole motive in threatening to erect the monstrosity is get you to pay him not to erect it. On what grounds can Nozick say that market compensation is appropriate here while full compensation is appropriate for the right to prevent the author from publishing the damaging information? Nozick cannot simply say that the neighbor has the right to erect the monstrosity while the author does not have the right to publish the information. The fact that the author is entitled to full compensation when the publication of his newly discovered information is prohibited indicates that he also has the right to publish the

information. The question is why we must pay market compensation to cross a person's boundary in one case and only full compensation in the other. Nozick never answers this question. Furthermore, he offers no basis for his apparent belief that the buyer in the exchange to prevent the erection of the monstrosity is served productively while the buyer in the exchange to prevent the publication is not. In each case the buyer can complain that he is worse off than he would have been in the situation in which the seller did not exist at all. Nor can he say that each buyer is served unproductively. Neither the neighbor nor the author threatens to do his act for the purpose of getting somebody to pay him not to do it.

#### 3.4 The Concept of Semi-Productive Exchange and One Aspect of the Problem of What Constitutes a Crossing:

What Nozick needs are new categories of exchange and new principles which are correlated with them. We will say that a semi-productive exchange is one in which one person serves another semi-productively and we will adopt the following account of "X serves Y semi-productively:"

X serves Y semi-productively when a) Y is not better off as a result of his voluntary exchange with X than he would have been in the situation in which X did not exist at all or had nothing



to do with him, b) the exchange is one in which Y buys X's abstention from doing an act, but c) X's motive for doing the act is not to sell Y his abstention.<sup>13</sup>

The exchange to pay your neighbor not to build the monstrosity and the exchange to pay the author not to publish would both be semi-productive exchanges. Furthermore, an exchange in which a risk bearer pays a risk creator to refrain from performing a risky act would also be a semi-productive exchange, provided that the risk creator's motive in performing the risky act was not simply to sell the risk bearer his abstention. We will eventually examine Nozick's account of what peoples' entitlements are in risky situations. Now, however, I want to bring the reader's attention to an aspect of the problem of what constitutes a crossing which is related to the concept of semi-productive exchange and which Nozick never discusses.

Nozick believes that a person who intentionally throws a rock through my window or intentionally tramples my lawn violates my property rights. He also believes that a person who accidentally does either also violates my property rights. In each case the person does something which lowers the value of my property and in each case the person must, since these are cases where the boundaries established by

my property rights are crossed, compensate me for the harm which he caused. Why isn't it equally clear that the person who builds the monstrosity for the sole purpose of lowering the value of my property also crosses the boundary established by my property rights? Why isn't it equally clear that the person who builds the monstrosity because he believes that it is beautiful, but who nonetheless lowers the value of my property, also crosses the boundary established by my property rights? A complete development of Nozick's theory must include answers to these questions. That is, it must include an account of which acts which lower the value of my property also cross the boundary established by my property rights. This account will be relevant to his solution to the problem of what constitutes a crossing, a problem which we have so far avoided discussing.<sup>14</sup> I bring attention to this problem here because of its obvious connection with the concepts of unproductive and semi-productive exchange. Furthermore, it would appear that his explanation for how we should distinguish between acts which constitute a crossing and acts which don't must not appeal to the beneficial consequences of living in a system which treats them differently. This is because an explanation of this distinction which appeals to those consequences would be incompatible with I. Therefore, it would be an incoherent explanation unless Nozick could explain why it is sometimes appropriate to solve

the problem of what constitutes a crossing by giving up I but it is never appropriate to solve the problem of how property rights limit liberty by giving up I.

Finally, once he explains the basis for this distinction he will still have the problem of how the boundaries established by property rights limit liberty; the problem of how to assign entitlements in cases when people desire to do acts which threaten these boundaries. He must defend his view that different entitlements are appropriate for different acts. Some acts are permitted provided that those who do them compensate those whose boundaries they cross. Others are forbidden so that those who want to perform them must pay market compensation for the right to perform them. Still others are permitted but those whose boundaries they threaten have the right to prohibit them provided that they compensate those whose liberty they restrict.<sup>15</sup> Again, Nozick's explanations for treating different acts differently must not appeal to the beneficial consequences of living in a system which treats them differently.

Nozick does not, as far as I can tell, offer a systematic account of how to solve these problems. All are related to the concept of semi-productive exchange because all are problems about how to assign entitlements, when the following conditions are satisfied: (1) at least one of the parties can complain that he is worse off than he would have been in

the situation in which the other did not exist at all or had nothing to do with him and (2) the exchange in which one pays the other to refrain from doing the act which makes him worse off is a semi-productive exchange. Some very important social problems, in addition to the problem of assigning entitlements in risky situations, are associated with the concept of semi-productive exchange. In the next chapter we will see that Nozick's solutions to these problems leave much to be desired. Now, however, I turn to a case where Nozick should have no trouble assigning entitlements.

### 3.5 The Natural Extension of the Principle of Unproductive Exchange:

If it is permissible to prohibit the publication of information by a person whose sole motive for threatening to publish it is to sell you his abstinence, then it should also be permissible to prohibit the publication of information by a person whose sole motive is to injure you. Similarly, if it is permissible to prohibit the building of a monstrosity by a person whose sole motive in threatening to build it is to sell you his abstinence, then it should also be permissible to prohibit the building of a monstrosity by a person whose sole motive is to injure you by lowering your property values. Neither of these persons wants to be bought off. The first wants to delight in the spectacle of your

embarrassment while the second wants the pleasure of seeing you suffer a financial loss. An exchange in which you pay either to refrain from doing his act would, however, be a semi-productive, rather than an unproductive, exchange. Therefore, Nozick cannot appeal to UP to justify the prohibition of either. He must adopt a new principle which implies that it is permissible to prohibit each of these acts provided that you properly compensate the person whose act is prohibited. This new principle would appear to be the natural extension of UP. Just as Nozick believes that a person whose act may be prohibited by appeal to UP must receive proper compensation, we would also expect him to believe that a person whose act may be prohibited by appeal to this new principle must also receive proper compensation.

There is a problem, however, in determining what is to count as proper compensation in these cases. Is this a case where no compensation is due the other party? Or, are these people entitled to compensation for the pleasure they lose because their desire to injure others is frustrated? Nozick discusses one case which is like the cases under consideration. He raises the following question: How much may a person charge for refraining to reveal information when he discovers information which another person wants to keep secret? He gives the following answer:

He may charge an amount of money equal to his expected difference in royalties between the book containing this information and the book without it; he may not charge the best price he could get from the purchaser of his silence.<sup>16</sup>

In the note in the text, however, he adds: "A writer or other person, who delights in revealing secrets, may charge differently."<sup>17</sup> The obvious implication of this remark is that the person who delights in revealing secrets is entitled to additional compensation for his lost pleasure. It seems incredible to me that a person who appeals to the idea that it is never permissible to use another merely as a means can say that this person, who is using another merely as a means to his ends, must be compensated for the loss of pleasure which he suffers when his revelations about the other are prohibited. It will not do for Nozick to respond that political philosophy is only concerned with cases where one person uses another as a means by physically aggressing against him.<sup>18</sup> This is because it is Nozick who insists that it is permissible to prohibit blackmail. It is not clear whether Nozick wants to say that the blackmailer, who clearly uses another as a means, is an aggressor. It is clear, however, that blackmail is not an example of physical aggression. If Nozick wants to keep UP, then he should, I believe, do two things. First, he should accept

the additional principle P4 which I initially included as part of the libertarian site constraint. P4 says that it is never permissible to do an act, regardless of whether the act threatens the boundary established by any person's right, when the sole purpose for doing the act is to make another person worse off. It seems incoherent for a person who accepts the root idea that it is never permissible to use another merely as a means to accept UP without also accepting P4. The blackmailer uses another's misfortune as a means to his ends. Although we may deplore his use of blackmail as a means to those ends, we cannot automatically conclude that his ends are bad. A person who violates P4, however, views another's misfortune as an end in itself. His purpose in acting is to bring about that misfortune. We can confidently conclude that his end is always bad. Nothing seems to stand in the way of the conclusion that if it is always permissible to prohibit blackmail, then it is always permissible to prohibit acts which violate P4. The second thing Nozick should do is give up his apparent belief that the person who delights in revealing secrets is entitled to compensation for his lost pleasure when another prohibits his revelations by appealing to the principle which is the natural extension of UP. This belief should be unacceptable to any person who takes seriously the root idea that it is never permissible to use another merely as a means.

### 3.6 The Inconveniences of the Principle of Unproductive Exchange:

I have suggested that Nozick's position on blackmail rests on his commitment to UP. Is UP a reasonable principle? Consider the following examples:

1. Smith owns a store. There is not enough business in town to support two stores of its type. Jones threatens to open a store of that type for the sole purpose of getting Smith to pay him not to open it.
2. Jones hates Smith and his sole motive for opening up the store is to drive Smith out of business and into financial ruin.
3. Jack is very fond of Mary. Jim, the campus Romeo, threatens to take her out for the sole purpose of getting Jack to pay him, by doing his physics problems, for not taking her out.
4. Jim hates Jack and his sole motive for taking her out is to cause Jack great anxiety.
5. Otto tells his neighbor Archie, who hates blacks, that he intends to sell his house to blacks for the sole purpose of getting Archie to pay him not to sell to blacks.
6. Otto's sole motive in selling his house to a black family is to cause Archie great anxiety.

Nozick's commitment to UP forces him to say that it is permissible for Smith to prohibit in case 1), for Jack to prohibit in case 3), and for Archie to prohibit in case 5).



Furthermore, if I am correct that it is implausible to claim both a) that it is permissible to prohibit acts when a person's sole motive in threatening to do the act is to sell you his abstention and b) that it is not permissible to prohibit the same acts when the person's sole motive in doing the act is to injure you, then Nozick must also say that Smith may prohibit in case 2), Jack may prohibit in case 4), and Archie may prohibit in case 6). Does Nozick want these conclusions?

Nozick leaves no doubt that he wants to retain his position that it is permissible to prohibit blackmail. He makes a point of contrasting it with the standard libertarian position on blackmail:

Contrast our view of blackmail with the following which sees it as on a par with any other economic transaction: "Blackmail would not be illegal in a free society. For blackmail is the receipt of money for the service of not publicizing information about the other person. No violence or threat of violence to person or property is involved."<sup>19</sup>

Nozick may be able to retain his position on blackmail without committing himself to principles which are as powerful as UP and the principle which appears to be the natural extension of UP. He may, however, prefer to keep these principles and argue that people in the state of nature would

give up their right to enforce such powerful principles because each fears that others will improperly apply it against him. This fear is reasonable since a person can apply them only by making a judgment about another's motives. People can avoid this fear by using their natural right of contract to agree to a less powerful, but more practical, principle which includes a prohibition on blackmail. Clearly, a more complete development of Nozick's theory would include discussions of these matters.

### 3.7 Aggression and the Libertarian Side Constraint:

Does the blackmailer act aggressively? It seems to me appropriate to say that a person who threatens to do an act for the sole purpose of selling another his abstention and a person who does an act for the sole purpose of making another worse off both act aggressively even when their acts do not threaten to cross the boundary defined by another's rights.

The fact that Nozick claims both a) that he accepts the libertarian side constraint against aggression and b) that it is permissible to use force to prohibit blackmail suggests that he believes that the blackmailer acts aggressively. If the blackmailer acts aggressively, then it seems only reasonable to say that the person who does an act for the sole purpose of making another worse off also acts aggressively. Furthermore, in each of these cases we can say of the person's act

that a) its prohibition leaves the person no worse off than he would have been in the situation in which his intended victim did not exist at all and b) it is an example of an act that uses another merely as a means. We can begin to see some connection between Nozick's concept of unproductive exchange, his root idea that it is never permissible to use another merely as a means, and the concept of aggression which he must have in mind when he talks about the libertarian side constraint that prohibits aggression.

Even if Nozick says that the blackmailer and the person who does an act for the sole purpose of making another worse off act aggressively he does not have to go straight to the conclusion that it is permissible to prohibit their acts. He can, instead, adopt the view that it is only permissible to prohibit aggressive acts which threaten the boundary established by another's rights. I believe that the common ground among libertarians is a commitment to PE and, therefore, to P1, P2 and P3. Nozick appears to want to add UP and P4 to this list. None of the criticisms which follow depend upon how libertarians should resolve this internal conflict. In the remainder of the book we will examine what principles are appropriate for assigning entitlements in cases of semi-productive exchange.<sup>20</sup> All libertarians can agree that the principles which apply in cases of productive and unproductive exchange do not apply to these

cases. The principles which are appropriate will include the principles which enable us to solve the problem of non-aggressive risky acts. The problem of non-aggressive risky acts is an emergent problem for Nozick just because he cannot appeal to the principles which he uses to assign entitlements in situations of productive and unproductive exchange to solve it.

## ARE RISKY ACTS SPECIAL?

### 4.1 Aims:

In this section I am going to consider whether Nozick needs special principles for solving the problem of how to assign entitlements in cases where people desire to do acts which subject others to risks of having their boundaries crossed. I will be especially interested in answering two questions. The first is whether Nozick can appeal to any theoretically interesting reasons for treating some risky acts differently from others. The second is whether Nozick can appeal to any theoretically interesting reasons for treating risky acts differently from acts which are certain to cross the boundary established by another's rights. By the end of this chapter the reader should have a clear understanding of why it is appropriate to say that Nozick views the problem of non-aggressive risky acts as an emergent problem.

### 4.2 Aggressive Risky Acts and Non-Aggressive Risky Acts:

The problem of assigning entitlements in risky situations is a difficult problem for Nozick because each of the natural assignments appears to leave at least one person with the complaint that he is worse off than he would have been in

the situation in which the other did not exist at all or had nothing to do with him. The natural assignments are:

1. The risk bearer is entitled to prohibit. The risk creator must get the risk bearer's consent to do the act and must pay market compensation for the consent.
2. The risk creator is permitted to do the act provided that he compensates the risk bearer in case his act actually crosses the risk bearer's boundary. The risk bearer must pay the risk creator for the right to be free from the risk.

In the first case the risk creator can complain because the risk bearer may, acting within his rights, prohibit him from doing the act. The risk creator would certainly be better off in the situation in which the risk bearer did not exist. In the second case each appears to have a complaint. The risk creator can complain because he must pay the risk bearer for any injuries which he suffers in case his boundary is actually crossed. If the risk bearer did not exist there would be one less cost associated with the performance of his risky act.<sup>1</sup> The risk bearer can complain because he must live in a world of increased risk. Although he is entitled to be compensated in case his boundary is actually crossed, he is not entitled to compensation for the fear he suffers

because of the increased risk.

There are two reasons which might incline us to adopt the first assignment of entitlements. One is that it appears to give only one person, the risk creator, a ground for complaint. The risk bearer has no complaint so long as we view the risk creator's act as an isolated act and abstract from the fact that the risk bearer will sometimes also be a risk creator. Nozick's commitment to I forces him to view it this way. The other is that a prohibition of the risky act does not appear to threaten the boundary defined by the risk creator's rights. In fact, however, Nozick appears to adopt the view that people sometimes have the right to perform risky acts. He writes:

We have rejected the view that the prohibition of risky activities is illegitimate, that through prior agreements and open negotiations people must be induced to agree voluntarily to refrain from the activities. But we should not construe our case merely as compensation for crossing a border that protects another's risky action, with the requirement of prior negotiation obviated by the special nature of the case (it doesn't involve any productive exchange).<sup>2</sup>

Where does the right to perform risky actions come from? It appears to come from a presumption in favor of liberty which

is part of the natural right to pursue one's life plan in a non-aggressive manner and is at the root of Nozick's theory.

Consider the following:

Does someone violate another's rights by performing an action without sufficient means or liability insurance to cover its risks? May he be forbidden to do this or be punished for doing it? Since an enormous number of actions do increase risk to others, a society which prohibited such uncovered actions would ill fit a picture of a free society as one embodying a presumption in favor of liberty, under which people could perform actions so long as they don't harm others in specified ways.<sup>3</sup>

We should note two things about the presumption in favor of liberty. One is that it undermines our inclination to favor the first assignment of entitlements and, therefore, leaves us puzzled about how to assign entitlements in risky situations. The other is that it would be implausible for Nozick to claim that it creates a right to perform any risky act. I will now explain why it would be implausible.

Consider each of the following cases:

1. The risk creator's sole motive for doing the act is to get the risk bearer to pay him not to do it.



2. The risk creator's sole motive for doing the act is to make the risk bearer suffer fear that he might be its victim.

In each of these cases it seems appropriate to say both that the risk creator uses the risk bearer merely as a means and that the risk creator acts aggressively. We would expect Nozick to claim that whenever a risk creator uses a risk bearer merely as a means to his ends, then a) the risk bearer has the right to prohibit, and b) the prohibition does not create a claim to compensation on the part of the risk creator.

In fact, Nozick appears to adopt a different view. Consider the following:

If using the more dangerous process is the only way that person can earn a living (and if playing Russian roulette on another with a gun of 100,000 chambers is the only way that person can have any enjoyment at all -- I grant that these are extravagant assumptions), then perhaps the person should be compensated for the prohibition.<sup>4</sup>

Nozick's claim that the person who plays Russian roulette may be entitled to compensation is puzzling. He should welcome the conclusion that it is permissible to prohibit his game

without payment of compensation. Doesn't his game clearly involve the use of another as a means? How can Nozick claim both a) that Sam is permitted to prohibit the taking of his rope by John without paying John any compensation even though John's purpose in taking the rope is to save his daughter's life, and b) the potential victim of the game of Russian roulette is not permitted to prohibit the game without paying compensation even though the person's purpose in playing the game is merely to enjoy himself? How can the fact that one act is certain to cross another's boundary while the other only creates a risk of crossing another's boundary make such a big difference? I do not believe that Nozick can answer this question. Therefore, I offer the following principle as a friendly amendment to Nozick's theory:

It is permissible for any person P to prohibit any person Q from doing any act A which threatens to cross P's boundary when P's prohibition of A leaves Q no worse off than he would have been in the situation in which P did not exist at all. Furthermore, P's permission to prohibit is not contingent on payment of any compensation to Q.

This principle appears to be a natural extension of Nozick's position when we take account of our earlier discussion of

how to assign entitlements in cases of unproductive exchange.<sup>5</sup>  
The problem of how to assign entitlements to perform risky acts in cases of semi-productive exchange is an entirely different problem. We will see that Nozick solves it by appealing to a different principle.

#### 4.3 Risky Acts Are Not Special:

Should the distinction between acts which are certain to cross another's boundary and acts which only create a risk of crossing another's boundary be an important distinction for Nozick? I have already suggested that it is natural to divide risky acts into two categories:

1. those whose prohibition leaves the risk creator no worse off than he would have been in the situation in which the risk bearer did not exist at all.
2. those whose prohibition leaves the risk creator worse off than he would have been in the situation in which the risk bearer did not exist at all.

Since actions in the first category involve the use of another merely as a means, Nozick should classify them as aggressive actions and welcome the conclusion that it is permissible to prohibit them without payment of compensation to the risk creator. The difficult problem for Nozick is the problem of when it is permissible to prohibit the non-aggressive risky

acts which fall into the second category. A prohibition of one of these acts crosses the boundary established by the risk creator's right to perform risky acts and leaves the risk creator worse off than he would have been in the situation in which the risk bearer did not exist at all or had nothing to do with him.

It also appears natural to divide acts that are certain to cross another's boundary into two categories:

1. those whose prohibition leaves the person who wants to perform the action no worse off than he would have been in the situation in which the person whose boundary he threatens did not exist at all.
2. those whose prohibition leaves the person who wants to perform the action worse off than he would have been in the situation in which the person whose boundary he threatens did not exist at all.

John's taking of Sam's rope and Bob's assault of Jim fall into the first category. Does Nozick want the conclusion that the entitlements which resolve the disputes between Sam and John and Jim and Bob should apply in any case where a) a person wants to perform an action that is certain to cross the boundary defined by another's rights and b) the person can easily find out whether the person whose boundary is threatened will give his consent to the crossing? Or,

does Nozick want the conclusion that we need a new assignment of entitlements when the action falls into the second category? Recall that neither PE nor UP applies to actions in the second category.

Consider the following:

1. There are termites on Luke's property which pose a threat to his house. The only way to prevent the deterioration of his house is to use a chemical which has the side effect that it will kill all tomato plants within 100 feet. Luke's neighbor, Matthew, grows tomatoes which are certain to be destroyed by Luke's use of the chemical. Furthermore, Matthew is the only distributor of the chemical. Is Luke permitted to take the chemical from Matthew, regardless of whether Matthew consents, provided that he compensates Matthew for the amount of chemical he uses and for the destruction of his tomato plants?
2. The same as above, except that Luke can purchase the chemical at his local hardware store. Is Luke permitted to use the chemical, regardless of whether Matthew consents, provided that he compensates Matthew for the destruction of his tomato plants?
3. Luke discovers that there are termites on his property which will, if he does nothing, begin to destroy his house. The cheapest way for him to protect his house is by injecting a chemical in the ground around his house. This chemical will not kill the termites. It will only prevent them from

destroying his house. A side effect of his use of this chemical is that the termites will move on to the next house which happens to be Matthew's. The termites will destroy Matthew's house unless he pays to protect it. Is Luke permitted to use the chemical, regardless of whether Matthew consents, without payment of any compensation?

Nozick would, I believe, say that the first case is indistinguishable from the Sam and John case. In an exchange in which Luke pays Matthew to give him some of the chemical Matthew serves Luke productively. Therefore, PE applies and Luke is not permitted to take the chemical without Matthew's consent.

What would Nozick say in the second and third cases? In each case either of the two natural assignments of entitlements will leave at least one person with the complaint that he is worse off than he would have been in the situation in which the other did not exist at all or had nothing to do with him. The only difference between these cases and cases of non-aggressive risky acts is that these involve acts which are certain to cross another's boundary. If neither of the natural assignments is appropriate in cases of non-aggressive risky acts, then how can it be appropriate in these cases? Nozick might want to say that in case 3) Luke is permitted to use the chemical, regardless of whether

Matthew consents, and does not have to pay Matthew any compensation for the costs he imposes on him.<sup>6</sup> He might try to justify this conclusion by saying that Luke's use of the chemical does not cross the boundary established by Matthew's rights to his land and his home. This will work, however, only if we are given an explanation of why Luke's use of the chemical, which certainly lowers the value of Matthew's property, does not also cross the boundary established by his property rights. Furthermore, this explanation must be compatible with I. Although Nozick never discusses a case like 3), he does discuss a case like 2). His discussion leaves the impression that he would say that it is appropriate to make Luke pay market compensation for the right to use the chemical. I will now turn to his discussion.

The evidence that Nozick believes that it is appropriate to make Luke pay market compensation comes in a footnote. He writes:

One may be tempted to delimit partially the area where full compensation is permissible by distinguishing between using something as a resource in a productive process and damaging something as a side effect in a process. Paying only full compensation would be viewed as permissible in the latter case, and market compensation as desirable in the former, because of the issue of dividing

the benefits of economic exchange. This approach won't do, for dumping grounds for effects are also priceable and marketable resources.<sup>7</sup>

Nozick appears to be saying that a person whose non-aggressive act incidentally, but certainly, will cross the boundary established by another's rights must pay market compensation for the right to do that act.<sup>8</sup> If he cannot negotiate a price with the person whose boundary he threatens, then he must refrain from performing the act. This position is surprising because it appears to ignore the fact, which is essential to his position on when it is permissible to prohibit a non-aggressive risky act, that the person whose act is prohibited can complain that he is made worse off than he would have been in the situation in which the other did not exist at all or had nothing to do with him. The only support which Nozick provides for his position is that "dumping grounds for effects are also priceable and marketable resources." Will this do?

It seems clear that it won't. There does not appear to be any market which we prevent from emerging when we adopt an alternative assignment of entitlements which permits Luke to use the chemical provided that he compensates Matthew for the destruction of his tomato plants. Furthermore, it would appear that markets for dumping grounds would emerge even



when we adopt the view that a person who must decide where to build and operate a factory is permitted to build and operate on any land which he has legitimately acquired provided that he pays full compensation to those upon whom his factory dumps its effects. The assignment of entitlements will not make him indifferent about where to build. How much full compensation costs will be depends upon how many people it dumps its effects on and who those people are. People with different tastes and different amounts of money will require different amounts to make them indifferent between receiving that amount and being a dumping ground and not receiving anything and not being a dumping ground. Since payment of full compensation will only be one cost of operating a factory, since it would be extremely risky to build a factory without some reasonable estimate of what those costs would be, and since it would be extremely expensive to find out what those costs would be, the rational strategy for our factory builder to adopt would be:

First, pick the sites which are the cheapest for reasons which have nothing to do with the costs of paying full compensation to those upon whom the factory will dump its effects. This will involve checking whether the site is near a source of the type of labor which will be needed, whether it is near existing transportation facilities,

and whether it is near a supply of the natural resources which will be needed. Then, make bids to the people in each of those areas for the right to dump the factory's effects upon them. Finally, choose the site which is, all things considered, the cheapest site for operating the factory.

We must recall that a person is liable to punishment when he does the joint act of crossing the borders defined by another's rights and failing to pay compensation. It follows that it would be extremely irrational to open a factory without first ascertaining the costs of paying full compensation to those upon whom the factory dumps its effects. Although Luke risks neither bankruptcy nor punishment, since he can reasonably estimate the value of Jake's tomato plants, the factory owner who simply goes ahead and builds appears to risk both. For these reasons it is reasonable to say that most people who end up as dumping grounds for effects will receive market compensation and that markets for dumping grounds will emerge.

We must stop and wonder, however, whether it is legitimate for Nozick to defend a particular assignment of entitlements in case 2) on the ground that it is the only assignment which will lead to the emergence of a market. Isn't this approach clearly incompatible with I? When Nozick discusses the problem of how to assign entitlements when a person does

a non-aggressive risky act he is insistent that we must evaluate each risky act as an isolated act. How can he argue that it is reasonable to adopt I as a constraint when we solve that problem but not when we solve the problem of assigning entitlements when a person does a non-aggressive act which is certain to cross another's boundary? I am not suggesting that he should adopt I as a constraint in the latter case. In fact, it will become clear that I believe that he should reject it as a constraint in both cases.

#### 4.4 The Emergent Problem of Non-Aggressive Acts:

I have, I believe, established that the distinction between acts that are certain to cross another's boundary and acts which only create a risk of crossing another's boundary is not the distinction which Nozick wants for solving the problem of how to assign entitlements in cases of semi-productive exchange where the person has a legitimate purpose for doing his act.<sup>9</sup> The important distinction appears to be between the following types of acts:

1. those which threaten (i.e., are certain to cross or create a risk of crossing) the boundary established by another's rights where the agent uses the crossing of the boundary as a means to his ends or as his end.
2. those which threaten to cross the boundary

defined by another's rights where the crossing is merely incidental to the agent's pursuit of a legitimate end.

PE applies to acts of the first type which are certain to cross the boundaries established by another's rights. It would appear that a principle similar to PE should apply to acts of the first type which only create a risk of crossing the other's boundaries. Additional principles are needed for acts of the second type. In order to determine which type a particular act is we must examine the relation between the person's reasons for doing the act and the crossing. We must ask whether he was using the crossing as a means to his end or whether the crossing was merely incidental to his pursuit of his end. It is appropriate that Nozick, who appeals to the root idea that it is never permissible to use another merely as a means, should be forced to ask this question. Any future development of his theory must certainly tell us more about how to distinguish between crossings which are means to a person's ends and crossings which are merely incidental to the pursuit of a person's ends.

Even if we grant Nozick his apparent belief that PE and UP are acceptable principles for solving the problems to which each applies, he must still solve the problem of when it is permissible to prohibit an act which threatens

another's boundary when one of the following conditions is satisfied:

1. the act is a non-aggressive act.
2. the crossing will be an incidental side effect of the agent's pursuit of a legitimate end,
3. the prohibition of the act will leave the agent worse off than he would have been in a situation in which the person whose boundary is threatened did not exist at all or had nothing to do with him.

This type of problem is emergent relative to the supposedly clear beliefs we have in cases where PE and UP apply. Furthermore, we can confidently say that Nozick does not offer any compelling theoretical reason for his apparent belief that we should adopt one solution when the act is certain to cross another's boundary and a different solution when the act only creates a risk of crossing another's boundary. Nozick's apparent belief becomes all the more puzzling when we note just how different the solutions he proposes are from each other.

With regard to non-aggressive acts which are certain to cross boundaries he appears to adopt the view, as seen in his discussion of dumping grounds, that the person who wants to do the act must pay market compensation for the

right to do it. This position is extremely non-libertarian. Where has the presumption in favor of liberty gone? With regard to non-aggressive acts which only create a risk of crossing another's boundary we shall see that he essentially adopts the view that it is permissible to prohibit only when a) the risk is so great that it will create uncompensated-for-fear and b) the person whose act is prohibited is compensated for any disadvantages which he suffers as a result of the prohibition. This position is extremely libertarian.<sup>10</sup> It pays great deference to the presumption in favor of liberty.

In the remaining three sections I am going to examine Nozick's solution to the problem of how to assign entitlements in cases of non-aggressive risky acts. Unlike the problem of how to assign entitlements in cases of non-aggressive acts which are certain to cross another's boundary, he discusses this problem at length. Since his solution in cases of non-aggressive acts which are certain to cross is presented in a footnote and is apparently inconsistent with other things he says, it is best to assume that he owes us a solution. I will not simply assume, even though the assumption is reasonable, that the solution which applies in cases of risk should also apply in cases of certainty. In the next section I will consider whether Nozick can offer any compelling reasons why we should adopt F and I as constraints on

solutions to the emergent problem of non-aggressive risky acts -- the problem of how to assign entitlements to perform non-aggressive risky acts.

## ARE F AND I DEFENSIBLE CONSTRAINTS?

### 5.1 Aims:

I will examine five arguments which Nozick might offer to defend the view that we should solve the emergent problem of non-aggressive risky acts in a way which is compatible with F and I. They are:

1. The individualist anarchist, whose doubts about the possibility of providing a justification of the state we are trying to answer, will only accept a solution which is compatible with F and I.<sup>1</sup>
2. It is only by appealing to principles which are compatible with F and I that we will be able to provide an invisible hand explanation of the state.
3. It is only by appealing to principles which are compatible with F and I that we will be able to provide a fundamental explanation of the political realm.
4. The root ideas of the correct moral theory, which are firmly grounded in our clear beliefs about people's entitlements in situations of productive exchange and unproductive exchange, commit us to principles which are compatible with F and I.
5. A moral theory which includes only principles which are compatible with F and I is, other things equal, preferable to a moral theory which includes principles which are not compatible with F and I as well as principles which are. Since principles



which are not compatible with F and I have no advantages over principles which we must, on grounds of simplicity, accept principles which are.

I do not claim that Nozick actually offers each of the above arguments. Unfortunately, Nozick never offers a systematic defense of his use of F and I. All we can do, therefore, is explain how F and I are related to other theses which play a prominent role in the book and examine whether these other theses provide any support for his commitment to F and I. Finally, in the last section of the chapter I will bring the reader's attention to the fact that Nozick appears to give up F and I as constraints on solutions to the emergent problem of non-abundance. This will raise the question of whether it is coherent for Nozick to insist on F and I as constraints on solutions to one problem but not another.

## 5.2 The Need to Answer the Anarchist:

We have already seen that the anarchist has doubts about the possibility of providing a justification of the state which Nozick accepts. Nozick might want to say that since the anarchist only accepts principles which are compatible with F and I we can only answer his doubts to his satisfaction by appealing to principles which are compatible

with F and I and which can be used to justify the state. We might, therefore, want to prove to the anarchist that even he must accept some principles for solving the problem of when any person acting alone in the state of nature is entitled to prohibit another person from performing a risky act or using a risky procedure. We might then try to show him that these principles can also be used to justify a prohibition on the use of procedures for determining whether or not one person has violated another person's rights which subject innocent people to too high a risk of being found guilty. A person's rights are violated when he is punished for doing an act which he did not do. This will be part of an argument to show him that, contrary to his initial doubts, the state can offer a justification of its prohibition on his private enforcement of his rights which he must accept. This argument will be of purely academic interest, however, unless it is preceded by an argument that the moral theory which the anarchist appeals to is the correct moral theory. Just as Nozick is not interested in whether act utilitarian or perfectionist principles can be used to provide a justification of the state because those principles are unacceptable, we are not interested in whether the anarchist's principles can be used to provide a justification of the state if those principles are not acceptable. Therefore, we ask the anarchist, as we have

already asked Nozick, to justify his belief that the correct moral theory must accept F and I as constraints on the solution to the emergent problem of non-aggressive risky acts.

Furthermore, the reader should recall that there is no necessary connection between the anarchist's commitment to F and I and his doubts about the possibility of providing a justification of the state. We can imagine an anarchist who concedes that the correct solution to the emergent problem of non-aggressive risky acts is inconsistent with both F and I because it sometimes appeals to established public rules which satisfy law bound principles. We can even imagine that he further believes that once we accept law bound principles we must also accept the natural position. That is, he believes that law bound principles create the need for the special principles included in the natural position including principles which are used to evaluate publication, enforcement, and collection procedures. Still, he may have doubts about the possibility of providing a justification of the state because he believes that there are some principles which any person acting alone in the state of nature is entitled to enforce. He does not have to believe, as a person who accepts F does, that all enforceable principles are principles which any person acting alone in the state of nature is entitled to enforce. So long as

he believes that there are some principles which any person acting alone in the state of nature is entitled to enforce, he has reason to wonder how any state can justify a prohibition on the private enforcement of these principles. An argument that any person acting alone in the state of nature is entitled to enforce PE is sufficient to throw doubt on the possibility of providing a justification of the state!

### 5.3 Invisible Hand Explanations;

We are now in a position to see that even a person who rejects both F and I can still explain how a state would naturally arise from a state of nature by morally permissible means without anybody intending it. Nozick calls this type of explanation an "invisible-hand explanation" and believes that there is something especially satisfying about it:

There is a certain lovely quality to explanations of this sort. They 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 the pattern, instead was produced and maintained by a process that in no way had the overall pattern or design "in mind." After Adam Smith, we shall call such explanations invisible hand explanations.<sup>2</sup>

Regardless of whether we adopt Nozick's enthusiasm for invisible hand explanations we should note that it is one thing to provide an invisible hand explanation of the political realm and quite another to provide an invisible hand explanation of the state.

A person who rejects both F and I in favor of law bound principles and the natural position cannot provide an invisible hand explanation of the political realm. On his view people who found themselves in the state of nature and who acted on the correct moral principles would certainly intend to establish a political realm. They would act on the natural duty to establish and maintain just publication, enforcement, and collection procedures. On this view it is trivial to explain how a political realm, or central authority, would emerge from the state of nature by morally permissible means. The central authority which emerged, however, would not be a state. Its justly selected officials would alone have the rights to publish and enforce the laws that are needed to satisfy the law bound principles. They would not, however, have any special right to enforce the principles which any person acting alone in the state of nature is entitled to enforce. Therefore, the establishment of a political realm with just publication, enforcement, and collection procedures does not amount to the establishment of a state. We can still give an invisible hand

explanation of the state if we can explain how this central authority can justify each of the following as an incidental side effect of its legitimate pursuit of some other aim:

1. a prohibition on the private enforcement of those principles which any person acting alone in the state of nature is entitled to enforce.
2. the provision of free protective services to those people in the area who do not have the means to pay for the protective services which the central authority provides to all in the area.

Unless the central authority can justify each of the above it will fall short of being a state.<sup>3</sup> Furthermore, if it justifies each as the side effect of its pursuit of a legitimate aim, then it will become a state by an invisible hand process.<sup>4</sup> That is, it will become a state without anybody intending it to become a state. Therefore, we can conclude that Nozick cannot justify his commitment to F and I on the ground that this commitment is necessary to keep open the possibility of providing an invisible hand explanation of the state. A person who rejects both F and I in favor of law bound principles and the natural position may also be able to provide an invisible hand explanation of the state.

#### 5.4 Fundamental Explanations of the Political Realm:

One reason why Nozick believes that an invisible hand explanation of a realm is so satisfying is that it is often also a fundamental explanation of a realm. We should not only aspire to provide an invisible hand explanation of the state, we should also aspire to provide a fundamental explanation of the political realm. Consider the following:

The possible ways of understanding the political realm are as follows: (1) to fully explain it in terms of the non-political; (2) to view it as emerging from the non-political but not reducible to it, a mode of organization of non-political factors understandable only in terms of novel political principles; or (3) to view it as a completely autonomous realm. Since only the first promises full understanding of the whole political realm, it stands as the most desirable theoretical alternative, to be abandoned only if known to be impossible. Let us call this most desirable and complete kind of explanation of a realm a fundamental explanation of the realm.<sup>5</sup>

Fundamental explanations of a realm are explanations of a realm in other terms; they make no use of any of the notions of the realm. Only via such explanations can we understand everything about a realm; the less our explanations use notions constituting what is to be explained, the more (ceteris paribus) we understand.<sup>6</sup>

It is important to note that Nozick is only interested in moral explanations of the political realm. He does not, as far as I can tell, make any distinction between providing an explanation of the political realm and providing a justification of the political realm; explaining how it would arise from the state of nature by morally permissible means. Providing a justification of the political realm and providing an explanation of the political realm are the same thing. We can go from a justification (explanation) of the political realm to a justification (explanation) of the state by taking the additional step of explaining how any political realm which emerges by morally permissible means will become a state by morally permissible means.

It might now appear that Nozick has a good argument for his commitment to F and I. A person who accepts law bound principles which are incompatible with F and I will have to face the difficult problems of who is entitled to publish and enforce the laws which are needed to satisfy those principles. He will, almost certainly, accept the natural position. Once he adopts the natural position, however, he will no longer be able to provide a fundamental explanation of the political realm. This is because some of the principles which are included in the natural position are themselves political principles. The principles which enable us to say which publication, enforcement, and



collection procedures are just procedures are certainly political principles. When these are supplemented by a natural duty to establish just procedures it becomes clear that a person who accepts the natural position cannot provide a fundamental explanation of the political realm. His explanation clearly makes use of "the notions of the realm." The conclusion we should draw is that if we want to gain full understanding of the political realm, then we should retain our commitment to F and I and avoid law bound principles and the natural position.

This argument goes much too quickly. Let us return to the emergent problem of non-aggressive risky acts. For the purpose of constructing an acceptable moral theory, the sole issue is what the optimal solution to that emergent problem is. It is no argument for (or against) a solution that it can (or cannot) be used to provide a fundamental explanation of the political realm. If we can argue that a) the optimal solution must appeal to law bound principles which are not compatible with F and I and b) these principles create the need for the special political principles which are included in the natural position, then how can Nozick claim that our understanding of the political realm is deficient? Where is it deficient? What understanding do we lack?

Since Nozick never gives an example of either a type

(2) or a type (3) explanation of the political realm I cannot say whether the explanation I have described, which appeals to the special principles included in the natural position, falls under either of these types.<sup>7</sup> It should be clear, however, that an argument for this type of explanation need not, as Nozick suggests it must, include an argument that it is impossible to provide a fundamental explanation of the political realm.<sup>8</sup> Moral theories are available which enable us to provide fundamental explanations of the political realm. Nozick must concede this point. The act-utilitarian explanation of the political realm is a fundamental explanation since it explains the political realm without appealing to any special political principles. Nozick would not, however, accept the act utilitarian theory, even if he became convinced that it was the only theory which could be used to provide a fundamental explanation. This is because the act utilitarian explanation appeals to an unacceptable moral theory. Similarly, we can reject any other fundamental explanation which appeals to an unacceptable moral theory. This consideration merely brings us back to the point that the real issue, and the only issue, is what the optimal solution to the emergent problem of non-aggressive risky acts is.

### 5.5 The Root Ideas:

We now turn to the question of whether there are reasons internal to moral theory which Nozick can use to justify his commitment to F and I. Can we appeal to the root ideas of Nozick's moral theory to get an answer? These root ideas include a) no person may be sacrificed for the benefit of any other person, b) it is never permissible to use another person merely as a means, c) no person is a resource for any other person, and d) each person is individually responsible for choosing his life plan. These root ideas can, perhaps, be used to explain how we should assign entitlements in cases of productive exchange and in cases of unproductive exchange. Furthermore, they may even explain why it is appropriate to assign entitlements in these cases in a way which is compatible with F and I. These root ideas do not, however, force any conclusion about how to assign entitlements in most cases where any choice of entitlements will leave at least one party with the complaint that he is worse off than he would have been in the situation in which the other did not exist at all or had nothing to do with him. If we accept F and I as constraints on how to assign entitlements in these cases, then we must view each act as an isolated conflict between two people in the state of nature. With regard to non-aggressive risky acts we must abstract from the fact that the person who is a risk creator in a

particular situation will also be a risk bearer in another similar situation. Nozick does not, so far as I can tell, ever argue that a commitment to any of the four root ideas listed above forces us to make this abstraction.

There is, however, a fifth root idea. It is the presumption in favor of liberty. This presumption may appear to favor solutions which are compatible with F and I. By examining each non-aggressive risky act as an isolated act we will almost certainly have to conclude that very few are serious enough to prohibit. So, for instance, we will not be able to prohibit an act on the ground that it is a member of a group of acts whose cumulative effect is to produce a risk that is so serious that it would be permissible to prohibit any single act which created that risk. We cannot, however, go straight from the fact that the presumption in favor of liberty provides a reason to favor solutions which are compatible with F and I to the conclusion that we must adopt F and I as constraints on solutions. We need an additional argument that none of the other root ideas provides a reason for favoring a competing solution. Nozick does not, as far as I can tell, offer this additional argument. Furthermore, this argument is almost certain to fail. A solution which permits the largest number of risky acts will have its costs as well as its benefits. Its main benefit is that it will give each person the largest number of

options to pursue his ends. Its main costs are that it increases the likelihood that each person will be a victim of another's risky act and, therefore, that it increases the amount of fear that each person will suffer. The root idea that no person is a resource for any other person would appear to provide a reason for favoring a competing solution which provides each person with more protection against being a victim of another's risky act. Furthermore, the presumption in favor of liberty itself would appear to provide a reason for favoring a competing solution which creates less fear. To the extent that fear of having our plans interrupted without our consent lessens the value of our liberty, we would expect the presumption in favor of liberty to require a compromise between the advantages of having options kept open and the disadvantages of being interfered with arbitrarily. We can conclude that Nozick's root ideas do not provide him with a compelling reason for accepting F and I as constraints on solutions to the emergent problem of non-aggressive risky acts.

#### 5.6 Simplicity:

We now come to the last argument which is an argument from simplicity. This argument will only work if Nozick can establish that his solution, which is compatible with F and I, has all of the desirable properties of the best solution

which is not compatible with F and I. Once we see that the root ideas of Nozick's theory do not force us to accept F and I as constraints then we must look for an emergent constraint which will enable us to pick out the optimal solution form all of the solutions which are compatible with those root ideas.<sup>9</sup> It may, of course, turn out that the optimal solution is a solution which is compatible with F and I. Its claim to being the optimal solution will not, however, be that it is compatible with F and I. It will be that it best satisfies the emergent constraint.

The emergent constraint should identify a property which can be used to rank competing solutions and which will be acceptable to people who a) accept Nozick's account of the root ideas, b) concede that these root ideas do not force a conclusion on how to solve the emergent problem, and c) are willing to adopt an impartial point of view for solving the emergent problem. I suggest that the following constraint is a reasonable constraint:

People who accept the principles which that solution appeals to will generally agree that the conflicts which those principles are intended to resolve are resolved in an impartial manner rather than in a manner which reflects the relative power of each of the parties to the conflict.

I will eventually argue that Nozick's solution to the emergent problem of non-aggressive risky acts falls far short of satisfying this apparently innocuous constraint. Furthermore, I will argue that it should be rejected in favor of a solution which rejects F and I in favor of law bound principles and the natural position.

#### 5.7 A Question About the Coherence of Nozick's Theory:

I have examined the arguments which Nozick might give to justify his commitment to F and I as constraints on solutions to the emergent problem of non-aggressive risky acts. I have, I believe, established that none of these arguments forces the conclusion that he must adopt F and I. Now I will show that Nozick's commitment to F and I as constraints on solutions to the problem of non-aggressive risky acts is especially puzzling since he does not appear to accept them as constraints on solutions to the emergent problem of non-abundance. Unless Nozick can explain why they are appropriate as constraints on solutions to one problem but not the other, he is open to the charge that his theory is incoherent.

We have already noted that Nozick believes that we have extremely clear beliefs about how to evaluate distributions of natural resources and the benefits which result from their uses in conditions of abundance.<sup>10</sup> He believes

that in conditions of abundance we have clear beliefs that the system which permits bequeathable property rights in natural resources is justifiable. Furthermore, we have clear beliefs that in these conditions a person is entitled to all that he has legitimately acquired and that we can determine what he has legitimately acquired without appealing to an established set of public rules which satisfies a law bound principle. He is confident that in conditions of abundance we can evaluate distributions of natural resources and the benefits which result from their uses without appealing to principles which are incompatible with F and I.

The emergent problem of non-abundance is the problem of how to evaluate distributions of natural resources and the benefits which result from their uses in conditions in which natural resources are no longer abundant. Then, Nozick realizes, the appropriations of bequeathable property rights in natural resources by some people will eventually make other people worse off by depriving them of the opportunity to appropriate bequeathable property rights in resources of that kind or, more weakly, by making them unfree to use resources of that kind freely. He insists, without argument, that a person does not have a complaint when another's appropriation makes him worse off by depriving him of the opportunity to appropriate.<sup>11</sup> He concedes, however, that a person does have a complaint when another's



appropriation makes him unfree to use resources freely. Consequently, he concedes that a justification of a system which permits the appropriation of bequeathable property rights in non-abundant natural resources must establish that the workings of the system provide all those who are bound to obey its requirements with benefits which compensate them for their loss of liberty to use natural resources freely. He believes that we have satisfied the Lockean proviso that there be "enough and as good left in common for others" when we show that the workings of the system which permits appropriations of bequeathable property rights provides these compensating benefits to all.<sup>12</sup> On his view we can answer a person who lives in twentieth century America and complains of injustice on the ground that he is no longer at liberty to use beaches, forests, or farmland freely by showing him that he is better off in his present situation than he would have been in a pre-institutional state of nature prior to the workings of the system of private property.<sup>13</sup>

My purpose is not to criticize Nozick's solution to the emergent problem of non-abundance. I will grant him his assumptions a) that a person does not have a complaint which gives rise to a claim for compensation when he is deprived of the opportunity to appropriate bequeathable property rights in non-abundant natural resources; b) that it is appropriate to count as compensation for a person's

loss of liberty to use natural resources freely the benefits which redound to all as a result of the workings of the system of private property; and c) that we can justify the system which permits bequeathable property rights in non-abundant natural resources without comparing its consequences with the consequences of alternative systems which can be used to solve the emergent problem of non-abundance. All that I want to show is that even when we grant Nozick all of these assumptions, which certainly help him avoid solutions which appeal to traditional law bound principles of distributive justice, which are incompatible with F and I, he still appears to accept a solution which is incompatible with F and I. Consider the following quote:

If my appropriating all of a certain substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso. If the proviso excludes someone's appropriating all of the drinkable water in the world, it also excludes his purchasing it all. (More weakly, and messily, it may exclude charging certain prices for some of his supply.) This proviso (almost) never will come into effect; the more someone acquires of a scarce substance which others want, the higher the price of the rest will go, and the more difficult it will be for him to acquire

it all. But still, we can imagine, at least, that something like this occurs: someone makes simultaneous secret bids to the separate owners of a substance, each of whom sells assuming that he can easily purchase from other owners, or some natural catastrophe destroys all of the supply of something except that in one person's possession. The total supply could not be permissibly appropriated by one person at the beginning. His later acquisition does not show that the original appropriation violated the proviso.... Rather, it is the combination of the original appropriation plus all the later transfers and actions which violates the Lockean proviso.<sup>14</sup>

I believe that this quote establishes two important points. First, it establishes that Nozick believes that the task of satisfying the Lockean proviso is a joint task which people are collectively responsible for satisfying. Even though he believes that the system of private property works in ways which almost certainly preclude the possibility of innocent violations of the Lockean proviso, he recognizes that such violations are possible. Second, this quote can be used to establish that Nozick is willing to give up both F and I when he faces the problem of how to rectify innocent violations of the Lockean proviso. I will discuss I first.

It would appear that each person in Nozick's example who sells his water can claim that his act of selling water

is not serious enough to warrant interference when it is considered as an isolated act. Nozick must hold the position, however, that it is permissible to use force to void at least some of the sales which led to the violation of the Lockean proviso. Can't any one of the person's whose sale is voided complain that this use of force is inconsistent with a commitment to I?

Perhaps Nozick can save I by noting that the seller will not complain if we void his contract since he does not want to live in a world in which he must pay monopoly prices for water. He wants his contract voided and his water back. It is only the buyer who would complain and the buyer cannot appeal to I for a complaint. This is because each of his contracts was not independent of his other contracts. We can, however, easily change the example to overcome this objection. We can assume that he sent out secret bids which covered 90 percent of the supply and that he was willed, much to his surprise, the remaining 10 percent. Or we can assume that the remaining 10 percent was destroyed as a result of a natural catastrophe. In either case his secret bids were not serious enough to warrant interference, when considered independently of the actions of others who were acting independently of him.

It is even clearer that this example shows that Nozick has to give up F. Who is entitled to use force to rectify

this violation of the Lockean proviso? Is it plausible to claim that any person acting alone in a state of nature is entitled to use force to rectify this violation? What is he entitled to do? Is he entitled to void all of the contracts? It would appear that the buyer can complain if more than one contract is voided on the ground that it is only necessary to void one in order to return to a situation in which the proviso is satisfied. If more than one is voided he can complain that another is using force to void a contract which is not serious enough to void when it is considered independently of the acts of others who are acting independently of him. But which one is he entitled to void? Each person wants his contract voided because he would like to be one of the two people in the world with a supply of drinkable water. Is any person acting alone in the state of nature entitled to decide which one to void? If these considerations do not convince the reader that Nozick must give up F, then he should reconsider the following:

More weakly, and messily, it owning all the drinkable water in the world<sup>7</sup> may exclude his charging certain prices for some of his supply.<sup>15</sup>

Certainly, Nozick does not want to say that any person acting alone in the state of nature is entitled to fix prices on

what some people can charge others for the natural resources which they have legitimately acquired.

The conclusion which I wish to draw from our discussion in this section is that we can say that Nozick cannot, without further explanation, have it both ways. He cannot say that F and I are constraints on how to solve the problem of cumulative risk but are not constraints on how to solve the emergent problem of non-abundance. He cannot say that the problem of cumulative risk is merely an inconvenience of remaining in the state of nature while the problem of unintended violations of the Lockean proviso is not. I am not suggesting that Nozick should adopt the view that the latter problem is also a mere inconvenience of remaining in the state of nature and, therefore, that it will provide people in the state of nature with a reason to establish a central authority with the right, through their consent, to publish and enforce laws which will assure that there are no violations. My own view, as I have made clear, is that he should change his view on cumulative risk. I am only suggesting that he owes us an explanation for treating the two cases differently.

## THE PRINCIPLE OF COMPENSATION

### 6.1 Aims:

In this section I will examine the principle which Nozick appeals to in order to solve the problem of non-aggressive risky acts. I hope to establish that the solution which we get by appealing to this principle is defective on two counts. First, it assigns entitlements to perform and to prohibit non-aggressive risky acts which people would regard as inconvenient. Second, it provides counter-intuitive solutions to many aspects of the problem of non-aggressive risky acts. After I have established that his principle has these shortcomings, I will examine Nozick's beliefs about the relevance of considerations of fairness to the solution to the problem of non-aggressive risky acts. I hope to establish that any theory which is committed to F and I as constraints on solutions cannot assign an appropriate weight to considerations of fairness.

### 6.2 The Principle of Compensation:

The heart of Nozick's solution to the problem of non-aggressive risky acts is contained in the following:

What about those cases where only the first condition of unproductive exchange is satisfied, not

the second: X is no better off as a result of the exchange than if Y didn't exist at all, but Y does have some motive other than selling abstention. If from Y's abstention from an activity X gains only a lessened probability of having his own border crossed (a crossing whose intentional performance is prohibited), then Y need be compensated only for the disadvantages imposed on him by the prohibition of only those activities serious enough to justify prohibition in this manner.<sup>1</sup>

In order to apply this principle, which Nozick calls "the principle of compensation," we must be told which acts are "serious enough to justify prohibition in this manner." Nozick certainly wants to say that an act is serious enough when it has the following property:

The failure to prohibit the act, when the act is considered independently of the acts of other people who are acting independently of the agent, will cause uncompensated-for-fear in those people whose boundaries it threatens.<sup>2</sup>

It is because an epileptic's act of driving a car has this property that we are permitted to prohibit his driving.<sup>3</sup>

It is because a factory owner's use of a very risky manufacturing process has this property that we are also



permitted to prohibit his use of that process.<sup>4</sup> Nozick also wants to say that we can identify which acts are serious enough to justify prohibition by appealing to the following principle:

If someone knows that doing act A would violate Q's rights unless condition C obtained, he may not do A unless he has ascertained that C obtains through being in the best possible position for ascertaining this.<sup>5</sup>

Nozick uses this principle to explain why it is sometimes justifiable to prohibit the use of a risky procedure to determine whether people are liable to punishment for violating the law of nature even when one person's use of that procedure does not cause uncompensated for fear. Any procedure for determining guilt will subject innocent people to some risk of being found guilty and, therefore, to some risk of having their rights violated. When a person uses a procedure which is too risky compared to the best procedures available, then it is permissible to prohibit his use of it provided that he is compensated for any disadvantages which he suffers as a result of the prohibition. Nozick is vague about how to determine what the best available procedure is and whether a particular procedure is too risky.<sup>6</sup> He appears to believe, however, that a procedure may be too risky

compared to the best procedure even when a person's use of it, instead of the best procedure, does not cause uncompensated for fear.<sup>7</sup>

Nozick never explains how a person in the state of nature is supposed to apply the principle of compensation. It would appear to me, however, that its application usually involves three steps:<sup>8</sup>

1. You must explain to the person who wants to perform the risky act that it is an act which you are permitted to prohibit.
2. You prohibit him from doing the act. That is, you warn him that he will be subjected to punishment, regardless of whether his act actually crosses any person's boundary, if he does the act.
3. You offer him an amount of goods which will compensate him for any disadvantages which he suffers as a result of the prohibition.

If you do all of these things, then you are entitled to punish him for doing the risky act. It does not matter, so long as the compensation which you offer is adequate, whether he accepts the compensation. In the absence of a public warning that he will be punished for doing his non-aggressive risky act you are only entitled to punish him for failing to compensate those whose boundaries are actually

crossed as a result of his performance of the risky act.

Nozick does not, and he is aware that he does not, ever defend the principle of compensation. He writes:

With some justice, I think, I could claim that it is all right as a beginning to leave a principle in a somewhat fuzzy state; the primary question is whether something like it will do.<sup>9</sup>

He does, however, offer the following to explain its plausibility:

One might view compensation for disadvantages as a compromise arrived at because one cannot decide between two attractive but incompatible positions: (1) no payment, because dangerous persons may be restrained and so there is a right to restrain them; (2) full compensation, because the person might live unrestrained without actually harming anyone, and so there is no right to restrain him. But prohibition with compensation is not a "split the difference" compromise between two equally attractive alternative positions, one of which is correct but we don't know which. Rather, it seems to me to be the correct position that fits the (moral) vector resultant of the opposing weighty considerations, each of which must be taken into account somehow.<sup>10</sup>

Since Nozick offers no argument for the principle of compensation we can only evaluate it by asking whether it has acceptable implications and is consistent with other positions which Nozick accepts.

### 6.3 The Concept of Being Disadvantaged Relative to the Normal Situation:

In order to explain why the principle is problematic we must begin by examining the concept of disadvantage which he uses when he states the principle. Nozick concedes that he does not have a theory of disadvantage. He writes:

One might use a theory of disadvantage, if one had it, in order to formulate a "Principle of Compensation:" those who are disadvantaged by being forbidden to do actions that only might harm others must be compensated for these disadvantages foisted upon them in order to provide security for others.<sup>11</sup>

The following quotes should give the reader some idea of what Nozick has in mind when he uses the concept of disadvantage:

Some types of actions are generally done, play an important role in people's lives, and are not forbidden to a person without seriously disadvantaging him.<sup>12</sup>

The idea is to focus on important activities done by almost all, though some do them more dangerously than others.<sup>13</sup>

Furthermore, he gives the following examples to contrast prohibitions which merely make another worse off with prohibitions which disadvantage:

1. We do not disadvantage a manufacturer when we prohibit him from using a very efficient but very risky means of manufacturing and, consequently, cause him to suffer a decrease in profits. We only disadvantage him when the prohibition leaves him no other way to earn a living.<sup>14</sup>
2. We do not disadvantage a person when we prohibit him from driving a car in an automobile dependent society unless the prohibition forces him to work in the cash market to accumulate the resources to hire a chauffeur or take taxis.<sup>15</sup>
3. We do not disadvantage a person when we prohibit him from "playing Russian roulette on another with a gun of 100,000 chambers" unless that is his only way of having any enjoyment.<sup>16</sup>

The second example brings out the point that whether or not a person is disadvantaged by a prohibition may depend on how wealthy he is. This raises the question, which we will examine later, whether the principle of compensation is unfair to the wealthy.

Whether or not a person is disadvantaged by a prohibition depends upon comparative considerations. We must compare his situation with the prohibition and without compensation with "the normal situation."<sup>17</sup> If his situation prior to the prohibition is at or above the normal situation and his situation after the prohibition is below the normal situation, then the compensation must bring him back to the normal situation. It does not have to bring him back to his situation prior to the prohibition. What happens, however, when his situation prior to the prohibition is below the normal situation and his reason for doing the risky act is to reach the normal situation? What compensation is he entitled to when this risky act is prohibited? A complete development of Nozick's theory must include an answer to this question. More basically, it must include an account of what the normal situation is. Is it the normal situation in his society? Is the normal situation some measure of the average well being in his society? Does it change for the worse when there is a mass immigration (emigration) of poor (rich) people into the society?<sup>18</sup>

It is clear that people who do not have access to a theory of disadvantage will often disagree on how to apply the principle of compensation. Even if they agree on a) which risky acts are serious enough to prohibit, b) when a person is disadvantaged by a prohibition, and c) what counts

as adequate compensation for the disadvantage, there would still be serious disagreements about how to apply the principle. Recall that Nozick's statement of the principle includes the following remark:

If from Y's abstention from an activity X gains only a lessened probability of having his own border crossed (a crossing whose intentional performance is prohibited), then Y need be compensated only for the disadvantages imposed upon him by the prohibition of only those activities which are serious enough to justify prohibition in this manner.<sup>19</sup>

What is appropriate compensation when X gains more from the prohibition than a lessened probability of having his own border crossed? Is he permitted to prohibit only if he shares the additional benefits which he gains with Y? Does the answer depend on whether his main reason for prohibiting was to gain the lessened probability of having his border crossed rather than the additional benefits? Nozick makes no attempt to answer these questions. They are, however, important questions for him. He believes that those who voluntarily a) give up their rights to enforce their rights, b) agree to permit a central authority (what Nozick calls "a protective association") to have the sole right to enforce

their rights for them, and c) choose to prohibit the use of risky procedures by those who do not give up their rights to privately enforce their rights, must compensate those whose actions they prohibit for any disadvantages which result from their prohibitions. If their sole motive for prohibiting is to lessen the likelihood that their borders will be crossed, then it is relatively easy to determine what appropriate compensation is. We can remove the disadvantage which a person suffers from a prohibition on his use of risky procedures to enforce his rights by enforcing them for him. We simply provide the person with free protection.<sup>20</sup> What happens, however, when those who prohibit have an ulterior motive for prohibiting? They may, for instance, prohibit to attract new industry which is reluctant to locate in an area which permits private enforcement of rights. Are those whom they prohibit entitled to additional compensation in this case? It appears that Nozick must say that they are. He never tells us, however, what appropriate compensation would be.

#### 6.4 Resolving Conflicts Between the Rich and the Poor:

The principle of compensation would appear to be unfair to the poor. It permits the prohibition of risky acts only when those who are disadvantaged by the prohibition are compensated for their disadvantages. Since the poor have fewer



resources than the rich it would appear that they must suffer greater risks. In many cases they will not be able to invoke the principle of compensation to prohibit risky acts and free themselves from risks because they will not have the resources to compensate those whose risky acts they wish to prohibit. In similar cases the rich will be able to invoke the principle of compensation because they do have the resources to pay the required compensation. Nozick appears to be bothered by the charge that the principle of compensation is unfair to the poor. This comes out in his discussion of whether a subsistence farming community could preventively restrain anyone. He writes:

Yes they may; but only if the restrainers give over enough in an attempt to compensate, so as to make about equivalent their own lessened positions (lessened by their giving up goods and placing them into the compensation pool) and the position (with compensation) of those restrained. The restrained are still somewhat disadvantaged, but no more than everyone else. A society is impoverished with regard to a preventive restraint if those restraining cannot compensate those restrained for the disadvantages they impose without themselves moving into a position that is disadvantaged; that is, without themselves moving into a position which would have been disadvantaged had only some persons been moved into it. Impoverished societies must carry out compensation for disadvantages

until the positions of those restrained and those unrestrained are made equivalent.<sup>21</sup>

There are two preliminary things to note about this long passage. First, Nozick appears to be saying that the right to preventively restrain is possessed by a society. If he is to remain consistent, then he must say that this right is possessed by any member of that society when he is acting alone in the state of nature.<sup>22</sup> Second, we should note that this quote arises during a discussion of the problem of preventive restraint. He distinguishes between two types of cases where preventive restraint may seem appropriate. In one type "people are viewed merely as mechanisms now set into operation which will (or may) perform some wrong action."<sup>23</sup> In these cases we believe that the person is incapable of making a decision against acting wrongly and that it is, therefore, appropriate to view his risky "acts" as we view any other risky act. In the other type "the evil (it is feared) the person may do really does hinge upon decisions for wrong [ful behaviour] which he has not yet made."<sup>24</sup> In these cases Nozick believes that deference to considerations of individual responsibility make preventive restraint unacceptable. Restraining people who are considered to be deranged falls into the first category while restraining ordinary people through gun control laws or curfews falls

into the second. Since Nozick's modification of the principle of compensation is certainly intended to apply to the first type of case, which is considered to be merely another type of risky act, we can fairly assume that he intends the modification to apply to all risky acts.

It follows that a person who prohibits another's risky act is only obligated to compensate the other for the disadvantages which result from the prohibition up to the point where further compensation will leave him more disadvantaged than the person whose act he prohibits. This implies that a person who is extremely disadvantaged is permitted to prohibit, without any costs to himself, any risky act which is serious enough to prohibit. Is this fair to rich people who might be made radically worse off by prohibitions on their risky activities and who will not receive any compensation at all?

Suppose that some people who are extremely disadvantaged move into an area where there is a factory whose operation subjects them to such great risks of harm to their health that they suffer uncompensated-for-fear. It would appear that they can give the factory owner the following ultimatum:

Either close down your factory or change your methods of operation so that we are not subjected to a level of risk which causes us to suffer uncompensated-for-fear.

The factory owner realizes that it is not economically feasible for him to change to less risky procedures. What obligations do those who prohibit have to the factory owner? It seems clear that he will not, even though he is made radically worse off by the prohibition, be disadvantaged by it. With his expert entrepreneurial skills he will certainly be able to find a job elsewhere. Even if he is disadvantaged by the prohibition it is unlikely that he will end up more disadvantaged than those who prohibit. It would appear, therefore, that those who prohibit have no obligations to him. He must, as a moral person, simply take this change of fortune in stride.<sup>25</sup>

What if the factory owner wanted to buy the right to subject these disadvantaged people to these risks? There would be tremendous transaction costs associated with such an attempt and any new person who moved into the area would still have the right to prohibit without any costs to himself. There is a temptation here to say that the fact that the factory was there first must make some difference. I do not, however, see how Nozick can say this. Any justification for adopting a policy which gives weight to the fact that one party was there first would appeal to the beneficial consequences of adopting that policy and would certainly be incompatible with I.<sup>26</sup> It certainly appears that the disadvantaged people do have the right to prohibit the continued

operation of the factory and that it would be in their interests to exercise that right.

The principle of compensation, which at first appears to be unfair to the poor, turns out to be unfair to the rich. There is further evidence that it resolves conflicts between the rich and poor in an unsatisfactory manner. Our intuitive belief is that the amount of risk a person is permitted to impose on others without their consent is not a function of his wealth. A commitment to the principle of compensation forces us to change this belief. Let us focus on a risky activity, such as the use of a very efficient but very risky manufacturing process, which is serious enough to justify prohibition. According to Nozick it is permissible to prohibit its use by a rich person without paying him compensation because the prohibition will not disadvantage him. Now let us assume that there is a group of disadvantaged people who, through charitable donations from others, have accumulated enough money to open a factory. Their aim in opening the factory is to escape their disadvantaged position and their success in doing this depends on their use of this very efficient but risky process. Those who will be subjected to the risks which their use of the process creates are permitted to prohibit their use only if they compensate them for the disadvantages which result from the prohibition. In this case the compensation would involve paying them enough

money so that they are no longer disadvantaged! This would be extremely expensive. It is, therefore, almost certain that these disadvantaged people will be permitted to operate their factory until they are no longer disadvantaged. At that time others will prohibit their continued use of the risky process and force them to adopt the less risky processes which their rich competitors use. Until that time, however, others will simply have to bear the risks and the uncompensated-for-fear which goes with it.

Nozick defends the view that the state is not permitted to use force to make the well off help the needy (many of whom, we can assume, are also disadvantaged.) It turns out, however, that his commitment to the principle of compensation leads him to the view that the well off may, after all, have to "help" some of the needy. They will be the unwilling victims of the non-aggressive risky activities which the disadvantaged needy must be permitted to pursue in their attempts to escape their disadvantaged positions.

The point of this example, as was the point of the previous one, is that the problem of how to assign entitlements in cases of non-aggressive risky acts is an important social problem. People are not indifferent to the solution insofar as their lives and jobs may be at issue. Furthermore, Nozick's solution, which appeals to the principle of compensation, assigns people inconvenient entitlements

which lead to unreasonable resolutions of the conflicts between risk creators and risk bearers. Nozick might concede that people's natural entitlements in risky situations are inconvenient. He appears to admit as much, as we shall now see, when he discusses the problem of cumulative risk.

#### 6.5 The Problem of Cumulative Risk:

Nozick introduces the problem of cumulative risk in the following quote:

One action alone would not cause fear at all due to the threshold, and one action less would probably not diminish the fear. Our earlier considerations about fear provide a case for the prohibition of this totality of activities. But since parts of this totality could occur without ill consequence, it would be unnecessarily stringent to ban each and every component act.

How is it to be decided which below threshold subsets of such totalities are to be permitted? To tax each would require a central or unified taxation and decision-making apparatus. The same could be said for social determination of which acts were valuable enough to permit, with the other acts forbidden in order to shrink the totality to below the threshold. For example, it might be decided that mining or running trains is sufficiently valuable to be allowed, even though each presents risks to the passerby no less than compulsory Russian roulette with one

bullet and n chambers (with n set appropriately), which is prohibited because it is insufficiently valuable. There are problems in a state of nature which has no central or unified apparatus capable of making, or entitled to make, these decisions.<sup>27</sup>

Nozick could, at this point, say a) that we need emergent law bound principles, b) that these principles include a principle which enables us to evaluate the social value of each risky act, and c) that these law bound principles create the need for the special principles which are included in the natural position. Instead, he says that the problem of cumulative risk is merely an inconvenience of remaining in the state of nature.<sup>28</sup> It provides people in the state of nature with a reason to establish a central authority which is given, through their consent, the right to publish and enforce the laws which are needed to remove the inconvenience. These laws can only be enforced against those who consent to them. The non-aggressive risky acts of those who do not consent to these laws must be treated according to the requirements of the principle of compensation which views each person's non-aggressive act as an isolated act in a pre-institutional state of nature. Will this voluntary approach to the problem of cumulative risk succeed in removing the inconvenience? There are reasons to believe that it won't.



Assume that two protective associations are located across a lake from each other and that the prevailing winds dump the pollutants which the factories in one association's territory produce on to the territory of the other association and create a health hazard. Further assume that the cumulative effect of this dumping creates uncompensated-for-fear in the members of the other association but that no single factory dumps enough pollutants to justify prohibiting its continued operation. Since no single factory owner's dumping causes this fear we cannot use the principle of compensation to prohibit his dumping. Furthermore, we cannot charge him for the fear created by the dumping because his dumping does not create the fear. Rather, it is the totality of dumpings (or, perhaps, the system which permits the totality) which creates the fear. In this case there does not appear to be anything that the protective association can legitimately do, without the express consent of the factory owners, to protect its members from this uncompensated-for-fear. It can, of course, require the polluters to pay for any actual damage which they cause. That is, however, all that it can do.

This example brings out the important point that we are inclined to view the other protective association as an individual. We are inclined to say that it must coordinate the behaviour of its members so that their collective

behaviour does not subject the members of another protective association to risks which cause uncompensated-for-fear.

Nozick cannot say this. Each of the members of the protective association is, in the relevant sense, acting independently of the other members. Therefore, it is permissible to prohibit any act of any one of them only when it is, when considered by itself, serious enough to prohibit.

These considerations raise the following puzzle for Nozick. Assume that some person owns a group of factories which creates a risk to the people who live near them which causes those people to suffer uncompensated-for-fear. Nozick would, I believe, say that it is appropriate to consider the operation of the factories as the single activity of the person who owns them. If this is so, then the people in the area can tell him that he must either reduce the level of risk which his factories create or shut them down. When he is given this ultimatum he decides that the most feasible thing for him to do is to sell his factories. He sells each to a different person who continues to operate the factory. Although the people in the area are subjected to the same level of risk as before, they are no longer able to protect themselves from the risk and the uncompensated-for-fear to which it leads. This is because none of the new factory owners operates a factory which creates a risk which is, when considered by itself, serious enough to prohibit. I do not see

how Nozick can avoid the conclusion that mere change in ownership will cause this change in the lives of those who live near the factory.

#### 6.6 The Enforceable Fairness Principle:

I have, I believe, established that when we appeal to the principle of compensation to assign entitlements to do non-aggressive risky acts we end up with assignments which are inconvenient and which lead to counter-intuitive solutions to important social problems, including the problem of cumulative risk. At this point in the development of his theory Nozick might have appealed to the enforceable fairness principle to solve these problems. It can be used to solve them because it can justify unconsented to changes in the boundaries established by people's natural rights when the changes make everybody better off. We have already noted that Nozick's commitment to the libertarian side constraint forces him to reject the enforceable fairness principle.<sup>29</sup> In this section I am going to look more closely at Nozick's reasons for rejecting it. I want to consider whether there is some way to modify the enforceable fairness principle so that it will become acceptable to a person who accepts the libertarian side constraint. The discussion is intended to reinforce my position that much of Nozick's theory depends upon a dogmatic commitment to F and I.

We have already noted that Nozick interprets the fairness principle as the following principle:

Whenever a group of people G voluntarily cooperates by conforming their behaviour to a public set of rules, then every person P, regardless of whether he is a member of G, has an obligation to follow the rules provided that; a) the rules are intended to apply to him, b) he has been informed of the requirements of the rules, c) he receives the benefits of the cooperation of others, and d) he is better off in the situation in which he receives the benefits of others and cooperates than he would have been in the situation in which he does not receive the benefits and does not cooperate.

The fairness principle is a principle about what obligations people have. By itself it is compatible with both F and I. When it is supplemented by a principle which says that an agent of G is permitted to enforce the obligations which arise under the principle, then it is incompatible with F and I. Nozick gives counter-examples to the fairness principle and expresses his scepticism about the possibility of adding a fifth condition which will make the principle acceptable.<sup>30</sup> Furthermore, he is certain that there is no way to modify the principle so that it gives rise to enforceable obligations.<sup>31</sup>

Nozick objects to the enforceable fairness principle

because it is incompatible with F and I and because he interprets it as simply a macro version of the unacceptable principle that it is permissible to give a person a benefit for which he has not consented to pay and then to force him to pay for it. He makes little effort to add a fifth condition in order to make the fairness principle a reasonable principle which gives rise to enforceable obligations. He simply asserts:

Perhaps a modified principle of fairness can be stated which would be free from these and similar difficulties. What seems certain is that any such principle, if possible, would be so complex and involuted that one could not combine it with a special principle legitimating enforcement within a state of nature of the obligations that have arisen under it. Hence, even if the principle could be formulated so that it was no longer open to objection, it would not serve to obviate the need for other person's consenting to cooperate and limit their own activities.<sup>32</sup>

If there is any argument here it is that since people in the state of nature would not agree on what obligations are created by the modified principle there cannot be a special principle legitimating enforcement of those obligations. This argument loses all force when we recall the amount of

disagreement that is bound to occur when people attempt to apply the principle of compensation to determine what their obligations are.<sup>33</sup> Nozick insists, however, that the obligations which it creates are enforceable within the state of nature.

How can we modify the principle of fairness so that it can be used to solve the problem of cumulative risk? The addition of the following condition will be a step in the right direction:

- a) the aim of the rule is to provide each person with increased assurance that the boundary established by his natural rights will not be crossed.<sup>34</sup>

This fifth condition puts radical limits on when the principle of fairness can be used to create enforceable obligations. Roughly speaking, it appeals to the distinction between providing a person with a benefit and preventing a person from suffering a harm, and says that the principle gives rise to enforceable obligations only when the cooperative behaviour is needed to prevent people from suffering harm. It provides the following solution to the problem of cumulative risk. Some people in the state of nature will almost certainly be bothered by the inconvenience of living in a system which permits so many risky acts that people suffer uncompensated-

for-fear. Consequently, they will publish an enforceable rule which coordinates people's behaviour so that the level of risk in the area is kept below the threshold level which causes uncompensated-for-fear. They are much more likely to take this initiative when they know that they are permitted to enforce their rule against people who do not consent to it. If they are not permitted to enforce the rule against the non-consenters, then they have no guarantee that their rule will keep the level of risk below the threshold level which causes uncompensated-for-fear. The modified version of the enforceable fairness principle helps to provide them with this guarantee.

There are two things we should note about this modified version of the fairness principle. The first is that it no longer seems appropriate to consider it to be merely a macro version of the unacceptable principle that it is sometimes permissible to give a person something for which he has not consented to pay and then force him to pay for it. The following examples which Nozick offers as counter-examples to the fairness principle no longer seem appropriate as counter-examples:

On the face of it, enforcing the principle of fairness is objectionable. You may not decide to give me something, for example a book, and then

grab money from me to pay for it, even if I have nothing better to spend the money on. You have, if anything, even less reason to demand payment if your activity that gives me the book also benefits you; suppose that your best way of getting exercise is by throwing books into people's houses, or that some other activity of yours thrusts books into people's houses as an unavoidable side effect.<sup>35</sup>

Does a person who accepts the modified version of the enforceable fairness principle have to claim that it is permissible to use force to make the person pay for the book? The answer is certainly "no." He might, however, make the more plausible claim that in each of the following cases it is permissible to use force to make a person pay you for the costs which you incurred in preventing him from suffering a harm even though he never consented to pay those costs:<sup>36</sup>

1. You find a person lying unconscious in the street. You hire an ambulance to take him to a hospital where the doctors save his life.
2. Your neighbor's windows are blown out in a storm while he is on vacation in a place where he cannot be reached. You board up his windows to prevent further damage, including damage caused by looters, to his home.

Nozick never discusses this type of case. An exchange in



which one person pays another to prevent him from suffering this harm would be an exchange in which the seller serves the buyer productively. For example, an exchange in which you pay me to shadow you so that I am always in a position to prevent you from suffering serious harm in case you become unconscious would be one in which I serve you productively. A commitment to PE implies that I cannot be forced to enter either of these exchanges. Therefore, it implies that I cannot be held liable for failing to come to your aid in the absence of a prior agreement to do so. In the cases listed, however, we are assuming that there has been no agreement, that I am now in a position to help you by crossing the boundaries established by your rights, and that I want to help you. In the one case I must cross the boundary established by your right to your body and in the other the boundary established by your property right in your home. In these cases PE does not apply because consent is impossible to obtain. In cases where consent is impossible to obtain Nozick says that it is permissible to cross another's boundary provided that you pay him at least full compensation for the harm which results from the crossing. In the above cases, however, the crossings do not cause harm to the person whose boundary is crossed. In fact, the purpose of the crossing is to prevent the person whose boundary is crossed from suffering additional harm. The present issue

is whether the person who takes the initiative to prevent the harm has a right to compensation for the costs he incurs in preventing it. Nozick never speaks directly to this issue. The closest he comes is his discussion of the person who gives you a book and then grabs money from you as a payment. In this case, unlike the cases I gave, the person who provides the benefit has no basis for his belief that you want to be benefitted in that way and, furthermore, has available an easy way to find out whether you do. He can simply ask you. As Nozick gives his example you must be close enough for him to ask you since you are close enough for him to grab your money.

A person who wants to defend a modified version of the enforceable fairness principle will borrow two features from the above cases. One is that the principle should only apply in cases where some people assume costs to prevent others from suffering what they regard as harms. We do not want a principle which permits some to impose their values on others. The other is that it should only apply when there are good reasons for discounting the relevance of whether the people who gain protection voluntarily agree to pay for the costs of providing that protection. In the two cases above it was impossible to get the consent of the person who was protected. In the case of the modified version of the enforceable fairness principle there are the following

reasons for discounting the relevance of voluntary consent:

1. There will be very high transaction costs associated with any attempt to get the consent of each person who will receive the protection.
2. It is sometimes impossible actually to give each person who will receive protection the choice between 1) receiving the increased protection and cooperating in the public system of rules which will provide that protection and 2) not receiving the protection and not cooperating. This is because it is impossible to provide the protection to some without providing it to all and, therefore, each person has a self-interested reason to withhold his consent.

I do not pretend that this modified version of the enforceable fairness principle is consistent with the libertarian side constraint against aggression as we have stated it. In fact, this modified version of the enforceable fairness principle is clearly inconsistent with the libertarian side constraint insofar as it sometimes justifies crossings without consent in cases where consent is neither impossible nor very costly to obtain. A person who accepts this version of the enforceable fairness principle will not permit people to opt out of the requirements of the public rules which it justifies even in the following situation: the people who wish to opt out are willing to pay whatever costs are involved in identifying themselves as people who choose to opt

out and to be treated according to the requirements of their natural rights.<sup>37</sup> We should note, however, how this modified version of the fairness principle is related to the evidence which Nozick uses to establish the libertarian side constraint.

Nozick gets his evidence for the libertarian side constraint by examining his beliefs about how to resolve two person conflicts which arise in a pre-institutional situation. His best evidence comes from examining conflicts which arise when one person desires to cross the boundary established by another's property right and a) it is neither impossible nor very costly to determine whether the person whose boundary is threatened will give his consent to the crossing, and b) an exchange in which the person who desires to cross buys the right to cross would be an exchange in which he is served productively. His best evidence does not come from examining our beliefs about how to resolve conflicts which arise when one person does something which prevents another from suffering harm in a case where it was impossible or very costly to get the consent of the person who was threatened with harm and then asks to be compensated for the costs he incurred in preventing the harm. I do not believe that any of Nozick's root ideas can be used to force a conclusion on how to resolve this latter type of conflict. It is implausible to claim that the person who asks to be compensated

for the costs he incurred in preventing the harm is using the other merely as a means, or is using him as a resource, or is sacrificing him for the benefit of some other person. He prevented this person from suffering what the other would agree was harm and is merely asking for compensation for the costs he incurred. He is not asking to be made better off than he was prior to discovering the other's predicament.

If I am correct in claiming that Nozick's root ideas cannot be used to force a conclusion on how to resolve this latter type of conflict, then Nozick faces a dilemma when he is confronted with the issue of whether or not to accept our modified version of the enforceable fairness principle. On the one hand, he can resolve this latter type of conflict by saying that the person who wants to prevent the other from suffering harm is not only permitted to cross the other's boundary without the other's consent to prevent the harm, but also has the right to cross the other's boundary to take compensation for the costs he incurred in preventing the harm. He can then use his belief about how to resolve this type of conflict to argue that we should sometimes discount the relevance of whether a person has actually given his consent to a crossing to the problem of whether the crossing is permitted. This approach will tend to support the modified version of the enforceable fairness principle. On the other hand, he can extend the domain of the principle that it is

never permissible to forcefully cross the boundary established by another's rights without his consent, which he insists is the appropriate principle for resolving all two-person conflicts which arise in a pre-institutional state of nature, so that the principle is also used to resolve all conflicts which arise between an individual and a group in an institutional situation. This approach will undermine the modified version of the enforceable fairness principle. His account of our clearest beliefs does not provide clear guidance as to which approach we should adopt. Therefore, it does not provide conclusive grounds for rejecting the modified version of the enforceable fairness principle. It is only when he makes his commitment to F and I that he has conclusive grounds.

Finally, I want to bring attention to two facts about the modified version of the enforceable fairness principle. The first thing to note is that there are reasons for claiming that it is unfair for those who receive the benefits of others' cooperation to refuse to assume the burdens of cooperation. To make this point let us focus on the problem of cumulative risk. Those who cooperate provide all of the people in the area with a less risky environment. They have two complaints that it is unfair when others do not cooperate. One is that when others do not cooperate they increase the costs which those who cooperate must pay,

in terms of increased restrictions on their liberty to perform risky acts, to keep the level of risk below the level which causes uncompensated-for-fear. The other is that those who do not cooperate have a comparative advantage, insofar as they have more risky options available to them, in cases where they are competing with those who cooperate. These considerations of fairness explain why an enforceable fairness principle is appropriate for changing people's natural entitlements to perform and to prohibit non-aggressive risky acts. They also explain why we should view the problem of cumulative risk as a problem which all of the people in an area are collectively responsible for solving and, therefore, why we should look for a solution to the problem which appeals to established public rules which satisfy law bound principles.<sup>38</sup>

The second thing to note about the modified version of the enforceable fairness principle is that some natural objections to it are objections which lead us in the direction of accepting the special principles which the natural position adopts. One objection might be that we want to know more about the properties of the public rules which regulate people's risky activities. This will lead us to adopt more structured law bound principles for evaluating the laws that are needed to solve the problem of cumulative risk. Another is that it appears arbitrary to permit some to simply usurp

the right to publish and enforce the laws which are needed. This will lead us to adopt special principles for evaluating procedures which determine which people are specially entitled to publish, interpret, and enforce the laws which are needed. This suggests that once you concede that there is an enforceable version of the fairness principle you must go all the way and adopt the natural position.

I have, I believe, shown that Nozick has not adequately defended his belief that there is no modified version of the enforceable fairness principle. What is certainly clear is that a person who accepts a modified version of the enforceable fairness principles does not have to base his acceptance on a belief that it is permissible to throw a book into a person's house and then force him to pay for it. Now I will argue that Nozick can use the principle of compensation to get certain conclusions which he wants only if he appeals to a modified version of the enforceable fairness principle.

#### 6.7 Nozick's Need for the Enforceable Fairness Principle:

The principle of compensation says that it is permissible to prohibit a risky act only if those who are disadvantaged by the prohibition are compensated for these disadvantages. Is each person who gains increased security from the prohibition supposed to pay? Or, is it each person who, in fact, voluntarily endorses the prohibition and agrees to pay?



Nozick discusses two applications of the principle of compensation. One is the case of a protective association which prohibits non-members, or independents, from privately enforcing their rights. This prohibition disadvantages poor people who cannot afford to buy a protection policy and, therefore, are left without any means of enforcing their rights. The other is the case of prohibiting driving a car without liability insurance in an auto dependent society. This prohibition also disadvantages poor people who can afford cars but who are prevented from using them because they cannot also afford to buy liability insurance. In the first case the benefits of the prohibition are divisible so there is no problem about forcing some to provide benefits for others and, therefore, violating the libertarian side constraint. Nozick notes that a protective association can offer its clients a choice between two policies:<sup>39</sup>

Policy 1: those who buy this policy will receive protection against all violations of their rights by independents except those which result from an independent's use of a risky procedure for enforcing his rights.

Policy 2: those who buy this policy will receive protection against all violations of their rights by independents including those which result from their use of risky procedures for enforcing their rights.

The second will cost more. The difference will cover the costs of compensating independents for the disadvantages which they will suffer because they are prohibited from privately enforcing their rights against those who choose to buy the second policy. Those who do not buy it will not receive any protection against violations of their rights which result from the use of risky procedures by independents. They prefer to live with the risks and to collect compensation in those cases where the risky procedures wrongly punish them and, therefore, violate their rights.

Things are much more complicated in the second case. We are to imagine that there are some poor people who do not have the resources to purchase automobile insurance in an automobile dependent society. Nozick is puzzled about how to treat them. He writes:

Yet how can people be allowed to impose risks on others whom they are not in a position to compensate should the need arise? Why should some have to bear the costs of other's freedom? Yet to prohibit risky acts (because they are financially uncovered or because they are too risky) limits individuals' freedom to act, even though the actions might involve no cost at all to anyone else.<sup>40</sup>

Some forty pages later he returns to give the solution to

the puzzle he raised. He writes:

We canvassed, in Chapter 4, the possibility of forbidding people to perform acts if they lack the means to compensate others for possible harmful consequences of these acts or if they lack liability insurance to cover these consequences. Were such prohibition legitimate, according to the principle of compensation the persons prohibited would have to be compensated for the disadvantages imposed upon them, and they could use the compensatory payments to purchase liability insurance! Only those disadvantaged by the prohibition would be compensated; namely, those who lack other resources they can shift (without disadvantaging sacrifice) to purchase the liability insurance. When these people spend their compensatory payments to purchase liability insurance, we have what amounts to public provision of special liability insurance. ... Providing such insurance would certainly be the least expensive way to compensate people who provide only normal danger to others for the disadvantages of the prohibition.<sup>41</sup>

This solution goes much too quickly. We must look more closely at who it is that prohibits, what he prohibits, and who pays the compensation.

A person who drives an automobile imposes risks on all those who share the roads with him. These include other

drivers, their passengers, and pedestrians. The protective association can invoke the principle of compensation, a principle which each person acting alone in the state of nature is entitled to enforce, to prohibit driving without insurance provided that it compensates those who are disadvantaged by the prohibition for the disadvantage of not being able to drive. How can it collect the money needed to pay the compensation by what Nozick would consider to be morally permissible means? It cannot tax all those who would benefit from the prohibition on the ground that it is only fair that they pay for the increased security which each will get as a result of the prohibition. This tax would violate the libertarian side constraint and could only be justified by appealing to some version of the enforceable fairness principle. If we concentrate on the case where the person who is disadvantaged by the prohibition poses more than normal danger to others, so that provision of a free insurance policy is not the cheapest way to compensate him, then it may be impossible for the protective association to collect the money needed to pay the compensation by morally permissible means. It can only collect the money through voluntary contributions. But each potential contributor will consider whether the contribution which the association asks for is worth the benefit he will receive. Although it may be clear to each that he prefers situation a) where

he pays  $m/n$  dollars (where  $m$  is the amount of compensation owed and  $n$  is the number of people who will receive the benefits of the prohibition) and receives the benefits of the prohibition to situation b) where he pays nothing and is subjected to the risks and fear which accompany no prohibition, there is no guarantee that each will voluntarily contribute  $m/n$  dollars. Many may hold out in the hope that the rest will be willing to pay just a little more and, consequently, they will get the benefits without paying anything. If Nozick wants to guarantee that these prohibitions of very dangerous acts will take place he may have to concede that there is an acceptable version of the enforceable fairness principle which can be used to force each person who benefits from a prohibition on risky activities to pay his share in compensating those who are disadvantaged by the prohibition.<sup>42</sup>

What will happen in the case where the person who is disadvantaged by the prohibition poses only normal dangers to others? Here it might appear that there is a voluntary approach which will lead to "the public provision of special liability insurance." The protective association will offer its clients a choice between two policies. The more expensive policy provides those who buy it with insurance against any injuries which a poor person might cause them in automobile accidents. The people who buy this policy voluntarily

give up all claims to sue the poor person and agree to accept the compensation that the insurance policy provides. The less expensive policy will not provide the people who buy it with any insurance against the injuries which a poor person might cause them in automobile accidents. Those who buy it, however, will retain their natural rights to collect from the poor person for those injuries. Is it reasonable to believe that most will buy the more expensive policy and, consequently, provide poor people with what amounts to free liability insurance? We cannot answer this question until Nozick tells us what a person's natural rights are against a poor person who causes injury to another person. It seems clear to me, however, that he will have to say that he has the right to compensation for those injuries. This is the only solution that is compatible with the requirement of weak absoluteness. In fact, it would seem to me that he has the right to appropriate that person's property in order to collect the compensation. I can see no way that Nozick can avoid these conclusions. If this is so, then the most economical thing to do might be to buy an insurance policy in the open market which provides you with protection from the injuries which a poor person inflicts on you by his use of his automobile and which has a large deductible. By buying one with a large deductible you can get it quite cheap. You should, however, be able to get the deductible back in

court. The poor person has a car which must be worth something. You can sue him and force him to trade in his car or agree to pay some percentage of his wages until he has paid full compensation. I am not saying that I approve of your doing this. I am only saying that this would appear to be the economically feasible thing to do and, therefore, that Nozick has not provided us with any compelling reasons to accept his conclusion that in a libertarian society there will be public provision of special liability insurance to poor people with automobiles. In order to establish this conclusion he would have to concede that the members of a libertarian society accept some version of the enforceable fairness principle.<sup>43</sup>

#### 6.8 The Risk of Death:

There is one very important problem concerning how to apply the principle of compensation which we have not yet discussed. Is any person acting alone in the state of nature entitled to prohibit any act which subjects him to a risk of death and causes him to suffer uncompensated-for-fear provided that he compensates those who are disadvantaged by his prohibition? I do not see how Nozick can avoid the conclusion that he is. There are, to be sure, many reasons why a person would not invoke this right unless the risk of death is non-negligible. One is that it will cost him time

and effort to make the announcements which are necessary to put the prohibition into effect as well as time and effort to enforce it. Another is that he will have to compensate any person whose acts he prohibits for the disadvantages which result from the prohibitions. Still another is that any person whose acts he prohibits might, when he otherwise would not, invoke the same right to prohibit against him. One person's use of the right to prohibit might lead to retaliatory uses of the right to prohibit and, consequently, to a mutually disadvantageous position.

It would appear, therefore, that the de facto system in the state of nature, among people who accepted the system of entitlements which I have attributed to Nozick, would be similar, if not identical, to the system which Nozick attributes to Charles Fried and rejects:

Charles Fried has recently suggested that people would be willing to agree to a system which allows them to impose "normal" risks of death upon each other, preferring this to a system that forbids all such imposing of risk. No one is especially disadvantaged; each gains the right to perform risky activities upon others in the pursuit of his own ends, in exchange for granting the others the right to do the same to him. These risks others impose upon him are risks he himself would be willing to take in the pursuit of his own ends; the same is true of the risks he imposes on others. However,



the world is so constructed that in pursuing their own ends people often must impose risks upon others that they cannot take directly upon themselves. A trade naturally suggests itself.<sup>44</sup>

Nozick goes on to suggest that Fried's system is not the fairest system and to offer a system which he believes is fairer. Nozick's discussion is of interest to us for each of the following reasons:

1. He denies that any person acting alone in the state of nature is entitled to prohibit any act which subjects him to a risk of death and causes him uncompensated-for-fear provided that he compensates the person whom he prohibits for any disadvantages which result from the prohibition.
2. He appears to appeal to considerations of fairness to justify his denial.

We must examine Nozick's discussion carefully.

In order to understand Nozick's argument against Fried we must first note that he believes that a natural rights theory can adopt one of three positions about people's entitlements in risky situations in the state of nature. They are:<sup>45</sup>

1. The action is prohibited and punishable, even

if compensation is paid for any boundary crossing, or if it turns out to have crossed no boundary.

2. The action is permitted provided compensation is paid to those persons whose boundaries are actually crossed.

3. The action is permitted provided that compensation is paid to all those persons who undergo a risk of boundary crossing, whether or not it turns out that their boundary actually is crossed.

He believes that this third possibility suggests an alternative that is fairer than Fried's system. He writes:

Putting Fried's argument in terms of an exchange suggests another alternative; namely explicit compensation for each risk of a boundary crossing imposed upon another (the third possibility listed above). Such a scheme would differ from Fried's risk pool in the direction of greater fairness.<sup>46</sup>

Before we can assess Nozick's claim that his alternative is fairer than Fried's risk pool we must note that Nozick interprets the third possibility so that a person is only entitled to compensation for having his boundary subjected to a risk of being crossed. He is not entitled to further compensation when his boundary is actually crossed. Consider the following:

Under the third alternative people can choose the second; they can pool their payments for undergoing risk so as to compensate fully those whose boundaries are actually crossed. The third alternative will be plausible if imposing the risk on another plausibly is viewed as itself crossing a boundary, to be compensated for, perhaps because it is apprehended and hence imposes fear on another. (Persons voluntarily incurring such risks in the market are "compensated" by receiving higher wages for working at risky jobs, whether or not the risk eventuates.)<sup>47</sup>

If people were entitled to compensation for having their boundaries crossed as well as for undergoing the risk of having their borders crossed, then there would be no reason for people to pool their payments to assure that those whose boundaries are actually crossed receive additional compensation.

In order to better understand the third position we should contrast it with the first position and the following position which Nozick never considers:

4. The action is permitted provided that compensation is paid to all those who undergo a risk of a boundary crossing and additional compensation is paid to all those whose boundaries are actually crossed.

According to the first position the risk bearer has the right to prohibit the risky act. The risk creator is permitted to perform the act only if he pays the risk bearer market compensation for the right to perform it. Different risk bearers will demand different payments and some will insist on prohibiting the act. The third position is different from the first in that it does not give the risk bearer the right to prohibit the act. The only way he can avoid undergoing the risk is to leave the area, at his own expense, in which the risk creator is operating. If he stays in the area he must accept a certain amount for undergoing the risk. Nozick does not tell us how this amount is determined. We can see, however, that Nozick's analogy to the compensation which a person receives when he takes a risky job in the market is out of place. That person receives market compensation for undergoing the job's risks. Furthermore, it is likely that he will insist on both a premium for undergoing the risks and the right to additional compensation in case he is actually injured on the job.

The way Nozick describes the third position the risk bearer is only entitled to compensation for undergoing the risk. The fourth position says that the risk bearer is also entitled to compensation when his borders are actually crossed. It seems clear to me that the fourth position is fairer than the third. The third position gives the risk

bearer the choice of either pooling his compensation payment or not pooling it. If he pools it he will, if enough others also choose to pool their payments, receive compensation in case his borders are actually crossed. He will, in essence, be choosing Fried's risk pool. If he does not pool his payment, then he will not receive any compensation when his borders are actually crossed. It is not at all clear that this is fairer than Fried's risk pool. Why, however, should he have to make this choice? Isn't the fourth position clearly the fairest? I suspect that Nozick actually had the fourth system in mind when he introduced the third. It seems to be fairer, so long as we focus on a world in which enforcement has no costs, than either Fried's risk pool or Nozick's third position. I will, to make Nozick's position as strong as possible, assume that he meant the fourth position when he described the third.

Does Nozick have any argument for why we should adopt the fourth position in cases where one person subjects another to a normal risk of death? I have suggested that he should adopt the view that a person is entitled to prohibit any act which subjects him to a risk of death and which causes him to suffer uncompensated-for-fear provided that he compensates each person whose actions are prohibited for any disadvantages which result from the prohibitions. Can he explain why his view is preferable to the view which I

have suggested he must adopt to the person who a) accepts the principle of compensation and b) believes that it should apply to all acts which create a risk of death, even those which only create a normal risk of death, and cause uncompensated-for-fear? This person may be one who is meticulous about never doing anything which subjects another to a risk of death. He claims that it is unfair that others should be able to subject him to the risk of death at all. So far as I can tell Nozick never offers an argument which will convince this person, who takes Nozick's theory seriously, that the fourth position is fairer than the position which I have suggested. He cannot argue for his position on the ground that my position will lead to a situation which will lead to disastrous consequences for all. This is for two reasons. One is that it would amount to giving up I as a constraint on how to assign entitlements. The other is that it is not clear that the adoption of the position which I have suggested will lead to disastrous consequences for all. There are compelling reasons to believe that people will only invoke their right to prohibit in cases where they are subjected to a high risk of death. We can conclude that Nozick's move towards the fourth (or, if he insists, the third) position proceeds without argument and appears to be incompatible with his commitment to the principle of compensation. We can also conclude that Nozick has provided us with no

explanation for how a person who wishes to work within his theory can avoid what we all regard as an untenable conclusion: that any person acting alone in the state of nature may, by invoking the principle of compensation, prohibit any act of any person which would cause him to suffer uncompensated-for-fear.

#### 6.9 The Relevance of Transaction Costs:

We can now turn to Nozick's brief discussion of how matters are complicated by the fact that there are high transaction costs associated with enforcing the fairest system of entitlements. Consider the following:

Putting Fried's argument in terms of an exchange suggests another alternative: namely explicit compensation for each risk of a boundary crossing imposed upon another (the third possibility listed above). Such a scheme would differ from Fried's risk pool in the direction of greater fairness. However, the process of actually carrying out the payments and ascertaining the precise risk imposed upon others and the appropriate compensation would seem to involve enormous transaction costs. Some efficiencies can easily be imagined (for example, keeping central records for all, with net payments made every n months), but in the absence of some neat institutional device it remains enormously cumbersome. Because great transaction costs may make the fairest alternative

impracticable, one may search for other alternatives, such as Fried's risk pool. These alternatives will involve constant minor unfairness and classes of major ones.<sup>48</sup>

Nozick's point seems to be that even when people in the state of nature have the fairest system of entitlements there will still be, due to the high transaction costs of enforcing that system, some unfairness. More specifically, the high transaction costs of locating each person who subjects you to a risk and negotiating a fair price for being subjected to that risk will almost always deter you from attempting to collect compensation in cases where you are being subjected to a risk. What appears to be the ideally fair system turns out to be a system which is, in practice, radically unfair to those who are risk bearers more often than risk creators. It may be obvious to all that there is an alternative system of entitlements which is much fairer than the ideal system of natural entitlements when the distortions produced by high transaction costs are taken into account.

Can Nozick claim that any person acting alone in the state of nature is entitled to set up and enforce this alternative system? It seems clear to me that he cannot. This position would be incompatible with his commitment to I. Can he claim that each person has a duty to establish systems which minimize the amount of unfairness in the world?



He might claim this. Even if he makes this claim, however, he cannot make the further claim that it is permissible to use force to make a person enter an agreement to establish these systems. When people's natural entitlements are inconvenient or unfair they can, through their voluntary consent, choose to adopt an alternative system of entitlements which is mutually beneficial.<sup>49</sup> Those who do not choose to change their natural entitlements, however, cannot be forced to do so. Others must treat them according to the laws of nature.

Even if we assume that considerations of fairness are relevant to determining what a person's entitlements are when we view each case of risk imposition as an isolated situation in an ideal world in which there are no transaction costs, they have no further role in Nozick's theory. If high transaction costs effectively prevent some from getting what they are entitled to that is simply tough for them. They cannot force others to cooperate in a scheme which comes closest to the distribution of benefits and burdens that would have occurred in a world in which there were no transaction costs. The others can simply insist on being treated according to their natural entitlements. Any movement away from these natural entitlements must be by their voluntary consent. I see no way for Nozick to avoid these conclusions. If a) you believe that our clearest beliefs about how to

assign entitlements to perform risky acts in a fair manner are our beliefs about how to assign them in an ideal world of no transaction costs and b) you want the assignment of entitlements in our world to lead to the same distribution of benefits and burdens which would have occurred in the ideal world, then you must accept law bound principles which give a central authority the right to assign entitlements to perform non-aggressive risky acts and to collect compensation which will achieve this result.

#### 6.10 A Possible Misinterpretation of Nozick's Position on Non-Aggressive Risky Acts:

It might appear that I am trying to commit Nozick to a precise view about what people's entitlements in risky situations are when his own view is that precision is impossible to come by. He can adopt one of three positions about what people's natural entitlements are in risky situations. These are:

1. They are clear and convenient so that people in the state of nature will have no reason to establish a central authority with the right, through their consent, to publish and enforce laws which define a different system of entitlements.
2. They are clear but not convenient so that people in the state of nature have a reason to establish a central authority with the right,

through their consent, to publish and enforce laws which define a different set of entitlements which are mutually beneficial to all.

3. They are not clear and, therefore, people in the state of nature have a reason to establish a central authority with the right, through their consent, to publish and enforce laws which define a clear set of entitlements which are mutually beneficial to all.

The arguments in this chapter have established that Nozick does not adopt the first position. I have interpreted him so that he adopts the second. It may appear to some, however, that he adopts the third. Consider the following:

Actions that risk crossing another's boundary pose a serious problem for a natural rights position.<sup>50</sup>

It is difficult to imagine a principled way in which the natural rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others.<sup>51</sup>

If no natural-law theory has yet specified a precise line to delimit people's natural rights in risky situations what is to happen in the state of nature?<sup>52</sup>

All of these quotes suggest that Nozick believes that the

natural rights tradition, a tradition which is committed to F and I, cannot provide a clear solution to the problem of non-aggressive risky acts. We should note, however, that all of these quotes appear before Nozick's presentation of the principle of compensation which is part of his attempt to solve the problem. It is for this reason that the reader simply does not know whether Nozick actually accepts the second or the third position.

If our aim is to prove that Nozick's solution to the emergent problem of non-aggressive risky acts is not the optimal solution, then it does not matter which position we attribute to him. It would appear, however, that we put his theory in the most favorable light when we attribute the second position to him. The theory looks more defensible when it provides a solution to the emergent problem, even when its solution assigns counter-intuitive and inconvenient entitlements, than when it concedes that it cannot, so long as it retains F and I, provide any solution at all. In either case, however, Nozick is committed to the view that the "real solution" to the emergent problem of non-aggressive risky acts is whatever solution people "voluntarily" agree to in order to remove the inconveniences of remaining in the state of nature. There are compelling reasons for saying that the optimal solution should not be a solution which essentially says that what is right is whatever people agree to. I

will explain what these reasons are in the next, and last, chapter.

## POWER AND PRINCIPLE

### 7.1 Aims:

I have argued that Nozick's commitment to F and I as constraints on solutions to the emergent problem of non-aggressive risky acts causes him to adopt one of the following positions although it is not clear which one:

1. People's natural entitlements in risky situations are not clear.
2. People's natural entitlements in risky situations are clear but not convenient.

In this section I am going to argue against each of these positions on the ground that its solution to the emergent problem of non-aggressive risky acts fails to satisfy the following emergent constraint:

People who accept the principles to which that solution appeals will generally agree that the conflicts which those principles are intended to resolve are resolved in an impartial manner rather than a manner which reflects the relative power of each of the parties to the conflict.

I will then argue that a solution which appeals to a law

bound principle and the natural position can satisfy this constraint to a high degree. We will be able to conclude that this solution is preferable to Nozick's and, therefore, that his solution to the problem of non-aggressive risky acts is not the optimal solution.

## 7.2 The Shortcomings of the First Position:

There is one very obvious shortcoming with the first position. Let us assume that most people in the state of nature agree to establish a central authority with the right, through their consent, to publish and enforce laws which define people's entitlements in risky situations. Most believe that the establishment of a central authority is the rational response to the inconvenience of being in a situation in which their entitlements are unclear. Some people may not, however, agree to establish the central authority. We will call these people "independents." What are their entitlements in risky situations? By hypothesis their natural entitlements are unclear. Is there any basis for the claim that the central authority can simply enforce its system of entitlements against them? It would appear that there isn't. These independents did not, after all, agree to those entitlements. Can Nozick argue that the central authority is entitled to enforce its system of

entitlements against them provided that it can establish that they are better off in the situation in which they comply with the requirements of the system and receive the benefits of others' compliance than they would have been in the baseline situation in which people's natural entitlements are unclear? Nozick's rejection of the enforceable fairness principle prevents him from using this argument.<sup>1</sup> He must say, if he adopts the position that people's natural entitlements in risky situations are sometimes unclear, that there is no principled way for the central authority to deal with independents in those situations.

A second shortcoming of the first position is that it throws grave doubts on Nozick's claim that it is possible to provide a justification of the state. More specifically, it throws grave doubts on whether Nozick can claim that a state will arise from a nonstate situation in which people accept his moral theory by means which all, or even most, of those people would consider to be morally permissible. We will say that a person accepts Nozick's moral theory when he accepts each of the following:

1. Moral theory is clear in just those places where Nozick says it is clear. This implies that he accepts PE and UP.
2. In places where moral theory is not clear, it



must be extended in ways which are compatible with F and I.

3. A person is morally bound to adhere to an agreement, which he has no natural duty to enter, only when he was not coerced to enter it.

On my view two people can both accept Nozick's moral theory even though they accept different principles for solving emergent problems. So, for instance, two people can accept Nozick's moral theory even though they have different views about copyright or about people's entitlements in some risky situations. Each will have his own view about how the theory should be extended to solve those problems. Each may, for instance, appeal to a different emergent constraint to show that his solution is the best one. They agree, however, that the correct solution must be compatible with F and I.

Will people who accept Nozick's moral theory and who offer different solutions to emergent problems establish a state by means which each considers to be morally permissible? Let us first note how it is possible for two people to disagree about whether an agreement between them arose by morally permissible means. The explanation is trivial in cases where the people accept radically different beliefs about when it is permissible for one person to use force

against another. A perfectionist believes that it is permissible to use force to get another to increase the amount of intrinsic value in the world. A libertarian denies that it is permissible. Consider the case where a perfectionist threatens to use force against a libertarian to get him to help increase the amount of intrinsic value in the world and where the libertarian agrees only because he prefers to contribute than to fight. The perfectionist will believe that this agreement arose by morally permissible means because he believes that his threat to use force was morally permissible. The libertarian will deny that it arose by morally permissible means. He will insist that it was coerced from him by the perfectionist's immoral threat of the use of force. Even though he will concede that the perfectionist acted as his conscience dictated, he will insist that he has a just complaint against him. Furthermore, he will deny that he is morally bound by his agreement.

The same points can be made in cases where people agree on many moral beliefs but sometimes disagree about when it is permissible for one person to use force against another. The disagreement may be about what principle applies to a problem which both recognize as an emergent problem or it may be about how to apply a principle which both accept. If one is in a position to impose his view of right on the other

who prefers to agree than to fight, then it is doubtful that the other will believe either that the agreement arose by morally permissible means or that he is morally bound to abide by it. This is especially so when a) the disagreement is about a problem that is of particular importance to him so that he is not indifferent as to how it is solved, b) he believes that he has compelling reasons to support his solution, and c) he agrees only because he believes that he has no chance of imposing his solution, the correct solution, on the other. From his point of view his agreement was coerced from him by the other's immoral threat of the use of force and, since there is no natural duty to enter the agreement, he is not morally bound to it.<sup>2</sup>

We can again make the same points when we change the example so that neither is in a position to impose his solution to the emergent problem on the other and each prefers to compromise than to fight. Each may believe, so long as his power relative to the other remains the same as it was at the time of the agreement, that it is in his self interest to abide by the compromise agreement in order to avoid the conflict that is certain to follow in case he breaks his agreement. He will not, however, believe that he is morally bound by the agreement. He entered it only because of the other's immoral threat of the use of force against him in case he tried to impose his solution, the correct

solution, on the other.

What would happen in a state of nature situation in which people accepted Nozick's moral theory? What will people do when their common moral beliefs do not force a conclusion on how to solve an emergent problem concerning when it is permissible for one person to use force against another and they disagree about what the correct solution to the emergent problem is? Will they compromise because each believes that that is preferable to fighting? Sometimes Nozick writes as if they will compromise.<sup>3</sup> This comes out in the following:

Not only does the day seem distant when all men of good will shall agree to libertarian principles; these principles have not been completely stated, nor is there one unique set of principles agreed to by all libertarians. Consider for example, the issue of whether fullblooded copyright is legitimate. Some libertarians argue it isn't legitimate, but claim that its effect can be obtained if authors and publishers include in the contract when they sell books a provision prohibiting its unauthorized printing and then sue any book pirate for breach of contract; apparently they forget that some people sometimes lose books and others find them. Other libertarians disagree. Similarly, for patents. If persons so close in general theory can disagree over a point so fundamental, two libertarian protective agencies might manage to do

battle over it. One agency might attempt to enforce a prohibition upon a person's publishing a particular book (because this violates the author's property right) or reproducing a certain invention he has not invented independently, while the other agency fights this prohibition as a violation of individual rights. Disagreements about what is to be enforced, argue unreluctant anarchists, provide yet another reason (in addition to lack of factual knowledge) for the apparatus of the state; as also does the need for sometimes changing the content of what is to be enforced. People who prefer peace to the enforcement of their view of right will unite together in one state. But, of course, if people genuinely do hold this preference, their protective agencies will not do battle either.<sup>4</sup>

Here Nozick suggests that people will compromise, even with regard to such fundamental issues as copyright and patent, rather than fight. He never asks, however, whether these people will consider the compromise solution to be morally binding. It seems unlikely that they will. If each firmly believes that his solution is the only defensible solution (i.e., the only defensible extension of the libertarian position), then each will view the compromise solution as something which arose as a result of the other's threat to forcefully subject him to the requirements of the wrong solution. If that is the case, however, then these people

will not believe that the central authority which enforces the compromise has the legitimate authority to do so. They will reject the view that the central authority arose by morally permissible means and, therefore, that the state, should the central authority ever claim to have the authority of the state, arose by morally permissible means.

Now is a good time to recall some of the important social problems which appear to be emergent relative to Nozick's account of our clearest moral beliefs. They include:

1. What principles apply to the evaluation of distributions of natural resources and the benefits which result from their use when natural resources are no longer abundant?
2. Which acts which are done for legitimate purposes and which are certain to lower the value of another person's property also cross the boundaries established by that person's property rights and which do not?
3. When is it permissible to prohibit, rather than to permit provided that compensation is paid, an act which is certain to cross the boundary established by another's rights when the crossing will be an incidental side effect of the act?
4. When is it permissible to prohibit, rather than to permit provided that compensation is paid, an act that creates a risk of crossing the boundaries established by another's rights when the risk is an incidental side effect of the act?

If Nozick believes that moral theory is unclear about one or more of the above, then he has no basis for his claim that he has used his moral theory to provide a justification of the state. People who a) found themselves in the state of nature, b) accepted his account of what is clear in moral theory, but c) disagreed about how to solve the emergent problems, would not believe that the compromise solutions to which they agreed, and which they permitted the central authority to enforce, arose by morally permissible means. If they wouldn't then how can Nozick?

### 7.3 The Shortcomings of the Second Position:

The argument which I have sketched, for the conclusion that Nozick cannot use his moral theory to provide a justification of the state, does not apply if Nozick adopts the position that his moral theory provides clear solutions, even if they sometimes assign counter-intuitive and inconvenient entitlements, to the emergent problems. If he adopts this latter position he can say that people who found themselves in the state of nature and accepted his moral theory would voluntarily establish a central authority with the right, through their consent, to publish and enforce laws which change their natural entitlements in a way which is beneficial to all. Since we are assuming that there is agreement on what people's natural entitlements are there is no basis for the

argument that each will view the new system of entitlements as a compromise which is coerced from him by what he perceives as others' immoral threat of the use of force against him. Those who agree to the new system of entitlements, which the central authority is authorized to enforce, genuinely believe that it is an improvement over the system of natural entitlements which any person acting alone in the state of nature is entitled to enforce.

Furthermore, this position does not leave Nozick with the embarrassing problem of how the central authority is entitled to treat those independents who do not voluntarily choose to change their natural entitlements. Since moral theory is clear on what their natural entitlements are it must simply respect their natural entitlements. We should note, however, that it must respect their natural entitlements even when respecting them causes great inconvenience to those who have voluntarily agreed to change their natural entitlements in their mutual relations. So, for instance, it must refrain from using force to coordinate the behaviour of independents even when failure to coordinate their behaviour will lead to a situation in which their independent actions, none of which causes uncompensated-for-fear, collectively produce a risk which does cause uncompensated-for-fear.

On what ground can we object to Nozick's adoption of the position that there are clear but inconvenient solutions,



which are compatible with F and I, to some of the emergent problems? First, we can note that we are not satisfied with his claim that the problem of non-aggressive risky acts causes difficulties for the natural rights tradition and his further claim, without argument, that something like the principle of compensation must be right. The issue is whether F and I should be constraints on how to solve the problem of non-aggressive risky acts and, therefore, whether anything like the principle of compensation will do. For the purpose of argument, however, let us assume that he has provided us with clear solutions to the emergent problem of non-aggressive risky acts which define inconvenient entitlements. Why should we object to those solutions when Nozick can explain why people will voluntarily choose to change their natural entitlements to more convenient ones? Will we get the most reasonable solutions when we let people voluntarily agree to what they believe are the most reasonable ones? It seems clear to me that we won't.

We have already noted Nozick's belief that the fairest system of natural entitlements may, due to the high transaction costs of enforcing it, actually lead to a situation which is extremely unfair. More specifically, it might lead to a situation which is extremely unfair to those who are risk bearers more often than risk creators. Is there any reason to believe that people in the state of nature will

agree to a new system of entitlements which will rectify the de facto unfairness which exists in the state of nature? Nozick might now adopt the view that each person has a natural duty to minimize the amount of unfairness in the world. People who accepted this natural duty would voluntarily agree to a new system of entitlements which is fairer, when we take account of the distortions caused by high transaction costs, than the system of natural entitlements. But if minimizing the amount of unfairness in the world is an important goal, then why can't people use force to assure its satisfaction? Why doesn't Nozick take the next step and say that there is an enforceable natural duty to establish a central authority which is entitled to publish and enforce laws which will, when we take account of the distortions produced by transaction costs, define the fairest system of entitlements and which are enforceable against people without their consent? Would this use of force against a person without his consent go against the root ideas that each person is separate and inviolable and not a resource for any other person? It seems clear to me that it would not. It is only intended to correct the unfair distributions of benefits and burdens which result, according to Nozick's own account of fairness, because of high transaction costs. The only ground that Nozick can give for objecting to the use of force here is that it is incompatible with F and I and

will interfere with his aim of providing a fundamental explanation of the political realm and an invisible hand explanation of the state. These are, as I have argued, no reasons at all. Unless Nozick concedes that it is permissible to use force to achieve the goal of achieving a fair solution to the emergent problem of non-aggressive risky acts, there is no basis for his claim that people will agree to a solution which is fair. Why should those who are the beneficiaries of the distortions produced by high transaction costs be expected to give up their benefits?

The main liability of the view that people's natural entitlements are inconvenient and that we should simply let people agree to new, more convenient, entitlements is that it leaves too much room for considerations of power to influence what agreements are reached. The only constraint it puts on what is a morally acceptable agreement is that the agreement must leave each party better off than he would be in the situation in which his natural entitlements are respected. If this baseline situation is an extremely intolerable situation, then a person really has no choice but to accept almost any alternative situation, even one which is clearly designed to benefit others much more than it benefits him. When he accepts this system, however, he cannot complain that he is being treated unjustly. He did, after all, voluntarily agree to it.

Isn't it reasonable to believe that people in the state of nature will, since they are of relatively equal power, agree to entitlements which are impartial? There are two responses to this. The first brings us back to our discussion of the distortions produced by high transaction costs. Why should those who benefit from these distortions be expected, in the absence of an enforceable duty to do so, to accept a system which takes these benefits away from them? One would expect them to accept a system which reflects their initial advantaged position. The second response is that if we want to assure an impartial solution, then why don't we search for enforceable first principles which will assure an impartial solution? Why are we running the risk that people might voluntarily accept solutions which have no claim to being impartial? If this involves giving up F and I and searching for an emergent constraint, then why don't we do that?

#### 7.4 The Power of an Entrenched Protective Association:

The point that people may agree to solutions which reflect the relative power of each of the parties can be made more forcefully by focusing on the situation in which a central authority has already emerged and been in power for a long time. We will assume that this authority has been authorized to publish laws which define its member's rights

in risky situations and to provide protection to its members. A person's relation to this authority is the same, according to Nozick, as his relation with any private business.<sup>5</sup> Consider the following:

A person will swallow the imperfections of a package P (which may be a protective arrangement, a consumer good, a community) that is desirable on the whole rather than purchase a different package (a completely different package, or P with some changes), when no more desirable attainable different package is worth to him its greater costs over P, including the costs of inducing enough others to participate in making the alternative package. One assumes that the cost calculation for nations is such as to permit internal opting out. But this is not the whole story for two reasons. First, it may be feasible in individual communities also to arrange internal opting out at little administrative cost (which he may be willing to pay), yet this needn't always be done. Second, nations differ from other packages in that the individual himself isn't to bear the administrative costs of opting out of some otherwise compulsory provision. The other people must pay for finely designing their compulsory arrangements so that they don't apply to those who wish to opt out. Nor is the difference merely a matter of there being many alternative kinds of communities while there are many fewer nations. Even if almost everyone wished to live in a communist community, so that

there weren't any viable noncommunist communities, no particular community need also (though it is to be hoped that one would) allow a resident individual to opt out of their sharing arrangement. The recalcitrant individual has no alternative but to conform. Still, the others do not force him to conform, and his rights are not violated. He has no right that the others cooperate in making his nonconformity feasible.<sup>6</sup>

There can be no doubt that Nozick's position is that the central authority can offer any package it chooses provided only that it leaves each person the option of opting out and living according to the principles of the law of nature. Let us examine the implications of this view.

A central authority, or protective association, can say to any person who lives within its area that if he wants to continue to receive its protection he must obey its laws. There are no moral constraints on what these laws may be. They may, for instance, include any one of the following laws:

1. No person is permitted to practice Catholicism,
2. Every person must donate 10 percent of his income to the poor.
3. No person is permitted to own a gun without the express consent of the central authority,
4. People who live near factories must assume the

risks and, therefore, receive no compensation in case their borders are actually crossed because of the factories' use of risky procedures.

The central authority cannot force people to obey these laws. That is, it cannot say to them that either they obey these laws or they will be punished. It can, however, offer them the following ultimatum:

Either you accept our total package, which includes obedience to these laws and the provision of a protection policy, or you become an independent and live according to the laws of nature.

Nozick's view is that no matter how unattractive the choice of being an independent is, a person cannot complain that he is being treated unjustly when he is given this ultimatum. This is because his choice will be, on Nozick's view, a voluntary choice. This follows from Nozick's beliefs that a) people do not have duties to collectively cooperate to prevent him from having to make this unpleasant choice, and b) his actual choice is not influenced by an immoral threat of the use of force by any person.<sup>7</sup>

Will a central authority be able to get away with offering outrageous packages and retaining its clientele? Remember that we are asking this question with regard to a

central authority which has been operating for a long time. It has developed a highly sophisticated system for providing its clientele with protection against breaches of the law as well as a highly sophisticated procedure for determining guilt and innocence. It must in principle permit people to opt out of the package it offers and to either protect their own natural rights or establish an alternative association for protecting their rights. It has the right, however, to prohibit the use of any procedure for determining guilt and innocence which it believes is unreliable. It will, according to Nozick, almost certainly prohibit the private enforcement of one's rights.<sup>8</sup> When we consider the joint facts that a) it would be very expensive to set up an alternative procedure which is as sophisticated as the central authority's, and b) any people who attempt to set one up must take the risk that the central authority might prohibit its use, it seems quite reasonable to conclude that an alternative association will not arise. A person who decides to reject the package will be prohibited from enforcing his own rights and will be provided with a protection policy. We cannot say how attractive this option is without examining exactly what this policy looks like. If it turns out to provide a person with very little protection, then it does not seem unreasonable to say that the central authority can



get away with offering some pretty outrageous packages. This is especially so if the package is intended to harm the members of an unpopular minority group.<sup>9</sup>

Nozick never offers a detailed discussion of what kind of protection must be provided to those who are prohibited from enforcing their own rights. He tells us that they must be compensated for being disadvantaged by the prohibition and suggests that it will do to provide them with an unfancy protection policy which is at least as good as the cheapest one which the central authority offers.<sup>10</sup> We need more detail than this. We want answers to the following types of questions:

1. Will independents be provided with the right to counsel?
2. Will independents be provided with the right of appeal?
3. Will independents have the right to subpoena members of the protective association as witnesses in disputes between them and members of the association?
4. How much will the central authority spend to investigate when an independent claims that his rights have been violated?

Unless Nozick can defend answers to these questions which indicate that independents will receive adequate protection

of their natural rights he will not be able to block my claim that the central authority will be able to get away with offering some pretty outrageous packages. There is nothing in the book, so far as I can tell, which suggests that Nozick can provide the answers which he needs.

I do not believe that I have to say more to make the point that there are grave liabilities with the view that people's natural entitlements are inconvenient and that whatever entitlements people voluntarily agree to in order to remove these inconveniences are morally acceptable. The reader should be aware, however, that I have offered two distinct arguments. The first is that there is no reason to believe that people will reach agreements which have any claim to being impartial. To the contrary, people will probably reach agreements which reflect the relative bargaining position of each. So long as this is so people will consider their relations with regard to the problem of non-aggressive risky acts to be based on considerations of power rather than principle. This argument clearly assumes that people's natural entitlements are inconvenient.

The second argument does not even have to assume that people's natural entitlements are inconvenient. It brings attention to the fact that any central authority which emerges may, as part of the total protection policy which it offers, ask any person to give up any one of his natural entitlements.

This person has no complaint when he is given the choice of giving up his natural entitlements and receiving a good protection policy and becoming an independent. The people who control the central authority can, with some reason to expect success and with no fear of being accused of acting unjustly, create a society which answers to their interests and whims and which shows little concern for the interests of others. It becomes clear that what people's natural entitlements are, whether they are convenient or inconvenient, ends up playing a very small role in what the just society looks like. The just society may well be a society in which people view their relations as essentially based on considerations of power rather than principle. Do we want to say that the optimal solutions to the emergent problems can lead to a society which has this undesirable property? It seems clear to me that we do not. We can avoid it, to some extent at least, if we accept solutions which reject F and I in favor of law bound principles and the natural position.

#### 7.5 The Advantages of the Natural Position:

What are the advantages of solutions to emergent problems which reject F and I and adopt the natural position? With regard to the emergent problem of non-aggressive risky acts one obvious advantage is that they drop the unrealistic assumption that we must view each non-aggressive risky act

as an isolated act between two people in a state of nature. Once it becomes clear that the root ideas of Nozick's theory do not force a conclusion on how to assign entitlements there is no basis, other than an irrational commitment to F and I, for retaining the assumption. We should, instead, view the problem of assigning entitlements in risky situations as a problem of evaluating the consequences of adopting alternative sets of public rules which assign those entitlements. This approach takes account of the following important facts:

1. each person is, in the course of his life, both a risk creator and a risk bearer.
2. the system of entitlements which is adopted will have direct effects on a person's life prospects by influencing the chances that he will be a victim of another's risky act and by influencing the opportunities he will have to pursue his own ends.
3. the system of entitlements which is adopted will have an indirect effect on a person's life prospects by influencing the level of productivity and the level of innovation in his society.
4. any reasonable solution to the problem of how to assign entitlements must take account of the transaction costs of enforcing that solution.

For these reasons it is appropriate to view the problem of assigning entitlements from a perspective which sees each

person as both a risk creator and a risk bearer and which looks at the long term consequences of adopting a public system of rules which assign entitlements.

A person who accepts Nozick's root ideas, but who rejects F and I as constraints, might suggest the following solution:

We must evaluate public rules which assign rights to perform non-aggressive risky acts on the basis of how well they achieve the following results: 1) they assure that no person is subjected to a risk of having his boundary crossed which is above a specified level, 2) they assure that each person whose boundary is crossed by another's non-aggressive risky act receives compensation for the harm caused by the crossing, and 3) they assure that each person who is disadvantaged by a prohibition of his non-aggressive activities is compensated for the disadvantages. Furthermore, we are to evaluate rules which achieve all of these results on the basis of how well each achieves the further result of maximizing utility.

I do not claim that this solution is the optimal solution. I only suggest it as an example of a solution which may be appealing to a person who accepts Nozick's account of the root ideas of the correct moral theory.<sup>11</sup> This solution is

not a utilitarian solution to the problem of non-aggressive risky acts. Utilitarian considerations only come into play after we have assured that those whose borders are crossed by others' risky acts are compensated and that those who are disadvantaged by prohibitions of their non-aggressive risky acts are also compensated.

It is clear that people who accept this solution, which is incompatible with both F and I, will often disagree about which laws optimally satisfy the principle to which it appeals. Principles which reject F and I do not remove moral disagreement. They do, however, handle it in a way which makes it plausible to claim that people who accept them will view their relations as based essentially on considerations of principle rather than power. First, people who accept them will also accept special political principles which evaluate procedures for determining which people are entitled to publish, interpret, and enforce the laws which are intended to satisfy the principles. These special principles will guarantee each person the right to express his opinion about which laws optimally satisfy the principles and to have a vote in determining which laws should ultimately be adopted. Perhaps it is here where democrats invoke the view, a view which Nozick mocks, that each person has a right to a say over what affects him.<sup>12</sup> Once we accept that there are principles which are incompatible with both F and I and that there

is room for reasonable disagreement about which laws optimally satisfy them, then it is plausible to claim that each person should have a right to some say over which laws are adopted. This right to have a say becomes especially important when we recognize the natural tendency for each person to apply common principles in a way which advances his interests. The right to have a say provides each with some protection against the tendency of others to apply principles in ways which disadvantage him. It enables him to express his views about why the principle is being improperly applied and to demand an answer in the public forum.

It is too optimistic to believe that there will ever be complete convergence of opinion, even after each person has heard every other person's point of view and votes his conscience, about which laws optimally satisfy the common principles. This is in part because there may be reasonable disagreement about what the consequences of adopting different systems of public rules will be. It is also because it may be impossible for people to be completely impartial in applying the principles. What is important is that the principles do not leave too much room for disagreement about which laws optimally satisfy them. The principle which I have suggested is, on this score, much better than the principle which simply says that we should adopt the public system of rules which maximizes utility. Even here, however,

it would be preferable to have a principle which evaluates the consequences of laws in terms of more specific concepts than maximizing utility. This principle would leave less room for partiality to work behind the scenes and would lead to more convergence of opinion. It seems reasonable to say that people will view their relations as based essentially on considerations of principle rather than power so long as a) the principle fixes certain critical features of just laws, and b) the laws which are enforced are the outcome of the use of just procedures. Certainly, it is more reasonable that they will view their relations as based on considerations of principle rather than power than will the people in Nozick's system. In that system people are not guaranteed any right to a say over which laws apply to them and their natural entitlements have little influence on what those laws are.

We now come to the second significant feature of how the natural position handles the disagreement which is bound to occur over which laws optimally satisfy principles which are incompatible with F and I. It appeals to special principles for the problem of when a person is morally bound to obey a law which results from the use of just procedures. These principles will imply that a person is sometimes morally bound to obey a law which results from the use of just procedures even though that law does not optimally satisfy the



principle which it is intended to satisfy. People adopt the perspective that they must sometimes tolerate laws which they do not believe are optimal because the benefits of having just procedures which are intended to produce optimal laws will be available to all only if each accepts the burden of obeying laws which he believes are reasonable but not optimal. Even Nozick is willing to concede that people who accept common principles must sometimes tolerate applications of those principles which they do not believe are optimal:

It seems that persons in the state of nature must tolerate (that is, not forbid) the use of procedures in the "neighborhood" of their own; but it seems that they may forbid the use of more risky procedures. An acute problem is presented if two groups believe their own procedures to be reliable while believing that of the other group to be very dangerous.<sup>13</sup>

Similarly, people who accept principles which are not compatible with F and I must tolerate laws which are in the "neighborhood" of those which they believe are optimal. They do not, however, have a duty to obey those which they believe are way off the mark. Furthermore they have the right to criticize any law, even those which they are bound to obey, which they do not believe is optimal.

## 7.6 Conclusions:

Nozick's state of nature approach to the problem of what principles characterize the just state begins with the assumption that none of the first principles of justice apply directly to the evaluation of institutions. I have argued that Nozick has not established that we should retain this assumption. My argument has been internal to Nozick's theory in the sense that I have given Nozick his account of our clearest moral beliefs. I have argued that even when we accept his account of our clearest moral beliefs we are not compelled to accept his solutions, solutions which are compatible with F and I, to the difficult moral problems which are emergent relative to those clear beliefs. Furthermore, I have argued that once we see the limitations of his account of our clearest moral beliefs we must search for an emergent constraint which can be used to evaluate the competing solutions to the emergent problems and pick out the optimal ones. I have argued for an emergent constraint which focuses on the desirability of having a society in which people view their mutual relations as based essentially on considerations of principle rather than power. Once we adopt this constraint it becomes clear that the optimal solutions to the emergent problems will appeal to law bound principles and the natural position which includes special principles for evaluating publication, enforcement, and collection procedures. One

reason why it becomes clear is that there are grave liabilities associated with the alternative view that each person's membership in the state is essentially a matter of voluntary choice. My conclusion is: even when we begin the search for the principles which characterize the just state by focusing on moral problems in a pre-institutional state of nature, we end up with the view that some of the main problems of justice are problems of institutional design.

## FOOTNOTES

### Chapter One

1. Robert Nozick, Anarchy, State, and Utopia ( New York: Basic Books, 1974 ), pp. 4 - 6. All future page references will be to Anarchy, State, and Utopia unless otherwise noted.
2. p. 5.
3. pp. 6, 22 - 24.
4. p. 114.
5. p. 26.
6. p. 9 and the introduction at xiv.
7. p. 87.
8. p. 87.
9. I establish this point on pages 68 - 76 below.
10. I establish this point on pages 76 - 84 below.
11. p. 33.

### Chapter Two

1. pp. 33 - 34.
2. p. 206.
3. p. 171.
4. p. 161.
5. pp. 58, 158.
6. pp. 34, 48 - 51.
7. pp. 51 - 52. I do not claim that this list is complete. Nozick might attempt to expand it by arguing for a natural right to privacy and he might attempt to contract it by arguing that a) the natural right to make contracts can be derived from the natural right to pursue one's life plan or b) the natural right to one's labor and to what one has legitimately acquired can be derived from the natural right to

one's body. The list is included here in order to give the reader an intuitive idea of the position which Nozick wants to defend.

8. p. 33.

9. pp. 31 - 32.

10. pp. 33, 171 - 172.

11. p. 34.

12. introduction at xiv.

13. In the next four pages I present what I believe is a defensible reconstruction of the structure of the argument which Nozick develops in the first half of Chapter Seven on pages 149 - 182. The best evidence that this is the structure of his argument is found in his discussions on pages 150 - 153 and 174 - 182. The reader should also pay careful attention to his discussion in the note on page 162 and to his subsequent discussion on pages 184 - 187.

14. p. 175; see John Locke, Two Treatises of Government 329 ( Laslett ed., 1963 ) ( Second Treatise ).

15. Although Nozick never uses the expression "emergent problem," he should be comfortable with the concept of an emergent problem. He claims on page 90 "that no new rights 'emerge' at the group level." Furthermore, on 205 he asks: "Are the fundamental principles of justice emergent in this fashion, applying only to the largest social structure yet not to its parts?" A reader who objects to my use of the concept of an emergent problem to explain how Nozick develops and defends his theory has the burden of offering a more illuminating account of how he develops and defends it.

16. John Rawls, A Theory of Justice ( Cambridge, Massachusetts: Harvard University Press, 1971 ), pp. 8-9, 244 - 248, and 543.

17. id. at 333ff.

18. id. at 284ff.

19. id at 8.

20. id. at 8.

21. I am not committing myself to the view that there are only two types of emergent problems. One important problem which Nozick recognizes as an emergent problem which does not fall neatly into either of the categories which I discuss below is the problem of how to resolve conflicts which arise when each of many people desires to punish the same person who deserves punishment. In his discussion of a system of open punishment in a state of nature at 138 - 140 he appears to assume that we have clear beliefs, so long as we assume that people do not have conflicting desires to punish the same person, that each person has a natural right to punish any person who has violated the law of nature. Relative to these beliefs the problem of who has the right to punish in cases where there are conflicting desires is an emergent problem. One solution is that in cases of conflict the right to punish is held jointly by all people who desire to punish. If we adopt this solution we will have to face the problem of determining which procedures adopted by a group to select its representatives who alone have the right to exercise the group's right to punish are just procedures. Only those who are chosen by the just procedures will have the right to punish. If we adopt this solution we will have an easy answer to one of the anarchist's (and Nozick's) doubts about the possibility of providing a justification of the state. This is the doubt which can be traced to the belief that the state violates a person's natural right to enforce his rights when it prohibits the private enforcement of rights. If we adopt the solution sketched above, then we can tell the anarchist that a person's natural

right to enforce his rights does not extend to cases in which his desire to enforce them conflicts with another's desire to enforce them. Therefore, we can tell him that a person's natural right to enforce his rights is not violated when he is prohibited from enforcing them and a justly selected official of the state enforces them instead. It is because Nozick rejects this solution that he becomes pre-occupied with the problem of providing a justification of the state. Furthermore, he rejects it even though he is aware of the grave inconveniences of having a system of open punishment. His only argument against the solution sketched above is that it goes against his belief that there are no rights which are (see 139) "possessed jointly by people rather than individually." On pages 68 - 76 below I examine the role which this belief plays in Nozick's theory and in Chapter Five below I examine whether Nozick can defend it.

22. Nozick makes an assumption very much like this on 59 and on 339 in footnote 7.

23. Nozick attempts to cope with the distortions created by high transaction costs in his discussion on 76 - 77.

I evaluate his discussion on pages 255 - 258 below.

24. p. 57.

25. See Nozick's discussion on pages 28 - 30 for possibilities which Nozick discusses and rejects and which I do not discuss.

26. p. 58.

27. pp. 63, 90 - 91, and 95.

28. The reader should be aware that it is consistent for Nozick to claim both that a person always has the right to enforce his rights and that he sometimes has the duty to retreat from an aggressor. The duty to retreat (see 62 -63) applies in cases where the amount of force a person is

permitted to use to subdue an aggressor is not sufficient to subdue him in the case at hand.

29. p. 59.

30. pp. 76 - 77.

31. Nozick appears to appeal to the concept of an emergent constraint in his discussion in the note on 153. He writes: "If the principle of rectification of violations of the first two principles yields more than one description of holdings, then some choice must be made as to which of these is to be realized. Perhaps the sort of considerations about distributive justice and equality that I argue against play a legitimate role in this subsidiary choice. Similarly, there may be room for such considerations in deciding which otherwise arbitrary features a statute will embody, when such features are unavoidable because other considerations do not specify a precise line; yet a line must be drawn." He is saying that the property of leading to a more equal distribution may be an emergent constraint on solutions to problems which cannot be solved by appealing to the theoretical considerations at hand.

32. p. 57 (emphasis in original).

33. The reader can find a definition of a law bound principle on pages 11 and 12 above.

34. There is additional compelling evidence on pages 32 - 34 and on page 39 for my claim that Nozick believes that rights are absolute in this sense. In other places, however, Nozick appears to retreat from this claim. First, he says in a note at 30 that side constraints "may be violated to avoid catastrophic moral horror." He does not, however, elaborate on what constitutes catastrophic moral horror. One wonders whether the anarchist could justify the use of force to prevent the emergence of a state on the ground



that the long run tendency of any state situation would be a situation of catastrophic moral horror. Second, he makes the puzzling claim at 41, while discussing the utilitarian position on when it is permissible to kill people, that "emptiness is hard to come by" with regard to "decisions where the number of persons is at issue." He never tells us, however, why numbers will pose a problem for his theory which views rights as absolute side constraints. Finally, his discussion of compensation at 58 suggests that a person is entitled to full compensation when another crosses his boundary without his consent only when he took reasonable precautions to minimize the amount of harm that might result from that type of crossing. He does not, however, elaborate on how we determine what counts as a reasonable precaution. Is it a matter of convention? Are there special principles which apply to the evaluation of conventions? May a convention be enforced against a person who has not consented to its requirements? No attempt is made to answer these important questions. His only further discussion of the problem of reasonable precautions occurs in the note at 76 where he refers to Coase's famous article "The Problem of Social Cost" and at 80 where he suggests that airlines might be able to reduce their liability to those whose boundaries they cross when they fly over their homes by offering to soundproof those homes. Interestingly enough, he does not tell us how airplanes cross our boundaries when they fly over our homes. What becomes clear is that Nozick does not defend the view that there is always strict liability in torts. Insofar as he believes that each person is responsible for taking reasonable precautions he leaves room for the concepts of comparative and contributory negligence.

35. p. 32 (emphasis in original).

36. p. 33.

37. pp. 33 - 34 ( emphasis in original; footnote omitted).

38. He argues for this conclusion in his discussion at 28 - 30 where he argues against the view that each person is bound (see 30) "to minimize the weighted amount of violations of rights in the society, and that he should pursue this goal even through means that themselves violate people's rights."

39. Nozick never explicitly accepts P4 and he can defend his position on blackmail without appealing to P4. In Chapter Four I argue, however, that it would be incoherent for him to accept his position on blackmail without also accepting P4. See my discussion at 156 - 159.

40. Nozick's anti-paternalism and anti-perfectionism come out clearly in his discussions at 34, 58, and 324. He appears to defend an extreme form of anti-paternalism which denies that it is legitimate for the state to use force to a) tax people for the purpose of supporting research into which products are safe so that people can make a rational choice about which products to buy and b) require manufacturers to provide information about how dangerous their products are so that consumers can make rational choices about what to buy. Nozick would defend his position that the state is not permitted to use force for these purposes by claiming that no private individual in the state of nature is permitted to use force for these purposes. He would probably then tell an optimistic story about how consumer safety laboratories would arise in a free society and make a profit by selling product safety information to a public that wants that information. He would conclude the story by telling us how the combination of consumer safety laboratories and the normal laws which protect people against fraud would provide responsible people with all the protection that they need.

41. p. 24.

42. p. 25.

43. p. 30.

44. This is, I believe, a fair statement of the principle which Nozick attributes to Hart and Rawls and which he criticizes on pages 90 - 95.

45. pp. 13 - 14, and 89.

46. A more complete discussion of the natural position would also include a discussion of the need for special principles for evaluating the official conduct of those who alone have the right to interpret the law bound principles and the public rules needed to satisfy them. We would call these special principles "principles of judicial review."

47. Similarly, two people can accept the same law bound principles and agree that law bound principles create the need for the special principles which are included in the natural position but still disagree on what the content of those principles should be. One may be a democrat while the other is not.

48. One person who agrees with Nozick that we should accept F is the act utilitarian. This is of some interest because disagrees with the act utilitarian on almost everything else. Another person who accepts F is Robert Paul Wolff. In In Defense of Anarchism (New York: Harper and Row, 1976) he writes (at 100): "Either all moral agents have the right, under some conditions or other, to use force to implement their purposes, or none do." My defense of the natural position can be taken as an argument against Wolff as well as an argument against Nozick.

49. p. 118 (emphasis in original).

50. p. 89.
51. p. 90.
52. pp. 149, 230 - 231.
53. Nozick expresses his belief that it is not permissible to use force against a free rider at 89 - 90, 93 - 95, and 265 - 268.
54. pp. 72 - 73. 89 - 90.
55. pp. 12ff.
56. pp. 54ff.
57. p. 88.
58. pp. 89 - 90 (emphasis in original).
59. p. 234.
60. pp. 235 - 238.
61. pp. 246 - 250.
62. Nozick appears to give a general endorsement to this type of argument in the section "Macro and Micro" which begins at 204. At 206 he claims that "it is 'undesirable to protect principles by excluding microtests of them.'" Also see his discussion in the note at 167. It is of interest to note that Nozick cannot argue against a principle which states that people have a right to be free from unconsented to risks, including cumulative risks, above a threshold level by claiming that it cannot be confirmed by microtests. His objection to it must be that it is incompatible with I.
63. Nozick appears to endorse the view that the amount of punishment which a person deserves puts an upper limit on the amount which he may receive in his discussion at 60 - 63. He had ample opportunity to endorse principles of comparative justice as acceptable principles of punishment in the sections "Retributive and Deterrence Theories of Punishment" at 59 - 63 and "The Right of All to Punish" at 137 - 142. His failure to endorse them is evidence that

he would not endorse them.

64. I discuss this point in section 5.7 at pages 199 - 206 below.

65. p. 74.

66. p. 82. The principle of compensation is discussed in detail in Chapter Six, especially in section 6.2 through 6.5.

67. p. 82.

68. See Nozick's discussions on 41 - 42, 153 - 155, and 202.

69. p. 42.

#### Chapter Two

1. p. 71.

2. p. 59.

3. P3 was introduced at page 45 above.

4. pp. 66, 78.

5. p. 64.

6. p. 57.

7. p. 65.

8. p. 64 (emphasis in original).

9. In the section "Fear and Prohibition" which begins at 65 Nozick often talks about general systems permitting different acts and he often compares two systems which permit different acts by examining what consequences would follow upon the public adoption of each. Furthermore, he clearly believes that a comparison of these hypothetical consequences is relevant to the task of establishing which acts a person is, in fact, permitted (or forbidden) to do. Let us call the general system which does best in these comparisons "the optimal general system." There is nothing in Nozick's discussion which suggests that he believes that

the acts a person is actually permitted (or forbidden) to do depends upon both a) whether the optimal general system says that he is permitted (or forbidden) to do them, and b) whether the optimal general system is, in fact, an established general system. The discussion seems to assume that a person is permitted (or forbidden) to do an act which is permitted (or forbidden) by the optimal general system even when there is no established public rule which a) says that the act is permitted (or forbidden), b) causes people to have reasonable expectations about how others will act and, therefore, c) brings about the good consequences which make the optimal general system a desirable system. This strongly suggests that Nozick intends his discussion in this section to establish what people's natural rights to liberty are. It also strongly suggests that the type of argument which Nozick appeals to is, contrary to what I have claimed, compatible with I. The argument can reach the conclusion that a person's act is permitted (or forbidden) without examining the actual acts of other people who are acting independently of him. It simply looks at whether his act is permitted (or forbidden) by the optimal general system. Therefore, it reaches the conclusion about whether it is permitted (or forbidden) by examining it as an isolated act in a pre-institutional state of nature. This is true, but it is not sufficient to establish that the argument is compatible with I. I requires both that we consider the act as an isolated act and that when we so consider it we establish that it is serious enough to warrant forceful interference. Nozick's generalization type argument does not satisfy this second condition. It never shows that each act it classifies as a forbidden act is serious enough to warrant forceful interference when it is considered as an isolated act. It only shows that the system which permits that act

would be serious enough to warrant forceful interference. A person whose act was forcefully interfered with on the basis of this type of argument could complain that his act is being interfered with even though it is not serious enough to warrant interference when it is considered as an isolated act. I elaborate on this point in section 2.7 below.

10. I am assuming that a libertarian would say a) that Sam acts within his rights when he refuses to give John the rope and b) that John is not permitted to use force to take the rope from Sam after Sam has refused to give it. The libertarian need not, and almost certainly would not, say that Sam's refusal is a good act. In section 2.8 below I offer what I believe is overwhelming evidence that Nozick accepts a) and b) above. This evidence will also, I believe, answer the suggestion that Nozick would say that John is permitted to forcefully take the rope because the taking is necessary to prevent (see note 34 in Chapter One) "catastrophic moral horror." When Nozick talks about catastrophic moral horror he has something more catastrophic in mind than the accidental death of a little girl.

11. We may be inclined to say that John should not have to pay market compensation for the rope because the exchange in which he buys the rope from Sam would not be a voluntary exchange and we may be inclined to say that the exchange would not be a voluntary exchange because John's alternative choice of increasing the likelihood of his daughter's death is an unacceptable choice. Nozick's discussion of voluntary exchange at 262 - 264 clearly indicates that he would say that the exchange in which John buys the rope is a voluntary exchange.

12. This principle is not restricted to cases where the boundary established by a person's right to his property will be crossed. It also applies to cases where the boundary established by a person's right to his labor will be crossed. If John could only save his daughter by using both Sam's rope and Sam's help in using the rope, then he would have the right to use both provided that all of the requirements of MA were satisfied. MA sometimes requires a person to respond to another's orders when the other takes the initiative to prevent a serious harm to himself or some third person. It does not, however, require a person to take the initiative to aid another. We would need another principle to get the conclusion that a person is sometimes required to aid another even when nobody requests his aid. A person who accepts MA would almost certainly accept some principle of this type.

13. These conclusions follow from the assumption that John has a natural right to enforce his emergent right just as he has a natural right to enforce the natural rights which appeared on the original list on page 16 above. In fact, this emergent right would appear to be a natural right insofar as the argument which John uses to establish his right does not appeal to the fact that some established public rule says that he has the right. See the discussion in footnote 9 of this chapter.

14. p. 71.

15. p. 57 in the note.

16. p. 84.

17. It should also be clear that we can use P3 to establish that John (or Bob) is forbidden to cross Sam's (or Jim's) boundary in those cases where John (or Bob) does not intend



to compensate Sam (or Jim) for the harm caused by the crossing.

18. p. 66. There is an interesting problem about how we should calculate the amount of compensation to which a victim of an assault in a system which permits assaults provided that compensation is paid is entitled. Let us assume that the victim attempts to defend himself and, consequently, suffers more harm than he otherwise would have suffered. Is he entitled to compensation for all of the harm or is he only entitled to compensation for the harm he would have suffered if he hadn't fought back?

19. p. 66.

20. p. 67.

21. p. 66.

22. p. 67.

23. p. 67.

24. p. 68.

25. p. 68.

26. p. 68 (emphasis in original).

27. See the discussion at pages 94 - 95 above.

28. See the discussion at page 100 above.

29. pp. 66 - 67

30. p. 67 in the note.

31. Here I take issue with the position which Nozick defends at 174. It seems to me perfectly plausible to claim that fraternal feelings will develop among people who live within a system which requires each to do acts which promote the well being of the rest. This is, clearly, an empirical issue.

32. p. 69.

33. p. 137.

34. It is of some interest to note that in Nozick's initial

discussion of punishment at 59 - 62, where he compares retributive and utilitarian theories of punishment, he assumes that there is a uniform system of punishment. That is, he assumes that there is a central authority which prohibits certain acts and which must adopt a uniform policy concerning which punishments should be attached to each of the acts which is prohibited. He argues that the principles which apply to the evaluation of the policy which is adopted are basically retributive rather than utilitarian. Furthermore, he argues that there is an upper limit on what amount of punishment is appropriate for each act and that it is not permissible to surpass that limit even when it will lead to greater deterrence. This is compatible with I. He does not, however, go on to accept a principle of comparative justice which says that those who deserve the same amount of punishment ought to receive the same amount. We have already noted (see the discussion on pages 83 - 84) that accepting these principles is not compatible with I.

Nozick does not discuss the problem of punishment in the state of nature until page 137. He asserts that any person acting alone in the state of nature is entitled to punish any violation of the law of nature. This immediately leads him to the problem of who has the right to punish in cases where more than one person wants to exercise his right to punish. I have already discussed this problem in footnote 21 of Chapter One. Here I will repeat and elaborate upon the earlier discussion. We noted that he rejects the solution which says that in cases of conflict we should assume that the right to punish is a right which is held jointly by all people. This solution would create the need for special procedures which are used by the group which has the right to punish to determine which people should

alone have the right to exercise the group's right to punish. Nozick's grounds for rejecting this solution are a) that it would be the only right which is held jointly by people and b) that there is no institutional apparatus already existing in the state of nature which people can use to determine which people alone have the right to exercise the group's right to punish. These reasons are not very convincing. They become less convincing when we examine Nozick's own solution to the problem. He writes: "To the extent that it is plausible that all who have some claim to a right to punish have to act jointly, then the dominant agency will be viewed as having the greatest entitlement to exact punishment, since almost all authorize it to act in their place. In exacting punishment it displaces and preempts the actions to punish of the fewest others." Does this imply that a representative of the People's Republic of China is entitled to punish any violation of the law of nature which occurs in the United States since he represents more people than the representative of the United States does? Nozick must, I believe, either give up his belief that any person has the right to punish any violation of the law of nature or his solution to the problem of how to resolve conflicts which arise when more than one person wants to exercise his right to punish the same person.

35. In fact, the members of a mutual aid society would probably agree to permit many more crossings than MA permits. They would probably elect representatives who have the right to publish and enforce rules which coordinate the activities of members in cases where coordinated activity is necessary to prevent another member from suffering a serious injury. So, for instance, the representatives might have the right to publish rules which coordinate the activities of

members so that they effectively sandbag a river which is about to overflow and destroy the property of other members. They might also have the right to publish rules which coordinate the activities of members so that they effectively work to mitigate the harm which other members suffer as a result of some natural disaster. The important point is that in many cases aid requires the coordinated behaviour of many. A reasonable mutual society would not overlook this fact.

36. p. 72 (emphasis added).

37. pp. 71-72 (emphasis added).

38. p. 101. The reader should also see Nozick's comment in the note on page 180 where he claims that a person may sometimes legitimately own the entire supply of drinking water. It is clear from the context that Nozick believes that when a person legitimately owns something he does not have to let others use it without his consent.

39. p. 238.

40. p. 238 (emphasis in original).

41. Nozick discusses the problem of how we determine how much harm may be inflicted on an aggressor to prevent his aggressive act at pages 62 and 63. He acknowledges that the amount that is needed is sometimes more than the amount that is permitted and, therefore, that a person sometimes has a duty to retreat. The amount of harm that Sam is permitted to inflict on John to prevent him from taking the rope may be low. This may establish the conclusion that Sam will have to retreat and let John take the rope. It will not, however, establish that Sam has no right to punish John for taking the rope without his consent.

42. In Chapter Three I discuss the problems which emerge when we drop assumption two and in Chapter Four I discuss

the problems which emerge when we drop assumption one.

43. Nozick worries about the problems caused by sadists at 138. There is, however, a more pressing reason why he should want to avoid the conclusion that any person acting alone in the state of nature is entitled to punish John. It is his commitment to the view (see 69) that "a person's ill gotten gains are to be removed or counter-balanced, if any remain after he has compensated his victims, apart from the process of punishment." If Nozick considers John's act of taking the rope to be punishable then he must, to remain consistent, also believe that it is permissible to remove John's ill-gotten gains. In this case the ill-gotten gain is his daughter's life. How is that supposed to be removed? It seems clear that Nozick must change his view (see 60 and 69) about how to interpret the maxim that no person shall profit from his own wrong. It is simply too counter-intuitive to hold, as Nozick appears to hold, that a person should be subjected to extra hard treatment when he violates another's rights for the purpose of providing a great benefit to a third party.

44. pp. 138 - 139. Nozick does not explicitly deny that the victim has the right to grant mercy. What he says, however, certainly suggests that he would deny it.

45. pp. 72 - 73.

46. See the discussion at 130 - 131 above as well as the discussion in footnote 35 in this chapter.

### Chapter Three

1. pp. 84 - 85.

2. In the note on pages 84 - 85 Nozick asks us to ignore the following types of complications: i) A might be a

person whose existence benefitted B over the long run but not in this particular and ii) A might be withholding information which he stumbled upon and he might be charging less than the next person who would have stumbled upon it would have charged. Since Nozick ignores these complications so will we. We should note, however, that Nozick's commitment to I would appear to force him to ignore each type of complication.

3. Can Nozick avoid saying this by claiming that there is a natural right to privacy? In footnote one of Chapter One I noted that Nozick might want to extend his list of natural rights to include a natural right to privacy. This right might provide each person with some protection against the blackmailer. This is because some of the information which a blackmailer might threaten to reveal is information whose revelation would constitute a crossing of the boundary established by a person's natural right to privacy. In the cases where he threatens to reveal the information there will be no difference between what he does and what the racketeer does; each threatens to do an act which he has no right to do. In the note on page 86, however, Nozick explicitly distinguishes between the blackmailer's activities and the activities of the racketeer. Therefore, he seems to be assuming that the blackmailer's activities do not threaten to cross a boundary established by a person's rights. In any case, many of the things which a blackmailer might threaten to reveal are things whose revelations do not threaten the boundary established by the right to privacy on any reasonable account of privacy. For instance, he might threaten to reveal information that another committed a crime or that another's property line is not where his neighbor believes it is.

4. p. 67 in the note.
5. p. 86.
6. See note 2 above for a list of complications which Nozick ignores and which we will also ignore.
7. The racketeer usually threatens to forcefully cross the boundary established by another's rights unless the other pays him to refrain from crossing. These forceful crossings are certainly forbidden by P2. They are also forbidden by P3 since the racketeer does not intend to compensate the people whose boundaries he threatens to cross.
8. p. 86. See the quote at footnote 5 on page 146 above.
9. pp. 85 - 86.
10. The problems of when it is permissible for one person to sell his silence and when it is permissible for one person to buy another's silence are difficult problems. It would seem that the correct solutions must examine and evaluate the consequences of adopting alternative policies. This approach is not available to Nozick, however, since it is incompatible with I and it presupposes an account of the public interest which is enforceable against a person without his consent. At 67 Nozick argues against a system which permits those who violate the rights of others to bribe their victims to keep silent. His argument appeals to the fact that this system will create uncompensated-for-fear. This argument is inconsistent with his commitment to I and, therefore, is not available to him if he wishes to remain consistent.
11. Nozick discusses problems relating to the right to speak at 129 - 130, 260 - 265, and in footnote 6 on page 342. None of what he says suggests that special principles are appropriate for solving the problem of when one person is permitted to speak. That is, he appears to believe that acts

which involve speech are to be treated the same as other types of acts.

12. p. 84. I take issue with Nozick's claim that a person who pays this person not to build the structure is served productively. It seems more appropriate to classify the exchange in which he pays the other not to build as what I will call a "semi-productive exchange." See my discussion of semi-productive exchanges in section 3.4 below.

13. Nozick never uses the expression "semi-productive exchange." However, he introduces the concept at page 86 and clearly uses it when he states the principle of compensation.

14. This problem was initially discussed in Chapter One on pages 30 - 32.

15. We will discuss which acts fall into this category when we discuss the principle of compensation in Chapter Six.

16. pp. 85 - 86.

17. p. 86 in the note.

18. p. 32.

19. p. 86 in the note.

20. We will not, however, examine cases of semi-productive exchange where the motive of one of the parties to the contract is to injure the other and the other is paying not to be injured.

#### Chapter Four

1. Does a risk creator ever have a legitimate complaint when the cost of performing his risky activity goes up? Usually we assign entitlements so that the risk creator must simply bear this cost. For instance, we usually say that it is simply unfortunate for a factory owner and the



people who work for him when there is an increase in the number of people who live in the vicinity of the factory which causes an increase in the factory owner's liability insurance which in turn causes him to go out of business. Sometime, however, we may adopt the position that since the factory owner was there first, those who move into the vicinity must assume the risks which the factory creates. If we believe that it is sometimes appropriate to adopt this view, then we believe that the risk creator sometimes has a legitimate complaint.

2. pp. 86 - 87 (emphasis added).

3. p. 78.

4. p. 82.

5. See the discussion in section 3.5 above.

6. Does Luke at least have to tell Matthew that he intends to use the chemical so that Matthew can take steps to minimize the amount of harm he will suffer? Leo Long has suggested that the answer to this question is "yes."

7. p. 64 in the note.

8. Nozick must square his discussion of how to assign entitlements in cases where one person incidentally but certainly dumps the effects of his productive activities on another with his later discussion (at 79 and 80) of how to assign entitlements in the case where airlines impose noise pollution on the people who live near the airport. It would seem that this is a clear case of one person incidentally but certainly dumping the effects of his productive activity on another. Yet, Nozick does not suggest that the homeowners have the right to market compensation for the harm they suffer as a result of the flights. That is, he does not suggest that they may prohibit the airlines from flying their planes and, therefore, that the airlines may fly their planes only

if they manage to negotiate an agreement with the homeowners.

9. There are, in fact, places where Nozick suggests that for the purpose of assigning entitlements to perform acts we cannot distinguish acts merely on the basis that one is more likely to cross the boundary established by another's rights than the other. See his discussion of the right to perform risky acts in the state of nature at 74 - 75 and his discussion of pre-emptive attack at 126 - 130.

10. I will discuss this position at length in Chapter Six, especially in sections 6.2 - 6.5.

#### Chapter Five

1. I have explained why the anarchist believes that it is impossible to provide a justification of the state on pages 47 - 52 above.

2. p. 18 (emphasis in original).

3. It turns out that Nozick never provides a justification of the state. At 114 he concedes that the protective association is not permitted to prohibit independents from privately enforcing their rights against other independents. At 112 he says that an independent who is prohibited from privately enforcing his rights but who has the resources to pay for the protective services which the association provides must pay for those services. If he does not pay, then he need not be given protection. Finally, the protective association is not permitted to prohibit people who use reliable procedures from privately enforcing their rights. Nozick has, at best, explained how a state-like entity would arise from a state of nature by what he considers to be morally permissible means. An anarchist could accept this.

4. Nozick is aware that a person who gives up F and accepts the enforceable fairness principle, which we discussed in section 1.3 above will again discuss in section 6.6 below, can use it to provide a justification of the state. It is not at all clear to me, however, how Nozick can defend his apparent belief that people who appeal to it to justify the prohibition on the private enforcement of rights must intend to establish a state while people who appeal to the principle of compensation, the principle to which Nozick appeals, to justify the same prohibition will not intend to establish a state. I suspect that in each case the people who prohibit the private enforcement of rights intend to establish a state. In any case, we cannot determine what their intentions are by simply asking whether they appeal to a principle which is consistent with F.

5. p. 6 (emphasis in original).

6. p. 19.

7. Nozick often contrasts his position with other positions without giving examples of theories which adopt the other positions. Can the reader confidently give examples of moral theories which offer either type (2) or type (3) explanations of the political realm? I can't. We run into the same problem when Nozick says at 33 and 34 that a person who rejects his account of rights as absolute side constraints has three alternatives but never gives examples of theories which accept each of the alternatives. (The relevant quote is on page 42 above at footnote 37). Which of these alternatives have I committed myself to by defending law bound principles and the natural position?

8. p. 6

9. I introduced the concept of an emergent constraint on page 36 above.

10. See my discussion on pages 18 - 22 above.
11. p. 176.
12. p. 176.
13. pp. 177 - 178 in the note.
14. pp. 179 - 180 (emphasis in original).
15. p. 179.

### Chapter Six

1. p. 86.
2. p. 88.
3. p. 82.
4. p. 83.
5. pp. 106 - 107.
6. pp. 96 - 98.
7. pp. 105 - 107.
8. I say "usually" because we might want to say that there are some acts which are so risky that the risk creator is responsible for warning each person who is exposed to the risk of the danger that he is in and is liable to punishment in case he imposes the risk on somebody without warning him. Furthermore, we might want to say that he is liable to punishment even though the person who was exposed to the risks created by his non-aggressive risky act never warned him that he would be punished for doing the act. The problem with this type of case is that we will usually regard the fact that the risk creator failed to warn the risk bearer of the danger as evidence that the risk creator intended to impose the danger on the risk bearer and, therefore, that he was acting aggressively. Still, it is impossible to imagine cases where we would be willing to conclude that the risk creator was acting non-aggressively but negligently. If we believe that the risk creator is liable to punishment in

these cases, we adopt the controversial view that a person is sometimes liable to punishment for his negligent behaviour. Since most retributivists are reluctant to adopt this view, we can assume that Nozick would also be reluctant to adopt it.

9. p. 87.

10. pp. 145 - 146.

11. pp. 82 - 83 (emphasis in original).

12. p. 81.

13. p. 82.

14. p. 82.

15. This appears to follow from Nozick's discussions at 79, 111, and 112.

16. p. 82.

17. Nozick uses the expression "disadvantaged relative to the normal situation" at 82.

18. This question is intended to raise doubts about whether Nozick's entitlement theory of distributive justice satisfies the addition and deletion conditions which he discusses on pages 209 and 210 and which he believes are important conditions.

19. p. 86 (emphasis added).

20. This is an oversimplification of Nozick's position. At 112 he says that a rich person who is prevented from privately enforcing his rights because of the prohibition on private enforcement must for the protective services he receives.

21. p. 146 in the note ( emphasis in original).

22. More precisely, he must say (see 89) that the right "is decomposable without residue into those individual rights which are held by distinct individuals acting alone in the state of nature." Furthermore, once we realize that the

right to restrain is held by each individual acting alone in the state of nature, then we can see that the society can save a lot of money by adopting the following strategy. Each year a different member invokes his right to restrain those who are considered to be dangerous. Since this person only has to pay those who are disadvantaged by his prohibition up to the point where he is as disadvantaged as they are and since he has fewer resources than the society has when it is considered as an individual, he will have to pay out much less than the society would if it issued the prohibition as an individual. On this view one person could preventively restrain each year and the rest could be free loaders. On what ground could a person who was restrained charge the free loaders for the benefits which they receive at his expense? If the restrainer cannot charge others for the free benefits which he provides them when he restrains others through his use of the principle of compensation, then how can those who are restrained charge others? I will pursue the question of who must pay those who are disadvantaged when the principle of compensation is invoked in section 6.7 below.

23. p. 143.

24. p. 143.

25. Aren't we overlooking the plight of the factory workers? The prohibition might disadvantage them by depriving them of their only employment opportunity. It is unlikely, however, that Nozick wants to claim that a worker has a property right in his job which enables him to complain when another's non-aggressive act causes him to lose his job. See Nozick's comments on whether people have a right to have their needs satisfied at 234 - 235, his comments on whether there is a right to equality of opportunity at 235 - 238, and his comments on whether people have a right to a say over what effects them

at 268 - 270.

26. Any theory which says that the appropriate way to assign entitlements in situations where people desire to perform non aggressive acts is to evaluate the consequences of adopting public rules which make alternative assignments, can provide an explanation for why being there first should make a difference. By assigning some weight to the fact that one party was there first we provide each person with some guarantee that the value of his property will not change due to circumstances beyond his control and, therefore, provide him with some incentive to improve the value of his property. For a relevant discussion see Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harvard Law Review 1165 (1967).

27. pp. 73 - 74 (emphasis in original).

28. This becomes clear when he returns to the problem of cumulative risk on pages 89 - 90. The relevant quote appears on pages 80 - 82 above and is discussed on pages 79 - 86 above.

29. See the discussion on pages 52 - 58 above.

30. p. 95.

31. p. 95.

32. p. 95 (emphasis added).

33. See the discussion on pages 214 - 216 above.

34. If Nozick were to accept this additional condition he would be able to justify some curfews and some gun control laws by appealing to the enforceable fairness principle. He would not, however, be able to justify forcing people to cooperate in the scheme for broadcasting radio programs which he discusses on pages 93 - 95.

35. p. 95.

36. It is of some interest to note that the people who compiled the Restatement of Restitution (§117, 1937) expressed the belief that it is sometimes permissible to use force (i.e., sue) to gain compensation for services rendered to a person who did not voluntarily agree to pay for those services. See the section "Benefits Voluntarily Conferred" which begins at 487. The discussion in that section seems to imply that in each of the above cases the person who provides the benefit is entitled to compensation. In any case, I am only claiming that it is more plausible to claim that they are entitled to compensation than are the people in Nozick's examples. Furthermore, I argue on pages 236 - 238 below that the considerations which lead Nozick to accept PE do not force him to accept the conclusion that the people in my examples are not entitled to compensation.

37. Nozick, who denies that there is an acceptable version of the enforceable fairness principle, claims that those who set up compulsory schemes "must pay for finely designing their compulsory arrangements so that they don't apply to those who wish to opt out." See 322.

38. A person who wants to defend Nozick might argue that he has answered the argument from considerations of fairness which I have proposed in the section "Philanthropy" which begins at 265. There he argues that once we assume that we have a solution to the problem of who owns what, then we cannot appeal to considerations of fairness to force people to cooperate in contributing to the needy and ending poverty. The most that the argument which he develops there can be used to establish is that once we assume that we have a solution to the problem of non-aggressive risky acts, then we cannot appeal to considerations of fairness to force people to cooperate in the task of keeping the level of risk below



the level which creates uncompensated-for-fear. The argument does not, however, affect my claim that we should appeal to considerations of fairness when we first determine what the solution to the problem of non-aggressive risky acts is. The reader should re-examine my discussion of the relation between the enforceable fairness principle and the libertarian side constraint against aggression on pages 52 - 58 above, especially the discussion on page 57.

39. p. 114.

40. p. 78.

41. p. 115.

42. Nozick might still insist that he can get the conclusion which he wants without appealing to any version of the enforceable fairness principle. He might argue that people would respond to the inconveniences of not having an enforceable version of the fairness principle by voluntarily giving the protective association the right to enforce some version of the enforceable fairness principle. In Chapter Seven I examine the shortcomings of this approach.

43. See the previous note.

44. p. 76 (footnote omitted).

45. p. 75 - 76.

46. p. 76.

47. p. 76.

48. p. 76 - 77 (emphasis added).

49. It is because people's natural entitlements are inconvenient in cases where people are subjected to the risk of death that each has a reason to sell his right to compensation in case he is killed to a company which buys such rights. By selling his right to compensation he is able to enjoy the benefits of having this right in his lifetime. It should be clear that the position which I am attributing

to Nozick is consistent with his comments on pages 77 and 78.

50. p. 74.

51. p. 75.

52. p. 76.

### Chapter Seven

1. This is not, strictly speaking, correct. We have defined the enforceable fairness principle so that it only applies in cases where it is clear what people's initial entitlements are. It is easy to extend it so that it also applies in cases where we do not know what people's initial entitlements are but it is clear that people are better off with the rule than without it.

2. Will an independent who is prevented from privately enforcing his rights on the ground that he uses unreliable procedures for determining guilt believe that his procedures are unreliable? If he doesn't, then he will believe that his compliance with the prohibition on private enforcement was coerced from him by the protective association's immoral threat of the use of force.

3. There are other times when Nozick writes as if people would not compromise. See the long paragraph on pages 98 and 99 which begins "When sincere and good persons differ ...." He never dwells on what the implications of the view he states are for the problem of whether it is possible to provide a justification of the state.

4. pp. 141 - 142 (emphasis in original). Also see Nozick's discussion on page 330.

5. p. 25.

6. pp. 321 - 322. Also see Nozick's discussion on pages 133 and 134 where he discusses the problem of what the liability of a corporation is to those who voluntarily associate with it.

7. The evidence that this is a fair account of Nozick's beliefs about when a choice is voluntary can be found on pages 162 in the note, 169, and 263 - 264.

8. p. 109.

9. The reader should now reconsider Nozick's claims on pages 33 and 271 - 274 that the night-watchman state is neutral among its citizens. Although there may be market considerations which mandate that a protective association must offer a neutral package when it first goes into business, these considerations almost certainly disappear when it becomes the dominant association. On Nozick's view there are no considerations of justice which force it to remain neutral. Control of the state is much more of a prize than Nozick realizes. See his discussion on page 272 where he suggests that control of the state is not much of a prize.

10. p. 113.

11. I have stated the principle so that it does not identify which people are liable to compensate those whose boundaries are crossed and which people are liable to compensate those who are disadvantaged by prohibitions on risky acts. One might argue that Nozick's root idea of separateness forces us to assign the first liability to those who cause the boundary crossings and the second liability to those who benefit from the prohibitions which disadvantage.

12. pp. 268 - 271.

13. p. 98