MINARCHY CONSIDERED

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WHILST SOME DEFENDERS of the minimal, limited state or government hold that the state is "a necessary evil," others would consider that this claim that the state is evil concedes too much ground to anarchists. In this article I intend to discuss the views of some who believe that government is a good thing, and their arguments for supporting this position. My main conclusions will be that, in each case, the proponents of a minimal state, or "minarchy," fail to justify as much as what they call government, and so fail to oppose anarchism, or absences of what they call government.

1. Libertarianism and the problem of government

It would not be unfair to define the core beliefs of libertarianism in the following way: Individuals' rights are best understood as being property rights, and people have full or pretty full property rights over themselves, as self-owners, and over any land not already owned that they are the first to use and mix their labour with. These rights can be transferred by voluntary agreement or fulfilment of a debt, thus granting to recipients also fairly full ownership of these things or their derivatives. Further, people have a right to do with *their* property, or that of consenting others, what they wish. The *only* legitimate use of force is to ensure this ability, by enforcing these property rights against force, fraud or theft. Any violation of these rights and any other use of force are called "aggression," or "the initiation of force," and are illegitimate. Force used in defence against aggression, or in retaliation to it, may be called legitimate.

It is well known that libertarians call for a much less extensive state or government than most people do, using the beliefs stated above as a reason for condemning more extensive states. They call for liberalisation of drug

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laws, for instance, in that taking drugs is a use of one's own property, one's own body, and not that of anybody else. The same goes for the decriminalisation of prostitution, or for various forms of expression or speech acts—they involve the use of one's own body, or property, or that of consenting others, and when they do they do not violate anybody's rights, and forcibly preventing these things violates rights. However, on the other hand libertarians would call for the liberalisation of trade or market exchanges between individuals or voluntary groupings, since regulations and controls on such voluntary occurrences prevent people from doing with their property as they choose. To take an example, if I own my labour, then surely I get to pick the terms upon which I am willing to provide it to others. But a minimum wage law may prohibit me from accepting terms that I am willing to accept. In addition, libertarians will oppose laws that attempt to rectify inequality or poverty by redistributing property, so long as the inequality or poverty did not come about by rights violations. Taxing people some proportion of their income means making it illegal for them to use their body to earn themselves an income unless they use it to earn one for others, and this undermines self-ownership.

So libertarians want a much smaller government than the one to which we are used. It would lack any extensive welfare state features, and also paternalistic features. But how much less extensive should the government be? How little government should there be? The prominent libertarian philosopher Robert Nozick posed exactly this problem:

> Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?[1]

This is indeed such a problem that some libertarians have seen fit to answer it by saying that no extent of government or state is justifiable—the existence of any government or state would be unjust or immoral. I shall call these libertarians a variety of names, none impolite: Market anarchists, individualist anarchists, libertarian anarchists, or anarcho-capitalists. Their opponents in this debate, those libertarians that do not think that the existence of a certain extent of government or state is unjust or immoral will be called minimal statists, limited government libertarians, or minarchists: If "anarchy" is no state, then a minimal amount of state must be "minarchy"! I will also be using the terms "government" and "state" interchangeably, since,

[1] Nozick, (1974, ix)—all further quotes from Nozick are from this book, so citations will be included in the text.

in the arguments I examine in what is to follow, some people have referred as governments to institutions that other people have referred to as states.

This categorisation, however, is already faulty. Most libertarians are not anarchists. Most think that there should be a state or a government to a certain extent, but they do so on practical grounds, thinking the alternative, no state, unworkable in some sense, and not worth giving up the state for. These libertarians are inclined to say that a little amount of state or government, the little they want and no more, is a "necessary evil." The views of these libertarians are not examined here. In a sense, they are in agreement with libertarian anarchists, in that both they and the anarchists agree that the existence of any amount of state or government, to any extent, is an evil—unjust or immoral. They just disagree with the anarchists, not on the evil part, but on the necessary part.

The libertarians I will be examining here do not think that the state is a necessary evil. Indeed, at least one of them, Ayn Rand, would consider the idea of a "necessary evil" as ridiculous, since it would imply that evil can be necessary. In the following paper I wish to examine the arguments of various libertarians who think that the state is not a "necessary evil" but a "necessary good." They attempt to argue that the existence of some extent of government or state is compatible with, and perhaps even required by, morality or justice. In so doing, they will be defending what they define as a government or a state against anarchy, or the absence of what they call a government or a state. I intend to show that none of these libertarian thinkers justifies as much as what they call a government or a state, that their arguments do not suffice to show that the existence of what they define as a government or a state is compatible with morality or justice, whilst alternatives are not. In short, whilst I will not address the question of whether the state is necessary, I will show that these thinkers fail to show that it is not a "necessary evil," because they fail to show that it is not an evil.

2. Ayn Rand

Ayn Rand's influence on post-war libertarianism is inestimable. With her philosophy of "Objectivism" (followers called Objectivists) she sought to provide a moral basis for capitalism and limited government that she thought was sadly lacking, even amongst the most ardent defenders of such things. She championed a form of moral egoism against prevailing philosophies that seemed to celebrate the sacrifice of the individual and his or her projects to others. (See "The Objectivist Ethics," in Rand 1965) Capitalism was, in her view, the only just economic system, not because it was the best for distributing "society's surplus," but because it was the only system in which

each person was free to pursue his or her own ends with his or her own property, the only system that was compatible with not violating rights and allowing each to pursue their own ends instead of having to sacrifice those ends to others.[2] Unfortunately for Rand, amongst the large number of people inspired by her philosophy, arose those that thought she did not go far enough.[3] These younger Randians suggested that the very existence of a government was immoral in Rand's own terms, and so her defence of a limited government was in contradiction with her own moral philosophy. Starting with how she defined government, then, we will see why they felt this.

Rand defined a government as

> ... an institution that holds the exclusive power to enforce certain rules of social conduct in a given geographical area… The difference between private action and governmental action—a difference thoroughly ignored and evaded today—lies in the fact that a government holds a monopoly on the legal use of force.[4]

This is her definition of government. It is not her view of what a government ought to be, it was her description of what government *qua* government is. On top of this, she also wanted government to have other features.

Anarchy etymologically means "absence of ruler," a ruler being a person or group of people that exercises sovereign authority. It is commonly used, then, to describe an absence of government. Anarchism is the political philosophy that desires an absence of government. Ayn Rand's definition of government was "A government is an institution that holds the exclusive power to enforce certain rules of social conduct in a given geographical area." If there is nothing that satisfies Rand's definition of government, then government does not exist so far as Rand defined the term, and we have what anarchism may seek to establish ("may," because "an absence of government" is not the same as "all absence of government"—the term "an" implies a specific or particular type of absence of government).

Ayn Rand's definition of government allows for two particular alternatives under which government does not exist:

1) There is no institution that enforces certain rules of social conduct over a given geographic area. In other words, with in a given

[2] See "What is Capitalism," in Rand (1966)

[3] See Wollstein, (1969,) L and M Tannehill, (1993), Childs in Childs, (1994)—the first argument in this section of the present paper is essentially that of Roy Childs

[4] Rand (1965), p125 and p128

geographical area, for whatever rules of social conduct that may exist, there is no institutionalised means of enforcing them.

2) Institutions for enforcing whatever rules of social conduct there may be exist in a given geographic area, but they do not possess the power to enforce them exclusively. In other words, they do not prevent anybody who wants to, from establishing their own similar institution within the same given geographic area and enforcing what rules of social conduct there may be.

Notice that these examples leave open the question of whether there ought to be a single body of known, universally applicable rules of social conduct, or whether there be a mishmash of such rules, competing. This is because this issue is irrelevant to the question of whether there be an organisation that has an exclusive power to enforce these rules of social conduct or not, and so is irrelevant as to whether what Rand calls a government exists or not.

A refutation of libertarian anarchism must be a refutation of option 2).

Rand explained why the use of force was justified—because men must use their minds in order to live; and so they must have rights to use their mind, and act on their decisions; and so they have a right to defend these rights. In order for men to act rationally in a peaceful and civilised society force has to be kept from human relationships. This means that the use of force must be suppressed: People must be prevented from initiating force. Government can have no right except the rights that people have, since governments are nothing more than people, and so all people have the right to suppress initiations of force. This right, Rand hopes, would be delegated to what she called a government.

However, if anything, this account only justifies the use of force to suppress force. It doesn't tell us why an organisation should exclusively possess the power to do so. Hence, telling us why having the power to suppress the use of force is not enough to tell us why having a government is necessary. Why not have simply institutions able to enforce certain rules of social conduct prohibiting the use of force, instead of having an institution with the exclusive power to do so?

The anarchist argument against Rand's defence of government is essentially this:

1) The initiation of coercion and force is immoral. "The only proper function of the government of a free country is to act as an agency which protects the individual's rights, i.e., which protects the individual from physical violence. Such a government does not

have the right to initiate the use of physical force against anyone—a right which the individual does not possess and, therefore, cannot delegate to any agency. But the individual does possess the right of self-defence and that is the right which he delegates to the government, for the purpose of an orderly legally defined enforcement. A proper government has the right to use physical force only in retaliation and only against those who initiate its use."[5]

2) Government is an institution which maintains a legal monopoly on the retaliatory use of force in a given geographical area. "A government is an institution that holds the exclusive power to enforce certain rules of social conduct in a given geographic area… The fundamental difference between private action and governmental action—a difference thoroughly ignored and evaded today—lies in the fact that a government holds a monopoly on the legal use of physical force".[6] "This distinction is so important and so seldom recognised that I must urge you to keep it in mind. Let me repeat it: *A government holds a monopoly on the legal use of physical force*."[7]

3) But to maintain a legal monopoly on the retaliatory use of force, a government must initiate coercive force to exclude competitors. It is a logical possibility that other agencies or institutions in society can use force in a purely retaliatory or defensive manner, and therefore in a non-initiatory manner. Suppression of this use of force, then, would not be a use of force that is itself purely defensive or retaliatory, but "A proper government has the right to use physical force only in retaliation and only against those who initiate its use."[8]

4) Hence, to exist as a legal monopoly on the retaliatory use of force, a government must employ immoral means. A government is defined by its existence as a monopoly. Should competitors exist, this defining feature would be absent, and so the institution would cease to be a government. Therefore a government, in order to exist, must suppress its competitors, which means initiating the use of force.

5) Government is thus intrinsically immoral.

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[5] Rand (1967), p46-7
[6] Rand (1965), p125 and p128
[7] Rand (1967), 46
[8] Rand (1967), p46-7

6) Hence, Ayn Rand's pro-government position contradicts her basic ethics.

In short, an organisation dedicated to prohibiting the initiation of force must allow similar organisations—that is, organisations dedicated to prohibiting the initiation of force—to exist in the same geographic area. However, this would result in an absence of an organisation possessing the exclusive power to enforce certain rules of social conduct in a given geographic area, and so an absence of what Rand calls a government. It would thus be anarchism.

Rand said that "In a free society men are not forced to deal with one another. They do so only by voluntary agreement and, when a time element is involved, by contract." She believed this so strongly that she believed that government could only be just if it was voluntary, saying

> The source of the government's authority is "the consent of the governed." This means that the government is not the ruler, but the servant or agent of the citizens; it means that the government has no rights except the rights delegated to it by the citizens for a specific purpose.[9]

and,

> The principle of voluntary government financing rests on the following premises: that government is not the owner of citizens' income and, therefore cannot hold a blank check on that income—that the nature of the proper governmental services must be constitutionally defined and delimited, leaving the government no power to enlarge the scope of its services at its own arbitrary discretion. Consequently, the principle of voluntary government financing regards the government as the servant, not the ruler, of the citizens—as an agent who must be paid for his services, not as a benefactor, who dispenses something for nothing.[10]

and,

> … the government of a free society may not initiate the use of physical force and may use force only in retaliation against those who initiate its use. Since the imposition of taxes does represent an initiation of force, how, it is asked, would the government of a free country raise the money needed to finance its proper services?
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> In a fully free society, taxation—or, to be exact, payment for governmental services—would be voluntary. Since the proper services of a government—the police, the armed forces, the law

[9] Rand (1965), p129
[10] Rand (1965), pp137-8

> courts—are demonstrably needed by individual citizens and affect their interests directly, the citizens would (and should) be willing to pay for such services, as they pay for insurance.[11]

The trouble is that government, by Rand's definition, can never ever be voluntary. This is because government is an institution that excludes others from having the power to enforce certain rules of social conduct in a given geographic area. The result is that it forcibly prevents people from choosing not to delegate their right of self-defence to the government, and give it to somebody else. Rand's government, in order to be a government, must prevent people from either contracting other agencies to use legitimate force in that given geographic area, or prevent them from establishing such agencies. For this reason it cannot possibly pass the voluntarist test of legitimacy. Since, in order to remain a government, the government must maintain an effective monopoly and suppress competition, government initiates force and is compulsory, not voluntary. It coerces citizens into accepting government as the only arbiter of their disputes and enforcer of their rights. In what way could it meaningfully be said that citizens are delegating their right to defend themselves to the government, when the government coercively prevents them from choosing to delegate them to somebody else?

On top of this is the fact that anybody able to use force must be subject to controls that prohibit the initiation of the use of force, and this also means institutions charged with the power to enforce rules prohibiting force. Government, being the exclusive holder of the power to enforce certain rules of social conduct in a given geographic area, is therefore free from institutional restraint on its ability to initiate force. This is because nobody but the government can enforce rules against the initiation of force, and so nobody but the government can enforce these rules against the government!

Followers of Rand try to counter this fact by saying that government's actions have to be rigidly defined, delimited, and subscribed. They say that government needs to be controlled. Government's actions have to be rigidly "defined, delimited and subscribed" by whom? "Government has to be controlled" by whom? After all, if government is the institution for bringing the retaliatory use of force under objective controls, as opposed to simply being *an* institution for bringing the retaliatory use of force under objective controls, then there is no institution to turn to when the government uses retaliatory force outside of its objective standards, or even initiates it. Indeed, "If physical force is to be barred from social relationships, men need an institution charged with the task of protecting their rights under an objective

[11] Rand (1965), p135

code of rules," and this means an institution charged with the task of protecting men's rights against the government. If this institution is to protect people from the government, then it cannot also be the government. But if such an institution were to exist, though, the government would no longer be the institution for regulating the use of force, but would simply be an institution for regulating the use of force, amongst others. It would not have any exclusive power to accomplish this task, since others would also have this power. In short, it would not be a government.

Therefore,

a) Physical force ought to be kept from human relationships.

b) "A government is an institution that holds the exclusive power to enforce certain rules of social conduct in a given geographic area."[12]

c) "If physical force is to be barred from social relationships, men need an institution charged with the task of protecting their rights under an objective code of rules."[13]

d) Since government is exclusive and monopolistic in its nature, then were a government to exist there would be no institution to regulate government's use of force, retaliatory or otherwise.

Therefore,

e) Government ought not to exist. Whilst there ought to be an organisation with the power to enforce certain rules of social conduct, namely, to bring the retaliatory use of physical force under objective control, it ought not have exclusive powers to do this, but ought to allow other institutions to have this power, too, so that they can enforce rules of social conduct against it.

In other words, given Rand's definition of government, anarchism follows from the premise that "If physical force is to be barred from social relationships, men need an institution charged with the task of protecting their rights under an objective code of rules." This is because some institution must bar the use of physical force by government, but the government would cease to be a government, by definition, were such an institution to exist.

[12] Rand (1965), p 125
[13] Rand (1965), p127

3. Neo-Randian Objectivists

The anarchist argument against Rand does presume that the fact that a government, by definition, is the only supplier of legitimate force within a given geographic area implies that force has been illegitimately used to prevent anybody else from using legitimate force. A Randian may object, saying that the fact the government is the only supplier of legitimate force within a given area need not imply that force has been used to place the government in this position, on one hand, or that such a use of force is not necessarily illegitimate, on the other. And argument that it is not illegitimate, offered by Robert Nozick, will be examined extensively later. Here, I will consider arguments from the Randian philosopher, Professor Tibor Machan that the type of institution that a government is might also be a type of institution that libertarian anarchists could also believe is legitimate, so that minarchists and anarchists are possibly left defending the same institutions. Machan suggests that many minarchists might take dispute with the suggestion that a government *must* be coercive. Along with anarchists,

> They admit that throughout history, governments have been more or less coercive. But they contend that this is neither unavoidable nor necessary. Just as marriages could be free of major flaws, although few are, so too could governments be free of major flaws, including coercive policies like taxation of conscription or even banning secession.[14]

It strikes me as surely correct, that, important as they are, empirical observations of government failure and government committed rights violations are not condemnations of government *per se*. Of course, they allow us to say that, based on the preponderance of the evidence, the *likelihood* of a government that never violates rights, or gets away with violating rights, is tremendously low. However, such empirical based arguments would only establish it as contingently true that governments violate rights, not necessarily true. A minarchist could still oppose all existing government, and all probable government, whilst claiming not to be an anarchist, in that they do not think that governments are necessarily unjust, that they are not unnecessary evils, but may be necessary goods, at least in principle. This is, of course, so long as it remains unshown that governments are inherently rights violators.

So how could a minarchist show an anarchist that, in the process of ensuring that it remains the sole user of legitimate force within a given geographic area, a government remains non-coercive (doesn't violate rights)? Well, Machan suggests that there are monopolies that anarchist libertarians

[14] Machan (2006), p155

are perfectly happy with. His position is worth quoting at length, because we will need to break aspects of it down to examine in detail:

> As the Declaration of Independence put it, it is 'to secure these rights' that governments are instituted among men. But must there be some kind of insidious, rights-violating monopoly afoot were governments to proceed to carry out this task? Or might government be a monopoly of the benign sort we find in the provisions of all goods and services? If the term 'monopoly' is construed with sufficient narrowness, even a barber shop enjoys a monopoly (over the barbering done at its exact location); as does any grocery store, amusement park, apartment complex or a gated housing community (and the various services provided or 'bundled' within). Could government be a monopoly that just happens to have emerged without anyone forcibly imposing it?
>
> To obtain the services even of a competing barber shop, one needs to take the trouble to go to a location other than the one where the original shop is located. So it is with all other competing providers other than those that deliver their service or product, such as some pizzerias or plumbers. Is the government merely a larger monopoly of this kind? Or is its monopoly necessarily held coercively, by the violation of the rights of others who would also want to offer its services...
>
> Perhaps the most controversial question among those who want legal services provided solely for the protection of individual rights is whether governments need by nature be a *coercive* monopoly, in the sense of specifically banning competition—as is, say, the United States Postal Service's first class division—rather than a benign monopoly, like that of a privately owned apartment house or an air carrier (once airborne). In order for the USPS to retain all first-class mail service, a legal authority must prohibit anyone from offering an equivalent service, and they must have the power to enforce this prohibition. Such an enforced monopoly is coercive.
>
> But a monopoly or near-near monopoly is not coercive if it exists by virtue of overwhelming customer support—for example, Microsoft's dominance in the software industry. A privately owned apartment house is a *de facto* monopoly in the same way in which any particular ownership constitutes such a monopoly, especially to someone else who wants that item in particular but cannot have it, since it is now owned by another. Prospective homeowners find themselves in this position when the seller closes a deal on the 'perfect' house with another buyer. Owners of a good may set terms of use for others, by, say, evicting renters who fail to abide by the terms of the lease. A passenger air carrier becomes a *de facto* benign monopoly between ports of embarkation and disembarkation. While

> flying United Airlines from LA toe NYC, one has no access to competitors *en route* over Kansas.
>
> In short, some provision of service, may only appear to be coercively monopolistic. However, since customers are aware of this and prior to entering the exchange can easily seek out competitors who are free to enter the market, the apparently coercive monopoly is not in fact such even when the service being obtained is one provided for a long period of time. My suggestion is that becoming a citizen of a country may amount to (provisionally) consenting to such long-term provisions of rights protection from a given government.[15]

What should we make of this? Well, the Machan seems to be saying that government doesn't have to be a coercive monopoly; it could be one of these other types of monopoly. What are these other types of monopoly? Machan has given us a host of examples:

1) He mentions a barber shop: In this barbershop only a specific set of people can sell barbering services. All would-be competitors within this barber shop are forbidden from tending their services. Similar to this are grocers stores and amusement parks.

2) He mentions firms, perhaps like Microsoft, that possess a "monopoly" or "near monopoly" by virtue of overwhelming customer support: They get all the business, because everybody chooses to do business with them rather than an alternative.

3) He mentions a situation in which a person cannot switch to a competitor because competition is technically impossible: The example of a passenger plane, wherein a passenger cannot switch to a competitor mid-flight.

4) And he mentions owners of resources as monopolists of those things they own, such as homeowners.

Now, these are, admittedly, different accounts of monopoly, none of which, apparently, involve making X the sole provider of Y by violating the rights of anybody else that would otherwise provide Y. So, how can we address each, and Machan's over all argument?

Well, first of all, it is true that in the case of the barbershop, it is attractive to make comparisons with government: After all, competition is

[15] Machan (2000), 151-4

restricted—nobody may compete with the owner of that barbershop in providing barbering services within that given geographic area; and, not only that, but if you want somebody else to provide you with barbering services, you have to change geographic areas, just like you have to emigrate if you want someone other than the government to protect your rights. But, what makes this comparison attractive for minarchists is that both these aspects are *justified*; it is perfectly right that nobody else is allowed to provide competition within that geographic area, and it is perfectly justified that if you want somebody else's services, you should go elsewhere. The forcible prohibition of competition, in this case, is an example of justified force, legitimate force, even of protection of rights. Hence this example involves a situation in which it is perfectly legitimate to restrict competition, and doing so doesn't violate rights.

But what makes this forcible restriction of competition a rightful or legitimate use of force? Plainly it is that it involves enforcing people's property rights. Barber B doesn't have a right to compete with Barber A in Barber A's shop because Barber A's shop is Barber A's property. If Machan wants to use the same argument to justify a government's monopoly of the provision of legitimate force, then he has to be able to make a similar comparison: That legitimate-force-provider B has no right to compete with legitimate-force-provider A in legitimate-force-provider A's geographic area, because legitimate-force-provider A's geographic area is legitimate-force-provider's property. But surely such a claim cannot be made, since governments do not own the land that they claim jurisdiction over. So, it is perfectly true that competition within a given geographic area can be legitimately restricted, if that area is the property of the person restricting the competition. But that observation is of no use in defending government unless the government is the owner of the country it rules over.

The last type of monopoly listed, 4), is also an argument from legitimate force, trying to say that the use of force to restrict competition is legitimate. After all, nobody else has a right to compete with me in the sale of my house, and it is perfectly legitimate for me to use force to stop them. But, again, government's monopoly is surely not like this. The reason you can't compete with me in the sale of my house is that it is *my* house, my property, and you don't have a right to sell what is mine. Unless we are going to say that legitimate force is by definition force provided by a government (which is saying that all legitimate force by definition is provided by government, but not saying that all force provided by government is legitimate), then I can't see how we could say that legitimate force belongs to the government in the same way as my house belongs to me, and that only the government, then, has a right to sell it.

Both these arguments attempt not to deny that government has a monopoly, nor even to deny that it is a forcible or coercive monopoly, but that the coercion or force involved is *legitimate* force or coercion. In other words, they don't deny that competition is prohibited, but point out that there are cases under which competition can be *legitimately* prohibited. I have countered these cases, not by denying that these are instances of legitimate prohibition of competition, but that government's prohibition of competition of the legitimate use of force (note, prohibition of a, by definition, legitimate activity) is not the same type of prohibition. Machan *does* have an alternative account as to why the government's prohibition of competition might be legitimate, and I shall examine this shortly.

The second type of monopoly that Machan suggests government might be could be called a "market based monopoly." The idea is that if a firm gets all the business in its industry simply because customers prefer it to any other, then it is a monopoly, and has gained this status legitimately, without violating rights. So, if everybody decided that they wanted the government and nobody else to provide protection against and punishment for the violation of their rights, then the government would have a monopoly on the legitimate use of force, and yet its having this would not be a violation of rights.

Of course, nobody has made such an agreement, but Machan is not attempting to say that existing governments are legitimate; he is only trying to say that governments *could be* legitimate. Now, if this arrangement *is* monopolistic, then Machan will have achieved his goal of showing that really anarchists and minarchists are quite happy to accept the same thing, and really do both support the same things. After all, various market anarchists *have* said that it doesn't matter if a protection firm gets all the business in its industry. For instance, Benjamin Tucker wrote,

> Under the influence of competition the best and cheapest protector, like the best and cheapest tailor, would doubtless get the greater part of the business. It is conceivable even that he might get the whole of it. But if he should, it would be by his virtue as a protector, not by his power as a tyrant. He would be kept at his best by the possibility of competition and the fear of it; and the source of power would always remain, not with him, but with his patrons, who would exercise it, not by voting him down or by forcibly putting another in his place, but by withdrawing their patronage.[16]

Machan would surely, upon reading this passage from Tucker, say that Tucker is simply advocating a government, albeit a voluntary one, since it is

[16] Tucker (1897 (1969)), pp326-7

an institution that is the only supplier of legitimate force in a given area. However, I think Machan is simply wrong to refer to firms that all the business in their industry as monopolies. In fact, in a foot note to the relevant chapter in *Libertarianism Defended*, Machan writes "This is the kind of monopoly Robert Nozick envisions as the dominant legal authority."[17] But Nozick himself says the dominant protection agency falls short of being what Machan calls a government, precisely because it "lacks the requisite monopoly over the use of force" (see pp22-5). The issue is not that the dominant agency is the only provider of legitimate force within its territory, but whether or not anybody else is prevented from competing with it. So long as they can, it faces indirect or potential competition, which governments, typically, do not. Later on, when examining Nozick's position in more detail, I discuss precisely why a protection agency or arbitration firm that gets most or all of the business should not be considered a government, precisely due to the absence of the requisite monopoly powers.

We should not even be convinced by Machan's argument as to *why* he thinks a single provider would arise:

> [Government] is a classic natural—though not coercive—monopoly, and must be a monopoly in its capacity as ultimate arbiter if it is to maintain the internal integrity required for administration of justice. The same services provided outside the legal framework would not be as valuable without provisions for due process of law and at least implicit reliance on a 'final authority' which could definitively resolve any persistent dispute, if necessary.[18]

However, firstly, the need for a "final authority" that definitively resolves any persistent dispute does not, by itself, imply that everybody needs the same "final authority." The final authority in a dispute between Tibor Machan and Richard Garner does not need to be the final authority in a dispute between Richard Garner and David Kelley, and the final authority in a dispute between Richard Garner and David Kelley does not need to be the same final authority in a dispute between Lew Rockwell and Ron Paul. It is an example of the fallacy of composition to say that just because everybody needs a final authority to resolve their persistent disputes, that there is a final authority need everybody needs to resolve their disputes. It is much akin to saying that because everybody likes at least one TV program, there is at least one TV program everybody likes. So it may be true that the services of a protection agency that has not reached mutual agreements with other agencies that the courts they use in disputes with each other will be considered final authorities may not be as valuable as the services of those

[17] Machan (2006), p160, n13
[18] Machan (2003), p34

that have, but that is no reason to suppose that a monopoly will arise, just a reason to expect that firms will abide by court rulings.

Further, due process can be assured privately. If I think that someone should not punish me without first having established, to the best ability, my guilt, under clear rules of evidence, etc. then plainly I want protection against their doing so. This protection I can hire another firm to provide.

Machan's third type of monopoly is a "nature based" or "technical monopoly," under which there is no competition, not because the monopolist prevents it, but because it is technically impossible. So, in Machan's example, it is impossible for airline company A to compete for the customers of B when those customers are in one of B's planes, mid air. This seems true, but is, or could, a government's monopoly be like this? The first point to take note of is that *if* the government *is* a technical monopoly, it cannot be a market based monopoly. Airline B retains the business of its customers mid-flight, not because they prefer B's services to those they expect to get from A, and think purchasing them is a better use of their money, but because they cannot get A's services whilst they are mid-flight. So if, analogously, consumers of the services of government B simply cannot get competing services of A, not because they are prevented by B, or because B prevents A, but because it is simply impossible, then the customers of B are not staying the customers of B because they prefer the services to those they could get from A.

Of course, Machan is not saying that governments *are* either market based "monopolies" or technical monopolies, he is only saying that since each monopoly can exist without violating rights, then so long as government is such a monopoly, government can exist without, inherently, violating rights (its mere existence doesn't involve violating rights). But this argument only works if government *could be* such a monopoly. I have already rejected the market based argument (and do so in more detail when discussing Nozick). What of the nature based monopoly?

Here Machan appeals[19] to an argument put forwards by another Objectivist philosopher, David Kelley. The claim is that the very concept of a free market presupposes the pre-existence of a government; that the notions are not conceptually separable, and so we cannot talk coherently about a market existing without a government. This includes a free market on which protection and arbitration services are offered, perhaps in competition with that institution calling itself government. So Machan writes, "Such market institutions as corporations, partnerships, private businesses—and even plain

[19] Machan (2006), p152

one-shot trades—presuppose a background of law-enforcement, including protection of property rights and the integrity of contracts."[20]. And David Kelley writes,

> A second failure [of arguments for libertarian anarchism] concerns the nature of the market itself. It consists in the assumption that the market would exist without the government. Anarchists wish to see the services presently offered by the government offered instead by private "protection agencies" competing on the free market.... We must now question the assumption that in the absence of governmental institutions outside and protecting the market, a free market would even exist for protection agencies to offer their services in.
>
> The free market is one in which all exchanges are voluntary. A person can trade his time, effort, money, or goods for those of another only if the latter is willing. The economic laws of a free market are true only when or to the extent that this condition obtains. Consider, for example, the law of supply and demand. What would happen to prices if one did not have to pay for a good at a price acceptable to the seller, but could take the good by force, giving nothing in exchange? There is no way of telling. The law of supply and demand does not apply to thieves. The economic analysis of the market assumes that the use of force does not occur, that all exchanges are mutually acceptable to the parties involved. It assumes, in effect that the cost of using force is infinite.
>
> The assumption is legitimate, for in free market theory there exists an institution outside the market which protects the rights of individuals, and therefore ensures that the principle of voluntary exchange will be observed. This institution may work well or badly, but its working well or badly is not a subject of economic law; it is the concern, rather, of political and legal theory. The government codifies and enforces the rules of the market; it establishes a framework of rights and liberties that men must respect in action. Economic theory then tells us what happens as individuals act within that framework to acquire the things that they value. Economic laws are to political laws as principles of strategy are to the rules of the game.[21]

It is worth noting that the claims here are unclear. After all, the law of supply and demand *does* apply to thieves, since they want to fence their goods. Likewise, with the development of what is called Public Choice Theory, the economic theory *has* been used, with differing degrees of success, to explain

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[20] Machan (2006), p152

[21] David Kelley, "The Necessity of Government," *The Freeman*, April 1971, Foundation for Economic Education, taken from a website

how governments operates, and, more importantly, why it works well or badly. Public Choice Theory has been of great use to libertarians, in fact, when it comes to assessing policy proposals.

The concept of a free market could just be the concept of a market free from government intervention. This seems plainly conceptually compatible with anarchism. But Kelley and Machan seem to be saying something more, that a free market seems to be a market in which participants (and non-participants) are secure in their rights, for instance. The fact that voluntary exchanges presuppose protection of parties, and their resources, should they choose not to make an exchange, for instance, does not imply that such protection has to comes from a government. If a fence takes from a burglar the loot the burglar wants to sell, the fence will be likely to face retribution, possibly even harsher than that which would be imposed by a government were the fence stealing somebody's legitimate property. Likewise, if the fence failed to pay a burglar the pre-agreed amount of money for his loot, again, we would expect the fence to face retribution—the burglar would beat him up, or whatever.

In less shady circumstances, just take international trade. This involves people from one legal system trading with people from another. It is less and less the case today, but at least was once true that they did so without some overarching governmentally created legal system.

There are, however, further philosophical problems with this argument against anarchism, and these relate explicitly to its role as an argument in defence of a government. Machan writes "government is logically or conceptually a pre-market institution. It is required *for* the maintenance, elaboration and protection of the individual, including private property and rights"[22]. But this seems tantamount to saying that we cannot have clear, elaborated and protected property rights without government. I am not going to question this now, though I doubt it, but see what it implies for the Objectivist government: Rand, for instance has said that government should be voluntary, that we (ought to) delegate rights of self-defence to this government, and that a proper government is voluntarily funded. Machan has also argued likewise, that government should be voluntarily funded, suggesting fees for services, lotteries, appeals for contributions, amongst various methods[23].

However, if a government is to be funded voluntarily, say, from donations, then it is presumably my property that I should be donating, not somebody else's, so, prior to any such donation, we need some means of

[22] Rand (2006), p155
[23] Rand (2003), pp27-37

clearly defining what belongs to whom. Likewise, if I hire the government for a specific purpose, paying a user fee or subscription, then I need prior assurances that my contracts will be honoured and enforced. It seems to me that all the prior requirements Machan and Kelley say are necessary to be in place before we can say that a free market exist, *also* have to be in place before a government can be voluntarily funded, by whatever means. If a voluntary exchange presupposes enforced property rights and contracts, then that is as much true when the exchange is between myself and my milkman, myself and my protection agency, or myself and the government, surely. Or, in other words, you cannot have a legitimate government, if such a thing is to be voluntary, without there being a pre-existing body of enforced law defining and enforcing people's rights. The notion of law must be conceptually prior to that of a legitimate government. But if this is the case, then the same argument that Machan and Kelley use to try to disprove market anarchism undermines their voluntary state. A voluntary government cannot exist until there is some means of clearly defining people's property rights, and contractual obligations, and enforcing each (against the government, or anybody else). Either some previously existing unjust government should do this job, thereby tainting the process, or it should be done in a non-governmental context, i.e. arising from a functioning anarchism.

Having covered Machan's views on monopoly, I have dismissed his claim that governments could be "market based monopolies," and his idea that governments could be monopolies by virtue of competition being technically impossible. I have also countered one variant of his argument that a government that actively prevents competition is forcibly suppressing competitors, but using legitimate force when it does so. However, there is another argument that Machan and other followers of Rand make that also tries to show that the suppression of competition is legitimate. This argument is essentially similar to that furthered by Nozick, to explain why the move from a dominant protection agency to an ultra-minimal state is justified, so some of what I say when I discuss Nozick will relate to what I am about to say here.

As an example of this type of argument, here is David Kelley:

> ... anarchists complain that governments are immoral because they initiate, or would initiate, the use of force against anyone forming a rival "protection agency." Now it is false that this would be immoral: a government is justified in preventing any private power designed to exercise coercion, because such a power is a threat to the rights of its citizens, even if the power is never actualized. ("Necessity of Government")

But this argument is bizarre in that Kelley previously makes a more accurate summary of the anarchist position, saying "An anarchist is one who wishes to place coercion, the use of force and the ability to use it, on the market. The use of force to prevent the initiation of force against its citizens is the basic function of government, and the essence of 'free market' anarchism is to hold that this service should be on the market, like any other." In other words, whatever an Objectivist thinks the government should be able to do, the anarchist thinks other actors, on the market, should also be allowed to do. Kelley would presumably not say that "non-rights violating force" when used by a private power "is a threat to the rights of citizens"? It is not immediately obvious why a use of force by the government may not be a threat to the rights of citizens, but a similar use of force by a private party becomes such. A government is an institution with a monopoly on the legitimate use of force; an absence of government is the case when people compete in the provision of legitimate force. So an anarchist is doing nothing more than say that people who are not the government should also be able to use legitimate force. He is not saying that people should be able to use illegitimate force. He is not saying that illegitimate force should be allowed to compete against government provision of legitimate force. So it would appear that Kelley is saying that legitimate force, when used by a "private power" threatens the rights of citizens.

All Kelley has done is say that if a use of violence threatens the rights of citizens, then it would be a legitimate use of force to prevent people using such violence. He has not explained why it should be a government that does this preventing, or why it should *only* be the government that should do this. Moreover, he has claimed that the use of force by "private powers" threatens the rights of citizens, but why can't an anarchist simply say that government force also threatens rights? The government, when it uses violence, may violate rights. That seems fairly uncontroversial. So surely, if the fact that such a use of violence threatens rights when performed by a "private power" justifies coercively suppressing the "private power," then why couldn't the "private power" do likewise to the government?

Editor *The Objectivist Forum* Harry Binswanger is another Objectivist that has attempted to argue that a government's suppression of competition is a justified use of coercion:

> A proper government is restricted to the protection of individual rights against violation by force or the threat of force. A proper government functions according to objective, philosophically validated procedures, as embodied in its entire legal framework, from its constitution down to its narrowest rules and ordinances. Once such a government, or anything approaching it, has been established, there is no such thing as a "right" to "compete" with

> the government—i.e., to act as judge, jury, and executioner. Nor does one gain such a "right" by joining with others to go into the "business" of wielding force.
>
> To carry out its function of protecting individual rights, the government must forcibly bar others from using force in ways that threaten the citizens' rights. Private force is force not authorized by the government, not validated by its procedural safeguards, and not subject to its supervision.
>
> The government has to regard such private force as a threat—i.e., as a potential violation of individual rights. In barring such private force, the government is retaliating against that threat.
>
> Note that a proper government does not prohibit a man from using force to defend himself in an emergency, when recourse to the government is not available; but it does, properly, require him to prove objectively, at a trial, that he was acting in emergency self-defense. Similarly, the government does not ban private guards; but it does, properly, bring private guards under its supervision by licensing them, and does not grant them any special rights or immunities: they remain subject to the government's authority and legal procedures.[24]

Note, straight off, that his argument seems to depend on there being a "proper government" or something approaching it. Absent such a thing, and Binswanger would probably admit that present governments exceed the bounds of "proper governments," why then should a private company not be entitled to compete?

As with Kelley, Binswanger claims that "private force" is "a threat," and so government is using legitimate force by retaliating against that threat. But this just means that using force to prevent a threat to somebody's rights is a legitimate use of force, it doesn't tell us why anybody not the government should be prevented from performing this legitimate activity.

We can go further, and simply paraphrase Binswanger: "Government force is force not authorized by a private protection agency, not validated by its procedural safeguards, and not subject to its supervision." Why shouldn't this protection agency be just as legitimate in viewing force used by the government as a threat, and so just as legitimate in suppressing it?

Binswanger says that the a proper government shouldn't just prevent a person who has no recourse to government, say in an emergency situation, from using force to protect himself (how could it, without also being available for him to recourse to?!). But "it does, properly, require him to

[24] Binswanger, "Q and A," *The Objectivist Forum*, August 1981, taken from a website.

prove objectively, at a trial, that he was acting in emergency self-defense." But why should an anarchist object to that? They don't—in fact, they advocate that private agencies *should* have to prove their actions are just or legitimate. For instance, the Tannehill's, in *The Market for Liberty*, asking what would happen in an anarchist society, if a defense agency, called Old Reliable, "acting on behalf of a client who had been robbed of his wallet, sent its agents to break into and search every house in the client's neighbourhood," and, further, what if "the agents shot the first man who offered resistance, taking his resistance as proof of guilty." The Tannehills point out that Old Reliable's actions have "put it in the precarious position of being a target of retaliatory force"[25]. It is plain and obvious, to me at least, that, in an anarchist society, private police will have to be able to prove that their actions are justified if they don't want to be punished by a protection agency hired by their victim, and that means prove to their victim's protection agency.

Likewise, Binswanger writes,

> The attempt to invoke individual rights to justify "competing" with the government collapses at the first attempt to concretize what it would mean in reality. Picture a band of strangers marching down Main Street, submachine guns at the ready. When confronted by the police, the leader of the band announces: "Me and the boys are only here to see that justice is done, so you have no right to interfere with us." According to the "libertarian" anarchists, in such a confrontation the police are morally bound to withdraw, on pain of betraying the rights of self-defense and free trade.
>
> Regarding the purported betrayal, one can only respond: if this be treason, make the most of it.
>
> In fact, of course, there is no conflict between individual rights and outlawing private force: there is no right to the *arbitrary* use of force. No political or moral principle could require the police to stand by helplessly while others use force arbitrarily—i.e., according to whatever private notions of justice they happen to hold.[26]

But this clearly evokes a straw man. In the example, police certainly can interfere if "justice is" not "done" by "me and the boys." Anarchists are not advocating that no use of force should go unpunished. They are saying that there should be competition in the provision of legitimate force, and that no single institution has a right to exclusively provide such legitimate force, or ensure that the use of force is legitimate. So the police can prevent "me and the boys" from going "to see that justice is done" if our actions are

[25] Tannehill, (1970 (1993)), p110

[26] Binswanger (1981)

detrimental to justice actually being done. And, other people than the police can also do it.

Further, Binswanger says that "there is no right to the *arbitrary* use of force," and that no moral principle can require the police to stand by whilst others use force "according to whatever private notions of justice they happen to hold." But is this what an absence of a monopoly on the legitimate use of force implies? Is saying that anybody, government or not, should be allowed to use whatever force is legitimate the same as saying anybody should be allowed to use whatever force they want? Plainly not. Anarchists are perfectly happy with the government, or anybody else (aside from the fact that if anybody else does it, there will be no institution that really is "the government") preventing private protection agencies, or anybody else, using *illegitimate* force, or even compelling them to prove that their use of force *was* legitimate. But anarchists also hold that private protection agencies should (a) be able to do the same to the government, and (b) the same to each other.

To this end, Roy Childs, Jr. the author of the anarchist argument these Objectivists are supposed to be trying to answer could not be clearer:

> Now, [the Objectivist government having allowed a private agency to compete with it] if the new agency should in fact initiate the use of force, then the former "government"-turned-marketplace-agency would of course have the right to retaliate against those *individuals* who performed the act. But, likewise, so would the new institution be able to use retaliation against the former "government" if *that* should initiate force.[27]

Again, Binswanger is missing the point that anarchists are simply saying that people other than the government should be able to do nothing more, nor less than what he says the government should do. They are pointing out the very real dilemma that it needs to be shown why, if X is a legitimate activity for the government, it is not the case that X is also a legitimate activity for private protection agencies or other would be competitors against the government. Instead, Binswanger is saying that the anarchist claim that rights are violated if the government prevents anybody doing X is false, because preventing people doing Y is not a violation of rights. It is not obvious that X is a case of Y (especially when X is "the legitimate use of force" and Y is "the illegitimate use of force." Here Y would surely be a case of not-X, and it is logically impossible for something to be X and not-X simultaneously), and even if X is a case of Y, it would surely follow that it is not a violation of rights to prevent the *government* doing X, on the grounds that X is a case of Y and preventing Y doesn't violate rights, as much as it is

[27] Childs (1994,) p148

true that the government preventing a private agency doing X doesn't violate rights.

Another of Ayn Rand's arguments that many writers have made much of is this:

> The use of physical force—even its retaliatory use—cannot be left at the discretion of individual citizens...
>
> The retaliatory use of force requires *objective* rules of evidence to establish that a crime has been committed and to *prove* who committed it, as well as *objective* rules to define punishments and enforcement procedures. Men who attempt to prosecute crimes, without such rules, are a lynch mob. If a society left the retaliatory use of force in the hands of individual citizens, it would degenerate into mob rule, lynch law and an endless series of bloody private feuds.[28]

Aside from a grievous collectivist error here (retaliatory force will always be in the hands of individual citizens, because individuals are all there are—even if some of them are members of an organisation called "the government," they are still individuals, like the rest of us, and these individuals, not some separate entity called the government, will be using retaliatory force), though, anarchists can surely cheer these words. Why? Because there is nothing here that an anarchist need dispute. If Rand is saying anything here, she is saying that it is OK to use force to prevent even the supposed retaliatory use of force, when such retaliatory force is conducted outside of clear, known, and just rules of evidence, without proof of guilt, and rules defining punishment and enforcement. Or, in other words, she is saying that use of force A is legitimate in order to prevent use of force B. Anarchists, though, are perfectly happy accepting that some uses of force are illegitimate, and so nobody should be allowed to do them, and so other uses of force are legitimate when they prevent the former. They accept that use of force A may be legitimate if it prevents use of force B. They think that if use of force A is legitimate for one group of people, it is legitimate for all groups of people. So if protection agency A attempts to use retaliatory force, but doesn't abide by "*objective* rules of evidence to establish that a crime has been committed and to *prove* who committed it, as well as *objective* rules to define punishments and enforcement procedures" the "government"-turned-market-place-agency is entitled to prevent or punish private protection agency A... but so is private protection agency B, or C, or D, etc. etc. If such prevention does not constitute a violation of rights, then nobody is violating rights when they prevent such enforcement, so the prevention is permissible,

[28] Rand (1965), pp127

no matter whom it is done by. But, further, if the government tries to use retaliatory force without abiding by "*objective* rules of evidence to establish that a crime has been committed and to *prove* who committed it, as well as *objective* rules to define punishments and enforcement procedures," then the anarchist says that the private agency can prevent or punish the actions of the government, on precisely the same grounds that Rand says that the government can prevent or punish the actions of the private agency.

Beyond this, we are left with a situation under which all force is merely retaliatory or defensive force, conducted according to "*objective* rules of evidence to establish that a crime has been committed and to *prove* who committed it, as well as *objective* rules to define punishments and enforcement procedures," but provided to individuals by multiple different agencies that individuals can patronise, each on its own merits, as they prefer, regardless of where they live or regardless of their geographic area. In other words, it is logically possible that there could be an absence of a monopoly on legitimate force even in a context in which such rules existed and were observed or enforced. After all, a government, as Rand said, is "an institution that holds the exclusive power to *enforce* certain rules in a given geographical area." Those rules may include "*objective* rules of evidence to establish that a crime has been committed and to *prove* who committed it, as well as *objective* rules to define punishments and enforcement procedures." But that just means that if there is no institution that exclusively enforces these rules, that is, excludes others from doing so too, then there is no government. The existence of the rules remains, so the need for the rules does not logically translate into a need for a government.

Tibor Machan concludes,

> Thus it seems that both the traditional conception of a homogeneous country and free and open competition [by immigrating and emigrating] could be secured, satisfying—one can always hope—the demands of both minarchists and 'anarchists' among libertarians. 'Anarchists' would have to concede the necessity of a robust ultimate arbiter in matters of legal enforcement; minarchists would have to concede that many forms of defence-service competition could coexist within a single regime if that regime (government) provides a means of that ultimate arbitration.[29]

This leaves us, though, in a situation not much different from that advocated by John Hospers, whose views I will examine next, and which I ultimately show are not different from free-market anarchism, since they allow competition in the provision of legitimate force. Perhaps this is what

[29] Machan (2006), p159

Machan means when he says that minarchists and anarchists advocate the same things, but I think he is just mistaken to think that there is a government in this scenario. The presence of "robust ultimate arbiters" doesn't prove that there is a government, since there could be any number of such ultimate arbiters, one for every pair of disputants, maybe one for every dispute, and anybody can set themselves up as an ultimate arbiter so long as they can convince people to bring their disputes to them. Even if there is only one ultimate arbiter, so long as competition is allowed, again they will not be a government in any recognisable sense.

4. John Hospers

If you were to ask somebody in a philosophy department who the most widely read libertarian philosopher in Britain was, they would be likely to say "probably Robert Nozick." However, they could well be wrong. The answer is more likely to be "probably John Hospers." His textbook, *An Introduction to Philosophical Analysis* has been used widely in Britain, in various editions, since its publication, and it was how I was first introduced to his works. In fact, in was under his editorship of *The Personalist*[30] that Nozick had a forum for some of his first writings on libertarianism. Unfortunately, at least in the UK, Hospers is forgotten as a libertarian thinker. This is tragic, since he holds a historic position in the history of the movement, as the US Libertarian Party's first presidential candidate in a campaign that saw his running mater, Tonie Nathan, become the first woman in American history to receive an electoral vote.

Hospers' selection as candidate was influenced by the fact that he had written a book providing a lengthy account of just what libertarianism was, as a philosophy and a political position. In *Libertarianism*[31], he expounded an extreme and radical version of non-anarchist libertarianism of a variety that Nozick might have called "ultraminimal statist." In his "free society" there would be no welfare state, but private charities would support those who really had no alternative. There would only be private utilities. Roads would be privately owned. There would be no compulsory licensing or inspection, but enforcement of laws against fraud coupled with private consumer reports and certification. Conservation would be accomplished by private ownership of the resource to be conserved, and law suits against pollution. There would be no government money supply, but private minting of coins. There would be no government provision of education or schooling, but private schooling.

[30] 1968-82

[31] Hospers (1971), all further quotes from Hospers are taken from the 2007 edition of this book and so are included in the text.

Most importantly, though, it would be a taxless society. The services that government provides, it might do so for a fee, for instance: If you want the contracts you form to be enforced in the courts, you pay a fee on each contract. If you want the police to protect you, you pay them a call out fee, or a subscription, etc. User fees would pay for government services. Otherwise, government could be funded by donations. Probably some combination would arise.

So, it can be seen that Hospers' libertarian society would be radically different from today's society. But would even as much government as he allows for be justified in existing? Personally, I am of the opinion that whilst Hospers thinks he is defending government from libertarian anarchist criticisms, he is left with something that falls short of being a government as he defines it. This would make his libertarianism actually an anarchistic variant.

The first stage in examining John Hospers' argument for the state is to see exactly what he means by a state, or government. Once we have seen this, we can tell what an absence of a state or government as he defines it may entail. Early on in his book Hospers' writes,

> The feature that distinguishes government from all other institutions ... is that *it operates by the use of force and the threat of force*—that is, by coercion, and that this system of coercion includes everyone in the land. (It is, of course, legalized coercion: The Mafia also operates by force, but illegal force—and one is not compelled to belong to the Mafia.) The government of a nation has a *monopoly of legalised physical force* within the defined boundaries of that nation. (A nation in which there are two competing armies within the same nation is in a state of civil war.) Government's distinctive function, within the geographical boundaries of the nation, is to pass laws that will be binding on everyone and to enforce them. (p14)

Key features can be identified, then: Firstly, the inclusivity of government—everyone in the land comes under its "system of coercion." Secondly, the familiar one, the monopoly of legalised force within that nation. Thirdly, reflecting both these features, government's role to pass laws that are binding on everybody and enforce them. One has to wonder, at this stage, about laws that are not the product of the legislature—judicial rulings, for instance. I suppose that, if the judiciary is to be seen as a branch of government, then this still fits the latter feature of Hospers' notion of government.

One could already get a picture of what a society or nation without a government would be lacking: If there was no organisation that involved everybody in the land under a system of legalised coercion, monopolised

legalised physical force within the boundaries of the nation, created laws that were binding on everybody in the land, or enforced those laws, then there would be no government, and consequently there would be anarchy. Or, in other words, under anarchy, there could be organisations that created laws for some of the people in the land, but not all of them, or created laws binding on everybody but did not enforce them, or did not monopolise the use of physical force. Such institutions would not constitute governments in terms of this preliminary attempt to define governments.

Later, in the book, in the actual chapter considering the position of anarchistic libertarians, Hospers again defines government:

> A government possesses exclusive jurisdiction over a certain geographical territory, and it exercises a monopoly on the use of force within a geographical area. (p419)

A jurisdiction is the authority given to a legal body to deal with legal matters, and to pronounce or enforce legal matters. So if nothing possesses an exclusive jurisdiction within a geographical area, then there is no government. Likewise, if nothing exercises a monopoly of force within a given area, then there is no government. And that is the crucial point, since it implies that if many different users of force exist in that area, then there is no government. It is crucial, because Hospers then goes on to say,

> In a libertarian society, men would be free to engage the services of protective agencies; but when such agencies resorted to force against those who initiated force, *they would have to be prepared to justify their actions before the law*. The matter would not be left to their personal discretion. Force is too dangerous a thing, even in its retaliatory use, to be left to the whims of individuals. A system of laws, published in advance and knowable to all, is required to regulate the use of force, if men are to enjoy any sort of security in their social existence. (p419)

The trouble for Hospers is that an anarchist could agree with what he says here entirely, since it is plain that, even if all protective agencies had to defend their actions before the law, where these protective agencies are allowed to compete against the government, no monopoly on force exists, and so no actual government exists. In other words, the presence of a system of law, binding on all, is not sufficient for us to say a government exists. Indeed, such a rule of law is not even a necessary feature of a government, since the rule of law has not always existed under all governments. What is both necessary and sufficient for us to say that an institution exists that can be called a government is that it monopolises the use of legal force within a given geographic area. This means that in a society where legal force is provided only by freely competitive protective agencies, even if they are

"prepared to justify their actions before the law," then there is no government. The definition of government Hospers has given us implies at least the logical possibility of a rule of law coexisting with anarchy, the absence of government.

This issue becomes more clear if we look at Hospers' response to one of the anarchist arguments against Ayn Rand. Hospers first summarises the argument, supposing a situation in which "individuals by the thousands start hiring their own guards and body guards, and subscribing to private protection agencies" in preference over the government provided police forces. The question is, what would be the attitude of the government to this situation. And here Hospers makes a concession to anarchists well worth quoting:

> If the government says no, this is not alright, it will have to *initiate* the use of force to stop the private protection agencies from doing their job. And the moment this happens, it is the government, not the individual, that will be initiating the use of force against those who have used none against it. It will now be the government that is violating the rights of individuals. (p425)

So, we have an agreement from Hospers that were the government to prevent private protection of rights, then it would be violating rights. But what if the government permitted competition in the realm of protecting or enforcing rights, in providing legitimate force? Well, then, as Hospers expresses it, the concern is that, "as one private agency after another takes over its function" government "may slip out of business entirely." But this might misconstrue the anarchist position, which is not that if the government allows competition in the provision of its most basic function, that of providing legitimate force, the concern is not that it might then go out of business, but that it then would not be a government, or state. It would simply be another firm competing in an industry of private protection providers, no more entitled to call itself "the government" or "the state" than any other supplier in the industry.

So what is Hospers' response to this anarchist argument, given that he has already conceded that preventing private competition would be an initiation of force and violation of rights? Well, he claims that actually allowing this competition, even if it means that all legitimate force is provided only by competing private suppliers, is no problem to the limited government libertarian:

> If all police became "private police" in the manner suggested, this would still be no threat to the limited-government libertarian as long *as they all enforced the law of the land*, the scope of these laws being

> limited of course to the protection of the individual against the use of force.
>
> Even if all police protection came to be by voluntary subscription, the police would still have to obey the law of the land and not simply their private whims or the whims of the people who hired them—so says the limited-government libertarian. Law, he says, is necessary for any form of social organization. (pp425-6)

The trouble is that, in this case, the limited-government libertarian is not actually responding to the objections of the anarchist. The anarchist libertarian may well not be objecting to the idea that all police should have to obey and enforce "the law of the land," but to the idea that the government should monopolise the rightful use of force—in other words, that the government should be the only institution that gets to enforce the law of the land, or to ensure that the police obey it. Since the scenario Hospers has painted is a picture of multiple different forms of "private protective agencies," each in their different ways, providing legitimate force on behalf of voluntary subscribers, rather than of a single organisation doing this, or licensing others to do it, the anarchist can be happy with this scenario, regardless of the fact that agencies enforce a single law of the land, and are constrained to obey that same law (presumably by other agencies). The picture is, quite simply, of a stateless, or governmentless society, in spite of the presence of a "law of the land."

That an anarchist might be perfectly happy with the presence of a single law code binding on everybody, so long as there is no institution with a monopoly on the use of force or an exclusive jurisdiction is a fact Hospers should be well aware of. After all, both in his discussion of anarchist libertarianism, and in other sections of his work, he cites Murray Rothbard's book *Power and Market*. But in this work, in a foot note to the chapter on how defence against person and property might be provided in "the complete absence of a State apparatus or government," Rothbard provides a footnote on the nature of law in such an environment[32]. More tellingly, though after

[32] Rothbard writes:

> The Law Code of the purely free society would simply enshrine the libertarian axiom: prohibition of any violence against the person or property of another (except in defense of someone's person or property), property to be defined as self-ownership plus the ownership of resources that one has found, transformed, or bought or received after such transformation. The task of the Code would be to spell out the implications of this axiom (e.g., the libertarian sections of the law merchant or common law would be co-opted, while the statist accretions would be discarded). The Code would then be applied to specific cases by the free-market judges, who would all pledge themselves to follow it.

Power and Market, Institute of Humane Studies, 1970, p267, note 4 to page 6.

Hospers had published the manifesto for libertarianism that I am examining, Rothbard wrote

> Furthermore, law and the State are both conceptually and historically separable, and law would develop in an anarchistic market society without any form of State. Specifically, the concrete *form* of anarchist legal institutions—judges, arbitrators, procedural methods for resolving disputes, etc.—would indeed grow by a market invisible-hand process, while the basic Law Code (requiring that no one invade any one else's person and property) would have to be agreed upon by all the judicial agencies, just as all the competing judges once agreed to apply and extend the basic principles of the customary or common law. But the latter, again, would imply no unified legal system or dominant protective agency. Any agencies that transgressed the basic libertarian code would be open outlaws and aggressors...[33]

So, at this stage, it is plain to see that Hospers has not refuted the libertarian anarchist critique of the state or shown how the existence of limited-government is reconcilable with libertarianism. In fact, he has agreed that were a limited-government to prevent competition with itself, it would thus be initiating force, and so such competition should be permitted.

It is worth pondering one possible come back defenders of limited-government libertarianism may use as a comeback. Hospers, as we have noted, admitted that preventing the private, competitive provision of legitimate force would require that the minimal state initiates force and thus violates rights. However, what if the state simply confined itself to acting like a licensing agency for private protective agencies? It could grant licenses to those that constrained themselves by a certain set of legal rules—Hospers' "law of the land"—whilst using coercion to put out of business or override those that operate without licenses, or break these legal rules. Would such a scenario save Hospers from the anarchists' objections? I think not. The first problem is why should it get to use force to put out of business all those agencies that are unlicensed and yet operate in conformity to the legal rules? They are following "the law of the land" when they provide legitimate force, and their only offense is not having successfully applied for permission to do so from the limited government. They have not violated rights or initiated force, so putting them out of business for merely not having a license would be unjust.

Secondly, and more importantly, though, this suggestion just knocks the anarchist objections back a level. Sure, the licensing authority would allow competition in the task of enforcing the law of the land, but what about in

[33] Rothbard (1977), p48

the task of approving licenses or suppressing those firms that broke the legal rules? What is being proposed is a that there can be a variety of competing protection agencies, but *one* of these agencies takes on the job of forcing all others to conform to the law of the land. But is this agency the *only* agency allowed to do this within a given geographic area? If not, then presumably we still lack a government since we still lack a monopoly on the use of legitimate force. What if this licensing authority did prevent new entrants into *this* field, and so functioned as a second order monopoly that permitted competition in protecting rights, but not in the task of certifying or licensing protectors of rights, even when other certifiers would be certifying in accordance with the right principles, enshrined in the laws of the land? Well, then surely it would be an unjust aggressor, since if, *ex hypothesi* coercively forcing protective agencies to conform to the laws of the land is permissible in justice, then it must be permissible for anybody, not just for that agency. If, on the other hand, it did allowed others to compete with it in the task of ensuring that protective agencies stuck to the laws of the land, then there would be nothing to distinguish it from its competitors, no reason to call it, and not them, the government, and, as such, it would not be a government.

In addressing the *practicality* of market anarchism, Hospers believes he came up with a problem: Suppose we are living in a market anarchist society, and I write a book and, after it is published you pirate it and sell copies yourself, perhaps altering parts to suit your own tastes, whilst keeping my name on the cover. "Now since there is no law of the land, there is no copyright law to protect me as an author." (p450) Of course, we must pause in examining Hospers' argument here, because we need to remember that he has *failed* to demonstrate that just because there is an absence of what he calls a government (an organisation with a monopoly on the use of legitimate force, and an exclusive jurisdiction, over a given geographic area), there is necessarily an absence of a "law of the land." The existence of a "law of the land" is neither necessary nor sufficient to say that there is a government. It is not necessary, because government, as Hospers defines it, can exist without enforcing a single law applicable to all throughout the land. It may enforce one set of laws for some people, and another set for others, or not enforce any. And it is not sufficient, since it is logically possible for there to be a "law of the land" and yet government as Hospers defines it not exist, since there is free competition in the service of protecting people under, or enforcing that law, and no institution has an exclusive jurisdiction in deciding when or how it applies.

Let us continue,

> I go to my defense agency, which I have chosen to belong to because it does believe in copyright protection, and tell the men in

> the agency to go apprehend the culprit (and punish him—by what law?). They locate the man who's pirating my work, and he says, 'You don't have the right to apprehend me. I don't believe in copyright protection, and I belong to a defense agency that doesn't either.' Now where do we go from there? We have two different agencies with two incompatible positions on the matter. So do we say: Here ends the argument and begins the fight? You see, there isn't any *one* law or any *final* court to decide the matter: there is the arbitration agency you belong to, which doesn't respect copyright, and the agency I belong to, which does. Now—you take it up from there! (p450)

Hospers says that if he feels strongly enough, he may be willing to fight rather than let you get away piracy. "I don't accept the jurisdiction of your 'court' and you don't accept the jurisdiction of mine, so we're at an impasse. What alternative is left, under anarchy, but the use of force against each other, either ourselves or via our defense agencies?"

But this objection totally misconceives how market anarchy is likely to work, mainly because it misconceives how arbitration actually works. When an arbiter settles a dispute between two or more parties *it is selected by both parties for that purpose*. There is no "your arbitration agency" and "my arbitration agency." What would be the point? The whole point in contracting the services of an arbiter is to resolve the dispute in a way less costly than war between ourselves or between our defense agencies. Each hiring a different agency, with incompatible beliefs would utterly fail to achieve that end, for precisely the reasons Hospers gives. So there will be no "your arbitration agency" or "my arbitration agency," we would either both hire the same arbitration agency to handle the dispute, or none at all.

Of course, the question remains as to what rules the arbitration agency will use to settle the dispute. If it uses rules that permit punishment for copyright theft, for punishment of piracy, then why would you agree to use that arbiter? On the other hand, if he uses rules that allow piracy, and perhaps allow punishment for those that try to punish piracy, then why would I hire it? One solution that has been proposed (Friedman 1989) is that my defence agency could pay your defence agency to adopt the arbitration agency that most suits my preferences, or yours pays mine to adopt the arbitration agency that most suits your preferences. Let's suppose that my agency pays yours to adopt the court of my choice. For that to occur it must be the case that the payment my defense agency is willing to give exceeds the amount that it could have got from you if it had got the arbitration agency of your choice—it must cover its loss. My defense agency will pass the cost of this pay-off to me, its consumer, but I will only be willing to accept this cost if doing so is worth it for me to get the court of my choice. Your agency, meanwhile, in

order to retain your custom, may pass some of the pay-off to you. You will only accept it if the pay-off is worth more to you than getting the court of your choice is. Whether it passes the pay-off on or not, your agency will only accept the pay off if it is larger than you think is worth paying it to get the court of your choice. Under these means, then, assuming that how much people are willing to spend on things is a pretty good measure of how highly they value things, the legal system will produce the most valuable laws or legal arrangements.[34]

However the issue is resolved, the fact is that in settling on a court between us, you and I would have, between us, "one law" that either prohibits piracy or allows and safeguards it. Contrary to Hospers claim, there would be "one law" at least between us. Another pair of disputants may have a different law on the matter between them, and you or I may have different law on the matter between each of us and other parties. Likewise, there can also be a *final court*. We, or our protection agencies, could agree on a number of appeals courts, the last being the final one. If, at the final stage, one of us still decides that they were not going to accept a court's verdict, well that would be no different from us not agreeing on a court in the first place—and the courts are there as an alternative to violence. The presence of a final court of appeals does not create a government as Hospers defines it, since the fact that every dispute could be taken to a final court of appeal does not logically imply that there is a final court of appeal that every dispute is taken to. It does not then imply an institution with an exclusive jurisdiction within a given geographic area.

Moreover, how wedded to the notion of a "law of the land" is Hospers? Suppose we introduce another possibility: Suppose that there were a limited government that enforced a law of the land, and ensured that other parties (say, private protective agencies) also enforced nothing but the law of the land... however, suppose that the law of the land was also not particularly libertarian. Perhaps homosexuality, pornography, and accepting wage

[34] For various other discussions of how law and order may be maintained in a stateless society, see Rothbard 1970, 1973, 1975, Tannehill 1970, Benson 1990, Hoppe 2002 and 2006. The most detailed and thorough accounts I have read are Benson's and Tannehills'; the latter, whilst in some ways attempting to "provide a blueprint for a free society" in a utopian manner, recounts in detailed ways the incentives that operators in a free market for police protection and adjudication will face. Benson's is a thoroughly academic piece that uses economic analysis of the actual working of cases of private production of law, security and dispute resolution, compared to public sector counterparts, to explain how a fully private system is likely to work, and likely to work better. A bibliography on anarcho-capitalism has been provided by Hans Herman Hoppe at http://www.lewrockwell.com/hoppe/hoppe5.html

contracts below a minimum price are illegal. Now, imagine some disgruntled libertarians, widely dispersed among the populace of the country, but a fair proportion of it (not a majority, though), decided that they would hire protection agencies that would protect each of them against each other in a *libertarian* way—they effectively establish a libertarian law code between each other, each hire agencies to ensure that they are protected under these laws, with each person, or pair of agencies, agreeing to arbitration agencies or private courts to resolve disputes about how or whether a party is guilty of a violation of this law code. Suppose, further, that these disgruntled libertarians also ask their agencies to protect them against the rest of the populace, in a libertarian way, though. And suppose, further still, that, as a token of good will, they instruct the agencies not to protect the disgruntled libertarians against punishment by the national government, or non-libertarian agencies, when they are guilty of offenses against other members of the populace *under the libertarian code*. In other words, we have a network of people amongst whom laws are enforced that are broadly libertarian, and this network also protects members from offenses by outsiders that would be in violation of these libertarian laws, but also permits members of the network to be punished by outsiders when the members do to outsiders things that would violate the libertarian laws.

What, in this case, would Hospers suggest the position of the government should be in relation to this occurrence? It can either permit it or prevent it. Hospers has said that the government should ensure that all uses of force conforms to the "law of the land," but the libertarian protection agencies would not be enforcing the law of the land, but would be enforcing libertarian laws (e.g. not punishing gays, but protecting them from punishment, or not punishing people who accept wage contracts below a certain price, but protecting them against those that would punish them). In that case Hospers would seem to be suggesting that the libertarian protection agencies should be forced to either comply with the unlibertarian law of the land, or go out of business (and perhaps face punishment). But such government would appear to be violating rights by doing so—it would definitely be instructing people to act in ways Hospers himself finds to be unjust and punishing them if they don't. It would appear that a truly libertarian John Hospers would have to say that the government should allow this process, and not punish it. But in that case he would be saying that the government should not order all protection agencies to enforce the "law of the land." Indeed, he would be saying that law of the land should perhaps be broken, and laws that are not the law of the land be enforced.

Adding this with other ways in which the institutions Hospers defends fail to live up to his definition of government, it would seem more accurate to

define Hospers' position as not really being a defence of limited government at all, but a defence of market anarchism.

5. Robert Nozick

The most famous libertarian philosopher is still probably Robert Nozick, with his book *Anarchy, State and Utopia*. In this well known and award winning book, he attempted to defend the view that

> ... a minimal state, limited to the narrow functions ofprotection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection. (p.ix)

Many, many articles have been written in response to Nozick's arguments for this position, his arguments about the positions of others, and then in response to those articles themselves. However, most of these articles deal with his reasons for opposing anything more extensive than a minimal state, and even then, primarily only with his reasons for opposing any sort of welfare, or redistributive, or socialist state. But one of the striking things about his book is that, unlike so many others, as he says, he treats "seriously the anarchist claim that in the course of maintaining its monopoly on the use of force and protecting everyone within a territory, the state must violate individual's rights and hence is intrinsically immoral." (p.xi)

Nozick attempts a form of Lockean argument against anarchism. His ultimate aim is to show how a state could arise without violating anybody's rights, so he starts, as Locke did, by imagining a "state of nature," a pre-governmental, or pre-state society: Anarchy. In this state of nature, people live in perfect freedom to order their actions and dispose of their possessions as they choose, within the bounds of a "law of nature" without asking permission from anybody else. The bounds of the limit of the law of nature are that nobody should harm the life, health, liberty or possession of others. Some people break these bonds, violating rights and harming one another, and in response people can defend against these transgressors.

Now, in this state of nature, clearly people will still feel the need to protect themselves and their property, and possibly those of loved ones or friends and acquaintances, from depredation. These things they are entitled to do, too. However, there are also advantages to a division of labour: If I can hire somebody else to protect me, that would allow me to specialise in

something else I am good at, and so produce more of that, or do a better job at it, and will also allow the other person to specialise in protection, gaining better skills and abilities, and doing a better job. Since there are clear disadvantages to going around constantly guarding oneself and one's property, devoting one's own time and resources to these ends rather than some others, it is plain that most people will hire others to protect them, and others will sell such protective services. Of course, to an extant, people may still rely on themselves, or they may form protective associations wherein the whole association comes out if an individual member is in trouble, or a few members take it in turns to come out when called. However, neither of these alternatives supplants the over all benefits of a division of labour, so the standard source for the protection of person and property, and punishment for transgressions, will likely be from hired personnel. It is also likely that economies of scale will bring these hired personnel together into firms. So most people's first line of defence against wrongdoers will be firms we can call *protective agencies*, or *protection agencies*.

However, further problems will arise in this state of nature. Just as I, in protecting myself, might accuse you of something you think you are innocent of, so my protection agency might accuse you of things you think, or claim, to be innocent of. Or it may punish you more severely that you think you deserve, etc. Of course, you can hire a protection agency to protect you, or to punish on your behalf any that you think punish you unjustly, but this just pushes the problem back one step further: Each of us is likely to be biased towards our own case, and, whilst our agencies may also be biased in each of our favour. Without an independent and impartial third party, conflict seems inevitable.

Nozick argues that, as a consequence of the occurrence of these disputes between people or the protection agencies that represent them, from this state of nature a Dominant Protection Agency will arise. When disputes such as the above arise, one of three things may occur:

1. In such situations the forces of the two agencies do battle. One of the agencies always wins such battles. Since the clients of the losing agency are ill protected in conflicts with clients of the winning agency, they leave their agency to do business with the winner.

2. One agency has its power centered in one geographical area, the other in another. Each wins the battles fought close to its center of power, with some gradient being established. People who deal with one agency but live under the power of the other either move closer to their own agency's home

> headquarters or shift their patronage to the other protective agency (the border is about as conflictful as one between states).

Or, finally

> 3. The two agencies fight evenly and often. They win and lose about equally, and their interspersed members have frequent dealings and disputes with each other. Or perhaps without fighting or after only a 'few skirmishes the agencies realize that, such battling will occur continually in the absence of preventive measures. In any case, to avoid frequent, costly and wasteful battles the two agencies, perhaps through their executives, agree to resolve peacefully those cases about which they reach differing judgments. They agree to set up, and abide by the decisions of, some third judge or court to which they can turn when their respective judgments differ. (Or they might establish rules determining which agency has jurisdiction under which circumstances.) Thus emerges a system of appeals courts and agreed upon rules about jurisdiction, and the conflict of laws. Though different agencies operate, there is one unified federal judicial system of which they are all component. (p16)

Nozick concludes that in each of these cases, almost everybody living in a geographic area will end up under "some common system that judges between their competing claims and *enforces* their rights." So, out of anarchy, "there arises something very much resembling a minimal state or a group of geographically distinct minimal states." Nozick concedes that these only "resemble" minimal states, of course, and we will look at why he is happy to say that dominant protection agencies are not minimal states later. However, we can now pause and assess some of his argument thus far.

Scenarios 1 and 2 assume that violence is likely to be the most common tool that protection agencies use to resolve their disputes. Murray Rothbard[35] has disputed this, saying that, "economically, it would be absurd" to expect agencies to battle each other physically," since doing so "would alienate clients and be highly expensive to boot." Instead, protective agencies would agree in advance on rules on what to do in case of dispute, and private appeals courts or arbitrators to resolve disagreements on how or when the rules apply. That would make scenario 3 the likely one. Before we go on to that, though, a word can be said in Nozick's defence against Rothbard.

[35] Rothbard (2002), p234

Nozick is simply arguing that a state *could* come about by means including the events in scenario 1 or 2, not that it would. Scenarios 1 and 2 could be absurdly unlikely, but that would not defeat the claim that it would be logically possible that a state could arise by means inclusive of these scenarios.

Rothbard does observe, of course, that Nozick's project is not that it is likely that a government *could* arise by means including these, but that it would do so without violating rights. But Nozick presumes, in his discussion of the state of nature, that each protective agency "attempts in good faith to act within the limits of Locke's law of nature." (p17) But this is problematic, argues Rothbard, in scenarios 1) and 2), because "in any combat, clearly one of the agencies would be committing aggression" by defending a person that had committed a rights violation.[36] No agency has a right to protect somebody who violates rights, since nobody can have a right to protect against being punished or against being compelled to make restitution that they can employ the agency to enforce (this is different from saying that they have no right to protect against disproportionate punishment, or punishment if they are innocent.)

I think this complaint is, perhaps, a little harsh. A firm could be acting in good faith within the limits of Locke's law of nature and yet still protect a rights violator because it doesn't know that the client is a rights violator. Even if everybody were moral, disputes would still arise. However, let us pass from this—the probability is, Rothbard argues, that scenarios 1) and 2) won't occur, because it would be in the self-interest of those that run or work in the protective agencies to decide on rules to resolve disputes, and take conflicts to third parties. This takes us to scenario 3). "But," the minimal-statist may respond, "that would mean accepting that the Dominant Protection Agency is likely to evolve from market anarchy, since, from scenario 3) 'emerges a system of appeals courts and agreed upon rules about jurisdiction, and the conflict of laws. Though different agencies operate, there is one unified federal judicial system of which they are all component'."

The trouble with this, though, is that it is entirely unjustified to call the outcome of scenario 3) a dominant protection agency, or "one unified federal judicial system." The fact that every dispute is resolved by a third party does not imply that there is a third party every dispute is resolved by. Protective agency A could resolve disputes it gets into with protective agency B in the court of arbitration company 1, but A might resolve disputes gets into with C in court 2, and D and E in another court entirely. Not only this, but different rules could exist between agencies as to how to resolve different disputes.

[36] Rothbard (2002), p234

Court 1 may rule according to one set of rules in disputes between A and B, and a different set to resolve disputes between A and C, whilst E and F have their own rules entirely. So, as Rothbard says,

> The fact that every protective agency will have agreements with every other to submit disputes to particular appeals courts or arbitrators does *not* imply "one unified federal judicial system."
>
> On the contrary, there may well be, and probably would be, hundreds, even thousands, of arbitrators or appeals judges who would be selected, and there is no need to consider them part of one "judicial system." There is no need, for example, to envision or to establish one unified Supreme Court to decide upon disputes. Since every dispute has two and only two parties, there need be only one third party, judge or arbitrator; there are in the United States, at the present time, for example, over 23,000 professional arbitrators, and presumably there would be many thousands more if the present government court system were to be abolished. Each one of these arbitrators could serve an appeals or arbitration function.[37]

The result of scenario 3), then, is *not* a dominant protection agency. So let us return to 1) and 2), however unlikely they may be. The essence of the argument seems to be that there is an aspect of "natural monopoly" in the protective agency industry, such that a single provider becomes dominant within a given geographic area. However, again, this may not be likely: in 1972, there were 250-200 medium to very small companies offering various security services in the London Metropolitan area alone, and as many private police in England as there were in the regular police force.[38] In the US, in 1977, between 800 and 900 resident patrols operated in urban areas that had a populace of over 250,000 people, and there were 50,000 block watches nationwide. 63 percent were composed of volunteers, 18 percent hired guards, 7 percent paid residents to patrol, and the remaining 12 percent combined paid watchers and volunteers. In 1980, about a quarter of New York City's 39,000 city blocks had functioning block associations to "compensate for inadequate city services," almost all of them had some kind of security patrol. Further, in the US in 1964 there were 1988 detective agencies and protective service firms, employing 62,170 people. By 1981 this number had risen 7126 agencies and firms, employing 331,294. So even though the average size of the firm, in terms of number of employees, had risen (from 31.3 in 1964 to 46.5 in 1981), this still makes them qualify as small to medium sized firms. (Benson 1990, p208 and 212). So the practical evidence may not support the claim that these economies of scale exist: if

[37] Rothbard 1982 (1998, 2002) p234

[38] Michael Taylor 1982 (1995), p63

they did, surely they would be evident in the real life provision of protective services.

However, there may be an obvious comeback: Real life protective agencies don't go to war with each other to resolve disputes. Maybe, if conflict between firms was most likely to be how disputes get resolved, the economies of scale would become apparent. Nozick argues that "The worth of the product purchased, protection against others, is *relative*," since it depends upon how strong others are. Of course, other goods are likewise comparative, but what distinguishes protection is that "maximal competing protective agencies" cannot coexist, "since the nature of the service itself brings agencies not merely into competition with each other for customers' patronage, but also into violent conflict. Thus, "since the worth of the less than maximal product declines disproportionately with the number who purchase the maximal product, customers will not stably settle for the lesser good, and competing companies are caught in a declining spiral. Hence the three possibilities we have listed." (p17)

Of course, the three possibilities do not follow from this. Only the first two may, since scenario three is not a dominant agency, or a "natural monopoly," or any such thing. Indeed, the above argument assumes that conflict is likely, that companies will choose the expense of conflict over any cheaper method of achieving their objectives that may be available, such as taking the dispute to a third party. This may be much more likely to be the case if there are a large number of similar sized firms, since this may ensure that firms are evenly matched, so increasing the expense of conflict relative to peaceful adjudication, and would also ensure that even if one firm does defeat another in conflict, the increase in total market share would still be miniscule. In fact, one could apply the findings of Robert Axelrod (1984) to the scenario, wherein a firm could follow something like Tit for Tat, say, by offering to take a dispute to an arbiter as a first move, rather than fight, or abides by the arbiter's decision rather than prevent punishment of its client, or punish an opponent's client, in spite of the arbiter's ruling, but would respond with force against any firm that failed to act the same way towards it. Axelrod's findings would suggest that, where the future is important, because there is a better than average likelihood of future interaction, it is in the rational self-interest of the people running these firms to adopt Tit For Tat, rather than either a nicer strategy (since that would invite other firms to ignore arbitration verdicts against it) or a nastier strategy (since Tit For Tat would reciprocate such nastiness), even where firms pursuing Tit For Tat are in a minority.

An argument may be presented that is similar to Nozick's: One of the ways a protective service may be more attractive to clients than competitors

merely because most people in that area utilise its services is that it may be able to offer those services to the prospective client more cheaply than a competitor *because* it has most business in an area. For example, it may cost less for a security firm to patrol past your house if it is already patrolling other houses on your street than if it isn't doing so. In that case, all else being equal, it would be rational for you to hire the firm everybody else is using.

This argument is like Nozick's argument, in that a firm becomes more attractive than a competitor dependent on how many people already use it, but differs slightly, in that it isn't that a firm with many customers would be better able to use force against other firms than a firm with only a few customers, but that it will be able to deliver its services more cheaply. In this way, it is similar to the claim that piping gas, or setting up phone lines, or electricity, is a natural "monopoly." It will be cheaper to get gas piped to one's house by a company that is already piping gas to one's neighbours than it would be to get it piped by anybody else. For this reason, it is likely that one gas company would be dominant within a geographic area, and, likewise, that one protection agency will be dominant. Of course, the fact that such there are so many small to medium firms supplying protective services in real life may count against this. However, where streets are patrolled, they tend to be patrolled by just one company. Admittedly, that makes the "single geographic area" that the dominant agency is dominant over much smaller than what Nozick may have had in mind.

But, we don't get from the Dominant Protective Agency to the minimal state, or even an ultra-minimal state merely by saying that a Dominant Agency could arise: The Dominant Protective Agency is not yet a state, as Nozick himself concedes. This is because the Dominant Protection Agency lacks the essential features of a state. So what does Nozick think these essential features are? Pinning these down, he says, may be harder than people might think: He notes that people in the Weberian tradition treat the state as having "a monopoly on the use of force in a geographical area," and that such a monopoly is "incompatible with private enforcement of rights." But this definition is problematic, since "a state can exist without *actually* monopolising the use of force it has not authorised others to use," since the Mafia use force, the KKK, terrorist cells, street gangs, etc. Claiming such a monopoly is insufficient—though maybe necessary—since *you* would not be the state if you claimed a monopoly on the use of force in a given geographic area. Nor is being the sole claimant a sufficient feature—if you were the only one to *claim* they and only they had the right to use force within a given geographic area, that wouldn't make you the state. Likewise, the state's claim to such a monopoly need not be legitimate for it to still be the state.

One possible response at this stage would be to ask why we shouldn't just define the state the same way Hospers and Rand have defined government: An institution with a monopoly on the right to use legal or legitimate force. The presence of the Mafia, etc, would not undermine such a monopoly, since the Mafia, presumably, do not use legal force. A possible answer to the suggestion that the state should be defined as having a monopoly on legitimate force is that it would mean that if there is no such thing as legitimate force (as some pacifists may hold), then the state not only ought not to exist (as such pacifists are obliged to hold—examples of pacifists that did are Leo Tolstoy and Ghandi), but does not exist. This surely must be wrong. It is no objection to the claim that the state monopolises the legal use of force, though, and continued calls not to "take the law into your own hands" would affirm this—the law belongs in the state's hands, we are told.

However, let us continue with Nozick's efforts to pin down the conditions that would qualify something as being a state. Whilst acknowledging that "Formulating sufficient conditions for the existence of the state thus turns out to be a difficult and messy task," he says that we can continue, at least for our purposes,

> ... by saying that a necessary condition for the existence of the state is that it (some person or organization) announce that, to the best of its ability (taking account of the costs of doing so, the feasibility, the more important alternative things it should be doing, and so forth), it will punish everyone whom it discovers to have used force without its express permission. (This permission may be particular permission or may be granted via some general regulation or authorisation). (p24)

Nozick says that the dominant protective agencies fail to meet this condition, since they "do not make such an announcement, either individually or collectively. *Nor does it seem morally legitimate for them to do so*." Both the system of protection agencies linked by arbitration agreements, which Nozick confuses for a dominant protection agency, and the actual dominant protection agency, "if they perform no morally illegitimate action, appears to lack any monopoly element and so fails to constitute or contain a state." A state is claiming a monopoly on deciding who can use force when it says that only it can who may use force, and under which conditions, when "it reserves for itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries," and claims a right to punish those who breach its monopoly. The monopoly can be violated in two ways: (1) a person or organisation may use force within the state's territories without its permission, or (2) a person or organisation can set itself up as an alternative authority to decide when and by whom a use of force is permissible. It is

plain that neither within the system of competing protection agencies linked by arbitration agreements, nor under the dominant protection agency, such a monopoly exists.

Some people may question this. It may be conceded, for reasons I have given, that under Nozick's "third scenario" under which protection agencies agree to use impartial third parties to resolve disputes, etc that no "dominant protection agency" has arisen, and so no monopoly exists. However, what about the other scenarios, where single protection agencies capture all of the business of protecting people in particular geographic areas? Well, Nozick's argument as to why a dominant agency might arise in these cases is the same sort of argument that piping gas is a "natural monopoly": In Nozick's argument, if a firm has a good deal of customers already, then it will be able to offer you a better service for your money than will a competitor for the same price, since, Nozick assumes, the relative strength of firms counts towards their ability to provide a good product, and the relative strength of a firm against others will be higher if it already has a high number of clients. (Is this necessarily true, though? Might not a firm with a smaller number of much richer clients be able to do as well?). Likewise, a gas company that already has a good deal of business in a town will be able to pump gas into the town more cheaply than a company that has only a little amount of business in that town, since the larger firm will be able to use its pre-existing pipe network, whilst the smaller one would have to lay more pipe. Eventually, the larger gas company will get all the business in the town, just as, Nozick argues, the larger protection agency will get all the business in a given geographic area.

However, to claim that this situation involves a monopoly would be erroneous. A monopoly exists when the firm is able to control the total supply of a resource, and so set its own prices, usually raising them. This is not the case in either of these situations. Just take the example of the gas company: First of all, if it tries to earn what are called monopoly profits by raising prices, then it faces the problem that people will simply consume less gas. All products are, to some greater or lesser degree, substitutes for each other—cans of Coke compete against yachts for consumer's money; and they also compete over time—money spent on a can of Coke today competes against money spent on Coke tomorrow. Most likely, if a gas company raises its prices, people will start consuming less gas, turning on the heating only once a day, sharing bath water, or using fewer hobs when cooking. In the mean time, of course, electricity becomes more attractive: Gas heaters will be more likely to be substituted with electric heaters, gas cookers with electric cookers, etc. Even if a single gas company gets all the business piping gas into a town, then, there is an upper limit set on how high it can raise its prices,

which will be equal to the lowest price at which the electric company, and subsidiaries, can substitute their goods for those of the gas company, or dependent on it, and also by maximum that consumers are willing to cut down on using either. If it was an electric company that had all the business, then it would find that people started using generators more. They may even share hook-ups.

More importantly, though, there is a sense in which more than one gas company would still be competing in the same geographic area, in the town. That is because companies in other towns, companies not "dominant" in that town, will still want to pump gas into that town if they can find a way. The dominant firm, then, will again face an upper limit on how high it can raise its prices, namely the lowest price at which competitors outside the town can pipe gas in. And competitors outside the town will be continually trying to find ways to reduce that price.

So, "potential" and "indirect" competition still keeps firms relatively accountable to consumer sovereignty even if the firm has 100 percent of business in an area. Only if such competition is hampered by coercive restrictions, would the firm be able to control supply and set its own prices. In cities in the US, for instance, it is apparently the case that it is illegal for utility companies outside a town to compete with the town's gas company—effectively, the "dominant gas company" in town no longer has an upper limit on how high it can set prices that is determined by how cheaply companies outside the town may pipe gas in. Indirect competition, competition that occurs by spending money on substitute products, including future products, can be eliminated by forcing people to spend that money on the monopoly firm's products or present products. States do this by taxing us: We don't have to consume all their products, but we can't spend money the state wants on competitors or on substitutes if it taxes that money from us.

We can now see why a dominant protection agency in a specific geographic area would not have a monopoly, and so not be a state, unless it coercively restricted competition in the way explained: People can do without protection, and not pay for it. They can also protect themselves, perhaps buying a gun. But most obviously, a lower limit on how low the dominant agency can reduce quality (effectively controlling the supply of good protection), or an upper limit on how high it can raise the price for such protection, is set by the lowest price at which it becomes profitable for a competitor from outside that geographic area to start supplying protection in that geographic area. If quality of the dominant agency falls lower than that of a competitor's protection (either from a firm dominant in some other area, or from a start up firm), then the dominant agency will lose business, and

other firms will start supplying protection in the same geographic area as it does. Likewise, if its prices rise so high that the lower quality protection of a competitor becomes worth more than the high quality, but high priced protection of the dominant agency, the dominant agency will again lose business. And because the business it loses is business gained either by agencies dominant in other areas, or by start up firms, they all have incentives to try to keep that quality or those prices as attractive as they can, thus keeping the lower limit of quality the dominant agency can provide as high as they can, or the higher price it can charge as low as they can. Competition, potential or indirect, still restrains the dominant agency, and keeps it from being a monopoly, able to control supply and set its own prices.

And this is why it is not a state. After all, imagine that if a British citizen, feeling that police protection in the UK was not good enough, called the French *Gendarme* to investigate a burglary, or finding that taxes in the UK were too high, decided to pay taxes to the US government instead and have the FBI protect him, even though he stayed in the UK! The French or US governments would be competing against the British government in the supply of services in the UK in exactly the same way that the dominant agency would be subject to competition in the scenario described above. Clearly, though, no state would ever permit such a thing: It would be a challenge to its *sovereignty*. Likewise, under the dominant agency, if a client thought that his mate would be able to do a better job than the dominant agency at protecting his rights, or, if not better, then at least cheaper, then he could stop paying the dominant agency, and his mate could go into business and he could pay his mate instead. No state, on the other hand, would allow people to stop paying taxes to it for protection and pay them to some start up security firm (unless that firm had first got a license, maybe).

So, dominant protection agencies are very different from states. But they need not be. They can restrict potential and indirect competition in the ways I have said. In order to become a state, as Nozick defines it, at least in the sense of what he calls an "ultra-minimal state," they can coercively prevent potential competition, and some forms of indirect competition. This is accomplished by their successfully gaining the conditions Nozick outlines: The dominant agency announces that it will "punish everyone whom it discovers to have used force without its express permission," threatening and actually using force against other users of force, to deter them from doing so. Some methods of substitution, then, are restricted: Whilst people can substitute future products for present products (e.g. by cutting down in the amount of police protection they use, by calling out the cops less frequently, perhaps), or even for other goods entirely, by not consuming any protection at all, they can't substitute for, say, self-defence, unless permitted or forgiven

for doing so by the dominant protection agency. More importantly, though, agencies dominant in other areas, or start up agencies, would be forbidden from providing protection in the same area as the dominant protection agency. The French government would be punished for providing police protection to people in the UK. Until the dominant agency has these features it is not a state:

> A system of private protection, even when one protective agency is dominant in a geographical territory, appears to fall short of a state. It apparently does not provide protection for everyone in its territory, as does a state, and it apparently does not possess or claim the sort of monopoly over the use of force necessary to a state. In our earlier terminology, it apparently does not even constitute an ultraminimal state. (p51)

Readers will notice another condition for statehood here that the dominant agency lacks: providing protection for everyone in its territory. I have not discussed this condition, since it is not clear that Nozick really regards it as a condition of statehood. Firstly, I see no reason why he should. If a state fails, or does not even intend to protect everybody in its territory, it is surely still a state. Why, it could withhold protection from everybody in its territory and still be a state. There are surely examples from history of states that have withheld protection of various peoples within their boundaries (Failure to protect against ethnic cleansing in the Sudan springs to mind). Secondly, Nozick also distinguishes between the minimal state and the utraminimal state in a way that suggests that a state that fails to protect everybody within its territory is still a state, albeit an ultraminimal state. Nozick writes,

> An ultraminimal state maintains a monopoly over all use of force except that necessary in immediate self-defense, and so excludes private (or agency) retaliation for wrong and exaction of compensation; but it provides protection and enforcement services *only* to those who purchase its protection and enforcement policies. People who don't buy a protection contract from the monopoly don't get protected. The minimal (night-watchman) state is equivalent to the ultraminimal state conjoined with a (clearly redistributive) Friedmanesque voucher plan, financed from tax revenues. Under this plan all people, or some (for example, those in need), are given tax-funded vouchers that can be used only for their purchase of a protection policy from the ultraminimal state. (pp26-7)

Thus the minimal state differs from the utraminimal state, in that it provides protection to everybody, whether to those that use their own cash, either in subscriptions or taxes, to pay for their own protection, or to those that use vouchers funded from taxes to buy a subscription. One can think of

variations on this theme that would produce alternatives between the ultraminimal state and the minimal state, of course. One possibility is that there are no tax revenues. Since Nozick has nothing good to say about taxes throughout the rest of his book, it is odd, and perhaps in error, for him to raise them here, though he does have an argument as to why they might be legitimate in order to fund these vouchers. But we could imagine that the state were funded entirely without taxes, perhaps by selling advertising ("This tank brought to you by Coca-Cola, Ltd" "Twelfth Precinct police station, in association with Esso"), or by collecting donations, or by charging a fixed fee for the privilege of becoming a "public servant" and holding office, or running lotteries, or a combination of these methods and others. If the state were to be funded by these means, it would avoid anarchist objections to its revenues being used to protect everybody—after all, people aren't *forced* to pay for the protection of others. (One way they may be said to be being forced, of course, is if the fees for protection were set high enough to pay for everybody, and at the same time the state coercively prohibited all alternatives to either buying its services or not being protected at all).

Also, since a state is an institution that monopolises the right to *permit* the use of force over a geographic area, and punishes only those who use force without its permission, it could permit some private provision of the use of force, license it in a sense (perhaps using a license fee to pay for the vouchers, although this may again be said by libertarians to be unjust, since it would be using force not just to enforce its monopoly but also to charge a license fee, this second feature lacking justification). Possibly not providing any police protection itself (other than to prevent unlicensed agencies from using force, and to prevent licensed agencies using it outside of the grounds under which the license was granted. People could then hire the licensed agency of their choice, spending either their money, or a state granted voucher. Under this system everybody is provided protection, and some of it is paid for by the state, and the state retains the relevant monopolistic features, but not all protection is provided by the state (except insofar providers have been licensed by the state to do so.

Nozick believes that an ultraminimal state is morally required to move from being an ultraminimal state to a minimal (nightwatchman) state, that provides for the protection of everyone. However, since neither the system of competing protection agencies, nor the dominant protection agency constitute a state, he needs to show how it would be morally correct to move from the statelessness of the competing system or the dominant agency, to the ultraminimal state at least.

Why might this be an issue? What would be wrong with having a state? Here, like Hospers, Nozick shows a familiarity with the libertarian anarchist's

position. In order for a minimal state to be a minimal state, it must monopolise the right to permit the use of force in a given geographic area, and also provide protection for everybody within its borders. But the individualist anarchist "holds that when the state monopolizes the use of force in a territory and punishes others who violate its monopoly, and when the state provides protection for everyone by forcing some to purchase protection for others, it violates moral side constraints on how individuals may be treated. Hence, he concludes, the state is itself intrinsically immoral." (p51)

Defenders of the state grant that under certain circumstances it is legitimate for the state to use force, that it is legitimate for it to punish people that violate the rights of others. But granting that such a use of force is legitimate begs the question of why the state is justified in forbidding the private (just) exaction of justice by people who have had their rights violated, or agents acting on their behalf.

> *What* right does the private exacter of justice violate, that is not violated also by the state when it punishes? When a group of persons constitute themselves as the state and begin to punish, *and forbid others from doing likewise*, is there some right these others would violate that they themselves do not? ... If the private exacter of justice violates no one's rights, then punishing him for his actions (actions the state officials also perform) violates his rights and hence violates his moral side constraints. Monopolizing the use of force, then, on this view, is itself immoral...(pp51-2)

It should be understood that this anarchist complaint is not that just any use of force should not be prevented by the state. Unjust uses of force should not be permitted to compete with just uses of force, but competition should be permitted in the provision of just force. The anarchist can still think that all *unjust* uses of force should be prohibited, and so also think that if a private exacter of justice (an individual, or perhaps a protection agency) were to use force unjustly then it would be legitimate for the state to (justly) punish this transgressor. The anarchist merely also thinks that (a) it would be equally legitimate for anybody else to (as justly) punish the transgressor, and (b) that if the state itself were to use force illegitimately, the same applies—it would be legitimate were the victim, or an agent of the victim, to (justly) punish the transgressors, as anybody else would be punished. But were this to be the case then there would be no monopoly on the legitimate use of force—anybody would be able to set up providing legitimate force—and consequently, there would *be* no state. The institutions punishing others for rights violations or illegitimate uses of force would not be states.

The further objection that Nozick supposes that the libertarian anarchist will raise is that if the state provided protection for everybody, it would be forcing some to provide for others, a form of "redistribution through the tax system." As Nozick says, a peaceful person minding his own business is not violating the rights of others. "It does not constitute a violation of someone's rights to refrain from purchasing protection for him (that you have not entered specifically into an obligation to buy)." So when the state threatens somebody with punishment for not paying for the protection, either of himself, or for anybody else, it, and its officials, violates that individual's rights. After all, if a person had a "right" that others pay for their protection, then such a right would be incompatible with those other's having rights to their money, or at least any rights to do things with that money that would not include buying protection for others when those others wanted it. Threatening to punish people for not paying you to protect them is what Mafia protection rackets do. Threatening to punish people unless they buy things for you or give you the means to buy them yourself is what robbers, thieves and extortionists do. All these things are things most of us think should be prohibited, and, ironically, we would call for at least a minimal state to do just such prohibiting. Moreover, Nozick argues later on that "Taxation of earnings from labor is on a par with forced labor" since "taking the earnings of *n* hours labor is like taking *n* hours from the person; it is like forcing the person to work *n* hours for another's purpose." (p169) When others force you to do certain work, or unrewarded work, for a certain amount of time, they decide what it is you can do *with yourself* and what purpose this *use of yourself* is to serve apart from your own decisions. "This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you. Just as having such partial control and power of decision, by right, over an animal or inanimate object would be to have a property right in it." (p172)

Theft, robbery, racketeering, forced labour, and treating people like chattel, are, in this view, then, all what would be involved in forcing, through taxation, you to pay for the protection of others. If, that is, "you have not entered specifically into an obligation to buy" that protection for them. Nozick tries to argue that people may be thought of as having entered into such an obligation, not contractually, but as a debt for compensation owed to those prohibited by the ultraminimal state from exacting justice themselves, or from using private protection agencies to exact justice on their behalf. Thus Nozick believes that it is not illegitimate to tax those on behalf of whom the ultraminimal state prohibits competition against itself in the provision of legitimate force, since those people that would have used such alternative sources of legitimate force are entitled to compensation for being so prevented, and the clients of the ultraminimal state owe it to them. Thus,

if this argument works, Nozick may be able to show how it is legitimate to move from an ultraminimal state (one that merely monopolises the right to permit the use of force in a geographic area) to a minimal state (one that also protects everybody within its borders). However, if he can't justify moving from anarchy, either with competing protection agencies or with dominant protection agencies, to the ultraminimal state, that move itself would be pointless. Thus he needs to show that it would be morally legitimate to move from anarchy to the ultraminimal state; morally legitimate to prohibit others from using force that it would be legitimate for the state to use.

Take the ways in which the ultraminimal state's monopoly on force may be violated: A dominant protection agency from another area might start protecting people within the ultraminimal state's territory, or a new start up agency from within ultraminimal state's territory might start competing with it, or people may merely defend themselves and not hire any agency or the ultraminimal state. Though in what follows I will tend to have in mind the competition from agencies, I will refer to all of these alternatives to the ultraminimal state/dominant protection agency as "independents." Of course, Independents and their customers may be geographically segregated from those of the dominant protection agency in the state of nature. The Dominant Protection Agency could instruct its clients not to rent to customers of Independents, or it could charge higher premiums if its customers move house next door to, or conduct business relationships (etc.) with those of independents, or even pay the neighbours of its clients not to sell or rent to clients of Independents. These things it would probably do if the costs of implementing such policies are lower than the costs of resolving frequent conflicts between its clients and those of Independents'(or between itself and Independents), whether by war or by arbitration processes.

However, these costs may well not be low if the clients of the independents are widely dispersed and proliferated amongst those of the Dominant Protection Agency[39], so what else may the dominant agency do in

[39] Benjamin Tucker writes

> It is perfectly true that voluntary taxation would not necessarily "prevent the existence of five or six 'States' in England," and that "members of all these 'States' might be living in the same house" ... What of it? There are many more than five or six Churches in England, and it frequently happens that members of several of them live in the same house. There are many more than five or six insurance companies in England, and it is by no means uncommon for members of the same family to insure their lives or goods against accident or fire in different companies. Why, then, should there not be a considerable number of defensive associations in England, in which people, even members of the same family, might insure their lives and goods against murderers or thieves?

response to possible competitors? Well, one thing that market anarchists are happy allowing is punishment for falsely punishing people (e.g. Rothbard (1970 (1977)), p267, n3, or L and M Tannehill, (1970 (1993)), p110). So Nozick writes that "An independent would be allowed to proceed to enforce his rights as he sees them and as he sees the facts of his situation," but if it turned out that he had acted wrongly, and punished the wrong person, "members of the protection association ... would punish him or exact compensation." (p55) However, Nozick points out that it may be the case that the victim of a miscarriage of justice may be severely injured or killed.

> Must one wait to act until afterwards? Surely there would be some probability of the independent's misenforcing his rights, which is high enough (though less than unity) to justify the [dominant] protective association in stopping him until it determines whether his rights indeed were violated by its client? Wouldn't this be a legitimate way of defending its clients? ... Is it not within a person's rights to announce that he will not allow himself to be punished without its first being *established* that he has wronged someone? May he not appoint a protective association as his agent to make and carry out this announcement and to oversee any process used to try to establish his guilt? (p56)

Nozick argues that people have "procedural rights." "The person who uses an unreliable procedure acting upon its results imposes risks upon others, whether or not his procedure misfires in a particular case," and procedural rights protect against this risk.

The morally problematic aspect of this position, though, is that it asserts that not merely may people be punished for violating rights, but they may be punished if their actions *might* violate rights. Many libertarians have rejected this argument for this reason. At the extreme, Murray Rothbard writes, points out that I may be much more at risk of being a victim of crime by a black, teenage male than anybody else. If we can compensate them when we do so, wouldn't Nozick's argument justify locking people up for being black, male and a teenager?[40] Or, for instance, how can Nozick reconcile his libertarianism, notably opposition to the drug war, with the idea that people can be punished if their actions *might* violate rights? Someone whacked out on PCP or crack cocaine is probably a risk to others, so surely Nozick's argument justifies prohibiting people from taking PCP or crack?

Another point is that the notion of "procedural rights" like a "right to a fair trial" evokes the concept of "positive rights," a concept libertarians

Tucker, *Instead of a Book by a man too busy to write one: A fragmentary exposition of philosophical anarchism*, Haskell House, New York 1897 (1969)

[40] Rothbard (1998 (2002)), p239

generally reject. To have a positive right to something entails that somebody, or perhaps everybody, has a duty to provide me with that thing, or whatever I need to secure it. So, if I have a positive right to life then others have to give me what I need to stay alive. A negative right to life, on the other hand, doesn't carry this implication. It is essentially a right to non-interference, requiring that not that people give me the means to live, but simply refrain from doing things that would kill me or put my life in jeopardy. Positive rights correspond to (some) duties that others engage in a course of action; negative rights correspond to (some) duties that others forebear from some courses of action. This distinction, of course, depends on a clear distinction between acts and omissions, causing harm and refraining from harming.

Why reject positive rights? The answer is that if we allow positive rights, then we face the likelihood that clashes of rights will be common. One easy example, for instance, might be that if I am starving and you have some spare food, a positive right to life would entail that I have a right to your food. But the food is *your* food still, and so you have rights to it. If you don't want to hand it over, then we have a clash of rights. This is even clearer if, for some reason, I am unable to cook, and the food would be inedible unless cooked, and you can cook. A positive right to life, in that case, would entail I would have a right that you cooked for me. This right would clash with any right you would have not to work for people you haven't agreed to work for. In both of these cases one right has to give way. The problem gets even more complicated, though, when we note that positive rights can clash with other positive rights. For instance, suppose you and I are both starving, but there is only food enough for one of us. My positive right to life would entail you should give me the food. But your positive right to life entails I have as duty to give it to you. In either case, neither of us can act within our rights without violating the rights of the other.

Libertarians then, for these reasons and others, typically hold that "basic" rights should be seen as negative rights about non-interference, or non-intervention, not positive. They can hold that some rights are positive, but these are not "basic" rights. They are rights created by contractual agreements, for example, or as debts owned by wrongdoers to their victims. But the "right to a fair" trial seems to be a positive right: A positive right to a fair trial entails that somebody, or perhaps everybody, has a duty to give us that fair trial, or the means to get it, whether they like it or not. This will mean clashes with those who have rights to the means to provide that trial who are not willing to give those means up. For instance, it might entail that lawyers have a duty to represent us, which would clash with any lawyer's right not to work for somebody they haven't agreed to work for. It would also

clash with anybody else's positive right to a fair trial that would entail the right to the same lawyer's labour.

So Rothbard writes,

> But one vital distinction between a genuine and a spurious "right" is that the former requires no positive action by anyone except non-interference. Hence, a right to person and property is not dependent on time, space, or the number or wealth of other people in society; Crusoe can have such a right against Friday as can anyone in an advanced industrial society. On the other hand, an asserted right "to a living wage" is a spurious one, since fulfilling it requires positive action on the part of other people, as well as the existence of other people with high enough wealth or income to satisfy such a claim. Hence such a "right" cannot be independent of time, place, or the number or condition of other persons in society.
>
> But surely a "right" to a less risky procedure requires positive action from enough people of specialized skills to fulfil such a claim; hence it is not a genuine right.[41]

However, I am not sure that rejecting procedural rights is necessary in order to reject Nozick's argument for the justice of transforming the "dominant protection agency" into an ultraminimal state. Indeed, the notion of procedural rights has at least some intuitive appeal, even if it might not be possible to defend it coherently. After all, take an extreme example, an agent from a protection agency may decide that every offense against his clients was a capital offense, and that guilt should be determined at the toss of a coin. I would suspect that most people, intuitively at least, would be opposed to this agent being allowed to do this, and would think that we should be allowed to stop that agent from pulling the trigger on the mere outcome of a coin toss, but should use some more suitable means. On the other hand there is something counterintuitive, also, about procedural rights: Sure, we would not want an innocent person to be punished for a crime they didn't commit, but do we think that the guilty should not be punished? If a person tosses a coin, heads you are guilty, tales you aren't, and applies just punishment to a guilty person because the coin came up heads, what right of the guilty person could possibly have been violated? They deserved to be punished and had no right not to be. So what if the procedure that was used is unreliable? Are they entitled to punish the punisher for some reason?

But still, procedural rights have some intuitive appeal. Edward Feser[42] has, in fact, tried to defend them from libertarian criticisms. Firstly, Feser

[41] Rothbard (1998 (2002)) p250

[42] Feser (2004), pp59-64

argues that your procedural right is not a positive right, but is derivable from a negative right. Because we have rights to non-interference, entailed by self-ownership, amongst other things, others have duties not to violate these rights. And, "It is because I have a duty not to violate your rights that I have a duty to make sure I do not punish you unjustly."[43] So, rather than being a positive right to a fair trial, a person's procedural right can just be seen as a corollary to the negative right they hold against others not to be unjustly punished. Sure, it requires positive action, but in some cases all negative rights require positive action: To use Feser's example, your right not to be run over, which is deducible from self-ownership, obliges me to take the positive action of turning my steering wheel to the left or right so my car avoids you.

Procedural rights, then, have some intuitive appeal, and there might be some defence of a formulation of them out there. I remain undecided. This doesn't matter, however, since I do not believe that even if one accepts procedural rights then the conclusions Nozick needs follow. What conclusion does he need? Well, lets recap: In order for the ultraminimal state to remain a state it must be able to prohibit the independents from arising or competing. And for Nozick to argue that this ultraminimal state was morally justifiable he will have to find some way of justifying this prohibition. His answer, he thinks, comes from the fact that independents, when deciding whether to punish those that wrong them or their clients, may use risky procedures. To take an extreme example, an agent from a protection agency may decide that every offense against his clients was a capital offense, and that guilt should be determined at the toss of a coin. Preventing agencies that might use risky procedures, Nozick argues, may be morally acceptable.

However, this proceeds too fast. In practice we get the following possibilities:

1) Independent protection agencies may use risky procedures against people who are not the customers of the dominant protection agency.

2) Independent protection agencies may use the same procedures as the dominant protection agency against its clients.

3) Independent protection agencies may use less risky procedures than those of the dominant protection agency against the clients of the dominant protection agency.

[43] Feser (2004) p60

4) The dominant protection agency may use risky procedures against the clients of the independent protection agencies.

In none of these cases would the dominant protection agency's right to protect its customers from risky procedures used by independent agencies justify preventing independent agencies from punishing wrongdoers, and in the latter case, the right to protect against risky procedures would entitle the independent to prohibit punishment by dominant protection agency (against the independent's clients at least).

Nozick acknowledges this outcome, writing "Has any monopoly element yet entered our account of the dominant protective agency? *Everyone* may defend himself against unknown or unreliable procedures and may punish those who use or attempt to use such procedures against him." (p108) The flaw in the argument thus far is that accepting the existence of procedural rights that may be defended and whose violation may be punished does not justify the dominant protection agency then claiming that it and only it should get to use or authorise the legitimate use of force. It only expands our definition of legitimate force to include these aspects of procedural rights. We are still left with the question of why anybody else who uses or authorises the legitimate use of force should not be allowed to do so. What are they doing that is impermissible when done by them, and yet permissible when done by the dominant protection agency?

Let's take two scenarios: Firstly, the dominant agency uses a procedure to determine that a client of an independent is guilty of a rights violation against one of its clients, or is deserving of punishment for doing so. In the second scenario, an independent uses a procedure to determine that a client of the dominant protection agency has violated the rights of one of the independent's clients, and is deserving of punishment.

Suppose that in the first scenario, the client of the independent goes to his agency and says tells them that the dominant agency used unreliable and risky procedures to determine his guilt and desert of punishment, and that, as defenders of his procedural rights, his agency ought to defend him against the dominant agency, and punish it when it attempts to enforce its verdict. Nozick says that,

> With regard to its own clients, however, it [the dominant agency] applies and enforces these [procedural] rights [to defend against unknown or unreliable procedures and punish those who attempt to use the procedure against them] which it grants everyone has. It deems its own procedures reliable and fair. There will be a strong tendency for it to deem all other procedures, or even the "same" procedures run by others, either unreliable or unfair... Since the

> dominant protective association judges its own procedures to be both reliable and fair, and believes this to be generally known, it will not allow anyone to defend against *them*; that is, it will punish anyone who does so. (p108)

So we can see, in the first scenario, the dominant agency will try to punish the independent should the independent try to defend its client's procedural rights against the dominant agency, or punish the dominant agency for violating them. This is quite possibly true, but the question is whether it would be justified in doing so. The correct answer seems to me, "only if it didn't really violate the procedural rights of the independent's client." After all, if *anybody* is entitled to defend against the application of unreliable or unknown procedures against themselves, or to punish their application, and this entitlement can be delegated to *anybody*, and so to an independent agency as much as to the dominant, then when the independent tries to defend its client against the application of unknown or unreliable procedures by the dominant agency, it is doing precisely what Nozick grants it is legitimate for the dominant agency to do on behalf of *its* clients. While it is likely that the dominant agency *will* try to prevent the independent from protecting against its procedures, and probably has the power to successfully do so, it still remains true that if it really did use unreliable and unknown procedures against the independent's client, then it has no *right* to do this thing it is likely able to do. Its doing so remains unjustified.

In fact, at this stage of his argument (pp108-110) Nozick's argument seems to ultimately collapse into a "might makes right" type argument. He says (p109) that the dominant agency "alone will act freely [meaning with impunity] against what it thinks are defective procedures, whatever anyone else thinks." But this may well be false: If an independent agency applies a non-defective procedure that the dominant agency believes *is* defective, and so prohibits the procedure, the independent *could* try to punish it. Is lack of effective punishment the same as impunity? Regardless, the question still remains as to why the independent isn't entitled to do this, and why the dominant agency is entitled to prevent it. The mere believing by the dominant agency that its procedures are legitimate and those of its competitors are defective doesn't actually make these claims the case, and only if they are the case could procedural rights justify prohibiting the procedures, or punishing those that apply them, and punishing those that attempt to stop the prevention of their application. Nozick seems to be assuming that if the dominant agency thinks its procedures are known and reliable, then they actually are, and if it thinks those of its competitors are unknown and unreliable, then they actually are. This is clearly not true. Thinking something doesn't make that something true.

On the "might makes right" vein, again, Nozick says that the dominant agency's

> ... strength leads it to be the unique agent acting across the board to enforce a particular right. It is not merely that it *happens* to be the only exerciser of a right it grants that all possess; the nature of the right is such that once a dominant power emerges, it alone will actually exercise that right. For the right includes the right to stop others from wrongfully exercising the right, and only the dominant agency will be *able* to exercise this right against all others. (p109, my emphasis)

The "able" here is meant to be literal, and not a variation of "morally entitled" or some equivalent. It is, then, an empirical claim which may or may not be true, depending on how successful an independent may be in enforcing the right to stop the dominant agency wrongfully exercising the right to punish against risky procedures. But this is important, since even if it is conceded that only the dominant agency can protect against occasions of the wrongful exercising of the right to punish the dominant agency for violating procedural rights, it does not follow that it *ought* to be the only agency that can do so. Nor does it follow that it has a right to prevent independents *rightfully* exercising the right to prevent the dominant agency from punishing those who apply procedures it deems unknown and unreliable (in cases when what it deems to be unknown and unreliable is not what is actually unknown and unreliable).

To reiterate, *all* Nozick has done, in introducing the notion of procedural rights, is to expand on the definition of legitimate force, not to explain why it is justifiable for a single institution to have a monopoly on using or authorising the use of this legitimate force. The right to defend against the application of unknown or unreliable procedures, if there are procedural rights, is a right the dominant agency *and any other agency* have. If an independent agency exercises this right, it is acting no less legitimately than the dominant agency would be if it exercised this right. If the dominant agency stopped it from doing this, it would be violating its rights, or those of the client of the independent that the client delegated to its agent. Likewise, if it is a corollary of this procedural right that people also have a right to protect against the wrongful application of punishment for alleged violations of procedural rights, then when an independent punishes the dominant agency for preventing a rightful enforcement of procedural rights against the dominant agency, the independent is acting no less legitimately than if the dominant agency punished it for preventing a rightful enforcement of procedural rights against the dominant. Forbidding this would likewise be a violation of the independent's rights, or those its clients delegate to it.

This collapses Nozick's argument. Having failed to justify prohibiting competitive provision of legitimate force, and thus the ultraminimal state, the minimal state must also be unjustified.

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