

## Revisiting Anarchism and Government

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### ***Libertarianism and Anarchism***

The late Robert Nozick started his famous political philosophy book, *Anarchy, State, and Utopia*, with a discussion of whether a libertarian society would be anarchist, as Murray N. Rothbard (as well as some others) had claimed. Nozick concluded that even with full respect for everyone's basic negative individual rights, a society would "back into" a minimal state.

Nozick argued that this backing into a minimal state comes about even if those in a "society without a state"<sup>1</sup> who are in the midst of private efforts to defend - or punish culprits for violating - individual rights are compensated for their worries about the possible side effect of private defensive actions. He claimed there would still be serious concern about those sides effects. As he puts it,

Even under the strongest compensation proposal which compensates victims for their fear, some people (the nonvictims) will not be compensated for *their* fear. Therefore there is a legitimate public interest in eliminating these border-crossing acts [i.e., violations of the rights of some in the process of acting to punish rights violations], especially because their commission raises everyone's fear of its happening to them.<sup>2</sup>

Nozick concludes that in the resulting society one legal order alone would prevail. There would be a single administration of this legal order.

This is contrary to what Rothbard and other libertarians have claimed, namely, that in a fully

free society, one that respects and protects individual rights of the sort Nozick (and Locke, Rand and Rothbard each) regards as basic, competing legal orders and administrators - courts and police - would operate within the same geographical or similarly homogenous realm. Or, to use as a clue the title of one well known book promoting this view, law would become an *enterprise*, just as any other provision of services people might want.

Nozick was not the first libertarian who had confronted the issue of whether libertarianism requires anarchism. Such early individualists as Lysander Spooner, Josiah Warren and Benjamin Tucker, and, more recently, Murray Rothbard, Roy Childs, Jr., the Morris and Linda Tannehill, John Hasnas, John Sanders, Jan Narveson, and Jan Lester - including, in the background, Eric Mack and other less explicit champions - all have advanced the anarchist libertarian case. Against these have stood, recently, Ayn Rand and most of her followers, such as David Kelley and myself, as well as other libertarians such as John Hospers, Douglas B. Rasmussen, Douglas J. Den Uyl, all of whom have denied the alleged anarchist implications of libertarianism. More precisely, *they have* - as I have understood them - *denied that the free society would need to abolish government*. Instead, they have argued that such a society could and even should have a government that would consistently uphold and protect individual rights, at least as its official, constitutional policy.<sup>3</sup> This means that the infractions government allegedly must commit against a system of individual rights would not be required.

This position may be put rather simply: When living in communities, dangers from others exist and it is *ethically* imperative to address these dangers; government, rightly understood, is the institution that specializes in proper protection of individual rights, thus it would be ethical to es-

establish government instead of leaving the task of rights-protection to individuals and businesses that lack the training to protect rights properly, that is, via due process, without violating rights in the process of this protection. Indeed, this institution, government, is unique in human communities because protecting individual rights isn't like other tasks (like producing and selling bread) because it's genesis isn't peaceful interaction but the initiation of force and the required response. This is why politics *cannot* be reduced, without remainder, to commerce, contrary to what individualist anarchists maintain.

I will reconsider this dispute here and show that in fact both the individualist anarchists and the so called minarchists - those who support a properly limited government - are right and their differences are only apparent. In one respect no competing legal orders would exist in a fully free society while in another sense competition among different legal orders would be the natural libertarian situation.

What is the anarchist case for the libertarian society's approach to adjudication and law enforcement? What about it suggests that it is truly anarchistic? And what is the minarchist case for the libertarian society's approach to law? What indicates that it is anti-anarchist? I'll show that the two positions only appear to be different because of certain preconceptions about what a legal order must involve.

Some might wonder why this topic is of general interest and should concern any political philosopher? In other words, why is this not some sectarian issue, relevant only to those who find libertarianism promising?

The fact alone that Nozick's treatment of it received such close attention throughout the community of political philosophers and theorists - as well as economists and public policy scholars -

should suggest that there is more at stake here than merely settling an intra-libertarian squabble. The dominant principles of Western liberal democracies are of two distinct types. One stresses personal autonomy, individual sovereignty. The other stresses some more or less extensive collectivism or, more recently, communitarianism. In this position all who are able naturally owe provisions for those who are in dire straits - the poor, helpless, injured, etc. These provisions are to be obtained via taxation or universal service, both of which are, to use Nozick's words, "on par with forced labor" and therefore rights-violating.

Whether either system can be stable, coherent, orderly, non-contradictory and just in the policies it precipitates has been the subject of numerous debates.

Arguably one motivation for incorporating a serious, maybe even substantial, welfare provision into an essentially liberal order is that without it no reason can be found for supporting the traditional configuration of countries as political entities. In other words, only if there are enforceable positive duties all citizens have toward one another may a government be justified at all. If no such duties are involved in maintaining justice, perhaps the need for government could not be established. So, in a sense, one promise (or threat?) of consistent classical liberalism, namely, libertarianism, is that it would require the abolition of government altogether, including the very idea of a country. But not all libertarians consider this a sound inference from their agreement that all individuals have unalienable rights to life, liberty and property.

Let me now restate, as neutrally as I can, why anarchism seems to follow from libertarianism. And I will also give the minarchist response to this as briefly as possible, at first.

The libertarian view is that each individual is a sovereign person, in possession of basic negative rights to life, liberty and property. None may violate these and other, properly derived, individual rights. If one needs to protect these rights, there is the option of doing so oneself or hiring others.

As with all services human beings may offer to others, provisions may be offered by various parties and none may acquire a protected, legal monopoly. So the protection of basic rights may be provided to different individuals by different firms specializing in such provisions. Ergo, no exclusion of competing providers can be justified on libertarian grounds. This, in essence, support the anarchist libertarian idea of the provision of legal adjudication and enforcement.

The response to this has often been that such a system would in principle be chaotic and could more easily than would a minarchist system lead to a failure of providing decisive results. This is because dissatisfied parties could always seek yet another trial court, employ yet another police department, switch to yet another appellate court, etc., so there would be no "court of last resort" so as to issue a genuinely *final* or *decisive* judgment. Such a situation would basically render the legal system non-functional in a variety of cases where those involved wish to press on with their claims.

It has also been argued that a legal system is essentially different from other kinds of provisions because (a) it involves the use of force against those who haven't authorized this use (alleged criminals); (b) there is a need for law prior to market transactions, so law itself is in a different category (politics versus economics), and (c) one should not be a judge in one's own case (*vis-à-vis* self-defense in complex cases).

It is my contention that, contrary to appearances, the two camps of libertarians aren't real opponents but emphasize different issues but ones regarding which a common ground (and system of justice) can be found.

### ***What is Government?***

Government is, rather broadly put, a legal service institution the actions or policies of which are backed by allegedly justified physical force and its threat. Since it is just the definition of government that's in dispute in this discussion, I will only give this rough characterization rather than a formal definition for the time being.

Government has been rejected by anarcho-libertarians on grounds that its very nature involves fundamental injustices (such as taxation or exclusive legal jurisdiction).<sup>4</sup> Legal services consist of enforcing laws, and laws are supposed to uphold justice. If, as libertarians hold, justice consists of respecting individual rights, then legal services involve the adjudication of disputes about rights violations, overseeing conviction of criminals, and providing for some of the police protection and military defense for people who live within of the relevant jurisdiction, all in the effort to give freely consented to protection to these rights.

Rights are the objective criteria by which just adjudication is to be conducted, so far, at least, as libertarians understand them. This, as they tell it, fulfills the requirement of a civilized legal system whereby the rule of law rather than of (the will of) human beings (as rulers) is followed.

So government here is criticized because it is considered impossible for it to achieve justice without also breaching it. If the provision of legal services is to be just, the argument goes, government must enjoy the full consent of the governed, not just the majority of those being served

by it. (That consent may be explicit or, some have argued, implicit - based not only on overt but tacit agreement implied by one's actions.)

But can even a properly limited government exist with the full consent of the governed? Some argue it has never done so and, indeed, cannot because it is necessarily coercive, involving as it does the forcible monopolization of the legal services it provides.<sup>5</sup> To achieve justice, it is held, legal services need to be provided in ways government cannot provide them, namely, absent any kind of coercion.

The reason government is supposed to be coercive by its very nature is often provided by reference to Max Weber definition of it "A state is defined by the specific means peculiar to it, the use of physical force. The state is a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory. Politics, then, means striving to share power or striving to influence the distribution of power, either among states or among groups within a state."<sup>6</sup>

Notice that Weber talks here of the state as a human community, in the fashion of Hegel, Marx, Green and Bosanquet, rather than of classical liberals such as Locke, Mill or Spencer. But many make use of this conception of the state to characterize government as an organization that monopolizes the use of force within some geographic area and raises its revenue through coercive taxation.<sup>7</sup> Tyler Cowen gives a slightly different definition of government or state, characterizing it by "finance through taxation, claim of sovereignty, ultimate decision-making authority, and prohibitions on competitive entry."<sup>8</sup> And John Hasnas tells us that "What appears to be essential for an organization to be considered a state is that it monopolizes the basic policing, rule-making, and adjudicative func-

tions in an identifiable area and funds these functions through taxation."<sup>9</sup>

What is of concern to me here is not the nature of the state as it is closely linked to Hegel's and Marx's ideas - as a holistic, organic community of human beings - but the nature of government, which is the institution that may be established to provide legal services for human communities. As the United States Declaration of Independence refers to it, such "governments are instituted among men, deriving their justice powers from the consent of the governed." Here government is not a state, meaning a human community of a certain type, but an institution *within such a community*.

The libertarian controversy concerns whether governments need to be in violation of basic individual rights or might they exist and function without doing violence to those rights. And that is my concern here as well.

In the broad field of political theory - apart from the various schools that defend various configurations of human politics - there is much controversy about the scope of legal services or governments. Some, as already noted, would include the provision of a wide set of goods and services apart from the protection of individual, negative human rights. Indeed, some deny that such rights exist and conceive of government in a pro-active, affirmative mode, whereby the laws mandate conduct that produces goods and services for various segments of the citizenry. Indeed, some argue that government comes before any rights, government being the grantor of rights, not their protector.

Others, especially in the classical liberal political tradition, see the protection of individual rights as the sole service that a properly conceived government or legal order provides. As the US Declaration of Independence put it, it is "to secure these rights" that governments with just powers are established. And among libertarians

there is a further, more specialized controversy, namely, about whether within some region of inhabitation only one or several governments or providers of legal services might properly or justly exist.<sup>10</sup>

To begin with, is there some kind of insidious, rights-violating monopoly afoot when legal services are being delivered by governments, or must there be? Or might government be a monopoly of the benign sort that we find in the provisions of all goods and services: even a barber shop has a monopoly, at the exact place where it is located, as does a grocery store, an amusement park, an apartment complex or a gate housing community? Or, is it a monopoly that just happens to have emerged without anyone having forcibly imposed 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 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?

In certain cases of providing goods and services no monopoly of even the former, benign sort, is involved, as in the purchase of, as already noted, take-out pizzas. One need not go anywhere to get the benefit of competing providers, only make a phone call to different establishments. Trash pickup is also provided in this fashion, as is mail delivery and satellite television reception.

### ***May Governments Exist?***

I have in the past argued that governments may serve communities without any degree of coercion, involving no coercive monopolies.<sup>11</sup> Jack Sanders, who argues for a society without government, dis-

cusses whether the view proposed by me qualifies as anarchist or archist.<sup>12</sup> He claims that in the position that I hold the concept "government" is used idiosyncratically since it proposes that one can have such an institution without any measure of coercion. Yet, Sanders argues, history shows that no government has ever existed that did not engage in extensive coercive activities.

One response to this point<sup>13</sup> is that the concept of "government," not unlike that of "marriage," is rarely - perhaps never - instantiated flawlessly. These are normative concepts and while it is important to learn whether instantiating them is realistically *possible*, it is not always decisive that they are rarely instantiated. So the *history* of governmental conduct is not decisive as to the *nature and morality* of government, any more than the history of actual marriages is decisive as to whether marriages can exist *as they ought to*, whether as usually conceived they could be a proper arrangement between couples.

Another, perhaps more direct, response, hinted at earlier here, is that in the relevant tradition, namely, classical liberal political theory, the concept "government" is used in a way that suggests that it has been held to be compatible with respect for individual rights. John Locke, for example, not only deemed government compatible with such respect but believed it was needed to provide effective protection of such rights. And the U. S. Declaration of Independence, as already noted, sketches a characterization of the function of government that also suggests such compatibility. And, more recently, Ayn Rand and her students have argued that government *can* exist without taxation, a practice that Murray Rothbard and others have seen as one that is decisively anti-libertarian.<sup>14</sup>

It also bears noting that anarchist libertarians are very different from the usual type anarchists since they defend various arrangements in

society that serve the sole purpose of protecting individual rights, calling these "defense agencies," "protection agencies," "justice services," whatever.<sup>15</sup> As far as I understand, this pretty much puts these libertarians in the camp of those who do, in fact, defend some form of government, albeit one free of the flaws of governments defended by socialists, welfare statistes, and rejected by other anarchists who want no laws at all to govern societies but believe that communities will flourish through cooperation not overseen by any laws, only by the impact of personal moral vigilance.

Thus Sander's claim, that the concept of government proposed by me here and elsewhere is idiosyncratic, is open to serious doubt.

### ***What is A Monopoly of the Legal Use of Force?***

The question over which there is perhaps the greatest controversy among those who want legal services provided solely for the protection of individual (and, of course, derivative, including contractually instituted) rights, is whether governments need to be a *coercive* monopoly - as is, say, the US post office's first class division - rather than a *benign* monopoly, like that of a privately owned apartment house or an air carrier (once air born).

In order for the US Postal Service to retain all first class mail service, it must be prohibited by a legal authority for anyone to offer this service for sale. This monopoly, then, of the USPS is *coercive*.

A monopoly, however, is not *coercive* if it exists by virtue of overwhelming customer support - for example, Microsoft's dominance in the software industry is not *coercive* although it could reach the level of monopoly, namely, being the sole provider of the relevant goods and services.<sup>16</sup>

A privately owned apartment house is a *de facto* monopoly in the same way as any particular ownership constitutes such a monopoly, especially to someone else who wants just that item but cannot have it since it is now owned by another. The owners may exclude those they do not wish to deal with from utilizing the provisions, just as anyone may set terms of use or non-use for others, by, say, evicting renters. A passenger air carrier, in turn, becomes a *de facto* monopoly between ports of embarkation and disembarkation. Flying United Airlines from LA to NY, one has no access to competitors *en route* over, say, Kansas.<sup>17</sup> In short, some provision of services, given the nature of the service, may only appear to be coercively monopolistic. However, since customers are aware of this and prior to entering the exchange have every chance of seeking out competitors who have every chance, in turn, to enter the market, the apparently coercive monopoly is not in fact such even if and when the service being obtained is one provided for a long period of time. Perhaps becoming a citizen of a country amounts to consenting to such long term provisions of rights protection from a given government.

It is very likely that the service envisioned to be provided by so called (non-coercive) legal service agencies - as well as by governments envisioned to only protect individual rights by operating within the terms of such rights - appears to have some of the characteristics of services provided via coercive monopolies. Citizenship, as noted above, is a condition that runs over the long term. One of its great benefits is, indeed, that it offers a substantial measure of predictability and objectivity - that is, the rule of law.

But is not one of the signs of non-coercive monopolies that potential competitors are not legally excluded, prohibited from entry into the market? Can there be *bona fide* competition among govern-

ments - for citizens, businesses and such - so that despite retaining some characteristics that resemble those of coercive monopolies, they are in fact non-coercive? Governments of this only apparently monopolistic type would be unlike postal monopolies in first class mail provision but like air carrier between ports of embarkation and disembarkation?

### ***Why Any Kind of Monopoly At All?***

There are those who challenge this by maintaining that no such, even apparent, monopoly is needed for the provision of legal services. That is, one could simultaneously gain those services from competing agents - shop for them on the model of shopping for home delivered pizzas or plumbing services. The idea is that one could gain criminal legal services, as well as others of course, from one legal agent but then decide, no, one no longer wishes that agent to be the provider and do so without having to change location by subscribing to another legal agency or enterprise (or, in plainer language, up and change one's citizenship).

One might put the question another way: Could there be legal service provisions without countries? Could legal service provisions overlap, be delivered to citizens without their having to move and even divided into various parts where some agency offers police service, another prisons, and yet another adjudication? Or is this impossible along lines that it is impossible that during a flight from LA to NY one could enjoy the benefits of both competent service and instant change of the service provider? Perhaps even the separation of distinct parts may not work, just as it wouldn't work for a patient in a hospital to get a bed from one agency, blood tests from another and nursing from yet another, without some common provider that coordinates it all?

### ***Is then Government Necessarily Coercive?***

Arguably, the anarchists among those who would limit legal services to individual rights protection believe that government amounts to a *necessarily* coercive agency. Therefore, it *cannot* be justified in terms invoking the principles of individual rights - for example, to life, liberty and property.

The reason for this given by anarchists is that the kind of monopoly government enjoys within some homogeneous region is supposed to be necessarily coercive, unjustifiably exclusive of competing legal service provisions. The idea is that by excluding alternative providers, a government would practice restraint of free trade. It is, I take it, as if one pizza delivery service were to prevent others from reaching the same customers. Of course, one could, via contract, establish such exclusive provision of services but this would not be necessary for getting pizzas delivered efficiently.

Clearly, some champions of individual rights who do not take themselves to be anarchists - or who find something seriously amiss with the anarcho-libertarian critique of government - dispute that governments must be coercive. This is so even though they hold that governments would naturally govern within a homogeneous region, in a given country, as it were. They even admit that throughout history governments that have had jurisdiction over homogeneous regions have been coercive, to a greater and lesser extent. But they contend that this isn't unavoidable or necessary.

Just as marriages could be free of major and minor flaws, although few in fact are, so, too, governments could be, in principle, free of flaws, including coercive policies such as taxation or conscription. Even banning secession need not be a part of government. (The right of secession is but the right of exit and may be exercised provided no debts or other legal obligations are owed anyone in the region from which a group or individual might

want to secede and no hostages - e.g., slaves - are taken in the process.)

Even by the reconstituted - non-Hegelian - conception of Weberian government, government is only a monopoly, not a *coercive* monopoly. Weber said that government "successfully claims the monopoly of the legitimate use of physical force within a given territory." This does not imply that such a successful claim must itself issue in a legal or coercively maintained monopoly. It is a monopoly, of course, but not necessarily a coercive one.

### ***The Morality of Self-Defense***

We need now to advance this examination by noting that arguably human beings *ought* to defend themselves against criminals and foreign aggressors. This is a view not shared by old-fashioned anarchists, those who reject all law-enforcement. As a matter of ethics, this seems to be uncontroversial among those involved in the debate about the nature of limited government or legal services. Furthermore, if the division of labor is a sound principle, not everyone ought to do his own defending - it is quite complicated to do so, with due process constraints, especially. We ought, instead, to employ specialists in law enforcement and adjudication.

Government could be construed to be at least a would be specialist in the professional of securing justice - just as the dentist is a specialist in securing dental health. The significant difference is that government is, at least in a complex communities, a pre-market institution. It is required for the maintenance, elaboration and protection of individual, including private property, rights.

What is in dispute is whether the competition that libertarians see as natural in the delivery of many services could be obtained in the provision of legal services while the traditional geographical

homogeneity of countries is retained. Or would such competition or non-exclusion make room for overlapping - Swiss-cheese type - legal jurisdictions. Would it not be a violation of individual rights to have governments that aren't competing *within a given geographical region*, akin to how different pizza delivery providers compete in the same neighborhood?<sup>18</sup>

### ***A Certain Kind of Competition***

The answer that non-anarchists would be inclined to give is that there can be competition between governments just as there can be competition between different apartment houses and gated communities - or airlines *while in flight* - but not the kind that takes place within the same territory, as is the case with pizza delivery services. Just as one can move from one apartment house to another, one gated community to another, and one airline service provider to another (once a flight is completed), one can also move from a legal jurisdiction to another. But one could not have some crucial legal services - mostly involving the criminal law - provided in the fashion of pizza deliveries. This is because the type of service being provided involves a long term commitment to having one's rights protected and innumerable activities conducted within the framework of such protection, something that requires on-going mutual access to courts, police services, and so on.

This answer disputes the viability, at least until the availability of transporter type machines familiar from *Star Track*, of crisscrossing jurisdictions in criminal law, that is, the predominantly Swiss-cheese conception of governments. It is arguable that such a way of providing legal services runs the serious risk of generating *in principle irresolvable legal conflicts*. For example, a criminal could run off to a more favorable competing court after being convicted by one. Such a

prospect would defeat the very point of law, namely, the resolution of a dispute.

As noted above, though, libertarian anarchists object by noting that if the competition is not within the same area, analogous to the pizza delivery business, then one is coerced to take one's legal "business" elsewhere, which would be a violation of basic rights. They also claim that there is no risk of accused or convicted criminals switching jurisdictions mid-way through legal proceedings because it would not pay, in the long run, for courts in adjacent or even remote jurisdictions, to go against the judgments of competing courts.

This analysis is, I believe, mistaken. It rests on the (economic?) assumption of the universally agreed to utility of common standards in market services. Indeed, in free markets providers do often converge on the standards they deploy for their customers, so that after the initial conflict between, for example, different VCR services, the market eventually settled for one over the other.

Justice, however, is not a utilitarian but rights based objective, aiming at settling disputes in individual cases, not over the long run. Even if in time the various courts would see the utility of adhering to common standards, at any given time they may well not do so, and this would be an obstacle to justice that is supposed to be swift and efficient *for individual citizens*.

Furthermore, to reiterate, one needs to consider that although pizza delivery does occur within the same territory, competing dentists and even department stores do so while occupying at least slightly different localities. Even at a mall or the traditional market place, competition occurs among those who occupy different locations, so reaching out to a new provider involves some measure of cost. One needs time to move from, say, *The Gap* to *Robinson-May*, from *Sears* to *J. C. Penny's* -

one cannot have it all brought to one's doorstep where one can stay put and just point and thereby obtain different goods.

Yet it could be replied to this that in fact all those providers could compete in the fashion of pizza delivery providers. With the proliferation of on-line merchandising this has become a familiar process: Nearly everything is brought to the stationary customer. So it is not necessary for customers to go to providers - they can stay at home. And the same may be envisioned by an anarchist as far as legal services are concerned.

However, in response to this, arguably the delivery system itself benefits from the unlibertarian coercive monopoly status of roads, something that a completely free society would not have available. Governments, however - or justice services - require a homogeneous sphere of jurisdiction, if only because their customers would ordinarily live in different localities - namely, their homes - and to come together for at least some of the usual legal services, the legal authority or government would have to be stationary, not the customers.

Yet - and this is a crucial point in the attempt to reach a rapprochement between anarchist and anarchist libertarians - none of the above considerations preclude a certain kind of competition among governments. Even now, in a roughly analogous circumstance, New Jersey competes with New York in the task of providing persons with legal services, attracting business firms, citizens, and so on to where their respective governments are located. This suggests that there could be, indeed, is, competition among stationary governments in the sense that once one finds the services provided by one of them unsatisfactory,<sup>19</sup> one can move to the jurisdictional region of another.

Thus it seems that both the traditional conception of a homogeneous country and free and open

competition could be secured, satisfying the demands of minarchists and anarchists among libertarians.

It has always been my view that there is some misunderstanding about this matter among supporters of the free society - they need not be divided on it; so long as the commitment to respecting individual rights is unwavering, a resolution between the anarchists and minarchists, along lines sketched above, makes good sense.

### ***Could Law be just Another Business?***

Now I wish briefly to turn to a subdivision of the argument between minarchist and anarchist libertarians, namely, the issue of whether law ought to be an enterprise, just as other enterprises that operate in the market place.

Among scholars who have been studying the structure of a free legal system there are several who model the nature of all law on enterprise. Bruce Benson's book stands out as a clear example, with its title, *The Enterprise of Law* (San Francisco: Pacific Research Institute for Public Policy, 1990). The subtitle of Benson's book, "Justice without the State," provides a clue to the difficulty with the idea of law as enterprise.

The alternative Benson poses is that between freedom of enterprise and statism. Others, such as Randy Barnett, seem also to pose this choice. Yet there is a third option. Free enterprise within the framework of law that protects the right to freedom.

As noted already, the concept of "state" is a complex one in political and legal theory but usually it means a society conceived as an organic whole. Hegel, Marx, Green and Bosanquet all worked with such a meaning of "state," as do many others who advocate a more or less powerful authoritarian political system. Indeed, Bosanquet might even be

said to argue for a minimal state, given the context of his discussions and arguments with the British socialists and social democrats. (He, for example, opposed the welfare programs of the state in part on the ground that they are demoralizing. He agreed that government cannot make people morally good, etc.)

Despite some relatively minimal statist in the history of political theory, the concept that seems to be the best candidate for a more benign substitute without losing certain distinctive political components is not "enterprise" but "government." There are some fairly clear-cut reasons why the enterprise model of law has problems.

First, enterprises presuppose property rights. In order to invest, trade, hire, fire, contract and do all those things enterprises are likely to do, those who embark upon an enterprise must have their right to private property and freedom of trade/contract *clearly (enough) defined and well (enough) protected* so as to carry on with their tasks. And the definition and protection of private property and related rights within a complex society requires objective law and its impartial enforcement. While the realm of politics may not be capable of yielding fully objective results, even by way of the judiciary of a free society, nor produce fully impartial enforcement of the law, it is arguably not explicitly committed to serving various private interests that - quite rightly and justifiably - prevent such objectivity and impartiality.<sup>20</sup>

There is then a serious threat of an institutional infinite regress if law itself is understood as just one more form of enterprise. There is your barbershop, your auto factory, farm, insurance agency, and brokerage firm and next on the block is your adjudicating institution. Whereas with the others there can be several on the same block, almost literally, with the adjudicating agency sev-

eral different ones serving the community will pose problems. Here is an example:

Suppose one is hired by the barbershop, another by the factory and a third by the insurance agent. And suppose some of these come into legal dispute among themselves. How is the adjudication to ensue? Will the plaintiff be able to secure the presence of the defendant in the same courtroom? Not if the defendant refuses to deal with the same adjudicating agency as the plaintiff.

More importantly, suppose there is a dispute between the adjudicating agency and some other enterprise regarding contract violation or property rights. Who will adjudicate this dispute? And how will jurisdiction over the parties be determined?

Benson & Co. have some answers to these questions, mainly along lines of interagency contractual agreements. This solution resembles international law. In the international arena we have no binding court of last resort, yet often the World Court and similar bodies function quite successfully as adjudicators of disputes between parties with different citizenship and, indeed, between different countries. Why so? Because there are various motivations that impel the parties to come to a resolution, usually involving business disputes.

### ***The International Model: Problems and Possibilities***

there are also some serious problems with the international adjudication process, especially where criminal law is concerned. Here compliance is not so readily come by. Different countries hold different standards of justice and reciprocity is often resisted. When Yugoslavia's Past-president Slobodan Milosevic was indicted by an international court, compliance wasn't initially forthcoming because Yugoslavia did not then grant the authority of the court, not at least within its jurisdiction. When the presence of ex-Chilean dictator Augusto

Pinochet in the Spanish courts was sought, he had to be captured in England where he went for medical treatment. Chile did not cooperate with the Spanish authorities. And when Bertrand Russell and Jean-Paul Sartre established the international court in which the United States of America was indicted and, if I recall correctly, convicted of war crimes in Vietnam, the US government refused to respond.

And these are only the more visible cases. Thousands of others where international cooperation in criminal adjudication is absent understandably go unnoticed. Those, I think, may be deemed failures of the enterprise of law or at least the model of law as a sort of competitive enterprise.

On the other hand, one can embrace the enterprise model with some modifications that will leave intact the idea that systems of adjudication need to be broadly integrated in order for them to be functional. If we consider, say, the USA, Canada, Mexico, New Zealand, Australia, Japan and all other countries as forums of dispute-adjudication, the possibility of changing one's residence or citizenship affords one something akin to benefiting from competition. Even within countries with a substantial federalist political organization there is the opportunity for benefiting from competition. New York versus New Jersey, Pennsylvania, and so on, states of the USA, all compete for customers of their adjudication services. Certainly we see such competition functioning vis-à-vis taxation, which in this context could be viewed as court fees. They vary and parties to potential disputes will shop to find the most efficient process at the lowest cost.

In this scenario, however, the forums wherein adjudication can proceed are large habitations, with thousands or millions of potential disputants signed up within the same homogeneous system. They are usually committed fairly long-term and may

leave only if they have a clean record and no adjudication pending that involves them. Moreover, within the system various layers of authority operate, so that the appeal process is integrated and there is in principle a court of last resort.

In this sense adjudication service resembles some other business enterprises wherein one signs up for the long haul. Insurance services are like this, as are apartment rentals, car leasing and, yes, marriages. Midway through the duration of the long-term contract the option to exit does not exist or exists only at great cost. And this is because the very idea underlying these kinds of relationships, between customers and service providers or trading partners, is that reliable, ongoing and predictable arrangements are of benefit to all of the parties.

### ***Is Law Enterprise or Not?***

So in one sense the idea of the enterprise of law is a mistake - if it is modeled on the shopping mall, where one can conduct trade fast and furious and switch trading partners without much loss - or on pizza delivery, where one need but call for the service and it'll be provided for a price to one's own location. The "enterprise" of law will normally involve what we might dub "customer commitments" over the long haul, known as citizenship.

As noted already, enterprises as such presuppose the existence of the adjudication forum. So there is something basically different between law and enterprise. (Of course, there is the further non-negligible difference that the customers of most other enterprises tend to be willing to deal when the important processes of the enterprise ensue, whereas in law half the customers - those accused of crimes - would usually not be accommodating at all.)

In another sense, however, law involving enterprise is already the norm. Different legal juris-

dictions are already offering different services and so there exists competition. Sadly, of course, much of the competition is between adjudicating agencies that offer not just different levels of efficiency and competence but, actually, fundamentally different goods. Some are in the business of providing what is pretty close to a just adjudicative and punitive service, while others are offering subjective, arbitrary decisions and services. But we can easily imagine this to be different, so that the competition involved ensues among agencies that could well all be aiming for just resolutions.

### ***Funding Legal Services***

Finally, a major objection to the view of government that is both monopolistic as well as competitive raises the issue of how such an agency might be funded without coercion.<sup>21</sup>

Some people consider Rand and those who find her position sound a statist, although she never advocated a state.<sup>22</sup> What she did defend is the institution of government but with no coercive powers. But what about her characterization of government as the institution that has a monopoly on the legal use of force?

The monopoly being considered in this context could well be necessary yet not coercive. It does not mean that there can only be one government in the world but that in any reasonably sized homogeneous geographical area, only one such institution makes sense.

This is arguable in view of the kind of service government (or call it what you will, say, legal authority) is to deliver to citizens, its customers), just as some other providers would have a monopoly, at least over some period of time (e.g., an airline, while you are traveling, an apartment house, a gated community).

The point in this final comment is only put on record a protest against calling people who defend this view "statists." It lends no light, only some heat, to the issue at hand among libertarians.

So it seems that what we have in the enterprise of law approach to the nature of a legal order is either a flawed or a substantively indistinguishable approach from one taken by those who claim that a human communities ought to have a government the task of which is "to secure these rights," namely, to "life, liberty and the pursuit of happiness." Government, though not a state, is just that kind of institution in a community that has this task and, properly or ideally, no other.

### ***Endnotes:***

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<sup>1</sup> For the most recent publication of Murray N. Rothbard's libertarian-anarchist essay, "Society Without a State," see Aeon Skoble and T. R. Machan, eds., *Political Philosophy, Essential Selections* (Upper Saddle River, NJ: Prentice-Hall, 1999), pp. 488-499. It also appears in J. R. Pennock and J. W. Chapman (eds.), *Anarchism: Nomos XIX* (New York: New York University Press, 1978), pp. 191-207, and in T. R. Machan, *The Libertarian Reader* (Totowa, NJ: Rowman and Littlefield, 1982), pp. 53-63. Originally the work was published in *The Libertarian Forum*, January 1975, pp. 3-7.

<sup>2</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 67.

<sup>3</sup> Some libertarians belong among those who defend government as a necessary evil but others hold that properly constituted, government is a positive good (based on the objective value to anyone of having his or her rights clearly identified and competently, expertly protected). For the latter most governments may well be corrupt, just as a body guard who has become a bully would be, but this need not be the case.

<sup>4</sup> Rothbard discusses the issue in *The Ethics of Liberty* (Atlantic Highlands, New Jersey: Humanities Press, 1982), pp. 162-163. For his definition, see p. 171, where he says, "The State may therefore be defined as that organiza-

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tion which possesses either or both (in actual fact, almost always both) of the following characteristics: (a) it acquires its revenue by physical coercion (taxation); and (b) it achieves a compulsory monopoly of force and of ultimate decision-making power over a given territorial area."

<sup>5</sup> Arguably though, everyone's consent may not be needed. Consider this: I hire a body guard who consents to become my defender against all aggressors. Some person then attacks me and my body guard defends me from this attack, a course of conduct that may become violent toward the aggressor. Now, does it matter that the aggressor did not give consent to my body guard defending me? No. The aggressor in effect gives consent by taking an action that has as its natural, rationally-to-be-expected result, my defending myself either personally or through an agent. So, *does it matter that a government that acts purely defensively isn't consented to by, say, criminals or foreign aggressors?* This would be a government that does not coercively collect taxes or such, so consent would only be relevant to its getting hired and being paid freely, voluntarily, by those whom it defends. Payment could be in the form of premiums, as with insurance, or per service, as with some attorney or dentist fees, or bundled with prices for various goods and services, as with payments for newspapers that also provide magazines on Sundays. For dealing with the free rider problem, see endnotes #8.

<sup>6</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), p. 56.

<sup>7</sup> See, e.g., Murray N. Rothbard, *For a New Liberty* 49-50 (1973); John Hospers, "What Libertarianism is," in *Liberty for the 21<sup>st</sup> Century* 14 (Tibor R. Machan & Douglas B. Rasmussen eds. 1995); David Boaz, *Libertarianism* 187 (1997); Robert Paul Wolff, *In Defense of Anarchism* 1 (1970); Ludwig von Mises, *Liberalism in the Classical Tradition* 35 (1985).

<sup>8</sup> Tyler Cowen, *Law as a Public Good*, 8 *ECON. & PHIL.* 249, 250 (1992).

<sup>9</sup> John Hasnas, "Some Reflections on the Minimal State" (unpublished MS).

<sup>10</sup> For a succinct account of the matter, see Aeon Skoble, "The Anarchism Controversy," in Tibor R. Machan and Douglas B. Rasmussen, eds., *Liberty for the 21<sup>st</sup> Century* (Lanham, MD: Rowman and Littlefield, 1995), pp. 77-09.

<sup>11</sup> See, Tibor R. Machan, "Dissolving the Problem of Public Goods, Financing Government Without Coercive Measures," in Tibor R. Machan, ed., *The Libertarian Reader* (Lanham, MD: Rowman & Littlefield, 1982). I have also advanced some

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points in support of this position in Tibor R. Machan, *Individuals and Their Rights* (La Salle, IL: Open Court Publishing Co., Inc., 1989), Chapter 7 ("Individualism and Political Authority.")

<sup>12</sup> Jack Sanders, "The State of Statelessness," in Jack Sanders and Jan Narveson, eds., *For and Against the State* (Lanham, MD: Rowman and Littlefield, 1996), p. 286.

<sup>13</sup> See, *op. cit.*, Machan, "Individualism and Political Authority."

<sup>14</sup> *Supra* note 7.

<sup>15</sup> Murray N. Rothbard, Morris and Linda Tannehill, Bruce Benson, Randy Barnett and most other contemporary libertarian anarchists favor such market based approaches to defending individual rights. See, as a seminal statement of this view, Morris and Linda Tannehill, *Liberty Via the Market* (Self-published, 1969). For a more recent exposition of this view, see Bruce Benson, *The Enterprise of Law, Justice Without the State* (San Francisco: Pacific Research Institute, 1990).

One matter, mentioned at the outset of this discussion, that these authors rarely discuss is noted in David Kelley, "The Necessity of Government," *The Freeman* 24 (April 1974). It is that market institutions, such as corporations, partnerships, private businesses and even plain, ordinary one shot trade, presuppose a background of some kind of law-enforcement, including protection of property rights and the integrity of contracts. The category of such enforcement would appear to have to be different from the provisions of other goods and services. J. Roger Lee has also raised this issue, in terms of the charge that anarcho-libertarians are committing a philosophical category mistake as they attempt to reduce all politics to economics. This may be symptomatic of some economic approaches to understanding human (social) life. See, for a recent example, Eric A. Posner, *Law and Social Norms* (Cambridge, Mass.: Harvard University Press, 2000).

It might be argued, of course, that "politics" is a category that's inherently coercive and thus inherently incompatible with justice. The idea is that all along the belief that we require politics has rested on a misunderstanding, namely, that the use of initiated force is sometimes proper in human community life. Anarcho-libertarians see ample evidence of this belief among out and out statist and tend to think that minarchist libertarians simply haven't gone far enough in distancing themselves from this

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very bad habit of associating community life with necessary coercion.

However, I wish to propose that the anarchists got this wrong: the distinctive aspects of politics concern, in part, *the need for using force against unwilling persons* who have, however, implicitly *asked for it* by way of their criminal conduct. It is not that politics rests on the acceptance of initiated force as sometimes justified but on the need to cope with such force in special, appropriate ways (suggested by the concept of due process in criminal law-enforcement). Unlike addressing market interactions, politics addresses the organization of dealing with involuntary or coerced human interactions -- crimes, wars, and other forms of rights violation or violence (for short).

To this it may be replied that even today there are arbitration agencies that carry on with the provision of legal services, so clearly it must be possible to do so. Yet all such agencies are still subject to legal scrutiny by governments if their customers file complaints against them. They can be sued in regular courts.

It might also be of concern here that with the reduction of all politics to commercial enterprises the very idea of limited government -- that is, the limiting of the providers of rights protection and adjudication to the tasks aiming for this goal -- will be impossible. After all, why should an ordinary business enterprise not expand its activities, perhaps to providing social security services, unemployment compensation, wild-life preservation? Such an enterprise might do this even if no profit is involved, provided other of its provisions garner a large enough profit.

<sup>16</sup> Max Weber's definition of "the State" does not specify coercive or non-coercive monopoly as characteristic of states or governments. Even Hasnas claims of the state only "that it monopolizes the basic policing, rule-making, and adjudicative functions in an identifiable area." This is ambiguous: the issue that is crucial is *how* it comes to monopolize these functions, coercively or by the consent of those to whom they are provided. Only when he adds taxation to the definition of the state or government does the coercive nature of such an institution become evident. But that is begging the question no less so than did Murray N. Rothbard when he made taxation a defining element of government.

<sup>17</sup> It is instructive to note that dealing with travel providers is often frustrating in nearly identical ways to

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dealing with government agencies; once one is on board or has signed up, changing carriers is very cumbersome and given one's plans, nearly impossible and financially prohibitive. Those providing the service seem to be well aware of this, given how they tend to conduct themselves toward their customers. Not in all cases, of course. One can disembark from a London cab and find another easily enough, although doing the same from one hired to transport one to some remote region of the city (let alone some village in New Mexico) may be far less manageable. There is also the analogy of being married and trying to be divorced -- the process can be excruciatingly difficult. Or switching life insurance and related long term coverage providers.

<sup>18</sup> There are some cases of Swiss-cheese types countries that might be pointed to as quite peaceful and operational, such as Baarle-Nassau/Baarle-Hertog. History has left us here with a territory composed of two municipal jurisdictions. The shape of this realm is unique: it belongs, in part to Holland and in part to Belgium. The people are reported to be quite comfortable with the situation, even though it raises so many complicated and difficult problems that even the most brilliant jurists are puzzled. See, for more on this, <http://wings.buffalo.edu/philosophy/faculty/smith/baarle.htm>. Arguably this shows their viability, workability and even survivability, although not necessarily their superior efficiency for purposes of administering a system of just criminal law.

<sup>19</sup> By "unsatisfactory" I am not here talking of tyrannical or oppressive, merely of less than competent, sloppy, sluggish, etc., governments that provide only the services that governments ought to provide.

<sup>20</sup> For why the goal of objectivity and impartiality is thought to be impossible to achieve, see James M. Buchanan and Gordon Tullock, *The Calculus of Consent, Logical Foundations of Constitutional Democracy* (Ann Arbor, University of Michigan Press, 1962), the work that advanced the theory of public choice in line with which public servants are no less utility maximizing than are market agents.

I dispute that this is a necessary feature of public service in any type of political order. It is, of course, typical behavior of public servants in what economists call a "rent seeking" welfare state. However, in a free, libertarian government such servants may well carry out their oath of office to defend the constitution because the constitution does not sanction special interest legislation

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and regulation. For more on this, see Tibor R. Machan, *Private Rights and Public Illusions* (New Brunswick, NJ: Transaction Books, 1995).

<sup>21</sup> In op. cit., Machan, "Dissolving the Problem," the case is advanced, following some suggestions by Ayn Rand, that a properly limited government can be financed via contract fees, payments for its major economic benefits.

<sup>22</sup> See, Ayn Rand, "The Nature of Government," In Ayn Rand, *Capitalism: The Unknown Ideal* (New York: New American Library, 1967).