

**A Penrose Stairway:
The Free Market and Limited Government**

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Clair de Lune

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Introduction

*A thing cannot both be and not be
at the same time and in the same respect.*
— The Law of Contradiction

You can't have everything.
— Restatement of the Law of Contradiction

SINCE AT LEAST 1960, the modern libertarian movement has been divided between those who believe that the free market is best served by a night-watchman kind of government limited to the protection of personal and property rights by providing police, judicial, and national-defense services, on the one hand, and those who believe that those services can and should be supplied by the market itself. The latter normally hold that a government is in fact an institution that by its nature must violate the personal or property rights the defense of which is its *raison d'être*. They argue that it is a blight on society and that social structures can and should exist without it. In the strictest, literal sense, they are anarchists, but they should not be viewed as shadowy figures with hats to hide their faces and cloaked in long coats hiding makeshift bombs. Because they are exponents of the free market, they may be called free-market anarchists.

The two sides agree that the case for the free market is sound, both morally and practically. They accept as a moral starting place the non-aggression principle, which holds that the use of force against those engaged in peaceful action is always wrong. The matter at issue, then, is whether a government necessarily and inherently must use force against some who have committed no such act against others. If it is true that government, by its nature, will act coercively against anyone, then libertarians who favor a government — however limited it may be — must abandon the non-aggression principle or they must abandon their support for a government.

It is not the purpose of this book to present the arguments for the free market, and it is not the purpose of this book to present the arguments that government by its nature must violate the non-aggression principle. It is my position that both of those cases have already been made conclusively. Those who favor a limited government are, for the most part, familiar with the arguments for the latter position, and for reasons of their own have not found them convincing.

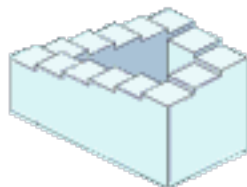
My purpose is to look into a separate but related matter. Those who favor limited government believe that it is possible for it to exist and not to intrude into the workings of the free market. By “intrude” is meant both to attempt to regulate the market with statutes

and by its actions to grant advantages to some market entities not available to others. Both actions are repugnant to the exponent of the free market. I believe this position is critical for libertarians: since the case for the unregulated free market is — at least for them — settled, if I can show that it is incompatible with the existence of a government, it is my expectation that a libertarian reader will retain his support for the free market and abandon his support for limited government.

In logic, of course, he could instead abandon his support for the free market, but since that case has been made in so many different ways by moral philosophers and by economists, I am counting on its having a stronger hold on the minds of libertarians. I am counting on the sturdiness of the case for a free market, as opposed to the uncertainty of the case for limited government, to be the decisive element in the judgment of libertarian readers.

It is common that arguments for a limited government also include objections to free-market anarchism. Necessarily, then, in presenting my case, there will be some discussion of the ethical arguments for free-market anarchism, and of ideas of how it would work, but they are not my primary focus. They have been made necessary by some of the specific criticisms of free-market anarchism to which I will be replying. My primary focus is to show that a night-watchman limited government that does not intrude into the free market is a contradiction in terms, a chimera, a Penrose stairway: [1] it may be drawn or described, but it cannot be built. **I will argue that by its nature, every government, including the night-watchman limited government, must take actions that exceed the charter of defending the natural rights of its citizens, protecting their persons and property, and adjudicating differences that may arise among them, actions that will affect the market, even distort it.** Moreover, those actions will favor some businesses and confer advantages on them to the disadvantage of others. It is important to understand that the difficulties I shall identify are not mere “bugs” in the system that can be worked out with a little time, effort, and imagination; they are built-in features.

My intellectual debts to writers such as Murray Rothbard, Morris and Linda Tannehill, Roy Childs, and Lysander Spooner will be almost instantly apparent. But I should be remiss if I should fail to mention also my friend of 50 years, Tom McPherran, also known as Nicholas Strakon. Our conversations about the state and other philosophical issues have taken so many turns that I am often at a loss to say whether any given idea is my own or one that he shared with me. And even if he should say that a given idea was mine, not his, its genesis would be so completely embedded in our conversations that I hesitate to claim it as exclusively my own. Moreover, for the past 23 years, he has provided me with a forum, his newsletter *The Last Ditch* and his website, for presenting my ideas on this and other subjects. My debts to him are incalculable.



[1] For illustrations of Penrose Stairways, other than the one pictured at chapter ends, see https://en.wikipedia.org/wiki/Penrose_stairs

Part I

Jacob Hornberger
and the Case for Limited Government

JACOB HORNBERGER IS THE FOUNDER and president of the Future of Freedom Foundation. Founded in 1989, it is an educational organization whose mission is

to advance freedom by providing an uncompromising moral and economic case for individual liberty, free markets, private property, and limited government.

In its flagship publication, formerly *Freedom Daily*, now *Future of Freedom*, it has been fairly consistent in opposing expansions of the state, and in arguing for the merits of limited government, particularly limited government as exemplified by the U.S. Constitution. Hornberger recognizes many of the Constitution's shortcomings, but is nevertheless enthusiastic about its merits. In a recent essay, he compared it to a sea wall that protects a community from being flooded by tidal waves.

Notice the phrase “uncompromising moral and economic case.” Hornberger means it. Whereas from time to time he takes positions that other libertarians perhaps think are mistaken, such occasions do not result from any effort or intention on his part to compromise with those he thinks are wrong. Rather, they are genuine differences of opinion about the application of the non-aggression principle.

It is for those reasons that I wish to undertake a critique of his recent six-part essay, “Why I Favor Limited Government.” [1] I do not consider that his arguments are the best that can be marshaled for the limited state, but they represent an effort by a principled libertarian to make the case without compromising the principles of the free market or other expressions of natural rights and liberty. And it is possible there are those who are persuaded by them.

Unfortunately, Hornberger’s effort nowhere takes up the issue of legitimacy. Nowhere does he present what would seem to be a moral case for limited government, uncompromising or otherwise. He does not tell us how a government can be legitimate, or how it can become legitimate if it is not. The omission is somewhat puzzling, given the mission statement quoted above: “uncompromising moral and economic case for ... limited government.” He also does not explain to us why he does not attempt to present that moral case. His case is based, rather, almost entirely on utilitarian considerations, though it is clear from his other writings that he is not a Utilitarian.

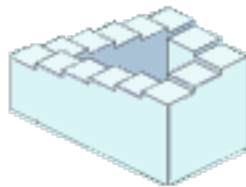
And because he does not take up the issue of legitimacy, he has failed to notice any number of ways in which his limited government intrudes into the free market. I will be pointing those out as we proceed. Nevertheless, some of his considerations and arguments present a useful point of departure for discussing common misunderstandings of free-market anarchism. For readers who wish to read other, much fuller presentations and defenses of free-market anarchism, I direct them to Murray N. Rothbard, *Power and*

Market; Morris and Linda Tannehill, *The Market for Liberty*; Richard and Ernestine Perkins, *Precondition for Peace and Prosperity: Rational Anarchy*; and perhaps David Friedman, *The Machinery of Freedom*, though that work dwells almost entirely on economic considerations cast in the Chicago school of economics style of arguing. As of this writing, all of those books are in print.

The most important works for the moral case for free-market anarchism are Murray N. Rothbard, *The Ethics of Liberty* (in print), and two essays by Roy A. Childs, “Objectivism and the State: An Open Letter to Ayn Rand” [2] and “The Epistemological Basis for Anarchism: An Open Letter to Objectivists and Libertarians.” [3] This latter essay remained unpublished until 2003, when it was published for the first time by *The Last Ditch*, Nicholas Strakon, editor. Before then copies were privately circulated, according to Childs, “in the thousands.”

In presenting his case, Hornberger refers to none of those works, except for a passage in *Power and Market*. It is unclear, therefore, just where he gets his idea of what a free-market anarchist society might look like or how it might function. And some of the arguments he says anarchists use are arguments that use are arguments that I myself, a free-market anarchist since 1971, do not remember ever encountering. Because he does not footnote his series of essays, I cannot argue that he has misunderstood any other author or incorrectly presented his views. I shall therefore be taking him at his word and replying to him as best I can.

My purpose in part I is to reply to the points Hornberger raises. I will undertake to clarify the free-market anarchist position where I think it has become misunderstood, and to defend it from objections that, in many cases, “prove too much.” His series will serve as a point of departure for addressing those issues.



[1] “Why I Favor Limited Government” first appeared in the March 2016 issue of *Future of Freedom*, and continued to the August 2016 issue. It is available on the Future of Freedom’s website: <https://www.fff.org/explore-freedom/article/favor-limited-government-part-1/>.

[2] Archived at <https://web.archive.org/web/20110723132732/http://tmh.floonet.net/articles/racolar.html>.

[3] Archived at http://www.thornwalker.com/ditch/eboa_1.htm.

One

The Sirens' Song — Why We Cannot Let This Matter Rest

I BEGIN MY DISCUSSION with the conclusion of Jacob Hornberger's series, where he presents an idea he attributes to an unnamed anarchist friend of his:

"Let's call a truce. Let's work to achieve freedom by getting down to the night-watchman state. At that point, we'll decide whether or not to dismantle it."

We free-market anarchists have been hearing this suggestion in various forms for decades. I recall Nathaniel Branden saying that if we got 70 percent of the way to a free society, he would be happy.

And even the principled Joe Sobran once said to me that if we could get to a truly limited government, "You can keep the change."

I believe this approach is fundamentally flawed, both intellectually and tactically. I suggest that those free-market anarchists who have been seduced by this sirens' song have not sequestered the idea of a free-market anarchism; they have not "compartmentalized" it; they have not folded it up and placed it in a cedar chest to be taken out for later use. In fact, they have retreated from free-market anarchism. They have not formed an alliance for the advancement of liberty; they have instead abandoned the case for it and in effect given the entire philosophy away to the exponents of limited government. They have lost sight of why it is important that we continue to make our case in as many forms and in as many venues as we can find. They have settled for what I call Vichy liberty.

Apparently, therefore, it is important to remind readers of why this subject should occupy their attention, why we must *not* "work to achieve freedom by getting down to the night-watchman state" first. Because it has the appearance of being reasonable and conciliatory, it is important that this suggestion be recognized for what it is: intellectual surrender. Once we have dealt with this sirens' song of surrender, we can turn to a fuller discussion of free-market anarchism itself.

Allow me to review a bit of movement history.

In 1969 the libertarian movement consisted of Objectivists and their imitators; FEE-type libertarians and conservatives; YAF conservatives; the students of Robert LeFevre's Freedom School and Rampart College in Colorado and of Andrew Galambos and his Free Enterprise Institute in California; and the radical libertarians clustered around Murray Rothbard in New York City (when, as he said, the movement could still fit into his living room), as well as a remnant of the Alliance of Libertarian Activists in California. All these components of the movement lived in uneasy alliance with one

another — and occasionally in uneasy ignorance of one another. Free-market anarchism was eschewed by all but the radical libertarians, and many of them rejected the term “free-market anarchism” in favor of the tamer “anarcho-capitalism.”

Into this inherently weak coalition burst Roy Childs’s “Open Letter to Ayn Rand,” published in Jarret Wollstein’s periodical, *The Rational Individualist*, in its October 1969 issue. [1] Its powerful arguments that government is inherently illegitimate caused an avalanche of letters to editors, articles, attempted refutations, and the conversion of hundreds — including Nicholas Strakon, later the editor of *The Last Ditch*, and me — from support of the limited, constitutional (night-watchman) state to free-market anarchism. The interest and stir Childs’s “Letter” created served as the economic base for the publication of Morris and Linda Tannehill’s *Market for Liberty*, an expansion of their booklet “Liberty via the Market,” showing how judicial, police, and defense services might be provided in a stateless society. Meanwhile, Morris Tannehill — a prodigious letter-writer — was circulating Childs’s essay “The Epistemological Basis for Anarchism: An Open Letter to Objectivists and Libertarians,” which was far more important than the “Letter” but which remained unpublished until *The Last Ditch* posted it on its website in 2003. [2]

Efforts to refute Childs’s central “Letter” arguments appeared quickly, the most important of which (at the time) were privately circulated: Edmund A. Opitz’s “Where We Differ” and a lengthy essay by Charles Jackson Wheeler that later appeared in *The Personalist*, a philosophical journal edited by John Hospers, director of the philosophy department at the University of Southern California. Hospers pronounced Wheeler’s refutation absolute and final, but very few of us who had been won over by Childs’s arguments agreed.

Perhaps the most promising effort to refute Childs came at a libertarian convention in early 1971 in New York, when Childs debated Jeffrey St. John. St. John was known to libertarians outside New York City primarily as the author of an essay in *The Objectivist*; he was therefore thought to be a sort of unofficial spokesman for Objectivist polity.

The debate, available on *The Last Ditch* website in its section devoted to works by and about Roy Childs, was a rout and St. John retreated to conservatism. [3]

Within a year, David Nolan — who had published a letter in Lanny Friedlander’s magazine *Reason*, vol. 2, no. 9 (circa December 1970) urging an end to the debate — published an article in the July-August 1971 *Individualist* calling for the creation of a libertarian party. The following year a political party was in existence with Hospers as its first presidential candidate. Hospers gleaned the party’s first and only presidential electoral vote, and his running mate, Toni Nathan, received history’s first electoral vote for a woman, a milestone feminists and other left-wing chroniclers of “women’s issues” often ignore, if they are aware of it at all.

For the next ten years, new organizations and publications were popping up all over, and significant money flowed into the movement from the Koch brothers of Koch Industries. Most important of the new organizations was the Cato Institute. The personalities dominating the institute and the party sometimes overlapped and sometimes were at war. Denunciations of former associates were almost a regular feature of newsletters and monthlies. Important alliances were formed, and important friendships were shattered, among them the long-standing affection between Childs and Rothbard.

When the dust settled, still standing were Laissez Faire Books (alone among the competing book suppliers), the Libertarian Party, *Reason* magazine (under new ownership since the January 1971 issue), and the Cato Institute. Also standing, perhaps because it had stood aloof from the various quarrels and altercations, was Leonard Read's Foundation for Economic Education (FEE), with its publications and book service. All others were lost, doomed, or marginalized. (By far, the greatest among the marginalized was Rothbard's *Libertarian Forum*.) By this time the official Objectivist movement had completely anathematized the broader libertarian movement, refusing even to recognize itself as a part of it.

Both Cato and the party had made the same significant policy decision: neither would discuss anarchism. In Cato's case, the decision was based on its desire to become a major think tank that would be taken seriously by policymakers. In the party's case, the decision was a big-tent effort to maintain peace among the anarchists and what some of us called the "limited statists" for the sake of winning elections. In short, most libertarians began to work for reform, rather than for liberty. And make no mistake: limited government is a reform measure.

We see the results today: free-market anarchism itself, which triumphed in virtually every setting when it first appeared, is now completely marginalized in the movement. It is supported by no major publication (even within the relatively small arena of libertarian publications); it has no spokesman. The two publications lately associated with Rothbard (the *Rothbard-Rockwell Report* and *The Free Market*) became part of a tactical alliance with certain paleoconservatives, and, like Cato and the party, their principals, for the most part, buried the hatchet of anarchism for the sake of the alliance. Beginning in the early 1980s while he was still working at Cato, Childs himself began telling people that he was no longer an anarchist. And later, the website LewRockwell.com — although it continued to publish free-market anarchist essays and op-eds now and then — gave up its tax-free status in order to advance the (Republican Party) candidacy of Ron Paul for president.

But what other result was possible? The only strength free-market anarchism ever had against the Vichy libertarianism offered by the advocates of limited government, constitutionalism, and the night-watchman state was its arguments. The latter enjoyed the numbers, the money, and the key positions in the organizations and publications. Once anarchism stopped wielding its only weapon (its *decisive* weapon), it could expect no other outcome than the marginalization in which it now finds itself. As Rand had warned in a January 1964 *Objectivist Newsletter* essay, "When opposite basic principles are clearly and openly defined, it works to the advantage of the rational side; when they are not clearly defined, but are hidden or evaded, it works to the advantage of the irrational side."

If free-market anarchists join with their limited-government allies and aim for the night-watchman state and only when it is achieved discuss whether it is necessary — instead of working from the start for the radical liberty free-market anarchism proposes — the result will be and can only be that their radicalism will be submerged in the reform measures of limited government. Their concession means Vichy liberty.

We do not need to go to Ayn Rand to understand this. Hornberger himself has explained to us in several insightful essays why reform cannot achieve a radical end, and his observations are worth quoting at length:

In “The Libertarian Case against Vouchers” (June 12, 2015), [4] he explains why supporting education vouchers will not advance education liberty:

[Voucher] proponents don't cause people to question the very idea of government involvement in education. How can we ever achieve a free society if libertarians aren't causing people to question illegitimate governmental apparatuses and instead coming up with reform schemes that keep such apparatuses intact? Indeed, why would we expect people who aren't well-versed in free markets to embrace a genuine free market in education if libertarians aren't willing to do so?...

The free market produces the best of everything. It would do the same with education. More important, educational liberty would be a gigantic step toward restoring fundamental moral principles to our land.

Is not the application of these observations to the debate between limited government and free-market anarchism obvious?

Once a night-watchman state is established, why would we expect people who weren't well-versed in free markets or political theory to embrace a genuine free market in justice and defense if libertarians weren't willing to do so? And if the free market produces the best of everything, why argue against its ability to supply necessary justice and defense services and products?

In his booklet “Why We Don't Compromise,” [5] Hornberger makes another excellent point. He is discussing the question of reform versus abolition:

Suppose 100 percent of libertarians called for a reform, rather than a dismantling, of the welfare-warfare state way of life under which Americans today live. What would be the chances of achieving the free society — that is, one in which a welfare-warfare state apparatus is no longer grafted onto our federal governmental system?

The chances would be virtually nil. That's because no one would be spreading the idea of abolition. Everyone would be talking about reform.

Even if the idea of abolition were raised from time to time, nonlibertarians would inevitably say to themselves, “Why do we want to consider abolition when libertarians themselves don't call for abolition?” After all, if those who have studied the market process decline to call for a free-market way of life, why would we expect others to do so?

Why, indeed? And if those who have studied the market process decline to call for a free market in justice and defense, why would we expect others to do so?

He offers another insight into the dynamic of compromise in the same essay:

[Gradualism] is not gradualism.... [By] entrenching the state more deeply into areas it should not be involved in, “gradualist” methods don't gradually lead to freedom; they instead obstruct and impede it.

School vouchers provide a perfect example....

At the end of five years, let's say that libertarian voucher proponents say, “Okay, everyone, time's up! Our voucher program was intended to gradually bring about the end of all state involvement in education. Five years is a sufficiently long time for such gradualism. Time to terminate the voucher program and to separate school and state.”

What are the chances that ... schools are going to enthusiastically join such libertarians? The chances are virtually nonexistent. That's because they, like the families who receive the vouchers, have grown as dependent on the voucher dole as the public-schooling establishment has become on school taxes. They are not about to call for the end of their dole.

In fact, voucher recipients are likely to lash out at the libertarian proponents of vouchers for failing to disclose to people that their ultimate aim with vouchers was to end government involvement in education. You see, voucher proponents learned a long time ago that they could not, as a practical matter, publicly state ... that school vouchers are a gradualist means of bringing about an end to government involvement in education. They found that if they disclosed that, it was more difficult to induce people to accept their voucher proposals.

Thus, voucher proponents decided to remain silent about their ultimate goal. In fact, many of them got so embroiled trying to get vouchers accepted that they themselves lost sight of what their ultimate goal was.

One final insight from Hornberger, and I believe the point will have been made. Again he is talking about education reform, i.e., vouchers, and he is taking libertarians to task for advocating them. The essay is “No Compromise Is the Only Way to Achieve Freedom” (December 8, 2014) [6]:

Let's consider [this possibility] — that a libertarian statist reform plan [i.e., education vouchers] succeeds in making the situation better.

What then?

People are going to be ecstatic that libertarians have figured out a way to keep the entire socialist apparatus, such as public schooling, intact and improved. People [are] going to say “Thank you!” to those libertarians who saved their statist system and even made it work better.

There is no reasonable possibility that ... libertarians who support school vouchers (or any other statist reform scheme) are going to say: “Despite our success, we want to now propose the abolition of vouchers and the entire public-school system.” Instead, it is a virtual certainty that such libertarians would be basking in the praise that would be heaped upon them by statists and that they would immediately begin searching for more statist ways to save and improve the life of serfdom under which Americans are now living.

I suspect that the attraction of the suggestion of Hornberger's friend is this: that when most people contemplate liberty without a government, they imagine that there will be little change in their thinking or in their outlook or in their intellectual impulses. They imagine that a free-market anarchism is just like a night-watchman limited government, but without the government, as though everything is the same, but with one less entity in the world. It is not so.

The idea of the free market is much more radical than most people imagine. Indeed, to quote Strakon speaking about the arguments of Childs in “Epistemological Basis,” “it is only when one begins working out their implications that their radicalism emerges fully.” [7] Similarly, the idea of the free market is so radical that most of its defenders would probably be terrified if they ever saw one in its beauty and virility. Just the idea of banking without regulation, without a treasury department or a central bank, will instill a hearty dose of disquiet in the average person. Even Milton Friedman believed that a central bank was necessary to keep the money level stable — and what he advocated was more liberty than many people can accept. (I almost hear the detractors of free-market anarchism saying, “Even Milton Friedman thought that we needed government to ...”) Or think of a judicial system that must operate without the power of subpoena, i.e., the power to coerce people who have committed no crime to appear in a specific place and a specific time and perform specific actions. Almost before some

readers finished that sentence, their minds were already formulating the question, “But how would you ...”

“How would you” is not an argument; it is a confession that one’s imagination is so obstructed that he is losing sight of the role of principles. In the first place, the person being asked is not usually a person who “would” do anything; it is not within his expertise.

In the second place, “how would you” presupposes that a free market is something to be designed, and that one person can design it for everyone else.

And in the third place, the idea is not “but how would you”; it is “should you”? To the “but how would you?” question, I am inclined to reply: “Should you continue to coerce people who have not committed a crime to come to a courthouse and swear to answer questions? No? Then think about how such a judicial system could work on your own and see what you can come up with.” The problem of modern libertarians — indeed, most people — is that they have spent so much time looking to reform the state, trying to get it to confer some benefit on society, that they have become incapable of imagining a free market without a government to direct it or “protect” it.

So many of the “problems” of society are addressed by the state’s coercion, that it becomes normal to seek solutions only within the halls of coercion. With such habits of mind it is no surprise that it is only coercive measures that occur to most people. Moreover, as I hope shall become apparent, once political solutions are sought for social problems, it will only be coercive solutions that can be found. Politics has no other solutions to offer.

The free market is not a weakling that needs protection; it is not a project that needs to be designed. We may think of it as a kind of powerful lion, and, like C.S. Lewis’s Aslan, it is not a tame lion.

Once one adopts free-market anarchism, the world and society begin to look quite a lot different. Over time, habits of mind will change. What initially seemed to be a minor problem in the logic of government, perhaps even a tolerable one, will come to be seen as a major contradiction, an affront to the intellect and a rejection of liberty itself. I cannot explain precisely how or why this is so; I merely report my own experience and that of the handful of free-market anarchists of my acquaintance. The gentle call to aim our efforts at “getting down to” a night-watchman limited government disguises what awaits us if those efforts should seem to be successful. The sirens’ song, after all, did not really lure men to a life of ease and pleasure, but to their deaths. The sirens were not just few pretty girls who sat naked on rocks and sang a little off-key; they were cannibals.

It comes down to this: if free-market anarchists agree to push for a night-watchman state, planning to take up the question of free-market anarchism later, the most they can hope to get is a night-watchman state. You get what you settle for. And in this case, not even that, for as I shall argue, its existence is not within the realm of possibility. It is not merely the central figure in a skirmish with free-market anarchists. It is in fact a durable and staunch lieutenant in an ongoing war against the Law of Contradiction.

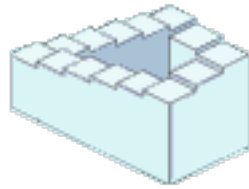
Finally, I issue this call to free-market anarchists who work for reform — either the kind that involves policy-wonk reformism or the kind of reform that has as its fulfillment the Vichy libertarianism of a limited government:

Liberty — real liberty — needs the help of dozens and dozens of men who will think about this subject; who will debate various methods, strategies, and tactics that

none of us has yet thought of and try them; whose genius, insights, and talents will not be squandered in the defense of the state, even a night-watchman state. There are plenty of people to serve that false liberty, that Vichy liberty. It is real liberty that stands in need of hearts and minds and hands. No libertarian who reads my words is needed to carry out the work of the limited state and its false liberty. Your work for it, your talent, and above all your vote are superfluous. The false liberty of the limited state and other chimeras do not need your voice to spin out their reforms. The state can get along without you. It has been getting along without you for centuries.

It is true liberty that stands in need of you, of your talents, of your intelligence, or your energy. And it can never be won as long as countless libertarians overlook the errors of Vichy libertarianism until such undetermined time as it is completely triumphant.

By that time, too many of you will be saying, “We have 70 percent of what we wanted. That’s good enough. You can keep the change.” I therefore, in the spirit of comity, offer this modification: “Let’s call a truce. Let’s work to get rid of the state completely. At that point, if it looks like we need a government, we’ll decide whether we want to cobble one together.”



[1] The article is archived at <https://web.archive.org/web/20110723132732/http://tmh.floonet.net/articles/racolar.html>.

[2] Archived at http://www.thornwalker.com/ditch/eboa_1.htm.

[3] A recording of the debate is available at <http://www.thornwalker.com/ditch/debate/debate.html>.

[4] Available on-line at <http://www.fff.org/2015/06/12/libertarian-case-vouchers/>.

[5] Available as a booklet from FFF and on-line at <http://www.fff.org/explore-freedom/article/why-we-dont-compromise-part-1/>. It should not be confused with a much shorter article by the same title published in 2010.

[6] Available on-line at <http://www.fff.org/explore-freedom/article/no-compromise-way-achieve-freedom/>

[7] “Editor’s Note,” posted at http://www.thornwalker.com/ditch/eboa_ednote.htm.

Two

Legitimacy

LEGITIMACY IS THE MORAL BASIS for answering the question, “By what right does the government do what it does?”

Another way of putting it is this: The government is permitted to do things that ordinary people are not permitted to do. Everyone understands that he can give permission to another person to do what he himself may do. I may give a friend the keys to my home and invite him to make himself comfortable there while I am away. I may not give him permission to make himself comfortable in my neighbor’s house while she is away. That seems clear enough.

But if the government is permitted to do what others may not do, the curious will sooner or later ask, who gave it permission to do it? Where did this moral exception come from? If no one in a society possesses police powers by nature, how does the government come to have them?

A government lacking legitimacy is unable to answer that question. It may reply that it has the power to do what it does, and that its power is sufficient reason. In that case, there is nothing to differentiate its claims from those of any crime boss or gang leader. Or, for that matter, an abusive wife, husband, or parent.

I take it as self-evident that if it is moral for a person to pursue a certain course of action, he has a right to take that action. It is simple logic, then (*modus tollens*), that if he has not the right to take it, it is not moral for him to take it. By extension, if the government does not have the right to take certain actions, then it is not moral for it to take them. Without legitimacy, the government does not have the right to do what it does, and therefore, whatever it does is immoral. This, of course, is irrelevant if one is not interested in establishing the legitimacy of a government, i.e., if one’s position is more or less that the government is necessary, irrespective of rights. But in that case, one must establish that it is necessary, not merely assert it. I shall be treating of that assertion in Part II.

For the most part, libertarians who advocate the existence of a government (usually, a limited government of the sort the United States is asserted to be, but not always: libertarian monarchists are not unheard of, though they are rare), normally have in mind some kind of moral authority for their state, and more often than not, it is that authority that is named in the Declaration of Independence, “the consent of the governed.” The idea is that if everyone gives the government permission to perform certain actions, then it may perform them.

I contend that that idea — along with the associated concepts of taxation, voting, and representation — has been fully treated already by Lysander Spooner in his three *No Treason* essays, of which Number 6 (“The Constitution of No Authority”) is the best known. [1] I shall therefore only touch on what he has to say, and add a few comments of my own, but before I get to that, I wish to make this categorical assertion:

No writer on the need for government — unless he is willing to base his claims on merely utilitarian or power claims — who does not discuss the grounds of legitimacy, or who in discussing them does not address the arguments of Spooner, can make a serious case for government. At the very least, he owes his readers an explanation for why he is not going to address them.

I propose to call persons who reject the claims for the need of a government anarchists, and those who advocate a free market in the absence of the existence of a government free-market anarchists. The term “anarchist” has suffered mightily at the hands of others — mostly leftists — who have made use of the term. Because the latter frequently engage in violent activities which they believe will advance their political views, activities including “peaceful” protests that somehow turn violent, bombings, assassinations, and simple physical assault, I exclude them from the category of “anarchist.” It is clear that though they may have grievances and objections to an existing system of rule, they do not have any objection to the existence of rule as such, and in most cases they propose to be the rulers themselves, or else to advance the political fortunes of someone else who intends to be the ruler.

Let there be no mistake about this: a person who uses violence to advance his political views is in fact exercising rule over some other person. If he shouts him down, he is attempting to keep that person’s views from being heard, which is to say, he is attempting to silence him. If he physically attacks another person who is carrying a sign calling for the end of abortion, or who is wearing a T-shirt announcing support for a hated candidate for public office, he is exercising rule over that person. He makes it clear that in his mind others do not have a right to present their views, and that they have the right to use their intellects, their resources, their physical powers only for purposes that please him. Of course, our attacker may have no thoughts of ever attaining power over a large number of people himself, but for the time that he is using force he is exercising rule over those he is forcing: they must serve his ends or perhaps those of someone else, but they may not serve their own ends.

The reader may have inferred that I have just used “violence” and “force” as synonyms, and so I do. While it is true that force can be exercised without actual and literal physical contact, it can be accomplished only by interacting with people on some basis other than agreement, reason, and courtesy, and may be rightly called a form of hooliganism. Furthermore, as I proceed, the reader will also notice that I differentiate between the initiation of force (coercion) and the use of defensive force. From a positivist point of view, they may appear to be the same, but in substance, they are entirely different.

You see two women tugging at the same purse. To outward appearances, they are both engaged in force, perhaps violence. But one of them is the rightful owner of the purse, and the other is not. The substance of the action, which is not accessible to perception, but only to the intellect, is that one of them is defending her property, and the

other is attacking it. Property rights are fundamental in defining what does and does not count as the use of physical force or coercion. [2]

The claim — implicit or explicit — that one person's effort, goals, or life are to serve the efforts, goals, or life of another is, when made without the agreement of the first person, a claim to rule. We may almost say that it is a claim to the legitimacy of human sacrifice, since implicit in the act is that the goals and purposes of the person ruled, i.e., a portion of his life, are to be sacrificed to serve those of the ruler. And a person who makes that claim or any like it is, whatever else he may be, not an anarchist.

It is often thought that an anarchist is someone who resents authority or even rejects authority. It is just the opposite. An anarchist is someone who rejects the claims of *false* authority. He has too high regard for legitimate authority to let random claims to it go unchallenged. Anyone can claim to have authority over another person or series of actions; the anarchist is the person who says, "Prove it to me." He asks, "How can your assertion of authority be substantiated?" And answers such as, "I was authorized by the county, or by the police, or by the government" merely push the discussion back a few steps: what authority did the supposed authorizers have?

At the very least, an anarchist is skeptical of all assertions of authority, if he does not reject them or most of them completely. An anarchist can be a Catholic, accepting the authority of the Pope in matters of faith and morals, if he believes that that authority can be demonstrated. He can be an employee, his agreement to follow directions being a grant of authority to his employer. He can participate in sports or other competitive activities, recognizing the authority of the captain of the team, the coach, an umpire, a referee, or a tournament director to make decisions of a certain sort. But when people in authority make demands that exceed the authority they have by virtue of their position, their demands lack authority and represent mere assertions of power.

When a cop at a traffic stop gropes the driver or carries out an illegal search of the vehicle, he is not acting within his authority. He has no authority to do those things. He is merely acting in the capacity of a thug with a gun and a certain amount of "back-up" power at his beck. When a stewardess on an airliner instructs a passenger to turn off an electronic device, during certain portions of the flight, she is acting with authority; at other times she is merely a bully.

What the anarchist wants to know of any government's claims is, What is the basis for your claims of authority? And it is possible that there are governments in the world that can support their claims. It is not likely, but I am not prepared at this time to argue that they do not exist.

The important point is that legitimacy confers a limited authority, and in the absence of legitimacy, claimed exercises of authority are in fact mere exercises of power deriving their force from the fear of violence or overwhelming physical strength. Obedience may follow from recognition of authority, or from fear. The first represents a kind of consent; the second betokens activity indistinguishable from that of a criminal.

We may distinguish between two kinds of anarchism. There is the anarchism that asserts that there are no governments in the world that are legitimate and that there have never been any or can be any. And there is the anarchism that in effect says, "Show me one." An anarchist of the latter sort may be perfectly willing to regard as legitimate the rule of some past figure, but of no other, and I propose to refer to this kind of anarchism as "soft anarchism." Soft anarchism does not presuppose the nature of the argument that

will establish legitimacy, and it does not require that it prove consent of the governed or divine appointment or anything else. It just requires that the claims be proven. Not merely asserted, but proven. In the absence of such proof, the assertions of authority of any government official — from the president of the United States to the False Dmitry — are treated as mere piffle, to be obeyed only as a matter of prudence, not of moral obligation.

An example from ancient history may illustrate the point. I take this example precisely because it is of little relevance to modern-day political passions, and therefore may be considered with a measure of detachment. In the Bible, First Samuel 16: 1-13, there is the story of the anointing by the prophet Samuel of the shepherd boy David, son of Jesse, to be king of Israel, this at the command of God. The event takes place even though Israel still has a living king ruling over it, said to have been chosen by God through the same Samuel and over the latter's objections.

Let us consider the position of an Israelite of the period who desires to know who is the legitimate monarch of Israel, and let us assume that he has heard the story of David and the anointing. Having heard it, he has several possible rejoinders open to him. He may say, "I agree that Samuel, a prophet from God, anointed David king, but since Saul is still alive, David may not take possession of the throne. He must wait until Saul is dead. Until then any anticipation of his reign is a usurpation."

He may say, "I agree that Samuel, a prophet from God, anointed David king, and Saul should abdicate at once. If he does not, he is a usurper, and should be opposed insofar as it is possible."

He may say, "Who witnessed this anointing? Are there any credible witnesses who are not members of David's immediate family? How do we know that Samuel did any such thing?"

He may say, "How can we know that Samuel anointed David at the command of God, and not on his own, having some personal grievance against Saul?"

And if he is not particularly devout, or is one of the foreigners living in Israel at the time, he may say, "Who is this Samuel fellow anyhow? And what authority does he have to go around anointing kings?"

The first two positions will require further analysis of the matter, and I am at a loss to anticipate how the differences can be resolved. Each of the three last questions represents an empirical matter. And the skeptics who may ask them are entitled to their doubts and to their implicit demands for evidence. The onus of proof of the legitimacy of David's ascension to the throne is on those who assert it.

The matter may be further illustrated somewhat comically by Dennis the peasant (and political philosopher) in the movie *Monty Python and the Holy Grail*. Upon being asked how he became king, King Arthur answers, "The Lady of the Lake, her arm clad in the purest shimmering samite, held aloft Excalibur from the bosom of the water, signifying by Divine Providence that I, Arthur, was to carry Excalibur. That is why I am your king." Dennis, nobody's fool, replies, "Listen. Strange women lying in ponds, distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses, not from some farcical aquatic ceremony.... You can't expect to wield supreme executive power just because some watery tart threw a sword at you.... If I went 'round saying I was an emperor just because some moistened bint had lobbed a scimitar at me, they'd put me away." And when Arthur grabs him and

orders him to shut up, he continues, “Ah, now we see the violence inherent in the system.”

Notice that Dennis does not question whether the Lady of the Lake did indeed give Arthur the sword, but whether that “aquatic ceremony” imparted legitimate authority to rule.

Dennis was not a soft anarchist (he belonged to “an autonomous anarcho-syndicalist commune”), but if there had been any government that convinced him that it was legitimate, it would later have to keep its legitimacy intact. Thus, supposing that the United States is a legitimate government and that its elections are a proper means for selecting the rulers, a soft anarchist may view the election of George W. Bush in 2000 as illegitimate, believing the claims that his opponent had won the election; or he may view the presidency of Barack Obama as illegitimate as being held by a person not qualified by birth to be president. Even supposing that the successors to illegitimate rulers are themselves legitimate, the acts of their predecessors are completely without authority, and must be re-enacted to enjoy the status of legitimacy. Otherwise they are what they seem to be: mere commands by a person who had no authority to issue them, sign them into law, or enforce them. Even if existing jurisprudence, embarrassed by the possibilities laden in the deeds of an illegitimate ruler, insists that those commands be treated as legitimate legislation, surely it is easy to see that in reason, it cannot be so; it is a mere finesse that avoids the complications of recognizing them as illegitimate and of no authority.

It is the aspiration of libertarian advocates of a limited government that there should exist a legitimate government that does not intrude into the free market. The limitations they would impose on their government are therefore many, and most nonlibertarians find them extreme beyond their expectations. They hope that the limitations they would impose will prevent the government from engaging in a large number of activities, e.g., taxation, that are normally considered the proper sphere of government, and that they should be recognized as efforts to be logically consistent with their non-aggression principle, to wit: that it is unjust to use force (coercion, aggression) against any person who has not committed a crime, crime being defined by the natural law of right and wrong and a *malum in se*, not merely a *malum prohibitum*. Indeed, there would be no legislation in the libertarian’s limited government that was merely creating a *malum prohibitum*. All legislation, it is hoped or imagined, will be legislation addressing only *mala in se*, and *not all of them*, but only such as involve one person’s (or group’s) initiating force (aggression or coercion) against another person. Shortly, we shall see that this hope is utterly vain, and cannot be realized.

Exactly what will count as initiated force and what will count as defense may differ from libertarian to libertarian, but the overarching principle is the same for them all: that initiated force may be prevented, and when not prevented punished in some way by the government. Whether the punishment will take the form of compensation to the victim or of prison time for the offender, may also differ from libertarian to libertarian, and I will not be treating of those differences here.

The Foundation

IT IS NOT ENOUGH merely to describe an ideal government and to postulate its legitimacy. It is not even enough to identify the source of its legitimacy. For the state does not exist in nature; it must be created.

We understand that it is easy enough to create a state by the use of simple coercion or conquest. History is replete with examples. But to show how any state could have come into existence legitimately is a more difficult proposition; and to show that any one has, more difficult still.

One may say, with Hilaire Belloc, “James the Second was the last legitimate monarch of England.” But that claim suggests the question, does it not, “Who was the first legitimate monarch? And how did he get that way?”

Ludwig von Mises patiently explains in *Socialism* that no state can be created legally, for the state is itself the author of legislation. That leaves us with the areas of morality and natural law.

The matter is more difficult than it may first appear. It is not simply a matter of saying that if a government has unanimous consent, then it is legitimate. But let us exercise our imaginations a little: how will that unanimous consent be created?

Let us suppose a small group on a desert island and, sensing the need for some kind of government, someone says, “Let’s vote on it.” Before the vote can be held and the votes counted, the entire populace must answer, “Okay.” In other words, unanimous consent must even be given to the prospect of voting on something.

Let us suppose a much larger population who send men to a convention to design a government and offer it for unanimous consent to the populace. It would be completely reasonable for someone to object, “What men? Why am I not one of them? Who gave them the right to design the government?”

Now, there is no real problem here if the answer is, “Well, no one actually. We just think it would be a good idea. When we have completed our design, let’s see whether it receives unanimous consent.” And in that case, there is no problem. There is also no problem if a different group of men say, “Good idea. While you work on your proposal, we will work on ours.”

Can anyone imagine that in such circumstances, either proposal will get unanimous consent? But on what basis will the second group be prohibited from doing their work?

In other words, if anyone will simply attempt to imagine creating a legitimate government, I think it will be very quickly seen that the job simply cannot be done.

Then comes the question of the newly created legitimate government’s being legitimate ten minutes from its creation. And ten minutes after that. In other words, legitimacy — if it is based on consent of the governed — is not a thing that, once created, simply continues on its own, for the reason that consent exists in the minds of the governed, and the governed can change their minds.

Moreover, each new person who enters the society supposedly governed by consent of the governed must give his consent, and keep on giving it. This includes those who enter it by means of birth. How one will elicit the consent of a two-year-old I cannot say. What I can say is that to set an age at which time consent is to be sought, is to allow

that some will be governed without their consent for some period of time. And no matter what the age is that is set, it will be an arbitrary number, set merely for the convenience of the rest of the population, and without regard to the natural rights of the person whose consent is not sought before that age.

Thus, I claim that if one will attempt to imagine the creation of a legitimate government, he will see that the difficulties are so severe that they cannot be overcome. And even if they were overcome, the fragility of that legitimacy would be so great, that it could hardly be expected to survive past breakfast the day after it had been established.

Legitimacy and a Unique Crime

THERE IS A QUESTION that the concept of legitimacy presents for the night-watchman limited government that is quite different from the matters just discussed.

In the night-watchman limited government not interfering with the free market, we are told, all crimes will be crimes against person or property. There will be no “victimless” crimes. The concept of “victim” may seem fairly simple at first, but like the lifelike statues of Daedalus, which were capable of movement, it becomes a little difficult to actually pin it down.

For there are activities which are considered by the bulk of mankind to be crimes, but which are not crimes against persons or property; they are specifically, and only, crimes against the state. Foremost among them is treason.

Will a night-watchman limited government, determined not to interfere into the market, define such a crime? Let us be clear, here. In order to commit treason — no matter how it is defined — one must first have certain thoughts, presumably have certain associates, and then perform certain acts. In this limited government, in which of them will the crime of treason subsist? Surely it cannot be in the thoughts or associations of the resident, for the night-watchman limited government will not, it must be supposed, interfere with one’s thoughts. Similarly, one’s freedom of association will not be infringed in any way.

But what about the actions? In any act of treason, again, no matter how it is defined, there will be an action against nothing that can be regarded as property. The government, not being a market entity, cannot own property in the sense that an ordinary person can own it. It also cannot own it in the sense that a market entity, say a corporation, can own it, for a corporation is an entity created, supported, indeed defined by legislation and contracts. And there can be no legislation creating the government, for it is, by definition, the creator of legislation. And there can be no contract creating the government, even if it is created by original unanimous consent. Unanimous consent, to be of any value to the legitimacy of the government, must be reaffirmed at virtually every other second of the day, which — particularly in a country of more than eleven people — would surely be impossible. Such a government would require that its residents be constantly checking their smart phones so frequently (more frequently even than nerds, geeks, and millennials check their Facebook pages) that all market activity would grind almost to a standstill.

So where is the victim in the crime of treason? If it cannot be the government itself, since it is neither an actual nor a legal person, can it be “everybody”? How could it ever be proved in a court that anyone had ever committed such a crime? At the very least, one would have to know who “everybody” was when the crime was committed, and one

would have to be able to prove that each and every one of them had been harmed by the supposed act. Could it be “nearly everybody”? How “nearly”? We have suddenly found ourselves in the territory of the arbitrary definition, when we had hoped to stay in the territory of the objective and of natural law.

If treason presents such problems, consider the still more slippery “sedition” — “overt conduct, such as speech and organization, that tends toward insurrection against the established order. Sedition often includes subversion of a constitution and incitement of discontent (or resistance) to lawful authority.” Alas, so many terms to unpack. Let us begin with “conduct, such as speech and organization.” Surely no speech or organization will be criminalized by the night-watchman limited government. Why, that would amount to McCarthyism! That would amount to the persecution of freedom-loving communists, such as the pro-Soviet Dalton Trumbo. We surely cannot have that.

How about “subversion”? or “incitement of discontent”? Again, we are looking at acts that surely involve no attack on the person or property of anyone. How about “resistance”? If it is an action distinct from committing a crime against person or property, it is hard to see how the night-watchman limited government can defend itself against it.

Of course, I did jump over that word “insurrection.” In what shall it consist? If a noisy, even armed, crowd should attack a government building, are they attacking someone’s property? If they empty it of all occupants and set it ablaze, have they committed arson? And against whom? Timothy McVeigh was surely guilty of murder; was he — by the standards of a night-watchman limited government — guilty of any other crime?

If the crowd seize a government official, rough him up a bit, and demand that he resign his position, will they be guilty of any crime other than possible assault? Let us go further: “rebellion.” Will the night-watchman limited government criminalize insurrection or rebellion? On what basis? Oh, yes, in the interest of peace, most of us will wish not to have to live in times where insurrection or rebellion is widespread. But just as surely, they are expressions of the discontent of certain people against the government and its policies.

Part of the problem this presents to the night-watchman government is that its exponents are so confident of its essential goodness and efficacy that it is hard for them to imagine anyone’s taking exception to any of its actions or policies. And surely it would never take so many actions or have so many policies repugnant to an important number of its residents that they would find themselves unable to bear them or to oppose them except by less-drastic, peaceful means. Surely, they should never elicit among its residents anything more disturbing of the peace than simple “civil disobedience.”

But why must anyone be limited to civil disobedience? For that matter, why must it be a first, or even early, resort? To be sure, I, as much as any man, prefer that people express their discontent with their rulers in a manner more agreeable to my own comfortable life. But it is not for me to tell others how to express their discontent, so long as they do not attack the persons or property of anyone who has committed no crime against them. I will tell them what I think is prudent; perhaps I can even argue that their intended actions would be immoral. But we are not talking about morality here; we are talking about legality, and the powers of a government that purports to exist solely to protect its clients against crime and foreign invasion.

Having seen how slippery is the concept of “insurrection,” we can see how much more so is “espionage.” At the very least, a government that can prosecute such a crime must have secrets, secrets from its enemies and from its own principals. That is, it must have secrets from the very population whom, it claims, it is serving and represents. No doubt, transparency is a difficult policy for any military entity, no matter how justly it attempts to act as a defender of rights. For the military of a government that claims legitimacy on the basis of “the consent of the governed,” I submit, it is more than a difficulty: opacity becomes an epistemological absurdity. Lysander Spooner has already shown the difficulties in the notion that we can be represented by principals who are not answerable to us and whom they cannot identify. Still worse, surely, is the notion that in the statement “we govern ourselves” — to borrow from a witticism of Murray Rothbard — it matters a great deal whether one is the “we” or the “ourselves,” for the “we” will be keeping secrets from the “ourselves.” The left hand’s not knowing what the right hand is doing has never been so artful an achievement.

Unless ... unless ... the night-watchman limited government is prepared to make some compromises with its founding principles. And at that moment, surely, the libertarian must be willing to be simply embarrassed and to press on, or else he must be willing to recognize the logical impossibility of his enterprise.

But what if espionage can be defined by reference to employment contracts with those who work within the state? No doubt, such contracts are imaginable. But are they enforceable? Who would enforce them? In the system of limited-statehood, there is no impartial third party to arbitrate disputes between citizens and the government, for the courts are arms of the government. To be sure, courts sometimes rule against the government that employs them; not all judges rule in the interest of the government of which they are a part. Still, any defendant can be forgiven for being a little bit uneasy at the thought that his judge and his accuser work together for the same entity. There is, after all, no guarantee, even in a night-watchman limited government, that there will not evolve a jurisprudence that determines that a government must have some legitimate interests that override the rights a defendant may be claiming for himself.

The next thing to be seen is that defining espionage in terms of violation of contract provides no basis whatever for prosecuting espionage on the part of non-employees. A private citizen who manages to steal some secrets (by hacking his way into a computer, perhaps, or by breaking into a secure location by simple accident and luck, as someone known to your humble servant once did) can hardly be accused of violating the terms of a contract. And the foreign agent who receives the secrets from an employee cannot be held guilty of contract violation. Just what did he do that may be called a crime? He stole no property; he did not even receive stolen property: the information he has obtained still resides exactly where it was found. He has injured no person.

Is the sale of the information to a foreign government to be the essence of the espionage? Well, suppose it was never sold, but only given away. In that case, there would be no espionage. And since when does the night-watchman limited government concern itself with sales and purchases, anyway?

And that reminds us that there are sales that involve no government secrets. There are privately developed and owned technology, privately owned weaponry, and privately developed unweaponized products. What private sales, what market transactions, shall be criminalized when the buyer is a foreign government?

In volume 4 of *Conceived in Liberty* (Murray Rothbard's account of the American Revolution and the aftermath), we are told that Benjamin Franklin had demonstrated in 1774 that even trade with an enemy with whom a country is at war benefits both countries. It is easy for writers to say such things; more difficult to imagine any government officials heeding them; still more difficult to imagine the people who are at war not becoming outraged at those who profit from trade with the enemy.

And mention of that amorphous body, "the people," leads us to ask a final question: By what claim of justice can the night-watchman limited government criminalize an attempt to overthrow it? I would be willing to go so far as to make that "overthrow it by any means," but I assume that most readers would simply regard that as a ridiculous question. Surely any government that is not permitted to defend itself when attacked violently by its own residents or citizens would not be regarded as a real government by anyone. Yet it is easy to forget that the government was supposed to have been created to defend rights; it has no natural rights of its own. It has only those rights that its founders — all of them, not merely a majority — granted it, and surely any part of them are free to withdraw those rights at any time. And what if they did not grant it the right of self-defense? In any case, it is surely clear that in the case of an attempt to overthrow it, a given government no longer enjoys the consent of the governed.

Let us not become embroiled in all that. Let us instead ask whether a night-watchman limited government can defend itself from being overthrown by peaceful means. This is quite another matter, is it not? If a large portion of the populace become dissatisfied with freedom as defined by the limited government, if they become enamored of some other idea of how a government should run, again, by definition, the government no longer has the consent of the governed.

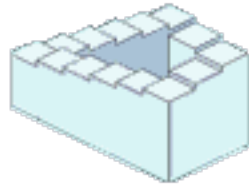
And beyond that, if the populace, by peaceful, lawful means, overthrow this government by voting for people who wish to redesign the government along quite different lines, even lines that will surely violate the rights of some, how can the night-watchman limited government defend itself? Alas, it cannot. For the night-watchman limited government, by definition, was intended and designed to defend the rights of the people who constitute it from criminals and foreign attackers, not to defend itself from its own people. Not to coerce their consent.

In the manifest absence of consent, surely it is necessary for the night-watchman limited government, true to its own principles, true to the principles it was created to defend, true to the principles of those who created it, to dissolve itself, to return, as they say, "to a state of nature" and start over.

But is there, I ask you, even a single exponent of the limited government who has ever given such assurance for his imagined state? Has it ever been a component of a single Constitution for a New Country? Of course there has not been. Everyone, I think, realizes that if a government must dissolve itself upon losing the consent of (even one of) the governed, no government could ever exist as a legitimate entity for more than twenty seconds.

Which means, I submit, that no one really believes that the government he advocates would ever derive its legitimacy from the consent of the governed. The idea is simply a chimera.

With all that as groundwork, let us now turn to Jacob Hornberger's recent attempt to establish the desirability of a night-watchman limited government over that of a stateless free-market society.



[1] All three of the *No Treason* essays can be accessed at <http://www.thornwalker.com/recoveries/>. The third one (Number 6; there are no numbers 3, 4, or 5) is available at <http://www.thornwalker.com/recoveries/notreason6.pdf>.

[2] This point is developed in R.A. Childs Jr., "Anarchism and Justice," section IV, "Justice in Property Titles."), available at http://www.thornwalker.com/ditch/childs_aj_04.htm

Three

Free-Market Defense, Crime, And Procedural Guarantees

THE MATTER OF CRIME IN THE STATELESS SOCIETY looms large in Jacob Hornberger's case for a limited government. Indeed, it looms large in the thinking of most writers who attempt to provide a case for the night-watchman limited government.

Hornberger begins by asking us to consider a society in which there is a government that has enacted only One Law, a law prohibiting murder. This starting point is important to him because it suggests that he has imagined a government that has not violated the non-aggression principle. Since the only legislation prohibits murder, and since murder is an act of aggression, anyone living in this society would surely think of himself as free.

Could not anyone support or at least settle for such a government? The point of the argument is that once we have settled for the government with One Law, why not settle for a government in which all of the laws are objective and just and directed only against aggression and aggressors?

What we have here is a failure of the imagination. Yes, we can postulate the existence of such a state, just as we can postulate the existence of The Emerald City. We can even postulate roads between here and there. But it does not follow that any of those roads can be built.

Again and again we shall see that, in arguments for the desirability of establishing a government, exactly how the thing is to come into existence is simply passed over. It will be like trying to construct one of the Penrose staircases drawn by M.C. Escher in which the stairs ascend and descend in a continuous loop. [1] The description is simple enough; but to build one will entangle the builder in impossible contradiction.

How did that One Law get passed? It was passed by a legislature composed, presumably, of elected officials. Some procedure of majority rule was enlisted to determine how to pass such a law, and some procedure of ratification was also in place.

Both the procedure of majority rule (whether simple majority or super majority) and the procedure of ratification represent two laws already existing. Even before we get to the One Law, there were two pre-existing laws. Where did those laws come from?

There is more. Where did the legislators come from? Someone — by some rule — determined how a person might become a participant in the proceedings that would produce the One Law. That determination is at least one other law. Moreover, that law

not only names some as legislators but excludes all others from exercising legislative power. That law created a legislative elite.

In short, in order to get the One Law (or any other so-called just law) on the books, there must already exist dozens and dozens — perhaps hundreds and hundreds — of procedures, all with the force of law, allowing some men to pass the One Law and forbidding others to pass it. By the very nature of things, there cannot be only One Law. And whereas the One Law may have been passed by some legislature, the procedures creating the possibility of legislation would most likely be found in some document of higher prestige, perhaps a constitution or “Supreme Law of the Land.” And where did that constitution or Supreme Law come from?

The postulate of the One Law is a metaphysical absurdity.

To make matters worse, note that, of the laws whose pre-existence is necessary for the One Law to exist, not one protects the personal or property rights of the people who are to be governed by the One Law. Our night-watchman limited government, in attempting to pass One Law to protect the people who have consented to it, must pass laws having nothing whatever to do with their natural rights.

Let us ask also who is enforcing that One Law? Is there a law prescribing who may and who may not enforce it? If there exists a government, then, as we shall see, there are almost certainly laws in place identifying the proper enforcers, and naming all others vigilante enforcers who must answer in some way to the final authority enforcing that One Law.

But suppose all the procedures creating the One Law and determining who shall enforce it are just. If each of the procedures is just, and the One Law is passed in accordance with them, and it itself is just, is not the governmental system just?

Here we find ourselves at the heart of all the flaws in all the arguments for the state. It is at this level that we see at last that the One Law argument — and, indeed, every argument for government — fails because it has not kept its eye on the ball. Looking all over the field for new plays, counterarguments, and logical subterfuges, Hornberger and other exponents of the night-watchman limited government have lost sight of the ball.

The ball is legitimate authority.

To pass any law — the One Law or the procedures that have the force of law — there must exist a body holding authority to enact those procedures and excluding others from enacting them. And where will that authority come from? How will it be conjured into existence?

And to repeat, because some men have been given, i.e., “delegated,” the right to pass this law, which right has been withheld from all others, it has given rise to the existence of a special ruling class, a legislative elite; indeed, it is dependent on the existence of a special ruling class. And all before its personnel have held even one debate to pass the One Law.

After postulating the existence of a government with only One Law, or, rather, as Hornberger goes on, a government only with laws that prohibit or deal with violations of the rights of its citizens, we are asked to consider the question of how a person who has violated the One Law (or the others) is to be found guilty. Hornberger’s answer is a celebration of English and American jurisprudence.

There is no guarantee that private agencies, says Hornberger, will apply these procedures or incorporate them into their own functions. And even if they do incorporate and apply them, there is no guarantee that they will continue to incorporate and apply them. He suggests that people may grow tired of “technicalities” used to “coddle criminals” and resort to all sorts of nasty substitutes.

The quest for a night-watchman limited government often reveals itself, as here, as a quest for certainty, and as a quest for guarantees that simply are not possible. It is a quest for epistemological assurance that all will be well, or at least that all will be as well as mortal man can reasonably hope for.

I will not be the first to observe that almost any objection to free-market defense agencies or courts will apply equally well, if not more forcefully, to governments. That is certainly the case here. Despite the fact that the English/American system has been in existence for more than 200 years, we do not see other governments adopting it. Or if they do adopt it, their adoption is often to be found merely on paper and not in practice. We can see also that there are corruptions of the procedures in that system both in the United States and in the other countries dominated by English jurisprudence. No country, no government, can hope to be free of those corruptions. No country, no government, can hope to be free of attempts to abandon those principles.

The guarantees of a night-watchman limited government are only as credible as the people who observe them are. If a vast majority of the populace are virtuous and have a regard for fairness and justice, they will get a system that reflects that regard, within the limits of the one in which they live. But that is true whether there is a government or not. But if it is true, as I am arguing, that the kind of government sought by libertarian exponents of the free market is simply impossible, then no amount of virtue will prevent it from collapsing, to borrow a phrase, “from its inner contradictions.”

It may be arguable that a system of free-market defense agencies would also collapse into a kind of tyranny, but there are three points worth remembering:

First: it is hard to see how the government exponent’s case is advanced by a criticism of free-market defense agencies that says, in effect, that they will begin to act like governments.

Second: unlike the collapse of a limited government, the collapse of defense agencies into criminal tyranny will not be system-wide. It will be limited by the fact that no defense enterprise controls the entire system. In a system of free-market defense agencies, if one agency begins operating with presumptions of guilt, or accepting confessions obtained under torture, or prohibiting accused persons from employing lawyers, the persons who are oppressed by them can call on other agencies for protection. When the night-watchman state begins to fail, its citizens have no one to turn to; not so in a free market with competitive defense agencies.

Third: even a system-wide collapse of a free-market system into criminal tyranny would not be metaphysically certain. If it should happen it would be because there were contingencies at work. In the case of the night-watchman limited government, the failure will be the result of its being riddled with attempts to violate the Law of Contradiction, and will therefore be logically inescapable.

Another way of stating this is that it is possible for a free-market system to “work,” however imperfectly. It is not possible for a night-watchman limited government that does not intrude into the free market even to exist.

Hornberger contends that the federal system of state courts and appellate courts operates as a kind of system of competitive agencies. But that can be the case only if there is no “final arbiter.” And it would be an ironic assurance indeed — to reverse an earlier observation — to argue that if the final arbiter failed to perform its duties, the system of state courts and appellate courts would begin to act like free-market defense agencies.

And should all those state courts and appellate courts become abusive or lawless — as many American libertarians would agree they already have — and if the final arbiter, i.e., the national government, should fail in its duties to overrule them, there would be no one to turn to. Unless — and this is crucial — one were prepared to argue for a world government. I hope it will become clear that any argument for a night-watchman limited government is, in fact, an implicit argument for world government, a position that, in my experience, few libertarians are willing to defend.

Of course, a world government may solve the problem of a national night-watchman government that becomes corrupt or abandons its duty to defend rights, but it will be of no help whatever when the world government collapses from the same contradictions, as it inevitably must. The Law of Contradiction spares no attempts to circumvent it, whether they are local, global, or even galactic.

Let it be allowed that the procedures that make up the jurisprudence of England and America are valid and worthy. Let it even be allowed that, as a matter of historical fact, they were developed within the context of governing states. Several important ideas do *not* follow from those allowances.

It does not follow that other states do not have valid, worthy, or even superior sets of procedures, though Hornberger states his opinion that the English/American is the best that has been developed so far. This is important because it highlights another problem that appears almost universally among those who write about a night-watchman limited government. The assumption is that *their* vision is the one that will be adopted. But I think we should not be surprised if, somehow having broken away from the U.S. tyranny and formed its own night-watchman limited government, Louisiana adopted the jurisprudence of the Napoleonic Code, not the Common Law of England.

It does not follow that entities other than states cannot put the specific features of the American/English system into practice.

It does not follow that entities other than states cannot improve on them.

It does not even follow that it was governments that developed them.

This last is important. It requires that we recognize that governments are not entities with minds. They are not thinking entities, they are not judging entities, they are not creative entities. They are institutions in which there are individual persons who work, who think, who discuss, who judge, who reason.

And those persons do not possess, merely in virtue of their employment or association with the government, any wisdom or knowledge or reasoning capabilities superior to those of other men. To quote Roy Childs, “Government does not consist of men who have powers of epistemological elitism; that is, they have no means of knowledge not available to other men.”

But I think there is another consideration even more damaging to Hornberger’s case, and that is that none of the procedures in which he has so much confidence was developed in the context of a night-watchman limited government.

Indeed, they were developed within the context of tyrannies, or in response to tyrannical action. In other words, in accepting them, Hornberger has implicitly agreed that it is not necessary to have a just government in order for them to develop. It is not necessary that there be a limited government in order for them to be discovered, or applied once they are discovered or developed.

And if such creditable procedures can be discovered within the context of a tyranny, such as King John's of England (a tyranny Hornberger frequently alludes to in his other writings on judicial procedures), surely they can be discovered and effected in the context of free-market defense agencies and courts. And just as they can be overturned or ignored in a free-market setting — a possibility I certainly cannot deny — they can also be overturned or ignored in the context of a government, as Hornberger must surely admit.

This difference is one we have seen before: that a single agency discontinues their use will not imply that all agencies have discontinued them. Once the final arbiter in a limited government — the Supreme Court, perhaps — drops them, they are gone from the entire area it rules.

Defense Agencies

IN DEALING with the question of crime, Hornberger turns, naturally enough, to the issue that was raised in Roy Childs's seminal essay, "Objectivism and the State: An Open Letter to Ayn Rand." [2] The argument is this: if a state prohibits a free-market agency from providing the defense or judicial services normally associated with government, it has initiated force against an entity which has not committed any act of aggression against anyone else. And in that case, it is no longer a government that does not violate the rights of nonaggressors. If it does not prohibit agencies from providing those services, then it enjoys no status different from theirs, and, in effect, is not a government at all.

Hornberger replies that in a night-watchman limited government devoted to the defense of personal and property rights, there would be no objection to the existence of private security services or of private arbitration services. But in making this argument, he is missing the point; he has lost sight of the ball again.

And, as before, the ball is legitimate authority.

The issue is not whether there will be private defense or arbitration services. The question is whether there will be an entity that has or exercises some privilege which they do not possess. And if there is such an entity, what is it and how does it obtain that privilege, that special status, and by what right does it exercise it?

Hornberger explains that what free-market anarchists are objecting to is that the government will have the final say in disputes. It will not permit private police or judicial businesses to use force or to determine when force may be employed. He agrees with them, and "explains" that the reason is that the state enjoys a monopoly on the use of force.

But that is the very point of contention in the Childs argument. It is the thrust of it. If it is asked by what right does the state and only the state make that determination of when to use force, by what right does the state and only the state act on it, the answer that comes back cannot be, "Because it has the monopoly to do so." It is certainly Hornberger's answer. But that answer fails to grasp that the question just is, "By what right, by what moral right, does it possess that monopoly? By what right did it acquire it?"

Hornberger assures us that its having that right is how it protects individual liberty and the free market and maintains peace in society. But all that means is that he considers the existence of government useful. Unless we are to believe that whatever some people consider useful is also moral, the assertion of usefulness is no argument for morality. It will be remembered that the mission statement of Hornberger's Future of Freedom Foundation is, *inter alia*, to "provide an uncompromising moral ... case for ... limited government."

That is not the end of it. Let us allow that there must be a monopoly in the use of force in society. Let us imagine an organization of people and institutions and offices that assert that monopoly. What makes *them* the proper government? — that is, supposing that enough people are dissatisfied with the way the holder of that monopoly is operating that they wish to operate their own monopoly ... their own monopoly operating in overlapping geographical territories. Which one is the limited government, and how will Hornberger know? Which of the two will be just when it prevents free-market defense agencies from using defensive force? Which of the two will be just when it prevents free-market judicial services from enforcing their findings? Which of the two monopolies has the right to be the monopoly, and by what means can anyone tell which of them it is? Which one of them has authority to exercise monopoly powers?

By what marks can the "just monopoly" be discerned from the "unjust monopoly"? What makes one of them a government and the other a criminal organization?

So, again, it is not enough to say that government has a monopoly on the use of force. One must be able to say which organization is the government. One must be able to tell which one is the real and which one is the imitation. Presumably one of them possesses authority, and the other does not. And what are the marks of its authority?

It would appear, however, that Hornberger wishes to construct a kind of "tu quoque" argument showing that a free-market defense system is inherently incapable of defending justice because the incentives that are inherent to it are in opposition to that end.

His argument is as follows: In a stateless society, the criminals (murderers, robbers, rapists, embezzlers, and so on) will be able to form their own defense agencies and judicial systems to protect them. They have no desire for justice. In the words of an attorney Hornberger quotes, "My clients don't want justice; they want freedom."

The same is true, Hornberger holds, for one who is normally law-abiding. If he is justly charged with a crime, he also does not want justice. He wants freedom. And as for one who is mistakenly charged with a crime, even he will very likely opt for freedom, if he has to choose between it and justice. Therefore, the most successful defense agencies and judicial systems in a free market will be the ones that are most successful at getting their clients free.

As I stated before, any argument against free-market defense agencies will almost certainly be applicable to a state system, and this argument is no exception. In the system we have now, the most successful lawyers are the ones who argue most successfully in their clients' behalf. Their clients do not want justice so much as they want their case (whether criminal, civil, or contractual) to prevail. Hornberger believes that a governmental system is able to surmount that difficulty by the fact that there are various entities in place (judges, juries, prosecutors, public sentiment) that have an interest in justice. It may be that certain procedures — perhaps he would cite the use of an adver-

sarial system — help to enforce the interest in justice, or at least counter the incentives for leniency. But certainly the existence of attorneys specializing in serving organized crime — along the lines of Bendini, Lambert & Locke, in the novel (and movie) *The Firm* — testifies to the existence of the very weakness in a night-watchman limited government that Hornberger fears will emerge in a system of free-market defense agencies.

What Hornberger neglects are the incentives of defense agencies, incentives more tangible than that for abstract justice. He has little regard for the free-market anarchist's reply that defense agencies catering to criminals will soon go out of business, but what he fails to notice is that it is not only accused persons who are the customers of a defense agency. Let us admit that even people mistakenly accused of committing a crime desire freedom more than they desire justice; it does not follow that the rest of the agency's customers have the same priorities. And any agency or judicial system that is seen to routinely set accused criminals free may soon find the rest of its clients looking at it a little askance. It is as though Hornberger thinks that most of the patrons of a restaurant do not care whether a handful of customers die from the poison in their rhubarb pie, because rhubarb pie is not particularly popular.

After all, if 98 percent of the people in a society are not criminals (a figure Hornberger uses by way of illustration), it follows that 98 percent of the customers of defense agencies do not want them letting criminals run rampant. In other words, while there may be an incentive for a defense agency to serve an accused criminal, that agency also has an incentive to serve those who are not accused.

It would follow that a free-market defense agency/judicial system has an economic incentive both to do its best by someone accused of a crime, and not to be too easy-going about crime.

Defense agencies have another and important incentive, which is related to the interests of the customers of any given defense agency and to the procedures the agency will employ. To begin with an example, no one has a natural right to confront his accusers; that "right," as we shall see in Part II, is a civil right, and is part of the English/American jurisprudence that Hornberger looks to, to serve the rights of the accused. It exists because the interests of those who are not accused demand that actual perpetrators of crimes be identified. It is not in the interest of anyone that criminals escape detection and that the innocent take their place in the dock. If an agency, either because its procedures are flawed or because the agency is incompetent, routinely condemns the innocent, it follows that the guilty are still free, and its customers are no better off than they would be without it. It is in the interests of the defense agency's customers that the agency not make mistakes of that sort. If I believe that it is wrong for a person to be tortured to give evidence against himself, it is in part because I believe that such a procedure will not correctly identify a criminal.

Procedures that protect the innocent and more surely identify the guilty are in the interest of the customers. I do not merely want the agency that is supposed to be protecting me to protect a suspect's rights; I want it to find the real criminal. As much as criminals might prefer to be free when they are charged with having committed a crime, even they — when an injustice has been done to *them* — do not want the wrong person to be convicted. And if I operate a defense agency that routinely gets that wrong, then I will indeed lose customers, respect, and investors. The "jury" of criminals in the movie *M* did not want to convict just any convenient person of child molesting; they wanted to find the

real child molester and punish *him*. They understood that to convict the wrong person did not solve their problem (the intense manhunt and police scrutiny to which each of them had become subject), for in that case the real molester would continue to commit his crimes, and they would be no better off than before.

So the private-enterprise defense agency has a genuine incentive — not merely an abstract desire to do right — to be just to the accused and to protect its customers. And even the accused has interests that are not fully captured by the desire to be free.

But what incentive has a government to do its best by both parties? Hornberger has inadvertently given us an answer. It was in a government system — a system of limited government, with a devotion to the procedures Hornberger admires as part of the American/English jurisprudential system — that we first heard of people getting “let off on technicalities,” that we first heard of “coddling criminals.” And what could the ordinary citizen do about it? What can the ordinary citizen do when those who are obviously guilty are released? Absolutely nothing.

Oh, he can vote for strong “law and order” candidates, but they could not, even if successful, reverse the findings of the earlier courts: the American/English jurisprudential system would not permit it. They could not, in most cases, even remove the judges whose judgments and verdicts released the “coddled criminals.”

Would a free-market system be better? I cannot say for sure. What I can say for sure is that if Hornberger is right and the free-market would lack the guarantees he would like to see, it would follow that those guarantees would not be around to protect the continued freedom for released criminals “coddled” by interpretations of the procedural matters. If the virtues of the system Hornberger wishes to see are absent, so too are the flaws that derive from with them. I can also say for sure that businesses have greater incentives to identify flaws in their operations than governments have; that businesses have greater incentives to correct flaws in their operations than governments have; and that businesses have greater incentives to do both quickly than governments have.

No one can say for certain how a system of free-market defense agencies would work, or even that they would all work the same way. The quest for certainty is a doomed quest, and no one can say for sure how any business concern in a free market will operate. What we can know for certain is that the outcome will ultimately be directed by the natural laws of economics and business, not by the arguments of Bendini, Lambert & Locke, which, when successful, are the end of the matter.

Foreign Competition

BY FAR, THE most interesting objection Hornberger has to the free-market system, which, apparently, is also supposed to serve as a justification for the monopoly of force wielded by the state, is the problem of foreign competition.

Hornberger rightly points out that even if Americans get rid of their governments, others probably won't. There may not be a United States of America, but there will certainly be a North Korea, a Mexico, a Vietnam, an Egypt. And those countries will be free to set up shop in what used to be the United States. He is not talking about military invasion. (In fact, *mirabile dictu*, the problem of national defense does not form much of Hornberger's case at all.) Rather, he is talking about the competition free-market defense agencies can expect to experience from foreign governments.

I confess that I find this objection a little surprising, coming as it does from an exponent of open immigration. Under a night-watchman limited government permitting open immigration, what is to prevent North Korea from sending a bunch of its citizens to, say, San Francisco, and organizing them to take over the city government? Or China from sending some of its millions to take over the area west of the Mississippi? Or Mexico from sending enough of its population across the Rio Grande to take over the Southwest?

The takeover I am talking about is electoral, not military. Would we not see Chinese and North Koreans running for public office in a night-watchman limited government? Could not their masses be positioned throughout the country to effect not merely a popular victory, but a victory at the Electoral College? For that matter, what would prevent them from taking over the Electoral College by being legally chosen as Electors and voting in a presidential election as they pleased, no matter what the popular outcome was?

The fact of the matter is that, even with America's immigration situation as it is today, Hornberger is not afraid that an electoral takeover will occur. I will leave it to him to explain himself. But if a night-watchman limited government has nothing of the sort to fear from its open-immigration policy, still less would free-market defense agencies.

The deeper error in Hornberger's speculation, however, is his model of defense agencies. To begin with, he supposes that the United States itself has ceased to exist, when, in fact, there is no reason to suppose any such thing. There is no reason that free-market defense agencies could not exist in parts of the geographical United States, even while that government continued to exist.

It is an absurdity that the entire population of the United States could one day decide to disband the government and become a free-market anarchist society, and not merely because it is implausible. It is absurd because it overlooks the existence of time or history. Changes take place over time. They do not occur all at once. And as they occur, a place is made for new entities to come into existence. One does not go to bed with party-line telephones connected by live operators asking "number, please," and wake up the next morning to discover that the iPhone has popped into existence. There was a process, and it took place over time. There were intellectual and technological developments that as it were prepared the way. Some segments of society were slower to participate in this process than other segments. When cell phones capable of taking photos were first introduced, most Americans were not interested; other developments — perhaps seeing the enthusiasm of Japanese tourists for the gadgets — induced them to change their minds, and a billion-dollar business was born. Only to be replaced by another. And another. We shall return to the role of time when we take up some of Hornberger's other challenges to free-market anarchism.

For now, let us say only that if we should ever be so fortunate as to see free-market anarchist communities begin to pop up here and there, we can be sure that there will still be a United States. And in that case, I cannot resist adding, the greater danger to those communities will not be that North Korea will set up shop in the area where the defense agencies are to be found, but rather that the U.S. government will take action against the fledgling communities.

Hornberger's model for free-market defense agencies is precisely that of a government. He imagines that the Chinese government could buy up large tracts of land and establish a chain of settlements across North America populated by 100,000 Chinese

and 10,000 military troops to serve as police. He then imagines a confrontation with the Minnesota Defense League.

In other words, he imagines that defense agencies would be organized geographically. I remarked earlier that I do not know where Hornberger gets his ideas of how a free-market anarchism would work. It is clear that he is not getting them from any of the major texts. Perhaps he imagines that it operates only as a system of proprietary communities, such as those described by Spencer Heath MacCallum in *The Art of Community*. [3] Although that is possible — as I said above, no one can predict how any market will organize itself — there is no reason to suppose that it is the only way, and in any case, he does not use the term “proprietary community” in his description of how he imagines defense agencies would operate.

Moreover, Hornberger — once again failing to imagine how what he speculates could ever come to exist in the first place — has not wondered exactly from whom the Chinese in his example are going to purchase those tracts of land, or why they will be sold. Within the United States as it exists now, there is only one entity capable of selling or otherwise signing over large tracts of land, and it is the government itself. And again, whatever the exponent of limited government imagines can happen in a free-market anarchism is equally possible in a night-watchman limited government. What will prevent the Chinese in his example from buying up all those tracts of land in Hornberger’s limited government with its open-immigration policies and its unregulated free market?

What will prevent China, in his example, with its billion population, from purchasing huge tracts of contiguous land from the free-market owners of that land in a United States with a limited government devoted only to defending personal and property rights, settling it with millions of their own people, and protecting them with its military? How, in its defense of private property, will the night-watchman state prevent private owners from selling contiguous parcels of their land (no doubt, at inflated prices) to Chinese interlopers? And how — given that Hornberger has allowed that there can be private defense agencies within the borders of his limited government — will his night-watchman limited government prevent these Chinese from shipping over tens of thousands of “private security guards”?

Since we have spoken a little bit about guarantees, let us pause here to reflect on the reduced size of the standing army of the non-imperial, limited government that exponents of the night-watchman state advocate. There is no guarantee that it would be any match for those Chinese “private defense agencies.” In a free-market anarchism, all efforts to take over the geographic area defended by non-governmental communities would require that the Chinese “defense agencies” confront and defeat every one of them. In the night-watchman limited government, it would need to defeat only one. And at that, not even the entire one, since a surrender by the central government effectively ends opposition from its scattered forces, highlighting once again my observation that nearly any objection to free-market anarchism is equally applicable to anything the advocates of government offer, and usually portending more disastrous outcomes.

(I interrupt my train of thought here to wonder why it is that Hornberger — who is so sanguine in his writings on immigration about the arrival of millions of Mexicans in America — is so concerned about the Chinese. Does he really think that a parallel “invasion” by Mexicans would be less a catastrophe for liberty and culture than the one

he imagines coming from the Chinese? For myself, when I look at the relative crime rates and academic achievement of the two peoples, I almost want to reply to him, “We should be so lucky.”)

The argument, as Hornberger has presented it, is reminiscent of the argument so often advanced by those fearful of the free market who are confident that some business concern or other will lower its prices, defeat all its competitors, drive them out of business, and then take over everything in sight and raise the prices.

I am confident that Hornberger sees that the argument from “predatory pricing” has no merit, and that he sees why it has no merit. (His publication ran an excellent article on the subject by Thomas Woods in its November 2012 issue.) Can he not see that similar considerations will apply here? After all, all he is describing is the attempt on the part of a large business concern (in this case, China) to get a monopoly over particular services in a given area.

But why, it might be asked, if I can be confident that the takeover Hornberger describes would fail in the free-market setting, can he not be confident that it would fail also in the night-watchman limited government setting? He cannot: once a party wins an election, it is in a position to undercut all possible future opposition. All that is required is ruthlessness. All it has to do is win one national election, and it can use its force, its “overwhelming force” (a term of which we shall shortly hear more often) to put an end to all liberty-friendly concerns and organizations. And that “takeover” does not even have to come at the hands of a foreign government that has bought up large plots of land and shipped 10 percent of its population over. It can occur when a political party is abnormally successful. Hornberger and other writers in his publication have often written of the New Deal, when the entire government — including, ultimately, the Supreme Court — was in the hands of a single political party, and how during that period of U.S. history, its Constitution became all but a tool for oppression. They have written also that when that party finally lost control of the state, the evil it had wrought remained in place, to be celebrated by its erstwhile opponents and then expanded by them.

If the New Deal teaches us anything, it is that our liberty is much more vulnerable to ideas from which the charter of a night-watchman limited government cannot protect its citizens than it is to land speculation by the Red Chinese. In the last one hundred years, the worst that the Chinese have done to us is to bring us opium. In the same period, the government to which Americans had entrusted their liberties turned on them like some ravening beast and devoured those liberties in almost a single gulp.

In the case of the free market, there is no analogue to the election, to a New Deal-style takeover. The effort to gain a monopoly through market means never ends and becomes prohibitively expensive, which — in conjunction with market defenses — is why no such effort has ever been successful. While the empiricism of history teaches us that governments can fall easily, there is no empirical evidence that markets can.

In fact, in a certain sense, the possibility that Hornberger suggests already exists. It is called nation-states. The reason that the “anarchism” he postulates runs into problems is that it is not an anarchism at all. It is a system of small nation-states.

And the really small nation-states are at the mercy of the really large nation-states.

If his analysis of “free-market” nation-states is correct, we would expect to see that it is correct on the larger scale, that is, in the real world of political nation-states. And yet, even there, the outcome Hornberger expects does not always obtain. Russia has not

yet taken over Ukraine, though it probably can. China has not yet risked war to take over Taiwan. Germany has not yet attempted to reclaim the Sudetenland. And the United States did not overthrow Communist Cuba.

No doubt, all these things are possible and may yet occur. But they demonstrate that even states — even bloodthirsty states, with their history of murder and plunder — sometimes sheathe their swords. Even without a final arbiter. Even without anyone’s having a monopoly on the use of force.

The Monopoly on the Use of Force

THE ODD THING about Hornberger’s defense of the monopoly on the use of force is his particular disparagements of force itself.

In the case of the confrontation between a fictional North Korea Defense League, with 10,000 armed troops, and a fictional Minnesota Defense League, with only a few hundred, it is his conclusion that “the side with the vastly inferior force will very likely let the side with the vastly superior force get its way.”

As a real-world example, he cites a case involving the United States and Nicaragua. Nicaragua had sued the United States in the International Court of Justice and won. But it could not collect its award because the United States simply refused to pay. In other words, his objection to free-market defense agencies seems to be that they will behave like states.

He claims that Nicaragua could never collect from the United States by, say, invading Florida because of overwhelming U.S. military force. But again, we see that Hornberger’s model is the state with its military. Even between states there are other options. Any number of states have nationalized the property of American businesses and gotten away with it, simply because the use of force is often considered prohibitively expensive. And just as the United States has frozen the assets of disfavored governments without risking immediate war, foreign governments could freeze assets of the United States without risking immediate war.

But what I want to highlight is the concern that in such cases, the side with vastly superior force might judge the use of force to be worth the anticipated cost. And Hornberger finds such an outcome objectionable.

However, when there is a limited government, after a defendant has exhausted his appeal to the appellate courts, Hornberger writes,

[There] isn’t going to be one armed force facing another armed force. There is going to be one final judgment. If that judgment declares that the defendant is guilty and must serve time, he will have to submit to the *overwhelming force* of the government. If he resists, he will encounter the *overwhelming power* of the state. [Emphases mine.]

Similarly, in civil law, “If the losing party resists with violence, the state will put him down with vastly superior force.”

Why the use of “vastly superior” or “overwhelming” force should be acceptable when used by government, but not when used by free-market defense agencies is by no means clear. It is as though Hornberger finds it acceptable that force prevails when it is used or threatened against one who cannot defend himself, but not when used by rogue free-market defense agencies against others who can defend themselves.

Hornberger confesses that in a limited government “a trial doesn’t guarantee that a just verdict is going to always be reached, but at least it guarantees people a process by which they can present their case and have it considered by a jury or judge.”

But the same can be said of any system of law and courts. Even in North Korea, someone accused of a crime has the assurance that his case will be considered by a judge.

Perhaps Socrates can say, “My case was tried and I lost, and it would be unjust of me to try to escape the penalty prescribed by the court.” I suspect that few prisoners — even among those convicted by a free-market system of courts — would find solace in such a consideration. Still fewer would find solace in recognizing that their attempt to elude punishment will be met by the “superior force” of a final arbiter.

In an example of the importance of a final arbiter, Hornberger cites a case from his time as an attorney. A jeweler had refused to repay a loan to Hornberger’s client, the lending bank. Hornberger disparages the free-market anarchist’s argument that people will not violate their contracts because they will be concerned about their reputation and will want other people to continue to deal with them. He says that evidently the jewelry-store owner wasn’t concerned about such things, and that his customers probably weren’t either.

In that observation, Hornberger commits an error we have seen before in his essay: he looks only at the interests of one or two parties, and fails to consider the wider context. The jeweler and his customers may not have been concerned about his reputation, but we may be sure that lots of bankers or investors, and perhaps suppliers, would be. Any such cavalier attitude about a reputation will suffer market consequences. No doubt there will be people in any market who will hold their reputations cheaply. The existence of a state will not prevent that. It certainly did not in the case Hornberger cites.

What he finds so beneficial to society in this example is that there will be no wars between competing courts. There will be the “overwhelming power of the state” to bring the matter to a conclusion. What makes this “power” so necessary, according to Hornberger, is the fact that it is not always the case that when there are disputes people will find a way to “work things out.” It is his contention that “people will work things out” is the reply that free-market anarchists make when asked how disputes can be resolved without a final arbiter. I must say here that in my reading of libertarian anarchist literature, I have not found this answer given by anyone. Certainly it is not the answer that the Tannehills or the Perkinses give in their books. One would think that a serious attempt to reply to free-market anarchists would include a reply to the systems proposed or described in such works. Hornberger says he has engaged in debates on the subject and organized debates on it; surely those works have come to his attention.

Still examining the case of the jeweler who would not pay his debts, Hornberger explains that it would not be the bank that would use force against him to collect the debt. Rather, it would be the government.

One might first ask why a bank may not use force itself to recover what is owed to it. Note that the question is not why did the bank not use force. The answer to that question may well be that it lacked the skill or resources. The question, rather, is why *may it not* use force to recover what was owed to it. In asking that question, we are once again looking at the argument of Roy Childs. Hornberger tells us that it will be the government that uses force to collect the debt. And why may the government use force in this case? One must suppose that Hornberger’s answer has something to do with a remark

he made at the beginning of his argument, when he said that in a society the 98 percent of a population who are not criminals will decide to “delegate” their right of self-defense to a “competent third party.”

Quite apart from the issue of the coherence of the concept of delegation, fully treated and discredited by Lysander Spooner, another writer whose name Hornberger must have heard at some point, one wonders immediately, what necessitates that the 98 percent agree on a single “competent third party”?

If delegation alone is sufficient to permit a third party to use force, it would seem that there can be no objection whatever to there being a number of such “third parties” in any given society, none of them with a geographical monopoly, all of them with overlapping customer bases, each of them a check on the others, each of them eager to satisfy their principals concerning the probity and success with which they will act.

It is clear from his examples and arguments, however, that Hornberger does not really believe in the right of delegation, but only in a muscular, irrevocable, but imaginary, kind of delegation. For once some group have (notionally) delegated the right to their self-defense, it would seem that no one will be allowed to revisit that issue. We are all bound by the decision of others who supposedly delegated their right to self-defense to yet others. We are not told who any of those people were, or even when the event occurred. And we surely are not told why it has any moral claim on our actions or decisions. But somehow their decisions are ours. One is reminded of the joke, “Do the Soviet people drink champagne?” Answer: “Yes, through their elected officials.”

In the market, when a customer becomes dissatisfied with the services he is receiving, he is free at once to make a change. He does not have to wait for others to agree with him. He simply stops dealing with one merchant and goes to another. He drinks his own champagne.

In the state, there is no such right, or rather, there is no such recognized right, and certainly no such protected right. When one becomes dissatisfied with the agency to which his right of self-defense has supposedly been delegated, he, alone or with others, may petition for a change, a petition any government one can imagine would be free to ignore. To compel the change, he must persuade a large number of his fellows to desire the change, and even then they must all wait for the next election. Even if successful in that undertaking, they must wait for their new rulers first to take office and then to act in a manner agreeable to them. And then they must wait for whatever new laws are passed to take effect. As in Gian Carlo Menotti’s opera *The Consul*, this is what even the night-watchman limited government ultimately gives us: “that men withhold the world from men.” [4] And the occupation of would-be reformers, like that of Magda Sorel, becomes “Waiting. Waiting. Waiting. Waiting. Waiting. Waiting. Waiting. Waiting.”

Finally, in this matter of the monopoly on the use of force, I note a certain parochialism in virtually all arguments in favor of a night-watchman limited government. It reveals itself first in the failure to call for a world government, and it reveals itself secondly in the assumption that the United States must be our model. That is, it is not just that there is a monopoly on the use of force; rather it is that there is only the same monopoly we already have. We are not even offered a different monopoly.

I have already noted that Hornberger regards the jurisprudential system of America/England to be the best in the world, with no consideration given to improvement. To be sure, he allows that improvement is possible, but he suggests no way

that it may come, and if the past is a guide, we may be sure it will come slowly if at all. One may be forgiven for failing to name a single improvement the state has put forth since the *Miranda* ruling. And one may be forgiven for doubting that *Miranda* represents an improvement.

What the absence of a one-world government demonstrates — where crime is concerned — is that most of the world functions fairly well with quite different forms of jurisprudence. Do the countries of Western Europe release more criminals? Do they imprison more innocent men? In precisely what way is the Napoleonic Code defective? Would not the Scottish verdict “Not proved” be a welcome addition to American jurisprudence? And finally, why is it, if New York jurors may return a “Not proved” verdict, that San Francisco must also have it? Why must the procedures be uniform throughout a geographical area?

That the nation-state is virtually the only form in which Hornberger is able to imagine a system of justice is further suggested when he prepares to make his argument concerning foreign competition. He writes, “Under anarchy ... there would be no more United States of America.” Why not? He assumes that there will still be a North Korea; why does he assume that the entire United States will become an anarchist society all at one time? More important, why assume that the entire United States will become the same kind of anarchist society at the same time?

He is not alone in his parochialism. Nearly all attempts to describe a free-market-friendly limited government are mere attempts to improve on the U.S. Constitution, with little imagination given to alternative structures. One never encounters a limited monarchy modeled on Renaissance Florence. Or a senatorial system modeled on that of Republican Rome. By contrast, consider the suggestions to be found in Robert A. Heinlein’s science-fiction novel *The Moon Is a Harsh Mistress*:

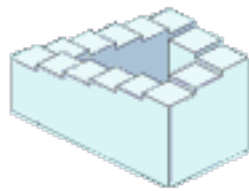
But if representative government turns out to be your intention there still may be ways to achieve it better than the territorial district.... Suppose instead of election a man were qualified for office by petition signed by four thousand citizens. He would then represent those four thousand affirmatively, with no disgruntled minority, for what would have been a minority in a territorial constituency would all be free to start other petitions or join in them. All would then be represented by men of their choice. Or a man with eight thousand supporters might have two votes in this body. Difficulties, objections, practical points to be worked out — many of them! But you could work them out ... and thereby avoid the chronic sickness of representative government, the disgruntled minority which feels — correctly! — that it has been disenfranchised.

But, whatever you do, *do not let the past be a straitjacket!*

I note one proposal to make this Congress a two-house body. Excellent — the more impediments to legislation the better. But, instead of following tradition, I suggest one house legislators, another whose single duty is to repeal laws. Let legislators pass laws only with a two-thirds majority ... while the repealers are able to cancel any law through a mere one-third minority. Preposterous? Think about it. If a bill is so poor that it cannot command two-thirds of your consents, is it not likely that it would make a poor law? And if a law is disliked by as many as one-third is it not likely that you would be better off without it? [5]

I would not have the reader suppose that Hornberger’s criticism of defense agencies is uniquely flawed. Rather, it features the errors that one will find in virtually all such criticisms: harboring utopian expectations for the night-watchman limited govern-

ment while harboring dystopian suspicions of the free market; searching for guarantees and certainty that cannot be had; imputing epistemological powers to legislative elites, powers that others lack; failing to imagine political systems dissimilar to that of the United States; failing to see that certain arguments, if valid, imply a logical commitment to the creation of a world government; failing to see that the flaws to be found in free-market defense agencies, where they are genuine, exist also in the night-watchman limited government, and with greater damage to society; imagining a system with no idea of how it could be created in the first place; and never noticing the simple metaphysical contradictions that make creating it impossible by the very nature of the thing itself.



[1] Many illustrations of Penrose stairways can be found online.

[2] Archived at <https://web.archive.org/web/20110723132732/http://tmh.floonet.net/articles/racolar.html>.

[3] San Francisco: Institute for Humane Studies, 1970. Online at <https://archive.org/stream/artofcommunity00maccguat#page/n5/mode/2up>

[4] Act 2, Scene 2. A 1970 performance is available at YouTube: https://www.youtube.com/watch?v=YSc_OC1dUaw, with LouAnn Lee singing Magda.

[5] Pages. 301-302, Tom Dabney Associates edition; the entire novel is available online on Google.

Four

Minimizing the State

THERE IS AN ODDNESS IN Jacob Hornberger's arguments that I have not touched on, and it is that they are not really arguments for the need for a government at all. In this respect, his arguments are not different from those of most proponents of a night-watchman limited government: most of them share in this oddness.

The oddness is the more stark among those who do not base their arguments on matters relevant to national defense.

In particular, they will argue that a government is necessary to hold a kind of monopoly on the use of force and to be the "final authority" in disputes. Their arguments, of course, show a great confidence in the ability of government to oversee matters, to make sure that private security companies do not get out of line, to make sure that court procedures are fair and follow certain procedures deemed necessary or good for reaching just decisions, and so on.

The advocates of the night-watchman limited government must, in the nature of things, have a fairly high confidence in government's ability to do the things they want it to do, and to refrain from doing the things they do not want it to do. They must have a fairly high confidence in their own ability (or someone's) to write a constitution that will "work" and not be subverted in any major way over a long period of time. In other words, they have utopian expectations for their government, as opposed to the dystopian expectations they bring to discussions of free-market defense agencies.

For my present purpose, let us assume that government is every bit as capable in making prudent judgments as its advocates say it is, that it will, or at least can, enact the provisions that will guarantee the procedural rights that Hornberger finds so necessary for justice to prevail.

A careful reading of the arguments will show that they never produce a conclusion of the form, "Therefore, it is needful that there be a legislature."

There is never an argument with the conclusion, "Therefore, it is needful that there be an executive branch in government."

There is never even an argument — appearances to the contrary — that justifies the conclusion, "Therefore a government court system is necessary."

A careful reading of the arguments will show that all they call for in the end is some kind of monopolistic agency that can exercise some oversight function over the market for defense and adjudication. Hornberger himself claims that free-market defense and free-market adjudication would be permitted in his night-watchman limited govern-

ment. His concern is that there be a final authority to enforce the decisions; his concern is that there should be certain “bill of rights” type guarantees. He never argues that the government should take the form of a republic or a democracy. (Neither does Ayn Rand, for that matter.) These are mere assumptions they make because ... well, because they think there has to be a government.

Every function Hornberger cites as calling for a government can be supplied by a kind of “executive licensing agency.” If the primary concern is that defense agencies provide certain guarantees and protections to those accused of crimes, nothing more is needed than a licensing agency to meet government standards, and that can be the end of the matter. That is, let the “state” be nothing more than an agency that defines “civil rights” and the procedures according to which defense and court services operate, and all the concerns voiced by proponents of the night-watchman limited government will have been met.

Let all security services operate under a license issued by the state. Let the requirements for being licensed be as strict and detailed as the proponents of the night-watchman limited government wish them to be. Compel the services (on pain of losing their license) to agree to follow whatever procedures the state now requires of its own forces. Put in place whatever protocols the limited-government advocates want included.

And let a similar course be followed with respect to the court system.

This is not so very far-fetched. Consider that in most states, the government does not provide alcoholic beverages. Rather it regulates them. It requires the suppliers to function according to some pretty well-defined rules. And there is plenty of free-market competition among them. Or at least competition that resembles free-market competition. I am not suggesting that alcoholic beverages be licensed. What I am suggesting is that the current system for licensing a particular market can inform the writers of a New Constitution for a New Country about how they can configure their state.

There will be plenty of competition, then, among the many licensed entities. Probably there will arise certification societies and professional associations (competing ones, at that) that will help to educate police and court services about the latest techniques, the latest thinking, even the latest regulations.

And let there be no mistake: the night-watchman limited government will be a regulatory state. It will regulate the means for apprehending criminals, for determining guilt, and for adjudication in civil matters. It will — unavoidably, inevitably — regulate some aspects of market activity. And it will use force against those who do not abide by its regulations. A state can perhaps exist without taxation. Perhaps it can exist without waging war. But it cannot exist without regulation of some commercial activity — that is what being a final arbiter entails. That is what defines the legal monopoly on the use of force.

With the licensing system, virtually every question of just how to constitute a limited government vanishes. Clearly the question of how to finance it is addressed, even if, as we shall see, it has not been solved: the licensing and fees (including the all-important renewal fees) will have to be set at a level sufficient to keep the licensing offices in business.

And what of “gypsy” police services and “rogue” court systems? Nothing could be simpler to deal with. Part of the licensing may require that the “official” services and systems will bring their influence and force to bear in putting an end to that competition,

uniting in the effort, if necessary. The licensing provisions could even spell out how such alliances are to be assembled and how they will function. There is no reason for the state to be hands-on in this matter. It had already deputized private industry to address such matters when it drew up the licensing (and, again and equally important, license-renewal) instruments.

Even the need for the “final arbiter” is satisfied, for the procedures for dealing with all the issues that are said to result from its absence can be folded into the terms of the license. Free-market defense agencies will be, as it were, deputies of the state. They will enforce the judgments of the free-market courts according to the terms spelled out in their license.

But what if a licensed entity refuses to abide by the terms of its license? That, too, can be dealt with in the terms of the licenses of the other agencies. They will enforce the licenses on each other, according to the terms the state has defined.

What if so many of them refuse that there are too few loyal ones to enforce the terms of the license? Well, in that case, what you have is a revolution against the state. And that can happen whether the state is merely a licensing agent or a police state (interesting term) under Fearless Leader or Duvalier or anyone else. So that once again, it would be the case that any objection that can be brought to bear against the licensing entity applies as vigorously against any state.

The system I am describing, I submit, answers every need of government that limited-government advocates advance, with the advantage that government itself lacks the means of directly committing acts of tyranny. To be sure, nothing prevents corruption in the licensing process, but there is nothing distinctive about this problem. Even the most ardent defender of the night-watchman limited government will surely not assert that government itself is free from corruption. Indeed, every objection that might be leveled against this system would merely be a special case of an objection that a free-market anarchist might level against a more-traditional limited government. Or, for that matter, that an advocate of limited government might level against a government with much wider powers.

It cannot even be argued that the state could not possibly function as a licensing bureau, for it already does. All the duties of a proposed U.S. Licensing Bureau of America are already prefigured in its current dealings with police and courts. And if the state truly cannot be expected to design competent and justice-seeking oversight provisions for licensed police services and courts and write them into its requirements for licensing, it perforce cannot be expected to run them itself. The state dictates how police forces shall be operated, and they more or less operate that way. The state dictates what shall be admissible in court, and courts follow that direction.

Moreover, if proponents want a “federal” system of government, there can be as many subordinate agencies as anyone thinks may be good. And the degree of independence they enjoy can be further defined by the licenses that create them.

Let us go further: there is no difficulty in creating this overarching licensing bureau, this U.S. Licensing Bureau of America, that is not also a difficulty for creating the more expansive, more traditional constitutional government. If the difficulties for founding the latter can be solved — especially the difficulties captured in the problem of legitimacy — so can the difficulties for the former.

“But who will design these licenses? Who will decide what goes into them? Who will decide who will ‘serve’ on the bureau?”

I confess that I do not understand why such questions will be asked. But since they surely will be asked, let us reply, “Essentially the same people who will do it in your government.” If private defense and private arbitration agencies are permitted to function (as Hornberger assures us they will be), lacking only the property of being a final authority, the state will necessarily have some system for controlling them, if only by overruling them, whether that system is one of licenses or of some other that takes the place of licenses. Someone will be defining the terms under which they may exist and under which they may operate. And someone will have to determine who will be doing that defining. Who will that be?

If the reader has followed none of my arguments to this moment, let him attend to this reply: **That is the limited-government advocate’s problem, not the free-market anarchist’s.** I do not say that there are or should be people in a position to make those decisions. The proponent of government (*any* government) says it. It is the proponent of government (*any* government) who says that there shall be men with certain powers and authority that other men lack.

Let me be clear on what I have been asserting here. I have not been asserting that a U.S. Licensing Bureau for defense agencies and court systems is necessary or desirable. I have not been advocating it. What I have been at pains to do here is to look at the arguments of the advocates of the night-watchman limited government and to ask myself what institutions are implied to satisfy those arguments. I am saying that even if we grant all the arguments offered in support of a limited government, there is no need for a Constitution for a New Country. There is no need for a legislative body. There is no need for any of the structures of government except a licensing bureau that licenses the defense agencies and court systems, which licenses will be the means of “guaranteeing” that they operate the way those fearful of a free-market anarchism want them to operate.

I am not arguing for the legitimacy of licensing or for the possibility of guarantees. But if one can swallow the camel of traditional government institutions, with all the problems of legitimacy and financing that they present, surely one can swallow the gnat of a state that is nothing more than a licensing bureau.

Indeed, it may even be less than a gnat. For the licenses can even define the terms under which the defense agencies and court systems can disband the Licensing Bureau and create a new one.

Naturally, it will be objected that there needs to be some provision against the agencies’ banding together to form a corrupt bureau that favors existing agencies and disfavors new entrants, that limits competition somehow. And again, in this objection, we see dystopian expectations for a (near-) market system and implicit utopian expectations for the government system.

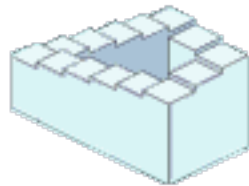
For consider: in a night-watchman limited government, what will prevent any cabal from banding together to disband it, either justly or unjustly? Nothing prevented it in 1787, when the Articles of Confederation were overthrown. Will there be a sufficiently powerful standing army to preclude it? None prevented the discarding of the Articles of Confederation. And surely the night-watchman limited government that libertarians would fashion would not be any more powerful than that formed by the Articles.

Remember also that the night-watchman limited government depends on consent of the governed for its legitimacy (or, at least, no other basis is to be found in contemporary writings). Any uprising, any cabal, any intrigue ipso facto constitutes a loss of some degree of consent.

In other words, I contend that if it is possible to fortify a night-watchman limited government against arbitrary dissolution or dissolution to be followed by tyranny, then it is possible to similarly fortify a licensing bureau.

But even this idea of a government that is nothing more than a licensing bureau — *nothing more* — is also a Penrose stairway. Perhaps, let us say, a lower one, a stairway with fewer steps and fewer turns. All the questions that pertain to the founding of a more familiar government pertain to founding it. And the attempt to answer them when they are asked of it will involve us in the same contradictions and impossibilities that we have already seen when we ask them about government.

And even a small defiance of the Law of Contradiction is a metaphysical calamity. All assertions follow from even one contradiction, no matter how small. And you can't have everything.



Five

Financing a Limited Government

“THE QUESTION OF HOW TO IMPLEMENT the principle of voluntary government financing ... is a very complex one and belongs to the field of the philosophy of law. The task of political philosophy is only to establish the nature of the principle and to demonstrate that it is practicable.” [1]

It is the thesis of this book, and especially of this chapter, that a limited government and a free market are fundamentally incompatible. A limited government cannot exist without encroaching on the market; and a completely free market exists only if government — even a night-watchman limited government — does not. I therefore suggest that the question of how to implement the financing of a night-watchman limited government is not a subject for the philosophy of law, but rather of metaphysics itself.

For the principle at issue is nothing less than the Law of Contradiction. One cannot logically advocate both a night-watchman limited government, i.e., a government that eschews the use of force except in the defense of the rights and liberties of its citizens, and a market into which government does not intrude, except by holding contradictory principles.

Nearly all libertarians agree that taxation is not one of the means for financing that is open to the night-watchman limited government. The collection of taxes in all their forms requires, in practice, that at least some people will be faced by a threat of force from the state. That is, a threat to use force will be made against people who have committed no crime, who have threatened to commit no crime, and who have lived peacefully and in harmony with their neighbors, engaging only in activities that are voluntary, and expecting the same of others.

In this regard, Jacob Hornberger’s discussion of government financing is correct. He takes up the claim of (some) free-market anarchists that a state cannot exist without taxation, and unequivocally rejects it: he recognizes that taxation is a violation of the personal and property rights of its citizens, and he will have no truck with it. And he, like Ayn Rand before him, offers some ideas on how a government can be financed.

To be sure, a limited government that is willing to defend a mixed economy presents no intellectual difficulties. The governments envisioned by the Founding Fathers, at least as they appeared in the state constitutions that predated the Constitution of 1787, all permitted taxation, though of different sorts and at different levels of government. And every government — excepting only a few scattered local governments — has resorted to taxation as the primary means of financing its activities.

I do not deny that voluntary forms of financing are possible. I deny that they can be put into effect in the context of a free market, by which I mean that even forms incontrovertibly voluntary will encroach on the market in some manner.

I shall begin with an idea that Rand offers, an idea that she puts forward in the essay quoted at the beginning of this chapter, and which she offers only as an illustration of how she imagines a free society could finance its government. I confess that before I became a free-market anarchist, I found it an intriguing suggestion [2]:

Suppose that the government were to protect ... only those contracts which had been insured by the payment, to the government, of a premium in the amount of a legally fixed percentage of the sums involved in the contractual transaction. Such insurance would not be compulsory; there would be no legal penalty imposed on those who did not choose to take it — they would be free to make verbal agreements or to sign uninsured contracts, if they so wished. The only consequence would be that such agreements or contracts would not be legally enforceable; if they were broken, the injured party would not be able to seek redress in a court of law.

The first thing to notice about this idea is that it proposes that the government be involved in the insurance business — and as a monopolist. No other insurance company would be permitted to offer similar insurance (for then, the purpose of the plan to finance government would be negated). But let us allow that objection to pass. The problems are much deeper.

In her essay “The Nature of Government,” Rand identifies the three traditional “proper” functions of government, among them, “*the law courts*, to settle disputes among men according to objective laws.” [3] In that same essay, she asserts that a “unilateral breach of contract involves an indirect use of physical force: it consists, in essence, of one man receiving the material values, goods or services of another, then refusing to pay for them and thus keeping them by force (by mere physical possession), not by right.” [4]

But if the government will not protect a given contract (because one of the parties has not purchased the protection insurance that the government, and only the government, offers), does it not follow that the other party may, with impunity, or at least without fear, breach the contract? Under the system described by Rand, the government will hold a monopoly on the use of force, so no one else will be permitted to enforce the contract.

The injured party may turn to an arbitration service, but it will be prohibited from enforcing the contract. It may use other means, perhaps, to bring the injuring party to uphold his side of the contract, but in the end everything will depend precisely on that set of persuasions which Hornberger asserts more than once are insufficient to carry out justice, because people sometimes just don’t “work things out.”

Moreover, let us note that in refusing to protect an uninsured contract, the government is implicitly permitting, indeed, we may say *depending* on, a contractor to use force and violate the property rights of the other party to the contract. I say “depending on,” for, let us remember, the purpose of this insurance is twofold: it is intended not only to be an instrument in the defense of property rights, but also to be a means for financing the government. It is in the government’s interest that it be clear to all citizens that this particular insurance product is one they cannot do without. A government financed by this method must permit the rights of an uninsured party to be violated *pour encourager les autres*.

I do not say that Rand had intended her proposal to function in this spirit. In fact, I think it obvious that she did not. My point is that, since the attempt to establish a government that does not violate rights must stumble over its own feet, in the end it is simply impossible. Like the Penrose stairway, it can be drawn; it cannot be built; when we draw it, the contradictions lie hidden; when we try to build it, they surge up and out and in all directions. The Law of Contradiction will not be mocked, and it will not suffer anyone to attempt to by-pass it.

Let us notice also another flaw in the proposal. Rand would have the premium for the policy set at a “legally fixed percentage of the sums involved.” But what percentage will that be?

It will not do to object, “It is not important what the percentage will be. The point is that the premiums will be set at some level, and it is not the purpose of political philosophy (or even legal philosophy) to determine it. That will be a matter for the politics and context of the day, and need not concern us here.”

Ah, but it does concern us here, for the question just is whether it is possible to fix the percentage without contradicting the goal of protecting a market left free from government intrusion.

In the free market, premiums are set by, *inter alia*, the competition among insurance companies for the business of those persons or businesses seeking the insurance. Note that I have said “set,” not “fixed.” The difference is not insignificant. Insurance companies in the market are free to vary their prices as market conditions change. The variations may occur within a given policy, if the terms of the policy permit, and they will certainly vary from policy to policy, even among policies that are in essence indistinguishable. Just as a gallon of milk may cost more today than tomorrow, so the premiums on a given policy offered to one customer today may — even if its other terms are unchanged — increase or decrease tomorrow, if the companies wish to change them. (That they may make these alterations does not, of course, imply that they will. In the market, the prices of some products, for example milk, are more volatile than the prices of others, for example, detergent purchased in a coin-operated laundry.) But government insurance will not enjoy this kind of price-changing flexibility.

Even if the legislative charter establishing the operation of the insurance department permits the department officials to make changes in the premiums or other terms, the prices will not be market prices, precisely because there will be no competition for the trade of the customers. It is the bidding for resources (capital and labor) that establishes the objectivity of prices in the market. Where there is no competition, there is no possibility of setting prices. There are only fees. And whereas prices can be said to be objective, in that they are set by impartial forces and economic natural law, fees are arbitrary. They therefore leave contractual rights exactly where Rand argues that rights should not be, to wit, “left at the mercy of the unilateral decision, the arbitrary choice, the irrationality, *the whim* of another man.” [5]

Rand’s mistake, then, was to ignore the warnings of Ludwig von Mises in *Bureaucracy* (New Haven: Yale University Press, 1944), an author whose writings the book service once associated with her used to sell: “In public administration there is no market price for achievements. This makes it indispensable to operate public offices according to principles entirely different from those applied under the profit motive.” [6] And what are those principles? Mind you, I am not saying that it is not possible to

determine whether the amount of money taken in is sufficient to finance the government. Surely that would be a simple matter of adding and subtracting.

No, the question is, by what principles is the office setting and collecting the premiums operating the insurance program? Is its operation efficient, i.e., are its costs appropriate to the services it performs? There is no one competing with the office to hire away its employees if they are paid too little. There will be no economic consequences of ruin if they are paid too much. There will be no way of making this calculation. Indeed, the business of making the calculation is not even to be considered. Because we are talking about the functions of a government, which is assumed not to be a market entity, and so cannot function according to whether it makes a profit, the principles of the office operating the insurance services must be those of a bureaucracy. And, to quote Mises, “Bureaucratic management is management bound to comply with detailed rules and regulations fixed by the authority of a superior body. The task of the bureaucrat is to perform what these rules and regulations order him to do. His discretion to act according to his own best is seriously restricted by them.” [7]

It may seem that in making this point, I am undermining my contention that limited government and the free market are incompatible. For if this crucial government agency is not operating according to market principles and cannot operate according to them, in what sense is it intruding into the market? The difficulty is only apparent.

When one market entity puts resources, i.e., capital or labor, to the use of its own purposes, thereby removing them from other possible uses and purposes, it is not intruding into the market. Moving the resources from one market activity into another just *is* market activity. In making use of resources to operate its insurance scheme, however, the government is removing resources, i.e., capital and labor, from the market. The prices it offers for supplies and other capital “crowd out” the bids for those same supplies and capital. The wages it offers to its functionaries “crowd out” bids for their services from other entities in need of laborers. Such will be the result if the government makes above-market offers (drawing away the most highly talented, highly desired workers), or below-market offers (drawing away entry-level workers from the appropriate market activities). And if we say that it will make “average” offers, then we perforce are drawing “average” workers away from “average” market opportunities.

Thus, the night-watchman limited government cannot even hire anyone without stepping into the market, without intruding into it, for it has entered the labor market, in competition with all other business concerns, needing to draw workers away from those concerns and unto itself. Moreover, if those same employees should decide to leave their government jobs and go work for, let us say, free-market law firms, they will enjoy an advantage that other potential hires will not have: they will have a more complete understanding and knowledge of the inner workings of the government. The law firm (or the accounting firm, or the insurance firm) that can hire more of them than its competitors will enjoy decided advantages, advantages that government, in effect, has given them. And as applicants for jobs, former government employees will enjoy advantages against applicants who do not come from government, applicants who could not have obtained comparable knowledge from their experience in competing firms, for there would be no competing firms. The night-watchman limited government, as Hornberger, Rand, and a host of other writers say, is a monopoly.

Finally, let us observe the constitutional difficulty posed by the need for an agency to operate such an insurance plan. First, just as the current U.S. Constitution explicitly identifies what taxes government may collect, so the New Constitution for the New Country must explicitly identify the means by which the government will be financed. If it is by an insurance scheme, the scheme must be explicitly authorized. In authorizing it, our New Constitution, we shall hope, will also specify that no other insurance scheme for any other purpose will be permitted to the government. Will it be left to a congress (“Congress shall have power to create an agency, etc.”) to specify the form of this agency? Or will the New Constitution itself specify it? To just what level of detail will the New Constitution resort to prevent future generations from misusing the clauses in ways that no one living at the time of ratification can foresee?

These are not minor questions. They are meant to illustrate just how much the proponents of a limited government leave unaddressed. It is as though they have left their limited government in the realm of fantasy, “a wishful and superficial series of images,” writes Joe Sobran. “Unlike fantasy, real imagination explores reality and possibility. You can’t separate it from the intellect. It takes imagination to see the world as it is, to understand people as they are, to grasp the remote implications of ideas, to foresee the results of various courses of action, to perceive abstract relations, to find analogies, to view a single truth from many angles, to sort out the essential from the inessential.” [8] It is in such undertakings, which free-market limited-government advocates hardly ever attempt, that we have been detecting their fall into contradiction.

We have seen men like those who call for a night-watchman limited government that will defend and not intrude into the free market before. They are like a man who thinks it would be grand to have a precise fraction for the square root of 2 or for π , but who has never troubled with the calculations to learn that they are impossible and why. They are like the men who see a drawing of a Penrose stairway drawn by E.M. Escher [9] and declare it would be a good thing if it existed. It is as though they believe that by describing a thing, even a logically impossible thing, or even by drawing it, they have made its existence possible.

It may be objected that, after all, Rand was explicit: she offered the idea of insuring contracts only by way of illustration, as a possibility. That I have gone to such lengths to show it impossible merely shows that it was a bad example.

But the difficulties I have identified here will plague us again and again in every plan to finance the free-market limited government. Let us look at the lottery, a proposal made by both Rand and Hornberger.

We must ask immediately, Since gambling will not be prohibited by the night-watchman limited government, is it not obvious that this government lottery will be operating in competition against free-market lotteries? To be sure, in this instance, there will be market competition, and the government will have the advantage of a price system created by the bidding for resources in which all gambling operations will be engaged. Its prizes and games will, at the margin, be comparable to those of all free-market lotteries. The prices it pays for the equipment to operate the lottery and the wages it offers to the personnel of the lottery will have a market base. In that respect, at least, there will be elements of objectivity in the lottery system that were absent in the insurance scheme.

But the idea, remember, was not to intrude into the market. And the government's lottery, as a competitor in the gambling business, will be nothing if not an intrusion into the market. Every announcer who reads out the winning numbers will be a person taken from other market activities. Every lottery machine will represent capital and physical resources (and the labor to assemble them) that will not be available to businesses operating in the free market. The paper and ink needed to print the tickets, the machines dispensing them, even the means for printing checks for the winners will all be unavailable to free-market operations. The government, in its attempt to behave like a market entity, will have "consumed" resources by taking them out of the market.

And every dollar spent by the purchasers of government lottery tickets will be a dollar not spent in a free-market gambling concern.

If the government chooses to purchase television time (as so many government lotteries do) to announce winning numbers, that time will not be available to advertisers and sponsors of networks or programs. Surely at this point it is not necessary to multiply the examples of the intrusions into the free market a lottery will present. A lottery as a means to finance the free-market limited government pretty obviously and at almost every conceivable point intrudes into and distorts the market.

Finally, because of the government's need for it as a means of financing, it cannot be permitted to go out of business. It will enjoy an advantage unknown to all its competitors, and in that respect it will not be a market entity at all, despite all other appearances. Dressed up to pass as a market entity, it will instead be a government agency intruding into the market.

What about donations? They are indubitably voluntary. What possible problems can they pose?

In *Power and Market*, Murray Rothbard gives an example of what we might call "voluntary taxation," and it is interesting enough to be worth quoting in full: [10]

A few writers, disturbed by the compulsion necessary to the existence of taxation, have advocated that governments be financed, not by taxation, but by some form of voluntary contribution. Such voluntary contribution systems could take various forms. One was the method relied on by the old city-state of Hamburg and other communities — voluntary gifts to the government. President William F. Warren of Boston University, in his essay, "Tax Exemption the Road to Tax Abolition," described his experience in one of these communities: "For five years it was the good fortune of the present writer to be domiciled in one of these communities. Incredible as it may seem to believers in the necessity of a legal enforcement of taxes by pains and penalties, he was for that period ... his own assessor and his own tax-gatherer. In common with the other citizens, he was invited, without sworn statement or declaration, to make such contribution to the public charges as seemed to himself just and equal. That sum, uncounted by any official, unknown to any but himself, he was asked to drop with his own hand into a strong public chest; on doing which his name was checked off the list of contributors.... Every citizen felt a noble pride in such immunity from prying assessors and rude constables. Every annual call of the authorities on that community was honored to the full."

Hornberger quotes this passage, but draws conclusions from it different from those Rothbard draws.

I cannot help but notice a few peculiarities of the account. I mention them aware, however, that the author (Warren, not Rothbard) may have merely been speaking casually, not actually intending that any inferences of the sort that are occurring to me

should be drawn. Nevertheless, I will make note of them here. Let us start with that “annual call.” Please note that it is annual. And why is that?

Where is the objectivity in collecting donations only annually? If the hope or ideal was to arrive at objective law, to remove the element of the arbitrary and subjective from public life, surely in this decision, we have failure. Again, it will not do to reply, It is only necessary that there be *some* time for collecting the donations, but that it does not really matter when that time is.

For if the object is to refrain from intruding into the market, it does matter when that time is. At what time can this annual call be answered that does not intrude into the market? People will be taking time from their work or from their leisure to answer it. Shopping will be diminished. Production output will be diminished. These diminishments will be greater or fewer as there are few or many sites for making the donations, so it is reasonable to ask: How many sites are there going to be for making the donations? There is no objective answer to the question. Walmart knows how many stores it should open in a given area because it has prices and profit-and-loss statements to guide it. What has the government?

No matter what location it chooses it will be convenient for some donors and inconvenient to others. It will affect some local businesses to their benefit, and others to their loss. How many people will be pulled out of the labor force to compile the list of contributors? Will they be volunteers or will they be paid? Will that list be made public or kept confidential? Will donors stand in long lines, as at the Motor Vehicle Administration? Or will there be enough volunteers or hired hands to minimize the wait, as at most fast-food outlets?

Perhaps the donations can simply be mailed in. But mailed in to where? This particular question will arise again when we talk about government buildings. For now let us note only that the recipient site’s location must be publicized. But how? I am not suggesting that it will be impossible to properly publicize it. Merely, I want the reader to realize that publicizing anything is a market activity, requiring resources, time, and personnel, all of them being put in the service not of market activity, but of bureaucratic (e.g., government) necessity.

Let us talk about that list of donors again, and we shall meet a few familiar questions. The listing requires the use of some office supplies. The supplies so used will be unavailable to other consumers for their use. And in any case, from whom will they be obtained? The supplier chosen to provide them will enjoy a certain market advantage over his competitors. And just how were those “invitations” managed? Were they mailed out? By what carrier? Were they printed in a newspaper? All newspapers? Or only a favored few? Did the government pay each newspaper the same, or did it allow each paper to set its own price?

And that strongbox — who manufactures it? Who sells it? Who loses out when his strongbox is not chosen for a particular location?

Surely by now, the reader is getting the idea. The government cannot act without intruding into the market, because to act it must move about in the world of men, time, and events. And in that world there is scarcity, a scarcity upon which government, like all other enterprises, must draw, and in drawing on it, it affects the market. And in affecting it, it has intruded into it.

And “drawing on scarcity” is no easy matter, either. The government itself is going to need a place in which to carry out its functions. Will it purchase land for that end? What land, and from whom? What real estate agents will profit from the privilege of handling the purchases? What contractors will profit from the economic advantage of putting up the buildings, and how will that advantage affect their interaction and competition with their economic rivals? Once the buildings are built, how will it be determined which of the competing utility companies will be favored with the contract to supply the electricity or the water or the heat? What service contractors will maintain the buildings and keep them clean?

Will there be restrooms in the buildings where the legislature debates and passes its impossible One Law or its objective laws? Will there be changing tables in them? Will there be feminine-hygiene products? What brands will be chosen? What suppliers of those brands? Will there be paper towels, and if so, what brands and what suppliers? Or will there be instead hot-air driers? What brands and what suppliers?

And if the government decides to purchase existing buildings, rather than contract for new ones, which sellers will be favored with the sale? How will the government know how much it should pay for them? How can it determine that the price it pays is justified by the value the building will contribute to the output of government? There is no way to answer that question, because there will be no competing government bidding on the building. All we can know is what return the seller is asking and whether there are others willing to offer it. And that information is inadequate to the question of whether a given building should be purchased at all.

For that matter, how will the government decide whether to own or to rent the buildings? And if it rents them, from whom? And the other questions — utilities, maintenance, service to the building, the privilege of the renter — will still irritate us.

If there is a military, it is going to need uniforms, weapons, vehicles. It is going to occupy buildings. It is going to engage employees. Someone must build its naval bases; someone must build its ships; someone must maintain them. Who? and how will that agency be chosen? Who will manufacture the weapons? And how can there be a price for them, if there is no competitive market? (Or will the night-watchman limited state permit free-lance arms dealers to function?) [11]

Anyone who wants to deal with the government to supply its needs will necessarily configure his business to those needs. The government wants its employees to compose their memos in WordPerfect? Software suppliers who want that business will have to stock up on WordPerfect licenses, to the detriment of Microsoft Word, and to the detriment of applications created only for the Macintosh or for Linux operating systems. Secretaries will have to be sure they are fully conversant with WordPerfect if they want to get jobs in the night-watchman limited government or with agencies that supply contract services to it.

The actions necessary for a government to function at all are the actions of a major participant in the market.

Other imponderables make their appearance. Assuming *per impossible* that all the foregoing questions could be settled objectively and without intruding into the market, there is the perennial question of location. No matter where the government offices are located, some advantage will be enjoyed by nearby merchants (restaurants, parking lots, boutiques, gas stations), that is not to be enjoyed by their market rivals. And lest the read-

er think that this is a small matter, let him remember that all those rivals had helped finance the very government (perhaps by purchasing the contract insurance suggested by Ayn Rand) that is now giving market advantages to their competitors.

Like kudzu wildly spreading over topsoil and killing the vegetation it covers, the matters I have suggested begin to take over the discussion, and there seems to be no stopping them. Unlike kudzu, the difficulties have no apparent use other than to destroy what we may call the native flora of the limited government, i.e., the reasons we “planted” the limited government in the first place. Every government employee, every policeman, every legislator, every judge, every administrator will be taken from potential competing enterprises, thus affecting them for better or worse. And how will they be paid? Their jobs are not market phenomena. There is no market competition for their services. The government will simply be removing them from a certain amount of market activity. There is no way to competitively price their services. There is no way to know whether their pay is justified by the value they add to the final product, because there is no competition for the final product, and no price for it.

And to follow our kudzu on its destructive path, we will see that at the end of each day these non-market actors leave their non-market jobs and enter the market with consumer power that was given to them by the government, which is to say, by the people who purchased the government’s insurance, played in its lottery, or dropped an unidentified amount into a strongbox. The people the disfavored merchants and service providers have indirectly paid (and to whom they could not have preferred others) will be taking their trade to business rivals. Something similar happens in the market all the time — the baker from whom I purchase my desserts may very well decide to purchase his auto parts from someone who does not even patronize my baker — but in that case, the results all represent choices, free choices, market choices made by all the actors. Government workers are not such; remember, the government has a monopoly on the use of force, so unlucky market actors will be required to support their rivals’ customers rather than someone of their own choosing. They will have no choice in the matter.

And that, I submit, is an injustice. An unavoidable injustice inherent in the existence of government, and it arises because we live in a world of limited resources, limited time, limited abilities. That is, we live in a world dominated by the Law of Identity and its corollary, the Law of Contradiction.

Can any of these outcomes be avoided? Of course not. The fundamental fact is that government does not really *do* anything. It hires people to do it. It purchases supplies created by others. It rents services from others, using contractors and subcontractors. All of them, to the last man, to the last nut and bolt, to the last lunch break, are taken out of the market and put into the service of government. I suppose someone might object that what I have described is not an intrusion into the market, but an extrusion from it. But government does not extrude from the market as though it were a gravitational force, like the moon pulling on the seas to cause the tides. It invades the market. It must enter the market with advertising; it must make use of physical objects that, if used by another, would be private property, because government is part of the same network of men, time, and events that the market is. The market and government coexist in time and space. They breathe one another’s air. Like physical objects, what one possesses, the other does not. What one uses, the other does not.

Not only can the outcomes I have described not be avoided, they are deeper and more far-reaching than I have yet let on. I have often referred to the payments made by government to the benefit of some and to the exclusion of others.

But how are those payments possible? What money will the government use to make its payments? In a free market, there will be a free banking system with, presumably, competing monies. There is simply no way for the government not to favor some issuers to the disadvantage of others. And if it issues its own money, operating a separate bank, it will be in the same kind of competition with banking that its lottery would be in with casinos.

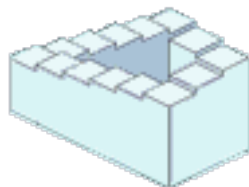
And it will not be only certain banks that are favored against others. By favoring the currency or coins of some banks over others, the government will be indirectly favoring some artists over others, viz., the artists who designed the money of the favored banks. They will enjoy a publicity and approval to the disadvantage of their rivals. Our night-watchman limited government not only could not keep from intruding into the market, it has intruded into the arts as well.

But was that not already obvious? It intruded into the arts when it hired someone to design its lottery tickets. Or the boxes into which the donations were dropped. It intruded into them when it hired architects to design its buildings; it even favored certain architects if it rented its buildings. It intruded into the arts when it hired interior decorators. When it hired fashion designers for its police or military uniforms or judicial robes. If it has military musicians, it must favor some composers over others. It favored certain artisans when it purchased its weaponry, whether the weapons are plain or crafted with a certain beauty.

There is no possibility of dealing with the several banks (or artists) “equally.” What could that even mean? The imagination simply staggers at the attempt to define “equality” in this context.

And where there is no equality, there is advantage to some and disadvantage to others. The government is unable to act without conferring one or the other. And as soon as it confers an advantage on one and a disadvantage to the other, it has intruded into the market; it has affected market outcomes.

To restate the problem more generally: It is impossible for a government, any government, to be financed without affecting the free market. without intruding into it. It cannot act without influencing the market, because it is not possible to act outside the market. Therefore the mere existence of a government, any government, is incompatible with the postulation of a market not influenced by it. And therefore, a night-watchman limited government and a free market are contradictories: the existence of one, implies the nonexistence of the other.



[1] Ayn Rand, “Government Financing in a Free Society,” *The Objectivist Newsletter*, February 1964; reprinted in *The Virtue of Selfishness* [New York: New American Library, 1964], page 116.

[2] *Ibid.*, pages 116–17.

[3] *Objectivist Newsletter*, December 1963; reprinted in *The Virtue of Selfishness*, page 112; and in *Capitalism: The Unknown Ideal* [New York: New American Library]), page 300.

[4] *Virtue*, page 111; *Capitalism*, page 299.

[5] *Virtue*, page 111; *Capitalism*, page 300.

[6] New Rochelle, New York: Arlington House, 1969; page 47.

[7] *Ibid.*, page 45.

[8] “Fantasy and Imagination,” United Press Syndicate column, July 25, 2006; reprinted online: <http://www.sobran.com/columns/2006/060725.shtml>

[9] Many illustrations of Penrose stairways can be found online.

[10] Menlo Park: Institute for Humane Studies, 1970; page 120.

[11] I discuss other problems besetting the inevitable and necessary privatization of war in “Privatizing War,” online at http://www.thornwalker.com/ditch/neff_privatizing.htm

Six

Arguments from History and Fiction

IN PART 5 (THE JULY 2016 ISSUE) OF HIS PRESENTATION, Jacob Hornberger attempts to undergird his case by citing a couple of articles by Emily Kadens purporting to show that the law merchant — cited by some free-market anarchist writers as evidence that the state is not necessary for the adjudication of disagreements — in fact arose within the context of state authority to defend and enforce the outcomes. He infers, “The law merchant judicial systems that existed within a governmental framework provided the means by which businessmen could peacefully — that is, without war and bloodshed — litigate their differences in those instances where they were unable to arrive at a mutually beneficial agreement.”

To be sure, it is a matter of historical fact that some form of the state has existed throughout the civilized world. Therefore, every advance in civilization — art, technology, commerce, philosophy, the science of justice, understandings of ethical behavior — all occurred within that context. What connection is there?

Hornberger asserts that there was a very strong connection, indeed:

By the time the 1700s arrived, the English people had developed a very sophisticated judicial system in both criminal and civil law, one that involved countless judicial opinions that provided precedence and guidance. All of this was setting the stage for the Declaration of Independence, the U.S. Constitution, the Bill of Rights, a free-enterprise economic system, the Industrial Revolution, and the most advanced and sophisticated judicial system in history.

I will not attempt to refute the Kadens articles. For all I know, she is correct in every detail. But I think that her arguments do not imply what Hornberger would have us believe they imply. For whenever a state exists, there will certainly be people and institutions that turn to it to solve whatever problems the state claims it can solve. Their turning to it does not imply its necessity or its goodness, or even its competence. We see also from our own experience that when a state exists claiming to provide any services whatever, there is little if any incentive for others to attempt to find or create needed services. It crowds them out, so to speak. What free-market anarchist (or night-watchman limited government exponent, for that matter) has not been met with the challenge, “But who will build the roads?”

Moreover, Hornberger’s argument — and perhaps Kadens’s — proves too much for his case. After all, if the merchant law arose in the context of tyrannical states, are not

it and similar ideas sure to arise in the context of true liberty? Must men be subject to tyrannies in order to develop such ideas? Or are free men perfectly capable of the same feat?

Or perhaps Hornberger is again relying on the final arbiter? Is he saying that it is only when there is a final arbiter that such ideas can develop and be employed?

In any case, there is an extreme intellectual danger in embracing the inference Hornberger draws from the arguments Kadens makes and the examples that she gives.

To begin, we must note that counterfactuals are simply not within the expertise of any historian. We may say that if Stuart had arrived at Gettysburg on July 1 rather than on July 2, the outcome of the battle would surely have been different (“if things had been different, things would be different”), but we are unable to say with certainty in just what way the outcome would have been different. Similarly, we may say that the law merchant developed within the context of state activity, but it is not legitimate to infer that it required that activity. We might just as well wonder whether its dependence on state activity *stunted* its development.

Let us work our way backwards and see what reliance on this argument would suggest. Hornberger and indeed many libertarians have argued that a welfare state is unnecessary, in part because a free people are a generous people. Most libertarians are confident that in the absence of a welfare state the generosity of a free people would be more than adequate to provide for the unfortunate of society. That generosity, it is to be noted, is different from the participation of Americans in the so-called friendly societies that existed before the New Deal drove them into extinction. I am talking here not about the charitable giving that has as at least part of its basis the purchase of a kind of insurance, but rather the kind of giving that expects little or no tangible return.

I am not unmindful of the extraordinary gifts made by the rich in the past — one thinks of the libraries created by the charitable giving of Andrew Carnegie. Neither am I unmindful of those gifts made by ordinary people today, or, for that matter, of certain extraordinary gifts — say, those made by Bill and Melinda Gates. It is incontrovertible that those modern gifts were made (and similar gifts continue to be made) within the context of a tax system that rewards such giving. Just as we can never say precisely what the market in defense would look like in the absence of government, so also we cannot say precisely what the market in charitable giving would look like in the absence of tax incentives. We have our hopes. The Tannehills and the Perkinses have given us some ideas about how defense would look or work in a free market, but, to be honest, we cannot know that what they describe is what would actually emerge. The same is true of charitable giving in a free market, for it is dependent not on the natural laws of economics, but on the particular character and virtue of the people in the economy.

Shall we infer that a complicated income-tax system with deductions for charitable giving is necessary for a robust system of charitable gift-giving in a society? Or even that it stimulates gift-giving beyond what we would see in a free society?

It is not sufficient to point to the past — say, the period immediately following the end of the Revolutionary War — when there was no income-tax system, but when Americans formed countless aid and friendly societies. To answer questions about present possibilities by referring to past accomplishments presupposes that the people of the present are made more or less “of the same stuff” as those of two centuries ago. And surely a cursory look at our social problems in comparison with those experienced by

eighteenth-century men will convince anyone that such is not the case. It may be that the welfare state is in large measure responsible for that transformation — “electing a new people,” as it were — but if the collapse of the Soviet Union and its satellite governments can teach us anything, it is that recovery from tyranny and from a welfare state is a tricky business. When any people — even the American people, maybe even *especially* the American people — have lived under a casually cruel and paternalistic government for just a few generations, the knack of being free is easily lost and not easily recovered, if it is ever recovered.

In many ways, the Revolutionary War generation had acquired that knack before they cast off their chains. Our generation certainly has not.

Let us now look at the performing arts. I daresay that every major symphony in the world, every opera house, is supported by government funds. Libertarians will argue that such delights could exist in a free market, and I am confident that they are right. But, in fact, they exist within the framework of government support. Using Hornberger’s logic, we should conclude that they would not exist if the market had been free all along.

The major medical advances in the modern age have been made in the context of government funding, and, indeed, by government agencies, such as NIH. While it is true that in the past certain advances were made without government support, in today’s modern and complicated interconnected world, with science no longer the purview of the individual researcher working in his basement laboratory, how confident can we be that government is not necessary for such advances? Oh yes, there are the criticisms of the foot-dragging of the FDA, and there are the inexplicable differences in policies from one government to the next, but on the whole, doesn’t history (as Hornberger’s hasty inference would have it) suggest that we really do need government to finance and oversee medical research?

Every libertarian who has discussed environmental policy has at one time or another probably pointed to the reduction in factory and auto emissions today compared with what they were 20 or 30 years ago, and perhaps compared them with what was found after the Soviet Union broke up into the 15 countries that had made up the USSR. But can it not be rebutted that the improvements in the United States were not the result of market developments, but rather of the regulations that had been passed and enforced by the EPA? Did not auto safety improve within the context of imposed NHTSA standards? And similarly, did not the safety workers now enjoy in factories and other workplaces develop in the context of compulsory OSHA standards? And even those improvements that can be certainly identified as purely market developments — did they not occur within the context of a state regulatory system? Can we say for certain that they were not preemptive attempts in the marketplace to avoid regulation, and therefore might very well not have occurred without that looming threat?

Taking a few major leaps further into the past, what *historical* evidence can Hornberger provide that intercontinental railroads could be built without government incentives and support, to say nothing of cronyism and bribery? Or that international air lanes would be safe without government regulation?

Leaping further, what *historical* evidence can Hornberger — or anyone else, for that matter — provide to show that the flourishing of culture in seventeenth-century England would have been possible without Elizabethan despotism? that the New World

would have been discovered without financing by Spanish, Portuguese, Genoese, or French monarchical funding?

What *historical* evidence is there that Virginia could have been colonized without the sponsorship of a government investment monopoly? Or that the rebuilt Jamestown colony could have survived without being a military dictatorship? I do not doubt that there are theoretical arguments that could be brought to bear on these questions, but none that can be tested empirically. By the nature of things, there can be no empirical, *historical* evidence for the counterfactual.

What *historical* evidence can be offered to suggest that the Renaissance could have taken place and on so wide a scale without the extorted funds provided by a Julius II or a Lorenzo the Magnificent? Does not the patronage system itself suggest that art requires the support of wealth that was not available on the market? Even Nadezha von Meck, a non-governmental patroness of the arts and often described as a “business-woman,” was the heiress to her husband’s vast fortune acquired as a Russian railroad magnate and monopolist. Shall we say that without monopoly, we should never have heard of Tchaikovsky? Alas, there is no *historical* evidence to the contrary.

Let us delight in the Greek tragedies, poetry, and philosophy and the sculpture and architecture of Athens. But let us never forget that it was a society that, at least in historical terms, depended on the existence of slaves. And let us acknowledge that there is no *historical* evidence that it could have existed without slavery.

We may further speculate that without publicly financed religious festivals, the Greek dramas presented on those occasions might never have been composed at all. Certainly, we can see that dramas were later written and performed independently of such festivals, but without any *historical* evidence to the contrary, may we speculate that without that context, the idea of the dramatic arts as we know them would never have been born? that the most we could hope for would be the kinds of reenactments we see among the savage tribes of Africa, South America, and Papua New Guinea — or for that matter, in films such as *King Kong*?

My point, of course, is not that historical evidence has no merit. Of course it has merit, but we must not require of it more than it can supply. We can “learn from history,” of course. But we cannot use history to answer counterfactual questions. And the relevant question to Hornberger’s discussion of the law merchant is, “Could the law merchant have been developed without state enforcement?” To that question there is no answer given by history.

My point also is not that I would agree with the positions suggested by my examples, a position summed up by the glib “taxation is the price we pay for civilization.” Rather, I merely want the reader to have a grasp of what a tenuous basis for philosophical argument can be found in the resort to history, whether that resort comes from night-watchman limited-government advocates or free-market anarchists. The fact that a given idea or practice arises in a certain historical context (e.g., the existence of a state) is not evidence that it could not have arisen in a different historical context (e.g., the absence of a state).

Learning from Fiction

WE HAVE NO BETTER SUCCESS when we turn to contemporary fiction to inform the case. While there are innumerable treatments in science fiction of what life is like after

civilization collapses — one thinks of the cannibalistic tribes and dictatorships that arise in *Lucifer's Hammer* or the *Mad Max* movies — Hornberger turns his sights on the highly popular AMC series *The Walking Dead*. He writes,

Does a peaceful, harmonious society come into existence where people are working together to protect themselves from the zombies and, in the process, develop the sophisticated system of competing courts and police forces that anarchists envision?

On the contrary, in *The Walking Dead*, society quickly devolves into a collection of competing gangs or tribes, with no one trusting anyone else and with groups warring against each other. The more powerful the gang or tribe, the greater the chance it's going to survive the mayhem.

One could with equal justification ask why, if limited government is so good, it never seems to occur to Rick Grimes or Negan to set up a Congress or an Electoral College. Neither one seems the least bit interested in habeas corpus or the protections afforded by the Third Amendment. These defects are the more telling in that both lived in a pre-zombie world and are fully aware of the existence and possibilities for such institutions. Rick, in particular, a law officer, never seems to have thought of incorporating any of his knowledge of due process into his dealings with others. Even when Deanna Monroe — a former congresswoman — ran Alexandria, she didn't exactly model her governance on anything found in the Magna Carta or in the writings of George Mason. We can hardly fault people for not establishing free-market anarchism, a social system they have never heard of, except in the pages of criticisms such as Hornberger's, if they will not attempt to establish one with which they are familiar and which, according to Hornberger, has so much to offer civilization.

One might even ask Hornberger, who, like me, is a Catholic, if Catholicism is the true faith why isn't there any Catholic Church? We see the occasional Rosary, with no indication that the person holding it has any awareness of the Mysteries, or knows any of the prayers associated with it. The figure of "Father" Gabriel Stokes — with his fragmented knowledge of theology, indeed, even of Biblical texts — suggests that what Christianity still exists is a deformed and degraded sort.

Such "moral compasses" as we find in the world of *The Walking Dead* offer little reason to believe that Christianity as we know it has survived. Dale Horvath subjected his fellows (and us) to what seemed would be a never-ending (at least until we were relieved of them by his death) blather of liberal and collectivist sentiments. Herschel Greene's quiet "faith" was never well defined. And about Morgan Jones, perhaps, the less said the better. Will Hornberger question the validity of his religious beliefs on the basis of a TV series in which such examples are the only morality the world has to offer? I doubt it.

There are a few other points worth considering. The first is that even absent anything resembling limited government, within the tribes Hornberger refers to, the early beginnings of a property civilization have made their appearance. One thinks of Joe and the Claimers, with their Lockean view of property rights and their application of the death penalty for exactly the kind of misdeeds (theft and dishonesty) that make a commercial society impossible. One remembers Joe's remark to Daryl Dixon: "When men like us follow rules and cooperate a little bit, well, the world becomes ours." It's almost a primitive statement of constitutional government with its empire-building.

But one of the most important lessons of a work such as *The Walking Dead* is surely that when they are reduced to a state of nature, men are not free. They are subject to the needs of the moment, even to their passions. They have no principles beyond the range of the moment to guide them; they can only attempt to make calculations of expediency based on some apparent short-range, ad hoc advantage or utilitarian considerations of what will count as “being safe.” In other words, they are slaves. The characters, if they ever were free men, have forgotten how to be free, and they must learn it all over again.

Then there is the question of how all this happened in the first place. Where was the limited government that was supposed to protect people from a collapse such as the one depicted in this series? If limited government is so strong, so vital, how could it and all society collapse in a matter of months?

Part of the answer may be found in the sister-series, *Fear the Walking Dead*, where it becomes clear that the military not only was unable to defend society, but actually abandoned the civilians. Whether the military was able to save itself in any form anywhere remains uncertain. What is certain, however, is that the artform Hornberger has chosen to rely on to make his case against free-market anarchism has instead echoed the insight of Morris and Linda Tannehill in *The Market for Liberty*, to wit, “Governments don’t defend people; people [such as Jacob Hornberger?] defend governments.”

* * *

It is important to note Hornberger’s failure to consider the importance of time in his discussions of social upheaval and recovery.

Even if *Walking Dead* characters Rick Grimes, Shane Walsh, Deanna Monroe, and Dawn Lerner — all characters associated with government or law enforcement before the collapse of society — had been Jeffersonian types inclined to rebuild a representative republic, they would have required years in which to do it. Moreover, then we must set aside the fact that among them only Rick has managed to stay alive for the two or three years since the zombie outbreak.

Even more to the point: There is no money in the society of *The Walking Dead*, even though all the characters at one time used it and had at least a passing understanding of the role it played in society. Clearly if a society is so degraded that even the institution of money has not yet arisen, we can scarcely draw any conclusions from the absence of a free-market arbitration agency or judicial system.

But why is there no money? Shall we consider the possibility that without the government, there can be no money? Shall we allow ourselves the suspicion (contra Carl Menger, Ludwig von Mises, F.A. Hayek, and Murray Rothbard) that money does not arise spontaneously in a society, but is the creation of the state? And if it does arise spontaneously in a society, why hasn’t it shown up in this one?

The short answer, of course, is that in the world of *The Walking Dead*, there really is no society to speak of. But surely Hornberger is not prepared to argue that society cannot exist until there is a government.

I suppose it is important here to note that a society can be free without there being a free market. It will necessarily be a primitive society, but its members can nevertheless enjoy a high degree of freedom, if not prosperity. All that is necessary for a people to be

free, after all, is for them to live in a society where coercion has been rejected as a proper means of solving problems. In that respect, a free society can appear overnight.

But for more sophisticated understandings of freedom and free societies, no matter what one may think of the night-watchman limited government or free-market anarchism, the emergence of such systems takes time. And in the case of the latter, it, like money itself, cannot be designed. It will grow spontaneously over the course of many years, perhaps centuries, and then only if people are of a proper character. The nomadic groups of *The Walking Dead* cannot even be described as a “hunter/gatherer” society. So far — with the exception of the short period at the prison, and the little bit of hunting that only some of the characters undertake — none of the characters of *The Walking Dead* has even been doing much in the way of productive work. They all — even the Alexandria community — live on the remaining capital of their society, mostly by scavenging, completely dependent on the remains of a productive society that has ceased to exist. There can be and will be no civilization until the nomads settle down near a water source and start to produce food and other necessities for themselves. (We see these beginnings, perhaps, in the “realm” of “King” Ezekiel.)

And, of course, even then, they may be subject to endless raids from gangs, along the lines of a *Magnificent Seven* character like Calvera. Even under those circumstances — and so far, Negan seems to be fairly successful as raiders go — sooner or later, the raiders learn that it is more advantageous to “tax” their victims than to steal from them and kill them. And the state is born — as it always is — in conquest. (Negan has set the “tax rate” at 50 percent.)

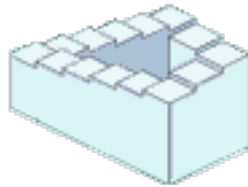
Obviously there are ethical underpinnings that are necessary for a free and productive society to exist — there can be no such a society, for example, in which theft is taken to be an ordinary staple of life, as it is in some Eastern countries (even 2,000 years after they have been exposed to Christianity). But there are also what may be called the “technological” underpinnings. Can a free market exist in a society without double-entry bookkeeping? Can it exist in a society that uses letters as numbers (as nearly all civilizations have done at one time or another)? Can it exist if there is no alphabet? No doubt, commerce can exist, but can a free market?

I doubt it. (It is worth insisting that the absence of double-entry bookkeeping in the world of *The Walking Dead* is also not an argument for the necessity of government.) I will even make the stronger claim that although free-market anarchism operates as it does because it is based on the natural laws of ethics and economics, it probably cannot emerge except in a Western-type society. It is entirely possible that even the night-watchman limited government as Hornberger conceives it could not emerge outside that context. (I leave to others to deal with the question whether it had to await, per Max Weber, a Protestant Reformation.) There is certainly no *historical* evidence that it can.

But aside from all that, I return to the earlier point: no one establishes a free-market anarchism. It appears spontaneously, to be perfected, to be sure, when writers turn their attention to its nascent forms, discovering the natural laws at work in it — such as Ricardo’s Law of Comparative Advantage and Say’s Law that there cannot be demand without supply — and arguing for the goodness of such a system. Intellectuals such as Frédéric Bastiat and Gustave de Molinari must appear on the scene to help make explicit what is implicit in whatever noncoercive society might emerge, giving people confidence in the freedom they naturally possess.

For free-market anarchism (and the kind of night-watchman limited government Hornberger champions, for that matter) represents the triumph of the *intellect*. And intellectual triumphs do not come easily or all at once. The importance for free-market anarchism of the writings of a Murray Rothbard or a Roy Childs or the Tannehills, is not that they provide a blueprint for a society that could be erected overnight — or even over the course of years. Rather, they highlight for us what errors we are currently making in our thinking. And as those errors are corrected, little by little freedom can expand. If we cling to our errors, it will not.

And surely one of the errors most persistent in the West is that we need some kind of “final arbiter” with a monopoly of force to settle our disputes, to enforce moral principles (such as the One Law), and to embroil us in an endless attempt to overcome the Law of Contradiction.



Seven

Somalia: Grasping at Straws

IT SEEMS THAT SOONER OR LATER, anyone who is defending free-market anarchism will be asked about Somalia. Of course, Somalia has nothing to do with free-market anarchism, any more than the Soviet Union, with its constitution, had anything to do with the night-watchman limited government.

The demand is, in some ways, not new. In 1981, after Menachem Begin had invaded Lebanon, Roy Childs told me that one of the reasons he no longer considered anarchism a viable political philosophy was the chaos in Lebanon. I found that an astonishing remark, coming from one of the seminal writers on free-market anarchism.

Still, there is something about areas of the world where governments break down that connects them in people's minds to free-market anarchism. I am not going to try to guess what it is, but since Jacob Hornberger makes use of Somalia among his arguments against anarchism, I shall venture to say something about it.

But first, what does he say? For one thing, he says that "many U.S. proponents of anarchy praised Somalia as a great example of an anarchist society," and adds that to his knowledge none of them ever moved there. As I said at the beginning of my reply to Hornberger's article, he provides no notes for his references, so it is hard to see whether he has correctly understood any of those "many ... proponents of anarchy." I myself have no idea who they may be, and I am certain that I never read or spoke to any exponent of free-market anarchism who voiced the opinion that Somalia was a "great example of an anarchist society." But perhaps I lead a sheltered life.

What is indubitable, however, is that such a claim is no argument against free-market anarchism. There are free-market anarchists who supported Donald Trump, Ronald Reagan, and (*mirabile dictu*) Lyndon Johnson for president, but that surely does not count as an argument against free-market anarchism. There were even free-market anarchists who supported (at least briefly) the U.S. invasion of Iraq in 2003, but that also does not count as an argument against free-market anarchism.

Hornberger goes on to point out that the anarchy in Somalia didn't last very long, and that Somalia now has a government. I cannot resist replying that the fact that a given country without a government now has a government is not really much of a criticism of anarchy, let alone of free-market anarchism, and not much of a recommendation for government either. (He mentions that the government of Libya also collapsed and that now that area is beset with gang warfare, as different factions try to restore and grasp the reins of government. Again, not, I think, much of a criticism of free-market anarchism.)

The thrust of these “arguments” is that even in the absence of a government, no free-market defense agencies and no system of competing courts took its place. Of course, since there has been no free-market anarchism for the people of those countries to use as a model, their failure to develop them is no surprise. After all, the people in those countries have had so little exposure to the free market or even to the idea of a free market that if they were to attempt to organize their society along those lines, it would be nothing short of an intellectual miracle. One doubts, indeed, that they would be able to devise a system of free-market pencil production.

It is also worth noting that the governments we have been discussing — in Lebanon, Somalia, and Libya — disappeared as a result of internal upheavals precipitated by a struggle for power and by the intervention of outside forces. They did not represent the studied choice of the populace, and there was no preparation for it, no effort to build markets, no penetrating writings circulated among the people. In short, the citizens of those countries had not been attempting to win political liberty for themselves before the collapse; why would anyone expect them to do it afterwards?

When Nicolae Ceaușescu’s government in Romania fell in 1989, sending him and his wife to their reward, it happened that a friend of mine, an expert in Romanian history, was in Bucharest doing some research on the revolutions of 1848. For a few weeks, there was sufficient chaos that he could sound the call, “Send books on free-market economics,” for at the time, virtually anything could get into the country. As happened throughout Eastern Europe in the closing days of 1989 and opening days of 1990, uncertainty prevailed, and there was some hope that once the Communist regimes had fallen, some measure of liberty could be achieved. I sent a box of books to my friend for him to distribute as he thought best, and I ordered another. But about the same time I received the second box some two weeks later, the Romanian window had closed, and restrictions were in place.

What I learned from that experience was something that I suppose should have been obvious to me: the fall of tyranny anywhere does not imply the rise of liberty. Everything depends on the character and understanding of the people, especially those who exercise the most power, whether material or intellectual.

More telling is that neither the Romanians nor the Somalis attempted to found a night-watchman limited government. They had many models they could have used and improved on, if they were of a mind to, but somehow the idea just seems not to have occurred to them. Does that count as a criticism of the night-watchman limited government?

I do not think that it does, and some of the points to be made here echo those I have already made concerning the fictional world of *The Walking Dead*.

Political liberty is an intellectual achievement. It does not emerge even as the brainchild of some genius overnight. It develops slowly, gradually, as the result of the actions and thoughts of any number of people. A certain sense of personal dignity must find a home in the hearts of those who are candidates for those thoughts. Men must, in effect, learn to be free. We may say that men are born free, but that is mere sentiment. Surely it is obvious that we are all born servile. Obedience and dependence are the marks of our childhood. Before men can be free they must overcome their childhood inclinations to obey, to be afraid, to seek approval.

Whatever passivity that has characterized their views must give way to a sense of outrage against the violation of their persons. There must be a certain segment of the population that has confidence in their ability to manage without government help, and there must be an intellectual basis for their confidence. Even then, there are no guarantees: though they had enjoyed the prosperity bequeathed to them by Richard Cobden's and John Bright's success against the Corn Laws, Englishmen still managed to slip into the servility of Fabian socialism in less than 100 years. A similar development in the United States is yet more degrading: where there used to be a sizable population of men who regarded no man as master, there is now no end of those who seek the gift of the welfare state, that Circe that turns men into pigs.

So despite history's vigorous example of somewhat limited government with partly free markets to show the world how it can be done, Somali and Romanian Jeffersons and Franklins just didn't show up.

In Somalia, the very idea of the rule of law did not emerge; only the rule of survival of the most ruthless prevailed. It is not surprising: the idea of the rule of law is not a self-evident one, and it is not a particularly robust one. Even in countries where there is a rule of law — not just in legal matters, but also in their games and other voluntary associations — people are forever trying to have exceptions to rules and prevailing customs made for them that will suit their interests. We may almost paraphrase the attorney Hornberger cited in the matter of justice: they do not want consistency, they want exception-making. G.K. Chesterton was wrong to refer to “the modern and morbid habit of always sacrificing the normal to the abnormal.” He was wrong because it is not modern; its pedigree is captured in the old saying that many things may “depend on whose ox is being gored.”

I noted earlier that although the free market is an outgrowth of natural law, and operates according to it, the substratum of it probably lies in Western culture itself. It is entirely possible that no other culture could even have imagined it; it is certain that no other culture did imagine it. The whole world was taught by the West what kind of institutions converge with the natural law (which it discovered) to bring the prosperity only the free market can both promise and deliver.

Even with the proper underpinnings, a free market does not arise all at once. It does not even arise in a few months. It is not a thing to be created and imposed on a population, after all. It wells up over lifetimes and centuries. A man cannot discover the musical scales on a piano one day, and be expected to have mastered Czerny exercises the next, let alone play a Hungarian rhapsody by Franz Liszt; you cannot teach him the moves of chess one day, and expect him to play like Aron Nimzowitsch the next. [1] Just so, a people buying and selling and investing must learn the skills that keep their businesses running. The bazaars of Samarkand may be thought of as a free market in embryonic form, but after 2300 years, they remain much the same as Alexander found them when he conquered the city. Creativity is necessary to make business flourish; without it, things just stay the same. Just so, the social and commercial innovations of the West, though they made a sophisticated market possible, were not the work of a day: it is 400 years from Jacques Cœur to the Woolworth brothers. [2]

Although we may analyze the free market from a *wertfrei* perspective, virtues are crucial to its development. Men must learn the need for keeping promises, for respecting property, for taking responsibility for their errors. Moreover, they must learn skills not

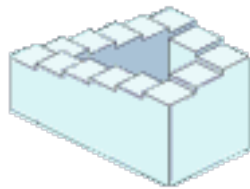
needed in the state of nature: how to think long-range, how to take calculated risks, how to persuade others to join them in their enterprises, how to anticipate unspoken needs and desires of future customers. None of those virtues or skills is instinctual. They must, I repeat, be learned. And passed on to succeeding generations for generations.

Without them, men are not free. They may live in a state of nature, but they are not free. The two are not identical. They may live blissfully without an organized government, without even some kind of chieftdom supported by the sorcery of a shaman. But without the virtues and habits I have named, without those skills, they are not free. Their lives may be enviable to one living in North Korea, but they are not yet the lives of free men. They are the lives of men still enslaved by their own passions and impulses. Only virtue sets us free.

So let us look again at Somalia. Do we see there the triumph of virtue? No? Then do not expect freedom — not even the Vichy liberty of the night-watchman limited state — to make an appearance. To expect otherwise is to reverse cause and effect, as though the free market (or even a night-watchman limited government) can produce virtue. The free market grows in the soil of virtue; and like any good plant, it can enrich the soil it grows in, but it does not create that soil.

Where the constellation of ideas that dominate a people is that of predators or of prey trying not to draw attention to themselves, it is no wonder that all you get is violent gang warfare. The majority of the people may be trying to lead quiet peaceful lives, happy to eat and have shelter. But that is not the formula for a vibrant free market.

So once again, Hornberger has implicitly voiced the expectation of seeing something built without looking for a proper foundation. He has left out of his calculations the role of time, the role of learning, the role of process and development. And a world in which such elementary components of human experience have been omitted is another world of Penrose stairways: we can describe it, but it cannot exist.



[1] Aron Nimsowitsch (1886–1935), an innovative chess master and writer. He was famous for creating an imaginative and unconventional style of chess strategy.

[2] Jacques Cœur (1395–1456), a French merchant who created the first chain of trading operations between Europe and the Levant.

Eight

The Survival of Limited Government

IN THE FINAL PART OF HIS ARGUMENT Jacob Hornberger is concerned to show that limited government has not been defeated in the United States, although it has suffered some severe blows. He undertakes this argument by way of replying to free-market anarchists who (he says — again, I do not know who they are) claim that the loss of liberty in the United States demonstrates that limited government cannot work.

Hornberger disagrees. He begins by citing the many freedoms that still exist in the United States that citizens of, say, North Korea, do not enjoy. He points to the several states and says that all of them still have republican forms of government, as guaranteed by the Constitution, and that not even city governments have become totalitarian with police “rounding people up, incarcerating them without charges, and executing them.” He believes that he has refuted the claim that a limited government must become totalitarian by answering — forgetting the role of time in the affairs of men once again — that in the United States, it hasn’t happened *yet*. He is like the man in a bar who, on being told that if he keeps drinking martinis he will become drunk, orders another and replies, “I’ve had four and I’m not drunk yet.”

In a more substantive reply in support of his claim, Hornberger points out that when laws are passed at one level of government, they are followed at the lower levels. There is no “anarchy” of government levels following their own devices.

In particular, he argues that when a lower court arrives at a decision that is reversed by a higher court, everyone more or less accepts the higher court’s direction. And that, he takes it, is a sign that the rule of law, and hence limited government, survive in America.

It is a strange argument, because it seems to presuppose that the decisions of the higher court will be in accordance with the requirements of the night-watchman limited government as Hornberger understands it. Surely it is obvious that if the decision of the higher court is tyrannical (as, for instance, upholding the constitutionality of the income tax or Social Security), and if the lower courts follow the decision, it may be a sign that the rule of law exists in some form, but it is not a sign that the government is not a police state at all. It can as well be a sign that whatever limitations on government may exist are being circumscribed. It may be a sign that the lower courts are acquiescing in tyranny.

That the lower levels of government do not have the power or the will to resist the higher levels is not a mark that limited government is secure. Or at least, it is not necessarily the case. In this country, it has become a sign that tyranny is spreading and has become in some respect irresistible.

It is almost as though Hornberger has transformed the ideal of limited government from what we may think of as a “substance,” and made it into a “procedure.” As long as the procedures are being followed, we may believe that limited government is still thriving (if wounded) in America.

There is a parallel here to another position that Hornberger has voiced, though not in this series, namely, that it is through voting that we will ultimately roll back the welfare-warfare state. Let us note, however, that voting is not a natural right. It is a civil

right, a procedural right, if you will, as are many of the rights, so-called, that Hornberger mentioned throughout his discussion as essential to the enjoyment of liberty and justice. If he is right, then the protection of civil rights is what ultimately makes a government “limited.” Not its structure. Not the defense of natural rights. The latter may be important and indeed useful, but in the end, it is the procedural, the civil, rights that define the state as limited.

But what are civil rights? Are they not the permissions given to us by the state itself? Are they not procedures which the state — even if by way of yielding to some popular outcry rather than by way of consideration for the common good — has defined, permitted, and extended? They are created by the state and defined by the state. It is madness to believe that the state will supply the means to its own limitation. It may allow limitations temporarily if it has overstepped itself and there is resistance or dissatisfaction brewing, but that is not the same thing as recognizing liberty. We may think of those limitations as the prunings of a gardener: if we see him cutting back the branches of his azalea bushes, it is not because he intends to be rid of the azaleas; he is rather helping them to flourish. The pruning is part of their health.

I do not say that the procedures Hornberger cites are not useful or do not offer some protection from complete despotism. What I say is that they are themselves part of the state system, and as such cannot be trusted in the long run. To see that they are part of that system, it is enough to see that whatever “protection” they purport to offer some, they are commands to others to behave or act in a certain way. They are not suggestions; they are not guidelines; they are commands. As such, they represent government’s iron fist, not always hidden in a velvet glove. The person who does not obey those commands — though he has not used coercion against a person who has committed no crime — will himself be subject to, as Hornberger might put it, “the overwhelming power of the state.”

Indeed, in part 4 of his essay, when he discusses the case of Kim Davis, a Kentucky county clerk who — in an act of nonviolent resistance to a court decision she deemed unjust — refused to issue marriage licenses to same-sex couples, Hornberger approvingly cites the use of that “overwhelming power” to achieve “finality of judgment.” Normally, a person who refused to do what her boss (in this case, a superior court) ordered her to do could be fired. Davis could not be fired or even required to resign, however, because she had been elected to her job, which just highlights additional problems with elections that even Lysander Spooner did not anticipate. It must be admitted that her refusal to perform as she was ordered to did not violate the non-aggression principle, yet she was jailed. In other essays, Hornberger has suggested that a defendant’s acting in accordance with the dictates of his conscience should play some part in a court’s decision — for example, in cases where defendants have released secret or classified information to foreign powers. (See “Patriotism and Conscience: The Edward Snowden Affair,” in the December 2016 issue of *Future of Freedom*.) But in this case, it is the achievement of “finality” that he celebrates. Thus must “civil rights,” i.e., procedural rights, be enforced, conscience and the possibility of injustice and nonviolent resistance to it being of lesser account.

(*Nota bene*: Davis was jailed for “contempt of court.” Referring to what was said earlier about crimes, I note that she was not charged with a crime against the person or property of another; she was charged with a “crime” against the state. Hornberger seems to have made his peace with the use of force against her ... for “reasons of state,” i.e., for

the sake of “finality of judgment.” How easy it is to begin making exceptions to the non-aggression principle when the necessities for state functioning present themselves.)

That procedural rights are creations of the state implies that they are at the mercy of the state for definition. Habeas corpus and trial by jury have both experienced subversions, limitations on their use against the state. Such must be the vulnerability of all civil rights. And when the procedural rights have been put in the service of releasing criminals “on technicalities” (in Hornberger’s earlier words), the releases may represent a triumph of procedural (i.e., civil) rights for the defendants, but they represent menaces to the natural rights of the peaceful population.

Natural rights are completely different. They may be trampled and violated. They may be ignored and infringed. But unlike civil rights they cannot be re-defined, for the simple fact of the matter is that there is no agency on Earth that ever created them in the first place. We discover them; we do not create them or grant them. They exist independent of any action the state may take, independent of any definition or law that may find its expression in Congressional legislation or judicial reasoning. They are eternal; procedural rights exist at the mercy of mercurial men.

If it is true that it is the exercise of our procedural rights that makes us free, and that the struggle for liberty must be fought in an arena in which the state has set the rules, inconstant rules at that, then the struggle for liberty must be fought in an arena in which only the state can ultimately prevail.

Moreover, if, like Hornberger’s anarchist friend (whom we met in chapter one), we are going to try to “achieve freedom by getting down to the night-watchman state,” we must recognize that politics will survive in the night-watchman state. It makes sense for advocates of the night-watchman limited government to participate in political action. Their goal is a political goal, and the means for achieving a political goal is political action.

But the goal of free-market anarchism is not a political goal. We are aiming for a different kind of society, not a different kind of government. We free-market anarchists are often called utopians and defeatists, but I submit that if our liberty depends on procedural rights rather than natural rights, that is the view that is utopian. And that is true defeatism. Nothing more can be expected from a Penrose stairway: Walk around and around on it; no matter how elaborate, elegant, or ornamented it is, you will never reach the goal of liberty. You can’t reach the top and you can’t find the bottom. You just keep retracing the steps of the countless millions before you who, like you, attempted to kick against the goad of the Law of Contradiction. The only solution is to jump off.

