

Taxation and Government Are Still Problematic

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Introduction

My essay, "Rand, Anarchy, and Taxes," which appeared last year in this journal, argued that Ayn Rand's notion of a government funded entirely by voluntary contributions is not viable.¹ I explained that the problems are due to the well known inefficiencies of monopoly suppliers as well as to the incentive not to contribute created by Rand's stipulation that protective services must be extended to all citizens, whether or not they help fund those services. Many Objectivists are aware that legal scholar Murray Franck, in a series of articles (1994a, 1994b, 1998), has agreed with Rand that government is essential to civil society but disagreed with her over the issue of taxation. Franck grants my point that voluntary contributions will be insufficient to properly finance government activities. However, he maintains that, since government is the necessary precondition for the free market, then *involuntary* taxation is defensible, justified, and, indeed, *moral*.

To respond to Franck's argument, I invoked the economic concept of the "non-neutrality" of (involuntary) taxes. This insight, familiar to economists, especially those of the Austrian School, identifies the fact that all known tax structures distort the structure of production and, thereby, rearrange the matrix of individuals' incomes. In short, taxes, whether intended to do so or not, unavoidably *redistribute* income. This would seem to be a result that no believer in individual rights can condone.

I summarized the above defenses of minarchy:

Rand avoids the problem of an inappropriate structure of production, but faces the likelihood of inefficiency, declining contributions, and rising costs. Franck avoids the problem of non-contribution, but faces inefficiency as well as the disruptive and redistributive effects of compulsory taxes. Neither effectively faces the challenges raised by anarchists. Neither offers a compelling defense of minarchy. (1999, 101)

Since the appearance of my article, four persons have offered formal criticisms of it. They are Marsha Enright, Murray Franck, William Thomas, and Daniel Ust. In the remainder of the present essay, I will do two things. First, I will respond to the specific comments of those critics. Second, I will offer several additional reasons why the case for anarchy remains empirically stronger, more in keeping with human incentives, and more internally consistent than any of the standard Objectivist arguments for minarchy.

A Confused Critic

Comments by Enright, Franck, and Ust can be found in this issue of *The Journal of Ayn Rand Studies*. William Thomas (1999, 14–15) published his opinions in *Navigator*, the journal of The Objectivist Center (formerly known as the Institute for Objectivist Studies), headed by David Kelley. I will, with some reluctance, be blunt. In stark contrast to those of my other critics, Thomas's comments are profoundly uninformed.

For example, Thomas asserts that I claim "the government could not monopolize gambling as it does in many states today and therefore could not earn high returns on a lottery" (15). Whether or not that is true of lotteries, the fact is that it does not appear anywhere in my essay. The word "lotteries" appears only once, when I am summarizing Rand's position on taxation (Sechrest 1999, 90), but I offer no comments whatsoever about the profitability of lotteries. Further, Thomas (1999, 15) asserts that "police service is offered at zero marginal cost almost everywhere in the world." It is

difficult to make any sense of this declaration. Is he claiming that law enforcement is characterized by significant "economies of scale," i.e., that in the long run, average total cost and marginal cost both fall as the level of production rises? Perhaps. But *falling* marginal cost does not necessarily imply *zero* marginal cost.

More likely, since he also refers to paying "a police service bill" (15), Thomas means that, for example, under the current system in the United States, individuals may be provided services by the public police without suffering any additional out-of-pocket expense. In other words, he means that the *price* paid by the beneficiary may appear to be zero. I would never reject that possibility. Indeed, the price paid by the beneficiary for gifts he or she receives normally is zero. If not, we usually do not call it a "gift." However, this does nothing to bolster Thomas's case. First, most beneficiaries of public police services certainly do have to pay a price much higher than zero. It appears in the form of property taxes, sales taxes, and/or income taxes, depending on whether we are talking about local, state, or federal police. It is simply less obviously a price because it is collected in advance and without regard to whether the taxpayer actually values the service. Second, if this is what Thomas means, then he is agreeing that some citizens pay for the services, while others may receive them for nothing. But that is precisely the problem of non-contribution I identified in my article. It appears that Thomas literally does not know the difference between the concepts "price" and "marginal cost."

Moreover, Thomas does not realize that he unwittingly concedes that the marginal cost of law enforcement is not zero. In his review, he agrees with me that government services, such as police protection, are not monolithic wholes. But Thomas must not grasp what that implies. If public police protection is not a monolithic whole, then it does not exhibit the characteristics of "joint production" and "external economies" about which economists often speak.² Joint production means that, if the service is provided to some persons, then it will be available to be consumed by all persons. In such a case, marginal cost would be zero. But a service which is not characterized by joint production is a service whose marginal cost is

greater than zero.

Thomas also declares that my argument about the non-neutrality of taxes is "old hat" and offers no new insights on the minarchy versus anarchy debate. It is true that some economists have been aware of this argument for many years.³ However, I believe it is correct to say that the non-neutrality of taxation has never before been used in print as a criticism of the orthodox Objectivist defense of minarchy. Indeed, if anyone can provide me with a citation that disproves my belief, I will be most appreciative.⁴

If Thomas yearns for the new or insightful, why does he not even mention the error of "concept-stealing" that, I have argued, Rand commits with regard to voluntary contributions? Similarly, why does he ignore the fact that I identify a crucial inconsistency in Rand's treatment of the typical citizen's sense of justice? To the best of my knowledge, neither observation has ever been published before.

There is one area where Thomas's comments are somewhat constructive. He admits that taxes distort free market behavior, but recognizes that, unless it can be demonstrated that the protection of individuals' rights is possible in the absence of government, then such a criticism of taxes "simply begs the question" (15). Fair enough, but that observation cuts both ways. Neither anarchists nor minarchists are justified in simply assuming their conclusions. Both must persuade the reader; both must provide evidence. The bad news for minarchists is that the preponderance of evidence is on the side of the anarchists. My failure to present the anarchist case more fully is, in my opinion, the major flaw in my original article.

Some Constructive Critics

Daniel Ust focuses on my use of the non-neutrality of taxes argument. In particular, he is concerned about my statement that time preferences and, therefore, the natural rate of interest are "unobservable" data. Ust grants that the conclusions I draw about the distorting and redistributive effects of taxes may still be correct, but he asserts that "if one cannot know time preferences or the natural rate of interest, then one cannot claim taxes violate them or

prices demonstrate them." This is a very good point, and it seems to pose a serious challenge to my argument.

My use of these terms is based largely on the Austrian (also referred to as the Misesian or pure time preference) approach to the natural rate of interest.⁵ To summarize, an individual's time preference may be thought of in a variety of equivalent ways: the rate at which one discounts the future, one's preferred rate of consumption versus saving, one's preferred rate of present consumption versus future consumption, or one's preferred rate of tradeoff between present goods and future goods. The natural rate of interest is that rate at which *ex ante* saving equals *ex ante* investment.⁶ For capitalist-entrepreneurs, time preference and the natural rate of interest appear in the form of their expected rate of profit, in other words, the price differential between what they expect to receive for the sale of their goods and what they pay for the factors of production (land, labor, and capital). Regarding both consumers and entrepreneurs, it is important to understand that this natural rate of interest is an *equilibrium* rate, i.e., a rate at which the production mix of entrepreneurs (capital goods versus consumer goods) is consistent with the time preferences of consumers (saving versus consuming).

What then of Ust's question about the measurability of the natural rate? As can be seen from the comments above, the natural rate involves both the preferences and expectations of consumers and the expectations and project appraisals of entrepreneurs. An observer cannot consistently know in any quantitatively precise or direct fashion what another person's preferences or expectations may be. All one can do is to infer from the person's actions that his or her preferences and expectations must have been in a certain direction and of some approximate magnitude. The natural rate of interest is an *abstraction*, not a datum like one of the array of market rates of interest. And those market rates, e.g., loan rates on certain types of debt, although known with precision and readily available in the financial press, are of little help because their components include a risk premium and an inflation premium in addition to the natural rate.⁷

To appreciate the analytical value of the natural rate concept,

despite its resistance to ready quantification, one might consider the somewhat analogous issue of price controls. Whether or not she knows the current market price of some specified commodity, every student of economics can tell you that the imposition of a legally mandated price will distort the market and redistribute the incomes of buyers and sellers. Price ceilings are intended to benefit buyers, but they create shortages. Price floors are intended to benefit sellers, but they create surpluses. In like fashion, Austrian economists will tell you that when monetary growth drives market interest rates below the natural rate, an unsustainable expansion of the economy will result, followed by a contraction during which market rates will rise back toward the natural rate. That analysis does not require exact numerical measures of either the natural rate or the market rate.

In order for government to set taxes so that the structure of production and the distribution of incomes are not redirected, central planners would have to possess precise *ex ante* knowledge of that huge matrix of individuals' expectations and preferences that lies at the heart of an economic system. This, I submit, would be tantamount to being omniscient. Furthermore, even if such knowledge was somehow possessed by government planners, changes in the tax structure could not possibly keep pace with changes in those expectations and preferences.

Entrepreneurs also face a kind of knowledge problem, though on a far smaller scale. However, they have recourse to a mechanism of social calculus that automatically and constantly records and reflects the kaleidoscope of human decisions—the price system. Keeping in mind that errors are an inevitable part of all human institutions, the price system nevertheless steers both businessmen and their customers in the correct direction. Time preferences, as manifested by the natural rate of interest, are an integral part of any true price system. In fact, a price system without time preferences is a contradiction in terms. But taxes are, and must remain, external to price systems in a fundamental way.

Marsha Enright offers some thoughtful, though critical, comments on my article that reflect her obvious goal of thinking in terms of essentials. First of all, she admits that, like Murray Franck (and

most other Objectivists, I might add), she thinks it almost self-evident that government is the necessary precondition for civil society. In the course of explaining why she believes so, she raises the familiar but important question of legal “consistency.” I think one must be careful when reflecting on the need for consistency. Enright seems to have in mind both multiple defense agencies and multiple legal codes as sources of the inconsistency she wants to avoid. Moreover, she appears to think one begets the other. But this is not necessarily so. Multiple suppliers of protection services could, by way of negotiation and motivated by self-interest, arrive at a common set of legal principles that took account of the beliefs and preferences of all their clients. This is not unlike the voluntary adoption of a common set of time zones by the American railroads in the nineteenth century.

Still, we must ask: Is a multiplicity of legal rules in itself always chaotic? Has not this situation always existed on an international scale? Despite this multiplicity, international trade has proceeded smoothly for centuries. What seems to be crucial is the *process* by which conflicts between different legal codes can be resolved, not that the entire human race must be subject to the same legal code as a prerequisite for living peacefully. Nor is it necessary that all disputes be ultimately resolved by some “final arbiter” who is known in advance. To insist, as most Objectivists do, that civil order absolutely requires that all potential disputants have knowledge of who that arbiter is and acknowledge the arbiter's authority—both being established prior to the litigation process—is to assume without evidence that only governments can produce civil order.

That typical assumption does serve one useful purpose, however. It helps to reveal the fact that the orthodox Objectivist position perceives justice as a public good rather than as a private good. To the orthodoxy, prosecutable acts are not torts to be settled by way of restitution paid solely to the victim, but crimes against society punishable by fines, imprisonment or execution.⁸ From this perspective, we are either all protected or none of us is. The adjudication of rights violations is, in that sense, a collective enterprise.⁹ It should be no surprise, then, that most Objectivists, by rejecting anarchy, in effect reject individual *consent* as the phenomenon without which no

government can be legitimate.

Of course, such Objectivists do not explicitly denigrate consent. Following Rand herself, they will declare that "the source of the government's authority is 'the consent of the governed' . . . the government as such has no rights except the rights *delegated* to it by the citizens for a specific purpose" (Rand 1967, 332). And, like Rand, they will insist that the individual has no right to withhold his consent from a "proper" government, i.e., he must delegate his right to defend his person and property. It requires only a small further step to conclude, as has Franck, that the individual also has no right to withhold that part of his income (or wealth) which the government demands in the form of taxation. In response, one need only ask: Of what value or significance is my consent if I am not free either to give it or to withhold it, as I choose? If I "must" give it, then why does government even need to ask for it?

Enright discusses consent as one of the two basic methods by which governments come into existence. She recognizes that many have been the result of exploitation of the innocent at the hands of unscrupulous men skilled in the martial arts. However, she claims that other governments—the only one mentioned by name is the United States—have arisen specifically to protect those who are productive and peaceful from the depredations of those who are parasitic and violent. In short, governments are the products of either conquest or a social contract. I readily grant the former, but I do have some doubts about the latter explanation.

One of the most famous presentations of a minarchist state created by social contract is that of Robert Nozick (1974). It closely follows Enright's scenario in that Nozick's hypothetical minarchy emerges first as an agency devoted to protective services,¹⁰ but through a spontaneous process based on mutual consent, comes to assume the mantle of a minimal state. Such a limited government supposedly remains committed to a policy of defending individual rights. However, there is a serious problem with all such social contract theories. As Murray Rothbard argues:

There is no evidence whatsoever that any State was founded

or developed in the Nozickian manner. On the contrary, the historical evidence cuts precisely the other way: for every State where the facts are available originated by a process of violence, conquest and exploitation, in short, in a manner which Nozick himself would have to admit violated individual rights . . . since no such State exists, then none of them [existing states] can be justified. . . . it is incumbent upon Nozick to join anarchists in calling for the abolition of all existing States, and *then* to sit back and wait for his alleged invisible hand to operate. (1982, 229–30)

Similarly, George H. Smith has stated: "If we accept the premise that individuals (and only individuals) possess equal and reciprocal rights . . . and if we condemn as illegitimate all governments that rule without consent—then all governments, past and present, have been illegitimate" (1997).¹¹

Furthermore, even if a government, such as that of the United States, did arise from an explicit social contract, there remains a troubling question raised by Lysander Spooner more than a century ago.¹² This question strikes so deeply at the foundations of nation-states that many people, when first encountering it, find it shocking and infuriating. Spooner's point is really a rather simple one. Let's assume that the men who, in the late eighteenth century, formally consented to be bound by the Constitution did so willingly.¹³ How can the social contract into which those men entered automatically be binding upon later generations? The phrase, "We, the people of the United States," can only mean those individuals alive at the time. And the sentiment that the authors hoped to "secure the blessings of liberty" for their posterity as well as for themselves "neither expresses nor implies that they had any intention or desire, nor that they imagined they had any right or power, to bind their 'posterity' to live under it" (Spooner [1870] 1972, 2). Spooner likens this sentiment to a man building a home and hoping that its use by his descendants will enrich their lives. Despite wishing that they will benefit from it, that man knows he has neither the right nor the power to force any of his descendants to live in the home.

As Spooner himself knew, some will claim in response that successive generations are indeed bound by the original political agreement, although implicitly rather than explicitly, because: 1) the nation is in some sense a single entity much like a corporation; 2) citizens vote in elections; or 3) citizens pay taxes. As for the first, the Constitution “does not speak of ‘the people’ as a corporation, but as individuals. A corporation does not describe itself as ‘we,’ nor as ‘people,’ nor as ‘ourselves’” (3).

The use of the ballot box also fails to prove that the citizens of a nation voluntarily support the government. If our elected representatives are merely acting to protect our rights, and thus are functioning not as our rulers but as our *agents*, why is voting done in secret? In a true principal-agent relationship, the agent is openly hired by the principal and strictly constrained in his actions to the powers delegated to him by the principal. Moreover, the principal is responsible for what his agent does on his behalf. With secret balloting, relationships are hidden, constraints are diluted, and no one accepts responsibility for the results (7–8). And some individuals may employ the ballot box in a defensive fashion. To protect themselves against those less honorable than themselves, i.e., against those who will not hesitate to seek political advantages at the expense of others, some persons may decide to vote. But that is not evidence of their general support for the existing government. Similarly, the fact that most people pay their taxes is no proof that those taxes are paid voluntarily (6–13). As long as taxes are compulsory, it is impossible to know who would have paid in the absence of the compulsion.

To much of the foregoing, minarchists are sure to reply—loudly and repeatedly—that they advocate only a “proper” government, a government that defends and never violates an individual’s rights.¹⁴ Writers like Rothbard and Spooner do indeed portray government as some Leviathan that cannot effectively be constrained. Is there evidence that contradicts Rothbard and Spooner? No, there does not seem to be any. Every known state, even if initially possessed of severely limited powers, has slowly but surely grown more invasive. Even Rand, who had enormous affection for the United States, characterized it as a neo-fascist state as early as the 1960’s (1967,

202–20).

Political scientists and economists have often explained why all governments tend to expand their functions beyond the protection of rights. Unless restrained by a personal commitment to libertarian principles, politicians and bureaucrats face irresistible incentives to seek greater power, prestige, and income. In order to reach these goals, they must expand the purview of their office or bureau. They must, in short, concoct excuses for being granted a bigger budget, a larger staff, and a more extensive range of action. The most common form these excuses take is that of alleged “crises.”¹⁵ Whether it is a literal war, foreign or domestic, or a metaphorical war such as the war on drugs, the war on poverty, the war on illiteracy, or the war on financial insiders, the result is fundamentally the same: the size, scope, and power of government ratchet upward. And individual rights are ground to dust in the process. In short, if government exists, it grows, and individual rights shrink. Who, then, are the true *utopians*? Who is it that posits a supposed solution, which in fact glosses over both the very real temptations facing political officeholders and the moral imperfections of those possessing political power? It is the minarchists, not the anarchists. In this vein, Hans-Hermann Hoppe has suggested a parallel between the utopianism of socialists and the utopianism of all “statists” (by which he means all who are not anarchists):

To this day, socialists claim that “true” socialism has not been refuted by the empirical evidence. . . . Similarly, statistes interpret all seemingly contradictory evidence as only accidental. If only some other president had come to power at this or that turn in history, or if only this or that constitutional change or amendment had been adopted, everything would have turned out beautifully. . . . Given the principle of government—judicial monopoly and the power to tax—any notion of limiting its power and safeguarding individual life and property is illusory. Under monopolistic auspices the price of justice and protection must rise and its quality must fall. (1999, 32–34)

This train of thought leads directly to one of the points made by Franck in his detailed and eloquent critique of my article. Franck invokes the adage "if men were angels" as a succinct expression of an error that he thinks is common to both Rand and "the contemporary anarchic perspective on government." Franck argues that Rand (incorrectly) advocated voluntary government financing because she was so devoted to the proposition that rational men will not experience conflicts of interest. He thinks that anarchists share her devotion to that proposition, and that this lies at the root of anarchist claims that justice and law enforcement can be supplied via the market process.

Unfortunately for Franck's position, he has probably misunderstood what lies behind the anarchist aversion to government. In my experience, most anarchists want to see centralized governmental power abolished precisely because they know all-too-well that men are not angels and that even rational men will face conflicts of interest. They simply believe that to centralize power is to increase the likelihood of injustice. Rothbard elaborated upon this years ago:

The chief difficulty with this criticism is that no libertarian—except possibly those under Tolstoyan influence—has ever made such an assumption . . . the libertarian would reason that the fact that human nature is a mixture of both good and evil provides its own particular argument in his favor. . . . the existence of the State apparatus provides a ready, swift channel for the exercise of evil, since the rulers of the State are thereby legitimated and can wield compulsion in ways that no one else is permitted to do. ([1970] 1977, 211)

The modern anarchist critique of the state does not depend upon the premise that men are unfailingly moral and rational. It does not, contra Franck, assume that there will be no conflicts of interest in a free-market, anarchist society. What it claims is that abuses and injustices will increase as power becomes more and more centralized. Therefore, it is best to leave essential functions, like the provision of law codes and protection services, to the spontaneous, decentralized

forces of the market. Here, anarchists have something in common with Carl Menger, the founder of the Austrian School of economics. Menger, although himself not an anarchist, nevertheless recognized that law—as distinct from positive legislation by some political entity—arose "organically" in early societies and pre-dated governmental statutes ([1883] 1996, 210–24). In fact, Menger's description of the process is very similar to his more famous description of the spontaneous appearance of money.

Fundamentally, Franck characterizes my argument as two dimensional. The political dimension involves skepticism about whether government is necessary to the protection of rights; the economic dimension concentrates on the redistributive properties of taxes. As the instrument of his response, Franck chooses the enforceable contract. This lies at the heart of the controversy, he maintains, since "a contract is the vehicle by which individuals exchange their rights in their thought, time and energy. Because taxation is imposed upon wealth, fundamentally, it is imposed upon this trade and thus upon the institution of the contract." The motivation behind the invention of the contract was, in Franck's words, "to impose a level of certainty upon a chaotic world in general and upon human relations in particular." Furthermore, contractual obligations can, allegedly, only be enforced if government exists as the enforcer.

Regarding my claim that all known tax schemes redistribute either incomes or wealth, Franck offers no technical economic counter-argument.¹⁶ In fact, he grants the plausibility of my claim. What he does do is to reiterate his earlier assertion that free markets and private wealth cannot exist without "government to underwrite their legal viability." In other words, the effects of taxes, despite the appearance of inequity, are a necessary and justifiable part of the "price" of having free markets. Therefore, he concludes that my argument about the non-neutrality of taxes is "irrelevant" and that the only practical issue left is to identify which taxes are the least distortive.

First, let me deal with some relatively minor aspects of Franck's paper before commenting on its major elements. While explaining

the redistributive effects of taxes in my original article (Sechrest 1999, 95), I quote from one of Rothbard's works. Franck apparently thinks I am citing Mises instead. The citation of Mises that appears earlier on the same page has to do with the non-neutrality of money, not the non-neutrality of taxes. And although there are certain parallels between the two concepts, the reasons for these phenomena "are different in the case of taxes from what they are in the case of money" (Mises [1949] 1966, 738).

Franck seems to ascribe to me the belief that a consumption tax (one of the types of taxes he considers) causes there to be dissaving in the economy.¹⁷ But that is *not* what I claimed (Sechrest 1999, 97). Rather, I tried to explain that the effect of a consumption tax varies depending on whether or not dissaving occurs, not that consumption taxes necessarily cause dissaving. If there is dissaving, a consumption tax serves as a tax on wealth. If dissaving does not occur, then a consumption tax acts like a tax on income.

Franck characterizes presidents James Madison and Abraham Lincoln as nationalists who shared a particular "vision" of civil society in which a powerful federal government must often intercede in order to protect individuals from the injustices perpetrated by the state governments. This is, I believe, not quite accurate, at least insofar as Madison is concerned. Although Madison did suggest, as a kind of compromise measure, that the national government be granted veto power over state laws, "[i]t was never his intention to effect a substantial transfer of governing powers from the states to the nation. The positive powers of the new national government, as he conceived them, would not significantly differ in scope from those of the Confederation government" (Hobson 1989, 97). In contrast, Lincoln presided over a national government that arrogated to itself "such new functions as subsidizing privileged businesses, managing the currency, providing welfare to veterans, and protecting the nation's morals . . . the United States had commenced its halting but inexorable march toward the welfare-warfare State of today" (Hummel 1996, 358-59).

Finally, Franck notes that some researchers have had praise for the "customary law" that developed in early England,¹⁸ but which was

swept away by the growth of the "authoritarian law" of the later medieval kings. This is almost certainly a comment about Bruce Benson's *The Enterprise of Law* (1990). And yet, Franck's paper includes no textual evidence of his having read Benson; in fact, he only refers to a review of Benson's book. I had hoped that by mentioning Benson's work in my 1999 article, I might inspire others to read it. Objectivists have for too long ignored the large and growing body of anarchist research.

So much for the small problems, what of the major ones? First and foremost, there seems to be a very large problem woven into the essential fabric of Franck's argument. Franck declares that taxation levied to support the rights-protecting functions of government "creates the very possibility of a functioning market." Furthermore, taxes are, he says, taxes on wealth. So without wealth, no taxes can exist. How is wealth created? By "rearranging the elements of that portion of the universe which is at hand." In turn, this rearrangement is brought about by the projection of creative thought "onto the field of the physical universe." The acquisition of the material that is later transformed into wealth by innovative thought "is the product of trade, i.e., of contract." Taxation "is imposed upon this trade and thus upon the institution of the contract." At first glance, this may all seem rather uncontroversial. I submit, however, that when looked at carefully the above offers no solace for minarchists whatsoever.

The reader can jump into Franck's circular argument at any point. Exactly where does not matter. Start, say, with taxes. What is the precondition for taxes? Wealth. What is the precondition for wealth? Enforceable contracts. What is the precondition for enforceable contracts? Government. What is the precondition for government? Taxes. So, in order to have government, you must first have taxes, which require wealth, which requires enforceable contracts, which require government. So the only way to have a government, is already to have a government? Franck has an insoluble muddle on his hands. It is the product of his valiant, but ultimately futile, attempt to deny that markets, legal systems, and enforcement mechanisms often evolve together. Moreover, that evolution does not necessarily result in a monopoly law enforcer that possesses the

power to tax, i.e., a government, as we will soon see.

While discussing why early Anglo-Saxon England does not, allegedly, provide evidence favorable to anarchism, Franck makes several claims about any system of law that is not created and enforced by a government. First, he appears to believe that any nation that is "fraught with war" cannot be "a law-abiding society," by which he seems to mean that rights are not protected and contracts are not enforced. If so, what of the early years of the United States? Between 1775 and 1815, the nation was engaged in four wars: two against the British, one against the French, and one against the Barbary pirates. Does this mean that the United States was not a law-abiding society? Perhaps Franck does not mean foreign wars, but wars fought on home soil. But then the bloody Civil War poses a problem. Franck praises Lincoln as a defender of individual rights but condemns civil unrest as proof that rights are not being defended. Franck, and all other minarchists, should abandon the ideas that 1) only lawless societies ever engage in warfare and 2) therefore, any society that is conquered in war must have been devoid of a viable legal system.

So-called "straw man" arguments that misstate one's opponent's position, as well as the unjustified packaging of two concepts in one, should always be avoided. Unfortunately, both can be found in Franck's presentation. He says that, contrary to the claims of anarchists, "humankind always is in society and always is governed." This statement places the debate in the wrong context. Anarchists are rarely misanthropes or hermits. They do not deny that human beings are, in an important sense, social creatures. What they deny is that a civil society can be fostered by means of the centralized power of the state. They are not anti-social. They are anti-state. Indeed, I have found that anarchists typically manifest great concern for individual rights and highly value cooperation, negotiation, and reciprocity.

It cannot be denied that, in order to interact successfully, human beings require some sort of structure or organization. In that sense, Franck is right to be concerned about the predictability of interpersonal obligations—"certainty" is what he chooses to call it. But there

is a difference between governance and government. With the former, the individuals involved remain sovereign. Decisions are primarily achieved by micro-level negotiation. Injustices can occur, but they tend to be small and localized. With the latter, a subset of the group assumes the role of sovereign over the others. Decisions are primarily achieved by macro-level legislation. When injustices occur, they are systemic.

In addition to his other assertions, Franck believes that, in the absence of government, legal systems cannot be sufficiently complex, cannot be effectively enforced, and are easily corrupted. But there is enough historical evidence to show that these propositions are false.

Evidence for Anarchy

Although angelic behavior can never be assumed, individuals tend to cooperate and reciprocate 1) in any environment in which they have repeated contact with one another, 2) if they voluntarily choose to interact, and 3) if both parties expect to benefit in some way from the interaction (Benson 1993, 48). In short, with repeated interaction, no "prisoner's dilemma" arises. Furthermore, the most crucial benefit to be gained is often the recognition by others of one's property rights. "Therefore, individuals have incentives to reciprocate and recognize other individuals' property rights in order to reduce their own costs of defending possession claims, and to enhance the property's value" (49). However, if the group of individuals becomes quite large, the probability of an intentional violation does rise. Thus, it is helpful to "form groups or associations for mutual support" (52). The implied threat of effective force on the part of the association decreases the probability of rights violations and increases the probability that negotiation rather than violence will be employed when such violations do occur. Since violence is always costly, there is pressure on the members of the mutual-protection association to seek negotiation. "Indeed, resort to violence without first trying to achieve a non-violent solution will result in ostracism by the group" (53). Anarchistic law impels the individual to internalize most of the costs of his own actions. The benefits are also

internalized, because violations are torts for which the victim receives restitution.

In contrast, the agents of governments tend to engage in more aggressive and violent behavior because they “can externalize the cost of such behavior onto others” (Hoppe 1999, 29). That is, compulsory taxation disperses the costs of the aggression throughout the populace, while the benefits are concentrated on those few agents. This may go a long way toward explaining why the “private dealings between foreigners appear to be significantly less war-like than the dealings between different governments” (29).

Benson has offered the following commentary on those legal systems that developed without the help of government:

This customary law was often quite complex, systematically covering all types of torts and breaches of contract relevant to the society. . . . The rules and institutions established to carry out the law appeared to be effectively designed to alleviate uncertainty, enhance efficient interactions between members of the societies, and encourage legal change. . . . [They] clearly were intended to minimize the chance of violent confrontations within the societies while maintaining systems of private property and individual rights. (1989, 21)

Historically, a number of specific examples have been investigated. One of the best known is Iceland from about 930 A.D. to 1262 A.D. Many Objectivists are aware that David D. Friedman, a law and economics scholar and a libertarian anarchist, has often praised the medieval Icelandic system ([1973] 1989, 201–8). Few seem to be aware that the most thorough analysis of Icelandic law yet published in English (Miller 1990) offers support for Friedman’s position, despite the fact that its author, a professor of law, is clearly not a libertarian. In concert with Friedman, Miller states that there was only one paid officeholder, the Lawspeaker. “It was his responsibility to tell anyone who asked him what the law was. He was also obliged to recite the law” at the annual summer meetings of the citizen-farmers, which were known as Allthings (18–19). The

Lawspeaker did not make any laws; he merely served as the repository of established legal principles.

Trials were judged by men selected by the regional chieftains from among the farmers themselves, restitutive payment was the primary method of exacting justice—although the blood feud was resorted to on occasion¹⁹—and the chieftains imposed no taxes on their followers. “There was no bureaucracy, no state apparatus that pretended to enforce the laws, nothing beyond the Things themselves, the annual meetings of free farmers. . . . Unlike all other peoples with whom they had cultural contact, they had no king” (21). Miller also understands the potentially profound implications of the Icelandic experience.

The often unquestioned assumptions that law depends on the state either for its existence or for its efficacy might have to be justified more fully . . . musings on the origins of law and the state of nature might benefit from knowledge of this remarkable instance of social and legal form in the absence of a coercive state. Law in Iceland was pervasive, complex, purported to be regular and uniform in application. (307)

Celtic Ireland, from about 700 to 1200 A.D.,²⁰ provides another notable example of law without government. In the Irish case, law was “almost wholly the product of a professional class of jurists called *brithim* or brehons,” who were paid for their legal judgments and whose income, therefore, was a function of their reputation for rendering fair and knowledgeable decisions (Peden 1977, 82). “There was no legislature, no bailiffs or police, no public enforcement of justice . . . there was no trace of State-administered justice” (83). To enforce the brehon’s decision, the plaintiff arranged for sureties who would help him persuade the defendant to comply. Those defendants who refused became “outlaws” whose property and even life were forfeited. Furthermore, “Irish kings were not legislators. . . . A king was not a sovereign; he himself could be sued. . . . He was subject to the law as any other freeman” (82–83).²¹

One of the several parallels between the Irish and Icelandic

systems was the concept of "honor-price." This was a "payment due to any free man if his honor or rights were injured or impugned in any fashion by another person" (86), and it varied with the prestige of the person and the quantity and quality of his property. An individual who violated the rights of another had to pay both a fixed penalty for the infraction itself and the honor-price appropriate to the rank of the victim. It should be noted at this point that social mobility in Ireland was greater than that found in most medieval European societies. Even those who owned no land and, thus, were "unfree" (could not vote or make contracts) still could become "free" if they acquired property. The Anglo-Norman idea of vassalage was alien to Celtic Ireland (88).

It is also instructive to observe that the legal status of women was higher in Iceland and Ireland than it was elsewhere in Europe. An Icelandic woman could even inherit one of the local chieftaincies, although she would be compelled to select some man to discharge the chieftain's duties on her behalf (Miller 1990, 24). In Celtic Ireland, a woman could inherit property from either parent if there were no sons. Furthermore, an Irish wife was empowered to file for divorce from her husband (Peden 1977, 93). And Celtic law granted certain rights to women who had sexual relations outside the bonds of Christian marriage. It is fair to say that, in its treatment of women, "Irish law in the 8th century may have had more sophistication than English law in the days of Queen Victoria" (91).

Ireland and Iceland are not the only instances of complex, effective legal systems that have existed without the support of a government. However, the general patterns seen in those two countries are repeated in almost all of the other cases.²² Therefore, I will merely mention several in the hope that readers will investigate the subject further. In the twentieth century one finds the Kapauku Papuans in western New Guinea (Benson 1990, 15–21). They have no formal government, and all property is individually owned. The society is organized into voluntary confederations headed by prominent individuals known as *tonowi* who adjudicate disputes. Or consider the Yurok Indians of northern California. "Private property rights were sharply defined. . . . Ownership was complete and

transferable. Exchange was facilitated by a monetary system" (Benson 1989, 7–8), but there was no government. There were also the Ifugao of northern Luzon in the Philippines, who "developed a very elaborate system of substantive law. Yet the Ifugao had no tribal, district, or village governmental organizations, and no centralized authority with the power to force compliance with the laws" (13–14). Disputes were settled by mediation under the auspices of the *monkalun*, who was paid for his services—if he achieved a peaceful settlement. The *monkalun* was usually successful, however, because ostracism served as a powerful deterrent.

Anderson and Hill have argued that the period from 1830 to 1900 on the American frontier provides useful, real-life examples of anarchy. They know that "the early West was not completely anarchistic," but they insist that "government as a legitimate agency of coercion was absent for a long enough period to provide insights into the operation and viability of property rights in the absence of a formal state" (1979, 9). Mining camps, vigilante groups, and wagon train companies are among the institutions they examine.

Finally, let me cite once again the development of the *lex mercatoria*, or Law Merchant, in the Middle Ages. Franck rejects this as an example of extra-governmental law on the grounds that it was effective only because, he assumes, governments enforced the decisions reached in the merchant courts. But this does not appear to have been true (Benson 1990, 31–35). Royal courts often would not even consider cases involving international business disputes and would not honor contracts that involved the payment of interest. Common-law courts would not accept merchants' account ledgers as evidence. Merchant law arose in order to correct such failures of the government to protect merchants' rights. Moreover, "[m]erchant court decisions were backed by the threat of ostracism, a very effective boycott sanction" (33), not by the threat of state action.²³

Conclusion

I would like to thank my critics for their various comments, which have stimulated my own thinking and driven me to consider

even more carefully than before the case for anarchy, or a "polycentric" legal order, as Randy Barnett has euphemistically dubbed it (1998, 264–82). Nonetheless, those critics have neither disproved the non-neutrality of taxes nor demonstrated that government is the precondition for rights protection. More broadly, I would say that both theory and history seem to offer more support for anarchy than for minarchy. Perhaps orthodox Objectivists and other minarchists will soon realize "that the idea of collective security is a myth that provides no justification for the modern state, and that all security is and must be private" (Hoppe 1999, 27). Lo and behold, they might even conclude that "[r]ational anarchism . . . is simply the application of Ayn Rand's theory of objective knowledge to the realm of justice" (Smith 1997).

Notes

1. Rand insisted on using the oxymoronic term "voluntary taxation" instead.
2. See Samuelson 1954 and Bator 1958 for two mainstream treatments of this issue.
3. See, for example, Mises [1949] 1966, 737–38.
4. Interestingly, I had raised this challenge to David Kelley in 1998; to this date, Kelley has yet to provide me with a single such citation.
5. For detailed explanations of this approach, the reader should refer to Rothbard [1962] 1970, 313–64 or Mises [1949] 1966, 479–550. Rothbard uses the phrase "pure rate of interest" and Mises prefers "originary interest," but both are referring to what most economists call the natural rate of interest.
6. *Ex post*, saving and investment are always equal.
7. From this statement it might appear that one can simply subtract the two premia from the market rate, and the remainder will be the natural rate. Conceptually, that is correct, but its execution in quantitative terms is a daunting assignment. The reason is that those two premia are, themselves, based on idiosyncratic perceptions of risk exposure and expected inflation.
8. In the course of his criticism of my article, Franck makes this exact claim.
9. If justice is a public good and it is desirable to have one final arbiter possessing a legal monopoly on force, should not minarchists be strong advocates of a world government?
10. This process seems quite similar to what Enright describes: defense at the family or clan level proves to be too small in scale as well as inadequately specialized. By voluntary agreement, a government is thus formed to provide protective services.

11. See Nock [1935] 1983, 40 and Oppenheimer [1922] 1975, 8–10 for additional testimony supporting the proposition that all nation-states have been the result of conquest rather than consent. Both employ interesting, and somewhat parallel, dichotomies. Nock differentiates "government" (governance might be a more accurate term) from "the state," while Oppenheimer distinguishes "society" from "the state."

12. Spooner, an American, was a constitutional lawyer, an abolitionist, and an active libertarian writer. Even though I value many of his legal and political observations, I must admit that his grasp of sound economics was tenuous at best.

13. Spooner was none too impressed by even that original "contract," since only a small fraction of the total American population of the time was empowered to vote or hold political office.

14. Bidinotto (1994b, 8) proposes a variation on this theme. He argues that Spooner is wrong because the Constitution is not a contract binding the people, but a document that constrains the government. If the Constitution places no obligation on any citizen, then anarchists can ignore it with impunity. But that is exactly what Bidinotto adamantly opposes. Franck believes that Bidinotto (1994a, 1994b) has convincingly demonstrated that "anarchism does not have the ability to protect rights." In my view, the principal flaw in Bidinotto's presentation is that it badly misstates the anarchist position. To a large degree, Bidinotto is a Quixote jousting with imaginary windmills. He goes so far as to claim that anarcho-capitalists believe they have a right "to employ force unilaterally—then to remain immune from the requirement to publicly, objectively justify that use of force" (1994b, 7). Anyone who investigates the literature on anarchistic legal systems will discover that public justification for the use of force has been common to such systems, particularly in the Icelandic case that Bidinotto so quickly brushes aside. (Here "public" means open to the scrutiny of other members of the community, not under the aegis of some government agency.) A second fundamental problem with Bidinotto also derives from his apparent lack of familiarity with modern research. Here I am thinking of the broad fields of law and economics and game theory, as well as the narrower field of anarchy. He fails to understand that, even in the face of conflicting personal beliefs, individuals have incentives to engage in mutually respectful behavior and, if that breaks down, to negotiate their differences. By contrast, Bidinotto categorically declares that all anarchistic societies must quickly degenerate into rival gangs, each bent on using violence to impose its beliefs on all the others. Bidinotto projects onto anarchy something that is common to governmental systems.

15. See Higgs 1987 for an excellent explanation of this phenomenon.

16. One point not considered by Franck or even by me in my original essay is this: If government requires taxation, and if government power tends to grow, then it follows that tax-funded governments *must* create a class distinction between those who are net-recipients of tax funds and those who are net-payers. This subject would take me well beyond the scope of the current paper, but it is worth examining.

17. Dissaving means that, in order to purchase goods and services, consumers use part of their accumulated savings, instead of spending out of their current income.

18. Franck does not share their enthusiasm.

19. Despite these feuds, the number of violent deaths appears to have averaged only one per ten thousand persons per year (Friedman [1973] 1989, 207). To provide some sort of comparison, I might add that I live in a small town in West Texas that prides itself on having one of the lowest crime rates in the southwestern United States. Over the last ten years, the murder rate here has averaged one per eighteen thousand persons per year.

20. The earlier date identifies the time by which most Irish legal tracts had been put in writing. The later date identifies the onset of the English conquest, which caused the Celtic Irish law to begin to be supplanted by Anglo-Saxon common law. That legal transformation was not complete, however, until the early seventeenth century.

21. The use of the term "kings" can be deceiving. These leaders might better be thought of as regional chieftains, because there simply was no single king who ruled over all of Ireland (Peden 1977, 83).

22. Violations are treated as torts, judgment of the case is undertaken by either private, professional jurists or respected community leaders, conflicts are resolved through the payment of restitution, sureties are employed to pressure the perpetrator into complying with the judgment, and outlawry or ostracism is used as a last resort.

23. Many Objectivists rightly emphasize that men can only flourish in a "social context," but then insist that ostracism is of little value as an enforcement mechanism. I find the conjunction of those two beliefs quite odd.

References

- Anderson, Terry L. and P. J. Hill. 1979. An American experiment in anarcho-capitalism: The *not so wild, wild west*. *Journal of Libertarian Studies* 3, no. 1: 9-29.
- Barnett, Randy E. 1998. *The Structure of Liberty: Justice and the Rule of Law*. Oxford, England: Oxford University Press.
- Bator, Francis M. 1958. The anatomy of market failure. *Quarterly Journal of Economics* 72 (August): 351-79.
- Benson, Bruce L. 1989. Enforcement of private property rights in primitive societies: Law without government. *Journal of Libertarian Studies* 9, no. 1 (Winter): 1-26.
- _____. 1990. *The Enterprise of Law: Justice Without the State*. San Francisco: Pacific Research Institute for Public Policy.
- _____. 1993. The impetus for recognizing private property and adopting ethical behavior in a market economy: Natural law, government law, or evolving self-interest. *Review of Austrian Economics* 6, no. 2 (Spring): 43-80.
- Bidinotto, Robert J. 1994a. The contradiction in anarchism, part I. *Full Context* 6, no. 9 (May): 6-8.
- _____. 1994b. The contradiction in anarchism, part II. *Full Context* 6, no. 10 (June): 7-9.
- Franck, Murray I. 1994a. Taxation is moral. *Full Context* 6, no. 10 (June): 9-11.
- _____. 1994b. Taxation is still moral. *Full Context* 7, no. 1 (September): 9-12.

- _____. 1998. The state, the market, and the morality of taxation. *Full Context* 11, no. 1 (September/October): 14-16.
- Friedman, David D. [1973] 1989. *The Machinery of Freedom: Guide to a Radical Capitalism*. La Salle, Illinois: Open Court.
- Higgs, Robert. 1987. *Crisis and Leviathan: Critical Episodes in the Growth of American Government*. New York: Oxford University Press.
- Hobson, Charles F. 1989. Republicanism, commerce, and private rights: James Madison's path to the constitutional convention of 1787. In *Life, Property, and the Foundations of the American Constitution*, edited by Ellen Frankel Paul and Howard Dickman. Albany, New York: State University of New York Press.
- Hoppe, Hans-Hermann. 1999. The private production of defense. *Journal of Libertarian Studies* 14, no. 1 (Winter): 27-52.
- Hummel, Jeffrey Rogers. 1996. *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War*. Chicago: Open Court.
- Menger, Carl. [1883] 1996. *Investigations Into the Method of the Social Sciences*. Translated by Francis J. Nock. Grove City, Pennsylvania: Libertarian Press.
- Miller, William I. 1990. *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland*. Chicago: University of Chicago Press.
- Mises, Ludwig von. [1949] 1966. *Human Action: A Treatise on Economics*. Chicago: Henry Regnery.
- Nock, Albert J. [1935] 1983. *Our Enemy, the State*. Delavan, Wisconsin: Hallberg Publishing.
- Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.
- Oppenheimer, Franz. [1922] 1975. *The State*. Translated by John Gitterman. New York: Free Life Editions.
- Peden, Joseph R. 1977. Property rights in Celtic Irish law. *Journal of Libertarian Studies* 1, no. 2: 81-95.
- Rand, Ayn. 1967. *Capitalism: The Unknown Ideal*. New York: Signet Books.
- Rothbard, Murray N. [1962] 1970. *Man, Economy, and State: A Treatise on Economic Principles*. Los Angeles: Nash Publishing.
- _____. [1970] 1977. *Power and Market: Government and the Economy*. Kansas City: Sheed Andrews and McMeel.
- _____. 1982. *The Ethics of Liberty*. Atlantic Highlands, New Jersey: Humanities Press.
- Samuelson, Paul A. 1954. The pure theory of public expenditure. *Review of Economics and Statistics* 36 (November): 387-89.
- Sechrest, Larry J. 1999. Rand, anarchy, and taxes. *The Journal of Ayn Rand Studies* 1, no. 1 (Fall): 87-105.
- Smith, George H. 1997. In defense of rational anarchism. Posted to the Objectivism-L Internet discussion list (23 November). Cited by permission of the author.
- Spencer, Lysander. [1870] 1972. *No Treason: The Constitution of No Authority and A Letter to Thomas F. Bayard*. Santa Ana, California: Rampart College.
- Thomas, William. 1999. Academic interpretations of Ayn Rand. *Navigator* 2, no. 14 (November): 10-15.