

## RAND, ROTHBARD, AND RIGHTS RECONSIDERED

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### Overview

THIS PAPER LOOKS AT RIGHTS and the protection of rights from the minarchist and the anarchist perspectives. The small government view is represented by Objectivist Ayn Rand as well as Neo-Objectivists Tibor Machan and David Kelley. The no-government perspective relies primarily on anarcho-capitalist Murray Rothbard. Minarchists argue for the need for government in order to protect rights; otherwise, they claim, mob rule would prevail. Rothbard (1998) viewed government as compulsory because of its monopoly on force and because of taxation. Machan (1975) did not regard government protection as coercive, although he held the opposite view of taxation.

In my view, government-provided protection is coercive, and because it is, all methods of financing are coercive. Although government is coercive, that does not mean there are no problems with anarchy. My case against anarchy is that children (and others with diminished capacity) would be systematically excluded from rights protection if they have been abused or killed by their parents or caregivers.

Unlike Rothbard (1998), I believe that children do have the positive right to care from their parents. Positive rights are also at risk under anarchy if children (or those with diminished capacity) are neglected or abandoned by caregivers and have no alternative means of care. I think government is responsible in cases such as these because of the issue of rights—not only the positive right to care, but the infringement of negative rights, specifically trespass. If no one takes in a child who is in this situation, the child is necessarily in a position of trespass, regardless of where he is. He is violating

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law, but he is not culpable. He is in a similar position as a person who is insane and violates the rights of others. Rand claimed that the insane who commit crimes should not be imprisoned, but admitted to asylums. Children and those with diminished capacity (through no fault of their own) who have been abandoned or abused by their caregivers and who have no means of support should have access to care commensurate with their capabilities. At a minimum, government oversight would be needed in these cases.

The arguments presented in this paper are similar in some respects to those in *Touchstone* (2006). The case for government has been modified in that it is partial rather than holistic. That is, the case for government presented herein is only for the situations described rather than extended to all individuals. The discussion of rights (to life, property, and retaliation) is expressed in terms of their totality and indivisibility. In framing these discussions, I draw from Sciabarra's *Ayn Rand: The Russian Radical*. His argument was that Rand's philosophy is dialectical in approach. He noted that dialectics stresses the totality, examining it from both a systematic and a historical perspective. I rely on Sciabarra's arguments in my discussion of the indivisibility of rights, in the argument that payment for government protection is coercive, and in the importance of time to the concepts of a human life and of society.

## I. Rand

Objectivist ethics (OE) are bio-centric. The "is-ought" gap is spanned by the assertion that what a person is determines what he ought to do (Rand 1964a, 15–17; Merrill 1997, 100). Man has free will. This implies that more than one alternative course of action is available for any given decision and that man has the capacity to choose. It also implies that he has the freedom to choose.

Ethics implies choice. More than one alternative must be available for behavior to have ethical relevance. The fundamental alternative for a living being is between life and death. For humans, life must be chosen. Choosing those actions that sustain life is the essence of OE. This presumes that man is efficacious—that he is capable of knowing which actions will sustain his life and he is able to take those actions (Rand 1964a, 20–22; Peikoff 1991a, 207–29).

Man has the capacity to choose. He is a rational animal. Reason is man's implement of survival. But reason is not automatic. It takes effort. Man must have the freedom to choose and to act on his decisions in order to survive (Rand 1964a, 23–24; Rand 1967a, 17–18). The qualification to this is that a person should be free to act so long as his actions do not interfere with

others. This is the OE non-interference principle. The expression “not interfere” means that a person should not infringe on the rights of others. Those rights include the right to life and the right to property. The right to property is a corollary to the right to life. Man must produce his means of survival. He must own that which he produces in order to sustain his life (1964d, 94).

Persons may voluntarily interact with each other (again with the caveat that they must not infringe on the rights of others). The exchange of value for value between independent equals is Rand’s Trader Principle—the Principle of Justice (1964a, 31). The Trader Principle follows from the right to property. If a person owns something, he is free to trade it with another or with others, so long as the exchange is voluntary.

If a person defaults on an exchange, the victim has the right to retaliate for just compensation. The right to retaliate follows from the right to property. However, the Objectivist position is that this right is unique among rights in that it is delegated to government (1967c, 46–47). Government has the exclusive right to retaliate. Rand’s justification for this is that if private individuals took justice into their own hands, this would lead to thuggery and mob rule (1964c, 108–109).

## II. Rothbard

Rothbard regarded rights as fundamentally negative (Rothbard 1998, 100). Negative rights mean that individuals have the right to non-interference with respect to their persons and property. Individuals have the rights to life and property. They may interact voluntarily, but the extent to which a person may voluntarily interact with another is limited. Exchange is limited to the transfer of titles of ownership (1998, 133). An individual can only exchange that which is alienable, such as money or goods. A person’s will is inalienable. Therefore a person cannot sell himself into slavery, either temporarily or permanently.

Labor service contracts are necessarily invalid and unenforceable, since a person must be free to change his mind at any time. Therefore, according to Rothbard, a person cannot be punished for going AWOL during war (1998, 136–37). However, a surgeon could be punished for leaving a surgical operation once it has begun because of the “creation of peril” (Evers 1978, 3). A person would be liable for injuries that were the result of a force that he initiated.<sup>1</sup>

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<sup>1</sup> This is Williamson Evers’s view and is consistent with Rothbard’s position. (In my view, desertion under fire may also “create peril.”)

Because a person cannot enter agreements that would alienate his will, he cannot agree to transfer the protection of his rights to the government via a “social contract” (Rothbard 1998, 147). By so doing he would be denied the option of using another protection agency if he changed his mind. Government, according to Rothbard, is coercive for two reasons. First, the enforcement of laws is exclusively delegated to government, and, second, to pay for these protection services, the government imposes taxes. Because government protection is exclusive and compulsory and taxation is compulsory as well, even the most minimal government is coercive by nature (1998, 162; Machan 1975, 147).

### III. The Principle of Reciprocity

The right to property forms the basis for the right to retaliate. It finds its expression via the OE Trader Principle. I prefer a broader extension of this principle, which I refer to as the Principle of Reciprocity because, unlike the Trader Principle in which it could be argued the right to retaliation is implicit, in the Principle of Reciprocity, retaliation is explicit.<sup>2</sup> The essence of Principle of Reciprocity is to cooperate with those who cooperate and to retaliate against those who default. This strategy, called Tit for Tat in game theory, has been found successful in repeated plays of the Prisoner’s Dilemma (Axelrod 1984, 20).<sup>3</sup>

In OE, ethical principles are based on long-range success. The standard, or measure, of success is one’s life. According to OE, if a principle is consistently followed, it will yield success in the long run. This is the

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<sup>2</sup> I am not the first to use this phrase, Principle of Reciprocity (for example, see Khawaja 1997, 118). Nor I am the first to recognize that retaliation is a response to default (Axelrod 1984, 138; Frank 1988, 66; Ridley 1996, 71–73; Sugden 1986, 218). Others have emphasized the cooperative aspect of reciprocity. For instance, Sugden (1986, 223) referred to the “principle of cooperation.” Retaliation, however, is seen as somewhat unsavory (Axelrod 1984, 137) or at best, prudent (Frank 1988, 34–35). Certainly, cooperation is desirable; however, generally, seeking retaliation is not seen as virtuous or morally obligatory on the part of an individual. In a state of nature (anarchy), an individual would have to do this himself or have a private agency do this for him.

<sup>3</sup> The Prisoner’s Dilemma is a highly contrived game based on restrictive assumptions. It examines only exchange transactions in a state of nature in which one or both of the parties may follow through with the trade or one or both may default. Retaliation is limited to the refusal to trade in the future with the defaulter (for example, see Axelrod 1984, 7–20). I am referring to retaliation in a broader and more realistic context. Retaliation would be the response to not only default on trade but to any forced unilateral transfer. A forced unilateral transfer occurs whenever there is an infringement upon a person’s person or property. The retaliatory response would be proportional retribution (see note 5).

essence of the Objectivist Benevolent Universe Premise (BUP) (Peikoff 1976; quoted in Binswanger 1986, 50–51). According to the BUP, success is the “to-be-expected” so long as a person behaves rationally (that is, ethically). There may be setbacks, but those are incidental.

Although OE is not rule-based, ethical principles are, in effect, “rules” in the sense that if a person consistently follows an ethical principle, he does not have to deliberate and calculate at every juncture when making decisions; particularly, if the decision involves choosing between an ethical action and an unethical action (Touchstone 2008a, 46–47; 2008b, 178–82). (Choosing between two or more ethical actions may require some deliberation, however, and for an ethical person most decisions would generally fall in this category.) This does not mean that there would never be a circumstance in which a person would choose an unethical action. Ethics are contextual in OE. For example, if a person had to choose between telling the truth or not to a Nazi storm trooper as to the whereabouts of a Jew whom he has hidden, then lying would be called for (see Machan 1998b, 27). This is a malevolent situation in which a person’s freedom is constrained by another person (persons) who is (are) unethical. Situations such as this would be atypical in ordinary circumstances. In OE, cardinal principles could be practiced alone on a desert island. They involve how man deals with reality.<sup>4</sup> Productivity is a cardinal virtue (Rand 1964a, 25). It “pays” to be productive, whether a person lives alone on an island or lives among others. It is a principle that can be consistently followed and yield positive results in the long run.

The strategy for success underlying the Principle of Reciprocity is other-dependent. The action a person takes is conditional. It depends on the behavior of another person. It does not recommend that a person should always be cooperative with another or others. Cooperation is desirable in an exchange transaction, but being “cooperative” is not an absolute virtue. A person should not cooperate with his “destroyers.” A person should cooperate with a cooperative trading partner. Trade necessitates voluntary interaction. If a person defaults on trade, then it is incumbent upon the victim to retaliate against the defaulter. In a state of nature (anarchy), a person would have to do this himself or arrange for another (a private agency, for example) to do it for him.

Reciprocity means value for value. Trade means the voluntary bilateral exchange of value for value. In my view, if a person’s person or property is violated, he has been forced to engage in an involuntary unilateral transfer. If, for example, a person’s property has been stolen, he has a right to seek

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<sup>4</sup> Reality, according to OE, does not fundamentally include others (Peikoff 1991a, 252–53). In *Athens*, I argue that other people are a fundamental part of reality (2006, 372).

retribution. That retribution may include a monetary component equivalent to the value of the property as well as a monetary component that reflects any pain and suffering. If the rights violator cannot afford to pay monetary compensation or other resources, then very likely he would have to substitute labor services. Retribution may also include punishment (incarceration), particularly if the person is a potential threat to others.<sup>5</sup>

The Principle of Reciprocity is an ethical principle—the principle of justice—and practicing it is virtuous. That is, (proportional) retaliation is just and virtuous. In fact, I argue that it is morally incumbent upon a person to retaliate if his rights have been violated by another.<sup>6</sup> Virtues, like living beings, are mortal. They have to be upheld (acted upon) or they risk dying. If a person does not act on his principles, he contributes to their demise (Touchstone 2006, 55). Thus, in the case of exchange with a potential trading partner, there is no single virtue or “rule” that can be practiced consistently that will result in success. The principle is two-fold. The virtuous course that a person takes depends on the reaction of one’s trading partner.

#### IV. Alienation of Will

A case could be made that if A contracts for B to perform in the leading role of a play three days hence, and B fails to do so, then A has a right to compensation (payment for damages or some equivalent of that). The basis for this would be the Principle of Reciprocity. However, Rothbard would counter that B cannot alienate his will. That is, the actor has the right not to show up. Such an agreement or contract is unenforceable. However, such contracts are necessary for trade to take place. A great deal of the trade in an advanced society requires a delay in either the delivery of services (and/or goods) or the delay of payment. Rothbard appears to have

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<sup>5</sup> Rothbard claimed that proportional retribution requires two eyes for an eye (1998, 88). I agree with that position in matters of monetary compensation. I think that if a person’s person has been violated, he is entitled to compensation. I also think that the punishment of incarceration would also very likely be necessary in some cases. However, I believe that the right to life implies that the accused as well as those incarcerated are entitled to physical integrity; that is, their punishment should not result in cruel or unusual pain and suffering. This does not mean that a murderer should not pay with his life for certain crimes. It simply means while the accused or the prisoner is alive, he should not be subjected to cruel or unusual pain and suffering (Touchstone 2006, 129–30).

<sup>6</sup> I am saying here that a person has an obligation in the same way in which Rand used the word “must” (1982a, 99). In some cases, a person in a state of nature (anarchy) may not be able to seek retaliation for good reasons. Like all virtues, there may be extenuating circumstances that limit a person’s ability to act on a virtue. The point here is that if a person is capable of acting and does not act, he has defaulted on a moral imperative.

recognized the dilemma involved in contracting for labor services and offered a legal “out” by way of a performance (or penal) bond (Rothbard 1998, 138). In the case of the actor, if he failed to show up, he would be obligated to pay via a performance bond.

Although Rothbard did not indicate this, there is a way, by a circuitous route, in which a person can voluntarily alienate his will. He could contractually agree to perform labor services that would have a monetary value that is equivalent to his human capital, put up a performance bond to back the agreement, and then renege. If he were to default on the bond, he would, according to Rothbard, put himself in “just slavery” (1998, 86; Touchstone 2006, 118).

A person would have to violate the rights of another in order to “voluntarily” become a slave, but it would be possible if that were a person’s objective. Can a person alienate his will voluntarily without violating another’s rights? Individuals voluntarily enter contractual agreements on a regular basis that could be construed as potentially alienating their wills—the marriage contract and gated community covenants being two examples. According to my reading of Rothbard, such agreements could be regarded as invalid to the extent that they limit a person’s liberty; that is, by entering such arrangements a person may be forced to behave against his will.

I would argue that so long as a person can “get out of the contract” for cause or buy his way out, the contracts could be valid. For instance, a person may buy into a gated community that requires as a condition of ownership that he contribute to the upkeep of a park within the community. If he decided at some point not to participate in the upkeep because, say, the time commitment became too onerous, he would have the option of selling out and buying elsewhere (Touchstone 2006, 200). Of course, if there were restrictive covenants regardless of where a person lived that prescribed and proscribed certain behaviors on his own property, it could be argued that the person is not entirely free.

## V. Rothbard vs. Machan

Rothbard was an anarcho-capitalist, who believed that individuals have the right to protect their rights. He envisioned competing private agencies providing protection services. Individuals also would have the right to take the “law into their own hands” if they wished, but he thought that ultimately individual retribution would lose favor (Rothbard 1998, 90–91). The reason he didn’t believe gang rule would take over is that a code of law would be agreed upon by those who administered justice (1998, 236). Only one code of law would prevail and all agencies would abide by the code. It seems a bit

contradictory for Rothbard to have claimed that a group of citizens cannot agree to a “social contract” that transfers rights protection to government because it alienates their will, yet a small group of individuals can agree on a code of law by which all people must abide, and this does not alienate anyone’s will (Touchstone 2006, 180).

According to Paul Beard, one of the problems with anarchy is that individuals who are accused of crimes are subjected to punishment for which they have not given consent (Beard 1976, 13). The same could be said of minarchy. All individuals who live under limited government would not necessarily agree to the laws. To Machan, it is immaterial whether individuals have agreed to live under a code of laws, so long as agencies that enforce the laws protect rights. Consent is not required from those who would be rights violators (Machan 1975, 175–76). Machan argued that a “court of the last resort” would emerge for a given geographic area (presumably because of economies of scale).<sup>7</sup> In effect, government would be established. To Machan, this would not be a monopoly so long as alternatives were available. These alternatives could include the existence of other free countries from which to choose and/or the right to secede (1975, 149–50).

As I see it, secession would not be a viable option to living under government. First, why would a person secede? If it is to violate the rights of others whom he had forced to secede with him, then the reason for secession would be illegitimate. The government would have the right not to permit it. If a country were free, why would a person want to secede? If the country was not free, and a person wanted to secede, then it is highly inconceivable that the government would permit it. If the government did not recognize any other individual rights, why would it recognize the right to secession?

Even if the country allowed the person to secede, he would not be able to protect his rights by so doing. Suppose a person, A, along with his family has seceded. Subsequently, his neighbor, B, who has not seceded abducts and kills A’s daughter. What recourse does A have? He cannot appeal to his former country’s law enforcement, because that is specifically what he relinquished. He now has the right to retaliate, at least in theory. To retaliate he must leave his property and return to his former country in order to administer justice. However, retaliation by individuals is forbidden in his former country since the government has a monopoly on force. In effect, the

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<sup>7</sup> Of course, private justice continues for small slights. For instance, if, for no good reason, person X reneges on a promise to person Y, say, to drive him to the hospital for outpatient surgery, then Y may retaliate by not befriending X in the future. Retaliation in these cases does not warrant force on the part of Y. In addition, individuals retain the right to use force for self-defense when peril is imminent. However, delayed retaliation is under the exclusive purview of government (Touchstone 2006, 207–208).



person could not protect his rights (or those of his daughter, in this case). A person who cannot protect his rights by any legal means available to him has no rights. Thus, secession would not be a viable alternative for an individual (Touchstone 2006, 182–83).

## VI. Government is Coercive

My view is that government is coercive. The coercive aspect of government's monopoly on the use of force is that retaliation is an individual right. "Having a right" means having a right to action; that is, having the ability to act on that right. According to Chris Sciabarra:

Rights have both positive and negative aspects. They sanction the freedom of voluntary, uncoerced action, even as they include the provision that each individual abstain from violating the corresponding rights of others. But Rand argued that all rights are indivisible. There is no distinction between the right to life and the right to property, just as there is no duality between mind and body. The right to life cannot be abstracted from its material manifestation. . . . Property rights are a material corollary of the right to life. . . . "The man who produces while others dispose of his product, is a slave" (Rand 1964d, 94). (Sciabarra 1995, 275)

Rand was not the only person to claim the indivisibility of rights. However, according to Sciabarra, Rand's perspective on the constitutive properties of an entity departed from that of traditional philosophy. Rand defended "the organic integrity of an entity," arguing that the entity is constituted by properties "from which it cannot be legitimately separated. Indeed, the entity's properties are internal to its identity" (1995, 145). For instance, "Rand saw Virtue as One" (1995, 244). The same could be said of rights; that is, restating her view on virtues in terms of rights: "no [right] can be thoroughly abstracted from the . . . totality they constitute" (1995, 244). Though they may be analyzed separately, "they form an indissoluble whole" (1995, 244; Peikoff 1991a, 250).

However, on re-reading the above quote on rights by Sciabarra, the right to retaliate is notably missing. It, too, is a right, and, since all rights are individual rights, it is a right of the individual. A person whose rights have been violated, must have recourse. I have argued that this is based on the Principle of Reciprocity. If he has relinquished involuntarily either his person and/or property to another, he is justified in seeking just compensation from the violator. I have argued that it is also his obligation to seek retribution in a state of nature. If he does not, he has allowed another to receive the

unearned.<sup>8</sup> Beyond that, it is also the case that principles are potentially mortal. They cease to exist if they are not supported. This does not merely mean to agree with the principle; it means acting to preserve the principle. If a person allows another to infringe upon his rights, the right to life and the right to property suffer. If a right is not upheld, it risks dying to some extent. Upholding the rights to life and property means that a person must retaliate if his rights are infringed upon.

Sciabarra pointed out that to Rand the internal relationship between concepts of life and value is not deductive, but inductive (1995, 242). The same could be said for rights. The right to retaliation is not deduced from the right to property; nor is the right to property deduced from the right to life. Their basis is from observing “facts of reality.” Sciabarra further noted:

Despite her emphasis on axioms and derivatives, Rand did not think in terms of strict logical dependence, or one-way causality, i.e., that A leads to B which leads to C. Rather, she thought in terms of reciprocal causation and mutual reinforcement: A leads to B which leads to C, with each of the elements being both the precondition and consequence of the others. (1995, 258)

This describes the case for the rights to life, property, and retaliation. As mentioned above, it can be shown via repeated games of the Prisoner’s Dilemma, that a Tit for Tat strategy is a winning strategy. It results in long-run success. This demonstrates the “reciprocal causation and mutual reinforcement” of the rights to life, property, and retaliation. Property is a corollary to the right to life and supports it. Retaliation follows from the right to property. Redress in turn is necessary for the good (life as well as property) to prevail.

An “inseparable link” exists between the elements that comprise an “internal relationship.” An internal relationship is inherently circular; although not “viciously” so (1995, 242). The following observation made by Sciabarra with respect to virtues could equally apply to rights:

Each of these moments is in reciprocity with its constituent relations. Each is both the source and product of the other. Each is part of an organic unity. (1995, 244)

If rights are a unified whole and inseparable, then as such, the relationship among them can “be abstracted epistemologically” but they “cannot be separated ontologically” from the totality (1995, 145). They cannot be reified “as separate existents” (1995, 146).

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<sup>8</sup> This violates the Objectivist non-sacrificial principle (1964a, 27); however, Rand would not have applied the principle in this way (Touchstone 2006, 55).

If, according to Rand as well as Libertarian thought, all rights are individual rights and, if they are indivisible comprising an indissoluble unit, then one right cannot be separated from the others and denied to individual citizens. Individuals cannot single out one right and delegate it to government. It is not only the inalienability of rights from the individual that makes separation impossible, it is also their indivisibility from one another.

One of Machan's arguments for government provision of protection is that government is charged with protecting individual rights and, as such, it is merely providing a service (1975, 149–50). By so doing, individuals are not denied rights protection. One could ask, if the right to retaliation can be separated from other rights and delegated to government, why then could not property rights as well? Individuals could turn over their right to property to the government. The government, in turn, would provide property to individuals. Individuals would still have shelter, food, etc. They would own those things after government supplied them to individuals. They would not be denied "ownership." Applying Machan's argument for protection services, so long as an alternative exists (that is, other free countries) then relinquishing the right to property to government would not be coercive (1975, 150, 155).

One argument against this is not based on rights but on efficiency. As Herbert Spencer noted early on ([1892] 1954, 246–47) and Public Choice economists (Gwartney 1976, 531–36) subsequently have elaborated upon, government is not as efficient as the private sector. If the government were to take over the supply of other goods and services in addition to protection, then protection would be marginalized. If protection is marginalized, this, in effect, would infringe on individual rights (Touchstone 2006, 198). This may be a good reason why government should not supply other goods and services to the public, but it does not explain why it should provide protection.

David Kelley has made a good case for why retaliation should be provided by government. His argument is not a rights argument per se. His point is that private retaliation is not workable. The reason for this is not an economic efficiency argument, however. It is that the right to retaliate is fundamentally different from other rights. This conclusion is based on the logical inconsistency of having competition among agencies whose job it is to enforce laws within a market in which exchange is voluntary and is predicated upon the enforcement of such laws. It follows that the market cannot by definition exchange services that are coercive by nature (Kelley 1974, 246–47).

This argument has merit; however, it does not resolve the inconsistency of rights being indivisible, yet, even though they are ostensibly indivisible, one of them (retaliation) has to be separated from the others, delegated to government, and denied to the individual. Nor does it follow that, as a consequence, government is not coercive. Individuals would still be denied a right. That is the coercive aspect of government provision of protection.

## VII. Payment is Also Coercive

According to Rothbard, an anarcho-capitalist, as well as Rand and others who favor minarchism, taxation is considered compulsory. (For another perspective on taxation, see Franck [1998, 15; cited in Franck 2000, 153].) My view is that if government is delegated with the exclusive provision of protection, then all methods of payment are coercive (Touchstone 2006, 204). Rand (1964e, 116–17) and Machan (1975, 271) have suggested a couple of voluntary alternatives to taxation. These were not meant to be exhaustive.

One is government-run lotteries. Lotteries as a method of acquiring government revenue are not considered coercive because those who purchase lottery tickets do so voluntarily. However, a lottery is a business. According to minarchists, only protection services should be delegated to government. Only private individuals should own and run all other enterprises. If the government is permitted to run a lottery business, why shouldn't it also be allowed to operate farms, oil companies, and other profit making ventures? The fact that individuals would buy these goods and services voluntarily sidesteps the issue that it would still be government ownership.

A second alternative to taxation put forth by Rand (1964e, 116–17) and Machan 1975, 271) is a premium, similar to an insurance premium, that would be voluntarily remitted. If the person did not pay the premium, he would not receive protection. This sounds like other types of insurance, but it is not. If a homeowner is uninsured, he is not entitled to policy coverage if his house burns down. However, the difference is that the homeowner has the option of paying to rebuild his house in the event it is destroyed. This is not true for the person who does not pay the premium for protection from the government. If he does not pay, he has no recourse. He cannot seek retaliation on his own behalf. He is denied that right (Touchstone 2006, 194–95).

One argument for government provision of protection which has not been considered thus far is Paul Samuelson's public good case (Gwartney 1976, 519). A public good is one that if provided for one individual is simultaneously supplied to everyone. Exclusion is not possible. Since exclusion is not possible, there is a disincentive for a person to purchase a

public good. Since the tendency would be for individuals to not pay or to underpay, then a (pure) public good would not be provided by the private sector, or if it were, it would be under-produced. The classic example is national defense. Since by definition national defense is the defense of an entire nation, if it is supplied to a single individual, it is supplied to everyone. The further argument is that if a country is to have national defense, it must be supplied by government since it cannot be provided (at least, sufficiently so) by the private sector.<sup>9</sup>

This may be true for national defense, but, as Sechrest pointed out, it is not true for police protection (Sechrest 2000, 165). It is possible to exclude non-payers from police protection; at least to a large extent. If a person refused to pay for the protection, it largely could be denied to that person. Because non-payers can be excluded from receipt of protection, this supports the case for voluntary payment of government provided police protection.

My counter-argument (Touchstone 2006, 202–203) is that protection is a public good, although not for the usual reasons given. It is true that exclusion is technically possible. But the “impossibility” of exclusion is derived from the nature of what protection is. According to Rand (and other minarchists) as well as Rothbard, individuals have a right to equal protection under the law. If government assumes the protection of its citizenry, then it must provide protection to everyone. Excluding non-payers may be technically possible, but it is a violation of their rights. The reason it is a violation of their rights is because if government does not provide protection, the individual is not allowed to retaliate on his own behalf. He is left unprotected. This violates the principle of equal protection. Therefore, “voluntary” payment for police protection services is also coercive, in that if a person does not pay, he does not receive the service; however, he cannot provide the protection himself. This right is denied to him.

### VIII. A is A: Why Payment is Coercive

In *Ayn Rand: The Russian Radical*, Sciabarra said: “The only important philosophical conclusion that can be made about the nature of any entities in the universe is that *each* has identity” (1995, 143; italics in original). This means that each “is something in particular” (1995, 144). In OE, “A is A” is the “principle of identity” (1995, 139). One of the basic identities in economic theory is that production equals income. The value of that which is produced must equal the value of the income (revenue) received, because output and income are identical. That is, A is A.

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<sup>9</sup> My discussion of the public goods case for government provision of national defense is in *Athena* (2006, 196–98).

Output and income must be equal because when output is produced income is earned. This “income” need not be monetary, but it has a monetary equivalent. For instance, a person may grow crops for his own consumption. The food he produces is his income. The output does not go through the market, but it has a dollar equivalent. In a non-free society, production is still equal to income, but that which the producer receives in payment will be determined by those who control him and will be less than the output’s value. Those who exploit the producer receive the difference. When government protection services are provided, income is produced, and, in a free society, that income should be received by the providers of the services. Production and income are identical.

To Rand: “The entity and its attributes are not two different things. ... ‘[T]he attributes are the entity, or an entity is its attributes’ (Rand 1990, 266)” (Sciabarra 1995, 146). The law of identity is “a variation on Aristotle’s law of noncontradiction” (1995, 139); the principle that ‘the same attribute cannot at the same time belong and not belong to the same subject and in the same respect . . . it is impossible for any one to believe the same thing to be and not to be’ (Aristotle 4.3 1005b15–20, in Aristotle 1982, 524)” (Sciabarra 1995, 139). An attribute of the government is that it is coercive by nature. If the government produces protection, it does so by denying private citizens that right. Since output and income are identical, then the attributes that apply to production must also apply to income. The revenue for those services must also be coercive by definition.

In Sciabarra’s opinion “what is most striking about Rand’s conception of government is its ahistorical character. . . . Rand’s voluntary political association remains an *unknown* ideal” (1995, 283; italics in original). A reason that the notion of a “voluntary political association” envisioned by Rand is an unknown ideal is because it is based on a contradiction. Rand stated that individuals must delegate protection services to government. This is fundamentally coercive for the reasons given above. She referred to this as government having a “monopoly on the use of force” (Rand 1967c, 46). Although this could be interpreted as an acknowledgment that the production aspect of government provision of protection is coercive, Rand still believed that voluntary methods of funding government could be discovered.

Rand viewed the law of causality as a corollary of the law of identity. It is “‘the law of identity applied to action . . . The nature of an action is caused and determined by the nature of the entities that act; a thing cannot act in contradiction to its nature’ (Rand 1957, 1037)” (Sciabarra 1995, 142). Government-provided protection is coercive by nature; therefore income is

as well. To try to uncover “voluntary” methods of payment for the provision of a service that is coercive by nature is a contradiction.

## IX. Anarchy

I have argued that government is coercive, whether viewed from the output side (the provision of protection services) or the income perspective (payment for those services). I am not claiming that there are no inherent problems with anarcho-capitalism, however. In *Athena*, I made the case that under some circumstances, children (as well as those who are mentally and/or physically incapacitated) will be systematically excluded from equal protection under the law under anarchy.<sup>10</sup>

In his chapter “Self-Defense,” Rothbard stated that “every man has equal liberty, equal rights under the libertarian law” (1998, 82–83). Under anarchy, each person has equal rights to self-protection. Recall that only negative rights are individual rights (Machan 1998a, 122; Rand 1964d, 94). Rothbard said:

[T]he very concept of “rights” is a “negative” one, demarcating the areas of a person’s action that no man may properly interfere with. No man can therefore have a “right” to compel someone to do a positive act, for in that case the compulsion violates the right of person or property of the individual being coerced. (Rothbard 1998, 100)

Because only negative rights are individual rights, children do not have a positive right to parental care, according to Rothbard.<sup>11</sup> This is because individuals (that is, parents) cannot, through contract or otherwise, agree to alienate their will. A parent could legally let his child starve to death. However, a child, like any other person, does have (some) negative rights.

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<sup>10</sup> The discussion in this section is limited to the protection of the negative rights of children, but would equally apply to those who are mentally and/or physically incapacitated and were abused and/or killed by their caregivers. I am assuming that if a child were murdered by someone other than his parents (or legal guardians), the parents (guardians) would seek retribution on his behalf. Although, according to Rothbard, children do not have a positive right to care from their parents, I argue in a later section, that children do have a right to parental care. This would include retaliation on the behalf of the child.

<sup>11</sup> This is not the Objectivist position (see Branden 1962, 55; Machan 1975, 178). In his book *Libertarianism Defended*, Machan (2006, 218–19) takes the position that since humans choose to have children, parents in effect invite children into their lives when they have them. They thereby enter a compact with their children. Since children are dependent by nature, this confers upon them positive rights to care from their parents.

When a child is born he does not have self-ownership rights, according to Rothbard (1998, 100). Yet, rights, necessarily, must be 100 percent. Rothbard presented a case detailing why each individual is entitled to full ownership rights (1998, 45–46). Despite that argument, Rothbard proceeded to make exceptions for children.<sup>12</sup> Because parents own the home within which the child lives, they have the right to lay down rules that the child must obey (1998, 103). Since parents can set rules, it would follow that they could also punish the child, because retaliation by individuals is an individual right in anarchy. Presumably, this could include evicting the child permanently from the property regardless of age.

Rothbard also claimed that the mother is the owner of the child. His argument here is based on creation and on the homesteading of original property (1998, 99). (Although in the homesteading case, it would seem more logical that the child should own the mother.) However, parental ownership is limited. Parental ownership entails two aspects: that others may not seize the child against the parent's will (1998, 99), and second, that the parent has the right to sell the child (1998, 103–104). The former aspect would seem to be an unnecessary additional layer of rights if a child truly had negative rights. The second seems contradictory. According to Rothbard, adults cannot alienate their wills, and therefore, they cannot sell themselves even for an instant, yet children can be sold by their parents. As for selling a child, exchange is supposed to be voluntary, yet, a child is not required to consent to this exchange; he is that which is exchanged.

Concerning exchange, Rothbard said:

The right of property implies the right to make contracts about that property: to give it away or exchange titles of ownership for the property of another person. (Rothbard 1998, 133)

Yet, who holds the title of ownership to the child? If it is the parent or the person(s) to whom a child is sold, when does the title pass to the child? Rothbard did not address this directly, but did offer the following: “For the child has his *full* rights of self-ownership *when he demonstrates that he has them in nature*—in short, when he leaves or ‘runs away’ from home” (Rothbard 1998, 103; italics in original).

A child can leave home at any time, regardless of age, and his parents cannot force his return, according to Rothbard. But where does the child go? All property, according to Rothbard, would be private property. If the child is a toddler and goes to his neighbor's house uninvited, he would be

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<sup>12</sup> Unlike Rothbard, Herbert Spencer allows no waivers to negative rights. Coercion by another is impermissible, regardless of the person's age ([1892] 1954, 154–57, 168).



trespassing—a violation of his neighbor’s property rights. By rights, the neighbor could retaliate against the child. If instead the neighbor were to keep the child, how can the parent be sure the child has not been coerced? If the child has been coerced, this would violate the parent’s ownership rights, presumably, but it could be difficult for the parent to investigate this. If the neighbor refused to allow the parent onto his property, the parent would have no way of questioning the child. Even if the parent did question the child, the neighbor could threaten the child into telling a lie (Touchstone 2006, 114–15).

Full ownership rights are the right to acquire, use, and dispose of that which is owned. Rights to life and property are ostensibly full ownership rights, yet a child does not fully own himself. Parents have ownership rights to the child, but those are limited as well. Rothbard did not address these contradictions. He did state that it “would be grotesque for a libertarian who believes in the right of self-ownership to advocate the right of a parent to murder or torture his or her children” (Rothbard 1998, 100). Yet, what if a parent did kill his child; who would seek retribution? It is the individual’s responsibility to seek retribution under anarchy; either by paying an agency for those services or by “taking the law into his own hands.” Who would seek retribution on the child’s behalf?

Rothbard recognized that there could be a problem with murder under anarchy. He said:

A problem might arise in the case of murder—since a victim’s heirs might prove less than diligent in pursuing the murderer, or be unduly inclined to let the murderer buy his way out of punishment. This problem could be taken care of simply by people stating in their wills what punishment they should like to inflict on their possible murderers. . . . The deceased, indeed, could provide in his will for, say, a crime insurance company to which he subscribes to be the prosecutor of his possible murderer. (1998, 86)

This is not a workable solution for children, particularly young children. In fact, there is no workable solution under anarchy for children who are victims of murder or abuse by their caregivers (Touchstone 2006, 119).

## **X. Children and Negative Rights under Anarchy**

The fact that children’s rights would not be protected in a scenario as just described violates the equal protection provision supported by Rothbard (1998, 82–83) and Rand (1971a, 164) alike. If a person cannot protect his rights, he has no rights. One could say that this could be true of an adult who does not have the time or other resources to protect his rights. But adults are

efficacious by nature. Individual rights are based on what a person is, his nature—they are conditions required for his life (Rothbard 1998, 3, 46–47).

Rights follow from what is required for a human being to sustain his life. As mentioned earlier, according to Rand, man is rational, but rationality is not automatic. A man does not have an automatic means of survival. He must choose to survive and uncover those actions that will sustain his life. He must be free to act on his decisions. A child is incapable of protecting his rights by virtue of his nature. A child does not have a fully functional reasoning capability. His nature works against the protection of his life, which is the purpose for which rights are designed and exist.<sup>13</sup> This, of course, is a contradiction. If a child (who has been killed or abused by his care giver) is to have equal protection—or any protection—of his negative rights, he must have a positive right to retaliation. However, unlike an adult, he, by nature, is incapable of providing that for himself.

The rights to which a child is entitled should be based on his nature. If rights are based on human nature, and everyone is entitled to have individual rights, and everyone is entitled to equal protection of those rights, then by the nature of what a child is, he is entitled to the protection of his rights. Since a child is by nature incapable of protecting his rights, there should be an “agency” that is responsible for protecting his rights.

I believe that agency should be governmental rather than private. The reason I believe that government should do this instead of a private agency is that a private agency survives by revenues either acquired by charging a price or by private donations. As already noted, there is no price (or premium) to a protection agency (or insurance company) that could be charged to a child because a child would not have the capacity or ability to pay it.

It could be argued that there could be reliance on charity to deal with children who have been murdered or abused by their caregivers. The problem I have with this is that rights are not a gift, they are an entitlement. Rights are a birthright.<sup>14</sup> And if rights are entitlements rather than alms, then there should not be reliance on an agency that depends exclusively on charitable donations to protect and preserve the rights of children who have been abused and/or killed by their caregivers. For this reason, I think that a government agency should be delegated with this responsibility. The government would have a monopoly on force, but it would be retaliatory in

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<sup>13</sup> In Rand’s view, rights are not *for* any purpose (Berliner 1995, 365).

<sup>14</sup> This does not mean that those who live in a free country do not inherit the “gift” of liberty. Freedom may be a birthright, but it is not free. Those who have discovered, articulated, established, defended, and preserved freedom are benefactors. Nevertheless, rights are not privileges.

nature and limited to the situations under consideration. It would not be coercive in the sense discussed above in that adults would still rely on themselves (the private sector), rather than government, to protect their individual rights.

Those who, by right, should have to pay are those who are culpable. Once the parent(s) or guardian of the murdered or abused child has been found guilty then it is within the government's purview to confiscate his property and use it to take care of the child if the child is alive, as well as to cover the guilty party's police, court, and incarceration costs. If those culpable could not be located or those who are guilty have insufficient resources to cover these costs, then private donations could cover the balance.

It could be argued that a government that is established solely for this purpose is not coercive in the sense that it is not preventing adults from protecting their own rights. Government would exist strictly to protect those who are incapable of doing so by their inherent nature. Since government provision of services would not be coercive in this sense, then coercive means (lotteries or taxes, for instance) should not be used to fund these services. Revenues should come exclusively from noncoercive sources—the resources of the guilty parties along with private donations.

It is very likely that these sources would be sufficient. However, since rights are not a gift, but an entitlement, I believe they should be protected even if some coercive measures (lotteries or taxes) are needed. Since it is likely that relative to crime in general, these cases would be relatively few, even if coercive measures were needed, the revenues required would be small in relative terms. Admittedly, this is more a matter of preference on my part than a rationale for coercive measures. By that I mean, if the revenue acquired by confiscating the property of offenders and by private donations are insufficient, I would prefer some coercive form of revenue acquisition (lotteries or taxes) than to compromise or sacrifice the principle of equal protection under the law for these individuals. I recognize that coercive measures for this purpose would qualify as an initiation of force against other individuals. However, coercive measures for attaining revenue are not integral to the argument for government protection for individuals in the circumstances described.

## **XI. Children and Positive Rights**

As previously mentioned, Rothbard did not believe that children have a positive right to childcare from their parents (1998, 100). Positive rights are the result of the contractual exchange of property rights that are enforceable,

according to Rothbard (1998, 79). However, contracts are not the only means by which positive rights are established. If a person infringes on another's rights, the victim has a positive right to compensation (1998, 78–82).

This can be true even in cases when it was not the culpable person's intent. When a careless person's actions result in the disability of another person, the disabled person has a positive right to care (medical expenses, loss of pay, etc.). Bissell (1981, 30) has argued by analogy that a parent's action leads to the existence of a helpless person (child), and therefore, the child is similarly entitled to care.

I think this liability argument has merit. Although Bissell did not address it, this argument places being born in the curious position of being an infringement of the offspring's rights. Although it may stretch the definition of rights violation, a case could be made for that based on the fact that parents bring into existence a person who is helpless and it is done without the consent of the person who is brought into existence. Although every act that a person performs with respect to another in which the latter does not give his consent does not qualify necessarily as a rights infringement of the latter (for example, performing CPR on a heart attack victim), the lack of consent coupled with the helplessness of the "victim" (child) could form the basis for a rights infringement argument.<sup>15</sup> Failing any other argument, the liability argument is a justification for parental provision of childcare.

I think that a case can be made for positive rights to childcare from parents based on the function that rights serve. Rights are based on what a human life is. That is, positive rights to childcare by the parent follow from the same source as negative rights; that is, what a human being is—from the perspective of his entire life.

Sciabarra's argument in *The Russian Radical* was that Rand's approach to philosophical inquiry was dialectical (1995, 15). He remarked that it is the "emphasis on the totality that is essential to the dialectical mode of inquiry. ... [D]ialectics requires the examination of the whole both systematically (or 'synchronically') and historically (or 'diachronically')" (1995, 17). Continuing:

Diachronically, dialectics grasps that any system emerges over time, that it has a past, a present, and a future. Frequently, the dialectical thinker examines the dynamic tensions within a system, the internal

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<sup>15</sup> Evers (1978, 7) brought up the issue of intent, suggesting procreation is not necessarily purposive. Intent is really a non-issue where procreation is concerned. A person may not intend to cause an accident that leads to the helplessness of another when he, say, drinks and drives, but a rational person recognizes that it is a possible outcome. The same is true for reproduction. It may not be the intent of the actions of the parents, but an adult recognizes that it is a possible result (Touchstone 2006, 117).

conflicts or “contradictions” that require resolution. . . . He or she views social problems not discretely but in terms of the root systemic conditions they both reflect and sustain. (1995, 18)

It is the importance of time that I will turn to now in discussing what a human life is and also later in discussing what is meant by society.

Rights are conditions required to sustain a human’s life. I have discussed the difficulty involved in Rothbard’s claim that children have negative rights. First, rights should be full rights. However, children do not possess full ownership rights. Parents (the mother) are said to be the owners of the child, but they do not have full rights either. On further analysis it was found that a child’s negative rights are not protected under anarchy if the parent(s) or legal caregiver abuses or murders the child. Children can not protect negative rights by virtue of who they are—their nature. If by virtue of his inherent nature, a person cannot protect his rights, he has no rights.

In that discussion, I spoke as if children are separate entities from adults. At a point in time, this is true. Children and adults are separate entities. However, when viewed over time, from the perspective the totality of a human life, it is obvious that all adults were children at one time. If rights function to protect life, then it must be asked, what is the nature of life for a human being?

Concerning the nature of “identity,” in general terms, the Objectivist position is:

[T]he law of identity is not a static tautology. Identity includes change and transformation.  $A \hat{=} A$ , but dynamism and process are inherent in  $A$ ’s development. In Binswanger’s view: “the law of identity does not attempt freeze reality. Change exists; it is a fact of reality. When a thing is changing, that is what it is doing, that is its identity for that period. What is still is still. What is in process is in process.  $A$  is  $A$  (Binswanger 1981).” (Sciabarra 1995, 140; italics in original)

A human life takes place over time, and it necessarily involves change. Rand’s case for rights is that humans are rational, but rationality is not automatic. A person must be free to uncover those things necessary for survival. He must be free to act on those discoveries, with the qualification that he cannot infringe on the rights of others. Rationality is the basis for rights; it is the defining attribute of man.<sup>16</sup> But rationality takes effort and time. Indeed, it

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<sup>16</sup> Although the basis for rights is rationality, I do not think that there is a “continuum of rationality” across species that forms the basis of rights for man relative to other animals (Touchstone 2006, 127). Man has a right to life based on his rationality. Children may have fewer rights than adults, but they still have a right to life. Tabarrok

takes years to develop. An adult is independent and efficacious by nature. But a human being is not born fully formed like Athena. He is born dependent. To survive, he must rely on others.

On whom should the child rely? Parents are the obvious choice. It is obvious because the parents' actions caused the child. Their actions led to the existence of a dependent human being. As stated earlier: the "law of causality is law of identity applied to action' (Rand, 1037)" (Sciabarra 1995, 142). "Reality is an interconnected system of interacting entities governed by laws of identity and causality (Peikoff 1976T, lecture 2)" (Sciabarra 1995, 144). Children have a positive right to childcare from their parents. It follows from the law of causality (parents are the cause of a helpless human being) and from the law of identity (the nature of what a human being is during his childhood).

In his argument that children do not have a right to childcare, Rothbard provided a number of counter-arguments (1998, 102). What about rape, he asked, it is not consensual. Why should the mother of a child that is the result of rape be responsible for the child? The answer to this is no different than one in which there is an infringement on one or more person's life or property. The responsible party is the rapist. The mother and the child are both victims in this case. Both are entitled to retribution.<sup>17</sup> A second question Rothbard asked is since adoptive guardians did not create the child, why should they be responsible for childcare? The argument I am making is not based on creation—as Rothbard suggested, but on causation. If non-biological parents have taken over legal guardianship, their actions have caused them to be responsible for the child. Another question Rothbard asked was at what point in time does the care of the child end? When does a child become an adult? Rothbard didn't have any trouble responding to this question when he addressed the timing of self-ownership (that is, when a child leaves home regardless of the child's age), but he did not apply the same answer to the question of when positive rights to care end.

My point is that the issue of rights hinges on the question of what a human life is. When a child is an infant, he is entitled to parental care. As a child ages and matures, he should take more responsibility for himself and

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indicated that work is needed to delineate why "the number and scope of rights increases with adulthood" (Tabarrok 2001, 460). As for those whose diminished capacity is permanent, they also may be unable to exercise the rights of a normal adult (Touchstone 2006, 132–40). If a case is to be made for rights for other species, it should be on a species by species basis.

<sup>17</sup> A problem arises if the guilty party cannot be located to pay restitution and face punishment. I would agree that the mother is not responsible. I argue later that the child is still entitled to care.

for his behavior. A human is not an infant for X number of years and then an adult. A human's capacity for reasoning and the responsibility that corresponds to it both develop over time. As a human develops, his positive rights should diminish.

## XII. Negative and Positive Rights

Both Rothbard and Rand regarded negative rights as basic rights. Positive rights are seen as derivative. In his discussion of rights, Rothbard first used the Crusoe device; the man alone on a desert island. It is only when another person, Friday, arrives on the island that rights become relevant (1998, 35). In this respect, Rand envisioned rights the same as Rothbard (Rand 1964d, 92; also see Machan 1975, 54). Although Rand believed that living among others was optional for man, she also recognized that "man *is* a social being (Rand 1957, 747)" (Sciabarra 1995, 270).

Rand clearly believed that the concept of the "social" was a legitimate abstraction. Rand saw "society" as a relational concept, as people's "relations to each other . . . men in relation to men (Rand 1 January 1945 quoted in Peikoff 1991b, x.)" (Sciabarra 1995, 268)

In *Athena*, I addressed the question: what is society? (Touchstone 2006, 90–93) Rand viewed social interaction as optional (1964c, 107) and society as relational (men to men). Clearly, there must be two or more people in order to have a social unit. However, it is not only relations between or among people that are relevant to the creation of a social unit, there also must be a time dimension. A one-time interaction between two people that is of short duration is not a social unit.

Essential to my definition of society is the element of time. A social unit requires a sustained duration of interaction between or among individuals. The concept of a social unit is time dependent.<sup>18</sup> I define the primary social unit (PSU) as the smallest relational unit that is necessary and

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<sup>18</sup> The reason for the added element of time to the concept of society is that for conventions to emerge, more than a one-time interaction between or among people is essential (Sugden 1986, 16). Similarly, cooperative strategies are more likely to take hold as the time horizon lengthens (Axelrod 1984, 16). For example, cooperation improves with the development of trust and reputation, both of which take time to establish. Although rights exist for a single interaction between people, a one-time encounter does not qualify as "society" (Touchstone 2006, 90–91).

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universal by nature and must occur over time. The PSU is the relationship between mother and child.<sup>19</sup>

Since it takes a man and a woman to reproduce, one could ask, why is that not the primary social unit? The reason is that even though the interaction between a man and a woman is necessary for the existence of every human being, it is possible for this relationship to be of short duration. Because a sustained relationship over time is optional between these two individuals, it does not qualify as the primary social unit.

What is the nature of rights for the PSU? The nature of the relationship between mother and child is necessarily one of dependency of the child on the adult. (Touchstone 2006, 121–22) When a person is alone, rights are not relevant. The adult in the PSU is not alone per se; however, the child, particularly when he is an infant, does not have the physical strength to hurt the mother. Even if by accident the infant did harm the mother, it could not be said that the child infringed upon the mother's rights since the child would not be culpable. The circumstance would be no different than if the mother was harmed by an act of nature; struck by lightning, for instance. As far as rights are concerned, they would not apply to the mother anymore than if she were alone in nature. Thus, negative rights are not an issue for mother. Being alone with an infant is essentially the same as being alone as far as negative rights of the mother are concerned.

The rights which would be relevant would be those of the child. He would have the positive right to care. Negative rights would not be necessary because they would be redundant; an unnecessary extra layer of rights. Negative rights are subsumed under positive right to childcare. Thus, the only relevant rights for the PSU are the positive rights of the infant. (The mother's negative rights would become relevant as the child matures and possesses the rational capability to be accountable for his actions.)

In order to uncover the nature of ethics and rights, both Rothbard and Rand relied on a desert island approach. Rothbard (1998, 29) used the device as a methodological tool; Rand (1964c, 107; 1961a, 127) as a metaphorical benchmark or springboard. I have used the PSU as an analytical device to illustrate that positive rights are basic to the most fundamental social setting.

In examining society, Rothbard as well as others have begun the analysis by initially isolating a man alone (on a "desert" island) and then adding another man. If focus is solely on men among men, living in society

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<sup>19</sup> It could be asked, what about the father—isn't he responsible to the child? Yes, he is. My point is that the smallest possible social unit, would be mother (or guardian) and child; although in examining that unit, one thing that is notable is its vulnerability.



seems optional.<sup>20</sup> It is not. If the entirety of a human life is examined, it must be acknowledged that every human being is first a child and dependent. The primary relationship that is necessary, dependent, and universal is between mother and child. In some cases the birth mother may not be the person who takes on the responsibility. Nevertheless, there must be a responsible guardian for a human being to survive to adulthood.

### **XIII. Protection of Positive Rights for Children (and Those with Diminished Capacity)**

I have argued that parents are responsible for their children; that is, children not only have negative rights to non-interference, they also have a positive right to care from their parents or legal guardians. I made a case that if a child's negative rights were violated by his parents in a state of nature, he would not be able to retaliate or arrange for someone to do so on his behalf. For that reason, government protection should be provided in these circumstances. In addition to these cases, government protection would also apply in situations in which a child has been neglected (for example, starved to death) or abandoned by their caregivers because a child has a positive right to care.

For a child who has been abused or abandoned by his parents (or legal guardians), it would be the responsibility of a governmental protection agency to seek retribution. If a child has been abandoned or abused by his caregiver(s), the caregiver(s) would lose custody and face criminal prosecution. As a result the child would no longer have any legal guardianship. In the event that the child did not have the maturity level or resources to take care of himself or arrange for care and no one voluntarily assumed responsibility, then technically he would be trespassing on another's property regardless of where he went (Touchstone 2006, 134–35). In a case such as this, I believe the child has a right to care that corresponds to his age and maturity level until he becomes an adult.

I do not think it necessarily falls on government to provide that care if private individuals or institutions can be found to take on that responsibility. Government oversight would be necessary to insure that care was provided, however. This is consistent with Rand's position that the penal code applies to those who have the capacity to realize that they have violated another's rights; that is, adults who are mentally competent. Thus, if it can be verified

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<sup>20</sup> Rothbard referred to Crusoe ethics as the "most elementary human situation and problem" (Hoppe 1998, xxii). As another man arrives on the scene, the issues of rights, ethics, and conventions can be tackled from the perspective of two men. However, I do not regard two men as the most elementary social unit (Touchstone 2006, 91).

that a person who has broken a law is insane, he should not be punished for the crime. He should be placed in an asylum instead (Berliner 1995, 560). A person who is mentally incapacitated through no fault of his own (for instance, not because of drug or alcohol abuse), can not be held legally responsible for his actions.

In the case of the abandoned or abused child for whom no one assumes responsibility, there are two factors that make this case similar to one in which a mentally incompetent person has committed a crime. First, he would be necessarily trespassing on someone's property regardless of his location. Second, because he is a child and has not developed the reasoning capability of an adult, he is not entirely accountable for his actions if they are of a criminal nature. In this particular situation, the child would not be responsible for trespassing.

Children have a positive right to care from their parents. However, if a person is incapacitated to the point of being incapable of caring for himself, who is responsible for him? Unless someone has caused the person to be incapacitated, the Objectivist position is that no one is required to be responsible for him.

As long as the incapacitated person has the ability to pay for care, he has a right to it. If and when his resources are exhausted, the person would be trespassing on the private property of the care facility. The person could be evicted, by rights, from the facility. If no one voluntarily takes on the responsibility for his care, he would be not only in violation of the facility owner's property rights, but also of anyone's property rights onto which he was sent. However, the infringement would not be willful (Touchstone 2006, 133–34). Although technically, the incapacitated person would be trespassing, regardless of whether he remained at the care facility or was evicted, he is not responsible. In this sense, he is like the person who is insane and infringes on another's rights or the child who is abandoned and without the possibility of guardianship. He should not be sent to prison. He should be admitted to a care facility commensurate with the degree of his incapacity.

In effect, what this demonstrates is that when a person who has infringed on another's rights without intent due to diminished capacity as a condition of his existence (for instance, not because of drug or alcohol abuse), he has a positive right to non-punitive care if all his resources have been exhausted. So long as private facilities are available (funded by donations, for instance), I do not believe that it is necessary for government to provide these facilities. However, since I do think that there is an issue of rights involved, the government may be the supplier of last resort.

In either case, I do think that government oversight would be necessary since criminal acts are involved and because of the specific nature of those acts. The criminal act is trespass, but the “offender” is innocent by reason of diminished capacity. In the case of, say, a nursing home that has a resident who is incapacitated, but no longer able to pay, the nursing home would have a responsibility to notify the authorities if the facility planned to evict him and there was no one who would take him in voluntarily. The care facility would have an obligation to do this because, whether he remains at the facility or is evicted onto someone else’s property, he is trespassing. The care facility would be in the position of having prior knowledge of a crime as well as facilitating (abetting) the criminal act. To that extent, they would be culpable (2006, 138).

All humans have a right to life, but not all have the same rights. Children do not have the same negative rights as adults, yet they do have a positive right to care from their parents. Similarly those who have diminished capacity may not have the same negative rights as those who are competent adults. What both children and those with diminished capacity do have is a right to protection. Since they cannot supply this for themselves in a state of nature, I argue that government should do so; otherwise the equal protection principle is violated. Specifically, the protection and oversight would be for children or those with diminished capacity when they are abused, killed, neglected, or abandoned by their caregivers.<sup>21</sup> Because children and those with diminished capacity are in the position of being without care when their caregivers are the abusers, then if no other person or private institution takes over that responsibility, I argue that government has a role to play. At a minimum, this would include oversight to insure that those in this situation are re-located to receive care commensurate with their mental competencies. For children, this care would continue until they are adults; the degree of their responsibility and independence increasing as they mature.<sup>22</sup>

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<sup>21</sup> Technically if a person with diminished capacity runs out of resources to pay a care facility, the facility is not an abuser by virtue of no longer taking care of the person. The facility personnel would have a responsibility to notify the authorities of the situation if no one voluntarily took over care. I have indicated that if they did not, they would be facilitating a criminal act—trespass. Although the person with diminished capacity would not be responsible, the facility would. This is because the person being evicted would have diminished capacity. The facility would be culpable in the same sense (only more so) that they would be responsible for disposing of any physical object onto another’s property without the property owner’s permission.

<sup>22</sup> There is the issue of “how much” should be expended by government in the protection of rights. Protection of negative rights could involve anything from one sheriff for a given geographic area to every person having his own personal security guard (Touchstone 2006, 139). There is no profit motive to encourage productive efficiency of

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government. Similarly, for positive rights to care for the situations discussed here, there is also the problem of determining an upper limit. If the government is too generous, then it tends to crowd out private initiatives. So long as reliance is on confiscation of the offender’s property and on private donations, this is a non-issue. The same would be true for lotteries because of their quasi-voluntary nature. It becomes an issue if there is reliance on taxation, however.

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