

Justifying a Stateless Legal Order: A Critique of Rand and Epstein

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Abstract

A robust legal order can survive and thrive in the absence of the state. In this article, I defend this view by responding to defenders of the state, notably distinguished legal theorist Richard Epstein. Epstein's views are of particular interest in that he persistently argues for substantial constraints on the role of the state. Nonetheless, I argue, he does not go far enough: he remains convinced that the state is needed to ensure the legitimacy and effectiveness of a just legal order. In this, I will show, he is mistaken. At the same time, I consider pro-state arguments from Ayn Rand, who, like Epstein, was inclined unnecessarily to affirm the authority of the state.

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I. Introduction

Most people reflexively reject any appellation that contains the dreaded “A” word, “anarchism,” as it brings up pictures of bomb-throwing. Free-market anarchism, or anarcho-capitalism, partakes of using the “A” word, but is the opposite of throwing bombs. Indeed, if there are any bomb-throwers around, it is the state—the archists—not the anarchists.

What, then, is free-enterprise anarchism? It is predicated upon two principles. First, the nonaggression principle (NAP), which holds that it is illicit for anyone, *anyone*,¹ to initiate or threaten violence against anyone else.² The second side of the libertarian coin is

* I thank Stephan Kinsella, who has a very sharp eye for libertarian theory, for greatly improving an earlier version of this paper. All remaining errors of commission and omission are my own.

¹ Even people calling themselves the government (Spooner 1870).

² This is about as far apart from bomb-throwing as it is possible to be, in case you weren't paying attention.

property rights, based on homesteading,³ and legitimate title transfer (Nozick 1974). A mixes his labor with a field, and grows corn on it. B domesticates a cow, and milks it. They each are the proper owners of these two products. Anyone who forcibly takes either away from them has violated the NAP. Whereupon the two voluntarily trade. A now owns the milk even though he did not directly produce it, while B is now the owner of the corn that he did not directly produce. But each can trace their new property back to homesteading and to one of the legitimate title transfers, trade.⁴ Libertarian anarchism is the system that brooks no exceptions to the NAP or the property rights generated on this basis. This paper discusses the following topics: in Section II, the evils of statism; III, world government; IV, secession; V, government formation; VI, democracy; VII, how anarchy would work; VIII, Rand on crime and objective law; IX, Rand on protectionism and government; X, Epstein on anarchism; XI, Epstein’s defense of taxes as market mimicry. Section XII concludes.

II. The Evils of Statism

Why do anarcho-capitalists reject the state? It is because governments necessarily violate the NAP in two ways. The first is taxes. Every state forces people within its domain to pay taxes to it, whether they are willing to do so or not. Taxation is a clear and present violation of the NAP. It might be argued, in opposition to this contention, that as citizens of the country, people have agreed to pay taxes, and that these payments, therefore, are not coercive. Stuff and nonsense. Where is the evidence of any such agreement? I never signed any such contract.⁵ Did you? Of course not. What of the argument that if people do not wish to pay taxes to the government, they are free to depart?⁶ This, too, is a non sequitur. It assumes the very point at issue: namely, that the apparatus of the state has the right to compel non payers of taxes in the first place. But from whence does that right emanate? Certainly not from prior agreement, which is entirely lacking.

³ This is very important, for without an understanding of who owns what, including human bodies, it is impossible to determine whether aggression has been initiated or defended against. See on this Block (1990, 2002a, 2002b), Block and Yeatts (1999–2000), Block vs. Epstein (2005), Bylund (2005), Hoppe (1993, 2011), Kinsella (2003), Locke (1948), Paul (1987), and Rothbard (1973, p. 32).

⁴ Others include gifts and gambling.

⁵ The most eloquent statement on this can be found in Spooner (1870).

⁶ This would not apply to prisons such as Cuba, East Germany, or the USSR, but certainly western democracies allow unrestricted emigration.

The second way in which government violates the NAP is via monopoly. It demands the right to be the sole taxing authority within a given geographical area, and seizes for itself the role of arbiter of last resort in terms of court cases, police matters, and so on. If government is really a legitimate organization, why cannot two such entities exist in the same jurisdiction? Pizza-making is a licit activity. Yet, what would we think of a pizza parlor that forbade competition at the point of a gun? If statism is as valid as supplying this foodstuff, why cannot there be two, three, many states in any one area, as there are pizza restaurants?

III. World Government

An argument on behalf of the government is that without it, we would be at each other's throats. According to Hobbes (1943), life would be "nasty, brutish and short" without the intermediation of this institution as policeman. But, if we need a state to keep the peace between individuals, we must of course require an institution of this sort to ensure that groups of people do not kill each other. Nations themselves qualify in this regard. That is, they, also, are amalgamations of persons. So, we need a government to attain peace and justice between them, too.

And what, pray, is such an organization called? Why, world government, of course. At the present time, China and Israel are in an anarchistic relationship with one another. That is precisely the situation between Canada and Spain, Mexico and Australia, and so on. If life would be "nasty, brutish and short" without a government to ensure it is not, then logic implies that a world government be set up, and forthwith. Of course, if this were done, and if that institution were even vaguely democratic, then, China and India between them would pretty much run things. Very few people, certainly not minimal government libertarians, would welcome such a state of affairs with equanimity. If not, then, they must, perforce, give up their dreams of local nation-states, as they both spring from the same fallacious considerations.

IV. Secession

Yet another proof that government is necessarily in conflict with the NAP concerns secession. Here, we sharply distinguish leaving a geographical area under control of a nation, that is, emigration, from staying put and rejecting the authority of the local state. That is, Mr.

A writes a letter to the president, or prime minister, or tax authority of his country along the following lines:

Dear State:

I no longer wish to subscribe to your “services.” Indeed, I am now and hereby severing all relationships with you. I intend to live in peace with you, my new neighbor; I wish to attain an arm’s-length distance from you in all regards. Thus, I shall no longer pay taxes to you, and shall no longer expect to be “served and protected” by you.

Yours truly,
Mr. A.

What might be the reaction of any “public servant” to reading such a missive? It would be roughly the one exhibited by the U.S. bureaucrat upon receiving a declaration of war from the “attacking” Duchy in the movie *The Mouse That Roared*, starring Peter Sellers: to ignore it. Well, not quite. After he got over stomach cramps from laughing, he would presumably detach the local constabulary to arrest Mr. A. What crime did Mr. A commit? Did he violate the NAP? Of course not. He was merely severing unwanted relations with an organization he rightly regarded as a bully and a tyrant.

But is not secession necessarily associated with support for slavery? Certainly not. Yes, the South, during the unpleasantness of 1861–1865,⁷ did indeed keep slaves. But so did the North at that time. In any case, the first secession movement occurred in Massachusetts in 1825, when members of that colony wished to secede from the union on the ground that the latter tolerated this vicious institution. If it was legitimate for the thirteen colonies to secede from Britain in 1776, the same applied to some of the colonies, the Southern ones, who wished to sever political relations with others of them, the Northern ones. Slavery abounded in all of these cases; therefore, logically, it can have nothing to do with the very different issue of secession (Woods 2010).

⁷ It was *not* a civil war. That is an apt description of an altercation between two opposing armies, each of which desires to rule over the entire jurisdiction (e.g., the Spanish Civil War of 1936). Yes, this applied to the North, but not at all to the South, which merely wished to go its own way. A more truthful name for this war would be: the war of Northern aggression, or the war to prevent Southern secession.

It is more than passing curious that some people opposed to secession nevertheless favor divorce. After all, secession is no more, and no less, than divorce writ large. If two spouses may separate, then why may not two groups of people avail themselves of the right to sever connections?

V. Government Formation

Let us consider the formation of a state. It must take place on the part of individuals who were living in a given geographical area before the existence of the government, which is supposedly a contractual relationship between them. Thus, these people lived antecedently to its creation, presumably in a state of nature. It would be logically impossible for the government to have been created before there were any people around to do so. People without the state is at least a logical possibility, no matter how unjustified it would be in the eyes of statist. The government with no people is a logical impossibility, akin to a square circle.

What was the genesis of this evil institution? Presumably, a bunch of people, in our fairy tale world, got together and agreed to form a government in order to better protect their rights. It was like a club. And, when you join the golf and tennis club, you have to pay your dues. Taxes are just another name for the club dues we pay to the state club.

Was this contract unanimous? Did *all* of the individuals accept participation? Of course not. In any real world scenario, there are always holdouts and those who do not wish to go along. On what basis were those who were reluctant to join, those who did not *wish* to do so, nevertheless forced to take part? Clearly, the process would have been incompatible with the NAP.

Here is a scenario that might well have occurred in 1776 between a representative of the new country, the United States (we'll call him Mr. B), and a man living peacefully in the back woods of western Pennsylvania (Mr. C.).

B: Hey, bro, we just started up this new organization, the United States of America, and you are now part of it.

C: That is wonderful. I congratulate you on the establishment of your new organization. We'll be great neighbors; we'll trade with each other. Here, let me give you this gift to celebrate the creation of your voluntary club

B: No, no, you don't understand. You, too, are now a member of this group.

C: Moi? Oh, thank you, thank you, for asking me to join your club. But, I'm not much of a joiner. In fact, I have never joined anything. Following Groucho Marx, I wouldn't join any club that would have me.⁸

B: Stop being difficult. You're now in the U.S. territory. You'll pay taxes and obey our rules and regulations whether you like it or not. We've got more guns than you; many, many more.

C: Whoa. I was here first. I homesteaded this here land before you were born, sonny. By what right do you compel me to join your group?

B: Might makes right.

C: Well, then, at least have the decency to stop with the nonsense that yours is a voluntary organization.

In this regard Schumpeter (1942, p. 198) opined: "The theory which construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social science is from scientific habits of mind."

Insofar as agreement—that is, true consent—is concerned, imagine if we were in the state of nature, thinking of setting up a government, and someone were to say, "If we don't have a state, we'll all be at each other's throats. So, let us all agree to set up an organization that will put a stop to such temptations. Let us all give power, and our weapons, to the Jones family over there.⁹ They will keep the peace. They will settle all disputes among us, including the ones we all have with the Joneses." The immediate objection would be, "Why trust the Jones family? If we give them power over us, the temptation on their part would be to rule over us to their benefit. According to the old aphorism, 'No one should be a judge in his own case,' the Joneses certainly cannot be trusted to adjudicate matters

⁸ I know, I know, Groucho Marx lived long after the creation of the U.S. "club," but, work with me here.

⁹ See on this Rothbard (1982, p. 174).

where they are plaintiffs or defendants.” Whereupon, there would be general agreement. Immediate rejection of the Joneses as arbitrary authorities would ensue.¹⁰

A far more accurate assessment of the origins of the state is provided by Rothbard (1961) in his fairy tale about Hector, a hit-and-run robber who decides to settle down among his victims and rule from within. He encourages a caste of intellectuals to weave apologetics about why Hector’s rule is necessary and just.

VI. Democracy

Next up in the batter’s box would be the Democrat. “Yes, yes,” he would say. “We cannot trust the Joneses as hereditary monarchs.¹¹ Let us, instead, have a vote every four years to determine whom the dictator will be. A thousand pardons. I meant *president*, not dictator.”

That is one difficulty with democracy. All too often, it is a matter of “one man, one vote, one time.” Then, too, Hitler came to power as the result of a democratic vote. Enough said about democracy, at least as any sort of guarantee of compatibility with the NAP. But the basic fallacy of this system is that it presumes that a majority of people may do something to an innocent man that any one of them alone would be forbidden to do under a civilized order. If A may not assault and batter B in his quest to mulct money from the latter, because to do so would be barbaric, then it matters not one jot or tittle that A amasses a majority of voters to his side, and then with this dubious moral backing, does precisely the same thing to B as he did before. Mere nose-counting cannot, ever, convert an illicit action into a licit one. If it was wrong for A to steal from B, it is *still* improper, and precisely as much so, for A to steal from B given the say-so or approval of the masses.

VII. How Would Anarchy Work? The Randian Critique

Without government, how would courts, police, and armies function? The minarchists are socialists on these issues; only libertarian anarchists maintain that the free market could work in these areas.

But before we respond to this challenge, we must quote Ayn Rand (1962, p. 112) on this matter at some length, since she is

¹⁰ Or, “*authoritab*” as Cartman of South Park would say.

¹¹ For the argument that monarchy may actually be better for most people than democracy, see Hoppe (2001).

perhaps the most famous of the court, army, and police socialists. Here are her views on this matter:

A recent variant of anarchistic theory, which is befuddling some of the younger advocates of freedom, is a weird absurdity called “competing governments.” Accepting the basic premise of the modern statist—who see no difference between the functions of government and the functions of industry, between force and production, and who advocate government ownership of business—the proponents of “competing governments” take the other side of the same coin and declare that since competition is so beneficial to business, it should also be applied to government. Instead of a single, monopolistic government, they declare, there should be a number of different governments in the same geographical area, competing for the allegiance of individual citizens, with every citizen free to “shop” and to patronize whatever government he chooses.

Remember that forcible restraint of men is the only service a government has to offer. Ask yourself what a competition in forcible restraint would have to mean.

One cannot call this theory a contradiction in terms, since it is obviously devoid of any understanding of the terms “competition” and “government.” Nor can one call it a floating abstraction, since it is devoid of any contact with or reference to reality and cannot be concretized at all, not even roughly or approximately. One illustration will be sufficient: suppose Mr. Smith, a customer of Government A, suspects that his next-door neighbor, Mr. Jones, a customer of Government B, has robbed him; a squad of Police A proceeds to Mr. Jones’ house and is met at the door by a squad of Police B, who declare that they do not accept the validity of Mr. Smith’s complaint and do not recognize the authority of Government A. What happens then? You take it from there.

Let us do precisely that. Let us indeed “take it from there.” Suppose that there is precisely that altercation between Smith and Jones. The former goes to his court—defense provider, not *government*

A¹²—while the latter avails himself of his competing judicial-police firm, B.

There are four possible results: (1) Both A and B support Smith; (2) both A and B find in favor of Jones; (3) each supports the client of the other—that is, A rules on behalf of Jones, while B maintains that Smith is in the right; and (4) each supports its own client—that is, A rules on behalf of Smith, while B maintains that Jones is in the right. We ignore the first two possibilities on the ground that the solution is not challenging. Smith and Jones are each legally bound to comply with the results of their “own” defense agency that also serves as a court. If both A and B support either of the contending parties, that is the end of the matter. There is no conflict between the two courts. Both Smith and Jones will have no choice but to obey this unanimous decision. We also abstract from option 3 on the ground that it is needlessly complicated, and our points can be made equally well with 4, which, presumably, is what Rand and all other such critics have in mind when they do not accept the argument that competition and free markets can supply *all* goods and services, including courts.

Will court and police agencies A and B fight with each other? That would be highly barbaric, and if this were the only option, Rand, and communists of her ilk,¹³ would have landed a telling blow against free enterprise. But they did not. As free-market anarchists have made clear,¹⁴ this uncivilized result is hardly the only possible scenario. For, with goodwill on the part of both A and B assumed, and any small modicum of intelligence assumed for each, they will have anticipated this very conundrum. They will have agreed in advance that should ever any such scenario befall them, in which they end up with incompatible judicial decisions, they would call in a third

¹² Governments are necessarily evil since they always and ever violate the NAP. There will be no governments found in the truly free society.

¹³ To characterize Rand as a socialist or communist seems a bit harsh, at least upon first reading. After all, she is perhaps the person who has brought more people to the free-enterprise philosophy than any other (Doherty 2007). But a moment’s reflection will convince any fair-minded person that upon this one occasion such a description fits, and no other does. After all, here, she rejects private firms, and calls upon government to settle matters. If that is not (limited) socialism or communism, then nothing is.

¹⁴ There is a long list of such analyses; see Anderson and Hill (1979), Benson (1989, 1990), Block (2007, 2010), DiLorenzo (2010), Guillory and Tinsley (2009), Hasnas (1995), Hoppe (2008), Rothbard (1973, 1982), Stringham (2007), Tannehill and Tannehill (1970), and Tinsley (1998–1999).

court to break the tie. That is, judges A and B would both make their cases to court C, the final decision-maker or supreme court in this case.¹⁵

But wait. Suppose that A and B are not quite so accommodating and reasonable. Suppose that one or both operates under the philosophy of “my way or the highway.” That is, if the other court in this scenario agrees with it, all is well and good. But, if there is a divergence of opinion, A or B or both of them will brook no disagreement. Instead, this free-enterprise defense agency will pick up the gun and settle matters in that way. We have a word for firms of this sort: bandit courts. First, let us suppose that court A is the reasonable one, while B engages in this sort of banditry. In this case, A will only have to fight illicit courts of B’s ilk, when there are divergent court findings, while B will have to engage in violence with every other such court in that context. Since combat is ever so much more expensive than settling matters in the civilized manner described previously, we can expect under *ceteris paribus* conditions that the A defense agencies of the world will prosper, while the ones emulating B will fail. The latter will have to pay far more to their policemen, will waste additional expense for arms, and so on, placing it at a distinct disadvantage.

More important, the bandit courts will not attain crucial legitimacy in the eyes of the general public. Their customers will not be able to rely upon court decisions accepted by all and sundry. Instead, they will have to operate in a shadow world of criminality. The pen is mightier than the sword, because it determines the direction in which the sword is pointed. No truer words were ever uttered on this issue than those by Hummel (2001, pp. 527–28): “A final factor affecting warfare is . . . the motivation of the people themselves. Ideas ultimately determine in which direction they wield their weapons or whether they wield them at all.”

It is no exaggeration at all to say that legitimacy is virtually all in these matters. The police will never point their weapons at the multitude if 99.9 percent of the populace is against them, since the crowd will consist of their families and friends. Without legitimacy, no 1 percent of the population can rule over the other 99 percent. It

¹⁵ There need not be any permanence in this role. On the next occasion, A and C might find themselves in a disagreement with each other and apply to the good offices of B to settle their dispute. Or, B and C might find themselves in a disagreement with each other and apply to the good offices of A to settle their dispute.

is not for nothing that governments, everywhere, attempt to control the opinion makers of society: academia, the press, and the media. Virtually no one will respect the bandit court's decisions.

Suppose that neither A nor B are legitimate courts. Well, then, yes, they will engage in fisticuffs with one another, and bad cess to them both. In this way, they will tend to eliminate one another.

Will this system work perfectly? Of course not. No institution known to mankind, at least on this side of the Garden of Eden, will function in a perfect manner. But, compare its operation to that of the government. There, judges tend to be political hacks. In parliamentary systems, they are the ones who give up their seats in safe jurisdictions so that their newly chosen but unelected leaders can perch in the highest legislative chamber. In the United States, they pass no sort of market test; rather, they are appointed so as to reflect the political ideology of the powers that be. Private judges,¹⁶ in contrast, gain acclaim via dint of honesty, reliability, and even brilliance. Another benefit of private judges is that they would not likely waste time, for example, in prohibiting victimless crimes such as drug use and sale. Which client of a private court would be willing to pay good money to assure that people not in his neighborhood be precluded from poisoning themselves in such a manner?¹⁷

VIII. Rand on Crime and Objective Law

But Rand (1962, p. 112) is not finished with her support of defense-service socialism. She avers:

Anarchy, as a political concept, is a naive floating abstraction . . . a society without an organized government would be at the mercy of the first criminal who came along and who would precipitate it into the chaos of gang warfare. But the possibility of human immorality is not the only objection to anarchy: even a society whose every member were fully rational and faultlessly moral, could not function in

¹⁶ American Arbitration Association, Bet Din courts (Jewish), Sharia courts (Muslim), Canonical courts (Catholic), the Law Merchant. For more on this see Rothbard (1973, 1982) and Tinsley (1998–1999). Then, too, there are the private industrial arbitrators, appointed by contracting parties, to deal with disputes between engineering and chemical firms and the like.

¹⁷ For the case in favor of legalizing the use of these controlled substances, see Block (1993, 1996), Block, Wingfield, and Whitehead (2003), Cussen and Block (2000), Friedman (1992), Szasz (1985, 1992), and Thornton (1991).

a state of anarchy; it is the need of *objective* laws and of an arbiter for honest disagreements among men that necessitates the establishment of a government.

There are two issues here: criminality and the need for objective law. Let us consider these objections in that order.

First, crime. Where is the average person more in danger of the “first criminal who comes along”: in Disney World, Six Flags, and Walmart; in New York City’s Central Park or New Orleans’ Audubon Park; or on the average city street, even in “good” neighborhoods? To ask this question is to answer it. And why is that? Because the first three are all protected by private police; the latter are protected by socialist statist officers of the very sort Rand advocated. Nor is it any accident or mere empirical finding that the first set of places should be far safer than the second. There is a compelling reason why this should be so. The three commercial endeavors function in a competitive environment. This means they are subject to profit and loss considerations. If they do not satisfy customers, they will lose money. If they do not change the error of their ways, they will go bankrupt. They will be weeded out of the competitive enterprise system. That is why they are very careful to promote safety on their premises. They hire and train security staff, install cameras, and in every other way try to protect their customers (and themselves) from any miscreant who comes along.

In sharp contrast, the latter three, as statist institutions, have no such profit-and-loss considerations to weed them out. If they lose money, whether through inadvertence or plain old incompetence, they are not allowed to go bankrupt. None of the people in charge of these parks or streets loses a penny of their own money when a murder or rape occurs at the facility they are presumably protecting. Is it any wonder that private enterprise can outshine government bureaucrats when it comes to placing salt on the tails of those uncivilized enough, as in the case of the government itself, to violate the NAP?

As for “gang warfare,” there are two responses. One, combination court and police firms that are really bandits, or illegitimate, will be weeded out of operation by the forces of the free enterprise system, something Rand ordinarily fully appreciated (indeed, she has made important contributions to an appreciation and understanding of this phenomenon), but in this one case, her usual keen insight deserts her. Two, it is inconceivable that the Mafia

would operate in the realm of free enterprise (unless it reformed itself and converted to a legitimate defense agency), to say nothing of such scourges as the Blood and the Crips. It would be impossible for the Mexican drug gangs to survive if what they supplied were legalized. Under alcohol prohibition the Al Capone gang prospered, as it brought to market a good that people valued. When Prohibition ended, customers turned to legitimate sources that had a comparative advantage in supplying this item on the legal market.

What of “objective law”? Does Rand really expect such a state of affairs to arise from the likes of George W. Bush or Barack Obama? Au contraire: Objective law is precisely the NAP coupled with private property rights based on homesteading and legitimate title transfer. This champion of free enterprise unerringly hones in on this insight in every other field of endeavor save this one. Here, she exhibits a socialist blind spot.

IX. Rand on Protectionism and Government

Let us allow Rand (1962, p. 108) one further crack at free-market competing defense services:

If a society provided no organized protection against force, it would compel every citizen to go about armed, to turn his home into a fortress, to shoot any strangers approaching his door—or to join a protective gang of citizens who would fight other gangs, formed for the same purpose, and thus bring about the degeneration of that society into the chaos of gang-rule, i.e., rule by brute force, into perpetual tribal warfare of prehistorical savages.

The use of physical force—even its retaliatory use—cannot be left at the discretion of individual citizens. Peaceful coexistence is impossible if a man has to live under the constant threat of force to be unleashed against him by any of his neighbors at any moment. Whether his neighbors’ intentions are good or bad, whether their judgment is rational or irrational, whether they are motivated by a sense of justice or by ignorance or by prejudice or by malice—the use of force against one man cannot be left to the arbitrary decision of another.

This argument is highly problematic. Let us transpose it from one industry, protection, to another, corn. Her quote would then read as follows:

If a society provided no [supply of corn] ~~organized protection against force~~, it would compel every citizen to go about [with seeds and a plow] ~~armed~~, to turn his home into a [farm] ~~fortress~~, to [sow and reap] ~~shoot any strangers approaching his door~~—or to join a [group of other farmers] ~~protective gang of citizens~~ who would [share information about agriculture] ~~fight other gangs, formed for the same purpose~~, and thus bring about the degeneration of that society into the chaos of [self-sufficient farming] ~~gang rule, i.e., rule by brute force~~, into [the misery and starvation] ~~perpetual tribal warfare~~ of prehistorical savages.

The use of [plows] ~~physical force—even its retaliatory use~~—cannot be left at the discretion of individual citizens. [Farming] ~~Peaceful coexistence~~ is impossible if a man has to live under the constant threat of [lower prices] ~~force~~ to be unleashed against him by any of his neighbors at any moment. Whether his neighbors' intentions are good or bad, whether their judgment is rational or irrational, whether they are motivated by a sense of justice or by ignorance or by prejudice or by malice—~~the use of force against one man~~ [the tilling of the soil] cannot be left to the arbitrary decision of ~~another~~ [individuals; only fully collectivized farming is civilized].

The obvious retort to this criticism of Rand's is that it assumes that if government did not supply defense services, each individual would have to do this on his own, for himself, only. But why cannot specialized firms arise to provide these services, as they have in every other area of endeavor known to man. If government didn't supply corn, as they did in the USSR,¹⁸ this hardly implies that we would all have to become farmers, any more than it means that if the government did not have a monopoly post office, we would all have to deliver our own mail. No. Specialization would spring up to provide these goods and services, as indicated previously.

¹⁸ Well, they sort of did. Actually, there was mass starvation due to collectivized farming.

X. Epstein on Anarchism

Let us now consider the views of another prominent libertarian who also does not embrace anarcho-capitalism. Epstein (2011) starts out by mentioning that Obama quoted Abraham Lincoln as follows: “Through government, we should do together what we cannot do as well for ourselves.” Epstein (2011) continues, “Without a doubt, this point has some real power. The provision of classical sorts of public goods—police protection, sanitation, public highways and infrastructure—often requires government support. There is, for example, no way that the government can provide protection against foreign aggression for some individuals unless it provides that protection for all. The nonexclusive nature of classical public goods means that the nation can no longer rely on the voluntary coordination of individuals, or even of states, to deliver these services.”

In my view, Epstein is here relying on the support of the so-called market failure of public goods, one of the hoariest fallacies in all of economics, in support of a quintessentially evil institution, government.¹⁹ Epstein’s specific claim, however, may well be correct: There is, for example, no way that the *government* can provide protection against foreign aggression for some individuals unless it provides that protection for all. Note that we emphasize the word “government” here. We do so to indicate that, yes, *government* cannot deter nonpayers, free riders, from benefiting from its so-called defensive activities. However, this is entirely beside the point. The real issue is not whether government can exclude nonpayers, but whether private enterprise can do so. And, a little thought, not undertaken by socialist critics of the market such as Epstein,²⁰ indicates that, in all likelihood, it can.

¹⁹ For a more complete analysis of why this public-goods critique of laissez-faire capitalism is erroneous, see Barnett and Block (2007, 2009), Block (1983, 2003), Cowen (1988), De Jasay (1989), Holcombe (1997), Hoppe (1989), Hummel (1990), Osterfeld (1989), Pasour (1981), Rothbard (1997), Schmidtz (1991), and Sechrest (2003, 2004a, 2004b, 2007). Rothbard’s (1997, p. 178) *reductio ad absurdum* of public goods is as follows: “A and B often benefit, it is held, if they can force C into doing something. . . . any argument proclaiming the right and goodness of, say, three neighbors, who yearn to form a string quartet, forcing a fourth neighbor at bayonet point to learn and play the viola, is hardly deserving of sober comment.”

²⁰ I claim, here, that Epstein is a socialist on this one issue. This does not at all apply of course to his many and important other contributions in support of economic freedom.

Take police service first. Any private local defense agency worthy of the name, if it did not want to protect people for free as a form of marketing,²¹ could relatively easily exclude free riders from benefiting from its protection services. It might, for example, issue small signs to be worn on the lapels of its clients. No such sign, no service. Criminals can be relied upon to take note of unadorned persons and focus their depredations on nonpayers. If this did not incentivize potential victims to pay for protection, it is likely that nothing would.²² The protective agency could also issue signs to owners of stores, malls, homes, and so on. In that way, it could separate the paying sheep from the nonpaying goats, if it wished. Would it have to do this perfectly? That is, ensure that there was no free riding at all? Of course not; not any more than the owner of supposedly private goods like hot dogs or pencils would have to be guaranteed no theft of his wares would ever occur before he would open for business.

A similar analysis applies to private defense agencies protecting against aggression from foreigners. Suppose that Massachusetts is filled with hippies, wusses, sissies, nambie pambies, peaceniks, and pacifists. In contrast, Texas features Marlboro men, ex-Marines, and Clint Eastwood and Arnold types. Posit that only 5 percent of the former sign up for protection against the Russians, or the Nazis, or the terrorists, or Saddam Hussein, or whomever is the bad guy du jour, while 95 percent of the latter do so. One scenario might be that the insurance companies threaten to “lob” one into the relevant men’s room if the baddies mess with Texans, while completely eschewing the New Englanders. The insurers would, in effect, allow the 5 percent of the Texans to huddle under this protective umbrella.²³ Another scenario would be to take on the 5 percent of the willing buyers in Massachusetts, but to tell the bad guys that they may

²¹ Walmart, Six Flags, Disney Land, and your local mall, do not charge customers for the safety they provide on their premises any more than they do for the lighting, the cleaning, the parking, and other such services they make available to customers to induce them to patronize their establishments. Rather, they see these amenities as loss leaders.

²² There was a recent case where a government fire department refused to quench a conflagration that was consuming the home because the owner did not pay for this service. See on this Carden (2010). Perhaps we have been too harsh on the state. At least in this one case, it would appear that it can indeed exclude nonpayers. I owe this citation to Jesse Thomas, Chris Westley, and Rob Blackstock.

²³ These worthies might well be subject to a boycott by the 95 percent who value defense. Is there any doubt that an able-bodied non-Hasidic Israeli would be subject to scorn if he did not join the army, assuming no draft?

target only the nonpayers in that area of the country. Thus, the terrorists, or Hitlers, could violate rights there, but only on a retail, not a wholesale, basis, without provoking the retaliatory might of the defense agency. But whichever ploy is utilized, it is clear that private firms in this industry, if they do not wish to give away some of their services as a marketing device, can exclude nonpayers. Can they do this perfectly? Again, alas, no. But, no human endeavor is ever blessed with perfection, at least not in this vale of tears we inhabit.

It is more than passing curious that Epstein would mention “sanitation” as a “public good,” as something only government, not the private sector, could provide. Not only is this assertion far from the truth, but based on the best evidence, the market can offer the service of garbage collection far more efficiently, and thus far more cheaply, than can the statist.²⁴ As for “public highways,” it takes a certain amount of intellectual courage on Epstein’s part to claim with a straight face that the provision of this good cannot only be better provided, but *only* provided, via socialism. Does Epstein not realize that the first roads were private ones (Block 2009)? Does he not know that some 35,000 people die each year on the public streets and highways he so strongly and illogically champions?²⁵ He adds insult to injury when he calls for “taxes” to overcome this failure “of public goods.” It is no failure, and, even if it were, it still would not justify the imposition of NAP-violating taxes. Epstein, in other words, leaps from a positive economic statement (the market cannot provide roads and highways) to a normative one (it is justified for the government to engage in coercive activities to make up for this “market failure.”) Even if the premise were true, which it is not, the conclusion would still not logically follow.

²⁴ See on this Adie (1999, 1990a, 1990b), Ahlbrandt (1973), Anderson and Hill (1996), Bennett (1980), Bennett and DiLorenzo (1983, 1989, p. 197), Bennett, and Johnson (1980), Blair, Ginsberg, and Vogel (1975), Boardman and Vining (1989), Borcharding (1977), Borcharding, Burnaby, Pommerehne, and Schneider (1982), Butler (1985, 1986), Clarkson (1972), Crain and Zardkoohi (1978), Davies (1971, 1977), De Alessi (1982), D’Souza, Bortolotti, Fantini, and Megginson (2000), Dewenter and Malatesta (2001), Fitzgerald (1989), Frech (1976), Hanke (1987a, 1987b, 1987c), Lindsay (1976), Megginson and Netter (2000, 2001), Monsen and Walters (1983), T. Moore (1990), Poole (1976), Priest (1975), Savas (1987, 1979, 1982, 2000), Vining and Boardman (1992), and White (1978).

²⁵ For the case in favor of road privatization, see Block (2009).

XI. Epstein Defends Taxes as Market Mimicry

Let us now hear from this author on that very question. Epstein's next contribution to this issue is as follows:

What's more, the government must impose national taxes to overcome this failure. Ideally, we would like to levy these taxes in ways that mimic market transactions. In other words, we hope that these taxes will, to the extent that human institutions can make it happen, provide *each* person with benefits that he or she values more than the taxes paid to fund them. Indeed, the distinctive feature of classical liberalism is that it defends this generalized use of state coercion only when this condition is satisfied. It is the set of return benefits to the parties who are taxed that prevents taxation from becoming a massive taking from A to B through state intervention.

There are problems here. Taxes do not “mimic market transactions.” Rather, if they “mimic” anything, it is what the highwayman perpetrates upon his victim.²⁶ Moreover, it is a mystery

²⁶ Says Spooner (1870): “The fact is that the government, like a highwayman, says to a man: ‘Your money, or your life.’ And many, if not most, taxes are paid under the compulsion of that threat.

“The government does not, indeed, waylay a man in a lonely place, spring upon him from the roadside, and, holding a pistol to his head, proceed to rifle his pockets. But the robbery is none the less a robbery on that account; and it is far more dastardly and shameful.

“The highwayman takes solely upon himself the responsibility, danger, and crime of his own act. He does not pretend that he has any rightful claim to your money, or that he intends to use it for your own benefit. He does not pretend to be anything but a robber. He has not acquired impudence enough to profess to be merely a ‘protector,’ and that he takes men’s money against their will, merely to enable him to ‘protect’ those infatuated travelers, who feel perfectly able to protect themselves, or do not appreciate his particular system of protection. He is too sensible a man to make such professions as these. Furthermore, having taken your money, he leaves you, as you wish him to do. He does not persist in following you on the road, against your will; assuming to be your rightful ‘sovereign,’ on account of the ‘protection’ he affords you. He does not keep ‘protecting’ you by commanding you to bow down and serve him; by requiring you to do this, and forbidding you to do that; by robbing you of more money as often as he finds it for his interest or pleasure to do so; and by branding you as a rebel, a traitor, and an enemy to your country, and shooting you down without mercy, if you dispute his authority, or resist his demands. He is too much of a gentleman to be guilty of such

as to what happened to the protection against aggression Epstein was so concerned about in our previous quote from him. There, he was intent upon protecting people from NAP violations. But with his support for taxes, he has in effect taken all of this back. Market transactions are quintessentially voluntary. Taxes, in very sharp contrast, are compulsory. If you don't believe this, try not paying them. It is the market, not the IRS, that ensures, at least in the ex-ante sense, that each person benefits from commercial interaction. No one would ever engage in such if he didn't expect that what he received in trade would be more valuable to him than what he gave up in exchange. If "classical liberalism" really only "defends this generalized use of coercion only when this condition is satisfied," there would never be any taxation at all, and that viewpoint would fold into laissez-faire anarchism. Epstein himself gives the game away. He admits that taxation amounts to "state coercion." But, if the system he advocates showers benefits upon all parties to it, why, oh why, is there any need to employ coercion to these ends? Coercion is only utilized when people are *unwilling* to engage in a given act; when they do *not* see these phantom "benefits." If they have to be coerced into doing something, then this alone *proves* that they do not benefit, at least in their own minds.

Lastly, Epstein denies that taxes are a "taking" from A to B.²⁷ Of course they are, otherwise the system would be entirely nugatory. If money is taken from A and B, whereupon it is returned to them penny for penny, then, why undergo the process in the first place? Why not simply leave the money in A's and B's hands? In that way, the costs of the transfers could be avoided. No. When people support mulcting money from A and/or giving it to B, and expose themselves as willing to violate the NAP and engage in coercion to this end, you can be sure that there are some net losers and that others are net gainers. States Oppenheimer (1926, pp. 24–27) in this regard:

There are two fundamentally opposed means whereby man, requiring sustenance, is impelled to obtain the necessary means for satisfying his desires. These are work and robbery, one's own labor and the forcible appropriation of the labor of

impostures, and insults, and villainies as these. In short, he does not, in addition to robbing you, attempt to make you either his dupe or his slave."

²⁷ This is more that passing curious for the author of a book titled *Takings*. See Epstein (1985).

others. . . . I . . . call one's own labor and the . . . exchange of one's own labor for the labor of others, the "economic means" for the satisfaction of need while the unrequited appropriation of the labor of others will be called the "political means." . . . The State is an organization of the political means.

XII. Conclusion

In the last century, governments have murdered almost 200 million of their own citizens.²⁸ And this horrific figure *ignores* all deaths due to wars.²⁹ The number of people who have perished from nongovernmental sources is a puny fraction of this figure. Perhaps this fact will give pause for thought to those who unthinkingly accept the socialist arguments in favor of statism.

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²⁸ The chief contributors to this literature include Conquest (1986, 1990), Courtois et. al. (1999), and Rummel (1992, 1994, 1997).

²⁹ It also abstracts from highway deaths, which range from 30,000 to 40,000 per year in the United States. For the case that these, too, are the responsibility of government, see Block (2009).

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