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Anarchism and the Public Goods Issue: Law, Courts, and the Police

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In the early 1970s, James Buchanan and Gordon Tullock held a series of seminars examining anarchism as a feasible method of social organization (Tullock 1972b; Tullock 1974b). The general consensus was that that good which may be termed "security" is a public or collective good. Since "security" is both (a) essential for the very existence of any social order and (b) incapable of being supplied *voluntarily,* government, that agency with a (legitimate) monopoly on the use of compulsion and control, is indispensable.

Interestingly, numerous articles have appeared since then in *Public Choice* (Goldin; Moss; Kim and Walker; Isaak, Walker and Thomas; McCaleb and Wagner) and elsewhere (Brubaker; Marwell and Ames; Schneider and Pommerehne; Brownstein; Hoppe; Rothbard 1970–; Bendor and Mookherjee) that have called into question, on both conceptual and empirical grounds, the accepted wisdom regarding the concept of collective goods and its corollary, free riding. These articles would seem to call for a reassessment of the original "public choice" consensus on the feasibility of anarchism as a method of social organization, but to date no such reassessment has been forthcoming.

This paper is an attempt to use what is essentially "public choice" analysis—which assumes that individuals will make "rational" choices based on self-interest—to show how the primary collective good, security, might be provided noncoercively, i.e., in the absence of a state. For purposes of presentation, the broad concept of security will be subdivided into three components: (1) law, (2) the courts, and (3) the police.

The "public choice" position on anarchism is thoroughly traditional. The proposition that security is essential for social order is combined with the usually *implicit assumption* that it is a single, indivisible lump, i.e., that since security is a "nonexcludable" good, in order for it to be supplied to any one individual it must be supplied to the entire population, and supplied in the same quantity and quality. The rational individual will therefore reason that he will maximize his utility

by "free riding," i.e., by not paying. He will then be able to receive the good at zero cost to himself. The problem, of course, is that if others think likewise and decide to free ride (which they will since they are by definition rational), no one will pay and thus the very good, security, which all presumably value can be supplied to no one. Since security cannot be supplied spontaneously through the voluntary activities of individuals, the solution necessitates a nonvoluntary institution, i.e., a government, to eliminate the incentive to free ride by coercing, i.e., taxing, all the consumers of the good to insure that everyone pay his fair share (see the definitions and descriptions of anarchy and government in, for example, Bush, especially pp. 6 and 14–15; Gunning, pp. 19 and 25; Hogarty, p. 53; Tullock, 1972a, pp. 65–75; Pingry, pp. 60–61; Tullock, 1974a, pp. 65–70; Tullock, 1976, pp. 8–13; Buchanan, 1975, pp. 35–73; Auster and Silver, pp. 56–57).

The critical question is whether or not security is, in fact, an indivisible lump, as is traditionally assumed by political theorists in general and public choice analysts in particular, or whether it is capable of being broken down into marginal units and either sold on the free market or provided in some other nonmonopolistic, noncoercive way.

1. The Rule of Law

Probably the single most persistent criticism of anarchism is the assumption that where there is no government there is no law. This view of anarchism as *inherently* lawless permeates public choice analysis. Both Buchanan (1972, p. 29) and Tullock (1972a, pp. 65–75) refer to anarchism as "the Hobbesian jungle." According to Tullock there can be "no serious reason for trading" in an anarchy since "the stronger can seize anything he wishes" (1972a, p. 65). And Winston Bush (p. 14) comments that "rules concerning property rights are better than anarchy," clearly implying that anarchism is incompatible with such essential components of security as rights and law.

This view is, of course, not limited to public choice theorists. It pervades nearly all the critical literature, professional as well as popular, on the subject. Richard Taylor (p. 138), for example, maintains that anarchism is contradictory because while the goal of anarchism is individual freedom, "freedom is possible only within a legal order or, which is the same thing, only within a vastly powerful state." Peter Crosby (pp. 382–83) says that "since the anarchist eschews all talk of law; constitutional, statutory or even common," there would be "no way to legally guarantee anything." John Hospers (1971, pp. 425–27) points out that "law is a necessity for any form of social organization," and then adds that "since there is no government, there is no law." The result, he believes, would be chaos and civil war resulting, eventually, not in freedom but rather in the tyranny of the strong. Similar quotations could be provided almost indefinitely.

These criticisms would indeed be devastating were it not that, rather than an opposition to law, one finds in anarchist literature continual references to "natural law," "objective law," "common law," the "libertarian law code," "enforcible custom," etc. It is clear from any careful reading of anarchist literature that what anarchists oppose is not law but *legislation.* Not only do anarchists recognize the crucial importance of the rule of law, but persistently argue that it is government legislation, with its ability to change old laws and to create new laws on the spot, that generates precisely that legal uncertainty that violates a true rule of law (see, for example, Rothbard, 1962; Perkins and Perkins; Tannehill and Tannehill; Kropotkin; Friedman).

The critical issue then changes: is it possible to have law in the absence of legislation? Since anarchists in general usually advocate some sort of common-law approach, a brief digression on the evolution and process of the common law is necessary to make what may be termed the anarchist solution to the security issue understandable.

It is significant that many scholars who do not question the need for government have pointed out that law as a product of legislation is a very recent phenomenon. F. A. Hayek (p. 72) remarks that while "law in the sense of enforced rules of conduct is undoubtedly coeval with society," the "invention of legislation came relatively late in the history of mankind." Bertrand de Jouvenal notes (pp. 209–11) that "the power to legislate" was not a power wrested by the people from the king but was a completely novel phenomenon that appeared only when popular sovereignty supplanted the concept of divine sovereignty during the seventeenth and eighteenth centuries. Norman Cantor (pp. 171–72, 234) admits that the English common law "had no concept of either legislation or royal authority to make law by the king's will." And, he adds, "not until the seventeenth century is the idea that legislation is the manufacturing of new law clearly formulated and grasped." And Frederic J. Stimson states (pp. 2–4) very clearly that

> The "law" of the Anglo-Saxon people was regarded as a thing existing by itself. . . . It was 500 years before the notion crept into the minds, even of the members of the British Parliaments, that they could make a *new* law. What they supposed they did, and what they were understood to do, was merely to *declare* the law, as it was then and as it had been from time immemorial.

"The notion of law as a statute, a thing passed by a legislature, a thing enacted, made new by a representative assembly," he continues, "is perfectly modern, and yet has so thoroughly taken possession of our minds . . . that statutes have assumed in our minds the main bulk of the concept of law as we formulate it to ourselves."

But if law need not be a command from above, i.e., either enacted by a legislature or imposed by a king, how did it emerge and, more importantly, acquire

validity for society? Both F. A. Hayek (p. 83) and Bruno Leoni (p. 85) argue that both classical Roman civil law and English common law were, in Hayek's words, "almost entirely the product of law-finding by jurists and only to a very small extent the product of legislation." The Roman jurist," says Leoni,

> was a sort of scientist: the objectives of his research were the solutions to cases that citizens submitted to him for study, just as industrialists might today submit to a physicist or to an engineer a technical problem concerning their plants or their production. Hence, private Roman law was something to be described or discovered, not something to be enacted.

While this no doubt took place, its extent is still a matter of some dispute (see, for example, Plucknett, pp. 316–17, and Jolowicz, p. 20), and it is possible that Leoni, in particular, exaggerates the importance of judicial law-making by Roman jurists and, accordingly, underrates the importance of legislation.

Whatever the relation between custom and legislation in ancient Roman law, however, there can be little doubt as to the relatively greater significance of custom in the English common law. This is not to say that legislation was totally absent. However, as Carter and Herz point out (p. 173),

> if all legislation in England and the United States were suddenly declared null and void there would still be a body of common law and equity on which to depend. . . .If, on the other hand, common law and equity were swept away, the basic foundation in both countries for the rules governing such matters as contracts, wills, trespass, or libel would be missing, except insofar as the rules in these fields have been embodied in legislation.

Although the origins of the common law can be traced to pre-Norman England, its significant beginnings date from around the twelfth century, when individuals schooled in the law began to follow a regular route—hence becoming known as circuit judges—traveling from town to town, holding court as they went. Individuals would submit disputes to these judges, and it was from the growing corpus of these *individual* judicial decisions that a body of law, common for the whole realm, gradually emerged.

The single most important element in the common law is the principle of precedent, or *stare decisis,* in which past judicial decisions became the basis for future ones. "In a codified system of law," says Rene Wormser (pp. 237–64), "a judge may interpret the language of the written law as he wishes, regardless of precedent. This is not true of the English system, which is governed by the rule of *stare decisis,* 'to stand by decided cases.'" This meant that when a dispute was submitted to a common law judge, his duty was solely *to clarify the existing law.* This has obvious ramifications for a rule of law. Since a judge's decision was immediately binding only on the parties to a dispute, and since a single maverick decision would have little impact on the body of the law, the judge was helpless to change the law. Thus the importance of *stare decisis* was that it gave stability

and certainty to the law, i.e., it made possible a *true* rule of law. Such, briefly, is the common-law approach.

Quite clearly, then, the common criticism of anarchism as inherently lawless is not only based on the nonsequitur that where there is no government there is no law, it is also historically false. Law has existed from the earliest of times; legislation only recently. However, references to historical periods when judge-made law was the dominant form of law making are not enough to establish that such an approach is still applicable today or that it can be the sole method of law making.

There is one possible criticism of the common-law approach, made even by those like Hayek who are otherwise sympathetic to it, that challenges the sufficiency of the common law as the sole method of law making. According to this criticism, the very inability of the judge to alter the law is not only the strength but also the weakness of the common law. The gradual development inherent in common law, says Hayek (pp. 88–89) "may prove to be too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances." Consequently, he concludes, although the overwhelming bulk of the law ought to be spontaneously emerging and evolving common law, one cannot dispense with positive legislation entirely. Legislation is required to remedy the occasional shortcomings of the common law.

This criticism is questioned by numerous nonanarchist authorities on the common law. Wormser acknowledges (p. 261) that *theoretically* the principle of *stare decisis* should make the common law static and thus changeable only by legislation. But, he continues, *in actuality* "the common law has been able to grow without constant interference by legislation because judges have been able in various ways to circumvent disagreeable or obstructive precedents." And Plucknett (pp. 306–14) observes that in many cases the facts are such that the real question is which of several possible precedents or customs, or combinations of them, to use. Judges thus have some latitude in adapting the law to new and changing circumstances and guiding it away from clearly outmoded precedents.

Another important mechanism for circumvention has been noted by James B. Scott and Sir Henry Maine. It "grew out of the practice," says Scott (pp. 107–24) in ancient Roman law of speaking of the *jus gentium,* and was "molded and interpreted in response to the needs of daily life." But occasionally conditions changed or situations arose for which no law existed. It was here, he says, that "theory came to the aid of practice." The jurisconsults looked for legal or philosophical principles compatible with the common law. These principles were then used as guides for applying the common law in new cases as well as for providing new interpretations of existing law where novel situations made such law outmoded or undesirable. The jurisconsults found the natural law aspects of the Greek doctrine of stoicism useful here, and it was thus that the common law

became closely associated with natural law. Maine (in Wormser, pp. 261–62) makes the nearly identical point regarding the English common law.

Clearly an anarchist legal system might be able to respond to unforseen issues in a similar way. One example, pollution control, will suffice to illustrate the process. The important point is not that the common law did not recognize ownership rights to air space but that until recently clean air was so plentiful that the issue of ownership rights to it never really arose. But as pollution became a problem, clean air became a relatively scarce and, hence, an economically valued good. Thus a judicial decision declaring pollutants to be a violation of property rights would constitute not so much the creation of new law as simply the extension of the existing law regarding trespassing into a new area, i.e., air space. It is also important to realize that since the decision of a common-law judge is binding only on the immediate parties to a dispute, he has no power to impose his decisions on "society." Whether or not such a legal opinion would become part of the body of law would thus depend on both the state of public opinion and the views of other judges. In this case, too, reference to the routine process by which the common law traditionally handled such problems is relevant here. Doubts created by gaps in the law, Wormser (p. 262) points out, were dispelled when "a further case decides the point about which the earlier judge speculated. And if the judge who uttered the *dictum* was well respected, other judges after him might continue to follow it." I see no reason why a similar approach could not work today. If so, it would be feasible to extend the common law into such novel areas as, say, pollution control, video recorder pirating, and the use of personal computers to "invade" personal privacy.

This raises an additional question: Could the evolution of the law take place with the rapidity required to cope successfully with changed circumstances? History, again, provides the answer. Plucknett, for example, argues (p. 307) that "the remarkable feature of custom was its flexibility and adaptability." "In modern times," he says, "we hear a lot too much of the phrase 'immemorial custom.' Insofar as this phrase implies that custom is or ought to be immemorially old it is historically inaccurate." In fact, he says, a custom was considered old if it had been in existence for ten to twenty years, very old if it dated from about thirty years, and ancient if it had been around as long as forty years. In short, there appears to be no reason why the pure common law could not successfully deal with even rapidly changing situations.

In summary, one can say that since legislated law is consciously *created* for the entire society by a single group of individuals, it can change quite rapidly. In contrast, while the common law does *evolve*, it cannot change nearly as rapidly as legislated law. But this limitation is not necessarily bad; it also means that because no one individual or group can repeal existing law or create completely new law, the *continuity* of the law is maintained, thereby giving individuals the security of knowing what the law is day in and day out. That is, while there may

be greater transitional or *short run uncertainty* associated with the common law, there is also far greater *long run stability.*

This historical excursus was meant to show not only that it is possible to have law in the absence of legislation but that that was, in fact, the norm. Law can be traced back to the very origins of society, while in terms of recorded history legislation made its appearance only recently.

Up to this point I have dealt only with the *process* by which law could emerge in an anarchist society. But a question of equal importance deals with the *content* of the law. While it might be thought that the content of judge-made or spontaneously emerging law could run the gamut from libertarian to authoritarian, depending on the "sense of the community," a closer analysis indicates, I believe, that it was no accident that the common law was largely libertarian. The distinguishing characteristic of judge-made law is that the judge is called in only to settle disputes arising between two parties, and his decision is binding only on the parties concerned. But since disputes can arise only when one individual feels his rights have been violated, the cases that the judge will be asked to decide will be limited to those concerned with the scope of individual rights. *The process by which the common law emerges therefore determines, to a large extent, its content.* The effect of the body of judicial decisions designed to ascertain when one individual is aggressing against another must result in a body of law defining the protected domains of each and every individual. How large or small the protected domains will be will, of course, be affected by the way such terms as "aggression" and "rights" are defined. And since, as we have seen, judicial decisions that departed widely from popular expectations of what the law ought to be tended to be ignored by other judges, the definitions of these terms were influenced by the views predominating in the community. This means, of course, that while the content of the common law could never depart widely or for long from the views dominant in the community, it must still be stressed that the process by which common-law decisions are made must produce a body of law establishing the protected domains for individual activity. In short, *the common law probably moves the community in a libertarian direction.*

2. The Courts

Even granting that there can be law without legislation, would it be possible for a judicial system to operate in the absence of a government?

The popular view of law, derived from the mechanistic and power-grounded philosophies of Jean Bodin, Thomas Hobbes, and John Austin (and James Buchanan, Gordon Tullock, et al.?), sees it as the command of the "sovereign" to the subjects. But this exaggerates both the extent and effectiveness of power. Law, as the noted legal philosopher Lon Fuller notes (p. 209), does not operate in a social vacuum. Law is not so much vertical, i.e., the command from the

sovereign, as horizontal, in that *any* functioning legal order is dependent on the "existence of a relatively stable reciprocity of expectations between lawgiver and subject." Much the same thing has been noted by Hayek (p. 35):

> It would . . . probably be nearer the truth if we inverted that plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that law appoints authority but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and resting on a diffused opinion of what is right.

Thus while laws will tend to be obeyed as long as they are seen as worthy of obedience, i.e., as legitimate, the decisions of the legal order will generally not be felt as binding if they are continually at variance with popular notions about what is right. It is probably true to a point seldom realized that *no* social system—of which the legal order is a major component—can long endure without the at least passive support of a large majority. It is only when such support exists that the legal order can focus its attentions on the recalcitrant activities of the socially disruptive minority.

What, specifically, would be the process by which laws would be judged and enforced in an anarchy? In the absence of government there would be no tax-supported and coercively imposed "protection service." No one would have to purchase protection if he did not desire it. Yet, law is obviously a good highly valued by most, if not all, of us. In the wake of the abolition of the government monopoly in this area it is likely that, just as in other industries, companies would quickly form to supply defense or protection services to those who want them. This would no doubt entail some initial uncertainty as companies offered a variety of legal codes and "protection packages" to consumers, although much would depend on the nature of the transition, i.e., radical abolition or a gradual phase-out, phase-in process. Nevertheless, there are definite factors that would facilitate the rather quick emergence of a rule of law, even in such "morally underdetermined areas," to use Robert Nozick's term, as legal procedures. First of all, there is what may be termed "economies of standardization." A plethora of conflicting legal codes would make the provision of defense services both needlessly inefficient and prohibitively expensive. In order for any protection agency or judicial entrepreneur to offer reliable service, it would be necessary to enter into an extensive and thus very expensive series of negotiations with all other companies or entrepreneurs offering different packages. Only in this way could it be decided which provision of which particular code would take precedence in the event of a dispute between its client and the client of an agency offering a substantially different package. As a result, argues John Sneed (pp. 121–22),

> there would be . . . a tendency for codes to standardize, especially in minor detail, due to considerations of transaction costs and the cost of maintaining a stock of knowledge of other codes. Difference in codes would persist only

> in those areas where demand for non-enforcement over-rides the economies of standardization. These areas would consist largely of enforcement demands based upon moral and religious convictions, which, while not irrational, can be classed as non-rational and not subject to profit-maximization behavioral assumptions. Thus, a substantial move toward standardization would occur in the treatment of crimes of violence and infractions of commercial codes, while diversity would persist in the demand for mores-enforcement.

The uncertainty of the transition would be minimized by a second factor. With the abolition of government the "public arena" will have ceased to exist, and all property would be privately owned. It follows, therefore, that that part of the law dealing with the public arena would become irrelevant, leaving only those laws pertaining to the use and abuse of private property. As a result of these two factors, not only would a rule of law quickly emerge, but it would emerge with a generally libertarian content. Would this mean that everyone, even nonlibertarians, would be forced to live an unrestrained lifestyle?

The answer is clearly no. Since it is likely that the basic tenet of the anarchist legal code, as it emerged from the common-law process, would be the injunction against the *initiation* of the use of force, it would permit the emergence of a complex set of voluntary contractual relations, or "bilateral laws." Such laws would be created on the spot by the individuals concerned. They would be designed to deal with a particular problem and would be binding only on those voluntarily binding themselves to them. And they would automatically lose their validity as soon as the conditions they were designed to deal with no longer held. An example will make this clear. A landlord with an acute aversion to noise might decide to rent only to those who agree that they will not listen to radio, television, or stereo and be quietly in bed by eight o'clock every night. While he would be completely within his right to set such stipulations on the use of his property, it is probable that such a landlord would find very few tenants. If he were to relax his restrictions to attract additional tenants, he would be deciding that more tenants and fewer restrictions is better than fewer tenants and more restrictions. Similarly, the tenants would be deciding that the contract offered them by the landlord is a better package than any other with which they are familiar. In this way the anarchist legal code would provide for the working out by means of voluntary contracts a complex and highly flexible set of arrangements that can not only be tailored to fit each particular situation but, since it requires the *voluntary* commitment of each and every individual concerned, must be to the *benefit of all parties.*

It takes little imagination to envision just a few of the possibilities that such an anarchist legal order would permit. For example, those who find capitalism distasteful could pool their property and establish socialist or collectivist communities. In fact, there is no reason why such communities could not stipulate such things as, say, minimum wages or even tariffs for their communities. Other proprietary communities might establish rules prohibiting the use of drugs or

permitting prostitution. So long as these commitments were made voluntarily, i.e., those who disliked the rules could get out, such activities would be consistent with the common law or the anarchist legal code. That is, since the fundamental tenet of the anarchist legal code would be voluntarism, *it is compatible with numerous economic and social lifestyles.*

The foregoing enables us to clarify the role of consent in the legal process. The primary purpose of law is to regulate human behavior in such a way as to allow for the emergence of a social order in which individuals are able to interact. But a fairly common view is that in an anarchy *every* individual would have to give his consent to *every* law. This, of course, would mean that the only laws any individual would then be required to obey would be those he had consented to, thereby rendering an anarchy "lawless." This view is based on a confusion about the role of consent. For any individual to give his consent he must be autonomous, i.e., free to give his consent. This freedom presupposes a *framework binding on all individuals* prohibiting anyone from interfering with the autonomous domains of others, i.e., from initiating violence. Clearly, if the area of consent, i.e., bilateral and contractual laws, is to operate effectively, the moral and legal framework within which it operates cannot itself be based on consent. Thus, the natural law qua common law provides the fundamental legal framework within which those laws based on actual individual consent operate.

Thus far I have dealt with how a generally libertarian rule of law would be likely to emerge in an anarchist society and with how that rule of law would provide the framework for a much more complicated and flexible system of contractual laws. Earlier, reference was made to the possibility that judicial services might be supplied privately, on a competitive basis. How, specifically, would such a system be likely to operate?

First, if a dispute were settled to the mutual agreement of the parties involved there would be no problem. This is often the case, for example, when an accident victim and the other party or his insurance company agree on a settlement. Second, the two parties unable to reach an agreement may decide to submit their dispute to an arbitrator. This, too, is a mechanism used today to an extent seldom realized. Insurance companies regularly settle hundreds of thousands of claims each year. As of 1987 the American Arbitration Association alone had in excess of 60,000 members empanelled as arbitrators or mediators. "Add to this the unknown number of individuals who arbitrate disputes within particular industries or particular localities, without AAA affiliation," writes William Wooldridge (p. 101), and "the quantitatively secondary role of official courts begins to be apparent."

Third, there would be no problem in cases where both parties subscribed in advance to the same court company or arbitration agency. Since both parties had already contractually agreed to abide by the court's decision, that decision would be binding.

But what if the parties subscribed to different agencies? There would be no difficulty if both courts arrived at the same decision. This is probably not as unlikely as it might seem at first, since no court company could stay in business by rendering biased decisions in order to protect the illicit activities of its clientele. If the Smith Court Company acquired a reputation for protecting criminals, it would then begin to attract criminals as clients. But who would be willing to sign a contract with a criminal-client of the Smith Company agreeing that in the event of a dispute between two individuals, it would be taken to the Smith Company? Since both the Smith Company and its clients would be suspect, any rational nonclient would be willing to do business with a Smith Company client only if the latter signed a contract agreeing to take any dispute to an independent company. Consequently, the only disputes that would be submitted to the Smith company would be those between its own clients. If it then rendered decisions unjustly favoring one of its clients over the other, it would alienate a part of its own clientele. In fact, since both parties would expect the Smith Company to decide in their favors (that, after all is what they paid for), the Smith Company would alienate its clients *regardless* of which way it decided. In this way, *self-interest* alone would compel the Smith Company to render just decisions or go out of business.

It is important to realize that this position is not predicated on the naive belief that all, or even most men, are good or desire justice. It is based, rather, on the simple but realistic proposition that no one desires to be swindled. A might wish to sign a contract to buy a piece of land from B, a transaction that would include an agreement to take any future dispute concerning the land to an agency A knew would favor him. B would desire to have any dispute taken to a company that would favor him. Since, obviously, neither would agree to the other's terms, the transaction could be consummated only if both agreed to submit any dispute to a neutral agency. This means that the greater a judge's reputation for honesty, the more cases he will have submitted to him. And, of course, the more cases submitted to him, the more money he will earn. "What keeps A&P honest," argues anarchist theoretician Murray Rothbard (1973, pp. 245–46),

> is the competition, actual and potential, of Safeway, Pioneer, and countless other grocery stores. What keeps them honest is the ability of consumers to cut off their patronage. What would keep the free-market judges and courts honest is the lively possibility of heading down the road to *another* judge or court if suspicion should descend upon any particular one. . . . These are the *real,* active checks and balances of the free-market economy and the free society.

Consequently, he concludes, in an anarchy "any suspicion of a judge or court will cause their customers to melt away and their 'decisions' to be ignored. This is a far more efficient system of keeping judges honest than the mechanism of government."

But what would happen when agencies *did* arrive at different decisions? If one grants such companies even a modicum of common sense and foresight, it seems probable that to protect themselves and their customers from attempts by con men and other unscrupulous people to play off one court against another for their own benefit, the various courts in an area, as part of their policies, would have worked out agreements with one another *in advance* specifying to which appeals court a legal proceeding involving two different agencies would be taken. Prudential and Metropolitan Court Companies, for example, may decide in advance to take all differences between them to Acme Appeals Court Company. But Prudential and Zenith Companies might agree to take such cases to Queen City Appeals Court Agency. In this way the choice of appeals courts would be a routine matter. The contract would no doubt also stipulate that the decisions of the appeals court would be binding.

Finally, what of a dispute in which one or both parties did not have prior contractual agreements, and one of the parties refused to submit the case to arbitration? In the first place, this would probably be unlikely since the reputation of the recalcitrant individual would suffer from such refusal, causing others to be quite hesitant to have any business dealings with him. Nevertheless, there is no reason why the judicial process could not proceed despite the refusal. If, say, Abbott brought charges in the Prudential Court Company against Costello, Costello could *either* attend the trial at the Prudential Agency *or* go to his own agency, say Metropolitan. But if Costello refused to do either, then the findings of the Prudential Court would be considered binding. If the Prudential Agency found Costello innocent, the matter would end at that point. But if Prudential found him guilty, then Costello could either accept the decision, in effect pleading *nolo contendere*, or contest it by submitting the matter to Metropolitan. Of course, if Metropolitan also found Costello guilty, then that would be the end of the matter. But if Metropolitan found Costello innocent then the dispute would, as a matter of course, be submitted to the previously agreed on appeals court company, in this case the Acme Appeals Court Company (See, for example, Rothbard, 1978, pp. 191-207, and Osterfeld, pp. 336-48).

What if the courts do not have a prior agreement and cannot agree on an appeals court? This, too, would be an unlikely occurrence since there is a clear monetary incentive for the courts to reach an agreement. Their customers, after all, are paying them to decide the issue, and if they were regularly unable to decide they would begin to lose their clients. Moreover, if, say, the Maverick Court Company acquired a reputation for delaying and disrupting the proceedings, other court agencies could simply announce to *their* customers that they will no longer handle disputes involving clients of Maverick, a decision that would make individuals hesitant to have any dealings with Maverick clients. Since this would cause Maverick's clients to use other court agencies, Maverick would be compelled either to mend its ways or to go bankrupt.

At this point it might be well to summarize the legal process as it would be likely to emerge in an anarchy:

[1] If two parties belong to the same court company, the decision of that company would be binding.

[2] If they have no contractual agreement but can agree on which court company to submit the dispute to, the decision of that court would be binding.

[3] If they subscribe to separate courts, the decision is binding if the courts agree. If they disagree, they will submit the dispute to an appeals court, which usually will have been chosen in advance, and that decision would be binding. If there is no prior agreement and the courts cannot decide on which appeals court to take the issue to, then the individual parties could work out on agreement on their own. If this, too, cannot be done, then no decision could be made. This would be extremely rare, for if a company regularly engaged in protracted and costly legal proceedings, other courts would refuse to do business with it, causing it to lose many or most of its customers, and thereby risking bankruptcy.

[4] If one individual refuses to submit a dispute for arbitration, the other party may go ahead and submit it to his company, and the decision of that company would be binding unless the reluctant party then submits his case to another court agency. The decision would be binding if the two courts agree. If they disagree, the case would then be submitted to an appeals court as described in [3].

4. Police Protection

Assuming that human nature in an anarchy would be no different than in a society with government, violent crimes such as murder and rape would still occur. Hence the need for police protection—defined here as the use of *retaliatory* force against individuals *initiating*, or attempting to initiate, the use of force against others—would remain. How might such protection be provided without government?

Since such protection would be highly desirable, it seems reasonable to suppose that defense agencies or police companies would form to provide protection services to consumers on a contractual basis. While there are numerous ways this might be done, the most likely is for such services to be "sold on an advance subscription basis, with premiums paid regularly and service to be supplied on call" (Rothbard, 1971, p. 4). The various police companies could offer their services on the market. Any individual could either provide for his own defense or purchase the services of one of the competing companies. Just as with any other good or service, the market would provide an abundance of protection policies offered at different rates and designed to meet a host of different consumer needs so that those who wanted bodyguards twenty-four hours a day could hire them, while those who merely desired an occasional nightly check of their property could get that too. No one would be forced, i.e., taxed, to pay for protection he did not want, and everyone would be free to purchase the quantity

and quality of protection services he desired, including none at all. It is precisely the competition between defense agencies, competition that by definition is absent when protection is supplied by the government, that would ensure that protection in an anarchy would be both better and less expensive than that obtained through government.

Several arguments can be, and have been, advanced against the idea of competing police agencies. An examination of these will help to clarify several important aspects in the proposal to provide police services on the market. These arguments are as follows:

1. The argument that either a "minimal state" or a Mafia-like agency would emerge through economic competition.
2. The argument that a Mafia-like agency would emerge through aggression.
3. The argument that selling protection services on the market would generate insecurity.

Each of these will be examined in turn.

1. The Competition Argument. Philosopher Robert Nozick (pp. 3–146) argues that because of the nature of the services being offered, a system of competing police protection agencies would give way to single "dominant protection agencies," or DPAs, operating in geographically distinct regions. According to Nozick, the effectiveness of any agency's protection would vary positively with the size of the agency. Thus, as one agency began to prosper, individuals would begin to shift their patronage to that agency. As the income of the competing agencies then fell, the scope and quality of their protection services would likewise decline. The competing agencies, he says, get "caught in a declining spiral," and the result is the emergence of a DPA. Since Nozick believes that the DPA *should* proceed to provide protection to everyone in its geographical area, it would then become a minimal, or "nightwatchman," state.

But philosopher John Hospers argues that the agency could also use its dominant position to *victimize* rather than protect "its" clients. "Perhaps the most important assumption of all," he says (1973, p. 21),

> is that there would continue to be a group of defense agencies (and courts) which *would remain competitive.* This is indeed one way in which the scenario could be written. But there are other ways. Suppose that one agency became so superbly efficient . . . that it became larger than any of the other agencies and . . . had, say, 99 percent of the business for a thousand miles around. . . . We would then have a defense agency grown so swollen with success that it could do just what it liked: it could turn into a criminal gang. . . . This would be in fact, if not in name, a military takeover. And the result would be . . . an aggressive bandit government.

A serious problem with the Nozick-Hospers line of argument is that they envision a number of dominant agencies whose areas of operation are geographically

distinct. But if the advantages of being a client of the dominant agency are so irresistable, and if, as Nozick says, "economies of scale" are positively correlated with increasing size, then, by the logic of Nozick's own argument, the protection agency of optimal size would be *the entire world.* Apparently, notes Lawrence Moss (p. 21),

> something imposes a limit on the expansion of a single protection agency in a given geographical area. If, for example, the marginal cost of adding individuals to the protection agency rises, there may come a point, with rising average cost, at which the marginal sacrifice of private goods as perceived by the choice-making individual is greater than the marginal gain in security. At this point . . . the optimal size for the protection agency has been achieved.

In the United States today there are approximately 40,000 police forces, ranging in size from one man to 30,000 men. Even if the optimal economic size of a protection agency were such that the market would not support 40,000 agencies, there is simply no reason to suppose, short of making the unrealistic assumption that average cost will steadily decline as the size of the agency increases, that this will lead to a dominant agency.

This argument is supported by the available empirical evidence. According to conventional wisdom, the consolidation of many of the 40,000 departments would permit much more efficient and effective police service. This wisdom was placed in considerable doubt when several recent studies, such as those done in Indianapolis, Indiana; Grand Rapids, Michigan; St. Louis, Missouri; and Nashville-Davidson County, Tennessee, all indicated that relatively small police forces were not only more efficient but also more economical (see, for example, Ostrom, p. 15).

But if large jurisdictions are economically and socially irrational, they would not be supported on the market. And if that is the case, the scenario depicted in the Nozick-Hospers critique could not occur. Not only is there no *economic* reason to expect the emergence of a DPA, it is possible that the optimal size of a defense agency would be such that the number of agencies might exceed 40,000.

2. *The Aggression Argument.* A second argument against competing police agencies is that nothing would prevent an agency from using force to conquer or absorb weaker agencies until it attained a position of unchallenged dominance, which it could then use to exploit its clients. The Mafia-like agency would achieve its dominance through aggression rather than economic competition. While not specifically directed at anarchism, this is the criticism raised by George Berkley and Douglas Fox against any decentralized political system (pp. 25–26). Germany's Weimar Republic, they point out, rested on a federal base. Most German states outlawed the Nazi Party, but Bavaria did not. "This gave the Nazis a sectional base on which to build. Then, when they did become a nationwide movement, they found that the individual governments of the states . . . were each too weak to curb their frequently unruly and unlawful tactics. There were thirty-

three police forces in Germany at the time and the Nazi Party soon became stronger than any one of them." In contrast, the French government was centralized and acted with vigor. With a single police force for the entire country, it was able to take decisive action against the attempted fascist and Communist takeovers of 1934.

This is an interesting criticism. However, if one starts from the plausible assumption that while nearly everyone values protection and security and only some will desire aggression against others, then those companies most adept at providing protection and security will get the vast bulk of the business. The moment any agency turned from attracting customers by providing protection services to coercing individuals into buying its policies, it would simply "compel them to buy protection from its competitors and drive itself out of business" (Tannehill and Tannehill, p. 81). If an agency initiated violence against individuals who were not its customers, it would be forced to deal with their defense agencies. Since other agencies are paid to protect their customers while the aggressive organization is paid to terrorize others, the latter would find itself in direct confrontation with all other agencies. Working for the criminal agency would thus become increasingly risky, and the agency would have to pay its employees high salaries to compensate them for the risk. Aggression would become less and less profitable and thus less attractive because the higher costs to the aggressor company would compel it to raise its premiums. The victims of theft, argues the anarchist David Friedman (p. 167),

> will be willing to pay more to be protected than the thieves will pay to be able to steal (since stolen goods are worth less to the thief than the victim). Therefore the noncriminal protection agencies will find it profitable to spend more to defeat them. In effect, the criminals fight a hopeless war with the rest of society.

Further, since the defense agencies are paid to protect their clients from aggression, they would have no reason to cooperate with the criminal agency. Even if the criminal agency had its own court, it is unlikely that its decisions would be heeded, for any other court honoring the decisions would, out of its clients' own interests, begin to lose its own customers. Finally, since insurance companies indemnify their policy-holders against the destruction and theft of their property, they would have a vested interest in seeing that such aggression were held to a minimum. It is logical to suppose that insurance companies would stipulate that their customers install burglar alarms or other security devices and have them connected to their defense agency's office. They might also insist that a client purchase his protection services from certain police companies in order, as the Tannnehills put it (pp. 85–86), "to avoid having him hire an inefficient or fly-by-night defense agency at a cheap price while counting on his insurance to make up for any loss which their ineffectiveness caused him." Thus, they continue,

> Insurance companies, *without any resort to physical force*, could be a very effective factor in bringing an unruly defense agency to its knees via boycott and business ostracism. . . . It would be difficult, indeed, for any defense company to survive if the major insurance companies refused to sell insurance not only to it, but to anyone who dealt with it. Such a boycott would dry up a major part of it the defense company's market in short order; and no business can survive for long without customers. There would be no way for a defense agency to break such a boycott by the use of force. Any threatening or aggressive actions toward the insurance companies involved would spread the boycott as other businesses and individuals attempted to stay as far away from the coercive agency as possible.

The possibility of collusion among several agencies would not alter the situation. We have seen that there are good reasons, both empirical and analytical, to believe that there would be numerous agencies operating in the protection field. Thus, if even a Mafia cartel were formed, the presence of independent agencies would bring about its quick collapse for the reasons already discussed.

In fact, the aggression argument is actually more applicable to governments than anarchies. An anarchy would be characterized by multiple centers of power. But the state, with its monopoly on the use of force, is characterized by a single power center. Since it would be much easier to take over a single center of power than multiple centers, the fear that a tyrant might take over is actually a compelling argument *against* government and *for* anarchism.

In short, the prospect of being victimized by a Mafia agency or even a Mafia cartel is remote. Moreover, given the increased efficiency of police companies in an anarchy, it is logical to suppose that crime would no longer, or less often, pay, in which case the crime rate in an anarchy would be well below that in a statist society.

Anarchism, however, is not a panacea. The *possibility* of a Mafia-like agency cannot be entirely dismissed. But this possibility must be placed in perspective. Just as there could be criminal agencies in an anarchy, so there could be and, as the widespread police and government corruption clearly shows, there are state and city police departments that can only be termed criminal. It is significant that since citizens have no alternative to these police departments in a statist society, there are no or only weak checks on police corruption and victimization. Consequently, one would expect to find less police corruption in a system in which police services were offered on a private basis and individuals could take their business elsewhere than in a system in which such competition is absent.

The empirical evidence on this issue is, of course, minimal. However, the Protection Section of the American Railway Association was close to being a purely private police agency. The section was studied by Jeremiah Shallou in the 1930s, when it constituted a force of over 10,000 men. The record compiled by the railway police, or "private armies" as Shallou calls them, was incredible. Between 1919, when they were organized, and 1929, when Shallou's study was begun, they

succeeded in reducing freight claim payments for robberies from $12,726,947 to $704,267 per year, or by 97.7%. And their percent of arrests turning into convictions was likewise phenomenal: regularly over 80%. But what particularly impressed Shallou was the comportment of the agents. "The fact that so few complaints have been directed against them," he says (in Wooldridge, pp. 116–17), "is eloquent of the efficiency with which they are controlled by the railroads. In Pennsylvania the state exercises no control whatever over these police. . . . Railroad police are responsible to the company by which they are employed and no one else."

In short, criminal agencies *might* exist in an anarchy. But one must not forget that they *do* exist in today's statist society. The real question is which system is more likely to result in a greater amount of criminal activity, private and public? A competitive system works automatically to minimize the incidence of corruption and criminality by both citizens and the police. It seems likely that it would also work to minimize the possibility of would-be dictators, of budding Hitlers, from gaining the "Bavarian base" they need to launch their takeovers. The aggression argument is therefore not particularly convincing.

3. The Insecurity Argument. In addition to his argument that competition in defense services would lead to the emergence of a DPA, Nozick contends that the knowledge that one is living is a society permitting individuals to engage in acts of "private justice" would produce public insecurity. The solution, he says, would be for the protection agency to forbid even nonmembers from engaging in such acts against clients of the company provided the independents are *compensated* for "the disadvantages imposed on them by being prohibited self-help enforcement." Compensation would be in the form of "protective services to cover those situations of conflict with the paying customers of the protective agency." Since the DPA could prohibit not only its own clients but nonclients as well from defending themselves provided they receive compensation, the DPA becomes, in effect, a minimal state.

Would an anarchy be a society permeated by insecurity? Assuming the existence of a clear rule of law, and given the overwhelming advantages of specialization, it seems safe to conclude that the vast majority of individuals would hire police agencies to act on their behalf. Consequently, acts of "private justice" would be few and far between and, when performed, it seems likely that they would be done with a fair degree of care. If so, the possibility that such acts could occur would generate very little insecurity. After all, if any individual or employee of a defense agency did

> negligently or aggressively apprehend individuals, the improperly detained individual may charge the defense agent employee with aggression and negligence. The mistakes by defense agents will be covered by the insuring bonding company. Under these conditions, a defense company will not retain an employee making an unreasonable number of mistakes, because the cost

> of insuring such personnel would soon become prohibitive for them. There is thus an automatic protection against "police" brutality, which cannot occur in a legal [statist] society (Perkins and Perkins, p. 101).

Two final points should be made in this context. First, anarchism does not necessarily mean that every individual need provide for his own defense at all times. It is possible that landlords would supply their tenants with police protection as part of the rental agreement. Insurance companies, anxious to keep down the crime rate, might provide protection to their subscribers as part of their policies. And owners of various business complexes such as shopping centers or downtown areas would have to maintain safe and pleasant surroundings in order to attract customers. Numerous other scenarios are possible.

Second, what of the individual who is too poor to purchase protection? Would he or she be condemned to go without protection? This, it must be acknowledged, is a possibility, and although such a possibility must be lamented, it must also be placed in perspective. Such a situation is hardly unique to an anarchy. It is fairly obvious that there are *no* governments that *in fact* (as opposed to theory) parcel out protection equally. Some individuals and groups receive special attention; others receive very little. Few would contend that American blacks or Russian Jews receive adequate or equal protection from their governments. Moreover, it is precisely in a society where protection services were not monopolized that inadequately protected individuals and groups could actually do something about their predicaments. There would be nothing to prevent poor individuals from getting together to pool their resources to purchase the services of a defense company or to establish their own organization.

In brief, the insecurity argument is no more convincing then the aggression argument. Not only is police protection likely to be better and more convenient in an anarchy but, given the inefficiency of government operations, there is little doubt that it would be far less expensive as well.

5. Conclusion

The public choice theorists maintain that government is necessary in order to insure the provision of public goods. "Security," the most important of all "public goods," has been examined in detail. The basic operating assumption used throughout was that used by the public choice theorists themselves: rational decision making by individuals acting in their own self-interest. The public choice consensus that security is a "nonexcludable good" that can therefore be dispensed only by government, that anarchism would be a "Hobbesian jungle," has been called into question. It was argued that the components of "security," laws, courts, and the police, can all be broken down into marginal units and provided on the free market. If so, then the public choice consensus must be reexamined. Either security is not a collective good, in which case government is not necessary for

its provision. Or, security is a public good but such goods *do not require government* for their provision. Regardless of how one chooses to view the matter, it is clear that the public choice consensus is badly in need of reconsideration.

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