

DISCUSSIONS FROM THE AUSTRIAN SCHOOL: MINIMALIST AND ANARCHO-CAPITALIST APPROACHES TO AND CRITIQUES OF PUBLIC INTERNATIONAL LAW

Scott James Meyer*

ABSTRACT

The Austrian School of Economics as represented by such notable scholars as the Nobel Prize winner Friedrich Hayek and classical liberal scholars Frederic Bastiat, Murray Rothbard, Ludwig Von Mises and others has fostered a robust and meaningful approach to international law. The principles of the Austrian School including non-aggression, unfettered free trade, anti-collectivism, individual autonomy and many others will make for a deep and interesting critique of the current direction of international law, especially international human rights and education or “the rights of the child.” This article critiques international law assumptions and theoretical positions through the lens of the works of the authors mentioned above as well as current leading scholars from the Austrian perspective. The article attempts to discover if a well-reasoned critique of international law from the Austrian perspective is compatible with a realistic and effective approach to international peace and order. Findings suggest that while significantly better than some domestic law systems, public international law currently fails to adequately provide individuals with the level of holistic protection necessary to secure for them, the libertarian ideal of individual autonomy, personal sovereignty and unfettered liberty.

I. INTRODUCTION

*By liberty I mean the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion.*¹

Austrian economics, a school of thought² that dates back to the 15th century, has been most prominently defined, and promulgated by the works of the academics Ludwig von Mises, Murray Rothbard and Nobel Prize Laureate Frederick Hayek.³

The Austrian school is defined by numerous characteristics, but most notably by a devotion to the encouragement of private business in society while fiercely opposing all taxes, price controls, and other government interference and regulations that inhibit, restrict or otherwise coerce and manipulate private enterprises.⁴ This makes Austrian

* LL.M. (International Law), University of Glasgow School of Law.

1 Lord Acton in his speech ‘The History of Freedom in Antiquity’ (February 28, 1877).

2 In order to avoid confusion, it should be said that Austrian economics does not reflect the economic situations of the nation of Austria.

3 Mises Institute, *What is Austrian Economic?* available at <http://mises.org/etexts/austrian.asp> (last visited March 23, 2011).

4 LLEWELLYN ROCKWELL JR., WHY AUSTRIAN ECONOMICS MATTERS? 1, 8 (1995).

Economics different from anarchism or libertarianism in its standard form because Austrians deliberately use the rules of classical liberal economics as tools to protect and expand personal liberty while curbing the influence of the state into private decisions and relationships. Llewellyn Rockwell Jr., president of the Ludwig von Mises Institute, sums up Austrian economics in this way:

*Austrians view economics as a tool for understanding how people both cooperate and compete in the process of meeting needs, allocating resources, and discovering ways of building a prosperous social order. Austrians view entrepreneurship as a critical force in economic development, private property as essential to an efficient use of resources, and government intervention in the market process as always and everywhere destructive.*⁵

Austrian economics is an approach to the study of human action and the social world of humanity, not a set of political or other policy conclusions.⁶ For the purposes of this paper, the working definition of Austrian economics is the individualist worldview of the great names of the movement including the aforementioned Ludwig von Mises, Murray Rothbard and Frederick Hayek along with other notable and important economists like Carl Menger, Henry Hazlitt, Albert Jay Nock and more. The specific notions, theories, approaches and beliefs of the Austrian school will be set out in specific detail below. Austrian economics and anarcho-capitalism (their nuances and differences to be delineated shortly) both comprise a focused and specific viewpoint for critique occupying a robust and specific position within the framework referred to as “minimalism” by Dr. John C.W. Touchie in his work “Hayek and Human Rights: Foundations for a Minimalist Approach to Law”. The growth of Austrian economics into anarcho-capitalism and its value to and method of critiquing public international law, especially international human rights law and closely related issues, will be the focus of this paper.

The most prolific Austrian scholars are Ludwig von Mises, Muray Rothbard and Frederick Hayek. Some libertarians may quibble with this statement but it is my opinion that no other thinkers have contributed more to the field of free-market economic theory more than these three individuals. Their legacy is intact at such economic departments as New York University and George Mason University in the United States.⁷ I will briefly discuss each of these influential thinkers and their major contributions to economic, legal and individualist theory.

5 *Id.*

6 Steven Horwitz, *What Austrian Economics is and What Austrian Economics is Not ?*, available at <http://www.coordinationproblem.org/2010/11/what-austrian-economics-is-and-what-austrian-economics-is-not.html> (last visited March 24, 2011).

7 Mark Skousen, *What are the Best Schools in Austrian Economics?*, available at <http://www.thefreemanonline.org/columns/where-are-the-best-schools-in-austrian-economics/> (last visited March 23, 2011).

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Ludwig von Mises fled the Nazis in 1940 and then proceeded to write his seminal work “Human Action”.⁸ Human Action has gone on to be arguably the most highly visible and valued work produced by an Austrian scholar. Rothbard himself said about Human Action:

For here was a system of economic thought that some of us had dreamed of and never thought could be attained: an economic science, whole and rational, an economics that should have been but never was. An economics provided by “Human Action”. The magnitude of Mises’s achievement may also be gleaned from the fact that not only was Human Action the first general treatise on economics in the Austrian tradition since World War I; it was the first such general treatise in any tradition.⁹

Murray Rothbard capitalized on the work of Mises and produced his influential and incendiary anti-state book “Man, Economy and the State.” Thus Murray Rothbard perhaps became the first major scholar who used the principles of Austrian economics to support anarchy and what came to be known as “anarcho-capitalism”.¹⁰ There will be a more developed discussion of this term below. The book “Man, Economy and the State” was instrumental in introducing a dedicated anti-state anarchist element beyond economics into the cause of the Austrian school.

Nobel Prize laureate Frederick Hayek is best known for his classic work “The Road to Serfdom.” It persuasively stated that “an extensive government role in the economy inevitably means a sacrifice of personal freedoms”.¹¹ His influence on the Austrian school was undeniably immense.¹² As I am currently living in the United Kingdom, it is worthwhile to note that the work of Hayek profoundly influenced the British Conservative party of the 1940’s and Winston Churchill in particular¹³, as Hayek’s hatred of central planning was considered a great tool in the ideological debate against the statist central planning of National Socialism.

Austrian economics (as well as libertarianism and anarcho-capitalism in general) has been thrust further into the spotlight due to the phenomenal popularity of Texas Congressman and former United States presidential candidate Ron Paul.¹⁴ Paul has said

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- 8 Jörg Guido Hülsmann, *Ludwig von Mises: American National Biography*, available at <http://mises.org/misestributes/misesjgh.asp> (last visited March 23, 2011).
 - 9 MURRAY ROTHBARD, *THE ESSENTIAL VON MISES* 36. (1st. ed., 1980).
 - 10 Roberta Modugno Crocetta and Murray Rothbard, *Anarcho-Capitalism In The Contemporary Debate: A Critical Defense*, available at <http://mises.org/journals/scholar/roberta.pdf> (last visited March 24, 2011).
 - 11 Greg Mankiw, *Austrian Economics*, available at <http://gregmankiw.blogspot.com/2006/04/austrian-economics.html> (last visited March 24, 2011).
 - 12 Peter G. Klein, *Biography of F.A.Hayek*, available at <http://mises.org/about/3234> (last visited March 24, 2011).
 - 13 Richard Cockett, *The Road to Serfdom - Fifty Years On*, *History Today* 44 Issue 5, available at <http://www.word-gems.com/wealth.hayek.50th.html>.
 - 14 Frank Newport, *Obama in Close Race Against Romney, Perry, Bachmann, Paul*, available at [http://www.gallup.com/poll/149114/Obama-Close-Race-Against-Romney-Perry-Bachmann-Paul.aspx\(utm_source=alert&utm_](http://www.gallup.com/poll/149114/Obama-Close-Race-Against-Romney-Perry-Bachmann-Paul.aspx(utm_source=alert&utm_)

openly that he entered politics because of his passion for Austrian economics¹⁵ and his campaign rhetoric and message constantly revolved around the themes laid out by Mises, Rothbard and Hayek (indeed, he was very good friends with Rothbard for nearly 30 years). The most influential organizations promoting Austrian economics are the Ludwig von Mises Institute (with branches in the United States, Europe and Brazil), the Foundation for Economic Education and the European Center of Austrian Economics Foundation. Institutions such as the Cato Institute and the Reason Foundation are also closely aligned with the Austrian school. Austrian Economics is not simply an outdated ivory tower debate but rather a tangible and timely movement currently influencing the real world of politics and economic markets. This will be an important method of critique because the idea of the free market itself is conceptually interdependent on the notions individual self-ownership, property rights and encroaching governmental coercion.¹⁶

II. WHY THIS CRITIQUE IS IMPORTANT TO THE STUDY OF INTERNATIONAL LAW

The following critique and discussion are important because the precepts of mainstream international human rights law, if worthy of being studied and discussed, will stand up to rigorous critiques of both those who claim that it does too little as well as those who accuse it of doing too much.¹⁷ In our present situation of budget cuts and bureaucratic excesses, perhaps a minimalist critique may prove timely, relevant and helpful. One of the goals of international law is to support order in the world and the attainment of humanity's fundamental goals of advancing peace, prosperity, human rights and environmental protection.¹⁸ I firmly believe that a rigorous and fair critique of international law through the anarcho-capitalist lens will help international law in its quest to fulfill this purpose. It is the radical and controversial nature of its power of deconstruction that so energetically yields itself to critiquing law in general and international law human rights law especially.

The question is: can the laudable goals of international law be more justly and effectively met by applying a minimalist, Austrian economic and anarcho-capitalist critique? What assumptions of international law theorists harm the cause of personal liberty? I will attempt to apply this critique by delegitimizing the mainstream assumptions of popular international human rights law theory and also in turn gain some ground for the acceptance of the Austrian viewpoint in the current international human rights law conversation. In

medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=All%20Gallup%20Headlines%20-%20Politics (last visited August 22, 2011).

15 *Id*

16 WILLIAMSON M. EVERS HOBBS AND LIBERALISM, 4,5 (1975) .

17 The use of the word "law" here meaning the discipline of studying the proper way, in theory, of how the rules of governments ought to apply to individuals living in a society.

18 MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (1st ed. 2008); ROBERT DALE OWEN AND FRANCES WRIGHT, TRACTS ON REPUBLICAN GOVERNMENT AND NATIONAL EDUCATION 16 (1847).

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order for international law to free nations and protect the rights of all the world's citizens they must first free each individual by allowing them to live in a world dictated not by the whims and desires of the state or states but by their own sense of calling, duty and preference. I hope that my paper helps in this regard.

I will be looking at the organs, stances, resolutions and majority opinions of the United Nations and the European Union international human rights law regimes, as well as other bodies where stated.¹⁹ I will be critiquing the mainstream international public law academic establishment and engaging scholars who support these regimes where relevant and important discussion demands it and where space allows.

III. ANARCHO-CAPITALISM

I will now define what Anarcho-Capitalism is and why it represents a worldview and legal theory consistent with and derived directly from the works of the famous Austrian scholars. In regards to minimalism and a critique of international law, anarcho-capitalism is the logical and proper extension of thought propounded by the Austrian school of economics. Though the basic concepts of anarcho-capitalism are at times unoriginal in regards to the content of the previous work and thought of the Austrians, what is distinctly and increasingly original is the manner in thinking and practice in which the original Austrian concepts are wielded and extended. Anarcho-capitalism is the practical summation of hardline Libertarianism and Austrian economics. It is important to note that anarcho-capitalists are not against rules or laws. They are against the unjust imposition of governmental pressure and coercion onto free individuals. For my purposes, it is a convergence of these anti-state traditions.

I did not start my discussion and critique with anarcho-capitalism because Austrian economics came first and it is the credible, necessary and legitimate groundwork laid by the historical and famous names of the Austrian school that helps to lend credence to the small and oftentimes demeaned, harangued and dismissed libertarian or anarchist movement within the international legal community. I am attempting to show the anarcho-capitalist movement as an internationally acceptable and functional scholarly pedigree dating back many years, astutely capturing the minds and attention of the economic arena before our current era of centrally controlled and essentially Keynesian practice of economist and governments of today.

Like any utilized popular theory, there exists many strains, traditions and opinions within that idea. In order to not get bogged down in esoteric debates about what anarcho-capitalism is, I submit the following definition and ask that any libertarian purist who might wish to debate the nuances of my definition assume that anarcho-capitalism in

¹⁹ By the terms "European Union" or "EU" the author does not mean the broader economic union of Europe but rather the human rights regime represented by such entities of the European Court of Human Rights and European Convention on Human Rights.

terms of my critique is interchangeable with anti-state minimalism, libertarianism, mini-archism (anarchy with an objective social order), private-property based individualism or any other limited-government viewpoint that is built on the tradition of the Austrian school. It is not simply any form of limited-government “constitutionalism,” because as Hayek said when seeing the governments of the world expand, “our attempt to secure individual liberty by constitutions has evidently failed”.²⁰

Utilizing the work of Mises, Rothbard and Hayek, I define anarcho-capitalism as a philosophy that is devotedly opposed to collectivism, aggression and coercion of any kind, statism, taxes and war while dedicated to the principles of individual sovereignty, free expression, completely unrestricted free markets and voluntary interactions. In the context of international law, I define anarcho-capitalism as a philosophy that seeks to bring all international public law interactions under submission to the rules of anti-coercion and anti-collectivism in addition to upholding the rights of the individual above those of the domestic state, foreign state, union, alliance or any other organized group. As anarcho-capitalism is concerned with the sanctity of the individual, the critique will primarily be about how international legal policies, declarations and expectations affect the personal liberty of the individuals in the states rather than the states themselves. It is concerned with individual sovereignty much more than it is with national sovereignty.

Anarcho-capitalism does not at all mean that there is an absence of law or order. Quite to the contrary, I will discuss how anarcho-capitalism holds the legitimate rule of law in extremely high esteem. It does however mean an absence of state-induced coercion in any area or public or private life. The term “anarcho-capitalism” is obviously a variation of a portmanteau combining the words “anarchy” (meaning without government) and “capitalism” (meaning private markets, or for our purposes, the human action of free individuals seen both domestically and internationally). The term essentially means “human interactions without government” through truly voluntary actions.

Though anarcho-capitalism may sound radical to the uninitiated, it is actually not at all far removed from classical liberalism of 19th century Europe²¹ or the constitutionalism of the American founding fathers.²² It is not an uprising, rebellion, revolution or political platform. It is not militant nor is it antagonistic. It is never aggressive or violent. It is simply a methodology of study designed to deconstruct ideas down to a place most compatible with personal autonomy and liberty.

20 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY VOLUME I: RULES AND ORDER* 1 (1973).

21 Ralph Raico, *What Is Classical Liberalism?*, available at <http://mises.org/daily/4596> (last visited March 24, 2011).

22 Ron Paul, *Interview with Alan Combes*, available at <http://www.ronpaul.com/2010-05-21/ron-paul-the-founding-fathers-were-libertarians/> (last visited May 1, 2011).

IV. THE UNIQUE SOURCES AND AIMS OF INTERNATIONAL AND ANARCHO-CAPITALIST LAW

To properly compare and contrast the sources, aims and understandings of law in both the international law and anarcho-capitalist senses, a brief discussion is in order. Once we see how each viewpoint embraces law, we will be able to more effectively critique one with the other.

A. INTERNATIONAL LAW

The authority and function of law are some of the primary ideas that we will examine in discussing how each viewpoint (mainstream international law and anarcho-capitalism) understands the law to operate. Many international law scholars subscribe to the positivist philosophy of law²³ as did the majority of the international law scholars in the past.²⁴ According to the popular and mainstream international public law establishment, the sources of international law are generally thought to be the ones listed in the Article 38(1) of the Statute of the International Court of Justice.

International law generally refers to the duties of states towards other states. International law is not built on the obligations of individuals but on the obligations, duties and actions of states and according to Professor Eric Posner it could be no other way. If it were not so, he states that:

*It becomes vulnerable to the births and deaths of individuals, migrations, the dissolution and redefinition of groups, and ambiguity about the representativeness of political institutions. States would flicker, and so would their obligations to treaties and rules of customary international law.*²⁵

When the anarcho-capitalist becomes concerned is when a state promises another state or group of states to coerce or otherwise rule over its domestic citizens in way incompatible with the Austrian conception of individual liberty and autonomy. When a domestic state takes on any legal obligation other than that of maintaining liberty for its citizens, and international law supports, enables or encourages this step, that is when international law becomes as bad to the anarcho-capitalist as the domestic laws that they so frequently protest against.

The aim of international law is to monitor the behavior and interactions between states, maintaining and providing essential law and order by way of the United Nations and other overseeing bodies.²⁶ The United Nations is an international organization

23 JÖRG KAMMERHOFER & JEAN D'ASPROMONT, MAPPING 21ST CENTURY INTERNATIONAL LEGAL POSITIVISM IN INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 1 (2010).

24 Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 271 (2001).

25 Eric Posner, *Do States Have a Moral Obligation to Comply with International Law?*, 55 STAN. L. REV. 1905 (2003).

26 Aron Mifsud-Bonnici, *The Aim of Public International Law*, available at www.mifsudbonnici.com (last visited March 28, 2011).

committed to maintaining peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights for all.²⁷ Within states that are members of the United Nations and other regional state associations (the European Union, which will be another example critiqued in this paper) these states have obligations to their own citizens and citizens of other member states in accordance with certain treaties and charters. There are select courts and tribunals set up to help states fulfill these aims.

One of these that I will be critiquing later in the paper is the European Court of Human Rights.²⁸ The aim of the European Court of Human Rights is to improve the capacity of national courts and law enforcement authorities to apply legal human rights protections.²⁹ The ECoHR is a type of “constitutional court” in part because of its identity as an institution designed to protect and recognize those rights that belong to the citizens of member States regardless of and often in the face of changing governments and political opinions.³⁰

International law has unique functions beyond global and international interactions. It has the ability to influence the moral attitudes, choices, and behaviors of individuals and states so much so that it is impossible to deal with international law apart from international ethics and morality.³¹ Professor Yasuaki also points out the memorable claim of Professor John Austin that international law is not law in a proper sense but a term of positive morality.³² It is this connection between international law and moral choices that influences the worldview of each global citizen that is of particular interest and concern to the anarcho-capitalist school.

B. LAW IN THE ANARCHO-CAPITALIST TRADITION

The net effect of law in anarcho-capitalism is legitimate only to the extent that it frees each individual by allowing them to live in a world dictated not by the whims and desires of the state or states but by their own sense of calling, duty and preference. This often means that an absence of positive law is preferable in a great many areas of private and public interactions, ideally with courts being replaced with private procedural bodies and even replacing the police with private security agencies.³³ The law is an individual

27 Scott Meyer, *United Nations Law Summative Essay, The United Nations General Assembly* 1 University of Glasgow (2011) citing <http://www.un.org/en/aboutun/index.shtml>

28 Hereinafter ECoHR.

29 The European Union Agency for Fundamental Rights, 2010.

30 *Supra* note 27.

31 Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 4 EUR. J. INT'L L 106 (2003).

32 JOHN AUSTIN, *THE POWER OF JURISPRUDENCE DETERMINED* 127, 140, 142 (Wiedefeld and Nicholson, eds., 1954).

33 Hans-Hermann Hoppe, *Mises Institute, The Idea of a Private Law Society*, available at <http://mises.org/daily/2265> (last visited March 27, 2011).

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experience and process that becomes invalidated any time a group attempts to give itself rights different from the individual. In anarcho-capitalism the law should act as part of a social order or mechanism. It should be a buttress in upholding the rights of the individual above those of the domestic state, foreign state, union, alliance or any other organized group. Anarcho-capitalists have traditionally been very wary and pessimistic but not necessarily hostile towards international law. Discussing the ability of international law to provide lasting peace in the world, Ludwig von Mises in his iconic work *Human Action* said:

*It is futile to place confidence in treaties, conferences, and such bureaucratic outfits as the League of Nations and the United Nations. Plenipotentiaries, office clerks and experts make a poor show in fighting ideologies. The spirit of conquest cannot be smothered by red tape. What is needed is a radical change in ideologies and economic policies*³⁴

In stark contrast to legal positivism, anarcho-capitalist scholars hold to a variety of legal philosophies, all of which oppose state, organizational, court and judge-made law. Murray Rothbard, widely considered the “dean of the Austrian school”³⁵ and his followers hold to a non-religious and what he called “rationally established” interpretation of natural law.³⁶ To Rothbard the law is simply a set of commands³⁷ which should be based around a set of objective ethics that can be established through reason.³⁸ This definition is of course contested by HLA Hart who would view the law not simply as rules but as processes or a discipline, as laid out in his seminal work “The Concept of Law.”

The definition of natural law is not overly technical and according to Rothbard is best laid out by Sir William Blackstone in book one of his commentaries on the law of England:

This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man’s real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man’s real happiness, and therefore that the law of nature forbids it.

Rothbard elaborates:

*The natural law, then, elucidates what is best for man what ends man should pursue that are most harmonious with, and best tend to fulfill, his nature. In a significant sense, then, natural law provides man with a “science of happiness,” with the paths, which will lead to his real happiness.*³⁹

34 LUDWIG VON MISES, *HUMAN ACTION* 821 (Reprint ed. 1966).

35 See <http://www.lewrockwell.com/rothbard/rothbard-lib.html>.

36 Murray Rothbard, *Law, Property Rights and Air Pollution*. 2 *Cato Journal* 55(1982).

37 *Id.*

38 *Supra* note 36.

39 *Id.* at 12.

As to what this valued and sought-after “happiness” is, Rothbard and Blackstone would of course greatly disagree. To Rothbard, happiness is best achieved when an individual is entirely at liberty, because it is only this liberty that allows the individual to deeply and truly appreciate and enjoy all possible domains of life.⁴⁰ International law then is only ethical, right or legal when it makes individuals and nations (in that order) more at liberty. In stark contrast to the mainstream approach to international law, this is the thrust of the anarcho-capitalist approach to international law.

Ludwig von Mises disagreed with the natural law theory and held to the legal philosophy of utilitarianism.⁴¹ Relying on the views of political philosopher Jeremy Bentham, Mises believed that the law should be “intent upon discovering what best serves the promotion of human welfare and happiness”.⁴² He believed that legal positivism was a futile approach to law and declared that “what counts is not the letter of the law but the substantive content of the legal norm”.⁴³ He believed that the rule of legitimate law must be obeyed since the only other option is the rule of the state.⁴⁴ Mises was a notorious critic of the United Nations and when considering the confusion of implementation and enforcement of international law he said that any attempt to create a substantive international law whose application is disputed among nations can be declared to have been miscarried.⁴⁵ UN norms fail to promote human welfare and happiness because they are based primarily on the faulty reasoning of state coercion and collectivist reasoning (among other faulty statist mantras).

Mises stands firmly in the anarcho-capitalist camp when discussing the issue of coercion. Speaking of the ability of nations to assert their version of the law on their citizens Mises says:

The state is a human institution, not a superhuman being. He who says state means coercion and compulsion. He who says: There should be a law concerning this matter, means: The armed men of the government should force people to do what they do not want to do, or not to do what they like. He who says: This law should be better enforced, means: the police should force people to obey this law. He who says: The state is God, deifies arms and prisons.⁴⁶

40 Anthony Flood, *Murray Rothbard: An Introduction to His Thought*, available at <http://www.anthonypflood.com/murrayrothbardthought.htm>.

41 Murray Rothbard, *Ludwig von Mises and Natural Law: A Comment on Professor Gonce*, IV, 3 J. LIBENMAN STUD. 289 (1980).

42 *Supra* note 34.

43 LUDWIG VON MISES, NATION, STATE, AND ECONOMY 173 (Reprint ed. 1983).

44 LUDWIG VON MISES, BUREAUCRACY 76 (1944).

45 *Supra* note 43 at 90.

46 LUDWIG VON MISES, OMNIPOTENT GOVERNMENT 47 (1944).

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For Mises, the law should work in a non-compulsory and useful way, it should be a tool of societal protection of the individual against the state and any international agreement, alliance, treaty, directive or other international legal commitment.

Other Austrians held similar or nuanced views of the anarcho-capitalist vision of the law. Frederick Hayek believed that liberty could be greatly served under the rule of law, contending that justice and general welfare are the convergent goals and values of law. Hoppe stated that “It is the purpose of laws or norms to help avoid otherwise unavoidable conflict” and that the state is a poor arbiter of legal disputes as it is not a disinterested party.⁴⁷ Private property protection being a hallmark of the anarcho-capitalist philosophy, it is worth noting that anarcho-capitalists see the law as something that exists in the first instance to help protect personal property. This primary function of law precedes any other discussion on the purpose and usefulness of law. French scholar and libertarian hero Frederich Bastiat said: “Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place”.⁴⁸

This line of reasoning can be contrasted to Thomas Hobbes and his opinion that the tendency of people to naturally act badly justified laws laid down by the state, so that rights are traded for guidelines on living in the form of a “social contract”⁴⁹ Hobbes believed that:

*The liberty that each man hath, use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.*⁵⁰

For Bastiat and the anarcho-capitalists, actual individual choices and relationships always trump what they would no doubt consider a sham philosophical “contract” regardless of one’s perceived inclinations of mankind. Hobbes is generally considered by anarcho-capitalists to be a totalitarian and an enemy of property rights.⁵¹

Legal scholar Robert Hale contributed another view of property rights, naming the government as the coercive arm of the property owner against those who unfortunately may not necessarily have any property to protect:

In protecting property, the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not

47 Hans-Hermann Hoppe, *The Idea of a Private Law Society*, available at <http://mises.org/daily/2265> (last visited March 27, 2011).

48 FREDERIC BASTIAT, *THE LAW* (2d ed. 1998).

49 MIKA LA VAQUE MANTY, *THE PLAYING FIELDS OF ETON EQUALITY AND EXCELLENCE IN MODERN MERITOCRACY* 76(2010).

50 THOMAS HOBBS, *THE LEVIATHAN* 79 (1st ed. 1651), available at <http://socserv.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>

51 WILLIAMSON M. EVERS, *HOBBS AND LIBERALISM* 4,5 (1st ed. 1975); *Supra* note 36.

*merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned.*⁵²

This reliance on the state in this instance may seem hypocritical to those libertarians (such as Congressman Ron Paul) who believe that the state (in his case, the United States government) has a constitutional duty to protect private property. In a free market, Hale would seem to demand more fair access to or protection from the means of coercion regardless of the property in question. The Austrians would say that coercion is always violence, taxes are always theft and that voluntary private choices will always provide a better framework in which to pursue societal goals.

C. THE ANARCHO-CAPITALIST AND INTERNATIONAL LAW: OBVIOUS TENSION WITH POTENTIAL AGREEMENT AND COOPERATION

Ironically, what are considered disparaging and frustrating problems in international law are what would most attract anarcho-capitalists to its cause. The apparent absence of an enforcement mechanism in international law would be seen as a virtue by anarcho-capitalists. One of the basic tenets of the anarcho-capitalist philosophy is non-coercion in life and law. The lack of a “sword”⁵³ is to the anarcho-capitalist a beautiful thing. Though anarcho-libertarian scholars are hesitant to accept the premises and obligations of much of international law, they have found it useful when opposing the domestic policies of their home countries. Congressman Ron Paul was vocal and steadfast that the invasions of Afghanistan and Iraq were both immoral and illegal according to international law⁵⁴, as well as critiquing the United Nations when it provides impetus for intervention and invasions by such things as the “responsibility to protect”.⁵⁵

One of the most popular topics that generally uninformed Americans complain about is that embracing international law and the United Nations represent a threat to the national sovereignty of the country. Even if this were to be true, to the anarcho-capitalist this could be in fact a very good thing. If the sovereignty of a nation correlates with the sovereignty of the individual such as that when the sovereignty of the nation decreases the sovereignty of the individual increases, then to the extent that international law through treaties, agreements and other expectations actually increases personal sovereignty by draining power away from the state, this is to be applauded and encouraged. Rothbard described those who were hung up on the international independence of America as “reactionaries and jingoists, emotionally and irrationally devoted to the mystique of

52 Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Political Science Quarterly* 470-478 (1923).

53 James G. Apple, *Enforcement Of International Law Is Not Dependent On A “Sword” Or Enforcement Mechanism*, available at www.judicialmonitor.org/archive_0207/generalprinciples.html.

54 Ron Paul, Fox News Republican Presidential Candidates Debate Presented in Durham, NH., USA, (September 2007).

55 *Id*

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American ‘sovereignty’ ”.⁵⁶ So, the age-old “national sovereignty” complaint falls by the wayside.

In discussing the understanding of law in the anarcho-capitalist tradition, it becomes clear that though they are unyielding in their enshrinement of personal liberty above all else, there is room to obey and appreciate some form of international law as in theory international law could mean that some subject matter would be outside of the jurisdiction of a coercive domestic state and centralized legal system. While the Austrian scholars have their doubts and reservations about the overriding concept of entities such as the United Nations and the European Union, the actual legislation and practice of international law is at times more favorable in their approach than are most domestic legal structures. There is enough admiration of some of the elements of international law by anarcho-capitalism that a well-reasoned critique is possible. I will now discuss two subjects that have been focused on by international law in various degrees by international legislation, scholarship, UN declarations and popular interest. These topics are international human rights and “the rights of the child” with respect to education.

V. HUMAN RIGHTS

Anarcho-capitalists are certainly not the only group that questions the current international human rights law regime, which is seen by many to be both excessively rigid and unnecessarily vague,⁵⁷ but their tradition promises a uniquely lively and energetic discourse on the subject. Through both treaty and charter-based systems, the international community has placed human rights expectations and obligations on states via international law. One of the primary statements on Human Rights within international law is the Universal Declaration of Human Rights⁵⁸ adopted by the UN on December 10, 1948. The General Assembly called upon all member states “to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories”⁵⁹. Many rights are listed in the UDHR including the right to equality, freedom from discrimination, marriage and family, a fair trial and others. The rights contained in the declaration represent the minimum standard of human rights due to each person’s status as a human being rather than as a citizen on any one nation. Diana Ayton-Shenker puts it this way:

Universal human rights do not impose one cultural standard, rather one legal standard of minimum protection necessary for human dignity. As a legal standard adopted through the United Nations, universal human rights represent the hard won consensus of the

56 MURRAY ROTHBARD, *THE TREATY THAT WALL STREET WROTE* (Reprint ed. 1995), available at <http://mises.org/daily/4493> (last visited March 29, 2011).

57 Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1763 (2008).

58 Hereinafter UDHR.

59 Universal Declaration of Human Rights, Dec 10, 1948, 217 A (III), available at <http://www.un.org/en/documents/udhr/index.shtml>.

*international community, not the cultural imperialism of any particular region or set of traditions. Like most areas of international law, universal human rights are a modern achievement, new to all cultures. Human rights are neither representative of, nor oriented towards, one culture to the exclusion of others. Universal human rights reflect the dynamic, coordinated efforts of the international community to achieve and advance a common standard and international system of law to protect human dignity.*⁶⁰

International law protects human rights in two primary ways: by joining treaties obligating states to ensure human rights protections and also by the providing for mechanisms such as the United Nations Human Rights Council and the European Court of Human Rights to help see to it that international human rights are being practiced at the local level (United Nations Human Rights Regional Office for Europe, 2010). These bodies (especially the ECoHR) have interpreted existing human rights law, scholarship and judicial activism as a means of greatly expanding the protections of human rights in the daily life of Europeans.

This begs the questions of how does international law classify something as a right and on what legal basis is it sought to be protected? Having figured that out, how does anarcho-capitalism define and protect human rights? Space will not allow for a detailed critique of each of the rights provided for in the UDHR and the decisions of the ECoHR but I will instead look at the theoretical underpinnings of each system of thought. There are a great many opinions, theories and perspectives in regards to international human rights law and it is not important that anarcho-capitalism critique each of them. The one thing that the majority of the perspectives of mainstream international human rights law theorists and academics have in common is the positive obligations of the state to secure human rights for people and the general concept that the majority of human rights obligations are of the “positive” rather than the “negative” variety.

To believe in positive rights is to believe that a person has a right to a certain benefit in the sense that this right must or should be proactively provided, maintained and protected. This perspective is completely discarded by the anarcho-capitalist school who believe that rights exists primarily in the negative sense. To use a popular example, a “right to food” is not a right for food to be provided to you at someone else’s expense, but rather the right for you to be able to eat food that you’ve provided for yourself without being harassed or hindered. There would also be no positive “right to health care” provided by others, only the right to not be molested in your personal pursuit to procure health care in the event that you are inclined and able to do so.

The theory of negative rights has been used publicly of late by the Libertarian (though Republican in official designation) United States Senator from Kentucky, Doctor Rand Paul (the son of Ron Paul) in an attempt to scale back the encroaching specter of

60 DIANE AYTON SHENKER, *THE CHALLENGE OF HUMAN RIGHTS AND CULTURAL DIVERSITY* (1995).

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a positive right to healthcare in the United States. In a statement during a Senate subcommittee hearing he likened the conscription of healthcare professionals into an obligatory relationship with people as that of forced slavery, as a right presupposes a resort to force in order to see that right positively enforced. Speaking of the American tradition of negative rights, he said that “Our founding documents were very clear about this. You have a right to pursue happiness; but there’s no guarantee of physical comfort, there’s no guarantee of concrete items”.⁶¹

Rothbard regarded all rights as fundamentally negative rights. In his classic work, “The Ethics of Liberty”⁶² Murray Rothbard agrees with James Sadwosky who has this to say about positive and negative human rights obligations:

*When we say that one has the right to do certain things we mean this and only this, that it would be immoral for another, alone or in combination, to stop him from doing this by the use of physical force or the threat thereof. We do not mean that any use a man makes of his property within the limits set forth is necessarily a moral use.*⁶³

Hayek was also devoutly opposed to positive human rights obligations because he felt that they were too vague to be properly enforced by a rational classically liberal functioning rule of law.⁶⁴ He has admitted a desire to see the needs of people met but cannot acquiesce to the government fulfilling positively these needs because of the failure of democracy to properly limit the scope, depth and expansion of government power in these areas.⁶⁵ In our current actual international legal climate where positive human rights obligations are so frequently disregarded, a vibrant and committed human rights policy based on negative rights might be more practical and easily applicable, as states tend to take negative rights more seriously than the positive rights.⁶⁶

Anarcho-capitalists agree with international human rights scholars that rights do belong intrinsically to people whether or not a government recognizes them. They agree firmly with international human rights proponents in saying that rights do not originate with the state and come from either nature, God, tradition, rationality or human necessity. However, with the exceptions of such human rights issues as the right to a fair trial or the right to not be held without cause, which anarcho-capitalists would consider as more concrete domestic criminal law procedural issues rather than internationally-enforced human rights standards; anarcho-capitalist thought refuses to acknowledge that any state

61 Rand Paul, Speech text and Video from DailyMail.co.uk, *available at* <http://www.dailymail.co.uk/news/article-1386658/Rand-Paul-says-having-right-health-care-like-believing-slavery.html#ixzz1MH4bXyO8> (last visited May 13, 2011).

62 *Supra* note 36 at 24.

63 JAMES A. SADOWSKY PRIVATE PROPERTY AND COLLECTIVE OWNERSHIP 120, 121 (1974).

64 JOHN C. W. TOUCHIE, HAYEK AND HUMAN RIGHTS: FOUNDATIONS FOR A MINIMALIST APPROACH TO LAW 12 (1st ed. 2005).

65 *Id.* at 174.

66 *Supra* note 57.

or collectivist body has the authority to burden people and institutions with positive duties in regards to human rights. Anarcho-capitalists despise coercion in all its forms. Anarcho-capitalists are much more concerned about such things as abuses by police officers than they would be with a “right to housing” paid for by either taxing a portion of the population or paying for it with inflationary fiat currency that harms future generations of working producers.

When the UDHR claims that humans have a right to food (food that most likely has been produced and paid for by the tax dollars which were the former private property of another human appropriated by force by a government), anarcho-capitalists will agree that nobody has a right to prevent them from farming, taking a job in a free market to earn money for food (or indeed to be paid in food). Rothbard, Hayek, Mises and their followers see no legitimate moral or legal duty for one person to provide a benefit to another and any attempt of a government to use their monopoly on force to do so is acting immorally and illegitimately. Another way to put it is to say that anarcho-capitalists believe in every human right possible as long as it does not have to be paid for by anyone else and is not a positive obligation of the state or anyone else. Anarcho-capitalists reject the international human rights law vision because it is an abridgment of personal property rights through imposing taxes and limitations on individuals and because it violates the free conscious of humans by imposing on them via an international organization of some type a positive duty of which they never consented.

Anarcho-capitalists have long come to terms with the notion that life is not fair. According to them, this fact can be attributed partly to government intervention into private markets and private life as well as hazardous international policies creating entanglements not beneficial to the common citizen.⁶⁷ The anarcho-capitalist would never seek to propound these inequities by the irrational notion of further distributing wealth and capital by way of unfairly taking the fruits of someone else’s labor to provide a “right” to another.

VI. COLLECTIVISM IN HUMAN RIGHTS LAW

The United Nations and other international institutions believe that some rights are sometimes best provided and protected for when granted collectively to groups. This is seen in Article 29 of the UDHR states that “Everyone has duties to the community in which alone the free and full development of his personality is possible” and Article 4 Part 2 of the UN International Covenant on Economic, Social and Cultural Rights which states that:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this

67 MURRAY ROTHBARD, *WHAT HAS GOVERNMENT DONE TO OUR MONEY?* 56 (5th ed. 2005).

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may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The idea that rights proceed from the government and exist to protect the community as a whole, to be limited as the government sees fit for the betterment of the community (logically assumed at the cost of at least some individuals) is the current practice of the UN and is appreciated by many international human rights scholars. International human rights law scholars believe that collectivism (or “group rights”) as being simply the sum total of the rights of the individual members in a certain group and that individuals can assert both an individual and collective right in an effort to achieve maximum human rights protections.⁶⁸

Anarcho-capitalists oppose collectivism in all its forms, as they see it as a catalyst for such despised ideas as racism, socialism, the welfare state and anti-free market “class warfare” rhetoric. Even such common rights intrinsically belonging to a group of more than one person, such as a community right to water, are conceptually rejected by anarcho-capitalists. They agree with the classically liberal understanding of rights being an individualized concept rather than as something tangibly given to a group of individuals. Anarcho-capitalists oppose the collectivist understanding of human rights because it requires the strong arm of a coercive government to sanction collective group identities and protect them on the basis of numbers against individuals who have not been given the same class status by the state. They believe that bonafide human rights exist because the person seeking their protection is a human rather than as a special class of human or politically favored citizenry. Anarcho-capitalists consider it an anathema to have certain individuals separated into a more (or less) protected class and given an oftentimes politically correct and expedient labeling based on group membership.

The Austrian tradition teaches that all of society is comprised of (or at least should ideally be comprised of) individuals making completely free choices apart from coercion or governmental interventions. Collectivist human rights theories fly in the face of such dogma when they seek to put certain individuals into privileged or hampered groups. Because collectivism seeks the group over or against individuals, it ultimately fails to truly protect the rights of anyone. One libertarian has put it this way:

Collectivism replaces voluntary and mutual cooperation with physical force as the essence of human interaction. Individuals are regarded as sacrificial appendages of an abstract group, to be commanded as chattel. The judgment of bureaucrats replaces the judgment of individuals motivated to pursue their own values and thus, individuals are not able to make rational and logical decisions nor are they allowed to cooperate voluntarily and mutually with others. The lack of productivity and stagnation follows.

68 Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. No.3 368, 386 (1991).

Mises himself believed that it is only through uncompromising individualism that the rights of collective groups would be protected. In “Human Action” he writes “In striving after his own-rightly understood-interests the individual works toward an intensification of social cooperation and peaceful intercourse.”⁶⁹

Of course, anarcho-capitalists desire to see humankind live in harmony without any fundamental rights violated. However, in their struggle against the state, they are on guard against the term “human rights” becoming essentially the catchword used by those who promote government interventions and expansion into often private situations in the name of securing a better life for some while using other people’s resources to accomplish that goal. All in all, the international law vision for human rights unfortunately fails when critiqued by the anarcho-capitalist framework because it is statist, expansionist, representative of the abridging and disregarding of personal property rights and insistent on positive and often collective human rights obligations.

VII. EDUCATION AND “THE RIGHTS OF THE CHILD”

Since the family is the primary building block of society, it is only fitting that the Austrians have a distinct outlook regarding the raising of children. Universal compulsory education is a primary concern for the United Nations and this is reflected in a myriad of conferences, goals, declarations and committees dedicated to the cause of education worldwide. The UN has made it one of its 2015 Millennium Goals that by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling.⁷⁰

The European Union has also seriously committed itself to the furthering of education within EU states by adopting numerous educational policies and initiatives. Article 165 of the Treaty on the Functioning of the European Union says that the EU must “contribute to the development of quality education by encouraging cooperation between Member States.” These educational goals are to be met by states and state governments, preferably by a free state-funded and operated public school system (though states are encouraged to make use of private schooling institutions as long as they are meeting the standards of the UN and EU).

Education is considered a right by the UN and it is guaranteed by Article 26 of the UDHR which reads that:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional

⁶⁹ *Supra* note 33.

⁷⁰ Statement By Kishore Singh, Special Rapporteur On The Right To Education, 65th Session Of The General Assembly Third Committee Item 68 (B) 25 New York October 2010, *available at* <http://www.ohchr.org/Documents/Issues/Education/SREducationStatement2025102010>.

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education shall be made generally available and higher education shall be equally accessible to all based on merit.

- (2) *Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.*
- (3) *Parents have a prior right to choose the kind of education that shall be given to their children.*

We will soon see the tension between number three in the list above and the actual practice of international law when it comes to the protections of families who choose to home school their children, as many anarcho-capitalists do and as every anarcho-capitalist believes families ought to be able to do.

What goes on inside schools is a concern of the UN. UN Special Rapporteur Kishore Singh has said that:

In this sense, we must continuously verify if human rights are respected inside the gates of our schools today. Thus, I will pay particular attention to the standards and mechanisms that ensure all educational entities comply with the standards provided by human rights law.

This sort of involvement in education by the international law community is seen by anarcho-capitalist as being far outside their sphere of jurisdiction and represents a potential tyrannical imposition of a value system at odds with their own onto their children that belong only to them and not a community, global village or to the world.

In addition to listing education as a fundamental human right due to children, the international legal community has also listed other rights and has made other efforts to secure human rights to children as a group. The UN Convention on the Rights of the Child⁷¹ is a prolific declaration concerning the rights due children and is monitored by the UN Committee on the Rights of the Child. The rights of the child include the right to life, to be raised by their own parents, to express their own opinions, privacy, to not be exploited, legal representation, health care, enjoyment of their culture, to not be forced into armed conflicts, protection against corporal punishment and the death penalty and that decisions of states be made in the best interest of the child).⁷² The United States has signed but not ratified the Convention on the Rights of the Child. The EU has similar protections in place with the duty of enforcing these rights of children against states and even their own parents sometimes falling to the European Court of Human Rights.

71 Hereinafter CRC.

72 Jodie Martin, *Guide to Children's Rights* (2008), available at <http://www.suite101.com/content/childrens-rights-are-important-a44482> (last visited April 14, 2011).

There is a distinct Anarcho-Capitalist vision for children's rights and education:

*It is better to tolerate the rare instance of a parent refusing to let his child be educated, than to shock the common feelings and ideas by the forcible transportation and education of the infant against the will of the father.*⁷³

Compulsory public schooling is the law in the United States, though each individual state currently has some form of legislation allowing for private schools and homeschooling of children. If there is one topic which you can count on all anarcho-capitalists agreeing on, along with the abolishment of the income tax and the Federal Reserve bank in the United States, it is that homeschooling is a sacrosanct human right and that governments have no right, duty or acumen in properly educating children. If there are any exceptions to this rule in anarcho-capitalist circles, I am unaware of them. As discussed previously, they would also balk at extending any special human rights protections solely on the basis of an individual belonging to a specific group (in this case, an age group). Due to the anarcho-capitalist insistence on negative rights and anti-collectivism, the majority of specific international law provisions for children would not be recognized by anarcho-capitalists. They would instead be seen as governmental intrusion into and usurpation of the last bastion of sovereignty apart from the state, which is the family. The church is seen in similar fashion, with sometimes overlapping jurisdiction in the realm of education. I will now lay out the anarcho-capitalist conception of the "right" to public education versus the practice of homeschooling, un-schooling or no-schooling.

The anarcho-capitalist leaders of the past were fundamentally opposed to state funded public education and were in favor of rights and protections for homeschooling families. In his book "Liberalism," Mises said:

*There is, in fact, only one solution: the state, the government, the laws must not in any way concern themselves with schooling or education. Public funds must not be used for such purposes. The rearing and instruction of youth must be left entirely to parents and to private associations and institutions.*⁷⁴

Reflecting on the Prussian model of education influencing the American public educational system, Mises commented that "continued adherence to a policy of compulsory education is utterly incompatible with efforts to establish lasting peace".⁷⁵ Hayek never formally commented on homeschooling or public education, but his dedication to curbing the centralized power of government in public and private life would suggest that today he would be firmly in the anti-public school movement of anarcho-capitalism.

⁷³ Thomas Jefferson: *Note to Elementary School Act*, 1817. ME 17:423.

⁷⁴ LUDWIG VON MISES, *LIBERALISM* 114 (Irvington ed., 1985).

⁷⁵ *Id*

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Murray Rothbard was unrelenting in his criticism of state involvement in education and sought the abolishment of public schools and the United States Department of Education. He argued that public education did not actually seek to educate children at all but rather to indoctrinate and propagandize children into the service of the state, and that truancy and compulsory attendance laws represented the “complete seizure and incarceration” of young people.⁷⁶ The state is not shy in describing their goals in education. Rothbard cites early public education campaigners Frances Wright and Robert Dale Owen in their own words: “It is national, rational, republican education; free for all at the expense of all; conducted under the guardianship of the State, and for the honor, the happiness, the virtue, the salvation of the state”.⁷⁷

The anti-state view towards education held to by Mises and Rothbard were fundamental in setting up the anarcho-capitalist worldview. Political sensation Ron Paul campaigned on the promise of shutting down much of the United States bureaucratic agencies with the Department of Education to be one of the very first to go. Paul has spoken frequently on homeschooling, maintaining that home education represents the most powerful step in preventing the state from indoctrinating by propaganda a new generation of students.⁷⁸ For the anarcho-capitalist the collective, compulsory and statist model of public education is completely incompatible with a free society and any legal attempt by the UN and EU to encourage and implement such a regime sets a terrible standard and example for states attempting to find their own way to educate their young people.

Homeschooling is often correctly associated with right-wing religious devotees. Mises and Rothbard were both atheists in religious identity and Jewish by birth, yet they defended homeschooling with a passionate vigor. Indeed the majority of homeschoolers are devoutly religious, clinging to the Biblical verses in Deuteronomy 6:5-9 which says:

You shall love the Lord your God with all your heart and with all your soul and with all your might. And these words that I command you today shall be on your heart. You shall teach them diligently to your children, and shall talk of them when you sit in your house, and when you walk by the way, and when you lie down, and when you rise. You shall bind them as a sign on your hand, and they shall be as frontlets between your eyes. You shall write them on the doorposts of your house and on your gates.

This point is interesting because it shows the ability of the pro-individual liberty and anti-state convictions to transcend religious perspectives and find a way to unite people of divergent ethnicities and beliefs in an effort to preserve autonomy against the

76 MURRAY ROTHBARD, EDUCATION: FREE AND COMPULSORY 43 (1971).

77 ROBERT DALE OWEN AND FRANCES WRIGHT, TRACTS ON REPUBLICAN GOVERNMENT AND NATIONAL EDUCATION 16 (1847).

78 *Id*

state and international law rules that violate the conscience of individuals across the world.

Homeschooling lawyers and scholars in America have a clear distrust for anything international, as international law is associated with perceived hostility to homeschooling families. Mike Farris (perhaps the biggest name in all of homeschooling and the popular voice for homeschooling rights across the world) of the Home School Legal Defense Association warily views the Convention on the Rights of the Child⁷⁹ as statism sneaking in as the trojan horse:

Article 3 (1) provides that in all actions concerning children, all decision-makers need to employ the legal standard known as the best interests of the child. What this means is that the government can substitute what it thinks best for that of the parents in every situation.

Article 12 (1) declares that the child's views must be taken into account in every situation.

When we read further, it means, taken into account by the government, because they're the ultimate decision-makers. In two very important areas of parental choice- religion and education- the CRC interferes with parental choice and elevates a child's wishes over that of the parent. Realistically, it is neither parents nor children who make the final decision in the case of conflict. The state has the power and duty under the CRC to make ultimate choices for kids.

It is important to note that most anarcho-capitalists do not see family rights as collective rights but rather as an institutional protection against encroaching state power. It is also true that while not all anarcho-capitalists (especially modern ones) subscribe to the patriarchal family clan mentality, most do agree that the individual rights of the children supersede those of the state or of society and that the primary right of a child is to be free from governmental coercion, bullying and dictation.

The UN and EU make legal assumptions that anarcho-capitalists do not accept, namely that domestic states and international organizations have any claim to make on behalf of children against their parents, churches or communities, that children deserve rights that others do not, and that the best interest of the child can be sought, defined and enforced apart from their identity as a member of a family. In his radical work "Education: Free and Compulsory" Rothbard states "The key issue in the entire discussion is simply this: shall the parent or the State be the overseer of the child?"⁸⁰ This clash of perspectives can best be seen in the European Court of Human Rights case of *Konrad and Others vs. Germany*.

Homeschooling families comprise a small but committed religious minority group in Germany, represented by only approximately 400 families who are in either hiding or

⁷⁹ Hereinafter CRC.

⁸⁰ *Supra* note 76 at 9.

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being persecuted by the German state.⁸¹ Adolf Hitler formally banned homeschooling in Germany in 1938 and this law has never been repealed. In January of 2008, this law was enforced in a manner uncomfortably reminiscent of Germany's shameful past when German government officers again persecuted a religious minority group by raiding the home of the Gorber family and taking five children by force into government custody. The children were finally returned to their parents ten horrifying months later and were forced to enroll into local public schools. After reviewing all court documents, the Home School Court Report Journal sums up the German government's case in this way:

According to the interpretation of the German courts, homeschoolers, by withdrawing their children from public education, subvert the state's effort to foster pluralism and tolerance. This threatens what the state sees as its interest to create responsible citizens.

Unfortunately, the Gorber case represents just one of many of the German government's attempts to persecute homeschooling families. The most famous of these cases is the case of *Konrad and Others vs. Germany*.

After threats, harassment and intense persecution by the German government, the Konrad family attempted to appeal the Nazi-era law that required that their children attend school by applying to the European Court of Human Rights.⁸² The Konrads claimed protection under Articles 8 and 9 and of Article 2 of Protocol 1 of the European Convention on Human Rights, which says that:

No person shall be denied the right to education. In the exercise of any functions, which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.

Shockingly the Court sided with the German government. Space prohibits a detailed analysis of the case, but in summation the Court stated that the interests of the state to be comprised of educated and socialized citizens and the right of a child to receive a state-approved education trumped any complaint that the Konrad parents brought and that the enshrinement of education mentioned in the articles was only state-sanctioned education alone.

Ironically, it was an American immigration Judge Lawrence O. Burman who took the opportunity during yet another German homeschooling case to lecture the German courts on human rights when agreeing to grant the family political asylum:

However, the rights being violated here are basic human rights that no country has a right to violate... Homeschoolers are a particular social group that the German government

81 Bob Unruh, *Teaching Children Gets Parents Ordered Into*, available at <http://www.wnd.com/index.php?fa=PAGE.printable> (last visited April 16, 2011).

82 Hereinafter ECoHR.

*is trying to suppress... This family has a well-founded fear of persecution ... therefore, they are eligible for asylum ... and the court will grant asylum.*⁸³

Adding a nice parting shot, he said that the attitude of Germany and the ECoHR towards Germany's homeschooling minority is "repellent to everything we believe as Americans." If a country that does not usually adhere to the notion of sprawling human rights obligations of Europe is addressing the human rights deficiencies of the ECoHR, perhaps some introspection on this issue is due. Applying a minimalist and anarcho-capitalist critique of the ECoHR may help the court to better address the human rights of Europe's homeschooling minority in the future.

In this case, we see the collision of worldviews previously described by Rothbard. To whom does the burden of educating children belong? Are rights collective or individual? Does the state or the family come first? Is there a positive obligation of parents to enroll their children in school or do the parents have a right to not have the government interfere in their homeschooling practices? Germany and the ECoHR believe that the state takes precedence over the rights of the family (though they mentioned that they did not challenge the quality of education that the homeschooled child would receive; only that they would be poorly socialized and integrated because of it). Where international law refuses to protect the right of choice in education (yet supporting the right of choice in countless other matters), the ECoHR is seen by anarcho-capitalists as bankrupt in terms of being able to properly defend the individual liberties and rights of the people of Europe. The ECoHR is immediately shunned by anarcho-capitalists as the worst example of judicial activism, ruthless collectivism and blatant socialism currently on display anywhere in the world today. The anarcho-capitalist refuses to acknowledge the jurisdiction of a court that has put the rights of the collective society above that of a peaceful citizen, especially when the court purports to have been established to vindicate individuals whose human rights have been abridged by states within the EU.

One shudders to think what Mises, Rothbard and Hayek would say about the ECoHR and the Konrad case. To see the EU apparatus allow for such a ruling would make a loyal anarcho-capitalist give up on the EU, the Council of Europe and their systems of courts all together. Though domestic governments everywhere can be terribly oppressive, Germany has outrageously persecuted their minority homeschooling population. Rothbard, never one to shy away from hyperbole, was perhaps thinking of cases like this when he famously discussed the future of governments as "a boot stomping on a human face, forever".⁸⁴ For a human rights court to essentially hold down the Konrads so that they could be stomped further would make the ECoHR (along with the laws set up by the German government which previously drove Mises out of Austria in 1934) an enemy of Mises, Rothbard and their followers.

83 See www.hslda.org/docs/media/2008/200808080.asp.

84 Murray Rothbard, *Our Future*, 4 ANALYSIS MAG. (September 1949).

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For international law to be used as a weapon of a state to abridge the personal and individual liberties of its people represents to the anarcho-capitalist a colossal and alarming failure. The preference of the ECoHR for state government interests over individual conscience is the antithesis of the anarcho-capitalist teachings of Mises, Rothbard and Hayek. It proves what anarcho-capitalists have long suspected: that European judicial human rights activism is often a crusade for statism masquerading as collective rights protectionism.

VIII. CONCLUSION

I have attempted to keep my critique tailored, orderly and tightly focused. It is my hope that the perspectives offered in this discussion of an admittedly small group of legal entities, regimes and court decisions would in the future be further applied by other writers to the broader global integrated legal order. The principles of the Austrian school including non-aggression, unfettered free trade, anti-collectivism, individual autonomy and many others make for what I feel is a deep and interesting critique of the current direction of international law. I have attempted to discover if a well-reasoned critique of international law from the Austrian perspective is compatible with a realistic and effective approach to international peace and order. My findings suggest that while significantly better than some domestic law systems, in its current expression and manifestation public international law (especially international human rights law) fails to adequately provide individuals with the level of protection necessary to secure for them the libertarian ideal of individual autonomy, personal sovereignty and unfettered liberty.

It should not surprise us that this is so, as the goals of anarcho-capitalism are laudably (and some might say impossibly) high. The detractors of anarcho-capitalism (which would include the majority of mainstream economist, historians and legal scholars) contend that the anarcho-capitalist ideal represents an untenable “rich man’s paradise” that is unworkable in the machinations of today’s modern and complex civil society.

Unfortunately, I feel that anarcho-capitalism and international law are, for the most part, essentially incompatible. They are completely opposite to each other in their intrinsic vision for what the law should do. For the true believer in international law, the law exists to include as many people as possible by issuing positive protections including restraining if necessary market forces and the influence of unequal wealth and inequality wherever it is found. It exists to make and keep peace through its obligations and influence. Dr. Ted Carpenter of the Libertarian think-tank The Cato Group speaks for many frustrated anarcho-capitalists when describing the UN and by extension international law in the following terms:

The organization is plagued by problems of mismanagement and corruption. Much of the UN’s energy and funds has been devoted to pushing such pernicious measures as the

Law of the Sea Treaty and holding pretentious summits on the environment, world population, and other issues. Delegates to those boondoggles invariably embrace the discredited notion that more government intervention and regulation are the solution to any problem.⁸⁵

For the anarcho-capitalist, international and domestic law should exist only as a check against state power and as a means to protect and preserve private property for the individual. To them, equality is the language and mission of socialism. Equality is theft. What is desired is to be left alone, to be free in your autonomy with no social contracts or positive obligations of any kind. Liberty is not a public policy or an entitlement benefit prescribed by a leviathan government or international body, but quite to the contrary, it is the absence of the coercive bureaucracy that is true liberty.⁸⁶ It has been said that the majority of international lawyers believe that most states obey international law most of the time.⁸⁷ This voluntary cooperation is far superior to the violent and coercive nature of most domestic legal systems and anarcho-capitalists should respect and encourage this aspect of international law.

Of course, theory (or critiques) and experience are not the same thing. It is entirely probable that many regions (Europe in particular) have descended too far into the socialized welfare bureaucracy and international commitments (such as the ECoHR) for the idealistic anarcho-capitalists and libertarians to ever gain any real ground there. With the current European regime, a drastically minimalist approach to international law sadly seems thoroughly unworkable. It would require a complete redefining of what governments and international bodies are and would require at least one generation before Europeans could begin to attempt to appreciate much less government. It would also require the repeal of so much EU legislation that the EU human rights regime would perhaps need to be abolished as a whole. So, for now, the anarcho-capitalist critique is essentially an academic exercise (which is not to say that the current model would not benefit from an energetic injection of free market ideas and the serious protection of individual liberties; I think that it would).

It is my desire that international law and anarcho-capitalism find a common ground in opposing tyrannical domestic states in an effort to secure freedom for each of the world's citizens. Though a drastic and oftentimes overwhelming worldview, the anarcho-capitalist perspective can at the very least define the individual as a human being with immense importance, vested with rights that pre-exist states and governments. With this in mind, anarcho-capitalism can be a force for human rights protections across the international community. I would like to see a compromise and have individual liberty

85 TED GALEN CARPENTER, THE UNITED NATIONS CATO POLICY REPORT 1 (February 1997).

86 Llewellyn Rockwell Jr, *It's Time To Rethink Everything*, available at <http://www.lewrockwell.com/rockwell/rethink-everything175.html> (last visited April 10, 2011).

87 Michael Ignatieff, *America The Mercurial*, available at http://www.legalaffairs.org/issues/March-April-2005/review_ignatieff_marapr05.msp (last visited April 10, 2011).

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more properly protected while still providing perhaps a voluntary market-driven safety net for those less fortunate than others.

I feel that if the best ideas of anarcho-capitalism (namely anti-aggression, individual autonomy, private property protections, freedom of choice in all areas of life, true free expression and jurisdictional boundaries when viewing families and the private market) can be clearly offered to individuals in the framework of international law (being embraced and dispensed from institutions like the UN, EU, CoE, ICC and ICJ) then the freedoms of both the individual and the states of the world will be better equipped to confront the international legal challenges of the day through respect for the individual and the valuation of high international standards of liberty and justice. Until that day comes, anarcho-capitalism can serve as one of many critiques that, when properly applied, can help to mould international law into the best version of itself.