

PROFESSOR KROY ON CONTRACT AND FREEDOM: COMMENT

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What Professor Kroy attempts to do in this paper, to distinguish between the technical views of Murray Rothbard and Ayn Rand, is very important. Unfortunately, there are some serious misinterpretations of Dr. Rothbard's views, particularly his view of contract and exchange. The problem in interpretation begins with Section 3, "An Example." A has a dog, B a hen, and they make a contract to exchange the dog for the hen. A delivers the dog to B. Then B refuses to give up the hen. Clearly, Prof. Kroy states correctly, something is amiss, and both Rand and Rothbard agree. Where they disagree, he states, is on *why* this is so.

"Rand would say that you are wrong because you have defaulted on a promise, contained in a contract." Rothbard, however, would say that (B) is in the wrong for a different reason. "(B) does not owe (A) a hen. The hen is (B's), and remains (B's). As for the contract, (B's) default amounts to a cancellation of it. The contract ceases to be valid once (A or B) refuses to abide by it. But if so, what makes (B) morally wrong? Simply, the fact that (B) now controls a dog which belong to (A), makes (B) a criminal. Once (B) has, by refusing to fulfill his part of the contract, cancelled the contract, (B) has, thereby, cancelled his right to control the dog. If he continues to hold the dog, he is in the same category as a robber, or a thief." (Kroy)

This however is not an accurate statement of Rothbard's views of contract and exchange. Rothbard would agree with Rand — B owes A a hen — but for subtly different reasons. Rothbard distinguishes between alienable and inalienable property titles. The titles which A and B have to the hen and dog are alienable. If a contract to exchange the dog for the hen is signed, or agreed upon, and if A delivers the dog, *then a transfer of titles has taken place.*

Though he may hold onto the hen, B no longer possesses the just *title* to the hen, for the dog has been delivered and the contract consummated. There is no longer any question of a *promise* to exchange, but an actual exchange has taken place, an exchange of *titles* even if the physical good (hen) remains in the hands of the original, rather than the new owner.

Now for Rothbard, the crime must consist not in keeping the dog, but in refusing to hand over the hen, whose title has now passed to A, upon B's acceptance of the delivery of the dog.

Prof. Kroy gets this backward. The contract is not "cancelled" because one party refuses to deliver the good; the contract has been *violated*. After the fact, some arrangements may be made, but the starting point is that the just title to the hen has been transferred.

When Prof. Kroy focuses on the differences between Rand and Rothbard, he makes a few mistakes. For Rothbard, as for Rand, a promise *may* create an obligation, but not a *legal* obligation, i.e. not an enforceable one. But when Prof. Kroy tries to differentiate between Rand and Rothbard by saying that for Rand, "If (B) refuses to deliver the hen, he is trying to detain the transfer of property which is *already* not his," he neglects that Rothbard holds the same thing, but *not* because a promise had been made; rather, because *the title to the hen has been legitimately transferred.*

On p. 206, paragraph eight ("But, on the other hand...") is entirely wrong. The title was transferred in the contract, and the contract comes into effect when either A or B delivers as per the arrangements made in the contract. B is still wrong, as Kroy suggests, *not* for holding onto the *dog*, but for *refusing* to hand over the *hen* once the title has been transferred. Kroy is right in holding that the illegality rests with the

refusal to turn over something which he (B) has no right to, but *what* he has no right to is the hen, not the dog. This is a key distinction, for how a Rothbardian court would in fact handle the dispute is the opposite of what Kroy suggests, although for generally the same reasons as Kroy suggests, i.e. one is holding onto something which one does not have a just title to, against the will of the proper owner.

This error on Prof. Kroy's part has some implications for the rest of the essay, but it isn't fatal. On the bottom of p. 206 and top of p. 207, (No. 1), Kroy is wrong: the Randian and Rothbardian judges would come to identical conclusions, but for different reasons. The Rothbardian judge would demand that the criminal return the hen. Sections Nos. 2, 3 and 4 as treated by Kroy are fine, and are not affected by the misinterpretation.

A few further comments.

Page 209, Kroy states that for Rothbard, "there are no subject-independent (or 'objective') factors which determine what your values should be." Not quite true, although perhaps it is true if we stress the word "determine." Rothbard is in the natural law tradition, and there are most certainly, for him, "objective" factors which determine what one's values should be: the nature of man and the universe in which he lives.

I also do not think that Kroy's treatment of Rothbard's view of freedom (of the will) is precise enough. Perhaps he should refer to Rothbard's "The Mantle of Science." Rothbard's disagreements with Rand on the question of free will is an extremely interesting topic. We may state the difference this way, drawing on the earlier works of Nathaniel Branden, a one-time philosophical associate of Ayn Rand. Dr. Branden, in his work *The Psychology of Self-Esteem*, develops a neo-Thomistic separation of the functions of man's mind, of human consciousness, into three separable elements: cognition, evaluation, and regulation of action. Ayn Rand and Nathaniel Branden seem to limit man's metaphysical

freedom to the first: the only choice is to think or not to think. The rest follows from this, and other (apparent) choices are reducible to this one. For Rothbard, man's freedom is broader, and includes such elements as *what* to think about and for *how long*.

In a nutshell, Rothbard's view of freedom may be said to integrate the basic Randian argument of why free will exists with the "subjectivism" of Mises and the Austrian school of economics. For Rothbard, a person does not only choose to think, but to think about something, rather than something else, and then for a specific period of time. Thinking, for Rothbard, is in a fundamental sense like all other human activities: in thinking, man faces limited means and unlimited ends; he must *economize*. *Choice*, and hence true freedom, is wider than merely the choice to think or not to think. It operates along the whole sphere of human activity. This is my interpretation of the basic difference between Rand and Rothbard. Rothbard is, in my view, more subtle, recognizing the importance of *degrees*, of selectivity, of choice all along the scale of human activities. Thinking is not for him something to be turned on or off ("to focus or not to focus") with its object *given* by a previously existing set of "premises." Premises do not "determine" the object of thought or the length of time one thinks about any one given thing because thinking is not mechanistic or mechanical; there is selectivity, choice, scarcity, all along the scale.

Finally, if Prof. Kroy wishes to take up the distinctions between the thought of Murray N. Rothbard and Ayn Rand in any detail, he needs to look into some of Rothbard's more obscure publications, such as his early essays on Austrian methodology, and the essay "The Mantle of Science," as well as the unpublished work *The Ethics of Liberty*. Since Rothbard's position is nowhere spelled out in full, one has to piece it together. When that is done, then the reasons for the differences between Ayn Rand and Murray N. Rothbard become more clear.