

“Do We Need a Government”

(Papers by David Friedman, Birgir Thor Runolfsson, and Boudewijn Bouckaert delivered at the Mont Pelerin Society meeting, Iceland, August 2005)

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It's a pleasure and an honor to be asked to comment on these fine papers. I received Professor Friedman's paper in advance and am acquainted with Professor Runolfsson's work and I will try to offer some spontaneous remarks on Professor Bouckaert's paper. These fine papers have occasioned five comments, as follows:

I. Government is not the only solution to the public goods problem, nor is the underprovision of public goods the problem to which government is the solution.

Professor Friedman is surely right in maintaining that the state is not the obvious or only solution to the public goods problem or to other failures of collective rationality; those problems also bedevil governments. For every problem of collective rationality encountered by people facing each other as buyers and sellers in a market setting, there is a problem of collective rationality faced by people facing each other as citizens in a political setting. Indeed, as Professor Friedman argues, such problems are likely to be worse in political settings, both because “it is harder to produce a public good for a very

large public than for a very small public” and because in political settings people are generally more able to impose costs on others, thus exacerbating rather than ameliorating problems of collective rationality.

Furthermore, the state may itself be the source of the problem to which it is often proposed as the solution. Many alleged market failures are due to previous decisions by political leaders to provide goods on a non-exclusive basis. “Freeways” that allow unrestricted access to drivers are a case in point; voluntary provision may not produce a lot of free-ways.<sup>1</sup> Toll roads, in contrast, allow exclusion and have been a very important part of voluntary provision of transportation.<sup>2</sup> As Kenneth Goldin notes,

“The evidence suggests that we are *not* faced with a set of goods and services which have the inherent characteristics of public goods. Rather, we are faced with an unavoidable choice regarding every good or service: shall everyone have *equal access* to that service (in which case the service will be similar to a public good) or shall the service be available *selectively*; to some, but not to others? In

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<sup>1</sup> Nonetheless, non-exclusive access to transportation is voluntarily provided on elevators, hallways, and the like, when the owners of the buildings, such as office buildings, shopping malls, and so on, can exclude the businesses from locating in their buildings; the ability to exclude, and therefore to charge for access, is what allows entrepreneurs to make the money necessary to provide the good.

<sup>2</sup> See Daniel Klein, "The Voluntary Provision of Public Goods? The Turnpike Companies of Early America," *Economic Inquiry* (1990), pp. 788-812. (Reprinted in *The Voluntary City*, edited by David Beito, Peter Gordon and Alexander Tabarrok [Ann Arbor: University of Michigan Press, 2002]) and Daniel B. Klein and John Majewski, "America's Toll Roads Heritage: The Achievements of Private Initiative in the 19th Century" (December 29, 2003). *Scandinavian Economics Working Paper* No. 30 (<http://ssrn.com/abstract=487676>).

practice, public goods theory is often used in such a way that one overlooks this important choice problem.”<sup>3</sup>

A decision by the state to provide law and law enforcement on a non-exclusive basis may contribute to the public goods problem to which the state is offered as a solution.<sup>4</sup>

So government is not the only solution to problems of collective rationality. Equally significantly, problems of collective rationality were rarely – if ever – the problems to which government was proposed as the solution. The “problem” the establishment of governments solved was the problem of how to extract resources involuntarily from others; the protective features of the state emerged substantially in response to the need to defend their subject populations from exploitation by rival predators. Governments historically emerged to engage in predation, as stable systems of rent extraction that have exploited their advantages in the mobilization and application of physical force.<sup>5</sup> The nation states with which we are currently familiar are not the outcome of inexorable social forces, nor were they invented as a means of solving problems of collective rationality or under-provision of public goods.<sup>6</sup>

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<sup>3</sup> Kenneth Goldin, “Equal Access vs. Selective Access: A Critique of Public Goods Theory,” *Public Choice* 29 (1977), p. 53 (emphasis in original). See also Anthony de Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem* (Oxford: Oxford University Press, 1989).

<sup>4</sup> Note, however, that the taxes extracted by states do come with a rather draconian device to exclude non-payers from the good of freedom and security: prison.

<sup>5</sup> See Charles Tilly, *Coercion, Capital, and European States: AD 990-1992* (Oxford: Blackwell, 1992).

<sup>6</sup> See Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton: Princeton University Press, 1994).

II. Law is already substantially created and enforced independently of government.

A great deal of law creation and law enforcement is already provided outside of or independently of the state. Max Weber's famous definition of the state specified not its activities (since there is hardly any activity that has not been undertaken by some state at some time), but the means employed that are specific to the state, viz. the attempted monopolization of physical force:

“nowadays...we have to say that a state is that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory, this ‘territory’ being another of the defining characteristics of the state. For the specific feature of the present is that the right to use physical violence is attributed to any and all other associations or individuals only to the extent that the *state* for its part permits this to happen. The state is held to be the sole source of the ‘right’ to use violence.”<sup>7</sup>

Despite the claim to have a monopoly on the legitimate use of force, no state in fact does exercise such a monopoly. Self-defense, at least, is almost always an option. Moreover, most social order is not secured by the state, nor do we as a general matter rely solely or even primarily on the state for the enforcement of law. Legal rules are produced

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<sup>7</sup> Max Weber, “The Profession and Vocation of Politics,” in Max Weber, *Political Writings*, ed. by Peter Lassman and Ronald Speiers (Cambridge: Cambridge University Press, 1994), pp. 310-11.

by non-state actors whenever they engage in contractual relations or whenever norms emerge as a result of repeated interactions.<sup>8</sup>

The restriction of the use of the term law to state activity has had a very harmful effect on the social scientific investigation of actually functioning legal orders. As in other cases, here we would do well to pay attention to the role of definitions in directing scientific investigation; in the case of law, such investigation was hampered when the imposition of violence was made a part of the very definition of law. Jean Bodin set back the study of law and social order when he made his case that law can only be a product of the state,

“Someone may object not only that magistrates have the power of making edicts and ordinances, each within his competence and jurisdiction, but also that private persons make the customs, which can be general as well as local. Custom, surely, has no less power than law, and as the price is master of the law [it is objected], private persons are masters of the customs. I answer that custom acquires its force little by little and by the common consent of all, or most, over many years, while law appears suddenly, and gets its strength from one person who has the power of commanding all. Custom slips in softly and without violence; law is

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<sup>8</sup> “The legal process always traces back in the end to individual claim. Individuals make the law, insofar as they make successful claims.” Bruno Leoni, “The Law as Individual Claim,” in *Freedom and the Law* (Indianapolis: Liberty Fund, 1991), p. 202.

commanded and promulgated by power, very often against the subjects' wishes; and for that reason Dio Chrysostom compares custom to a king, law to a tyrant."<sup>9</sup>

It is a grave mistake to insist that law requires violence, and therefore the mailed fist of the state; in fact, provision of legal order can be a matter for "private persons [who] make the customs." To deny that is to deny the existence of readily observable legal orders. When the deployment of violence is removed from the definition of law, we see that a great deal of law and legal order is neither created by nor enforced by the state. As Lon Fuller noted, "Law has to do with the governance of human conduct by rules."<sup>10</sup> Violence may sometimes be used to enforce law, but it is a mistake to make violence an element of the definition of law.

Not only are many legal rules the product of non-state actors,<sup>11</sup> but also much enforcement is carried out by non-state actors, from the non-professional use of defensive force by ordinary persons to the professional use of force by persons dedicated to the

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<sup>9</sup> Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Republic*, ed. by Julian H. Simon (Cambridge: Cambridge University Press, 1992), p. 57. Bodin continues: "Law, furthermore, can repeal customs, while if custom should detract from law, the magistrate, and those charged with making sure the laws are kept, can have the law enforced whenever they see fit." What he leaves out is that custom can also repeal "law," as he defines it, because it may not in fact be enforced. See, for example, Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991). See also the examples of legal order outside of the state in Avinash K. Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton: Princeton University Press, 2004).

<sup>10</sup> Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), p. 53. As F. A. Hayek stipulated, "The law will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans." F. A. Hayek, *Law, Legislation, and Liberty: Volume I, Rules and Order* (Chicago: University of Chicago Press, 1973), pp. 85-86.

<sup>11</sup> See, for example, Terry Anderson and P.J. Hill, "The Evolution of Property Rights: A Study of the American West," *Journal of Law and Economics*, Vol. XVIII (1) April 1975. Many other cases are described in Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute, 1990).

enforcement of law, including private security guards and, in some countries, private bounty hunters.<sup>12</sup> In the extreme, we have seen examples of legal systems in the past that did not rely on the kinds of monopolies on the employment of force that we associate with the modern state – the Icelandic commonwealth is a useful and fascinating example of that<sup>13</sup> – and we see examples today of non-state provision of law and law enforcement, as well.<sup>14</sup>

An examination of such non-state institutions as title insurance, arbitration and dispute resolution, security firms, bail bondsmen, and bounty hunters shows that much of the enforcement of legal rules is already carried out quite independently of the state. We can learn a great deal about how non-state legal systems work, not by dreaming up fantasies of competing defense agencies, but simply by studying closely the world around us.

III. The debate over limited government vs. statelessness is interesting, but not a very useful way of distinguishing liberal approaches, since we never face a binary choice of having a state or not having a state.

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<sup>12</sup> See John A. Chamberlin, “Bounty Hunters: Can the Criminal Justice System Live Without Them?,” *University of Illinois Law Review*, Vol. 1998, No. 4, pp. 1175-1205. As John Chamberlin points out, “Approximately 35,000 defendants jump bail annually, and an astonishing 87% are brought back to justice by bounty hunters.”

<sup>13</sup> See Jesse Byock, *Viking Age Iceland* (London: Penguin Books, 2001), William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago: University of Chicago Press, 1990), David Friedman, “Private Creation and Enforcement of Law: A Historical Case,” *The Journal of Legal Studies* 8, pp. 399-415, and Birgir Thor Runolfsson, “Ordered Anarchy: Evolution of the Decentralized Legal Order in the Icelandic Commonwealth,” *Journal des Economistes et des Etudes Humaines* 3 (2/3), June/September 1992, pp. 331-351 and “Institutional Evolution in the Icelandic Commonwealth,” *Constitutional Political Economy*, Vol. 4, No. 1 (1993), pp. 97-125.

<sup>14</sup> See Tatiana Nenova and Tim Harford, “Anarchy and Invention: How Does Somalia’s Private Sector Cope without Government?,” *Public Policy for the Private Sector*, World Bank Group, Note No. 280, November 2004, <http://rru.worldbank.org/PublicPolicyJournal>

Rarely do we face choices between having a state or not having a state. Setting aside Somalia and a few other places, few of us find ourselves in completely stateless societies facing the choice of whether to institute a state or not. We normally face choices on the margin: in this or that case, shall we substitute state monopolization for non-state ordering or shall we substitute non-state ordering for state monopolization? As James Buchanan notes,

“The choice among alternative structures, insofar as one is presented at all, is between what is and what might be. Any proposal for change involves the status quo as the necessary starting point. ‘We start from here,’ and not from somewhere else.”<sup>15</sup>

From where we are now, what changes should we propose or support?

When examining how securities markets are regulated, how the internet is governed, or how property disputes are resolved, we can ask whether we want more or less monopoly, more or less freedom to compete and choose among legal ordering systems. Positing a merely binary choice ignores the transitional issues of how to choose to move along a continuum between more or less monopolization of the creation and enforcement of law. And that is not an immaterial issue. There are plenty of cases in which even the convinced advocate of the benefits of a stateless legal order would favor

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<sup>15</sup> James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975), p. 78.

shifting state resources from pure predation to the valuable efforts to define and enforce legal claims, for example. (That's the sense in which it's meaningful to say that all modern states do both too much and too little: they undertake too much predatory behavior – such as protectionism, redistributionism, and enforcement of victimless crime “laws”; and at the same time, they invest too little effort in defining and enforcing rights to property in land, defending people from criminal assaults, adjudicating disputes, and enforcing contracts.)

Moreover, treating the issue of state or non-state order as a binary choice has the disadvantage of leading some who are otherwise advocates of liberalism to define themselves as simply “anti-state,” and therefore as opposed to any action by any state. They may even hail the collapse of a state, without regard to what replaces it, whether lawless statelessness or an even more vicious and predatory state. We have plenty of evidence that there are many cases of lawless and illiberal statelessness that are decidedly inferior to relatively law-governed and relatively liberal rule by governments. Being anti-state is not the same as being pro-liberty.

IV. Non-state actors can provide law and legal order in the absence of any state under the right circumstances.

Professor Friedman concludes that non-state creation and enforcement of law can work, under the right circumstances. He focuses on “the economies of scale in the rights enforcement industry.” His arguments are compelling when it comes to the enforcement

of legal claims (something that already happens; think of debt collection and repossession agencies). I think, however, that he has left out of consideration very important circumstance: whether the legal system is focused on righting wrongs through restitution or on punishing violations of rules or edicts. Restitution has traditionally provided a great part of the incentive for voluntary participation in the enforcement of rights in non-state legal systems. The desire to receive back what was taken from one or to be compensated for harms is a motive that, for most people, is more powerful than the desire for revenge through punishment, especially when the punishment is implemented at the expense of the victims.<sup>16</sup>

One reason that state enforcement seems so inefficient is that citizens have so few incentives to participate actively in the enforcement of rights claims, even their own, because the outcome will typically involve little or no restitution to the victims or compensation to those who might come to their aid. Harold Berman describes the Norman introduction of the crime of “felony”: “In England after the Norman Conquest the most serious crimes came to be called felonies because they were considered to be breaches of the fealty owed by all people to the king as guardian of the peace of the

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<sup>16</sup> That is why restitution is at the heart of the legal treatment of stateless law provided by Randy Barnett in his *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Oxford University Press, 1998). In addition to relying on the incentive of restitution, the incentive of being lawworthy through voluntary association with other law worthy sureties has been an important element in non-state legal ordering, much as credit cards give one access to credit among strangers. See the discussion of the voluntary Anglo-Saxon borh system of legal enforcement in William Alfred Morris, *The Frankpledge System* (New York: Longmans, Green, & Co., 1910): “The borh obligation of the laws of Ethelred and Canute was not permanent, as was that of frankpledge suretyship. It was voluntary, its assumption for a person of bad reputation was optional, and apparently it might be withdrawn so long as no legal imposition thereby incurred remained undischarged.” (p. 27)

realm.”<sup>17</sup> As Berman notes, “One obvious disadvantage of the appeal of felony as a means of controlling violence was that it took a high degree of public spirit to initiate proceedings. The ‘appellor’ got nothing if he won, and indeed was fined if he lost.”<sup>18</sup> Compensation was a central element in the effective functioning of non-state legal systems.<sup>19</sup>

#### V. Geography plays a role in determining whether societies rely on non-state legal ordering or develop (or succumb to) states

Sigurdar Lindahl has described how under the legal system of medieval Iceland “No provision was made for a leader with powers comparable to those of a King.”<sup>20</sup> He immediately notes that “The reason was no doubt that Iceland’s remoteness rendered unnecessary the centralization of power dictated by military defence.” No doubt the relative freedom of England after 1066 from invasion provides some explanation for the

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<sup>17</sup> Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), p. 314.

<sup>18</sup> Harold Berman, *Law and Revolution*, p. 450.

<sup>19</sup> Compensation was central to the functioning of the system of law under the Icelandic commonwealth; it was the alternative to the blood feud. The story told in chapter 106 of *Njals’s Saga* of Amundi the Blind and Lyting, who killed Amundi’s father, comes to mind as a reminder that compensation was what drove people to accept peace and lawfulness: “Amundi: ‘I am asking what compensation you are prepared to pay me.’ ‘None whatever,’ replied Lyting. ‘I cannot understand how that can be right and just before God,’ said Amundi, ‘for you have struck me close to my heart. And I can tell you this, that if my eyes were blest with sight, I would get full compensation for my father or else take blood-revenge. May God judge between us.’ He walked out of the booth. At the door he turned once more, and at that moment his eyes opened. ‘Praise be to the Lord my God,’ he said. ‘His will is revealed.’ He ran back into the booth right up to Lyting, and sank his axe up to the hammer into Lyting’s head; then he wrenched the axe out, and Lyting fell forward, dead..... ‘No one can blame you for what you did,’ said Njal, ‘for such things are foreordained. It is a warning to others in similar circumstances never to rebuff those who are so close of kin.’ *Njal’s Saga*, translated by Magnus Magnusson and Herman Pálsson (New York: Penguin Books, 1960, p. 227.

<sup>20</sup> Sigurdar Lindal, “Law and Legislation in the Icelandic Commonwealth,” *Scandinavian Studies in Law*, Vol. 37 (1993), pp. 55-92, p. 55.

longevity of constitutionalism in that country, as well. The need for military defense against external aggression, or – put more precisely, the competitive struggle for military predominance – helps to account for the relative durability and virtual omnipresence of centralized state systems.

The issue is relevant to the papers of Professor Friedman and Professor Runolfsson in the following ways.

First, it seems that the fixed territorial nature of the Hreppur and of the church tax described in Professor Runolfsson's paper helps to account for the final collapse of the Icelandic commonwealth, albeit after over three hundred years of glorious existence. The introduction of religious conformity on the island about the year 1000 and later the establishment of the compulsory church tax in the year 1096 established a system of rent-seeking, control over which was a source of contention.<sup>21</sup> Furthermore, although the Thing functioned as a robustly voluntary association, neither strictly geographical nor kinship-based,<sup>22</sup> the territorial nature of the Hreppur, which was defined in terms of geographical clusters of at least twenty households,<sup>23</sup> meant that exit from a chieftain-Thingman relationship was relatively low cost, but exit from a Hreppur required geographical relocation and was accordingly more costly. Professor Runolfsson argues that the introduction of the tax and of taxing units that were difficult to escape was a primary source of the collapse of the competitive and decentralized system of provision

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<sup>21</sup> Lindal, pp. 82-83; Runolfsson, "Institutional Evolution in the Icelandic Commonwealth," p. 117.

<sup>22</sup> See Byock, "The Flexibility of the Goði-Thingman Relationship," in *Viking Age Iceland*, pp. 126-132, for evidence.

<sup>23</sup> William Ian Miller, *Bloodtaking and Peacemaking*, pp. 19-20.

and enforcement of law in Iceland. Recall that Weber cites territoriality as a defining characteristic of the modern state; we can see the role of territorial monopoly in the collapse of Iceland's stateless order.

Second, I found Professor Friedman's scenario of how the residents of a stateless region might defend themselves rather unconvincing, as well as suggestive of a reason why a state might emerge to coordinate defensive force. Professor Friedman describes a stateless territory with multiple volunteer militias that mobilize for defense against external aggression. He states "What the model so far lacks is organization – ten thousand separate companies of a hundred men do not an army make. To provide that organization we have a small cadre of full time professional soldiers, funded by charitable donations." The cadre of full time professional soldiers that Professor Friedman suggests would organize the various units of the voluntary militias. That sounds fairly state-like. Moreover, Professor Friedman asks how "such a system could successfully defend *its* territory." I emphasize the word "its." Professor Friedman suggests that there will be incentives to create a unified system to mobilize defensive force. If the defense is not unified, there is the danger that the territory will just be nibbled away from the outside, if not overwhelmed all at once. It sounds like the start of a state to me, for if it is a unified command structure, it is asserting a legitimate monopoly on the use of defensive force. It seems that perhaps the only way to avoid the problem is to be Iceland, i.e., a single territory that is not threatened from outside. Or, rather, be Iceland without the Hreppur. But for territories that do not have those characteristics, it seems like there are strong incentives to develop a state.

## VI. Conclusion

1. States claim the monopoly on the legitimate use of force, as well as on the creation of law, but they don't generally exercise such monopolies and they aren't in fact the sole source of legal rules. (Moreover, the fiction that all legitimate exercises of force are somehow authorized by the state is implausible.) There are many sources of legal rules and there are many sources of enforcement of law, much of it without recourse to violence. We live in a world that is already substantially ordered by non-state mechanisms.

2. The interesting problems are how to choose among the best means of ordering human relationships. We can ask whether we want more or less monopoly, more or less freedom to compete and choose among legal ordering systems. There is a continuum and we can move along it.

3. In general, the right of property—importantly including the right to restitution—provides the incentive for parties to cooperate voluntarily in enforcing law through non-state systems of legal ordering. It is hard to imagine a non-state legal ordering system that did not rely heavily on the right to restitution for harms.

4. Finally, whenever we have linked goods that are geographically based, whether they are systems of pollution control or of defense from external aggression, we should expect something at least state-like to be the primary provider of law enforcement.