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On the Monopoly of Rule Enforcement

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I. Episodes

A man travelling at night in the New York subway is menacingly surrounded by five young men brandishing long screwdrivers. He shoots and wounds all five, one grievously. His plea of self-defense is vitiated by his disproportionate use of force. Convicted and sentenced to a long prison term, he fights a protracted legal battle financed by donations, and is finally acquitted on appeal.

In a French school, a teenage boy misbehaves, disrupts the class, and ends up kicking everyone in sight, including the teacher. The assistant head takes him to his office and spanks him. The head of the school suspends the assistant head on the spot, and he is prosecuted under the act forbidding corporal punishment. He is acquitted because he did not humiliate the boy (as he would have done if he had spanked his bottom in front of the class).

After the July 2005 terrorist attacks on London Transport, police shoot dead an innocent foreigner, mistaking him for a terrorist. In the ensuing storm of indignation, the police are severely blamed for not ascertaining the intentions of their victim. The article in *The Economist* discussing the matter is entitled 'Excuse Me, But Are You A Suicide Bomber?'

* Editor's Note: We are pleased to publish this article by Anthony de Jasay, whom James M. Buchanan (1986, p.241) describes as offering "solid, foundational analysis, grounded in an understanding of economic theory, informed by political philosophy, and a deep sense of history," and whom Gerard Radnitzky (2004, p.99) describes as "one of the most significant social philosophers of our age." Anthony de Jasay's eyesight is not what it once was, so he requested that I provide readers with references to other authors who have addressed some of the questions raised in this article. Private enforcement of law has been discussed by authors such as Anderson and Hill (1979), Friedman (1989), Rothbard (1996), Benson (1990), Ellickson (1991), and Ekelund and Dorton (2003). For an overview of the literature, see Stringham (2007). De Jasay has a unique perspective on this topic, so we are pleased to publish it here. As Roderick Long (2003, p.120) wrote, "Anyone with interests in philosophy, economics, political theory, or rational-choice analysis will profit from close reading and long pondering of de Jasay's arguments."

II. The Monopoly of Enforcement

1. Rule Enforcement as a Public Good

It is a well-understood problem of public goods that because it is very difficult or morally repugnant to exclude any member of the public from enjoying such goods if they are provided at all, each individual member will choose to enjoy them without contributing to their cost. In other words, he will choose to be a free rider. Obviously, if everyone tries to be a free rider, no contribution is made to the cost, and the public good cannot be provided at all. Logically, therefore, everybody cannot be a free rider. Some – at least a critical minimum number – must contribute for the public good to be produced so that all, contributors and free riders alike, can enjoy it.

In a world where each person is motivated by the good of all, presumably all would contribute. The public goods problem would not arise. In a world where each person pursued mostly his own interest, two solutions would be open.

One is for an authority with sufficient backup force – the state – to compel some or all individuals to contribute by taxing them on some basis. The angelic version of democratic theory supposes that all individuals positively wish to be so compelled, because compulsion ensures that all will contribute equitably. Adult versions of democratic theory tell us that a majority of people will accept compulsion provided the major part of taxation falls on the minority, so that the majority gets at least a little bit of a free ride.

The other solution is the state-of-nature one in which the state does not intervene (or there is no state), and any contribution to producing a public good is voluntary. Received wisdom from mainstream economics holds that voluntary contributions would be irrational; hence the public good either could not be produced at all, or only to a suboptimal extent. Optimality criteria are contestable, but this is not the place to explore that particular controversy. For the present purpose, what we need is to relax the received wisdom about voluntary contribution being necessarily inadequate or nil. It is the wrong kind of a priori reasoning to deny the possibility that some individuals attach a high enough 'utility' to a public good to contribute to its cost rather than allow it to fail altogether, given the requisite probability that enough other individuals will also contribute for the same reason. The secret of this voluntary solution is the

reliance of each contributor on a reciprocal probability[1] that each accords to others behaving the right way, – a probability that serves as the foundation of a coordination equilibrium or convention.

Instead of any public good in general, consider next the particular public good of the enforcement of beneficial rules, notably rules against torts and rules of civility. It is true of many such rules that if they are upheld, a temptation is provided to breach them or at least not to contribute to their enforcement, but to free-ride instead. Hence enforcement is necessary by punishment of some kind or the credible threat thereof. We can consider that the rule is self-enforcing, i.e., an equilibrium, if the conditions for generating voluntary contributions to the cost and effort of enforcement are fulfilled.

One such condition is that the contributor should derive a greater benefit from punishing and deterring the breach of a particular rule than his cost of punishing the rule-breaker. Two kinds of benefit may play a role here. One is the defense of his own life, limb and property by shooting the intruder who threatens to stab him with a long screwdriver, running after and catching the thief who stole his case, putting pressure on the bad debtor, or teaching a lesson to the neighbor who is making a nuisance of himself. Here, enforcing the rules is like acquiring any private good that is worth its price. The other potential benefit is derived from rule-enforcement in general that may be to one's own advantage in some future contingency, but that is definitely helpful to other rule-followers, while similar action by the latter is helpful to oneself. The benefits are reciprocal. Here, enforcement functions as a public good.

Formally, an individual facing a state-of-nature public goods problem can opt for one of two pairs of possible alternatives: to contribute or not to contribute to its cost. Contribution can have two

[1] Any member of a group who values the public good will either contribute to its cost or attempt to free-ride on the contributions of others, depending on the proportion of the group members that he expected to contribute. If he expected a very low proportion to do so, his contribution would be futile; if he expected a very high proportion to contribute, he would not need to do so. If he expected the proportion of contributors to be neither very low nor very high, his own contribution could have a sufficient likelihood of being critical for the provision of the good, and the risk of non-provision would appear sufficiently high to deter free riding. In this range, the probability of his choosing to contribute would be at a maximum. In equilibrium, each actual contributor to the public good would rather continue to contribute than to stop and run the risk of the failure of the good.

outcomes: successful production of the public good in conjunction with others, or failure to produce it. Non-contribution may permit a free ride if others produce the public good, or it may fail to be produced. The fully rational choice depends on the probabilities and 'utilities' of the four alternative outcomes. The probabilities, in turn, depend on the expected behavior of others.

I am far from suggesting, however, that in practice such subjective probability estimates are in fact made and calculations really based on them. Actual behavior is more likely to be rough-and-ready guesswork and adjustment to what others close by are doing. It is clear enough, though, that voluntary contribution to rule-enforcement is a logically coherent alternative that can be fully consistent with rationality. That it can under the right circumstances be a realistic outcome is attested by the fact that as far as we can read history, rules enforced by spontaneous civic actions have largely preceded specialized rule-enforcers such as the state.

2. Monopoly of Enforcement: The State Favors Free Riding

Looking at the sufficient conditions for rule-enforcement by voluntary effort in the state of nature furnishes, as a matter of course, some insight into the consequences of state intervention.

A widely used definition of the state attributes to it the monopoly of the legitimate use of force.[2] This definition is vacuous, for under it force is legitimate if and only if it is the state that uses it, hence the condition that the state has a monopoly of it is satisfied by definition. (It is like defining Nestle as the monopoly producer of Nestle chocolate). The state is the state by virtue of its monopoly (Nestle is Nestle by virtue of being the producer of Nestle chocolate). A less vacuous definition would have the state (1) possessing enough force to deter a coalition of equal or greater force being formed in civil society, and (2) using its force to dispossess actors in civil society of such force as they may still hold and punishing them for using it.

If the state bears the cost of public goods in general, and of rule-enforcement in particular, by levying taxes, it relieves individuals of the need to make choices in the matter. Since they must pay taxes anyway, and public goods are provided anyway, all that is left to them is to gratefully to accept the comfort of free-riding, the sole option

[2] Monopoly of possession of force is more relevant than of its actual use. If others than the state can legitimately possess force, they can make credible threats to use it, whether or not such use would qualify as legitimate.

the state can leave open if it wishes to affirm its monopoly of rule-enforcement.

By dispossessing its subjects of the means of threatening or using force (except such tamed means as firearms licensed by the police), and by punishing unlicensed private enforcement (except under carefully defined restrictive conditions), the state ostensibly relieves its subjects of a burden. It also assumes a responsibility that it is intrinsically ill-suited to discharge.

3. Why Seek a Monopoly?

Manifold reasons move the state to establish and defend its monopoly. The most evident ones serve its own survival as an institution, the consolidation of its discretionary power over and above the power it must exert merely to 'stay in power,' and the growth of its authority over and above that conferred by its possession of a great concentration of material force.

When rule enforcement was a diffuse, decentralized function, non-corporal punishment mainly took the form of fines for the benefit of victims and plaintiffs. Kings saw obvious advantage in diverting this income stream from victims and plaintiffs to themselves. Stripping civil society of rule-enforcing functions also stripped it of much of the justification for possessing arms and maintaining organized forms of exerting force. This has permitted a substantial reduction in the force the state needed to protect itself within civil society, or alternatively a great expansion of the area over which it could exert its will by relying on a given endowment of force. Last but not least, by effectively playing the role of sole teller and interpreter of the law, sole judge above the parties, and sole enforcer, the state gained a moral authority that had only previously existed dispersed in society among the elites.

Though they may be more open to argument, other kinds of reasons for the state's monopoly may weigh more heavily than the 'opportunistic' ones noted above. The major one can be traced back to the ingrained fairness principle that like cases must be treated alike, and they will probably not be treated alike if a party may be the judge in his own cause and execute his own judgment. The judiciary and the police, as parts of the state and in some, albeit a little obscure, sense standing above civil society, have a better chance of being impartial in judgment and even-handed in execution. There is much to be said about the rights and wrongs of this argument, but one

cannot deny that it is generally held with great conviction and is inculcated in people from an early age by the education system that identifies respect for the law with respect for the state as the sole legitimate law-enforcer. I am not concerned in this paper with the validity of the 'party and judge' argument beyond noting the weight it carries, but rather with the ultimate effect I believe it has upon the very possibility of reasonably effective rule-enforcement. However, for those who feel no reservations about the authority of the state and the duty of political obedience, it appears truly anomalous that private individuals should act as their own policemen and their own judges. Not only is it in the institutional interest of the state and its police and judiciary agencies to foster this belief; it is certainly also the deeply held conviction of what one may loosely call the political class.

Taken together, these reasons seem amply sufficient, and have proved amply sufficient over the last two or three centuries of Western history, to induce the state to assert its monopoly of rule-enforcement. It has sought to restrict the capacity of civil society to assume such tasks, discouraged its last vestiges by punishing private initiatives, and has done much to cause the rule-enforcing ability of civil society to atrophy by disuse. There is now by and large a clear-cut division of labor. Rule-enforcement is the exclusive responsibility and privilege of the specialized agencies of the state. With but a mild exaggeration, we might say that private persons and informal groups are breaking the rules when they try to uphold them.

III. The Inability to Punish

1. Restraining the Monopolist

In medieval Europe there was some local rule-enforcement by elements of civil society at the grassroots level, but specialized agencies also fulfilled both police and judicial functions in competition with each other. Disputes could be brought to, and remedy solicited from, feudal lords, towns, and ecclesiastical and royal authorities. Step by step, royal agencies drove out the competition, and the state's monopoly became increasingly effective in Europe from the 17th century onward. It was to be expected that establishment of the monopoly should soon be followed by demands for restraining and regulating it. This has duly happened. It was inevitable for states depending to a greater or lesser extent on the consent of their subjects to meet these popular demands, the more so

as regulation of the monopoly has *pari passu* enhanced its moral authority and confidence in its moderation and impartiality.

Restraint of the monopoly, becoming more and more strict and elaborate under pressure from the rising clamour of 'rightsism,' has many minor and two major consequences. One of the latter impinges on the police, the other on the judiciary.

Before it was restrained, the duty and the prerogative of the police included the maintenance of public order and respect for the rule system by using such force as proved necessary. Theoretically, this could authorize it to shoot rioters with live ammunition or torture suspected criminals to extort information about accomplices, though such recourse to force has long ceased to be standard practice in the western world. A probably more important police prerogative was to settle disputes on the spot and administer summary justice and immediate punishment for commonplace breaches of the rules. Obviously, this carried a risk of police error, abuse, brutality, and arbitrariness. It is fair to add that in less civilized countries where police power is circumscribed in constitutional rhetoric but in practice is unrestrained, the conduct of the police often verges on the outrageous.

Opposition to these practices became near-unanimous with the rise of 'rightsism.' It was never properly understood that the risk involved in police powers great or small cannot be abolished by restraining them, but can only be transformed and transferred, often from the innocent victims of police abuse to the no less innocent victims of rule-breakers let loose upon them by the lack of police powers. Which set of innocents should be sacrificed to the other is a question moral theory cannot answer. It is a painful matter of arbitrary judgment colored by one's taste for one kind of society rather than another. Be that as it may, the end result of restrictively defining police duty and prerogative was that the chief function of the police became, not to apprehend and punish misbehavior on the spot, but to deliver presumed rule-breakers to the judiciary together with the evidence supporting their indictment.

In sum, one is inclined to conclude that monopoly of the police function leads to a dilemma: It is far too dangerous to let the police have a free hand, yet the police loses a large part of its usefulness when its hand is tied behind its back.

The other major consequence of restraining the monopoly of the state affects the judiciary, which has adjusted itself, and lent a helping

hand, to the progressive deformation of due process.

It is a morally quite appealing principle that, all things being equal, it is a greater wrong to condemn the innocent than to let the guilty go unpunished. Under the impulse of 'rightsism' it became all-important, and worth paying almost any cost, not to condemn the innocent, and never mind if as a result more of the guilty go unpunished than would otherwise be the case. This has led to an accelerating expansion of the prerogatives of the defense in criminal cases. It has, in particular, led to a luxuriant growth of appealed judgments to lighten or overturn sentences, in part because of a multiplication of the admissible grounds for appeal and in part because the cost of the appeals process, no matter how frivolous the grounds, came to be mostly a charge on the public purse. Appeal became a 'heads I win, tails they lose' game, a meal ticket for lawyers, and a major reason for the slowness of justice.

In civil justice, the monopoly of the state has created an indissoluble tie between jurisprudence and politics – politics in the most elementary sense of electoral exigencies. The liberties and rights of ownership, and the freedom of contract, became to a remarkable extent subordinated to what was regarded by the courts as the public interest. The courts' view of the public interest, in turn, came to be closely related to the view of the electoral majority and to what 'progressive' opinion demanded of the majority. One by-product of electoralism, particularly virulent in the United States, was and remains the treatment by the courts of corporate defendants in tort cases, as shown in truly extravagant damage awards to individuals. If justice was to be a state monopoly, at least let no one say that it did not protect the weak against the strong – as if doing this, instead of protecting the just against the unjust, were the task of justice.

2. Punishment Must Not Hurt

Punishment administered by the state must fulfill two parallel functions. First, it must demonstrate to society at large that with the state as its responsible and effective guardian, justice is being done. Punishment in some cases is also designed to prevent the offender from offending again for a while (if imprisoned) or permanently (if executed). Second, it must deter breaches of the rules. Beyond a basic level where they can be complementary, the two functions soon become rivals; promoting one will involve demoting the other As

justice leans over backward to be irreproachable, its potential to deter breaches of the rules by punishment gets blunted.

It is obvious that the deterrent effect of punishment becomes stronger as it grows swifter, more theatrically spectacular, more brutal and merciless. Conversely, the deterrent effect cannot but weaken if punishment is humane, clinically dispassionate and discreet. Capital punishment is a case in point. Its opponents argue that it has no deterrent effect, or, more precisely, that it deters no more than a life sentence.

Argument cannot decide this question one way or the other. Since the problem does not lend itself to controlled experiments where potential murderers are exposed both to a death or a life sentence and react by committing or not committing the contemplated murder, one must take an agnostic view. However, the deterrent is not death in the abstract or life imprisonment in the abstract, but all that may be brought on by such sentences. A modern-day death sentence usually becomes executory only after an appeals process that is notoriously long and often stretches over a couple of decades. Perhaps strong reasons exist why this is so, but it is liable to wipe out the deterrent effect of death and assimilates the death sentence to a long prison sentence. At its end point, no hanging occurs on the gallows in public view; no dramatic beheading takes place. Instead, execution is carried out as discreetly and painlessly as possible. It can hardly have the same imprint on folk memory and imagination as did the old-style hangings or beheadings.

The swiftness of punishment is arguably a crucial factor in deterring all breaches of the rules, be they minor misdemeanors or grave felonies. The most likely hypothesis to explain it is that the various types of rule-breakers all tend to discount the future at a higher rate than rule-abiding people, and/or they systematically underestimate the probability of getting caught and, if caught, being convicted. If this hypothesis is near the truth, it underlines the efficacy of summary punishment on the spot, and the softening effect of a delayed judicial process.

Summary justice, however, almost necessarily involves corporal punishment. Maximizing deterrence, as I suggested at the head of this section, calls for punishment that is not only swift – a rap on the knuckles – but also brutal. It must hurt physically and humiliate psychically. Spanking the disruptive pupil may teach him a lesson, but spanking him in front of the whole class will teach something to the

class as well. It will also belittle him in his peers' eyes. Vandals, leaders of youth gangs and neighbourhood bullies may lose prestige if put in the pillory.

Finally, punishment will lose much of its deterrent effect if it is alleviated on grounds of divided responsibility. The classic case is for the offender to be treated more lightly because responsibility for his offense is shared by the society that ill-treated him, failed to educate him, and has offered him no decent future. The offense, then, is not wholly the offender's fault, and judging it as if it were would be unjust. Obviously, however, if punishment serves not so much to deter, but to show that justice is being done, it can ill afford to be swift, it must not be brutal, and it should be merciful or at least humane. Summary justice must be replaced by due process, corporal punishment must be abolished altogether as a violation of human rights, schoolchildren must neither be spanked nor otherwise humiliated, and rioters must be dispersed without doing them bodily harm. Prisons must be salubrious, prisoners must have exercise, entertainment and education, and must not be made to do forced labor.

The same social forces that seek to impose restraint upon the state for fear of its monopoly of force also work to make punishment increasingly symbolic, painless, and consistent with the humane treatment that befits a civilized society. The price paid for this laudable development is the progressive blunting of the edge of deterrence. If rules are respected without effective enforcement involving punishment that hurts, well and good. Taking a lucky path may lead a society to this happy condition. The society we now live in has clearly not taken this path.

IV. Turning a Blind Eye

1. Restore Competition?

Section III.2 was intended to persuade the reader that state monopoly of rule-enforcement leads to soft, sluggish, and ineffective punishment. As a consequence, rules will be poorly enforced, and public order and the security of person and property undermined.

It might be thought that a possible remedy lies in the formal abolition of the state monopoly and the legalization of do-it-yourself policing, judging, and punishing by individuals and *ad hoc* groupings at the grassroots level, relying on voluntary contributions to produce the public good of rule-enforcement. Competition would then occur

between private and public efforts, each moving into areas where the other was the most deficient. The pressure of opinion for taming and restraining the state monopoly would presumably ease off. A spontaneous division of labor might evolve, with private enforcement by vigilantes taking on the vandals and the street gangs that spoil the daily life of ordinary residents, while the state would assume more complex tasks, such as crime detection. There might even be statutory dividing lines, capital punishment and imprisonment remaining a state prerogative, while private enforcers might be given freedom to deal with petty offenders by using strong-arm methods, perhaps including the imposition of forced labor in local infrastructure projects. If forced labor could to a substantial extent replace imprisonment, (a form of punishment whose usefulness is as doubtful as its cost is burdensome), rationality would have gained a minor triumph. Popular imagination and initiative would, in the nature of things, be at work to devise easily applied and low-cost varieties of punishment.

The principal, and very likely decisive, objection against this solution would be the indignation it would provoke in a large section of opinion, and in the politically most articulate part at that. To authorize formally private individuals and their formal or informal groups to employ violence at their own discretion would seem to be unthinkable: after all, one could not pass laws legalizing lawlessness. At all events, it is hard to see the state legislating for its own withering away.

A little less unrealistic solutions, given a measure of good luck, may emerge spontaneously. The mechanism could be driven by the progressive worsening of the state's performance in the maintenance of public order and personal security. In recent decades, several Western European states have tried to reverse this rather threatening evolution by pouring money into the police and judiciary services. The effort may have slowed down the worsening of the security situation and the disruption in parts of the school system, but has not reversed it.

It is clearly in the interest of the governors not to allow this deterioration to go on indefinitely, for it brings ever nearer the point at which the patience of the governed snaps and political obedience becomes precarious. One way for the state to ward off this danger might be, not to abolish the monopoly of enforcement, but to turn a blind eye when exasperated individuals and their *ad hoc* coalitions

resort to self-help and organize themselves for the private enforcement of basic rules. Once such a movement takes hold – and it may take fortuitous events to help it to take hold – it would have some chance of being carried wider and farther by its own momentum. There would be no need for a formal division of areas of responsibility between the state's services and private endeavors, nor for any explicit acknowledgment that the state is turning a blind eye. Success would be more likely if the rise of private enforcement happened by tacit occupation of the ground by private initiatives and by its tacit acceptance by the former monopolist.

It must, of course, be borne in mind that private enforcement of public rules requires some private muscle, some private willingness to bear the inconvenience and risk of self-help and reciprocal aid, and no doubt also certain social skills in carrying out enforcement and imposing punishment. During the long years of an effective state monopoly, the muscles have atrophied, and the social skills have been largely forgotten. The beginnings of evolution toward a public *cum* private enforcement system might therefore be shaky, but performance could be expected steadily to improve for the obverse of the very same reasons that brought about the worsening performance of the monopoly.

2. Fiat Mundus, Pereat Justitia?

Much of the foregoing will have struck many readers as Utopian, coldly cynical, or both. It is Utopian because it imputes to rational individuals a willingness, under certain and far from exotic conditions, to make the effort and assume the cost involved in maintaining the complex good that is rule-enforcement. I have no very good answer to this charge, whose validity must be anybody's guess, except to say that we cannot say until we try, and as suggested in Section IV.1, this fortunately can be tried piecemeal.

The charge of cold cynicism springs from the way this essay speaks out the unthinkable, weighing up the merits of cruel brutality, dramatic punishment, summary justice, and, perhaps the most shocking of all, the readiness to sacrifice some innocent people to the inescapable errors of rough-and-ready, two-fisted rule enforcement.

It is as if I were putting forward the crassest of utilitarian arguments, satisfied that one cannot make an omelette without breaking eggs. *Fiat justitia, pereat mundus* has long been a principle of Western civilisation, honored as often in the breach as in the

observance, but at least it was honored. The present essay – so the charge goes – is setting it upside down, turning it into *Fiat mundus, pereat justitia,* let justice perish so the world may live.

However, the charge is poorly conceived. There is no question of justice perishing, at least no more than it has already been damaged. Privately enforced rough-and-ready justice would no doubt sacrifice some innocents. State monopoly justice, vainly attempting to squeeze through the two horns of the dilemma set by its very monopoly, is sacrificing the equally innocent victims of the many kinds of rule-breakers who abuse them with relative impunity. The point that the victims of the rule-breakers are far more numerous than the likely victims of the private rule-enforcers is one I think one should firmly set aside as having no moral weight. No utilitarian head-count should decide the question. Value judgments must ultimately do it, and this essay makes little secret of which way the author's judgment leans.

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