

LAW WITHOUT THE STATE

A consent-based legal system can exist without the state, argues **Jonathan Crowe**

Could there be law without the state? This strikes many people as a strange question. Law is so closely associated today with the promulgations of government authorities that it is hard to disentangle the two ideas. This article begins by exploring the conception of law that underpins this mindset. It offers an alternative understanding of law that makes it possible to conceive of a legal order without state authority.

The article then asks what legal institutions might look like in the absence of the state and discusses some challenges to law in a stateless society. I argue that it is at least plausible to think that stable sources of legal order could be maintained in a stateless environment. This conception of law without the state provides a useful framework for thinking critically about the limitations of current state-centred legal institutions.

Two views of law

It is useful to begin by considering two possible definitions of law. The first definition holds that *law is a set of rules enacted by socially recognised authorities, such as legislatures and courts*. This definition portrays law as whatever the legal authorities say it is. The content of law comes from authoritative sources such as legislation, regulations and judicial decisions. Law is essentially a top-down institution.

A second possible definition holds that *law is a set of rules that have evolved over time to enable members of society to coexist and pursue their individual ends*. This definition presents law not as the enactments of a supreme body but as a set of evolved social norms. The rules arise organically by consensus among members of society. Their content is determined by custom, not authoritative statements. This is a bottom-up conception of law.

There can be no doubt that centralised sources of authority play a prominent role in contemporary legal systems. This makes people naturally inclined to accept a top-down view of legal institutions. It is commonly assumed that all law comes from authoritative sources, such as legislatures and judges. However, it is worth asking whether our most important legal rules owe their origins to this process. Where did the legal rules against murder or in favour of keeping contracts originally come from?

The answer seems to be that these rules initially developed as a matter of custom, before being recognised in judicial decisions and eventually codified in legislation. This story about the emergence of legal rules has been told in detail by F.A. Hayek.¹ Legal rules emerged organically as a way for members of a community to coordinate their behaviour and live harmoniously together. In this respect, they resemble other kinds of customary social norms like norms of grammar, spelling and etiquette.

What, then, is the process by which customary social norms arise? A compelling answer can be found in the notion of spontaneous order that is central to the evolutionary theories of law and economics. The customs governing a spontaneous order are not planned. Rather, they evolve over time. As the Scottish philosopher Adam Ferguson put it, 'Many human institutions are the result of human action, but not ... of any human design.'² However, this does not mean the rules are purely random.



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In a spontaneous order, people adopt the practices they think will best enable them to pursue their self-interest and coexist with others in society. If the practices do not work, they are abandoned in favour of other approaches. In this way, people across the community will come by a process of trial and error to accept common social rules. This process of rule-formation is by no means infallible, but neither is it arbitrary.

Law and anarchy

Anarchism is the view that the state is unjustified and should ideally be abolished. However, what would law look like in an anarchist society? Is law possible without the state? We have seen Hayek arguing that customary law predates the modern state. This provides us with reason to think that law without the state is at least possible. An anarchist society might be expected to feature customary legal norms. These norms would emerge organically through a process of spontaneous order.

People often worry that a stateless society would descend into chaos. Anarchists typically respond that this concern both *overrates* the state and *underrates* other sources of order. They point out that the desirability of a stateless society can only be properly evaluated by comparing it with a realistic picture of the effectiveness of current state institutions. It may seem obvious that the state is essential to prevent violence, promote equality, combat poverty, and ensure access to education and health care. However, the state has generally done a poor job of achieving these goals.

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Violence, inequality and poverty continue to be widespread under the modern state. Access to education and health care has certainly improved over time, but it remains far from universal. Even developed Western democracies face serious problems in these areas. The failure of the state to safeguard the vulnerable suggests the anarchist alternative is at least worth considering.

It may, of course, turn out that a stateless society would be even worse, but it would be unreasonable to simply assume this.

It is a complex task to identify the positive and negative consequences of a stateless society. This is partly due to a dearth of empirical evidence (although some case studies have been identified in the literature).³ Nonetheless, there is clear value in raising the question of what a stateless society would look like. It allows us to critically assess common assumptions about the indispensable role of state institutions and think creatively about possible alternatives to current legal and social arrangements.

Why obey the law?

A number of challenges confront the idea of law in a stateless society. Concerns are often raised in this context about the reliability and stability of legal institutions. Customary legal norms may well arise in a stateless environment, but would people obey them? How would the legal norms be enforced and interpreted without centralised institutions? What would be done about competing legal systems and outlaws? The remainder of this article considers each of these questions in turn.

Would people obey law in a customary legal system? The answer to this question partially depends on the more general issue of why people obey the law. Does obedience to law depend upon formal means of enforcement? There is reason to doubt it. The vast majority of people in developed Western nations obey the law the vast majority of the time. However, it's hard to explain this by pointing solely to formal enforcement. The total proportion of the population who ever appear in court for a criminal offence is fairly low, but most people who have never been in court nonetheless follow the law.

It might be said that it is the *threat* of legal action that keeps people in line, rather than actually being subject to punishment. However, there are plenty of opportunities to commit crimes in everyday life without much fear of being caught. Petty theft, for example, remains relatively uncommon, despite the frequency with which people leave their belongings unattended in

public settings. The vast majority of people simply pass up the everyday opportunities they have to commit crimes.

The influential legal theorist H.L.A. Hart sought to explain this phenomenon by emphasising the role of social pressure in securing compliance with legal rules. Hart famously argued that law does not get its force from the threat of punishment, but rather from the sense of obligation it imposes.⁴ We do not obey the law because we are forced to do so, as suggested by earlier theorists such as John Austin.⁵ Rather, we obey it mainly because we feel a sense of social obligation. Social pressure to comply with law gives rise to a critical reflective attitude in relation to our own behaviour.

Hart's analysis suggests that people might obey customary law even without formal legal institutions. The most important factor in obedience to law is not the harshness of the sanctions attached to disobedience, but rather the stability of the associated social norms. A customary legal order without formal institutions might still be widely respected by the community if there was consistent social pressure to comply with its rules.

Legal institutions

Legal obedience, then, does not necessarily depend on formal enforcement mechanisms. Nonetheless, it is important to note that a stateless society is unlikely to totally lack formal legal institutions. It will lack the centralised legal institutions maintained by the state, but a range of consent-based security and legal institutions might be expected to arise.⁶ Many people would willingly pay a fee to subscribe to a local security service and dispute resolution system. A market for such services would be likely to emerge. There might be several options available in a community.

Wouldn't a market-based system for law enforcement give rise to conflicts between rival security forces and court systems? Maybe, but it would be in the interests of all parties to avoid such conflicts, and in particular, to forestall the possibility of violence. Security firms and court systems would therefore be likely to make agreements on how to resolve disputes between their clients. An obvious mechanism for resolving

such disputes between private dispute resolution systems would be to refer them to a neutral third party arbitrator. These kinds of agreements might plausibly result in something functionally quite similar to a formal court hierarchy.

A number of existing models show how voluntary legal institutions might operate. Most commercial disputes are already resolved by negotiation, mediation or arbitration, rather than by the courts. Family law disputes about matters such as separation and parenting are also often resolved by mediation. Indeed, the proportion of social disputes that actually reach the formal court system is extremely low. These methods could continue to operate in much the same way without the state.

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There are also examples of how different sets of legal institutions can resolve potential conflicts. International law is largely based on the consent of states to be bound by treaties and traditionally lacked binding courts.⁷ It is nonetheless fairly effective at preventing serious conflicts. States sometimes go to war, but this is usually avoided. Similarly, the operation of federalism in countries like Australia shows how regional governments can agree on common rules where this is in the interests of all parties.

Legal pluralism

A stateless approach to legal institutions would have pluralistic tendencies. It seems likely that multiple providers of security and dispute resolution services would arise in any given community.⁸ The infrastructure costs involved in providing such services are not obviously such as to create the likelihood of natural monopolies, although economies of scale might cause the number of providers to decrease over time.

Different security agencies and dispute resolution services might choose to recognise different legal rules. We can imagine that people may choose to subscribe to an agency based at least partly on the

rules it recognises. People might also choose their place of residence based on the rules prevailing in the local community. There are some obvious advantages to this. Legal rules could be responsive to local conditions or community values. People could exit communities with inefficient or unfair rules and move elsewhere, creating a competitive market in legal regimes.

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Nonetheless, it seems likely that legal systems under anarchy would converge over time on a set of common basic rules. The theories of spontaneous order offered by authors such as Hayek suggest that trial and error tends to lead communities to settle on shared rules of conduct over time. Ineffective and unfair legal rules are likely to be modified or abandoned, especially if they are subject to competition from more effective and equitable approaches. Convergence between different legal regimes would also make interaction between regimes easier. Dispute resolution providers would therefore have an incentive to standardise their rules.

Outlaws and outcasts

What if a person refused to join any of the available private security services or legal systems, preferring to rely on their own means of protection and remain outside the reach of the law? A person like this would be a free rider, as they would benefit from the social stability provided by security and dispute resolution services without paying the fees. However, the existence of such free riders may not present a serious problem so long as they remain uncommon compared to fee paying subscribers.⁹

Security groups could make their own decisions about how to deal with those who decline their services. This might include choosing not to protect such people from aggression. This would create a strong incentive for individuals to join

one of the available security services. Outlaws would probably be uncommon, since it would be a perilous existence. However, if enough people declined to subscribe to local security services, this might indicate a problem with how the services are provided. It could encourage the service providers to be more responsive to local needs.

There might be some organised groups that would flout community laws and rely on their own means of protection. These outlaw gangs could pose a threat to social order. However, there's no obvious reason this problem would be more pronounced in a stateless society than it is under the state. Outlaw gangs present significant social challenges now. The state is far from immune from this problem. Indeed, the state exacerbates the problem by aggressively pursuing drug prohibition, thereby increasing both the risks and the potential gains from illegal conduct. The incentive structures for outlaws might be significantly different in a stateless environment.

There is another potential concern about law in a stateless society. Even those who are sympathetic to market provision of legal services often worry about people falling through the gaps. What about those who can't afford to pay for protection and dispute resolution? Services might be expected to be available at a variety of price points. People might also voluntarily subsidise through cooperative and pro bono programs those who cannot afford legal services. Nonetheless, there would probably still be gaps in access to law in a stateless society. There would also no doubt be inequalities: rich communities would have better services than poor ones.

Every known legal system—and state—has gaps and inequalities. Many people can't afford to access the state legal system. Indeed, the least vulnerable are generally the least able to get legal protection. It seems at least possible that access to law would be more equitable under anarchy. Market incentives would exist for service providers to emerge in poor communities. Competition and innovation would reduce the gaps in the system. The result would be imperfect, but it might be better than what we have now.

Anarchy and order

Would a consent-based legal system of the kind imagined in this article support or undermine the rule of law? Hayek doubted that legislators can access the full range of knowledge needed to solve complex social problems. He argued that spontaneous order is preferable as a way of organising large social groups.¹⁰ Decentralised law runs less risk of locking in undesirable rules. It allows for innovation and competition in legal regimes. This might lead to more predictable and stable legal rules in the long run.

I noted earlier the common perception of anarchism as leading to chaos. People are naturally sceptical about the stability and effectiveness of legal institutions in a stateless society. However, I have argued that an anarchist legal system might be expected to feature stable rules, widespread obedience, and effective institutions. Some problems would be likely to arise, but it's far from obvious whether these would be worse than the equivalent problems that currently beset state institutions.

Would a stateless society produce a better model of law than we currently enjoy under the state? It's hard to be sure. However, the possibility is not as outlandish as many people initially think. There is value in thinking through the possibilities and challenges presented by law in a stateless society—if nothing else, such an exercise can help us understand the failures of state law and think creatively about alternatives. We shouldn't simply assume that our current top-down model of law is the only way. A more organic approach to legal rules and institutions might not be a bad thing.

Endnotes

- 1 Friedrich A. Hayek, *Law, Legislation and Liberty* (London: Routledge, 1982), volume 1, chapters 4–6.
- 2 Adam Ferguson, *An Essay on the History of Civil Society* (London: Cadell, 1793), 205 [part III, section II].
- 3 For an overview, see Gary Chartier, *The Conscience of an Anarchist* (Apple Valley: Cobden, 2011), 19–23.
- 4 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 82–91.
- 5 John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995).
- 6 For useful discussion, see David Friedman, 'Anarchy and Efficient Law,' in John Sanders and Jan Narveson (eds), *For and Against the State* (Lanham: Rowman and Littlefield, 1996).
- 7 For discussion, see Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Cheltenham: Edward Elgar, 2013), chapter 7.
- 8 For helpful discussion, see Gary Chartier, *Anarchy and Legal Order* (Cambridge: Cambridge University Press, 2013), 244–248.
- 9 Compare James M. Buchanan, 'What Should Economists Do?' *Southern Economic Journal* 30 (1964), 213–222, 220.
- 10 Friedrich A. Hayek, *Law, Legislation and Liberty*, as above, volume 1, chapters 2–3.