

The Enterprise of Law. By Bruce L. Benson.
San Francisco: Pacific Research
Institute, 1990.

Many advocates of the free market hold an odd view of that institution's scope. Although economists such as F. A. Hayek and James Buchanan laud the market to the skies and never tire of describing the depredations and stupidities of the state, they reverse themselves at a crucial junction.

They maintain that the market depends on the state for its existence. Unless a government establishes and enforces law, they claim, the market will soon sink from order to chaos. It is the outstanding merit of Bruce Benson to subject this view to withering scrutiny, both theoretical and historical. He argues that people can secure justice through private arrangements and that they have often done so, both now and in the past. Far from being necessary to a just social order, the state is a hindrance.

The book should not be taken as a defense of anarchism, since Benson does not discuss functions other than justice such as national defense usually assigned to the state. But in the contemporary climate of opinion, the work is startlingly radical.

If one characterizes law as a system of enforceable rules of conduct, nothing in the nature of law requires its provision by a state. How law has been provided is a question for historical investigation, not one to be resolved by fiat.

Benson clearly gets off to a good beginning. One might add that many eminent legal scholars, most notably John Austin and Hans Kelsen, have defined law in a question-begging way: They require that law be promulgated by a sovereign. Benson, who relies here principally on Lon Fuller, avoids this pitfall.

On one minor point he seems to me incorrect. Why is it the case that if "law is simply represented by any system of rules . . . then

'morality' and 'law' would appear to be synonymous" (p. 11)? In this definition, what is moral would be legal, but it is not necessary that what is legal be moral.

Benson gives an excellent account of the development of law in Anglo-Saxon England. Custom gave birth to the law and sustained it. The state entered *after* the legal system was developed, seizing control of it in order to gain power and money. His description of the history of English law from Anglo-Saxon times through the nineteenth century shows mastery of a wide variety of sources; his presentation is a veritable *tour de force*. I would suggest only two additions. First, in the description of the Magna Carta, its annulment by Pope Innocent III should have been mentioned. Also, in contrast to the earlier situation described by Benson (p. 68), defendants during much of the nineteenth century could not testify.

The author places great stress on the Law Merchant, which during the period 1000-1200 "evolved into a universal legal system through a process of natural selection" (p. 32). Trade among the nations of Europe took place principally in fairs and markets, and merchants traveled from one to another. They devised a system of courts and regulations to handle business disputes; to rely on the varying customs of each nation would have been grossly inconvenient. This system, formed independently of the various states, became the basis of modern commercial law.

Benson, drawing upon a wide array of data, describes many cases of law without the state, ranging from the Kapauku Papuans of Western New Guinea to the American West in the nineteenth century. Contrary to various Hollywood movies, the West was not a series of never-ending gunfights in which outlaws terrorized a cowed populace. Quite the contrary, the West developed a considerable measure of home-grown law and order (pp. 312-21).

Though these facts cannot be denied, some will be inclined to interpose an objection. Before one can have private arrangements to enforce a body of law, do we not require a structure of rights, in particular an assignment of property titles? How can this structure be created by the market, since for the market to operate rights must first exist?

Benson's reply is cogent. Rights are indeed necessary for a market to function, but it by no means follows that they must be established through collective action. By a mutual recognition of one another's claims, people can gradually build up a system of rights. The market does not delay its arrival until the full details of a law code are hammered out; it comes into existence and develops along with the clarification and extension of the system of rights.

However surprising one may find the historical facts, they are exactly what one would expect given elementary principles of economics. In a market system, producers have a strong incentive to give customers what they want; if they do not, they will be replaced by those better able to fulfill consumer demand. Those who succeed in satisfying consumers will profit. This is the mechanism of natural selection mentioned above, and it exerts an inexorable pressure.

The state operates through an utterly different principle. As Benson accurately notes, the principal purpose of the state is the transfer of wealth. Like Franz Oppenheimer and Albert Jay Nock before him, Benson pictures the state as an instrument of coercive interference with free activity. Struggles among the Anglo-Saxon kingdoms, culminating in the Norman Conquest, dealt the non-statist Anglo-Saxon legal system crippling blows. The state took over the Law Merchant and subjected it to rigid restrictions.

The situation remains the same today. The abundant efforts of people to escape from the official legal system, e.g., through arbitration and private police, have been continually shackled by the state, a "jealous God" indeed, fearful and intolerant of all rivals.

Supporters of state provision of justice frequently rely on one weapon to defeat opponents, the famous public-goods problem. Law and its enforcement, it is alleged, generate several public goods. If, for example, police patrol a neighborhood, the benefit of deterrence of crime extends not just to those who pay for the services but to all local residents. Most of these public goods are familiar but some are rather recondite. David Landes and Richard Posner, for example, maintain that written opinions by judges produce positive externalities, since people other than the parties to the case can use written decisions as guides (p. 279).

Benson has a double line of defense to these criticisms of private law. First, he endeavors to show that the market can internalize the externalities in question. Neighborhood associations, e.g., can require everyone who purchases property in an area to contribute to police protection. (Of course, this must be done not through compulsion but contractually.)

So far as the problem of precedent is concerned, judges do have an incentive to issue written opinions. In a competitive situation, judges need to acquire a good reputation in order to attract customers; no one can compel disputants to use them. To issue opinions that attain widespread respect is obviously one means of doing so. One might add to Benson's discussion that in the Roman Empire many legal scholars or *jurisconsults* gained recognition through their writing.

The second string in Benson's bow is as much an attack as a defense. To think that government has any realistic chance of improving the provision of public goods by the market is fatuous. Government is dominated by bureaucrats, intent on gaining power for themselves. Special interest groups can through concentration of resources gain privileges that worsen the position of others. Benson develops his bleak picture principally through application of public choice economics. He defends it by massive citation of historical and contemporary evidence.

Furthermore, state activities tend to create their own public goods problems. Access to the courts is available to all; people do not have to pay a market price to use the state's legal services. Of course, expenses such as filing fees and attorneys' costs do limit entry, but there is no charge just for access. Overcrowding results; and the governmentally supplied resource is used inefficiently. If the market sometimes underproduces public goods, the state more frequently overproduces them.

Benson concludes that the public goods problem does not strike a fatal blow at a free market legal system. Given the manifest advantages of this system, he accordingly recommends it.

The book's outstanding argument can I think be strengthened at two points. First, the underlying assumptions of Benson's model of public goods are not entirely clear. On one model, "a public good is one that enters two or more persons' utility" (p. 273, quoting Paul Samuelson). Efficiency aims at matching utilities and costs as closely as possible.

I am far from certain, but I think this is the conception of efficiency Benson uses. Although in his hands it leads to results favorable to the free market, it is intrinsically objectionable. If taken as a welfare ideal, a glance will show that this view of efficiency is a variant of utilitarianism, subject to most of the problems of that position. This is not the place to debate ethical theory, but it is uncontroversial that utilitarianism is controversial. It cannot simply be assumed without defense.

Another way of looking at public goods has quite different implications. Here one begins with having people and property rights not subject to coercion. People may find themselves in situations where individual and collective rationality conflict, but the question facing the analyst is entirely different from that of the first model. All solutions must strictly respect property rights.

If one goes one step farther and adds the Austrian demonstrated preference principle, the problem of public goods dissolves. The principle is of course much disputed; but it seems to me that even those

inclined against it ought to adopt a strict view of rights. Had Benson done so, he could not so easily have said: "An ideal and *permanently* limited government might be an improvement" over a complete free market (p. 373).

The second point at which the book's argument might benefit from expansion resembles the first. If efficiency is understood in loose terms as increasing wealth then it seems evident that it is an important value. But it is not the sum and substance of political philosophy, and its relation to other values needs to be examined. How would Benson reply to a defender of government who accepted his argument but claimed that other ethical principles still required a statist legal order?

I cannot guess Benson's response to this question, but of one thing I am sure. It would be a carefully considered answer, based on exhaustive research. *The Enterprise of Law* is a magnificent achievement and I enthusiastically recommend it.

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