

The State Is the Source of Rights?

It Just Ain't So!

In 1776 a reliable indicator of an American's opinion of the ideas expressed in the Declaration of Independence was his attitude toward the 1649 execution of England's King Charles I. Liberals, who shared Jefferson's principles, believed Charles to have been a tyrant and hence most deserving of losing his head. Conservatives, resisting the call to liberty, classified Charles's execution as "murder," believing the English revolutionaries of 130 years earlier to have been reckless destroyers of the foundation on which civilization rests: a powerful monarchy.

Indeed, it was Charles's execution that put the fear of chaos into Thomas Hobbes, inciting him to write his 1651 classic, *Leviathan*. Hobbes was so sure that only an all-powerful monarch could create the law and order necessary for civilization that he famously predicted that lives in a world without such a monarch would be "solitary, poor, nasty, brutish, and short." Hobbes, I'm sure, thought of himself as a clear-headed realist who was immune to silly bourgeois notions of individual rights.

While few people today share Hobbes's commitment to monarchy, most modern folks accept uncritically his deeper premise that law and order can be produced only by government.

This neo-Hobbesianism normally is accepted quietly, as a matter of course. But recently it has been boldly trumpeted. Just last year Oxford University Press published Liam Murphy and Thomas Nagel's *The Myth of Ownership*, and in 1999 Norton published Stephen Holmes and Cass Sunstein's *The Cost of Rights*. Both books argue

that government is the necessary provider of law, order, and infrastructure; therefore, taxes are the price citizens must pay for civilization. In fact, both books go further—especially Murphy and Nagel's—arguing that rights don't exist without the state.

The *Washington Post's* E. J. Dionne is smitten with neo-Hobbesianism. He used the dismal occasion of April 15 to instruct readers on the necessity of government and of the taxation that fuels it. "Absent a government committed to the protection of rights, there are no rights," Dionne insisted in his op-ed "The Price of Liberty." Utterly convinced of the truth of this claim, he is "tempted to pick out the two dozen loudest anti-tax propagandists and send them a copy of one of the most important volumes of the last decade . . . [Holmes and Sunstein's] 'The Cost of Rights.'"

Although it appears to Dionne and many others to be indisputably correct, neo-Hobbesianism suffers from at least two flaws: it is mistaken in its facts and defective in its logic.

Factually Mistaken

Contrary to the belief of neo-Hobbesians, law, rights, and the security they beget can be, and often are, provided privately.

A well-documented example is the *Lex Mercatoria* (law merchant). This is the extensive body of commercial law that began growing a thousand years ago in the Mediterranean region as trade expanded. Medieval merchants scattered around the Mediterranean—from Turkey to Morocco, from Egypt to Spain—had no common sovereign power to whom disputes could be referred. Nevertheless, an impartial, effective, efficient, and surprisingly nuanced body of law developed out of merchants' practices and the expectations generated by these practices. Merchant courts—manned by merchants—became part of this law-discovery and law-enforcement process.

If, for example, a merchant court ruled that a Turkish rug maker owed ten pounds of gold to a Sicilian ship owner, the Turkish merchant would pay. He would pay even though no royal sheriff, no police force, no sovereign power of any sort was available to force him to do so. He obeyed the law because he wished to protect his reputation.

Despite the fact that it emerged unplanned over the years from the competitive practices of private merchants, and despite the fact that the courts which enunciated the rules of the *Lex Mercatoria* and handed down judgments were not arms of a sovereign power, this body of law serves today as the foundation for the Uniform Commercial Code in the United States.

It is simply untrue that the state is the sole source and sole enforcer of law.

A Non Sequitur

But let's suppose, contrary to fact but for the sake of argument, that Dionne and other neo-Hobbesians are correct that the state is the only possible source of law and law enforcement. Given that law is absolutely necessary for order to exist and for rights to be protected, would it then be correct to insist that without the state "there are no rights"?

No. Even if government were necessary, it does not follow that individual rights are not antecedent to, and logically independent of, government.

Fundamental to civilization is the enormous dependence that each of us has on countless others. I'm able to spend my days teaching students, writing papers, and giving talks only because each of millions of other people regularly performs his own small task: growing food, assembling automobiles, stocking supermarket shelves, weaving cloth, drilling for oil, piloting commercial jetliners, making laundry detergent, con-

ducting philharmonic orchestras, writing computer programs, negotiating and drawing up contracts, researching and developing medicines, and on and on and on.

Some of these tasks might be more important, on some scale, than others. But no one task alone can properly be identified as *the* key task; many individual tasks are indispensable for civilization. Only *together* do they make civilization possible.

Neo-Hobbesians commit a non sequitur when they erroneously conclude that, because civilization would crumble without law enforcement, civilization ultimately owes itself to law enforcement.

There are any number of sets of tasks whose absence would cause civilization to crumble. Most obviously, if no one grew food, civilization would cease; if no one worked to supply clothing, civilization would cease; if no one built human dwellings, civilization would cease. These tasks are surely no less important than that of the police officer who patrols the neighborhood or of the naval officer who steers a destroyer.

And yet no one argues that horticulturists or haberdashers or homebuilders provide *the* foundational input for civilization—an input so fundamental that rights themselves owe their existence to it. (After all, what "rights" would I have if all farmers stopped working? I'd starve to death.) Why the special regard for law enforcement?

It's time to quit regarding the state and law enforcement as something special. At its best, the state is an efficient supplier of law and order. At its worst—and at its worst it's a monster too terrible to describe—it is the single greatest enemy of civilization and individual rights.

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