



Private Law?

Guest: Robert Murphy

April 10, 2014

Bob Murphy holds a Ph.D. in economics from New York University. He is the author of *Chaos Theory*, *The Politically Incorrect Guide to Capitalism*, *The Politically Incorrect Guide to the Great Depression and the New Deal*, and *Lessons for the Young Economist*. He blogs at consultingbyrpm.com/blog.

WOODS: Finally a program on your book from eight gazillion years ago called *Chaos Theory*, which you admit is so named because it's a cool sounding title, not because it actually has to do with chaos theory per se. The subtitle is *Two Essays on Market Anarchy*, and it couldn't be simpler: one of them is private law, and one of them is private defense.

Let's start off with private law. That's how you start off in your book. These are the areas where people think you have to have government, and they can't see how society could function otherwise. You give the most persuasive demonstration of how things would be likely to work that I have ever read.

How does private law work? What does private law consist of?

MURPHY: Well, I think the first thing to get people warmed—to think about it—is to refresh your memory as to why we don't like government monopolies in other areas, where we can conceive of what a private alternative would look like. You don't want to have the government monopolizing the production of cars or computers or food, things like that. Why wouldn't you want that? Well, because the quality would be bad. They would have no incentive to serve their customers, especially if it was something really important like food. It would just be monstrous to have the government monopolize that, because people would have no choice but to take whatever the government gave them or else they would starve to death. The prices would be really high and so on. You can see the benefits of bringing in competition in those arenas, and that's just standard. Everybody should see that in two seconds.

So the first thing to point out is, everything that is bad about government monopolies in other areas is also true of government provision of police services and judicial rulings. We see that with our—if you just think about it for a second, I mean, there's cases of police brutality. There are corrupt judges. There are all sorts of things that people just take as a fact of life, and oh, well, that's the way it is. You got to have police. So if the police shoot some unarmed man 57 times, and they don't even get in trouble for it, well, that's just the price we pay to have people fighting crime. So there should be this sliver of doubt I am hoping to raise in people's minds saying, does the system have to be like that, or is there a way we can bring in all the benefits of competition that we see elsewhere? So people should be wanting to see how could there be a better way, and now we just have to try to show them and sketch a framework, and say what would private law look like.

So to finally now address your specific question, I think one way to look at this is just to realize what is it that judges actually do and that is that they render an opinion, right? And that's actually the terminology that we still have, that when a judge makes a ruling, it's called the opinion, like say it's a divided thing, it's the opinion of the majority or what have you, and so it's the judge giving an opinion. Ultimately there's still this idea that we retain that the law is this objective thing that's out there and that the judge is just an expert who comes in and renders his or her opinion on what the law says for a particular case. And for me that's the starting point, that when people have disputes, no matter what kind of social arrangement you're

going to have, people will have disputes, even well-meaning people, over contracts, or someone alleges that somebody else stole his property or committed violence against him, and so they need to settle that in a public forum, and that's what a judge does. You go to the court and you say both sides present their cases and then the judge is supposed to render a neutral opinion on the case and who the judge thinks is in the right and in the wrong on this case as the law dictates.

WOODS: Well, when we look at the evolution of law in the Western world, we know that before we had legislatures every year churning out reams of legislation, we instead had courts that more or less did what you're saying, that rendered opinions, and then these opinions over time began to form a body of law that everybody recognized, that gave a certain predictability to human activity and so on. But those nevertheless were government courts all the same. So are you saying that in a private law system there would be an analogous situation except the courts would be private courts with private judges that would operate on the basis of trying to establish a reputation for fairness so that they could get more and more customers?

MURPHY: Yes, I am saying that. The historical record, though, in terms of jurisprudence, is actually a little bit more nuanced. One distinction I think we need to make is that between law and legislation. This is a point that Hayek talked about, but he wasn't the first to note that there is this distinction if you look through human history and the way legal theorists would write about the law, the idea that—there had to be law. I mean, humans have known about this thing called law going way back. In order to have civilization, there has to be a set of norms and rules and people have to believe that there are things that you just can't do, and then, just to say, oh, well, that would be illegal. There has to be that set of rules that most people in society abide by. Otherwise it would just break down. You can't have people walking around thinking cannibalism is fine. That just wouldn't work. You couldn't have society like that. So the idea of law, that there's a bunch of rules that you just can't violate in a civilized society, that's very ancient. But this idea of legislation—that humans have the competence and the authority to just make up what those rules are and to tweak them in order to improve society. That's a fairly recent innovation. That's one thing that we should keep in mind when we think about historically how this developed.

What would it look like? There would be competing judges, and so when people had disputes, they would want to, they would both agree, both parties to the dispute would bring it before a judge that they agreed upon, and so the judges would be competing in that they would be vying for the service of providing legal opinions, and then in the vast majority of cases it would be both parties would agree and pick this same judge. This happens all the time right now. So this isn't science fiction stuff that when businesses have disputes with each other, they very rarely literally take it to a government court. Usually they decide on arbitration because that's just so much quicker, when there are divorces and things like that. In most cases people do not want to actually go to a government court because they just know they are going to run up huge legal bills. It's going to take forever. They want to get a reasonably fair ruling quickly without spending too much money, and so that's why they take it to outside, private arbitration.

I am saying that ideally you would just codify that system in its entirety. You wouldn't need this government judge to rubber stamp the agreement that the parties had actually under private arbitration. So all the benefits of competition would accrue in this sphere as well: if there were a judge who just was notorious for always siding with the plaintiff, then the people who were accused of things wouldn't ever agree to pick that judge, and so that person would go out of business. Likewise, if somebody always was bending over backwards, taking the side of defendant in a case, saying, oh, well, his parents abused him, or what have you, well, then no plaintiff would ever agree to that judge to hear the case. So there would arise a market, and judges would get a reputation for actually being fair and just, and that's how they would stay in business. And there would be a standard for that. I think empirically the reason people might think that wouldn't work is they are going to ask, how could anybody ever agree on having a fair judge? They would always just want the judge that was going to be sympathetic to their perspective. But we just see that's not true. Empirically it does work. There is private arbitration. Companies when they have disputes with their employees and so forth, and they have clauses in the contracts saying "private arbitration." They go to these people. It's not like there are widespread allegations of unfairness. If there is a market for arbitration services, the way you stay in business is by having a reputation of doing a fair job of it.

WOODS: That's right. Of course, it's easier now to make these kinds of arguments now that there is a fully developed system of private arbitration in the United States. You don't have to appeal to people's imaginations. You can say, "Look around you." I could imagine 50 years ago somebody making this argument and being laughed at and being told there could never be private arbitration because of these 12 reasons, but now who are you going to believe? That guy or your own eyes? They are actually out there. But then you also suggest in this book that in my ordinary dealings every day, and the stores that I visit, the restaurants that I visit, there would be a hybrid of an implicit and an explicit contract between us. Implicit in the sense that I don't expressly sign anything every time I walk into a restaurant, but explicit in that it's sitting right there available for me to see at any time that if I cause damage to that restaurant, or I steal from them, according to the satisfaction of some arbitration agency, then I consent to have the case heard by this or that arbitrator. And so in advance these things are already taken care of.

MURPHY: Right, that's the way I am trying to get around the issue of or address the issue of well, gee, how do we have rules and yet not violates somebody's liberty? I am saying that ideally people who interact with each other would have agreed upon that framework in advance. If you're going to rent a car from some company or you're going to rent an apartment or you're applying for a job, clearly all those things where you're literally signing contracts with people there would be clauses in there saying things to the effect of, this contract will be governed by the interpretation or the rule book as codified by Acme legal agency and the list of arbitrators as maintained on this website here of arbitrators in good standing with the community, and if there is a dispute, the two signers to this agreement will select a mutually agreeable arbitrator from that list. So that nobody can say, wait a minute, I never agreed to this and claim that they are being imposed upon. But they can say, no, you agreed to this beforehand. That would be the ideal arrangement. And then as you said, in the interest of brevity, you're not going to literally sign contracts every time. Just like when you go into a restaurant and you sit down and you order—forget about anarcho-capitalism, just normal free-market scenarios—when you go into a restaurant, sit down, and order, they can't just come up and then give you a bill and say, we're charging you \$50 for sitting there, and then we're also going to charge you on top for the food you ordered. You would say, what are you talking about? I never agreed to that.

So there's some inkling of the community expectations and what that entails. On the other hand, if you ordered something and then you later said, you know what, give me a piece of pie as well, and you didn't actually see the menu, and then they gave it to you, you wouldn't be able to claim after the fact, well, you actually didn't tell me how much it costs so I am not paying you anything for that pie. You see what I mean? There are all sorts of norms that are built in in social expectations as to what is happening when people engage in commercial transactions without having to explicitly sign a contract. And so to connect with what you were saying, I tried to argue in *Chaos Theory* the same sort of thing, that when you enter a shopping mall, they could have a sign posted, perhaps, but it would be understood that we subscribe to the community norms as to the type of laws governing what happens when you enter this mall, and so you are implicitly endorsing that when you come onto our property.

WOODS: You also use this kind of analysis to explain how it could be legitimate, how it could work out that a wrongdoer could be taken off to prison. In a sense he has consented to this in a similar way.

MURPHY: Yeah, I think this is the one that intrigues people the most. So yeah, I am glad you brought that up. Let's just walk through this one. So the issue is, you guys are obviously pining for a really free society, and yet the problem is, what if there is a serial killer? What if there are people doing clearly anti-social things, and they are not going to sign contracts beforehand and say, well, if I am convicted of serial killing than I agree to such and such. So what do you do about things like that? And don't we have to at some point just arbitrarily say, well, we're going to violate this person's bodily integrity because he violated a bunch of rules that we think are important whether or not he agrees to them?

The way I try to handle these really nightmarish scenarios is to say, first of all, in a truly free society along the lines that somebody like Murray Rothbard would have pictured, every piece of property is privately owned. So there's no such thing as so-called public land, and so no matter where you are standing, you are physically on somebody's property. Now, if it's your own house, then you're standing on your own land, but

in general you are on somebody else's property in such a society. Let's say that there's a serial killer and the victims bring the evidence. They call the detective agencies and so forth, and they present evidence in various courts. They say to the public, we think this guy is a serial killer. He doesn't show up to his defense, and so there's not an issue of him choosing the arbitrator or he just refuses to show up and say, no, those guys are all crooked. And so in various courts with reputable arbitrators, judges all agree that yes, the evidence beyond a shadow of a doubt says this guy is a serial killer. We've got video surveillance. Okay, so the community now has labeled this guy as a pariah. It is well known that he is convicted serial killer, but still he's just walking around because he's crazy, and so what happens, what I am saying, there doesn't have to need to be any pre-existing contractual arrangements between the various members of the community. They all own the sidewalks and the roads and the shopping malls and so forth. Everybody in the community who has been alerted to who this guy is can say, you are not allowed on my property. Right? You do need to have a contract with someone to be able to say, get off my land, and so the point is no matter where he is standing he is going to be violating somebody's wishes and be on their property. So everybody says, get off my property. And so where is he going to end up?

Well, that's now where I am saying you can see the so-called private prisons—that we can imagine companies building facilities that could contain violent individuals, and they could just have an outstanding offer to these pariahs: you can come on to our property, but we have certain rules you have to abide by. Of course, we're going to search you when you get here to make sure you don't have weapons. We have specially trained staff. You're going to stay in certain types of rooms where there's not going to be steak knives lying around and that sort of thing. We are going to perhaps make you see counselors. Whatever it may be. But we're going to give you a cubicle where you can work; if you're a brilliant engineer or something, you can still do that. We're not going to have you do something silly like make license plates or smash rocks that serves no purpose for anybody. And if there is this pending judgment against you that you owe somebody \$600,000 because of all the crimes you committed, you can come here and work that off over time.

So we're giving you this opportunity to do that, and of course, we're going to charge you a fee for this, and we'll deduct that out of the amount that we allow you to work. But as it is right now, no one is going to sell you food. Electricity companies aren't going to deal with you. You are going to just be an outlaw running for your life unless you come in here where you know you'll be safe.

And the other thing is these prison companies would compete with each other for the inmates, right? Because you would have the right to leave, even go to a separate facility. So the guards couldn't be sadistic in these organizations because if they were, the inmates would just go somewhere else that says we welcome outlaws here. You just have to follow our rules if you want to stay here. So that's the framework that I am picturing. It's not that we're some agency that goes and grabs people and physically drags them off and puts them in jail according to a bunch of rules they never agreed to. It's that everybody says, or most people in the community say, if you are a convicted murderer, then get the heck off of my land—which, of course, they have the right to say to anybody. Then these so-called private prisons would arise to say, we're an oasis for people like you to rehabilitate you and so forth, and they are doing it to make money. It's a profit-making business.

WOODS: You're envisioning a system in which people would take out insurance that would help in case, let's say, they were found liable for damages or something. They may have caused some damage by accident. They don't have to be out-and-out criminals, but people would be carrying policies of some sort. Can you flesh that out?

MURPHY: Yeah. Just to alert your listeners: this is the one area where I deviate from the standard Rothbardian tradition. I just wanted to make sure that they realize that. The other stuff you and I have been talking about, I think most people would say that what I am saying has been compatible at least with the ways somebody like Murray Rothbard or Hans Hoppe would have described it. What I am about to talk about right now is a twist on that, and so, just want to make your listeners aware of that. Thus far we've painted this picture where private judges would render an opinion and say, this is what we think the law says in this situation, and so the problem is: let's say some husband gets drunk and comes home and sees

his wife cheating with his best friend and shoots them both. Then the estates of the victims come, the relatives, and they bring the case before the judge and the judge says yep, you're guilty. You owe \$300,000 to each of the victims, and that's my ruling. The problem is, what if he doesn't have \$600,000 on him? He probably won't. Most people aren't going to be walking around with that kind of money. So what I said is, there would be a role to have insurance for these types of contingencies, and so to the extent that everybody is insured then you know the victims of crimes are going to be indemnified immediately. The insurance company is going to pay them, and then it's just an issue of the insurance companies dealing with their client who caused the transgression and was the reason to trigger the payout. And so when you hear that, at first it sounds kind of pie-in-the-sky, but my point, and I raised the issue in *Chaos Theory*, is wait a minute: we see examples of this all the time, right now, in the real world. The most obvious one is medical malpractice suits for surgeons. In order for you to be a doctor and work at a reputable clinic or a hospital, you have to carry medical malpractice insurance so that if you do something wrong on the operating table and kill the patient, and then you are found guilty and you owe a bunch of money to the estate of the person you killed, even though you're a doctor and have a bunch of money, maybe you don't have that much, and so the insurance pays for it. That's a precondition to be able to work at the hospital, to carry that kind of insurance. Or just to be able to drive on the road you have to have automobile insurance. Now that's technically required by the state, but you can easily imagine privately owned roads having a similar requirement, saying if you're going to come onto our road knowing that you're agreeing that if you smash into somebody recklessly, that you owe them a bunch of money, we want to make sure that you actually have the ability to pay that kind of money, so we're going to check to make sure you have insurance to be able to ride on our privately owned road. So you can see that kind of mechanism. By the same token, if you apply to be an employee somewhere, the company could say, we want you to have a policy with a reputable insurance company saying if you come onto the work site one day and go nuts and start killing people, then we know you're covered and your insurance is actually going to pay the liabilities for that and pay off the families of the victims and that sort of thing. And so that kind of framework, I think, is what would happen in a large civilized society where most people would have insurance like that, and the insurance would be pretty cheap in most cases since most people aren't going to be criminals, and so actuarially, the insurance company doesn't need to charge a lot for homicide insurance. Very few of their clients are actually going to be convicted of homicide. It also gives the insurance companies the motivation to actually investigate these people.

Part of why I like this idea is it kind of solves the problem of: some random stranger wanders into a city who has never been there before, and in your libertarian utopia how the heck are the store owners and the apartment owners and things like that supposed to know who this guy is? They've got to go do background checks on everybody and spend a bunch. There should just be a central agency that keeps tabs on everyone [according to the standard view], but no, there doesn't need to be that. It's rather: all they would have to do is say, before I let you rent an apartment here in my building, I want you to provide proof that you've been insured by some reputable insurance company. So it's the insurance company that does the background check, and there is also competition there. If somebody has some blemish on his record that's unfair, that some agency reports that he was convicted of a crime in Albuquerque when actually it was some guy with his same name, but it wasn't him, well, then there's a profit opportunity there for some other insurance company to get it right and to give him the policy. That's the basic framework, where I am just kind of flipping it and saying people have insurance to indemnify others for crimes that they might be convicted of, and so that's the way you know that victims get paid immediately—in contrast to the present system, where if somebody kills a guy, the best that that family is going to hope for usually is that the government might take him and throw him in a cage, and that doesn't really help the family of the victim.

WOODS: Bob, there's an analogy in your book between what you are saying here, in which the insurance companies play this important role, and a case like airline safety. People would say, in your libertarian utopia—by the way, we never use the word utopia, and yet that's always thrown at us. In your libertarian utopia, everybody would have to investigate each airline and each airplane for himself for safety, safety record, the qualifications of the pilots and so on. What you point out here is that again, the insurance companies that have to pay out if there are crashes are the ones who want to prevent crashes. They have skin in the game. They are the ones who are going to subject the airlines to inspections and they are the

ones who are going to require background checks to be performed on the pilots to their satisfaction. So there you make sure that there's a socially optimal amount of regulation placed on these airlines. If there's too little regulation, then there are too many crashes and the insurance company has to pay out too much and they go out of business. Too much and the firm goes to another insurance company. This way you balance it all out.

The big question that we'll come back to you on is what about the enforcement agencies going to war with each other? What about the mafia taking over? I want to take that up the next time we have you on. Next time we'll finish up this topic.