



Episode 938: Law Without the State?

Guest: Bob Murphy

WOODS: I am just going to start off by playing devil's advocate in the most contemptuous way possible. I'm going to say, Murphy, this whole private law thing just sounds so ridiculous on the face of it, I can't believe you'd even bother putting it forward. I mean, it's just ridiculous. You spin all these fantasies about this would happen and we would do this. And yeah, maybe we would, but maybe we wouldn't. Maybe it would be a bloodbath in the streets without a single agreed-upon adjudicator. And then what would we do then? We'd go over to Murphy and get an apology from you? It would be too late. Civilization would be destroyed. So I'm going to need some real convincing here that there is any merit at all to this idea that, "Oh, we can leave law to the free market." All right, everybody, I'm playing devil's advocate here but with a really effective viciousness, just so you know.

So let's start — I'm going to give you the opportunity to start at the most fundamental level here. When you say you think that law does not need to be something created or administered by government, then how do you envision law in a free society?

MURPHY: Okay, sure, and I do want to say the fact that you're doing your fake voices, that shows you're really throwing down the gauntlet.

WOODS: Oh yeah, yeah, this is not going to be some cakewalk here.

MURPHY: Yeah, this is like Tom, "I need a safe space on campus." When you start doing those things, I know this is serious all right.

WOODS: Yeah, and I'll tell you something else. When Megyn Kelly secretly promised Alex Jones that, "It's not going to be a hit interview. I just want to do a profile of you" — that was how I got you on to the show. But now that you're on the show, I'm actually Megyn Kelly, and I'm actually going to throw a lot of things at you that I said I wouldn't.

MURPHY: Well, fortunately, like Alex Jones, I've been taking supplements and I'm bear chested and I'm pretty ripped.

WOODS: All right, okay, so go ahead; now you can answer my question.

MURPHY: Okay, so I think the first thing to say is – let me try to rephrase it or just to spin it and put it back on the accuser, is that most people, certainly most listeners of *The Tom Woods Show*, would agree that it would be crazy to let the state be in charge of producing cars. What would happen? Well, if we just had a monopolist in charge of producing cars, quality would go way down, price would go way up, at least relative to the quality you were getting, and they would manipulate it for political purposes. Somebody wasn't toeing the government line, they just would, "Oh, no car for you. Sorry, we're backlogged this year."

So there would be all sorts of reasons that you – you wouldn't trust politicians to be in charge of something as important as your car, and yet, what we do trust them with is whether or not they can throw you in a cage, whether or not you're convicted of a crime. Someone's breaking into your house, that's the thing where you say, Oh yeah, we'll let that sort of activity be left to the provision of the political system, but when it comes to things like food and shelter and transportation and video games and everything – pizzas. You wouldn't want the government in charge of pizzas; they'd screw that all up. But when it comes to protecting you from rapists and bank robbers and murderers, then that's the kind of thing we reserve for government provision when we know in any of those other areas it would be horrible relative to the market.

So I think most people realize yes, there's a huge burden of proof on the interventionist, the one who thinks that this is the one area that for some reason can be handled adequately by the political process.

WOODS: All right, so by saying that, you've tried to puncture the presumption that it makes sense or that we ought to, in an unexamined way, say law needs to be provided by the state because all these other things we wouldn't have the state provide. Okay, that's all very well, but what if law is something qualitatively different from shoes or basketballs or automobiles or anything else? It's qualitatively different that we need law in order to be able to produce basketballs and cars and whatever. We need that basic framework, and so in that sense, law is different from these other things.

MURPHY: Yes, and I agree that it is, but again I'm going to push one more time. It's not that I'm being evasive, but I do want to make sure we don't just concede that, wow, the burden of proof is on the anarchocapitalist – or whatever term you want to choose for this sort of mentality or this perspective – that the burden of proof really should be on the other side first.

And so yeah, law is qualitatively different from basketballs. You need to have a legal framework before the market works properly when it comes to basketballs. But by the same token, you could say there's plenty of other things too, like computers are qualitatively different from basketballs, right? One's a computer; one's the other thing. Food is qualitatively more important, right? You can't have basketballs if everyone's starving, but again, the same principles apply, and just because it's qualitatively different, why does that by itself apparently wash away all the huge negatives of a monopoly and the political process when it comes to this?

So again, I'm just saying that the mere fact of pointing out, "Oh wait, but this is different," that doesn't automatically take away all the advantages. In other words, it's not that the problem with monopoly was only for tangible goods that are rival in

consumption in so forth — you know, the textbook arguments for where the market tends to work.

So I've said all that, so let me now not be so evasive and try to answer you positively. So I think the way the basic framework here — and by the way, for those of you who are familiar with my booklet *Chaos Theory*, my thinking has evolved since then. So I think the starting point when it comes to, when you say, "How would a private legal system work?" is just to ask what function is it that judges are supposed to provide — or the law itself — that that's not something that a bunch of experts just promulgates de novo, just out of thin air that you had societies. There was law. People understood what we now call property rights, legal customs or conventions well before humans thought they had the ability or the privilege or the permission to just start legislating. So for a long time people knew murder's wrong and they generally respected that. If a society didn't respect that, it would have disappeared.

And so what I think the basic starting point is when you try to figure out how could a legal system work without this one group arrogating to itself the power to say, "No, no, we're the ultimate authority here," is just to say people still would have this idea of property rights. There would be a general framework of understanding to say, Okay, yes, it is immoral — it is a crime. It's not just immoral but it's a crime to walk up to somebody and stab them in the face for no reason. You can't do that; you just broke the law. I don't think we would need to say, Oh, how would anybody know that? People do know that, and they would know that here, and that's the starting point. People have this shared framework.

And then what judges would do is render their private opinion when it comes to disputes that can't be handled just between the parties in question. So just like with arbitration right now — so this isn't purely science fiction. We have models of this right now we see in operation all over the place, that if a couple's getting divorced, they probably don't go through the regular court system unless one of them's being completely obstinate. Both parties agree even though we have this dispute, we might hate each other's guts and one party might not even like what's happening, nonetheless, they might go through arbitration because it's just so much more efficient. And so how does that market work? Well, because both parties can agree we need to have some third party to give us a ruling or an opinion on this matter. And that's how they go through it.

So just like right now you have people — like if a worker starts with a firm and they might have a contract, then they might say we agree to settle this through arbitration. So how do private arbitrators stay in business? They have to have a reputation for fairness.

So the big thing here is, the starting point to me is that people would already have basic, primitive notions as to what the law is. They would know basic things like if somebody builds a house in the middle of a forest, that's that person's house. You wouldn't say, Oh no, some guy who had nothing to do with that can just stroll in and the community would say, Oh geez, I don't know; maybe it's his house. There would be basic intuitions like that, and the role of private judges would be in cases where there was genuine conflict. The two parties would submit their case to the judge and say, We want to get your opinion.

So even in our statist society, the terminology – what does the judge do? The judge writes an opinion. And so that really I think is the key here. It's not that the judges are making law. What they do is they say, Here's what the law is in my opinion and how it applies to this particular case. And that's what judges do, is they apply the law to particular cases. And they're experts in it. They have expertise in certain areas of the law. So all of that follows through in a private legal system.

The main difference at this level – and I'll stop here and let you push back, Tom. But the main difference is there's no monopoly. You can't compel people to be in your jurisdiction. So right now in the state monopolistic framework, if there's a case that goes before a state-appointed judge, it's not that both parties have to agree as to which judge is going to hear the case. That's sort of just assigned. And so if a judge is corrupt or incompetent, makes a string of horrendous rulings that the public is outraged by – maybe if a judge is up for election or something that will come up later.

But it's not like a private system where the judge who rules on labor contract disputes has expertise in that. He has a whole history. And if he's always consistently pro-employer, then the workers will say, No, I'm not going to that judge. And so if there's a bunch of judges available in various areas of the law who all have stellar reputations for being quite fair and equitable, you can just say, No, let's take it to one of them. And so the community would know which judges had a reputation for fairness, and so if one party was saying, No, no, I only want to take it to my brother-in-law and let him judge, it would be obvious that he was being corrupt and he was being stubborn.

So I think that sort of framework would handle the vast majority of just genuine disagreements among people. Most cases we don't have to worry about it being an axe murderer. We can get to the axe murderer case if you want, but most cases, most legal disputes in a modern civilized society are going to be people who, they're not monsters, but they're self-serving and biased and they think it's in their favor, and so you need some third party to come in and render an official expert opinion, and I think there would be a market for that and the community would really favor fair judges and there would be a market for that. And so your reputation would be on the line. As a judge, you would be silly to throw that away by taking a side payment and giving what's clearly a bad ruling, whereas in the monopoly system there's much less incentive to worry about your reputation for fairness if both parties don't have to consent to you being able to rule on their case.

WOODS: All right, let's take the classic case then that gets raised all the time that everybody wants to know how it gets resolved. You believe that I stole your – I'm not going to say TV because we're not going to date ourselves. TVs are on the way out. So let's say I stole your iPad, and you're pretty sure I stole it, and so then what happens? Do you need my consent to drag me before a judge, and if not, what gives you the right to drag me before a judge? Just what, because you think I have an iPad? Where would you get the right to do that?

MURPHY: Okay, great, so I think the general way this would happen is I would think, Oh yeah, Woods stole my iPad, and so I would challenge you, and then you would say, No, I didn't; what are you talking about? Get out of here; this is mine. And so then I would not at this point be able to just go up to a – I'm not sure what these agencies –

let's call it a repo man or something, that kind of an agency where they have burly men who wear flak jackets and have other sorts of methods of persuasion who have things where they can knock down doors and so on.

At this point I would not yet be able to go do one of those companies, and if I did and said, Yeah, Woods has my iPad, they would say, Well, you need legal proof, because otherwise the community might think we're just a bunch of thieves if we go break down his door and take the iPad back and give it back to you on your say so. You need to have the legal system agree with you. We need a legal opinion.

And so then I'd say all right, and so I go to you, and I say, Look, here's a list; I just went to Google and looked up a list of ten judges in our area who all specialize in petty property theft or whatever the actual term would be to handle what our case was. And here, I'm willing to submit our case to any one of them. I have the receipt from Best Buy that I bought that iPad. You conveniently scratched off the serial number, so that's not going to be very good. It will be clear that that was mine. I can show some other documentation. You, I'm presuming, have no ability to demonstrate that you bought this through a legitimate way – and I can go through whatever my case is and say, I'm happy to go to any of these ten judges in our area that this website that rates judges and stuff on their reputation says all get five stars. What say you?

And either you agree to it or not, but if you don't agree to it, then I'll go to one of those judges and you'll be tried in – what's the term? – in absentia, where you don't show up, and presumably the judge, assuming I have some compelling evidence, the judge is going to make a ruling. And so then if I have that kind of a thing, I'll go to the burly-men agency and they may go retrieve my iPad.

And so the point is I'm getting the community to realize that we're not outlaws, that we're not just stealing your iPad, that the judge ascribes some legitimacy. So to answer your question: no, I don't think I can physically grab you and bring you before a judge; it's just that you would be foolish not to if you actually were in the right.

WOODS: Okay, so what happens – but what happens if I don't? What happens if I just don't cooperate? What happens next? Are you going to try to damage my reputation? But what if everybody loves me and you were some nerd in high school that nobody liked and I was the popular kid and, you know –

MURPHY: Your story's only half true. I think we were both nerds in high school [laughing].

WOODS: [laughing] I have nothing to do with this story. This is all about you. No, I guess I am partly involved. But do you see what I mean? It seems like a lot of this revolves very heavily around reputation, and that just seems like such a thin reed for holding society together. I mean, sometimes you just need to bring down the hammer.

MURPHY: Right, and I think unfortunately you're just assuming that what I was saying to you was other things you've read. But no, in my story that I just told you what would happen is if you just sit back, you're going to be at a serious disadvantage when all the evidence presented is going to be from my side and I'm going to get very – By

the way, if I just made up something, presumably a fair judge would say, Yeah, there's really not enough here. I can't in good conscience say —

WOODS: Right, all right, but let's say —

MURPHY: So if there's a ruling —

WOODS: Yeah, but —

MURPHY: So I'm saying then the legal system in our society would say that it's okay for these guys to go retrieve the property.

WOODS: Okay, okay, now stop right there. Now, under the state, I see where they get the legitimacy for that or where they say they get the legitimacy for that. I get it. They're sovereign. They have a monopoly on violence. This is one of the public goods they provide. I get that. But in the absence of the state, where does some schmoe working for some private company get the right to come seize me? Is it that he has this as a natural right and so this company is going to be the locus of how these natural rights are vindicated?

MURPHY: Okay, well so now we're kind of shifting over to saying where does the law come from. In a group of people, what makes them think certain things are lawful and certain things are crimes? All right, so I just stipulated that there is this general understanding of basic legal principles, and I think in a society that was similar to, let's call them Western societies of today, accept that everybody in them is a real stickler for property rights in the sense that we would say, okay, so yeah, what we now call taxation really would be considered as theft; what we call conscription everybody would recognize as, Wait a minute, that's kind of like slavery, isn't it? And locking people up for drug crimes would be considered kidnapping. So I'm saying people really taking seriously when they say, No, I believe in property rights, then the general respect that people have for property rights applied in the private sector would also carry over to the so-called public sector.

So in that kind of framework, I think most people would say yeah, if somebody takes your thing, you have the right to go retrieve it. You can't go and shoot them in the head to get it back, unless maybe when you're going in to get it he comes at you with a gun. But you're allowed to go retrieve it. So in that particular instance, what I'm saying is what the judge would be doing is saying yes, the legal system recognizes that iPad inside Woods' house is actually Murphy's, and so it's not a crime for people to go in and retrieve it. So long as they don't cause all kinds of damage and shoot infants on the way in, that's not a crime. So you would not be able to call on the legal system in retaliation to punish me.

So if you want to push it back and say, Okay, but why would the legal code be like that?, we can have that conversation, but I'm just clarifying the way I'm viewing it is let's not mix up the use of force with the legal system and where does that come from per se. I'm saying I was kind of taking it for granted that the legal system would be there and that the community would have this general understanding of basic legal

principles and that judges would just be the ones to apply it in specific cases with expertise.

WOODS: All right, let me give you an example of a difficulty that has to be overcome. I read an article about Jeremy Corbyn in Britain, and he is advocating in the wake of that terrible fire that we all saw in London that the houses of the rich, the unoccupied houses of the rich ought to be requisitioned for the poor and displaced from this fire. Now, you can argue whether that's morally justified or not, but that guy is obviously arguing from a different set of moral principles.

So I guess what my question would be: given that there are people who are Bernie Sanders supporters who no doubt think that rich people – they don't make these cute little distinctions that libertarians make about people who came about their money reputedly or disreputably. There are a lot of people who think it's downright immoral to be rich, period. So how could we ever have a society with those people, where there's enough of a consensus about right and wrong that we could have a uniform legal system that everyone would be satisfied with the principles of and that wouldn't degenerate into, "Well, here's my legal system; you have your legal system. I've got my courts; you've got your courts. I have my principles; you have your principles," and it degenerates into violence?

MURPHY: Okay, so I think there's two related issues going on there in your question. So one is to say, Murphy, if we had basically the same kind of people in our hypothetical world that we have in our current world right now, wouldn't we just have the same political institutions? Well, yes, we would. If we had the same people in our hypothetical world that we have right now, it'd be the same thing. So I grant you that. I'm not saying no, every population necessarily will have libertarian Rothbardian land. Well, no. I'm looking around; I don't see it. So clearly the argument can't be that any group of people whatsoever will instantly yield up one of these Rothbardian visions. No, that's clearly not true.

But what I am saying is that it's not necessary that every last person reads *For a New Liberty* or *The Ethics of Liberty* and is fully convinced of the wonders of libertarianism the way you and I think of that word. I think all it would take is people growing up in a society that generally respected property rights but they didn't make special exceptions. And then once people saw how it worked, they had an example of it going back a generation, then the mystique of the state would be smashed for that group of people and it would be very hard for someone to get a foothold who said, No, no, no, but don't we just in case need this special group of people who have all the nuclear weapons and can take as much of our paycheck as they decide is necessary and can tell your farmers whether they can plant crops or not? Shouldn't we have a group like that just in case? And they would laugh and say, What, are you out of your mind?

But right now, people have been bamboozled into thinking, Oh no, we do need a group like that because otherwise the Soviets might get us or al-Qaeda might get us or else we might not have any food. And we don't know any better because most people have grown up in this other system. So I think that's the way to handle the one problem.

Now, if you're saying, Okay, but in that kind of world, if there's differences of opinion, there's competition, why wouldn't there just be mass slaughter in the streets with

warring agencies and things?, I can go into that. Is that where you wanted me to take this?

WOODS: Well, before you do that, let me give you another example. There are cultures that approve of honor killings. This young woman has brought dishonor on our family because she married some man without our approval, and therefore we can murder her. How do you integrate that – so in other words, you're saying that, okay, we can't integrate that into a Rothbardian society. Okay, but those people live there and those people have those beliefs, and unless you have a state that's going to smack them down and say, Look, in this jurisdiction, you don't act that way and you can't just go appeal to some other court that's going to say that it's okay – no, you are out of here. You are not going to live in our society. How does it operate in – how does this work in what you're describing?

MURPHY: Okay, let's frame, though, the issue. Right now, you admit that on planet Earth there are honor killings. That's why you're worried about this, because it's a real thing, right?

WOODS: Yeah.

MURPHY: Now, does that just happen in Somalia right now?

WOODS: It happens in a bunch of places – with governments, if that's what you mean.

MURPHY: Yes, that's what I'm getting at. So it's certainly not the case that, Oh, wait a minute. Because there might be human beings who really strongly believe in the legitimacy of honor killings, therefore we clearly need a state, because otherwise these killings might occur, that's obviously a non sequitur. These killings occur right now, primarily I would think in regions that are dominated by states that claim to have a monopoly on the legal and police power. So that's certainly not solving the problem by saying no, let's let the population support a monopoly agency. If the population in general thinks that honor killings are fine, no matter what institutional framework you have, that's probably going to occur. My claim is that for a given population, honor killings and other things that to use seem crazy are going to be much less likely if you decentralize the power and make individuals pay for the actual costs of what their views entail.

So for example, something like – it's conceivable in the situation I just sketched out if 99% of the people are really hardcore Christians of a certain variety who think that, no, it is really a sin and I also think it's entirely appropriate to punish legally somebody who becomes a heroin addict, then that would probably be a crime in the legal system, even if they were otherwise libertarian. But I would say if they have to pay for it, it's clear how it's coming out of their paycheck directly, and on the margins they're making decisions and they have a wide spectrum of things and they're allowed to choose and say, Okay, do you actually want to lock up these people for an extra such-and-such that you're paying each month to you agencies to pay for this, or would you rather just lock up the rapists and the bank robbers and the serial killers and then your bill would be such and such? I think even in the real world with people with strong views, they would be much less likely to pay for strict enforcement of what we call the drug war in that kind of a framework versus the current one where there's an

election every four years, and someone gets up there and says, Yeah, I'm going to lock up these heroin addicts, and then they go vote for it and it's not really clear to them how much they're paying for that.

WOODS: All right, I've heard that argument and I think there's something to it. What about the overall argument that somebody listening to this model might respond with: in what way would the rich not dominate this system? Yes, we know that in the current system, we all know that rich people get through the court system more easily because they can deal with delays and they can get the best lawyers. And we know celebrities, because of their fame, can sometimes get shorter sentences and things like that. But that's not an excuse. That's a dodge just to raise that as an argument for anarchy, because I get that the current system is not perfect, but at least I've experienced it and it's at least reasonably tolerable. We're all still living in it. We're all prospering, most of us, not as much as we would otherwise, but in the grand scale of civilization and human life on this planet, we actually have it pretty good. And maybe we have it good enough that it's not worth experimenting with something as revolutionary as this.

But anyway, I got a little bit off track. Why wouldn't the rich guy simply win every time? Why couldn't he bend justice to his advantage?

MURPHY: Okay, so you're right; you did raise two objections there. So the second one that you went into I think is actually pretty strong. So if someone just says, in general, what we have now seems to be okay, especially in the wealthy countries, and why don't we just try to tinker or work for improvements on the margin here instead of, whoa, we don't want to go down the French Revolutionary path. I actually agree with that largely.

So what am I doing? I write essays and books and I'm just trying to convince people: let's imagine this world first. Okay, now how would we get there? So I'm actually being pretty pragmatic and step-by-step and nothing crazy in that sense. I'm just saying let's first think about that society and how would it work and how do we apply this now in our own lives. And step-by-step, you know, maybe I'm not going to go vote for one of the two candidates next time. Okay, so that's not a real crazy, radical implication in terms of my behavior day to day switching just because now I've had this philosophical insight, this change in perspective.

So I actually am okay with you saying that, but if you're now saying, And in particular, the types of things I'm worried about, Murphy, is in your framework, wouldn't the judges get paid off by rich guys and wouldn't it be better to have a monopoly state?, I would say, No, that's not a good argument, because again, all the reasons for why there might be corruption under decentralized judicial rulings where both parties have to consent before they bring the case before the judge, clearly you're going to have much less corruption in that kind of a framework than under the current system.

And so when you look at the current system and say, Yeah, I'm sure there are judges on the take and I'm sure when the Supreme Court rules in cases involving the federal government versus someone who objects to it, I'm thinking maybe the Supreme Court sides with the federal government since it's part of the federal government — if you're okay with this system and think, "Yeah, that's not so bad," well, then, I think

what would happen under genuine decentralization and competition among judges would be amazing to you; it's just we haven't tried it. And like I said, it's not pure science fiction. We can see it in things like arbitration. It's not the case that the richer party always wins an arbitration. If it were, then those arbitrators would go out of business. Any time there was a disparity in wealth, then the party that was poorer would say, No, I'm not going to do this because we know that that arbitrator always picks the rich guy.

Or if somebody wants something more objective and tangible that most people can look at, something like the NBA or the NFL, it's not the case that the refs always throw the game to the richer team. You can see how that would ruin the sport and that would be crazy to do that. By the way, there are statistical analyses to see in things like, where it would be better for ratings and for advertising revenue if the richer team ended up going to the championships or the playoffs, there are statistical evidence of perhaps referee bias, but the point is you've got to do econometrics and stuff and it's really subtle. It's not something crazy like, Yeah, I think the Supreme Court generally sides with the power of the federal government.

WOODS: Now, given that you say you've kind of modified your views from *Chaos Theory*, where would people go to find out where Bob Murphy stands on all this or if they want to find out more?

MURPHY: Well, one thing is let me mention before I forget: I have recently written down the latest version of my thoughts on this stuff, of private law and private defense, it's going to be in a forthcoming issue of the *Journal of Libertarian Papers*. And so what's happening there is I'm actually responding to Joseph Michael Newhard had a piece, if people are hearing this later – it's Volume 9, Number 1, 2017 is where his article is in, where he was challenging the ability of – he thought that the nonaggression principle was like a suicide pact and if libertarians actually believed that and followed it, they would be very vulnerable to foreign invasion. And so in response to his arguments, I wrote a lengthy thing laying out my vision of a private legal system and then how military defense would work on top of that.

WOODS: All right, I'm going to link to – I mean, people might as well still look at *Chaos Theory*. It's still great stuff.

MURPHY: Oh, sure. Also, if you Google "Robert Murphy 'The Possibility of Private Law,'" you'll have an essay pop up. And another one you can link to, Tom, is "Wouldn't Warlords Take Over?" That was one, by the way, where Walter Block said that was one of the best essays making the case for private law, private police that he's ever read – and he's read a lot, I think.

WOODS: Right, right, okay, all right. He has, as a matter of fact, and he's written a lot. So let's – I'll just make sure and link to all that at TomWoods.com/938. All right, thanks, Bob. Great talking to you. I don't know when I'll talk to you next, but whenever that will be, I'm really looking forward to it.

MURPHY: Me too.