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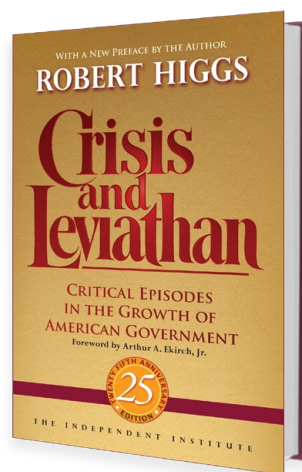
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The Defensive State

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HARTMUT KLIEMT

In his seminal book *The State* ([1985] 1998) Anthony de Jasay draws attention to the anomaly that a minimal state would have to devote its coercive power to no other purpose than to keep itself minimal. Once a state exists, those in control of its fundamental coercive power will use it for their particular redistributive purposes and go beyond the minimum redistribution necessary to maintain the minimal state. If anarchy is under the threat of being destabilized by the invention of statelike organizations (external or internal to it), so is the minimal state by its proclivity to grow beyond any limits.

Within a politically realist perspective, neither anarchy nor the minimal state forms a stable equilibrium of social interaction. Nevertheless, Jasay prefers anarchy to a minimal state as an ideal. He believes that we should not even in theory accept as legitimate what by its nature implies the use of fundamental coercive power of collectivities—that is, a power to which its subjects did not agree in prior explicit or implicit acts of free assent. Any philosophical approach that legitimizes collective coercive power in some way or other will pull down our defenses.

For instance, for Jasay, Herbert Hart’s famous rule of recognition (see Hart 1961), the social acceptance of which explains how a legal order can exist in the first place, is in truth a rule of submission. Any standard that transmits any legitimacy to state coercion beyond acknowledging that coercion as a brute fact will pave the way for expanding the state’s role beyond any proper limits. To expand the state’s reach, those in control of the state will use the willing obedience of those who apply the rule of recognition.

Of course, Jasay acknowledges the fact that states do exist, but he commends that in adapting to this fact, we always stick to the anarchical reservation that their

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existence is fundamentally illegitimate. However sophisticated theories may be, there simply is no fundamental justification for fundamental coercive power.

Jasay's theory—like, say, John Rawls's theory of justice or any other sophisticated political philosophy—is not directly about the state but rather about how we should *think* about the state. In particular, Jasay resents those theories, most notably contractarianism, that describe the existence of what is decidedly not the outcome of free consent as if it were the result of voluntary agreement. This description of it as if it were freely agreed upon merely camouflages the state's dangerous coercive nature. It lets the powerful have their way more easily. Combining contractarianism with concepts of democratic legitimacy and the “logical foundations of constitutional democracy” (the subtitle of James Buchanan and Gordon Tullock's book *The Calculus of Consent* [(1962) 1999]) amounts, in Jasay's eyes, to deploying weapons of ideological mass destruction of liberty by means of political theory. For him, the only legitimate route to creating social institutions is assent-based unintended growth of conventions (for a more precise model of such a Humean–Hayekian process, see Sugden [1986] 2005).

To understand Jasay's views on this issue, it is most important to see that for him—as for Thomas Hobbes—no “natural law” or system of “natural rights” preceded the evolution of institutions and the conventions underlying those institutions.¹ There is no a priori standard of reason against which the conventions can be normatively assessed. Jasay subscribes to the a posteriori nature of *all* obligations and rights. They are brought into existence only when social conventions are created. In the original process of convention formation, individuals cannot be blamed—there is no standard for that at this point—for agreeing to whatever seems fit to them (i.e., they cannot be blamed for creating any externalities). Before conventions, there is no nonconventional and, of course, no “conventional” normative standard that can be used to criticize what individuals do unto others or unto themselves. All normativity is created by conventions.

Jasay, like the rest of us, needs to come to terms with the facts of life. Though “the world until yesterday” (Diamond 2012) was anarchic, we live in a world of states today. The economies of scale in warfare make truly anarchic existence outrageously unrealistic in the world today.² In my subsequent tribute to the depth of Jasay's reflections on the state and on the necessity to uphold anarchist ideals in keeping the state—unavoidable as it may be—under control, I explore whether the ideal that I introduce under the name “defensive state” may help. Can we acknowledge the unavoidability of the state conceptually and still keep intact the anarchist reservation against the state's legitimacy?

1. We should not be led astray by Hobbes's trick of hijacking the terms of the theories he is fighting, as when he redefines “natural right (to everything)” simply as the absence of any noncontingent obligation to omit anything.

2. The world Jared Diamond describes in his book *The World until Yesterday* (2012) was less hospitable to individuals and more Hobbesian than I imagined it to have been before reading this book.

The defensive state that I envision is akin to Chandran Kukathas's (2003) "liberal archipelago." It is not protective of preexisting rights—preceding the existence of conventions—nor is it protective of some set of state-sponsored rights and obligations. Instead of requiring that individuals should be left to make their own decisions within a *predefined* system of rights, as the adherents of the notion of such a "protective state" typically do, the ideal of the defensive state requires that individuals be left alone in the first place to develop their conventions defining obligations and rights. The existence of the defensive state that strives to keep itself minimal is, of course, as much an anomaly as that of a minimal state. And it is as unstable as anarchy.

As far as realism is concerned, anarchy, the minimal state, and the defensive state are all in the same boat. Acknowledging this weakness of the very concept of a defensive state, I intend to explore whether an ideal theory of anarchy or an ideal theory of a defensive state may serve us better in defending our liberties against intrusions by the collective bodies under which we of necessity must live.³

From Anarchy to the Defensive State

If there were no state, individuals would automatically and trivially be left alone by the state. However, in anarchy there is no guarantee that no state will emerge. As history has proved, a state or statelike institution may in fact emerge. The economies of scale in aggression and warfare are such that it takes a state to defend us against the state once the state has been created (somewhere). Therefore, though in anarchy there may be no justification to found the state in the first place,⁴ once that state exists (somewhere) we need a state to defend us against it and other states.

The "reluctant archist" accepts the fact of the state's existence while evaluating it according to how well it approximates ideals of anarchic liberty in a world of states. Accepting that the state will not go or "wither" away, such a subscriber to anarchism as an ideal should want a state that has the sole aim to protect internal anarchy. Such a state carves out a sphere in which it eliminates all state interference (in particular by another state). But it pursues no internal "peacekeeping" mission and is not involved in the internal enforcement of "justice." I henceforth

3. On ideal theories and their role in assuming away institutional problems, see Brennan and Pettit 2007. Even if ideal theories are mistaken in assuming away the problem of institutional implementation, they may as a matter of fact shape our thinking about institutions.

4. The better protection of individual rights in interindividual relationships, as Nozick assumes, may not be a good justification at all for founding such a dangerous institution as the state. Merely the existence—or the threat of emergence—of an unjustified state can justify the founding of a new state. In that sense, any justified state would be a defensive one. The first state in the chain is not justified, yet all others are justified by the necessity of defense because defense against a state—our own or another—requires a state. From this perspective, the Nozickean view that the founding of a state can be justified in pursuit of the protection of some given set of rights seems doubtful. If rights can "exist" at all without a state, the state's role should not be that of protecting rights but rather that of defending the sphere in which individuals can create and then protect rights themselves.

refer to such a state ideal according to which the state enables convention formation and agreements unhampered by statelike institutions (internal or external) as a *defensive state*.

If the state's territoriality is assumed (when it is viewed as a stationary rather than roving "protector" [Olson 2000]), the most minimal variant of a state would claim a monopoly of *state* action on a certain territory.⁵ The only "article of the constitution" of such a defensive state would require that it should leave its citizens alone. Such a state would keep out of its citizens' backyards and see to it that the interaction internal to the protected sphere remains insulated from interference by other organized outside or inside groups.

However, the defensive state cannot simply keep sitting on the fence as far as internal interaction is concerned. To the extent that the aim is to keep anarchy viable—in view of its instability—the defensive state faces the necessity of suppressing efforts to organize statelike structures internally. Internal, local anarchy will tend to be as unstable as global anarchy.

In short, keeping out external bandits is not sufficient; eliminating internal bandits—that is, those who manage to organize on a statelike scale—is necessary as well. In view of this necessity, the "constitution of the defensive state" is merely an incomplete description of the basic norms that must characterize the defensive state. To subsist, internal anarchy needs additional provisions. Even the defensive state cannot leave it to society to create a natural equilibrium given the threat that a (protective) state may spring up internally.⁶ An exclusively defensive state seems just as subject to Jasay's warning about the minimal state and, for that matter, anarchy. To repeat, however, all these forms of social organization are "unrealistic." Jasay is right in claiming that adherents of limited government cannot coherently blame anarchy for its latent instability and at the same time envision a minimum state that will not be subject to the same latent threat of becoming unlimited. The same social forces are basically at work in both cases and, of course, in case of the defensive state.

Instability of the Defensive State

The defensive state is, so to say, "subminimal." It is not even ultraminimal in the Nozickean sense of forbidding individuals to use violence internally. Contrary to the Nozickean ultraminimal, the defensive state does not claim the monopoly of

5. On nonterritorial alternatives to statehood, see Frey and Eichenberger 1999.

6. One should think of a Cournot–Nash equilibrium wherein individuals do not have an individually rational incentive to deviate from the behavioral plans supporting the equilibrium as long as the others involved stick to it. In more extended settings, one would presumably use some coarser notion of "stability," as in Kohlberg and Mertens 1986. The best discussion of philosophical (ab)uses of equilibrium and rationality concepts can still be found in the modern classic *Game Theory and the Social Contract* (Binmore 1994; see also the more recent Binmore 2009).

coercive power in its territory. It claims only the monopoly of *state* (or statelike organizational) power.

It seems that the defensive state needs the power to tax, though.⁷ Otherwise, it cannot compete with other states—defensive or other—that rely on that power.⁸ As stated earlier, the defensive state must also assume some fundamental coercive power against those who might otherwise reach clublike agreements in anarchy for the purpose of eliminating (internal) anarchy.⁹

Not only is anarchy subject to the risks of internal instability, but the defensive state protecting internal anarchy might “run wild” as well. Moreover, as a *matter of fact*, it seems empirically extremely unlikely that an exclusively defensive state can survive in a world in which more-extensive states exist. Yet as a bit of so-called ideal theory, an exclusively defensive state has some merits: the best bet for realizing the ideals of being left alone by collective coercion consists in focusing on the defensive *role* that a state may still play in certain spheres even if the state as a whole is not defensive only. Philosophy can contribute something here by providing critical argument in favor of such a defensive rather than a protective role for the state. Such arguments may support the same ideals as anarchy while conceptually acknowledging that in a world in which the original sin of creating the state has been committed, that evil will not go away.

Humean Natural Law, Peace, and Justice

“Humean natural law” is understood here as a set of social rules guaranteeing some form of “stability of possession, its translation by consent, and the performance of promises” (Hume [1739] 1978, book 3, sec. viii). Such law is “antecedent to government,” altogether conventional and could be different if the conventions were different. The law is natural only in that it seems to comprise the empirically necessary conditions for a society to exist in peace and some order.¹⁰ To put it bluntly, the “functions” of guaranteeing stability of possession, its translation by consent, and the performance of promises (contracts) must be fulfilled by any normative order, but the concrete ways (i.e., the specific “natural law” in place) to fulfill the three basic abstract functions of natural law are diverse.

7. It does not need to maximize tax revenue, though; see the corresponding thought experiment in Brennan and Buchanan 1980.

8. Anarchists, of course, have argued that a statelike organization might conceivably be financed on the basis of purely voluntary contributions. What is conceivable in theory will in all likelihood not work in practice, though.

9. It is a bit like the old slogan “intolerance against the intolerant.”

10. Hart (1961) describes these conditions as the “minimum content of natural law.” His claim is universalist in that he names the minimum conditions that must be fulfilled by all working normative orders fulfilling the functions of law in a society of individuals who as a matter of fact want to survive.

For instance, in the case of driving a car, it does not matter whether all drivers have to use the right or the left side of the road as long as they all have to use the same side; there is scope for fulfilling the same function with different means. There is not one natural law, but a vast manifold of normative orders—all of which may be fulfilling the abstract functional criteria of Humean natural law. For instance, possession may be collective or individual as long as it is stable in the sense that nobody has a rational reason to challenge the underlying equilibrium by individually deviant behavior.¹¹ Peace, as rational acknowledgment of the status quo equilibrium, is tantamount to respecting the “natural law” that *exists*. In peace, there is no rational incentive to deviate individually from the equilibrium.¹² It is clear that under many circumstances peace without a state and some imposed conception of justice are viable if some normative order as a matter of fact manages to prevail.

The prevalence of one normative order over competing normative orders is a necessary condition for peace. In peace, disputes are decided according to some normative standard that *as a matter of fact* prevails as part of the equilibrium. In this sense, peace cannot be had without a kind of normative monopoly.¹³ Even “peaceful anarchy” must be characterized by a “factual monopoly” of some normative order, for only then will it be clear according to which convention a decision must be made “when in doubt.”¹⁴ To that effect, the normative criteria need to be accepted by individuals according to a rule of recognition (to recognize the “ethical” code that is not to be enforced by the state). The normative criteria must be shared by many sufficiently influential individuals to render dissent insignificant. If dissent is insignificant, disputes will be settled without quarrelling—*whatever* “the” ethics is. *Any* such ethics will then in fact be treated as Humean natural law.

The defensive state tolerates the emergence of any such ethics in the defended sphere of residual anarchy.¹⁵ It does not interfere with the specific natural law as emergent. It will not enforce any specific concept of justice because justice as an ethical concept depends on “positive ethics” in the same sense as justice in the realm of law depends on what as a matter of fact prevails in enforcing “positive law.” Conventions define the “ethics of the land.” This ethics, though prevailing, is not state-sponsored law. Once the state adopts a protective role and ratifies and enforces some type of conventional ethics as the “law of the land” (while enacting some additional rules by its rule of rule change), the game as well as the role of

11. Stronger equilibrium concepts would be possible as well. Yet including subgroups of individuals would lead us too far into technicalities.

12. Peace is not tantamount to the absence of violence. It merely shows how such deviant behavior is “generally” irrational.

13. The courts do not need to be backed up by a state or a monopoly for the use of force, however.

14. Iceland as described in Njal’s saga is a perfect example of an anarchical order with a normative monopoly (see Cook 1997).

15. In a Humean perspective, beyond the purely conventional there is no other sense of the foundations of “ethics,” even though a relativistic view of reflective equilibrium is viable (see Rawls 1951).

“justice” change completely. The state’s monopoly power can be levied in pursuit of partisan purposes.¹⁶ However, contrary to the protective state, the defensive state does not play an active role in defining what counts as “harm.” In a defensive state, it is therefore much harder to conceal the pursuit of partisan purposes as efforts to prevent harm.

The Harm of No Harm

Imagine Crusoe and Friday on the island. They may quarrel over a patch of land on which bananas are growing or can be grown. There are several ways to resolve the issue. First, the dispute may be settled by fighting it out. As Hobbes understood already, the fight will end without any proclivity to rekindle it only if one of the two—by whatever means—has a factual monopoly of control over the patch of land and the other cannot rationally challenge—at least not for the time being—that factual control.¹⁷ Second, in a Humean world, after the two have lived together and developed certain expectations and conventions, the dispute may be resolved in a negotiation between them according to some convention or standard commonly recognized.¹⁸ Third, the dispute may be settled by “Saturday,” who is in command of power that cannot be rationally challenged and who wields his “sword” either in accordance with or in violation of emergent conventions.

If it were established that people be left alone *only* when and to the extent that they exert “no harm” on others,¹⁹ it would be virtually impossible to leave people alone, ever, because anything one person does can have some (harmful) effect on another person. If Crusoe does not like Friday’s indulging in religious thoughts or reading magazines describing violent acts or what have you, Friday’s act can be regarded as potentially inflicting harm on Crusoe. This conclusion applies even if, beyond the information flow, there is no direct physical influence on Crusoe. If Crusoe gets to know what Friday is up to and resents what is going on, he may feel hurt or he may honestly believe that the behavior will bear the seeds of major future damage to him.

16. Agreement between separate individuals can still be seen as fundamental in “contractarian” justifications of state action if coercive action is meant exclusively to correct injustices. This “trick” of having an assent-based moral conception and at the same time to eat it away with an inflation of the coercive enforcement of a specific conception of justice would be much more convincing if the standard of justice were plausibly derived from a freely emergent convention based on “locally” consensual acts. However, this cannot be the case in the statist framework supplied by modern philosophers of justice, who tend to confuse their idiosyncratic “theories of justice” with established conventions. Yet as Jeremy Bentham dryly remarked in his criticism of anarchical fallacies, “Hunger is not bread” (1838–43, article 2).

17. In more modern terms, an anarchical equilibrium has emerged; in the *Metaphysics of Morals*, Kant (1991) says that in a state of nature the law reaches as far as the cannons do.

18. After others have arrived on the island, the convention may include a rule that identifies a mediator, whose verdicts are themselves identified voluntarily as “binding.”

19. This has been an pervasive problem ever since John Stuart Mill’s essay *On Liberty* ([1859] 2008).

In a preference-based (welfarist) approach that treats respect for others' subjective judgments and feelings as fundamental, it is not absurd to accept it as *necessary and sufficient* for harm to have occurred if somebody *regards* something to be harmful. If individual definitions of harm as a matter of fact clash, a verdict is needed that protective state politics puts its weight behind.²⁰ To this effect, the state would have to enforce some conception of rights and obligations.

The state will be drawn into citizens' life ever more deeply by the principle that only acts that are not harmful are to be treated as beyond the sphere of state control. It does not really help to argue that everything should be allowed unless explicitly forbidden by the state because we are asking here what should be forbidden and what not forbidden in the first place. It is not the case that certain acts are not harmful *per se*;²¹ rather, certain acts should be tolerated by the state regardless of the fact that they are harmful to the interests of some. The state should then play a defensive rather than a protective role,²² but will it keep out of politics as well?

Politics and the State's Defensive or Protective Role

The defensive state will be less political than the protective state as far as explicit political rule fixing and enforcement are concerned. However, a reading of the Icelandic sagas (in particular Njal's saga) or reports of anthropologists describing the role of informal social networks in norm enforcement, for instance, shows that it is obvious that life within the quasi-anarchy of a defended sphere always tends to be "politicized" in a nonstatist sense: the individual becomes quite dependent on groups and their support. For instance, in Njal's saga everybody is engaged in social networking all the time. The individual needs to do so because he or she needs to have potential supporters at hand if a "legal" dispute should arise (see Diamond 2012 for the anthropology and Greene 2013 for the moral psychology and philosophy of the matter).

The society in the saga is peacefully anarchic in that disputes are decided by mediation and in line with the conventions that serve as law without specialized

20. The so-called paradox of liberalism emerges as a philosophical problem of forming convictions of what is legitimate. Such a philosophical problem exists, whereas a problem of political or institutional liberalism does not, particularly if the state is assigned a merely defensive role after fixing some basic rules of the game (see Kliemt 2006).

21. If X is running a food store with a local monopoly in front of an office building, then X is harmed by Y's act of opening a competitive store in the same locality. According to public standards, "no harm" occurred, yet in another sense harm did occur.

22. The question whether the public at large *should* subscribe to the view that harm must be prevented by means of the state's fundamental coercive power cannot be answered by finding out what *is* a harm or what *is regarded* as harmful by somebody. This question has from the beginning been a political query regarding what *ought* to be treated in a certain way by the state rather than what *is* treated in a certain way. What is a harm or not in the politically relevant sense is *constituted* (defined) by the state. It depends entirely on what the state politically intends to suppress or not suppress. This difficulty can be avoided only by the state's adoption of a defensive role.

enforcement. Who gets her or his way in a conflict crucially depends on what the rules of order say. Under the prevailing nonstatist Humean natural law—the conventions at the time the saga was written—it is not merely a question of brute force but also a matter of argument who gets his or her way and to what extent. But the number of weapons and of auxiliaries matters, too, for how the decision might go. Therefore, without a well-organized protective state the individual's personal life becomes “politicized” by the need to organize coalitions of supporters.

In a defensive state, groups of individuals may be more independent of state politics than in a protective state. Yet social networking, social coalition formation, and so on remain almost as important under the shield of a defensive state as in pure anarchy. Vice versa, although the protective state will make individuals at least in a way more dependent on state politics, it will make them more independent of interindividual and community politics. As we all know, this pattern is borne out by the greater independence of individuals from family support in modern societies. These societies “produce” rights as obligations of state authorities to do what the right holder demands in a certain realm.

Hunger is not bread, and the demand for a right is not a right. However, if there is a bakery, we can go there, and if it is a state-sponsored one, we may not even have to pay for its services. Though even that lunch is not free, it may to some extent be worth bearing the risks of allowing the protective state in. This being said, the naive trust that the protective state will not become a “protection racket” of other than our own views on rights is astonishing. A good dose of anarchist ideals and Jasay's hard-nosed realism about the proclivities of states to become intrusive may be most useful here.

Conclusions

The worst atrocities in human history have been committed by states. In view of the risks brought about by founding a state, anarchy may be seen as a morally justified hedge of bets: the best and the worst results of human organization are prevented. Put otherwise, this view claims that risk aversion—and certainly “maximin”—means that founding a state in a world in which no states yet exist creates a negative externality.

We might insist that *conceptually* society comes first and the state only second, if at all, in creating order, peace, and justice. *Factually*, after the anarchical world of human prehistory has gone for good, the state and society have always been coevolving. Fundamental coercive state power is a fact of political life. Therefore, for the “reluctant archist” the willingness to restrict the state to a defensive role of keeping the state out seems the only realistic option. In the sphere left to the citizens by the defensive state, state-sponsored “rights” do not exist as institutional facts. In this sphere, communities may create their own “Humean law,” which may

or may not contain certain “rights.” The trick is, of course, to keep that sphere as large as possible.

For those who think in terms of making individuals more independent of communities, a more sophisticated role for a protective state may have great charms. However, they should take into account the risks of this strategy. In view of the many protection rackets run by particular interests in all states, the defensive state role may be the ideal to beat rather than some conception of an ideal rights’ scheme in a protective state.

It seems that much would be won if in public discourse the burden of proof could be shifted to those who are in favor of a protective rather than a merely defensive role for the state. In the spirit of Anthony de Jasay, this essay has aimed to assist in shifting that burden in the desired direction. It pleads for the support of the ideal of a defensive rather than a protective role for the state. The ideal defensive state leaves it open to convention what is protected, whereas the protective state facilitates the imposition of some substantive view of what is to be protected.

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