

Polycentric Law in a New Century

by Tom W. Bell

Humans cannot live together without some sort of law. As F. A. Hayek noted, society can exist “only if by a process of selection rules have evolved which lead individuals to behave in a manner which makes social life possible.” Law’s practical effect thus predates not only states but even the idea of law itself. For millennium upon millennium, customary and private legal systems have ordered human affairs, either alone or in conjunction with state law.

States claimed a monopoly in law only relatively recently, and only after a long struggle to eliminate competing legal systems. Polycentric law—that is, law arising from a variety of customs and private processes rather than law coercively imposed by a single state authority—survived that onslaught, however, and has now taken root in the interstices of state power. As we enter a new millennium, we can anticipate the growth and flourishing of polycentric law.

Three areas in particular stand out as likely fields for the development of polycentric law: alternative dispute resolution, private communities, and the Internet. Each has seen the failure of political legal systems, an exodus by dissatisfied consumers to private alternatives, and rapid growth in the magnitude, diversity, and sophistication of non-statist legal services.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) is one of the most tangible—and rapidly developing—ways in which modern, dynamic mar-

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At a Cato Forum on September 15, Sen. Rod Grams (R-Minn.) announced that he would introduce legislation based on the Social Security privatization model described in *A New Deal for Social Security*, by Peter Ferrara and Michael Tanner.

ket processes open new choices in legal relations. Taken broadly, ADR includes a variety of private means of settling disputes, including mediation, negotiation, and arbitration. Its record of thriving where state law cannot reach indicates that ADR has a very bright future, indeed.

ADR has thrived under conditions that render soldiers and bureaucrats powerless. Consider the Mediterranean in the 11th century: Muslim and Christian worlds stood on opposite shores, divided not only by sea but by religion, kinship, kingdom, and culture. Merchants struggled with far-flung agents and suppliers, an inability to specify comprehensive agreements, and sharply limited means of enforcing contracts. Yet free, private, and competitive trade thrived thanks to the Maghribi traders, a coalition of merchants who developed a private legal system.

The law merchant (*lex mercatoria*) rep-

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resents a more sophisticated and well-known example of how the demands of commerce can create and sustain a private legal system under circumstances that frustrate statist law. Like the Maghribi traders' coalition, the law merchant's effectiveness relied not on state coercion but on the threat of ostracism. Merchants who deviated from the law merchant's standards found themselves cast out of its community of reciprocal commercial relationships. The law merchant survived the political turmoil of the Middle Ages and influences international law and customary business practices to this day.

Just as impotent states left room for the development of the Maghribi traders' coalition and the law merchant, so today the long delays and high costs of state legal systems encourage the growth of commercial alternatives. The largest private provider of ADR services in the United States, the American Arbitration Association, administered 62,423 cases in 1995, nearly twice as many as the 35,156 it handled in 1975. More than 1,000 ADR brokerages compete with the AAA, led by Judicial Arbitration and Mediation Services/Endispute, a private California company founded in 1979. JAMS/Endispute handled about 15,000 arbitrations and mediations in 1997, generating \$45 million in revenue. By March 1998, its monthly average caseload had already risen 13 percent over 1997 figures, to 1,500.

The growth of ADR demonstrates that polycentric law naturally arises in the gaps that open where state power fails. Private communities and the Internet provide other examples of this diffusion of freedom. ADR proves especially interesting, however, because it demonstrates the distinction that F. A. Hayek and Bruno Leoni drew between law and legislation. Law arises as a spontaneous order, an aggregate effect of courts' settling various individual disputes. “The law is something to be *discovered* more than *enacted*,” as Leoni put it. In contrast, “legislation is conceived as an assured means of introducing homogeneity where there was none and rules where there were none.”

The state's courts have less and less time to *find the law* for civil litigants because their dockets overflow with criminal prosecutions

enforcing legislation. That the Drug War generates most of those prosecutions merely illustrates the manifold hazards of unjust legislation. By effectively abandoning civil litigants, therefore, state courts have not only encouraged the rise of competing, polycentric legal processes; they have also vividly demonstrated the perils of confusing law with legislation.

Private Communities

Although private communities have existed in various forms for many years (since at least 1831, when Gramercy Park was formed in New York City), their growth has accelerated in the last few decades because of the rapid decline of political communities. The fear of crime and the spread of urban decay have encouraged Americans to seek security and convenience in gated communities, condominiums, and homeowners' associations. Although they vary in detail, at root all such associations rely on the private control and ownership of real property, whether held by individuals singly or in common. The growth of private communities has made polycentric law an everyday reality for millions of people.

By managing their neighborhoods through clear-cut property rights and contractual agreements, residents of private communities win a variety of emotional, psychological, social, and financial advantages, including enhanced property values, security, aesthetics, and “community spirit.” On a less esoteric level, those associations provide the basic services—such as garbage collection, water works, and road care—that residents of political communities have found are not consistently provided by state institutions.

Privatization alone is not sufficient to make any community a success. It does, however, create incentives that reward the development of successful communities. Those who own private communities, whether initial investors or later residents, directly benefit by prevailing in the competition for residents. Private communities thus tend to seek out and implement tools for making neighborhoods safe and pleasant. Politicians, who loosely run but do not own conventional communities, simply do not face the same incentives.

Does community privatization work? The numbers speak for themselves. In 1962 the United States had fewer than 500 homeowners' associations. The number has exploded since then. There were 10,000 in 1970, 55,000 in 1980, and 130,000 in 1990. By 1992 there were 150,000 residential associations housing some 28 million people. Experts expect that number to double within a decade. The number of residential associations in the United States has long exceeded the number of cities. Gated communities, which press the extremes of privatization, have become the most rapidly growing type of housing in the United States, with about 4 million residents at present.

Residents of private communities experience polycentric law, not as a theoretical abstraction, but as a working reality. Those people have deliberately removed themselves from the inefficient political machinations of municipal governments, seeking instead to live under regulations of their own choice and making. Faced with the futility of trying to exercise any real influence over the politicians and bureaucrats, who would run their lives, residents of private communities have rediscovered the pleasures—and undoubtedly the pains—of reaching consensus with their neighbors.

Private communities are thus reintroducing a growing number of people to the principles of self-governance. Those people have already rejected political control of their neighborhoods. They are rapidly acquiring a taste for home-cooked governance. Residents of private communities thus may be ready to embrace an expansion of polycentric law in the coming years.

The Internet

Media pundits often describe the Internet as a virtual “Wild West.” Thanks to a double dose of dumb luck, the label fits surprisingly well. The pundits mean to imply that the electronic frontier is, as everyone “knows” the western frontier was, a lawless place ruled solely by force and cunning. As Terry Anderson and P. J. Hill have shown, however, the private legal system that existed before the arrival of U.S. marshals made the Old West considerably less wild than, say, the modern District of Columbia. Similarly, a careful study of the Internet reveals that it, too,

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can boast of pervasive and effective polycentric legal processes.

For the most part, informal customary norms suffice to regulate Internet society. Principles of “netiquette,” enforced through praise and criticism, set the basic rules for newsgroups, listservs, chatrooms, and other virtual communities. In some cases, “netizens” of those communities establish more formal means of regulation, such as relying on a moderator to screen messages or adopting written rules. In the *Village Voice*, Julian Dibbell offers a fascinating account of how one of those virtual communities responded to anti-social behavior by, in essence, creating a civil government. Professor Robert Ellickson of Yale Law School points out that such examples demonstrate that on the Internet, as in the Old West and elsewhere, “people frequently resolve their disputes in cooperative fashion without paying attention to the [state] laws that apply to those disputes.”

Although the Internet began as an academic and recreational network, in recent years it has become an important new marketplace. With the advent of commerce have come new types of disputes—and new types of polycentric law. Consider the well-publicized problem of assigning rights to domain names, the Internet’s addresses. Companies holding trademarks, such as “Panavision,” have frequently sued parties holding rights to allegedly infringing domain names, such as “panavision.com.” While government bureaucrats endlessly deliberated about how to fix the quasi-public domain name registration system, entrepreneurs set up a private, for-profit alternative, the Real Name System. In addition to *technically* bypassing the traditional domain name registration process, the Real Name System *legally* bypasses state courts by relying on adjudication to solve conflicts over trademark rights.

The Internet has just begun to develop generic adjudication and ADR services to which, in contrast to the Real Name System, any mutually consenting parties can turn for help. These on-line experiments promise to open exciting new frontiers in polycentric law. A quick review of three such services, Virtual Magistrate, Internet Neutral, and Online Ombuds Office, illustrates this burgeoning trend.

Virtual Magistrate is an on-line arbitra-

tion and fact-finding system designed to settle disputes involving Internet users, parties who complain that on-line conduct has harmed them, or (to the extent that complaints implicate them) system operators. Its organizers, for the most part academics, have given careful thought to why Internet disputes call for special legal procedures. On the Internet, they explain,

People all over the world interact in real time and take actions that affect the rights, interests, and feelings of others. When conflicts arise over similar activities in the “real” world, regular courts are available to resolve resulting formal complaints. But *the court system is too slow, too expensive, and too inaccessible* to address all problems that arise on the Net. Also, *with people from many countries communicating on the Net, traditional nation-based legal remedies are especially difficult to apply* [emphasis added].

Virtual Magistrate has adopted procedures uniquely suited to Internet law. Filings and other communications normally take place solely via e-mail; neither the parties nor their virtual magistrate need ever meet face to face. Indeed, they need not even leave their computer terminals. Proceedings move at the accelerated pace of “Internet time,” with decisions issuing within 72 hours of the receipt of complaints. Far from merely interpreting and applying state law to disputes, virtual magistrates examine the standards of network etiquette and applicable contracts to determine the evolving shape of Internet law.

Another ADR project, Internet Neutral, demonstrates the diversity of the polycentric legal services that have already taken root on the Internet. In contrast to Virtual Magistrate, Internet Neutral offers only mediation and uses on-line chat rather than e-mail to conduct proceedings. It also, again in contrast to Virtual Magistrate, operates on a for-profit basis.

Yet another project, Online Ombuds Office, offers mediation via e-mail, at no charge, as part of a nonprofit experiment in developing Internet ADR programs. Its most interesting work has yet to come. Online Ombuds Office aims to develop a sophisticated interactive multimedia virtual envi-

ronment, called “LegalSpace,” to facilitate on-line ADR. If successful, LegalSpace will make polycentric legal services easy to use and instantly accessible for the millions (and counting) of netizens worldwide.

Internet users sorely need polycentric law. Notwithstanding its somewhat ethereal nature, the Internet sees quite real conflicts. Online Ombuds Office has observed a wide range of situations calling for mediation, including personal disputes between members of newsgroups or listservers, contests over domain names, disagreements between Internet service providers and their customers, and allegations of copyright infringement. Even that partial list shows that life on the Internet, like life off it, gives rise to disputes that demand legal resolution.

As the Internet community grows in population and diversity, it will need polycentric law all the more. At the close of 1995, about 9 million people used the Internet. A year later, the figure had grown to 28 million. Today, more than 100 million people use the Internet. By the year 2005, according one estimate, 1 billion people will do so. American netizens will soon find themselves in the minority. The international Internet community, like the community of itinerant traders that created the law merchant, flows too freely and quickly for state law. Only polycentric law can keep up with that most polycentric of networks, the Internet.

Conclusion

Polycentric law has a very bright future. The case studies of ADR, private communities, and the Internet reveal that all three provide excellent platforms for the growth and development of polycentric legal services. But those examples merely bring us up to date. Ultimately, the fate of polycentric law depends on what individuals choose to make it.

Bruno Leoni wrote, “Individuals make the law insofar as they make successful claims.” By that he meant that legal norms arise out of the sorts of claims that have a good probability of being satisfied in a given society. But what Leoni said of the law’s *content* holds equally true of the law’s *structure*: individuals make the law more polycentric insofar as they reject existing, often inadequate statist legal structures and successfully lay claim to newer, freer ones. ■