formulations

Summer 2001 A Publication of the Libertarian Nation Foundation Issue No. 29

The FNF Split

by Phil Jacobson

The Free Nation Foundation has been split into two separate organizations, as of 28 February 2001. One organization is the Libertarian Nation Foundation (LNF), which will publish *Formulations*. The other organization is called the Free Nation Foundation–Critical Institutions (FNF–CI). This split is the final product of a long period of controversy within the Board of Directors of the former Free Nation Foundation, which followed Richard Hammer's resignation as FNF President. As FNF members and subscribers to *Formulations*, few individuals have been aware of the full scope of the controversy. I will attempt, here, to provide some explanation of what has happened, why, and what might be expected in the future. These observations are my own. Each of the Directors of the former FNF has a unique perspective on these events. As I understand things, the views of some other former FNF Directors may also be presented here in *Formulations*. Rich Hammer declined a request to contribute his view to *Formulations*. He did, however, explain the FNF split from his point of view in a letter dated 9 March 2001, mailed to members and friends of the Free Nation Foundation. For the best overview, I recommend that those interested in these issues read all of the accounts or, if possible, communicate directly with former FNF Directors themselves.

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A House Divided: The View from Auburn

by Roderick T. Long

As Phil Jacobson explains elsewhere in this issue (see his article "The FNF Split" for more details), a conflict of visions within the Board of Directors of the Free Nation Foundation has resulted in a mutually agreeable split into two separate organizations, the Libertarian Nation Foundation and the Free Nation Foundation-Critical Institutions. I would like to offer my own perspective on the split.

The extent of the disagreement that had been growing among the Directors initially came as a surprise to me—partly because the viewpoints of the various sides were less different from my own than they were from each other, and partly because my professional relocation from the University of North Carolina to Auburn University in Alabama in 1998 has kept me 500 miles away from the day-to-day interaction among FNF Directors and thus to some extent "out of the loop."

Crucial to understanding the history of FNF is understanding the intentions and motivations of Rich Hammer, its founder and first president. I obviously cannot speak for Rich, but I shall describe his viewpoint to the best of my understanding, as I heard him articulate it to me and others over the past several years. Please bear in mind, however, that I am simply offering my own impressions, subject to correction.

Rich founded FNF with a certain vision in mind. His hope was to develop an organization that would emulate, say, the Cato Institute in terms of professionalism, quality, and respectability—not however with the goal of reforming the American polity, but rather to spearhead a movement that would provide credibility and scholarly credentials to, and ultimately help attract investment in, the project of creating a new libertarian nation elsewhere (most likely by leasing territory from a cash-hungry third-world nation). Seeing this "FNF Workplan" as a long-term goal, Rich was happy to bring in collaborators whose vision differed somewhat from his vision, since in the absence of a Cato-style endowment FNF would have to depend on the contributions of volunteers, and the opportunity to advance their visions via FNF was the only payment Rich could offer them in exchange for their help in advancing his own vision.

As the years passed, however, Rich became increasingly discouraged about the extent to which FNF continued to fall short of his vision, both in style and in goals; and in the end, Rich came to feel that the difference between his own agenda and that of others on the Board was too great to justify ongoing collaboration.

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Inside

formulations

a publication of the
Libertarian Nation Foundation
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Statement of Purpose

The purpose of the Libertarian Nation Foundation is to advance the day when coercive institutions of government can be replaced by voluntary institutions of civil mutual consent, by developing clear and believable descriptions of those voluntary institutions, and by building a community of people who share confidence in these descriptions.

Check out our excellent archive of *Formulations* at:

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Subscription or Membership

Subscriptions to *Formulations,* may be purchased for $15 for four issues. Membership in the Libertarian Nation Foundation may be purchased for $30 per year. (Members receive: a subscription to *Formulations*, an invitation to attend regular meetings of the Board of Directors, copies of the Annual Report and Bylaws, and more inclusion in the process.)

Send orders to the postal address above. Checks should be made payable to the Libertarian Nation Foundation. Additional contributions are welcome.

Information for Authors

We seek columns, articles, and art within the range of our work plan. We also welcome letters to the editor which contribute to our debate and process of self-education.

Our work plan is to work within the community of people who already think of themselves as libertarian, to develop clear and believable descriptions of the critical institutions (such as those that provide security, both domestic and national) with which we libertarians would propose to replace the coercive institutions of government.

As a first priority we seek formulations on the nature of these institutions. These formulations could well be historical accounts of institutions that served in earlier societies, or accounts of present institutions now serving in other societies.

As a second priority we seek material of general interest to libertarians, subject to this caveat: We are not complaining, we are building. We do not seek criticism of existing political institutions or persons unless the author uses that criticism to enlighten formulation of an improved institution.

Submissions are welcome at any time. We no longer have fixed deadlines. Instead we will publish the next issue of *Formulations* when we have at least 16 pages of suitable material. All submissions are subject to editing.

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Land Policy and the Open Community: The Anarchist Case for Land-Leasing versus Subdivision

by Spencer H. MacCallum

When planning a new community, questions of architecture, platting of streets and parks and other physical considerations immediately come to mind. It is rare that anyone consciously considers the system of land tenure. Seldom is it recognized that there is a choice other than subdivision, and least of all that the choice might make a difference for those who share the kinds of concerns that are most important to modern anarchists. Those concerns are individual autonomy, entrepreneurship and, lastly, community, which enables the flowering of the human spirit in cultural pursuits of every kind.

A necessary first step when forming a community of any kind is to parcel a tract of land into exclusive occupancies while retaining for common use areas such as parks and access ways. The parceling can be accomplished in either of two ways. One is to subdivide the land ownership into separate fees. The other is to let out parcels as leaseholds, keeping the land title intact. These two logical possibilities do not have equal merit.

At first blush, subdivision might seem to be the anarchist choice, each individual owning his own piece of turf and building thereon his castle to enjoy that individual autonomy that is the necessary precondition for community. This seems so self-evident that the alternative is seldom explored. This paper will help fill that gap by briefly reviewing the modern anarchist argument for land leasing. Bear in mind that land leasing means only what the phrase implies, namely, leasing the land, or location, itself and not necessarily any of the improvements on it such as buildings. These latter can be readily owned, bought and sold independently of the land under them.

The Argument from Individual Autonomy

The first of the several anarchist arguments for land leasing over subdivision is the argument from *individual autonomy*. Because of the fractured land interest, subdivision gravitates toward government—toward the formation of arrangements whereby each person tries to coerce the behavior and lifestyle of his neighbors. What is the logic supporting this? Imagine a couple who have bought their new home in a subdivision. It is perhaps the largest single investment they will make in their lifetime, and they are understandably concerned that it retain its value. Note, however, that this is not a productive investment but a speculative one. It is a consumer expenditure—a residence. There is no capital employed on the site, no business to generate value apart from its site value. The value, therefore, aside from the salvage value of the bricks and mortar, is locational, rising and falling with the fortunes of the neighborhood. It is speculative because it depends upon factors beyond the control of the couple. If they want to make their investment less speculative, their recourse is to try to control some of those locational, or neighborhood, factors influencing the value and liquidity of their individual site. In plain words, that means controlling who their neighbors are and how their neighbors live. This is a classic externalities argument for the origin of states.

Communities in the United States from colonial times onward have been subdivisions. Invariably as they have grown in size, they have organized under a municipal government. Such governments at first were controlled by the land owners through a property qualification for voting, but by the end of the nineteenth century virtually all had become popularized, which is to say, democratic. Forming a perfect parallel in the last half century, planned residential subdivisions have organized under a home owner association (HOA) which, though now controlled by the land owners who alone can vote, are virtually certain to follow the same historic pattern.

Unlike municipal and country governments, HOAs enjoy immunity from the constitutional restraints that apply to other levels of government. This very immunity threatens to undo the property qualification on voting, however, when the thus far disenfranchised renters and family members (normally more than half of the residents) sue for federal protection of the freedoms of assembly, speech, religion and voting, not to mention guarantee of due process, to which they may suppose themselves to be entitled as United States citizens.

Meanwhile these neighborhood governments, unrestrained by any constitutional limitations, levy taxes and legislate rules, many of which are extremely invasive of traditional freedoms to enjoy one's castle. Often these rules govern such minutiae as the color one can paint one's front door and the kind of window curtains one may use. "Double Diamond," a subdivision in Reno, Nevada currently requires that garage doors be up not more than three hours a day. Compliance is enforced by fines and ultimately by liens on homes.

The very structure of subdivision living under an HOA encourages watching for and reporting infractions by neighbors. Tipsters are rewarded by warm feelings of self-righteousness and of being a good citizen while never having to accept responsibility for taking a complaint personally to his or her neighbor. The association launders every complaint as a bank might launder money, and enforcement follows as an impersonal action of "the community," anonymous and divorced from whomever reported the infraction. Such pitting of neighbor against neighbor has given rise to so much litigiousness that the California legislature in 1992 established tort immunity for association board members, giving them protections like those enjoyed by municipal officials (44 per cent of association directors were threatened or harassed with lawsuits during one year, according to a study).

Why would anyone choose to live under such conditions? It is not as though people had complete freedom of choice. The subdivision pattern is fixed in American life by federal subsidy and a tax law which discriminates against renting. Most new housing construction takes place in subdivisions, and all new subdivisions must have mandatory-membership HOAs. That is because only housing in subdivisions under an HOA can qualify for FHA and VA insured mortgages (the assumption being that HOAs will keep property values from declining), and no builder can compete in the market whose product does not qualify for such federal assis-

tance. It would be a mistake, therefore, to assume that planned subdivisions accurately reflect consumer choice. When anthropologist Erna Gunther once asked a woman weaver of one of the Northwest tribes why she used harsh aniline colors rather than softer ones more nearly resembling natural plant dyes, the woman replied that these were the only colors sold at the trading post. Later Dr. Gunther asked the trader why he didn't offer a better selection of colors. "Because," he answered, "these are what the women buy."

It is natural for subdivisions to drive toward government formation. We can't prevent it, and obviously a bigger government to oversee the matter is no solution. But if we were to have a private, competitive enterprise a part of whose business was to see that governments did not form in a community and that, more to the point, no one had reason to want them, we would be able to live in relative freedom, secure in the enjoyment of our person and property. But I'm getting ahead; I'm alluding to the community entrepreneur at the various levels in a land-lease community.

In sum, the argument from individual autonomy is that externality pressures inherent in fractionated land ownership drive toward political organization, the most recent example being HOAs. The downside to HOAs legislating rules or laying them aside, changing the restrictive covenants, and levying fines and taxes, all by vote of the neighborhood, is that it gives residents no control or ability to predict, from day to day or from one year to the next, how they will be allowed to enjoy their property. Individual autonomy, which is nothing if not control of one's person and property, is thus lost. In a land-lease community, by contrast, all the rules that will ever apply are stipulated not by faceless others through periodic votes of the community or an elected board, but only once—and then only by the private parties who entered into the lease. For the term of the lease, however short or long, the contracting parties know where they stand. (It is not uncommon in English common law countries for leases to be written for 999 years.) The terms are negotiated and spelled out, once and for all, unlike the shifting sands of an HOA where everything is subject to the politics of a voting constituency.

It should go without saying that because lease terms are fixed and dependable unless amended by mutual agreement between lessor and lessee, lease writing requires careful thought on both sides. This is where lawyers will have a legitimate role in a free society. It is a field that Alvin Lowi calls "contractual engineering." Some novel exercises in contractual engineering are being considered even now in connection with a proposed land lease for a free society in Somalia.

The MGM Grand Hotel in Las Vegas, which promotes itself as a "city within a city" and comprises an elaborate mix of land uses, is substantially larger in population on an average day than the city of Boston at the time the United States gained its independence.

It must be noted that, although precluded by government policy from any widespread application in residential housing, land-leasing is not an unknown quantity but has a robust business record in commercial real estate. The twentieth century proved its practicality and market acceptance in that field. From the mid-nineteenth century onward, a rising trend toward renting or leasing multiple sites with a concentrated entrepreneurial interest in the "commons" was evidenced in a proliferation of multiple tenant income properties affording specialized micro-environments of every description: hotels, apartment buildings, office buildings ("skyscrapers"), luxury liners, commercial airports, shopping centers, RV/camp grounds, mobile home parks, marinas, science parks, professional parks, medical clinics and theme parks, as well as integrations and combinations of these and others to form properties more complex and, over all, less specialized. The MGM Grand Hotel in Las Vegas, which promotes itself as a "city within a city" and comprises an elaborate mix of land uses, is substantially larger in population on an average day than the city of Boston at the time the United States gained its independence. The multiple tenant income property has proved its viability, competing hands down with subdivision in commercial real estate. No contest . Given equal treatment under the law, it might be expected to do the same with respect to residential housing, providing consumers attractive alternative housing choices in a field now dominated by the planned subdivision and obligatory HOA.

The Argument from Entrepreneurial Opportunity

A second line of argument for favoring a leasehold policy is the *entrepreneurial opportunity* it opens up to profit from the production and marketing of community services. The entire public service field now becomes an opportunity for private enterprise. The speculative profits realizable from subdividing land—buying at wholesale and then parceling out at retail when land uses have grown up sufficiently to give the sites added locational value—are nothing compared to the long-term opportunities for return on investment from operating an entire community as a complex multiple tenant income property. The principle is the same as that of a hotel out of doors and on an enlarged scale. The business rationale of such a wholly nonpolitical, entrepreneurial enterprise is discussed in more detail in a recent paper by the author under the title, "The Entrepreneurial Community in the Light of Advancing Business Practice and Technology" (available from the author).

The Argument from Quality of Community Life

A third line of argument is the *quality of community life* that is only possible where a private company is in the sole business, competitively for a profit, of promoting the success of the community *qua community*—facilitating ways that it might become an attractive place to live, work, visit or raise a family. Such a company, representing the organized land interest of the community, is impartially positioned to afford authentic leadership (not rulership). One study of this subject has been made in shopping centers, considered in their internal organization as a community of landlord and merchant tenants. Mall merchants are nothing if not competitive, yet these merchant communities are utterly non-litigious. Members settle their differences according to the custom of the particular mall. In the course of fieldwork undertaken in 35 centers and twelve mobile home parks many years ago, in which I collected accounts of dispute situations and analyzed how they were handled (*Human Organization* 30:1, Spring 1971), I never heard of anyone "going off the mall" to litigate in a political court.

In a land-lease community, our couple still might make a major investment in their home even though leasing the land. But much of the speculative element will have been removed, since it will be the business of the community entrepreneur to look to the land values. The couple will be free to enjoy their neighborhood as a place to comfortably live rather than as an investment to be concerned about.

Because a land-lease community has someone—the community entrepreneur—whose business it is to facilitate "community" and thereby build land value as measured by the capitalized revenue from the land leases, it is here that we begin to find out what real community can be—where individual privacy is respected and opportunities for communication and exchange facilitated. This is the intangible value and potential of the land-lease community. To put it in the terms of public-choice economics, given competition and a well considered lease, incentives can be structured for mutuality into the indefinite future. It is win-win.

Somalia: A Special Application

A fourth line of argument in favor of land-lease can be made in an area like Somalia, where leasing would require no substantive change in customary tribal law. This question has arisen in connection with recent proposals to develop freeports on tribal lands in northern Somalia. One of the major tribes, a traditionally stateless society, has been considering how to make its statelessness an asset by attracting world-class professional and business talent to form a free enclave within its territory. If successful, this latter-day Hong Kong might then become their stepping stone to full participation in the modern world without becoming subject to any government. To do this, they would need to lease or sell a land area.

Because ownership of land in Somalia is ultimately defined by kinship status, land theoretically cannot be alienated permanently from the kin group without the unanimous consent of every member. Leasing, however, is quite acceptable provided the kin group's eventual right of reversion is not lost sight of. (If the end of a line died intestate, for example, the land would have some place to revert.) This explains the practice, surviving in English law with respect to leases of hundreds of years duration, or in parts of Africa with respect even to perpetual leases, of a "peppercorn" rent such as a single rose being paid every year as a reminder.

Especially since the proposed freeport would have a predominantly European population at the outset, we should not ignore the possibility, however remote, that a sale of land could be attacked in the future. Activists, if it served their purpose, could represent it as an unlawful and unconscionable alienation of the tribal patrimony. If land values had increased dramatically, they could appeal to envy, painting it as a European "land grab."

Under a land-lease, however, the tribal people would be able to identify with the freeport land and could feel pride in its progressiveness. They wouldn't be strangers in the freeport but would be tied into the contractual fabric of the community. Even if it were mainly ceremonial, they would nevertheless enjoy a dignified status as the ultimate landlords. This would afford PR for the freeport to answer any would-be political detractors worldwide who might try to impugn the integrity of the developers of the freeport as exploitive of tribal peoples. Such continued identification of the tribe with the freeport could also help to ensure their support and possibly even defense at a critical time.

A further advantage of a lease of land rather than a sale is the possibility of building into the lease agreement with the tribe certain safeguards against politicization ever happening within the freeport. Words to the following general effect might be included as a condition of the lease from the tribe:

> No person holding land in Newland Freeport shall be required by his immediate landlord to pay more rent than was consented to in his lease

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> Some prospective investors in the proposed Somali freeports... ...expressed misgivings about leasing rather than holding fee title. They had only to look to Singapore and Hong Kong, however, to see that land-leasing is not by any stretch of the imagination incompatible with economic development and prosperity.

Respect from One's Neighbors

by Phil Jacobson

1—Legitimizing a Libertarian Regime

I have written before about the notion that all "rights" can be viewed as a form of property, and that all property is a matter of permissions given from one person or persons to another. As libertarians we can use this terminology to describe the rules of a possible libertarian society. But having done that, serious problems remain. We must get people to adopt these rules. And these people must become associated with one another in a community or set of communities, where such rules are respected. Further, at least some respect must be accorded to the community and its rules by neighboring peoples. These are the problems of legitimacy.

I will present here some thoughts about the factors which would affect the legitimacy of a libertarian regime. But despite the many influential factors, I think that the most important thing we can do to prepare a future libertarian regime to be accepted as legitimate, is to enact as much of it as possible as soon as possible. The most important contributor to the legitimacy of a regime is that regime's grounding in a tradition.

No two persons agree completely. Yet people holding widely differing opinions can be neighbors. The same is true of communities. A new libertarian community will need to get along with its neighbors at some minimum level to survive and at some higher level to thrive. At the very least, a libertarian community needs for the neighbors to refrain from destroying or driving out the libertarians. And within the libertarian community, there is a need for the choices of each libertarian individual to be granted legitimacy by the other libertarians. Hopefully, despite their differences, the neighbors would grant legitimacy to the libertarian regime. Hopefully, despite their differences, the libertarians would grant legitimacy to each other.

It is possible to divide a given community into segments, into separate institutions, and to appraise the problem of legitimacy with regard to them separately. However, in this essay I wish to address the more general problem of establishing and maintaining legitimacy for the whole libertarian community. This is certainly a community-to-community issue. But because the boundaries between one community and another are not always sharp, it is inevitably a community-to-individual issue, and even an individual-to-individual issue. The libertarian community should have as much legitimacy as possible in the eyes of its neighbors, both in terms of philosophy and some notion of "character". But it must also have legitimacy in the eyes of its own citizens. Without such legitimacy, all its component institutions are threatened.

2—Respect for Libertarian Philosophy

2.1 Levels of Respect

Before legitimacy comes respect. One person judges one another on first contact, to some degree. This begins a process, however subtle, wherein the question, "How much do I respect this person?" is answered. Respect for another's philosophy is not always associated with agreement, nor even with the philosophy itself. Respect may merely be a matter of acceptance, possibly admiration, of a package of many personal qualities that will to some extent be associated with personal philosophy.

Respect begins at a very basic level. The mere physical existence of a neighbor engenders a form of respect. "That libertarian neighbor of mine has enough common sense, luck or friends to stay alive—and even thrive—at the level I see," might be all that the libertarian's neighbors think to themselves. And this level of respect can be accorded even to those one does not like.

Yet the neighbors may not yet grant legitimacy to the libertarians. Legitimacy, it seems to me, requires a recognition that another has the right to exist—that the other ought to be allowed to exist. A libertarian community's neighbors might consent to allow the libertarian community to exist. This would grant the libertarians a minimum degree of legitimacy in that the neighbor, as a practical matter, willfully refrains from active efforts to subvert the libertarian community. But the neighbors might still prefer that the libertarian community collapse from its own weight.

Hopefully, the libertarian community could foster an active, even if small, desire on the part of its neighbors to see it survive. It might not be reasonable for the libertarians to expect their neighbors to expend much effort on their, the libertarians', behalf. But even a mildly beneficent attitude will confirm the feeling of legitimacy and provide a basis for increasingly positive levels of respect.

Given some positive respect and an opportunity to profit, the neighbor may be willing to trade with some or all of the libertarians. Even if the neighbor has some non-libertarian choices in trading partners, the libertarians who have achieved this level of respect might begin actively trading simply by offering competitive prices. Economy of transportation alone should allow the libertarians to find some service or product which they can trade. In doing so, a network would be formed with the neighbors. In time this network may develop into a larger society, within which the libertarians share with non-libertarian neighbors.

In addition to economic benefits, neighbors could begin to see the military advantages to having libertarians nearby. As the neighbors begin to become acquainted with the libertarians, it would seem likely that the neighbors would begin to appreciate the simple fact that the libertarians never initiate force against them, and are philosophically opposed to doing so. No matter the intentions of the neighbors, a new dimension of security will ensue. For many neighbors, this will translate into a form of respect accorded by the libertarians, and the respect will be reciprocated.

Other admirable traits may be observed of the libertarians by their neighbors. The list is endless, and will vary considerably from neighbor to neighbor, and from libertarian to libertarian. Not all neighbors will be favorably impressed by the libertarians, of course. But wherever the libertarians make a good impression, higher respect and/or legitimacy will tend to follow.

At some point, some individuals in neighboring communities may themselves become libertarians. Similarly, some individual neighbors will have been libertarians prior to contact with the libertarian community, and will make themselves known to the libertarian community without joining it. Either way, the existence of individual libertarian members of non-libertarian neighboring communities will help the libertarian community gain respect within the non-libertarian community. Like it or not, these "foreign" libertarians will be mini-ambassadors, even if they never overtly identify themselves as "libertarians". In all likelihood, the neighboring community, influenced by both these internal libertarians and by the libertarian neighbor community, will develop some sympathy for the libertarian philosophy. Even if the neighbor community does not fully adopt a libertarian philosophy, it may become more libertarian than it was originally.

Conceivably, a neighboring community might start non-libertarian, only to gradually adopt the libertarian philosophy. While these neighbors may, for various reasons, feel a distinct identity such that they do not want to formally merge with the original libertarian community, the neighbor community would be likely to cooperate very closely with the original libertarian community along a wide spectrum of issues.

2.2 Respect from Neighboring Communities

2.2.1 Collective Opinion

Many libertarians, especially those in the USA, tend to be "individualists", who scoff at any notion of "collective opinion". Yet there is a real political fact at work when a mob or other collective human action occurs. Often a community will harbor sentiments that are not discussed very much in the open. Other times open discussion will be distorted by traditional means of expression or lip service given to traditional ideas. These sentiments come into play with various forms of collective behavior. The buying habits of consumers, the progression of rumors through a community, the willingness of persons to support a social movement—each of these can be critically influenced by collective sentiments which are distinct from ideas discussed in "polite" or "proper" conversation. Such collective sentiments can be the basis for opinions about a neighboring community—and may then become dominant forces, setting the range of "policy" within which community leaders can operate.

That said, it remains true that a community's leaders will have their own ideas, which may or may not be "orthodox" according to prevailing community sentiments. Even so, the leaders will be pressured by collective opinion with regard to issues like the legitimacy of a libertarian neighbor community. So the libertarians will be well advised to take collective sentiment into account, regardless of what they may hear from various individuals. It is very important that the prevailing collective sentiment towards the libertarians be positive. If this can be achieved, the libertarian community may be granted de facto legitimacy regardless of official pro-

nouncements or individuals statements to the contrary.

Different types of neighbors, discussed below, will have different basic collective sentiments towards "neighbors" generally. The libertarian community's "foreign policy" (possibly an informal one) can foster legitimacy for the libertarian community if it adapts to the qualities of these neighbor communities.

Generally, the presence of libertarians on a neighbor's border will be less of a burden than any other randomly selected group the neighbor might need to encounter. Therefore, any community which finds itself with a libertarian neighboring community, will probably develop some kind of respect for the libertarians. Only two exceptions to this seem possible. In one of these, the neighbors are pirates. In the other the neighbors are ideological zealots who feel compelled to convert others by force.

"foreign policy" of a free nation is likely to be a combination of setting an example and of allowing foreigners to try living a free lifestyle as individuals. In this way legitimacy with opportunist foreign elites is maintained, while a slow corruption of foreign statist ideology proceeds.

2.2.2 Pirates and Ideologues

A pirate neighbor presents no special problem for libertarians, as opposed to the pirate's relations with other communities. If the libertarian community is seen as weak, there is a military problem, which is independent of the concerns of this essay. Indeed, the libertarians may be seen as being willing to let the pirates mind their own business, so long as the libertarians themselves are not attacked. Possibly, the libertarians would develop an alliance with a third community against the pirates as part of trade relations with the third community. This might involve extradition arrangements or military cooperation in the event that a pirate tried to attack members of the third community, even though that pirate may not have attacked the libertarians. Again, this is really a military question. While it would be well within the libertarian philosophy to help someone from such a third community retaliate against initiated force launched by the pirates, the libertarians would have no philosophical requirement to do so. And if the resulting entanglement put the libertarians at a serious military disadvantage, such an alliance with a third community might simply be unwise on military grounds.

As with the pirates, should the libertarians have neighbors who believe in forcing their ideals on others, the libertarians will have no special problems that non-libertarian communities would not also have. The fundamental military concerns would be similar to those mentioned above for the pirates. The fact that libertarianism is itself an ideology might cause special concern on the part of the ideological neighbors. But this is a two-edged sword, since the strength of belief of the libertarians could be a source of respect. The neighbors might hesitate to attack another group of "true believers" knowing the cohesiveness that ideological solidarity can bring. And since the libertarians will not attack first, the ideological neighbors will have some tendency to want to conquer others before addressing the libertarians with force. Again, the ability of the libertarians to militarily defend themselves is the real question.

2.2.3 "Mainstream" Regimes

It is important to note that most statist regimes are run by opportunists who masquerade as mild ideologues. Some statist regimes derive directly from warlord estates that have adopted an ideological veneer to fit into a world that values high-sounding rhetoric. Many had begun as ideological communities, only to run out of steam in their attempts to convert everyone by force. In either case, an elite group of opportunists will tend to pick up the reigns of power, specializing in giving ideological rationales for essentially pirate behavior. And while ideological constraints may limit the range of their pirate behavior, the actions of such regimes will be far more opportunist than either "cutthroat" or "righteous" in practice.

The best way for a libertarian community to win the respect of the opportunists who control most statist regimes is by building trade. In most cases it will be possible to develop a set of goods and services which neighboring opportunist elites will be willing to buy at reasonable prices–even though ordinary citizens in these regimes may not be given equal access to trading opportunities. It should be possible to find some combination of goods and/or services upon which to build a trading relationship. Indeed, this will be the tendency of entrepreneurs in the libertarian community.

As long as the libertarian community does not become too eager to convert all its neighbors to libertarianism, the libertarians will gain a minimum necessary level of respect from the opportunists who rule any neighboring statist communities. This is not to say that the libertarian community can never function as a haven for political exiles from neighboring communities. It may be militarily unwise for the libertarians to give foreign rebels a lot of overt assistance. But the libertarians will be unlikely to be of one voice regarding this issue. Nor are they likely to give as much voluntary assistance to any foreigners as most comparably sized communities tend to spend on state-sponsored foreign interventions of various kinds. The best, and most likely the dominant, "foreign policy" of a free nation is likely to be a combination of setting an example and of allowing foreigners to try living a free lifestyle as individuals. In this way legitimacy with opportunist foreign elites is maintained, while a slow corruption of foreign statist ideology proceeds.

2.3 Respect from Neighboring Individuals

No matter the official "foreign policy" of a neighboring community, a significant amount of respect can be granted by individual neighbors, often in contrast to the official position of any groups with which a given neighbor is associated. Indeed, since any community policy is ultimately made by agreements between individuals, the opinions of enough individuals, especially influential ones, will ultimately become community policy.

The process whereby the libertarian community acquires the respect of its individual neighbors is much the same as the process for gaining respect from entire neighboring communities. First non-aggression by the libertarians is a convenience to the neighbor. Then opportunities for trade create mutual self-interest, etc. The main difference is that the individual neighbors may be at odds with their home communities. So an individual neighbor who begins to give the libertarians increasing levels of respect may need to do so covertly. The libertarian community may find its greatest support from individuals on the "outside"—from those who live fairly autonomous lives.

3—Respecting Libertarian Rules—Individual Morality

To some extent, the libertarian philosophy is self-evident to many people. Most however learn libertarian ideas, in addition to their own intuitive insights, from contact with other people. Certainly the vast majority of individuals have made a conscious commitment to the "non-aggression principle" only after having heard someone else quote it. Some individuals learned this in childhood, having been raised by overtly self-described libertarian parents. But as of this writing, most are converts.

Even when raised libertarian by the same libertarian parents, no two libertarian children are likely to understand the philosophy in the exact same way. Consequentially, the particular interpretation of libertarianism which each individual in a libertarian community might have, will be unique. Regarding their sense of morality, such individuals are each a culture of one, in alliance with other cultures. This is probably true of most belief systems to a very large extent. But since libertarianism stresses voluntary choices by individuals, differences between individual beliefs are emphasized and made more conscious. So each libertarian individual will tend to be aware of ideological differences with other libertarians and be making appraisals regarding their legitimacy, whereas adherents of other belief systems might try to ignore or even deny such differences.

So while it will be hard enough to start a "free nation" with exclusively libertarian membership, it seems unlikely that there will be a uniform interpretation of the philosophy amongst the members of this community. Thus the first limitation on the legitimacy of the libertarian community will come from the distinctions between individuals regarding the interpretation of the libertarian philosophy itself. Libertarians will need to develop a keen sense of tolerance regarding the varieties of interpretation of the philosophy found in their own community. The whole range of "respect" accorded to a neighbor mentioned above, applies equally to the relations between individuals within the libertarian community itself.

Fortunately, the libertarian philosophy automatically provides for a minimum degree of legitimacy. That is, anyone who refrains from initiating force should be accorded a right to exist by any libertarian. And until the libertarians themselves become a major force in the broader human ecology in which their community is located, each libertarian will place special value on merely having other libertarians nearby, regardless of ideological technicalities. In this context the temptation to ignore differences will be great—but it will be artificial.

Later, if libertarianism becomes fairly common (thus a less valuable local resource), individuals should be expected to accord somewhat less respect to variations on the libertarian theme which they find "strange". And at that point each individual will begin to consider fellow libertarians with different beliefs more critically. This would be natural. But it will be important to establish traditions which legitimize the very notion of lack of respect within a basic libertarian framework—especially if it has taken a while to build up a large population of libertarians.

It would be best if such diversity were explored and celebrated overtly, yet politely, while the libertarian community is new. Perhaps "safe" arenas where diverse interpretations of libertarian belief could be presented, discussed, or even debated should be part of many community holidays. School children should be given regular exposure to this diversity as part of "civics" education, etc. Yet in each of these situations, the right of the individual to quietly, even covertly disagree should also be respected. Even those traditions which encourage the health of the libertarian community must be voluntary.

4—Respecting Libertarian Rules—Morality within Communities

4.1 Libertarianism within a Libertarian Community

Given that a "nation's" worth of individuals have come together to form a single libertarian community, it will be likely that a specific citizen will find more in common, for various reasons, with some of their libertarian neighbors than with others. A given citizen might find it useful to network with some neighbors more than with others, to the point where they formed a caucus, or sub-culture within the broader libertarian community.

Quite conceivably a caucus or subculture might reach the point where it chose to secede from the original free nation to form another free nation. In such a case, the new nation might find that members of the old nation gave them less respect than they had been accorded before the split. However, the respect which members of the new nation accorded to each other might be much greater than the average respect accorded by these citizens to random fellow citizens before the split. Relations between libertarian sub-cultures will be somewhat "international" in character. This would be true whether or not a given libertarian subculture within a specific libertarian community chose to formally secede and form a new, separate, libertarian community.

True feuds should be expected between libertarian sub-cultures, especially where the overall libertarian community is strong and stable. Most visions of a new libertarian nation fail to recognize this. But a new libertarian "nation"

should be prepared to accept a wide spectrum of mutual legitimacy accorded between its sub-cultural components. Towards this end, institutions of conflict resolution must, from the beginning, be prepared to deal with relatively low levels of legitimacy accorded between genuine libertarians.

This is probably important at all points in the history of the new nation. As a new nation is merely being conceived, the planners should develop traditions of honest disagreement, designed to openly test the mutual compatibility of would-be members of the new community. As the process of working together exposes these initial adherents of the free nation to each others' quirks, conflict resolution institutions should encourage open discussion of the degree to which each point of view is granted respect by the others. Early conflicts should be explicitly addressed and resolved by formal or informal traditions for diplomacy or arbitration.

These traditions should be exercised as frequently as new problems of mutual respect are found. It is important to do so for several reasons. First, the problems themselves are dealt with. Also, a tradition of honest disagreement is established which, hopefully, includes social institutions for expressing and discussing these disagreements. Most importantly, the institutions of dispute resolution, heretofore a purely theoretical construct, will be tested, perfected, and habituated by the time a real nation is formed. There will probably be precious little time to develop real conflict resolution once the nation is under way. The legitimacy of the conflict resolution institutions will be critical, both to the survival of the nation itself, and to the legitimacy of other institutions.

4.2 "Resident Aliens" within a Libertarian Community

Conceivably, it would be possible to establish a relatively isolated libertarian community, which made little contact with non-libertarians. But in an increasingly "global" economy, we can expect that most if not all libertarian communities would have extensive contacts with non-libertarian neighbors. Further, we could expect that this contact would to some extent require non-libertarian persons to live, for varying periods of time, within the libertarian community itself. These "resident aliens" would need to be integrated with the libertarians at least to the extent that minimal respect was accorded between the aliens and their libertarian hosts. The problems involved in maintaining this mutual respect increase as libertarians allow larger and larger numbers of aliens to live amongst them.

Should the libertarian community be geographically dispersed (not a single block of contiguous territory), or perhaps even a completely non-geographic "nation", the "alien" problems are compounded. We may think of this concern as a spectrum. The more highly dispersed the libertarians are, the more their "nation" is like an ethnic group, or professional association, or church denomination, not really in complete command of a separate territory. At the furthest extreme, the "nation" is virtual, not really based on land at all. At the other extreme, the libertarians allow no resident aliens at all within some "home" territory. While one can imagine a fully dispersed "virtual" libertarian nation, it is difficult to imagine a territory where no non-libertarians were allowed—at least not one of any significant size. This level of purity would require a major commitment on the part of all the libertarians to exclude "foreigners" completely, even as personal guests or customers and does not seem feasible in the near future. So a libertarian community is likely to have a significant resident-alien population.

It would seem likely that the libertarians would only allow aliens to live amongst them if those aliens seemed likely to adhere to—would respect at least behaviorally—libertarian standards of conduct. But how might such "likelihood" be established? Some "aliens" might in fact be libertarians who simply do not establish citizenship within the libertarian community in which they reside. Other aliens might in fact have little sympathy for libertarian ideals, though they might respect the economic opportunities a libertarian community might offer. In the former case, a set of prior libertarian associations might serve as a "character reference" for the resident alien. But where an alien seeks residency merely for profit, loyalty to libertarian ideals may be quite shallow. Indeed such an alien might try to gain full citizenship, yet still harbor significant disrespect for libertarian ideals. But it is also true that a "resident alien" may value foreign citizenship while becoming a de facto member of the libertarian community. Such a person's loyalty to the libertarians might exceed the loyalty still given to an official "homeland". The line between "citizen" and "alien" is more about sentiments than credentials.

I see two factors which should be of concern to the libertarians who wish their community to remain libertarian in character. First, there should be some clear sense of identity for the libertarian community, which "foreigners" might respect but would not join. This can be a de facto "citizenship", not necessarily an official set of papers, and might be more a function of informal association than any formal membership. But the "insiders" should be able to clearly identify their fellows. In some ways this would be easier for a virtual community

(Continued on page 31)

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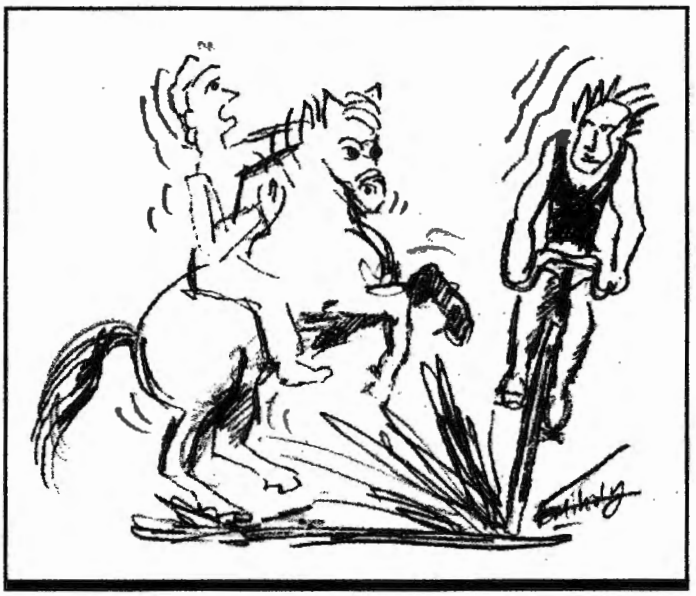

Theories of Highway Safety

by Walter Block

The highway safety record in the United States is unfortunate, where some 50,000 people lose their lives every year and some 2,000,000 more are involved in serious accidents. This phenomenon has evoked a response from the social science community: try to find the causes and hence the cures. The difficulty, however, is that all such attempts have been marred by a major flaw: the belief that whatever else is the cause of the problem, one thing is not responsible—the current institutional arrangements, whereby road and street safety is the responsibility of the public sector. This view is challenged, and an alternative scenario of private road ownership is presented. Based on this model, several attempted explanations of, and implicit cures for, highway fatalities and accidents are discussed. Specifically, an analysis is undertaken of the claim that a major portion of the responsibility can be leveled at the manufacturers of road vehicles. One fallacy committed by this argument includes ignoring the fact that the private highway inspection industry has been in effect nationalized. The criticisms by the Naderites of the NHTSA are considered, and the policy recommendations based on this analysis are rejected.

Current interest in deregulation and privatization is being manifested in the social sciences. So far, this interest has pertained to airline deregulation and to the replacement of municipal sanitation services with private alternatives.

A more ambitious undertaking in this direction involves the substitution of private or marketplace-oriented road and highway ownership and management for the current institutional arrangements under which such tasks, rights, and responsibilities are accorded to the public sector.

[Note: The substitution of private for public road ownership and management should be distinguished from another theoretical position–one that advocates that the current public-sector highway managers introduce peak-load or other pricing schemes usually associated with the marketplace. There is a vast difference between these two proposals. In the former case, the highways would be turned over to private entrepreneurs, and the new owners would themselves decide what kind of charging mechanism to institute (1, 2). In the latter case, the various road authorities would continue their overall management but would merely introduce some type of marginal-cost pricing system for road use (3).]

In this paper, only one argument in favor of such a change is implicitly considered: that such a substitution would improve the safety standards under which the system of roads and streets currently operates. [See Block (1, 2) for other arguments and for a defense of the proposition that this scheme would be feasible.] This is accomplished by considering a theory of highway safety regarding vehicle malfunction from a point of view that holds private road ownership as a feasible alternative to the current system.

The thesis of this paper is that the

dismal highway safety record is due to the absence of a free marketplace in the provision for, and management of, highways. Under the status quo, there is no competition, i.e., no financial incentives to urge managers to control accidents. (Bureaucrats do not lose money when the death rate rises, nor is the road manager rewarded, as in private enterprise, if a decline in accidents occurs.)

This lack of incentives has not gone completely unnoticed by the highway establishment. For example, Kreml (4, p. 2), a member of the President's Task Force on Highway safety, calls for the government to

> Establish an incentive system that will relate federal aid to some overall measure of safety improvement. Under such a system, each state could be eligible to receive from federal funds incentive payments for reduction in deaths...accidents...etc.

Although in one sense this would be an improvement compared with the current system, it is paradoxically a step in the wrong direction. For what we need is not a superficial improvement of the government system, but a basic revamping. It is true that Kreml's suggestion may have some beneficial effects, but it depends on, and would further entrench, the management system that brought us to the current crisis. Further, it is replete with problems.

First and most important, it would not be an incentive system commensurate with the one provided by the market. The financial rewards and penalties would not be automatic as a result of an ongoing market process. Rather, Congress would have to act and would presumably delegate this responsibility to yet another government bureau. A new core of bureaucrats would thus be born, whose job would be to hand out the actual incentive payments to the states that show the most improvement.

Second, the consumer is not involved in the process. There is not even a hint in this plan that the purchaser of road services could, through his or her consumption decisions, affect plans of the highway managers. In the Kreml plan, the incentive payment goes to the state government, not to individuals. But can the prospect of the state government receiving the extra millions of dollars raise the morale and support of those employees charged with highway safety to the degree necessary to make serious inroads on the death statistics?

Third, why should the plan reward a reduction in the accident rate? Kreml specifically calls for a relation of incentive payments to safety improvement. This is far from the pattern that usually takes place in the market.

The basic problem with the thinking of the road authorities is the approach that they have taken. They ignore the possibility of employing the usual profit-and-loss business incentives to minimize highway accidents, and instead have an overwhelming concern with objective considerations. Unwilling to look at entrepreneurial potential because they see only government institutions as viable for highway management, the professionals in the safety field concentrate on the physical means through which death rates can be lowered and not on the subjective elements necessary to mobilize objective factors for this purpose.

A brief survey of the literature shows that these objective conditions are usually listed under three headings: the vehicle, the driver, and the road. For example, Campbell (5, p. 210) cites the driver, the road, and the vehicle as causes of accidents and implores that "we move on all three fronts." Oi states the following (6, p. 22):

> In the accident research literature, accident "causes" are typically classified under three headings: the host, the accident agent, and the environment. Injuries on the ski slope are "caused" by (1) the reckless actions and physical condition of the skier, (2) the design and condition of the ski equipment, and (3) the characteristics of the slope and the snow.

Here the host and skier are readily seen as the driver; the accident agent or ski equipment as the vehicle; and the environment or slope as the road.

It must be stressed that there is nothing wrong with this division–if it is used as an organizing tool—provided that the essential nature of the problem (entrepreneurial incentive) is not obliterated. The difficulty with the division of highway safety into driver, vehicle, and road is that it ignores and masks the true solution. Unless the physical elements, along with the financial incentives, motives, and purposes, are analyzed through a perspective that makes entrepreneurship (7) its primary focus, a solution to the problem will not be found. The chief drawback to the safety literature is that there is simply no room in the analysis for the only institutional arrangement that makes entrepreneurship its centerpiece–the free market. Only government solutions fall within the realm of this analysis.

One manifestation of this mind-set is the division of the profession into "vehicleists," "driverists," and "roadists," where each faction urges that its realm is the most important and the key to the solution of the safety problem.

Nader, perhaps the best known of the "vehicleists," states the following (8, pp. xvi, xvii):

> For decades the conventional explanation preferred by the traffic safety establishment and insinuated into laws, with the backing of the auto industry and its allies, was that most accidents are caused by wayward drivers who ipso facto cause most injuries and deaths....Not only was their approach unscientific regarding drivers, but it conveniently drew attention away from the already available or easily realizable innovations that could be incorporated into vehicle and highway design to minimize the likelihood of a crash and to reduce the severity of injuries if a crash should occur.

One problem that particularly concerns Nader is the presence of dangerous hood ornaments on automobiles (8, pp. xxviii, xxix). Even more vexing to him is the lack of NHTSA action to alleviate this problem in the late 1960s and early 1970s.

Another vehicle-related problem is the lack of conformity of truck cab dimensions to the variations in human body size. It is charged that by using assembly-line techniques, arm and leg room can be built to only one set of specifications. But this means that the tallest and shortest drivers will be uncomfortable and unable to react to road conditions in an optimally safe manner. McFarland (9, p. 671) states:

> Clearances were frequently inadequate; in one model the shortest 40% of drivers could get the knee under

the steering wheel when raising the foot to the brake pedal. In another, this clearance was so small and the gear shift so close to the steering wheel that the tallest 15% of drivers could not raise the foot to the brake pedal, by angling the knee out to the side of the wheel, without first shifting the gear level away.

Inferior truck tires have been allowed on the nation's roads and have contributed to the accident toll. Sherril (10, p. 99) claims:

> Tire failure and brake failure are the top killers in truck accidents caused by mechanical failure, and two-thirds of the tire failures are blowouts on the front. Even with new tires, the heavier front load presents an extra risk of blowouts. With retreads the risk becomes much greater; but the Federal transportation bureaucracy, despite repeated pleas from drivers to come up with a ruling, has not outlawed retreads on the steering axle.

Another aspect of the vehicle that might contribute to safety, but all too often does not, is the license plate. Were it to be constructed out of reflectorized material (11, p. 229), it might reduce the likelihood of rear-end collisions at night.

Therefore, how is it that private companies, such as General Motors (hood ornaments), private trucking firms (retread tires), and truck builders (improper cab dimensions), have been responsible for contributing to the accident rate? The only item mentioned above that is not the fault of the market is nonreflecting license plates, which are clearly the responsibility of state authorities, not private companies.

Let us stipulate for the sake of argument that all of these charges are factually correct. The case for the market is not ruined if some, many, or even all participants have made mistakes. Any real example of a free market in action will have to consist exclusively of fallible human beings. As such, the surprise in not that mistakes are made, but how few there are compared to the limitless human potential for error. The market can still be justified in terms of minimizing error, not eradicating it, in the tire retread and truck cab specification cases when compared with alternative methods of control.

But what of the public agencies responsible for the malfeasance? If it is assumed that the above-quoted charges are substantially correct, then public agencies (e.g., NHTSA) must also be held responsible. And here the explanation of human frailty will not suffice. For regulatory bureaus are without the safety net of market competition. If one falters, no others need arise to take its place.

the dismal highway safety record is due to the absence of a free marketplace in the provision for, and management of, highways. Under the status quo, there is no competition, i.e., no financial incentives to urge managers to control accidents.

Nader's hood-ornament charge, however, cannot be answered in this manner. Again, on the assumption that these decorations are actually harmful to pedestrians, it cannot be assumed that the market forces will engender a tendency toward their removal. This is because, by definition, the ornaments will not harm the purchaser of the automobile, the driver, or his family; they can, at most, prove detrimental to outsiders, i.e., pedestrians.

However, it cannot be concluded that the market is incapable of registering the desires of pedestrians, i.e., third parties to the purchase of a car. [For a fuller discussion of the externalities issue, see Block (12).] It appears incapable of doing so, but this is because public highway ownership has foreclosed a vital part of the market—street ownership.

The owner of a shopping center (this is the closest current analogue to private streets) must ask: "Can I earn more money by permitting entrance to automobiles with possible dangerous hood ornaments, or can profits be maximized by forbidding them? If I forbid them, I shall be boycotted, to a degree, by owners of the offending cars, but patronized, perhaps to a greater degree, by those who fear these protuberances. If I allow them, the reactions will be identical, but in the opposite direction." In the market, the (perhaps different) decisions of thousands of street and road owners will determine whether hood ornaments stay or go. If the overwhelming decision is that ornaments are a significant danger, then the owners of private roads will either charge more for their use or else forbid them entirely. In either case, it will be to the advantage of the automobile manufacturers to discard them. [It can perhaps be concluded from the nonexistence of any prohibition of hood ornaments by private sources (parking lots, shopping centers, and so on) that they are not as dangerous as Nader believes. But even if the hood ornament is not a good example of an actual danger, the same analysis can be used to show how, under full market conditions, safety implementation can still take place.]

But many accidents are caused in relation to other vehicles. Hood ornaments are but one example of this phenomenon. Other examples of one vehicle involving others in accidents are when the high beam from one automobile interferes with the vision of the driver of another; when the rear of one automobile is inadequately lighted so that the driver of another cannot see it in time; and when a blowout or a brake failure or a swerve of one automobile results in a crash with another.

Only the road manager, not the original manufacturer of the automobile, is in a position to alleviate problems of this sort. But the government, by seizing a monopoly on highway management, has not adequately assured the public that

vehicles allowed on the road will meet minimal safety standards.

Austrian economists have long taught that capital, far from being a homogeneous entity, where any bit could fit in equally well with any other, is actually highly differentiated and heterogeneous. In order to work efficiently, capital must fit together in a delicate latticework, where each piece is in a position to support and make effective all other pieces (13, 14).

But labor, too, fits the same principle. The automobile safety establishment has failed to realize that a whole profession, complementary to automobile manufacturing, has been prohibited.

The area that is complementary to automobile manufacturing in terms of certifying and upgrading vehicle safety is the private enterprise of vehicle inspecting. But there is no such private industry. It has been in effect nationalized—in part and parcel of public control of all aspects of road management.

The public enterprise of vehicle inspection has been sadly remiss in its self-claimed monopoly responsibilities. According to a report from the former Department of Health, Education, and Welfare (15, p. 21):

> In the realm of government jurisdiction over traffic safety, matters at first fell to revenue collection agencies on the one hand and to law enforcement agencies on the other. Vehicles were initially licensed solely for the purpose of collecting revenue, and not for many years did the notion appear of vehicle inspection for safety purposes. (Fourteen States still do not have inspection laws.)

By government admission, then, there were many years during which there was no concern with vehicle inspection for safety purposes. This is only believable of a governmental institution, i.e., one that suffers no monetary or any other reversal for failure to carry out its self-appointed tasks. And as late as 1968, 14 states did not even carry out this task to the extent of passing inspection laws.

The overriding problem with NHTSA, and with all similar government systems that are supposed to guard the public against vehicle defects, is that no competition is permitted. If market certification was allowed, there might be several or perhaps many competing private agencies; in real life, there are only a few commercial testing laboratories. [For a sympathetic analysis of what might be termed the private safety certification industry, see Friedman (16, Chapter 9).]

Perhaps the above discussion explains some of the shortcomings Nader has charged against NHTSA (8, p. xxvii):

> Since February 1969, no new regulations have been added to the meager data informing the consumer of differences between vehicles, thus reinforcing the absence of quality competition in the auto market.

Written in 1972, this translates into a 3-year hiatus during which consumers learned nothing about the quality difference between competing brands of automobiles. One could scarcely imagine a similar occurrence in a private industry, or even on the part of one single firm, such as Consumers' Union, dedicated to providing information on automobiles. If such a thing were to occur, there is no doubt that other profit-seeking competitors would move in to exploit such an opening. They would take advantage of this lack of knowledge by providing the missing product.

Another difficulty with NHTSA, as with other regulatory agencies, is the tendency of bureaucrats to become "too friendly" with the regulated companies. Cecil Mackey, Assistant Secretary of Transportation 8, p. xxxi) states:

> As the more obvious regulatory actions are taken; as the process becomes more institutionalized; as new leaders on both sides replace ones who were so personally involved as adversaries in the initial phases; those who regulate will gradually come to reflect, in large measure, points of view similar to those whom they regulate.

[For a more extreme viewpoint on this phenomenon, one that contends that such commonalities have existed throughout American history, see Kolko (17).]

It cannot be contended that the free market is completely without such problems. It must admitted that all institutions, whether public or private, are susceptible to this danger. Free enterprise, however, has certain safeguards that are absent in the public sector.

This phenomenon can be better understood by comparing what happens to people involved in public and private institutions when a problem is discovered. For the owner of a private commercial testing laboratory, when an employee is discovered accepting bribes for rendering favorable opinions, the results are truly catastrophic.

But this would not be the case for employees of the government. Barring jail sentences, the worst that is likely to happen is that the single bureaucrat caught will be fired. And even that is by no means certain if he is protected by civil service regulations.

In addition to competing on the basis of their main mission (laboratory testing, checking, and certifying), private certification agencies also compete in terms of preventing defections on the part of their employees. And this job is second in importance only to their main mission.

Therefore, it can be concluded that, at least as far as the vehicle malfunction and maldesign theory of highway accidents is concerned, no barriers to private road ownership have been found. If the Naderites were consistent, they would call for a radical alteration in the institutional arrangements provided for highway safety. As it is, they are reduced to advocating what can only be considered marginal improvements.

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(Concluded from page 5)

agreement, nor shall his landlord hold him accountable for rules of conduct not specified there. Nor shall any person subletting to another under this lease enforce a monopoly in any economic activity including the provision of policing or court services. No land shall be sublet on terms inconsistent with any of the terms of this lease. In the event any of these conditions are disregarded, the lessor shall have the option of repossessing the lands herein described (although sub-leaseholds shall continue to be honored) or receiving monetary penalties in such amounts as may be set by independent arbitration.

What is refreshing about Lascola's idea is that it is as fine an anarchic concept as might be found, yet it is non-ideological, being promoted as a purely business venture for profit to its investors.

Some prospective investors in the proposed Somali freeports, reflecting their American background, expressed misgivings about leasing rather than holding fee title. They had only to look to Singapore and Hong Kong, however, to see that land-leasing is not by any stretch of the imagination incompatible with economic development and prosperity. Indeed, prosperity in the freeport would translate directly into profits for the land investors, productivity on the land being the source and whole basis of ground lease revenues. Land comes into demand only as it is conducive to people being productive on it. Land-leasing does not foreclose subdividing for speculation, since leaseholds can be bought and sold the same as freeholds. However, the subdivision approach yields a one-time capital gains opportunity from the speculative turn-over of location, whereas enlightened land-leasing will yield increasing returns indefinitely into the future. Rather than a speculation, land-leasing has the advantage of potentially becoming a productive enterprise set up to rationally and systematically build land values.

Leasehold as Property

To conclude this brief discussion of land-leasing, the fact is sometimes lost sight of that a leasehold is property as much as anything else ever was or might be. It is not a second-class form of tenure. David Hume makes that clear (*A Treatise on Human Nature* 1896:529-31):

> A man that hires a horse, tho' but for a day, has as full a right to make use of it for that time, as he whom we call its proprietor has to make use of it any other day; and 'tis evident, that however the use may be bounded in time or degree, the right itself is not susceptible of any such gradation, but is absolute and entire, so far as it extends.

Postscript:

A California developer, Paul Lascola, is in the initial stages of planning a land-lease, mixed-use community of approximately 25,000 population. Among its amenities, the community will feature its own integrated, on-site utilities system with zero discharge into the environment. Only in a land-lease community is such an approach possible, since it requires a concentrated entrepreneurial interest in the commons. With that sole proviso, however, the implications for real estate development are significant. It obviates any need for government involvement in utilities and opens the possibility of community development any place on the globe, independent of government utility grids or even naturally occurring water (since the object will be to manage and recycle an inventory, having only to make up evaporative losses). What is refreshing about Lascola's idea is that it is as fine an anarchic concept as might be found, yet it is non-ideological, being promoted as a purely business venture for profit to its investors. More information about the project is available from the author (Spencer MacCallum <sm@look.net>).Δ

Bylaws of the
Libertarian Nation Foundation

As Approved April 19, 2001

Article I. Purpose

The Libertarian Nation Foundation, hereinafter called the Corporation, is organized to operate exclusively for charitable, scientific, and educational purposes, and toward these ends to conduct research, hold meetings and colloquia, and disseminate information on the nature of the institutions in a free society, in which government is limited, and voluntary interaction among individuals is maximized.

The purpose of the Libertarian Nation Foundation is to advance the day when coercive institutions of government can be replaced by voluntary institutions of civil mutual consent, by developing clear and believable descriptions of those voluntary institutions, and by building a community of people who share confidence in these descriptions.

We encourage libertarians of all types from all countries to join us in building this community.

The Corporation shall not carry on any activities not permitted to be carried on by a Corporation exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law).

No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

Article II. Board of Directors

There shall operate a board of directors responsible for oversight of all operations and affairs of the Corporation.

The Directors have the right and responsibility to control all aspects of the policy and operation of the Foundation. Each Director has the individual responsibility to be involved in this process. Each Director is expected to make the Board aware of any information which the Director has which may be relevant.

The number of directors, initially seven, may be changed by the board of directors provided that the number shall be no less than three.

Directors will be elected by a majority vote of the current directors, and will serve terms of three years or less as directors may decide. Directors may serve any number of terms.

No director shall be replaced or removed except by resignation or death prior to expiration of the term to which that director was elected, nor shall the number of directors be increased, unless all directors be notified of such proposed action in writing by mail or e-mail at least ten days prior to the meeting in which such proposed action will be brought to vote, and unless such action is approved by vote of two-thirds of the directors.

No compensation will be paid to any member of the board of directors for services as a member of the board. By resolution of the board, reasonable expenses may be allowed for attendance at regular and special meetings of the board.

Article III. Meetings of the Board of Directors

The board of directors shall have a regular meeting at least once per year.

Notice of regular meetings will be mailed at least ten days prior to the day such meeting is to be held.

Special meetings of the board of directors may be called at any time by the president of the Corporation, or upon receipt of a request therefore signed by a majority of the directors. Reasonable effort shall be made to notify all directors of special meetings.

A quorum shall consist of a majority of the directors.

A simple majority vote of the directors present is required to pass a motion before the board, except in those special and separately-noted cases where a two-thirds majority is required.

Unless modified by a vote of two-thirds of the directors present, or by these bylaws, Robert's Rules of Order (Newly Revised) will be the authority for all questions of procedure at meetings of the Corporation.

The president may, upon notice to the other directors, authorize conduct of a meeting of the board of directors by a conference call or by e-mail.

At all meetings, proxy voting shall be allowed on all issues where practicable. The meeting announcement shall attempt to describe in detail all substantive issues to be considered at the proposed meeting, so as to enable each director who is unable to attend the meeting in person or via e-mail or conference call to participate in the activities and the votes of the board by selecting a proxy and specify-

ing the scope of the proxy's authority.

Article IV. Committees

The board of directors may create committees, consisting of directors and/or other persons, and empower these committees to perform specified tasks on behalf of the Corporation.

Article V. LNF Authorized Projects

The Board may commission at its discretion Authorized Projects, through which it grants specific authority to LNF members, acting as Project Guarantors, allowing these members to represent LNF and to act autonomously to pursue LNF objectives. The responsibility for each Authorized Project will be assumed by the Guarantors, but the Board will retain the authority to monitor each Authorized Project, to remove or add Guarantors, or to decommission any Authorized Project. The Board may establish rules to implement the provisions of this article.

Article VI. Officers

The officers of this Corporation will be a president, secretary, treasurer, and such other officers as the board prescribes. The president and secretary must be members of the board of directors. One person may hold more than one office, except that the president and secretary must be two separate persons.

The officers will be elected by the board of directors and will continue to serve at their pleasure.

In the event of the resignation or death of an officer the board of directors shall replace that officer.

The president will be the chief executive officer of the Corporation, will have general supervision of the affairs of the Corporation, and will execute on behalf of the Corporation contracts, deeds, conveyances, and other instruments in writing that may be required or authorized by the board of directors for transaction of the business of the Corporation.

The secretary will keep Corporate records including but not limited to minutes of regular and special meetings of the board of directors.

The treasurer will have general charge of the finances of the Corporation. As directed by the board of directors the treasurer will: maintain for the Corporation a bank account (or accounts); receive all contributions and payments; pay all just debts and obligations; keep accurate and complete records of these transactions; report to the board of directors on the financial status and activities of the Corporation as requested but not less than once annually; and report to governmental authorities as necessary concerning the financial affairs of the Corporation.

Article VII. Members

The Corporation will have members who will be qualified by their payment of annual dues as established by the board of directors.

Members will receive privileges and benefits as decided by the board of directors, but as a minimum each member: will be mailed a copy of the current bylaws of the Corporation upon request; will be mailed a copy of the annual report of the Corporation; and will be invited in writing to attend each regular meeting of the board of directors.

Members attending meetings of the board of directors will not have a vote at these meetings, but may participate in discussion.

Article VIII. Advisory Senate

The Advisory Senate shall be an honorary council consisting of those directors or officers who have resigned from active participation and those who have been appointed Senators by the board of directors.

Article IX. Miscellaneous

The board of directors may authorize any officer or agent of the Corporation to enter into any contract or execute and deliver any instrument in the name of, and on behalf of, the Corporation. Such authority may be general or confined to specific instances.

All records of the Corporation, as kept by its officers, may be inspected by any director of the Corporation at reasonable time and place and upon reasonable notice.

The fiscal year of the Corporation shall correspond to the calendar year, and shall begin on January 1 and conclude on December 31 of each year. The initial fiscal year shall begin on the date of incorporation, and end on December 31, 2001.

Article X. Dissolution

Upon the dissolution of the Corporation, the board of directors shall, after paying or making provision for the payment of all of the liabilities of the Corporation, dispose of all of the assets of the Corporation exclusively for the purposes of the Corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes as shall at the time qualify as an exempt organization or organizations under section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law).

Article XI. Amendments

The board of directors may amend these bylaws at any regular meeting with a quorum and with a vote of two-thirds of the current board of directors.

(Continued from page 1)

The History

In my view, the interests of the Board members of FNF began to take overtly separate paths when Board members received FNF founder and President Richard O. Hammer's "Letter of Resignation". That letter was published in the Spring 1999 issue of *Formulations*. As the letter states, Rich Hammer had come to believe that the rest of the FNF Board did not share his vision of what FNF should be.

FNF came into existence as a result of Rich's efforts. At the time Rich announced his resignation as President (12/28/98) he had been working to build FNF for several years (since 1993), hoping that others would join him as time went on. Rich had given liberally of his own resources, donating money and labor. Rich had worked as FNF's only full-time employee for most of the time he was President. Yet despite these efforts, Rich had been able neither to recruit much volunteer labor to assist him, nor raise enough funds to pay himself or a staff. Those of us in FNF who had worked with him began to see Rich become discouraged about the possibilities that FNF would achieve the goals that he wished it to achieve. Indeed, Rich had begun to express concerns that even the assistance he was getting from others was off the mark. At one point he had gone so far as to say at an FNF Board meeting, that "No one here understands what FNF is about."

As Rich's Letter of Resignation says, Rich finally reached the point where he felt that he could not justify the further investment of his own resources in FNF at such a high level. The letter was sent to FNF's Board members and others who had made substantial financial contributions, several weeks before it was published in *Formulations*. Rich announced that he would resign as President, effective at the end of 1999, and would stop performing most of the tasks which he had been doing for FNF. He did not attempt to recruit anyone to replace him, saying simply at one Board meeting, "I don't know who will be doing these things."

Rich's letter gave the FNF Board a year to make a series of important decisions, since Rich himself was not making them. Should an effort be made to continue those FNF activities which Rich would be leaving, such as the Forums and *Formulations*? Who would replace Rich as President? Rich, in his letter, had predicted that FNF would revert to little more than a web site. After some discussion, the Board made a decision to try to recruit enough volunteer labor, largely from itself, to keep all functions going. Most Board members had in fact done very little actual volunteering within FNF. At a series of Board meetings, most of Rich's tasks were accepted by Board members, assisted by other FNF members such as Robert Mihaly, James Wilson, and later, Jesse Halliday. Bobby Emory was elected to succeed Rich as President. Rich agreed to keep a very few tasks on a temporary basis.

As the re-organization meetings progressed, Rich, though still reserved in his attitude towards the process, assisted the volunteers by describing in detail the tasks he had decided to drop and by providing them the various physical materials which he had used in performing them. At one point he even smiled and expressed his pleasant surprise that people were willing to pledge so much effort to continue what he'd started. But once his jobs had been re-assigned and his resignation took effect, Rich became extremely quiet. While attending all Board meetings, Rich never voted, nor volunteered opinions. His primary interaction with the Board was to make a series of announcements wherein he dropped, one at a time, the few remaining tasks he had still been doing. To many of us on the Board, it seemed that Rich had again become very depressed about the state of FNF.

Rich's concerns were understandable, in at least two ways. One factor was the clear change of policy which FNF was undergoing. During an FNF Forum held just before Rich's resignation took effect, Rich had been asked to explain what it was about his FNF Workplan "few persons understood". At that time Rich had replied that he believed that FNF should focus almost all its attention on what Rich called "critical institutions", which he then defined as "constitutions and systems of law". The Forum discussion moved on, but later, at an FNF Board meeting, Rich was asked to reconcile his concept of the FNF Workplan with the very broad FNF Statement of Purpose (which Rich had written, and which appeared on the FNF web site and in each issue of *Formulations*). Rich replied that the Statement, which the Board had never previously discussed, was just a very loose approximation of FNF policy–intended only for public consumption, not as a real FNF policy. Most of the Board members were both surprised and disappointed by this interpretation of the Statement. [I for one feel that Rich had engaged in an intentional deception.] Soon after, the Board approved an explicit policy which affirmed the philosophy of the Statement, which contrasted with Rich's much narrower vision for FNF.

The second factor which caused Rich concern was that FNF's new volunteer labor force was having considerable difficulty maintaining the level of activity which Rich had maintained as President. While many more people were now involved with FNF, they were providing, collectively as part-timers, far fewer hours than Rich had provided as a single full-time FNF worker. Further, the tasks when performed by Rich alone had been easily coordinated (Rich coordinating only with himself). But the many volunteers, some of whom were hundreds of miles from the North Carolina FNF base (where most of us live), were not regularly in contact with one another, and did not always have a full understanding of what each other were doing or should be doing.

At first, Rich was quiet about these concerns. But later Rich explicitly (and rightly, in my opinion) criticized the new volunteer arrangement for failing to keep the schedule of production of *Formulations* and the Forums. He followed his criticism with an "offer" to accept all responsibility for FNF and all authority within it, at which point he would formally cease production of *Formulations* and the holding of Forums, and would assume full control of the web site. This was not well received by most of the other Board members. The ensuing debate inside the Board became intense.

A short time later, Rich rephrased his polite "offer" as a firm demand, based on a claim of legal and moral rights as "owner" of FNF. His resignation as President, Rich insisted, had no effect on these "rights", which he based on the labor he had previously contributed. This position was received even less en-

thusiastically by most Board members. They pointed out that Rich himself had established FNF as a non-profit corporation with a governing Board of Directors, not as a proprietorship. Rich had never mentioned the notion of a sole proprietorship during his entire time as FNF President—including the time, over a year earlier, when the Board had been forced to decide on how to proceed without him. Despite this, Rich has alleged that the actions of the Board since his resignation as President should be interpreted as a personal promise made by each Director to Rich himself, as sole proprietor of FNF, to pursue Rich's own objectives in a "professional" manner—a promise which Rich felt was broken. To my knowledge no other FNF Director takes this view, though most felt that Rich should be given an opportunity to own an organization which formally derives from the FNF tradition. And one Director asserted that Rich was and had always been the sole "owner" of FNF.

For several months the debates became increasingly heated, as ideas about responsibilities and authorities within FNF were discussed. Generally, Board members have followed an informal policy that this debate be kept within the Board. But this has had a serious disadvantage, in that neither FNF members nor the general public have been aware of the controversy. By contrast, it has appeared to many non-Board members that FNF was slowly dying. It is my intention here to correct that false impression. To paraphrase Mark Twain: the rumors of FNF's demise are greatly exaggerated.

The current splitting of FNF is the result of an agreement between all parties, intended to settle the dispute. Probably the most positive aspect of the Split Agreement will be for the energies which have been spent on internal disputes at the FNF Board to be rechanneled into productive functions at the two new organizations. The problems experienced at FNF in this last year have at least in part been caused by the arguing which has occurred inside the Board. Little productive business was conducted.

The New Arrangement

The two primary visions of FNF will now have clear separate homes in the two new organizations. By the terms of the Split Agreement, the two "daughter" organizations are to be considered equally derived from the original FNF. The new LNF, will continue to support a wide variety of activities, consistent with the FNF (now LNF) Statement of Principles. The new FNF-CI will focus on Rich Hammer's Workplan. FNF members will, to the best of my understanding, be considered members of both new organizations unless they indicate another preference.

> The Libertarian Nation Foundation holds that a libertarian nation, conceived as such from its beginning, ought to exist and should be created. LNF develops formulations for the institutions and social arrangements of a libertarian nation. LNF will continue to provide the arena for discussion which had characterized FNF from the beginning.

Free Nation Foundation–Critical Institutions

The non-profit corporation operating under the name FNF-CI will be organized according to a very different model from FNF. Rich Hammer has written a new set of Bylaws for FNF-CI. Rich has included in the Bylaws a method he has designed for employing the Labor Theory of Value at FNF-CI. Credit, for labor contributed either to the old FNF or to FNF-CI, is to be used to assign votes within the FNF-CI Board of Directors. Rich himself has endeavored to calculate the initial assignment of this labor credit, but only for those who had served as Directors in the old FNF Board. Initially four of the eight Directors of the old FNF have agreed to accept this assessment of labor credit and become Directors at FNF-CI–Richard Hammer, Roderick Long, Chris Spruyt, and Robert Mihaly. While the arrangement still takes the form of a corporation officially, Rich has assigned himself the vast majority of the votes and the power to reassess all future vote allocations. Thus, FNF-CI is designed to function indefinitely not only under the control of, but as the personal property of Richard Hammer. Hopefully, potential FNF-CI members will be made overtly aware of this. FNF-CI's objective will be, I assume, to follow Rich Hammer's "FNF Workplan" as closely as possible. It has not, to my knowledge, been decided whether or not FNF-CI will officially abandon the "FNF Statement of Principles". But as a practical matter, it can probably be assumed that FNF-CI will strictly adopt the notions stated in Rich's "Letter of Resignation" as FNF President. The key statement about the Workplan in the letter is, as I read it: "In the overall plan, the work of FNF (this present corporation) is Step 2. Since I think the first three steps are necessary only for us non-billionaires, let me try to make this point clear: The purpose of Step 2 is to help us attract the respectful attention of a billionaire, or of 1,000 millionaires, or of some sufficient combination of interests."

From this and the philosophy of management and ownership which Rich is following, I conclude that the "nation" FNF-CI will try to foster would probably function as the private estate of a small number of individuals who had acquired great wealth in non-libertarian contexts.

(Continued on page 29)

To Serve and Protect by Bruce L. Benson

Reviewed by Roy Halliday

In *To Serve and Protect: Privatization and Community in Criminal Justice*, Bruce Benson argues for privatizing the American legal system (including police, courts, and prisons) and adopting a revised version of the old Anglo-Saxon system under which crime victims have a right to restitution from criminals. Benson describes the pros and cons of some measures that would reform the American legal system to allow more privatization. He also explains the fully privatized legal system that he advocates, which would require changes in the law to allow individuals to sell some or all of their right to restitution and to allow private ownership, management, and policing of roads and all other "public" property. Benson's restitution-based legal system fits well with the system promoted by Randy Barnett in *The Structure of Liberty* (see my review in *Formulations* Vol. VI, No. 4); they have the same advantages and are supported by some of the same arguments.

Compared to the current legal system in America, which imposes the costs of investigations, trials, and prisons on innocent taxpayers and does little to compensate victims of crime, Benson's victim-restitution system is more fair and more libertarian because: (1) it eliminates all victimless-crime laws, (2) it helps victims of crime to recover from the losses inflicted on them, and (3) it makes criminals bear most of the costs of crime investigation, court proceedings, restitution, and incarceration. With regard to preventing and negating crime, Benson's privatized justice system is more efficient than the

current legal system because: (1) victims can receive compensation quickly by selling all or some of their right to restitution to agents who are in a better position to capture criminals and extract restitution from them, (2) competition and the profit motive made possible by the markets for these services will lead to improved methods of crime prevention, crime investigation, court proceedings, restitution, and incarceration, and (3) the prospect of compensation gives victims more incentive to report crimes and to cooperate with the private police and courts.

Benson's system is not merely hypothetical. He cites many examples to show that the government-run legal system in America is so broken that private alternatives are popping up all over the country in spite of government efforts to hamper them. Furthermore, Benson explains that victim-restitution-based law has worked well in the past (in Anglo-Saxon England for example) and that it works well now in Japan.

Many of Benson's points about the efficiency of privately produced services are simple, common-sense conclusions, but he backs them up anyway by citing study after study. He aims his arguments at potential reformers of the American legal system in the hope that his data and logic can help overcome the resistance of entrenched groups who have a vested interest in the current system. Perhaps out of deference to this audience, Benson makes his case without appealing to emotions or conscience. Laws for Benson, are simply rules of a game—they are nothing to get excited about. Life, it would seem, should not be taken personally. In fact, Benson makes his case for liberty, justice, and individual rights with less passion than some others exhibit in arguing over the designated-hitter rule in baseball. I don't care for this dry approach, but maybe it is appropriate for Benson's primary audience.

Even if Benson's scholarly and respectful manner of pleading for more justice from the American judicial establishment is in vain, and even if his facts and polite arguments turn out to be wasted on American opinion molders, his research still provides a lot of ammunition for libertarians who want to create a free nation somewhere. He gives us the historical background of private law enforcement and provides information about current, market-supplied legal services that support the idea that a free (libertarian) nation is viable.

Historical Precedents for Private Law Enforcement

Private law enforcement preceded law enforcement by the state. In fact, state responsibility for law enforcement is a relatively new phenomenon in European history. The state got involved after monarchical government replaced the mediaeval system:

> ...development of monarchical government led to the creation of criminal law as a source of royal revenues, and this criminalization took away the private rights to restitution and significantly reduced the incentives to voluntarily cooperate in law enforcement. (195)

At the end of his summary of the history of law in England, Benson makes the following observation:

> The fact that the state has taken over such a prominent role in criminal law is not a reflection of the superior efficiency of state institutions, but a result of the state's undermining the incentives for private participation in criminal law. (223)

Law in Anglo-Saxon England

Benson gives us a brief history of Anglo-Saxon law, which Germanic raiding parties brought to England around 450 A.D. The raiders were freemen who chose to follow war chiefs based on their confidence in the chief's ability to lead them in land-grabbing and looting. The law among these pirates was a contractual arrangement between the chiefs (kings) and their followers.

The contractual arrangement among these thieves obligated the king to provide his followers with "battle equipment, food, and war booty (including land) in exchange for their support in war." (202) As is typical of those who believe rights derive from contracts rather than being an inherent part of man's nature, the pirates regarded their victims as being outside the law and therefore as having no rights. Since the Anglo-Saxons had made no contract with the earlier inhabitants of England, how could it be wrong to invade England, kill the inhabitants, and take their property?

The tenure of Anglo-Saxon kings was temporary. It only lasted if warfare continued and the kings were able to persuade men to follow them into battle. "Kingship was contractual rather than hereditary, and appointment of a successor was not automatic; nor was a kingship considered a position for life." "In fact, the word *king* derives from the Old English word *cyning*, and the earliest records use the phrase *ceosan to cyninge*, which means 'choose as king.'" (202)

Unfortunately for those Anglo-Saxons who moved to England, warfare between the various Anglo-Saxon kingdoms was almost continuous from 450 to 600 A.D. And why not? The contracts that established obligations were within kingdoms rather than across kingdoms. No kingdom had an obligation to respect the property of other kingdoms—so they fought to take land from each other. The victorious kingdoms grew in size as the number of kingdoms declined such that by 600 A.D. England was divided into seven regions controlled by fairly well established dynasties.

> Throughout this period the primary function of kings was to carry out warfare. They apparently did not presume to be lawmakers, and law enforcement remained in the hands of local reciprocally established groups. (202)

Over the next 250 years warfare between the Anglo-Saxon kingships continued, and the kingdoms of Northumbria, Mercia, and Wessex became dominant. Then the Vikings invaded and wiped out the kingdoms of Northumbrian and Marcia, which left only the kingdom of Wessex in southern England. King Alfred of Wessex fortified his position and began to reconquer the parts controlled by the Danish kings. His son continued the process. By 937 England was a single kingdom.

Meanwhile there were apparently some people who engaged in farming and other peaceful pursuits. These people were not part of the contracts with kings. Instead their rights and obligations toward each other were determined by the customs that the Anglo-Saxon

invaders brought to England. Traditionally, neighbors helped victims catch criminals out of friendship and because they might need reciprocal help in the future or had received such help in the past.

> By the tenth century, there was a clearly recognized Anglo-Saxon legal institution called the *hundred*. The primary purposes of the hundreds were rounding up stray cattle and dispensing justice, although they were also the locus of a number of other important social activities and the providers of a number of jointly produced services, such as road maintenance. When a theft occurred, the men of the several tithings that made up a hundred were informed and they had a reciprocal duty to pursue the thief. A tithing apparently consisted of a group of neighbors, many of whom probably were kin. These voluntary groups provided 'the police system of the country,' but their role went well beyond policing; they also 'made everyone accountable for all his neighbors.' Indeed, social relations were generally maintained only with people who shared surety protection through association with a tithing and a hundred. (198)

The hundred performed the local judicial function by selecting a committee of twelve to arbitrate disputes between members. To settle disputes between individuals who lived in the same shire but were not members of the same hundred, the hundreds selected a committee of twelve to arbitrate disputes in the shire court. There was apparently also a third court, probably with a committee operating in a similar manner to the hundreds and the shire courts, to settle disputes between individuals who lived in different shires. "When the committee could not determine guilt or innocence in a particular case, it was appealed to what Anglo-Saxons believed was a higher authority: their God. In such cases, trial was by ordeal, and the survivor of the ordeal was assumed to have been saved by God because he was innocent." (199)

In the Anglo-Saxon legal system, all offenses were basically treated the way torts are treated in American civil courts. That is, the guilty party was punished by making him pay restitution to his victim. Even those found guilty of murder were punished by being required to pay money to the victim's family. For large restitution payments, offenders were given up to a year to pay or they were made indentured servants of the victim's family.

If an accused individual refused to submit to a trial, the accuser and his supporters could legally kill him. If either the accused or the accuser refused to accept the decision of the court, he was "ostracized by society in general, and physical retribution became the responsibility of the entire community." This sometimes resulted in blood-feuds when the accused's family backed him up against the onslaughts of those supporting the accuser. (200)

Today this so-called voluntary system of justice is not only unacceptable to the entrenched establishment, it is not acceptable to most Americans. Benson recognizes that our society is too secular to unite behind the idea of trial by ordeal as an appeals court run by God. But that is not the only problem. Another problem is that the American population is too large, diverse, and mobile for ostracism to work as well as it did in the small Anglo-Saxon communities of England in the first millennium. (It is hard to get away with a crime if you can't get away.) Another problem, for me at least, is that American juries are too extravagant with other people's money. Having heard horror stories about absurdly high awards given by juries to plaintiffs, I don't want to see criminal law follow the model of American civil law.

Another problem is that modern Americans are too horrified by involuntary servitude and debtors prisons to condone them as means for restitution, even though if you think about it, such forms of slavery can be more humane than sanctions that have more support in America such as imprisonment and capital punishment. In some cases, if the restitution owed is not beyond the person's abilities, his sentence in a debtors prison is self-determined. The harder he works, the sooner he pays off his debt and the sooner he regains his freedom. There is a sort of poetic justice in this.

The major objection I have to the traditional Anglo-Saxon system of law is the same objection I have to the contracts between Anglo-Saxon kings and their followers: both of these arrangements are based on the assumption (which Thomas Hobbes revived centuries later) that people have no obligations other than the ones they create through contracts and, therefore, that it is all right to pillage, rape, and murder strangers, foreigners, and any others who have not made a specific contract with you or who have opted out of their contract. In other words, the Anglo-Saxon rules are based on the denial of natural rights.

As evil and barbaric as Anglo-Saxon law is, it compares favorably with American law in some respects. The primary advantage Anglo-Saxon law has is that it aims at restitution to the victim, whereas American criminal law is based on coercive control of the public through government legislation and administrative regulations that often define crimes that have no victims and that are enforced by fines, compulsory rehabilitation programs, prison sentences, and executions. Another advantage of the traditional Anglo-Saxon system of law is that it keeps politics and the corruption of officials that characterizes most politically run activities out of the legal process.

Benson briefly explains the devolution of English law from privately enforced, restitution-oriented law to state-enforced, punishment-oriented law.

> By the early eleventh century, many of the relatively localized functions of ealdormen (e.g. within a shire) had been taken over by royal appointees (sheriffs). The earls that remained, now clearly designated as royal appointees, were lords over much larger areas (several shires). Thus, the aristocracy that survived the long period of warfare was quite strong and relatively concentrated. At the same time the well-being of nonnoble freemen in England declined considerably, producing "semi-servile communities in many parts of the country." These institutions of government evolved, in large part, because of external conflict (warfare), in order to take land from other groups or to protect existing holdings. (203)

The earls and sheriffs each controlled military forces, so the kings

granted special privileges to them in exchange for their support in war and for providing administrative functions. The sheriffs administered the local land holdings of the king, accumulated produce for the king to consume, and collected tolls and other revenues for him. The king allowed sheriffs and earls to keep part of the produce and revenues they collected as payment for their administrative services. Eventually, the kings came to realize that they could obtain more revenue and grant more favors to their noble followers by intervening in the legal process.

As the number of kingdoms got smaller and the size of the remaining kingdoms got larger through conquest and consolidation, kings began to centralize power and take on the role of lawgiver.

> Well before the Norman Conquest, for instance, outlawry began to involve "forfeiture of goods to the king" rather than the potential for confiscation by victims and tithings. ... More significant, violations of certain laws began to be referred to as violations of the "king's peace," with fines paid to the king rather than to the actual victim. (203)

In addition to the one-third of revenues from collection of tolls and other taxes that the kings allowed ealdormen to keep in exchange for mustering and leading men into combat, the kings allowed the ealdormen, as royal representatives within shires, to keep one-third of the fines they collected from the profits of justice. By the time Edward the Confessor came to power, judicial profits were lumped in with the profits from the royal farms and manors, and these were collected by the local sheriffs in exchange for part of the profits.

Law in England after the Norman Conquest

Things got worse when the Normans conquered England. William the Conqueror seized virtually all the land and established a system of feudalism by granting fiefs to Norman barons and the church in exchange for military support and administrative services.

> The Norman kings also brought the concept of felony to England by making it a feudal crime for a vassal to betray or commit treachery against a feudal lord. Feudal felonies were punished by death, and all the felon's land and property were forfeited to the lord. (208)

The Norman kings, inspired by greed, declared more and more different activities to be felonies. The kings became as arbitrary in their punishments as they were in their definitions of felonies. They generally opted to take all the property of a felon, but at different times they favored different forms of death, and sometimes they spared a felon's life and merely had one or more of his limbs chopped off.

The Norman kings saw the opportunity to increase their revenues by intervening in non-felony law enforcement, and they were less reluctant than the Anglo-Saxon kings had been to ignore the traditional Anglo-Saxon system of justice.

Henry II laid many of the foundations for the modern system of English law. In stark contrast to the positive interpretation of Henry II's reign that Arthur Hogue gives in *Origins of the Common Law*, Benson correctly views Henry II in an unfavorable light. According to Benson, Henry made the English system of law much worse. He wanted to increase his revenues to reinforce his power and to finance his wars, so he had his royal courts take over many of the functions of the county and hundreds courts.

> Henry and his judges defined an ever growing number of actions as violations of the king's peace. These offenses came to be known as crimes, and the contrast between criminal cases and civil cases developed: *criminal cases referred to offenses that generated revenue for the king or the sheriffs rather than payment to a victim.* (210)

The increased number of activities defined as crimes and the increased scope of royal justice created a backlog of cases. So in 1178:

> Henry established a permanent *curia regis* court to hear all suits except those that required his personal attention. This court met throughout the year and almost always at Westminster, becoming the first centralized king's court. The treasurer always sat on the ten- or twelve-man court, indicating the vital role of justice in revenue collection. (209)

The transformation of the English system of law continued under the reign of Edward I. To ensure more profits for the king, royal law declared victims to be criminals if they "obtained restitution prior to bringing the offender before a king's justice where the king could get his profits." Then "royal law created the crime of theftbote, making it a misdemeanor for a victim to accept the return of stolen property or to make other arrangements with a felon in exchange for agreement not to prosecute." (211)

> More laws were added. For instance, civil remedies to a criminal offense could not be achieved until after criminal prosecution was complete; the owner of stolen goods could not get his goods back until after he had given evidence in a criminal prosecution; and a fine was imposed on advertisers or printers who advertised a reward for the return of stolen property, no questions asked. (212)

The diminution of the right to restitution substantially reduced the incentives for non-nobles "to maintain their reciprocal arrangements for protection, pursuit, prosecution, and insurance, and to participate in the local court system." Many of the hundreds ceased functioning altogether during William's reign. Succeeding regimes imposed other changes that further reduced the effectiveness of the Anglo-Saxon system of private law enforcement. More and more land was enclosed, which reduced the possibility of cattle wandering away and correspondingly reduced the value of cooperating in tithings to retrieve strays. In the 1400s, the price of wool rose relative to the prices for grain, so the lords evicted large numbers of tenant farmers and converted land that had been used for crops into sheep pastures.

> Many of the remaining kinship groups and tithings were broken apart as people were driven from their traditional homes. Thus, for a number of interrelated reasons, the reciprocity-based tithings and hundreds dissolved or became ineffective, and Norman kings were forced to attempt to establish new incentives and institutions for law enforce-

ment in order to collect their profits from justice. (206)

As a result of the breakdown of the private system of law enforcement in England (which nowadays would be characterized in the media as a failure of the unregulated market), the state eventually found it necessary to coerce people to provide law-enforcement services and to make taxpayers absorb the expenses.

> As early as 1729, the central government began to support local law enforcement in Middlesex, where the seat of government and the residences of most government officials and parliamentarians were located. Thus, government officials transferred the cost of law enforcement in the area where they lived and worked onto the general taxpayers, while the rest of the citizenry was forced (under statute) to provide their own policing and prosecutorial services. (213)

As taxation became accepted and profits from justice became a relatively less significant source of government revenues, the state began to replace fines and confiscations of property with other forms of punishment such as imprisonment and transportation to penal colonies.

> By the early 1800s, imprisonment was the major form of punishment for felons in England, and parliamentary actions in 1823, 1865, and 1877 effectively transformed England's system of punishments into a public prison system financed by tax revenues. (219)

Protection from criminals and pursuit of them was a mandated duty of all private citizens, but citizens had less incentive to cooperate after the Anglo-Saxon system had been eviscerated. So in 1692 Parliament offered rewards for the apprehension and prosecution of highwaymen. As a result, a bounty hunter industry replaced the cooperative system of law enforcement. This led to a new problem: bounty hunters began to arrest and prosecute innocent people to collect reward money. When this scandal came to public attention, the bounty hunter system was discredited.

Finally, in the 19th century, government police forces began to be established, first in the major cities, and eventually in most municipalities.

The government courts were not widely used by colonists even when those courts held a monopoly on criminal prosecution. Many settlers preferred to treat offenses as torts so they could receive restitution through private arbitration rather than go through the criminal prosecution process and have the offender pay fines to the government.

Law in the American Colonies

For a brief period in early colonial times, the colonial governments played no active role in arresting and prosecuting lawbreakers, and government courts were often circumvented:

> Public courts were available in most colonial capitals, but distance and poor roads made use of them for many colonists very expensive. Thus, government trials could be and frequently were simply bypassed in favor of direct bargaining or third-party arbitration or mediation, with restitution to the victim from the offender being the dominant sanction. (95)

As a consequence of these circumstances, officials in the judicial system had low status and received low pay, and the revenues expected from court-ordered fines did not materialize. The colonial governments acted quickly to fix these problems by instituting more public prosecutions. In Virginia by 1711 deputies of the attorney general in each county were prosecuting not only cases of special interest to the king but also most routine criminal cases. In 1751 all crime victims who wanted to prosecute offenders were ordered to confer with the deputy attorney general whether they wanted to or not, and by 1789 the deputy attorney generals had almost complete control of prosecutions in their counties. This increase in the judicial bureaucracy was motivated by demand on the part of colonial governments for money rather than by consumer demand. The government courts were not widely used by colonists even when those courts held a monopoly on criminal prosecution. Many settlers preferred to treat offenses as torts so they could receive restitution through private arbitration rather than go through the criminal prosecution process and have the offender pay fines to the government. (95-96)

Merchants established their own arbitration arrangements because the government courts did not apply commercial law fairly and the proceedings took too long. The use of commercial arbitration expanded in the 17th and 18th centuries and it continues today.

Law in the United States for the First 100 Years

The rules and procedures used in the government courts in United States were imported from England and were basically the same. But for the first hundred years or so in the United States many people continued to use private means of law enforcement. Some chose to do so because they belonged to special communities that held common beliefs (Quakers and Mormons for example). Merchant communities chose to do so for economic reasons. Frontier associations chose to do so because they were moving west faster than the government

bureaucracy. (96)

Wagon trains adopted contracts to establish the rules for the journey and used banishment as the ultimate means of enforcement. (102) Land clubs and claim associations in the west adopted written contracts that specified the rules for registering land claims, enforcing those claims, and settling property-rights disputes. Members of these groups who refused to abide by its rules and court rulings were ostracized and denied protection. (101) Mining camps also created contractual laws that they agreed to mutually enforce. When land suitable for mining became scarce enough to create potential disputes, the miners would gather together and vote to adopt rules. Rules were established by majority vote, but anyone who did not want to accept the rules was free to opt out of the contract for reciprocal protection of rights. "If a minority disagreed with a majority, they could set up their own separate mining district. Thus, those governed by a particular set of laws actually *unanimously* consented to be so governed." (104)

When government law officers finally arrived in the mining towns, they tried to establish a coercive monopoly on criminal prosecutions. The public generally acquiesced, especially when the government courts honored the claims established by the private laws of the miners associations. But when the government office holders became corrupt, the people sometimes took the law back into their own hands temporarily by creating vigilance committees until justice was reestablished. This happened several times in Montana. (See my review of *Vigilantes of Montana* in *Formulations* Vol. VII, No. 2.)

It was not merely coincidental that the government law officers often turned out to be corrupt. Government law was sometimes instituted in the west by groups of entrepreneurial swindlers "who saw opportunity in prospecting in government." (106) These criminals needed a corrupt legal system to protect themselves against prosecution for their murders and robberies, so they used the political means to replace the existing private legal system with a governmental one that they could control.

The first public police department in the United States was established by the Mayor of New York City in 1844. Soon thereafter mayors in other cities followed his example. These early police departments were established for political purposes rather than because of consumer demand, and they were corrupt.

> Crime control was, at best, a secondary concern. First of all, local elected officials used their police departments as a way to reward political supporters, much as early Norman kings granted some of the profits of justice to their powerful baronial supporters. A newly elected mayor typically fired virtually the entire police department and replaced it with his own supporters. Bribery was often necessary to obtain a position on the police force; that practice was financially reasonable, given the potential payoff from police corruption. ... At any rate, mayors and their political machines used their police departments to control the city for their own benefit. (224)

> They [police departments] may have had some impact on crime, but that does not appear to explain their growth (in many instances the police impact on crime was to facilitate its organization by accepting bribes in exchange for providing support for powerful criminals' activities, and the powerful criminals were often powerful politicians). (225)

The public distrusted the urban police departments and believed (usually correctly) that police detectives were closely linked to organized crime. Sometimes, as in San Francisco in 1856, police departments became so corrupt that the citizens had to resort to vigilante activities to reestablish order.

> The poor performance of public police is evidenced by the fact that this same period saw the birth and rapid development of the modern private security industry. ... Many of the largest and most well-known private detective and protection agencies that exist today were formed during this era of highly corrupt and ineffective public police, including the Pinkerton Detective Agency, Wells Fargo, Brinks, the railroad police, and the Burns Detective Agency. ... They protected private property and transported valuables, investigated crimes, arrested criminals, and provided all the types of crime control services that public police are expected to provide today ... (225-226)

Private Legal Services in the United States Today

Nowadays most Americans associate law and order with the state-run legal system and regard the idea of private law as unworkable and unjust. They don't know about our heritage of private law and they don't realize the extent to which private law still operates here. They haven't read Benson's book.

Private Security

In the United States, private security is the second fastest growing industry. Private guards patrol residential buildings, neighborhoods, and corporate headquarters and provide security for airports, sports arenas, hospitals, colleges, state and local government buildings, banks, manufacturing plants, hotels, shopping malls, and retail stores. (89)

> The American Banking Association and the American Hotel-Motel Association retain the William J. Burns International Detective Agency to investigate crimes committed against their members. A bank security director pointed out why. "[I]t was necessary to employ private investigators because the public police and investigative forces were too busy to devote the amount of effort required by [banks]" ... this view is prevalent in private business organizations. Private investigators therefore are frequently employed to do things that public police will not do, such as preemployment background checks or undercover work to detect employee dishonesty or customer shoplifting. (149)

> As for competition, the number of private protection and detective agencies in the Unites States probably exceeds thirteen thousand today, and competition is fierce. (171-172)

To combat employee theft, business firms use sanctions such as "dismissal, suspension without pay, transfer, job reassignment or redesign to eliminate some duties, denial of subsequent advancement, and restitution agreements." As a result, "close to half of all employee thefts are resolved internally with private procedures

and privately imposed sanctions." (125)

Private Courts

By 1992 there were more than 50 private, for-profit, dispute resolution companies in the United States. Judicial Arbitration and Mediation Services Company (JAMS), which started in 1979, has grown to be the largest firm in the industry. Civicourt in Phoenix and Judicate in Philadelphia have been settling disputes quickly and inexpensively since 1983. As of March 1987, Judicate employed 308 judges in 45 states. Other firms in the business include the Washington Arbitration Services, Judicial Mediation of Santa Ana, Resolution of Connecticut, and EnDispute, which is the second biggest firm in the industry. EnDispute had an increase in gross revenue of 130% between 1988 and 1992. JAMS had an increase in gross revenue of 826% during the same period. (115-116)

Since the 1960s community dispute resolution programs have been using volunteers to resolve domestic quarrels, squabbles between neighbors, animosities between ethnic groups, and even robberies that the courts find too trivial to bother with. (116-117)

Victim-offender mediation (VOM) is spreading throughout the United States, Canada, and Europe. In 1995 there were about 150 VOM programs in the United States.

> These programs offer mediation between victims and the criminal offenders, generally seeking restitution for the victims and reconciliation. Victims are able to express the full impact of the crime on their lives, to find out why the offenders targeted them, and to directly participate in determining how to hold the offender accountable. Offenders can also tell their story and explain how the crime affected them. Most (over 90 percent in one large survey) result in an agreement regarding compensation to the victim from the offender, and most of the agreements (over 80 percent in the same survey) are fulfilled by the offender. (117)

Unfortunately, victims cannot choose officially recognized private options such as VOM without the approval of criminal justice officials.

> Such programs have relatively little chance of making a major impact because they are simply part of the government-controlled institutional arrangement of law enforcement dominated by people who are interested in maintaining their power and influence or pursuing their perception of "public interest," rather than in actually achieving justice in the interest of individual victims. Thus, the programs tend to get the cases that prosecutors or judges do not want to be bothered with. (250)

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Neighborhood Vigilance

Because of the limitations placed on officially recognized private options, less formal institutions tend to dominate private criminal justice. In close-knit neighborhoods, whispering campaigns and ostracism have been used against offenders to induce them to pay their debts or make restitution to their victims. Sometimes neighbors will even break laws as defined by the state and seize or destroy an offender's property when he refuses to pay his debts. (119)

Organized residents in crime-ridden neighborhoods have pressured drug dealers and associated violent criminals to leave. In general, these anti-crime volunteers wear distinctive apparel such as orange hats (so they won't be mistaken for drug dealers or their clients), and they stand watch outside crack houses and on street corners where drug traffickers and prostitutes congregate. Sometimes they chant anti-drug slogans, write down license-plate numbers, and carry video cameras and two-way radios. These activities cause the drug dealers, their clients, and the potential muggers who prey on customers of drug dealers and prostitutes to feel uncomfortable and to take their business to less vigilant neighborhoods. Sometimes these neighborhood groups go beyond libertarian methods by reporting building-code violations to the city government, causing the city bureaucrats to serve eviction notices and confiscate crack houses. (119-124)

Private Streets

Many residential developments all around the United States involve private streets and private security arrangements (90). The same is true for many apartment and condominium complexes, enclosed shopping malls, and office parks (92). In 1970, the residents of several crime-ridden neighborhoods in St. Louis, Missouri, petitioned the city to deed the streets to them, and the city complied with the requests "in return for the residents' assumption of responsibility for street, sewer, and streetlight maintenance, garbage pickup, and security services above normal fire and police protection." (84)

A comparison of crime rates on private streets with those on adjacent public streets shows significantly lower crime in virtually every category. (158)

Pitfalls of Privatization

Benson recognizes the dangers involved in privatization. If services are

privatized as monopolies, the private services are likely to be almost as inefficiently provided as government services because of the lack of competition. (42) If services are privatized on an open and competitive basis they will be provided efficiently, but this is only a good thing if the service demanded is itself a good thing. Benson explains the point this way:

> If Hitler had contracted out the rounding up and extermination of Jews, it might have been accomplished at a lower per unit cost and more Jews could have been exterminated, but the fact that more of these politically defined "criminals" could have been exterminated more "efficiently" in a technological sense does not mean that the contracting out of this process would have been desirable. (47)

To avoid the pitfalls of privatization, such as monopolies and political corruption, Benson recommends privatizing the demand for criminal justice services as well as the supply. (48)

Hiring Criminal Services

In a libertarian nation, most kinds of contracts would be honored in private courts, but not all contracts. A murder contract would not be upheld, nor would any other contract between two parties to deprive a third party of his legitimate property. Some services now provided by various levels of the US government deprive people of their legitimate property and liberty. In a libertarian nation these services would be abolished rather than privatized. For example, a private company called Multi-State, which rents narcotics agents to small-town police forces and which in its first few months of operation arrested 150 drug traffickers and seized thousands of dollars worth of drugs, would be regarded as a criminal organization. (19) Another example is Behavioral Systems Southwest, which runs a prison that deprives 600 to 700 "illegal aliens" of their liberty on behalf of the Immigration and Naturalization Service. (21) Although many libertarians disagree with me, I regard the private prisons advocated by Benson as criminal organizations for the same reason that Murder Inc. and rent-a-narc companies are illegitimate—they violate people's rights.

The Theory of Restitution

It is common knowledge that people disagree as to the proper amount of punishment or restitution due in cases of murder, rape, kidnapping, maiming, and other forms of assault and battery. It is less often acknowledged that different opinions are possible in the easiest cases. Consider a case of simple theft. Suppose Mooch steals Brown's car. According to restitution theory Mooch has an obligation to restore Brown to the condition he was in prior to the car-theft, and Brown has an enforceable and transferable right to obtain restitution from Mooch. If Mooch does not make restitution voluntarily and if Brown does not have the time or resources to extract restitution from Mooch, Brown can sell or transfer all or some of his right to restitution to an insurance company or prison-labor company or any other company or person. The person or company that has the right to restitution can legitimately use force against Mooch to extract the restitution, even if the only way to do so is to capture Mooch and put him in a work-prison. Benson's theory of restitution encompasses imprisonment of criminals if, and only if, "imprisonment to supervise the criminal as he works off his debt to the victim is the only way to assure payment." (231).

This theory seems straightforward until you start asking questions about the objectively correct amount of restitution. To keep it simple, let's suppose that Brown by himself tracks down Mooch. Now consider these questions: (1) Should Mooch return the car to Brown? (2) Does Mooch own Brown compensation for the amount of time Brown was deprived of his car? (3) Does Mooch owe Brown reimbursement for the costs of investigating the crime and tracking him down? (4) Does Mooch own Brown compensation for the emotional trauma caused by Mooch's crime? (5) Does Mooch deserve to be punished in addition to his obligation to make restitution? Different theories of restitution are defined by how many of these questions are answered in the affirmative and by whether an affirmative answer implies an enforceable right (call this a hard yes) or merely a recommendation to the offender (a soft yes).

A total pacifist would answer each question with either a soft yes or a no. I would give a hard yes to the first question and a soft yes to the others. For criminal debtors like Mooch, Benson gives a hard yes to all five questions. For non-criminal debtors Benson gives a hard yes to the first four questions and a no to the fifth:

> Like tortfeasors, criminals should be held accountable for the measurable damages they do, but since crimes with victims are intentional harms, criminals' restitution payments should cover both measurable damages for the restoration of property or health (or if restoration is impossible, as with severe physical harm or murder, for the present value of the stream of lost income) and so-called punitive damages to compensate for the invasion of another person's property rights. (235)

No only do people give different answers to these questions, but people who give hard yes answers to the same questions do not agree on a standard of measure for calculating the amount of restitution owed, they do not agree on what the ratio between crime and restitution should be, and they do not agree on the extent to which penalties should be augmented or mitigated by special circumstances. Furthermore, there is no way to determine which of the many plausible opinions on these issues is objectively correct. Benson gives historical examples of different yardsticks used in different cultures. A rule of thumb in the Bible (Numbers 5: 6-7) specifies that an offender must pay measurable damages plus one-fifth for the immeasurable harm. In medieval Iceland fines were adjusted, in part, depending on whether the offender tried to hide or deny the offense. In Anglo-Saxon England a first offender could make restitution, but a second offender could not be forgiven and was declared an outlaw who has no right to live. Also in Anglo-Saxon England, the status of the offender and the victim were taken into account so that the wealthy and the powerful were required to pay more as offenders and were entitled to receive more compensation when they were victims.

My reason for giving soft-yes answers to the last four questions about the car thief is that I do not believe crime and restitution can be quantified with the precision necessary for enforceable rights. This is not a problem for Benson

because in his view the right to restitution negates the rights of the criminal. Benson is willing to go along with whatever rules for restitution are acceptable to the majority in a particular culture.

> The point is that the rules regarding restitution can be as complex and fine-tuned as the society wants them to be, and the precise rules that might evolve in a modern restitution-based system would naturally depend on the norms of the citizens of that society. (240)

The priority that Benson gives to restitution versus concern for the welfare of criminals and their families allows him to entertain proposals advocated by some utilitarian economists who are interested in deterring crime. One such proposal is to set fines equal to the measurable costs to the victim plus the costs of bringing the offender to justice divided by the probability that the offender will be brought to justice. This means that the penalty is doubled for types of crime that are now being solved half the time, the penalty is tripled for types of crime that are now being solved one-third of the time, and so on. Benson does not stress the arbitrariness of linking restitution to the variable rate at which criminal cases are cleared in the courts and the incompatibility of this with any coherent notion of objective rights. Instead he worries about the incentives that such a system would set up. "If damage awards are too high, there are incentives to falsely accuse and to falsify evidence in order to collect the damages." Also, if the fine is too high "there may be incentives to commit an additional crime: if killing the robbery victim reduces the chances of getting caught, and the restitution for robbery is greater than or equal to what the robber can conceivably pay, then the robber might rationally commit murder." (243-244)

To determine the level of restitution that will diminish the incentives to falsely accuse and provide effective marginal deterrence of crime, Benson seems to advocate that we experiment with people's rights as though life were a video game that were inventing and we can play the restitution game under different sets of rules to find out which version of the game is the most fun. Benson has confidence that competition in the private justice industry in the free market will produce better and better rules for restitution. I would agree with him if he were referring to voluntary forms of restitution. But when we are considering forms of restitution that are imposed by force we are no longer considering an economy with an unhampered, free market. To the extent that the market for forcible restitution is unhampered, the market for protection services is restricted. As victims' rights to restitution wax, the rights of the protection-services industry to defend debtors wane. Repossession of stolen property is not an act of aggression, but any use of force beyond that to obtain restitution or to punish an offender is arguably an aggressive act. To the extent that restitution and punishment, beyond repossession of stolen property, are not worked out voluntarily, the overall market is not free.

> the residents of several crime-ridden neighborhoods in St. Louis, Missouri, petitioned the city to deed the streets to them, and the city complied with the requests "in return for the residents' assumption of responsibility for street, sewer, and streetlight maintenance, garbage pickup, and security...

Conclusion

Benson's system of restitution-based justice administered by private enterprise is superior to the current American system of justice, and I suspect it is more acceptable to most radical libertarians than it is to me. It occupies a position on the libertarian spectrum somewhere between my position in which self-defense is the only legitimate excuse for using force and Murray Rothbard's retributive-justice-plus-restitution position. (See my article "Law and Violence" in *Formulations* Vol. VI, No. 1 for an explanation of how I classify libertarian theories of law according to the kinds of violence they condone.)

Thanks to Benson's research this book is full of information of value to anyone interested in establishing a libertarian legal system. Except that I believe restitution should be voluntary rather than forced, I share Benson's assessment of his hope for the success of this book:

> Criminal justice is not going to be privatized immediately upon publication of this book. The hope is, however, that at least some of the analysis presented here will be sufficiently convincing that the already very rapid privatization trend can be accelerated, at least on some dimensions. That is why a large number of privatization options have been discussed, from more contracting out (recognizing its potentially serious flaws and shortcomings), to lifting legal barriers that limit the use of private security, all the way to a major reorientation of criminal justice into a restitution-based system that allows private courts (arbitrators or mediators) to determine restitution fines and private collection firms to supervise them. (317)Δ

To Serve and Protect: Privatization and Community in Criminal Justice ISBN 0-8147-1327-0 is published by New York University Press, Washington Square New York, NY 10003. Their website is http://www.nyupress.nyu.edu

Roy Halliday has written his own book about criminal justice: Enforceable Rights: A Libertarian Theory of Justice. *It is available at his website http://*

royhalliday.home.mindspring.com/ROYHOME.HTM

(Concluded from page 19)

Libertarian Nation Foundation

The Libertarian Nation Foundation holds that a libertarian nation, conceived as such from its beginning, ought to exist and should be created. LNF develops formulations for the institutions and social arrangements of a libertarian nation. LNF will continue to provide the arena for discussion which had characterized FNF from the beginning. LNF will continue to display the (formerly FNF, now) LNF Statement of Principles on its web site and in issues of *Formulations*. As such, LNF will try to create an atmosphere which encourages the development of ideas about all of the voluntary social institutions which might manifest themselves in a libertarian society. LNF, as an organization, will not attempt to determine that some of these institutions are vital while others are not, allowing authors and audiences to make such appraisals for themselves. While financial donations towards this work from anyone who believes in it will be welcome, LNF is not focused on the recruitment of wealthy patrons.

LNF will sponsor the continued publication of *Formulations*, hopefully getting back to a regular schedule soon. An effort to reorganize *Formulations* and recruit new participants is now underway. The fate of the Forums has not been so clearly established, though it is possible that there will be fewer of them and that they will be less formal in character, than was the case at FNF. The e-mail FNF Discussion List, a private enterprise owned by Roy Halliday, has been replaced by Roy with another list associated with LNF. Other ideas have been discussed as well.

LNF is organized as a non-profit corporation (as of this writing still applying to the government of the USA for 501(c)(3) tax status). The LNF Board of Directors has adopted a set of Bylaws which is very similar to that of the FNF Bylaws. LNF Directors include President Bobby Emory, Secretary Roy Halliday, Treasurer Jesse Halliday, plus Wayne Dawson, Roderick Long, Robert Mihaly and myself. The FNF Bylaws were used as a model for the LNF Bylaws, with some modifications. The Statement of Principles is explicitly included in the Bylaws. Directors will be assumed to be aware of the activities of the organization, and to be expressing any serious concerns that they have. There is now a provision allowing for responsibility and authority regarding specific projects to be decentralized.

Internet Sites

Each "daughter" organization will have its own new Internet site. LNF's site ("www.libertariannation.org") will initially duplicate (except for organizational name changes as appropriate) the existing material at the old FNF site. The Archive located at the LNF site will continue to add issues of *Formulations*, as they become available. The FNF-CI site (www.fnf-ci.org) may, by the terms of the Split Agreement, use any of the content from the old FNF site. I am not aware of the details of Rich Hammer's plans for that site, however.

The original Internet site for FNF, "freenation.org" will be reduced in scope considerably. At "freenation.org" an individual surfing the Internet will find only a brief description of the split of FNF into two organizations, and two links out to each of the "daughter" sites. Links will exist at each "daughter" site to the other "daughter" site.

Conclusion

The splitting of FNF will come as a surprise to most FNF members. It may appear to some that they are being encouraged to "take sides" in a dispute. This was not the intention of those involved in writing the Split Agreement. The idea behind the agreement was to allow the distinct visions for FNF, which had been held by those involved, to be pursued independently without further conflict. This will we hope, allow more opportunity for all—especially for the membership of the former FNF. We urge the FNF membership to explore each organization and to become involved in either or both as seems appropriate. It's supposed to be a positive sum environment.Δ

(Concluded from page 32)

6—Conclusion

The "idols" I observe above do not represent completely futile efforts at obtaining legitimacy. Each has value, used appropriately (yes, even the inevitable inertia provided by ignorance). But the legitimacy of a libertarian society will also require strong institutions for educating citizens and will require institutions which foster a "mythology" for the
society. These I have discussed in other essays for *Formulations* [see "Political Curriculum: Education Essential to Keep a Free Society" *Formulations* Vol. III, No. 3 and "Sacred Choice: Myths for a Free Nation" *Formulations* Vol. VI, No. 3]. But above all, the legitimacy of the libertarian society must be a living thing. It must exist in the here and now, not just in cleverly worded stories and essays.

FNF's Statement of Purpose calls for "formulations": "clear and believable descriptions of those voluntary institutions [of civil mutual consent]". This is good. It is a necessary step to the establishment of a free nation somewhere. But the Statement of Purpose also calls for "building communities of people who share confidence in these descriptions." I say that such communities will be much easier to build, and the confidence will be much stronger, if the people in them actually use the institutions involved–even before any group of them breaks fully away from the statist societies in which they currently live. This can be done, prior to anyone changing residence, prior to any claim to separate geography, prior even to a Declaration of Independence. The legitimacy of the free nation will be enhanced by such early community building. Indeed, that legitimacy and the very survival of the new community may require pre-secession practice.Δ

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On this issue I found myself in the middle. On the one hand I was largely in sympathy—perhaps more than any other Director besides Rich—with the FNF Workplan; on the other hand, unlike Rich, I generally found the contributions of those who in retrospect might be called the "anti-Workplan faction" (for want of a better label) to be complementary to and helpful toward the FNF Workplan rather than a distraction from it. (See the debate in our last issue between Phil Jacobson and myself on the subject of the FNF Workplan) Certainly I—unlike both sides at present, apparently—never saw any conflict between the FNF Workplan and the FNF Statement of Principles, since the task of formulating, and trying to attract a libertarian consensus on, the critical institutions of a free nation was always an integral part of the Workplan.

In any case, the result of Rich's discouragement was his decision to resign as president of FNF and withdraw from most of his FNF work, postponing the FNF Workplan until such time as he could devote more time to it, or raise more money for it. Since he had always been the prime mover of the organization, Rich expected FNF to lapse into quiescence in the wake of his resignation; but other Board members surprised Rich by undertaking to step in and continue the functions that Rich was relinquishing.

Concerning this series of events, two very different interpretations have arisen. To the anti-Workplan faction, this is the point at which Rich, by resigning as president and drastically reducing his FNF involvement, surrendered all moral claim to control FNF, yielding the reins to the other Directors. To Rich, by contrast, the other Directors' agreement to take over all the functions that Rich was relinquishing represented a contract or promise, and when subsequent implementation faltered, it seemed to Rich that the anti-Workplan faction had defaulted on its promise and thus had surrendered all moral claim to control FNF.

Each side in this dispute appears to regard its own interpretation as obvious beyond doubt, and from this perspective the other side's position is bound to appear disingenuous. Having moved to Alabama by this time, I was not present at the meetings where these decisions occurred, so my information about these events is second-hand; but on the basis of what I do know, I do not find either interpretation too implausible to be accepted by honest and well-meaning people; nevertheless, I find both interpretations too one-sided to be compelling, and thus am not convinced that *either* side then surrendered all moral claim to FNF.

> I am proud to serve on the Board of both the Libertarian Nation Foundation and the Free Nation Foundation-Critical Institutions. Let us continue to build the road to a free nation.

In any case, Rich decided he wanted back the rights to the FNF name and website, appealing to his rightful ownership of FNF. The possibility of splitting FNF into two organizations emerged, but the question remained as to which side would retain rights to the FNF name and website. The anti-Workplan faction's position was that since Rich in founding FNF had constituted it as a majority-rule corporation, he could not be the rightful owner of it. Rich's position was that since he had been the creator and motive force behind FNF, he had a moral right to it regardless of the content of the by-laws. It was with reluctance that I took sides in this dispute, since I valued the contributions of both sides and regarded both sides as having some legitimate moral claim; but I was one of the Directors who voted with Rich on this matter. Let me explain my stand.

I am not convinced that Rich had a *right* to FNF, in the sense of a legitimately *enforceable* claim. But the realm of moral claims is not exhausted by rights alone. Whatever the legal structure of FNF may have been, Rich was unquestionably the prime mover of FNF for most of its existence; it was created and sustained by his blood, sweat, and tears; and so, even if the Board had the *right* to refuse his request, it would have been *wrong* to exercise that right. I won't deny that other members of the Board had made contributions that earned them some moral claim also, but in my eyes their claim was simply not of the same magnitude as Rich's; hence in case of conflict it was Rich's claim that had to take precedence.

The FNF split was a disappointment to me; and it was particularly painful to have to take sides in a dispute among people whom I continue to regard both as cherished friends and as valuable intellectual allies. Nonetheless, I view the split as a crisis from which both groups can emerge strengthened; I support the missions of both the new organizations, and I am proud to serve on the Board of both the Libertarian Nation Foundation and the Free Nation Foundation-Critical Institutions. Let us continue to build the road to a free nation.Δ

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than for a geographically contiguous one. But again, the issue is more one of sentiments.

The second variable would be to allow, recognize, and even encourage each resident-alien community to have its own identity. To the extent that resident aliens become a distinct community, the libertarians may consider the need for them to do so formally and take some of the libertarian community's resources with them. It may be that this is just another kind of libertarian community, the same "splitting" process whereby long-established libertarian subcultures break away. Or it may be that the resident aliens want to set up–for themselves, a non-libertarian community nearby. This is where the "virtual" libertarian community has an advantage, for the new non-libertarian neighbors can be treated just as old non-libertarian neighbors had been treated. But for a contiguous libertarian community, the breakaway process may run afoul of some sense of monopoly, which the libertarians had hoped to impose and keep over the geography. If serious conflict is to be avoided, the contiguous libertarian community will have to trade isolation for flexibility from its inception, and discourage resident aliens in the first place. Worldwide, even this strategy generally has not worked in the long run.

5—False Idols

5.1 A Broad Approach Is Needed

All too often, libertarians have concluded that some single institution is wrong with statist societies. In each case, the assumption is made that when this institution is corrected, all other social institutions will conform to it, thus transforming the statist society into a libertarian one. But societies emerge from ecological contexts, not from drawing boards. To the extent a society is a function of purposeful planning, that achievement is more akin to gardening than to the design of a new machine.

Attempts to establish legitimacy exclusively via well formulated social philosophical tracts justifying the legitimacy of a proposed libertarian regime are inadequate. While this tool is useful, the key to the adoption of any social philosophy is in the establishment of a working political tradition wherein that philosophy is both respected and of practical value. This task precedes the formation of any functional separate society.

Thus the problem of legitimacy in a libertarian society requires consideration of many institutions. A libertarian society, like any other, will be functional only if all its institutions are compatible with one another. Those who would envision a libertarian society should consider the full spectrum of institutions, realizing that even then each real society will have unique characteristics.

Many libertarian thinkers seek an end to politics. Politics is simply the pursuit of human action via informal, extra-legal alliances between individuals. By *extra-legal* I do not necessarily mean illegal but merely the building of alliances based on perceived mutual self-interest, where such alliances are not enforceable by any legal or even a traditional authority. Both traditional and legal factors may also influence a political alliance, but the basic glue is diplomacy.

The human use of political alliances to address serious issues is a biological trait, which cannot be legislated out of existence. An attempt to build an "anti-political" tradition will simply weaken the natural strength of the community. Indeed, it is politics which is the natural human vehicle for consciously planned social change. Politics is the tool of the social gardener, not a weed to be driven out. Politics is essential to building legitimacy.

5.2 The Idol of Written Constitutions and Other Contracts

Most libertarians, living in the statist societies which currently dominate the globe, feel oppressed by rules which have been made into law by the work of political alliances. Many libertarian thinkers seek a new "politics free" society where citizens would arrange all significant relations between themselves via voluntary contracts. These mechanistic social engineers often believe that the only significant tasks of libertarians are to formulate a code of conduct for a libertarian society and to get other individuals to contract with one another to adhere to this code. Legitimacy would presumably follow.

While these two achievements are laudable, they are inadequate for the formation of any society—a libertarian society being no exception. New societies do not spring whole from the plans of men, but rather are modifications made when a part of an older society breaks away. Such breaks may be consciously conceived, but cohesion for the new group will not be achieved simply on the basis of contracts. Deeper belief systems already in place provide the basis for a code of conduct. The break-away group may have some very distinct beliefs from the older society. But the beliefs of the new group will depend more on the older group's beliefs than on any new beliefs that distinguish the new community. Over a period of years, after the separation, further new ideas may effect the new group, evolving it further away from the old. But it will take generations before the new group is based on largely different principle than the old.

Contracts, while a useful tool to the social gardener, are brittle cultural machines which will break or fade out of significance as social change follows from inevitable shifts in ecology. Deeper, traditional values must be available from which to forge alternatives when contracts reach the limits of their value.

5.3 The Idol of Geography

A few cultures have thrived in geographical isolation. Some who plan libertarian communities assume that a libertarian community could thrive if geographically isolated from other communities. If nothing else, a contiguous piece of real estate with a well-guarded border is planned, to keep non-libertarians out of the new community. If only libertarians are allowed inside, it is reasoned, then the legitimacy of the community is assured.

Two problems exist when depending on geographic isolation to ensure legitimacy for a libertarian community. First, the libertarians themselves will not agree on everything. A very narrow interpretation of libertarianism, say Orthodox Objectivism, might keep all inside the community within the same ideological sphere. But it is unlikely a sizable community could be assembled with such narrow beliefs. Indeed the very nature of libertarianism itself makes for a wide variety of individual beliefs. Internal diversity will plague the

community if it depends on geographic isolation alone.

Secondly, the border of most libertarian communities will not likely be so strict as to allow for an easily enforced policy of orthodoxy regarding immigration and resident aliens. As free traders, most libertarians will want extensive economic and cultural exchange with non-libertarian neighbors. A significant pressure will thus exist for a lax border policy–laissez passer.

5.4 The Idol of Property

Some libertarians call themselves or are called by others, "propertarians". Many of them rely heavily on property claims to establish legitimacy. It is often thought that if one can acquire a valid property claim to real estate or other assets, one can assume the legitimacy of what one does with them.

I myself like to use property claims as a basis for analyzing social systems. But in doing so I always like to point out that these claims are subject to dispute. So while it may be true that to get someone to agree that something is your property is to get them to give your use of it legitimacy, we are merely playing with words to say so.

Property claims are often hard to validate. While a claim may be traced back across many transfers of "ownership", the original claim may still be in dispute. Further, there is considerable disagreement between cultures and political traditions as to what things can become property. Most cultures disavow slavery, the ownership of one human by another. But many also disavow "intellectual property". Rules regarding homesteading vary. Rules for establishing abandonment vary. Respect for various systems of inheritance vary. Property claims which originate in conquest are often questioned. More often than not, property claims are respected because of good relations between the people involved, rather than as a result of abstract legal theory. A good theory and chain of documentation is fine. But politics and diplomacy will often trump them.

5.4 The Idol of Ignorance

In most societies most persons have a poor understanding of why they respect or disrespect the legitimacy of the institutions around them. Such persons usually grant respect or legitimacy on the basis of emotion, only to copy "their reasons" for these sentiments from other, more verbally adept persons around them. This tendency leads many community leaders to take ignorance for granted, and to cultivate an atmosphere where claims to legitimacy will be settled by "experts", the common citizen being expected merely to obey. We like to think that libertarian citizens would not be fooled by such tactics and that libertarian leaders would not resort to them. But even in a libertarian community, there will be some reliance on citizen ignorance on the part of leaders who seek to confer legitimacy upon the communities institutions.

However, being libertarian the citizens will be equally if not more susceptible than non-libertarians to calls for critical examination of institutions when the institutions perform poorly. And any participants in the libertarian community who are not libertarians may not only embrace criticisms of institutions which are dysfunctional, but may further question the libertarian foundation of the community at large, when allegedly "libertarian" institutions fail. Thus a reliance on public ignorance to grant default legitimacy to a libertarian community's institutions is a poor strategy.

5.5 The Idol of Economics

When the economy of a community does well, people often accept the community's institutions because they assume that these institutions contribute to prosperity. To some extent this can be valid reasoning. It would probably be more so in the case of a libertarian community, since most libertarian theory alleges that libertarianism fosters prosperity.

But legitimacy requires more than a feeling of economic well-being. Those who find themselves without economic insecurities may indeed lapse into a carefree state with respect to other issues. But others in the same position may grow restless, seeking new challenges. It is common for instance, for the children of well-to-do persons to join crusades for "social reform". It is also common for those who have set aside feelings of injustice while they strove to attain economic prosperity, to seek to use a new position of strength to settle old scores.

When these forms of prosperous restlessness develop, it will be all the more important for the non-economic libertarian institutions to command respect. Institutions which foster justice and tolerance will be needed at these times. They should not be called into being only at the last minute, but should be available as a result of long-standing tradition. Leaders should not grow dependent on buying off dissent, though this tool may be useful much of the time. Active traditions of diplomacy and mediation of disputes should be available to maximize the legitimacy of resolutions found within solidly libertarian institutions of conflict resolution which value tolerance and individual responsibility.

(Concluded on page 29)

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