



**Forum:
Business in a
Free Nation
19 October 1996**

Come to the next Forum of the Free Nation Foundation. It will meet on Saturday, 19 October 1996, from 10 AM till 5 PM, at Oliver's Restaurant in Hillsborough, N.C. The topic will be "Business in a Free Nation."

Three papers in this issue of *Formulations* will be presented at the Forum by their authors. These are: "Business in a Free Nation," by Richard Hammer, beginning on page 3; "Business in a Free Nation," by Philip Jacobson, beginning on page 30; and "Beyond the Boss: Protection from Business in a Free Nation," by Roderick Long, beginning on page 37.

Additionally, we will discuss the content of two papers whose authors, too far distant, could not attend. These are: "Optionality: Beyond Law and Order," by Ben Mettes, beginning on page 28; and "Everyone at Risk," by Dennis Riness, on page 35.

The cost of the Forum is \$10 general admission, and \$8 for FNF Members. You may pay at the door. Oliver's Restaurant is on South Churton St., about 0.5 mile north from Interstate 85, exit 164.

If plan to attend, you might call Rich Hammer a few days or more ahead of time, at 919-732-8366, and he will reward you with a computer-printed

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formulations

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Foundation News Notes

- The Free Nation Foundation rented a display table at the national nominating convention of the Libertarian Party in Washington D.C., on 3-7 July. All five FNF Directors were at the convention, and took turns staffing the table.
- A midsummer dinner meeting of FNF Directors, Members and Friends, attracted a record low turnout. On 15 July, at Oliver's Restaurant in Hillsborough, two Directors and one Member enjoyed themselves anyhow, in a meeting which had nothing crucial on the agenda.
- A group, focusing on Isabel Paterson's classic *The God of the Machine*, met on three Monday evenings early this summer to discuss what Paterson teaches in this important but difficult-to-understand book. The meetings, which were announced in a mailing, took place in Richard Hammer's living room, and were attended by 5-6 men who shared animated discussion late into the evening. The discussions were led by Roderick Long and Richard Hammer.
- With the success of the meetings (above) to discuss Paterson's book, the group scheduled another series of three meetings to discuss *Origins of the Common Law*, by Arthur R. Hogue. In these meetings, likewise held in Richard Hammer's living room, and likewise announced in a mailing (to all FNF Members and Friends, as well as to all local names on the mailing list), discussion is being led by Philip Jacobson.
- Planning to post almost all of our publications to the World Wide Web, Roderick Long has started to send electronic copies of *Formulations* to Marc Joffe. Marc maintains a Web page in accordance with our joint publication agreement (described on page 2). Rich-

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Topic for Spring Forum: Family Structure

We invite our readers to start thinking about family structure in a free nation, as that will be the topic of our Forum in April '97. We want your ideas, and we seek people to write and present papers on the subject. The specific time and place of the Forum will be announced in the Spring '97 issue.

We assume that government in a free

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Editor: Roderick T. Long

a publication of the
Free Nation Foundation
[outdated street address]
Hillsborough NC 27278

Statement of Purpose

The purpose of the Free 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.

Board of Directors

Richard O. Hammer, President
Bobby Yates Emory, Secretary
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Roderick T. Long
Christopher H. Spruyt

Formulations is published quarterly, on the first of March, June, September, and December.

Subscriptions to *Formulations* may be purchased for \$15 for four issues (one year). Membership in the Free Nation Foundation may be purchased for \$30 per year. Members receive: a subscription to *Formulations*, 20% discount on conference registration fees, invitation to attend regular meetings of the Board of Directors, copies of the Bylaws and Annual Report. Additional contributions are welcome.

FNF is a 501(c)(3) federal income tax exempt organization.

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.

All submissions are subject to editing.

Submissions will be considered for publication if received by the 15th of the month preceding month of publication. Thus, the deadlines for writers are: February 15, May 15, August 15, and November 15.

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JOINT PUBLICATION AGREEMENT

Pursuant to agreement between Marc Joffe, Director of the New Country Foundation (NCF) headquartered in New York, NY, and Richard Hammer, on behalf of the Free Nation Foundation headquartered in Hillsborough, NC, *Formulations* carries material from NCF as well as from FNF.

Material in *Formulations* from NCF is distinguished by a line "for the New Country Foundation" under the author's name.

In reciprocation NCF publishes material for both Foundations in electronic media, the Internet and World Wide Web (<http://www.freenation.org>).

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Statement of Purpose

The purpose of the New
Country Foundation is to es-
tablish a libertarian nation.

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Information for Authors

Material for publication
through the New Country
Foundation should be sub-
mitted to Marc Joffe, at either
the postal address or the e-
mail address above.

Business in a Free Nation

by Richard O. Hammer

INTRODUCTION

Working with this topic "Business in a Free Nation" has educated me. But perhaps I have learned more of importance about the meta-topic, the larger problem which includes this topic as a particular instance, than I have learned about business in a free nation.

Later, in the body of this paper, I will get to the intended meat, speculating on general changes which I believe we would see in the business environment in a free nation, and speculating more specifically on residential living arrangements that I think would evolve in a free nation. But before I get to that I want to share what I think I have learned about the meta-topic, about the problem of finding people to contribute on this topic.

I have searched far and wide for people who could contribute ideas to answer any of the five questions with which we outlined this topic, "Business in a Free Nation." A few people have told me that they like the questions. But almost no one has developed, so far as I have found, answers to the questions.

As I think about it, perhaps I should have expected this. It is difficult to imagine what institutions of business would evolve if government backed out of regulating business. It is guesswork. It is a little like trying to predict the specific behavior of a cat which is set outside the door. The behavior will unfold, in a mix which reflects both the motives of the cat and the moment-to-moment experiences of the cat as it moves into the environment.

To the extent that we can predict what the animal will do, we must employ our understanding of the nature of the animal. And similarly, if we would predict what business will do when freed, we must employ our understanding of the nature of business.

My frustration in finding so few people who have ideas about "Business in a Free Nation," has led me to think that maybe complaining about government is not all bad. As you may know, since I have grown weary of the stream of angry complaints

about government which emanates continuously from both me and other libertarians, in FNF I encourage people to stop complaining and start building. I do not want to hear again what is wrong with



Rich Hammer

government. I want to build, by first building the vision, what we will use to supplant government.

But while many libertarians have a vision of how medical care, or schools, or highways, will be supplied without government involvement, because these libertarians know well how government has messed up these services, not many libertarians, or anybody for that matter, has an idea of how business will change if we get government out of business law. This lack of vision may exist because there have not been enough complaints, circulated in the libertarian media, about the sorts of ills which I think I see resulting from government seizure of law. Maybe now and then a spate of robust complaining helps things along.

During the last few years I have developed a sort of specialty (some, I am sure, may reasonably call it a sort of insanity) in spotting ill effects of state action. I can find plausible ways to blame government for almost every social malady.

Every act of state, I believe, has some bad side effects. But while many people who object to acts of state are vividly aware of the bad side effects of an act during the era in which the act is debated, as many Americans now know the bad side effects of a government takeover of the medical indus-

try, it seems to me that most people forget the bad side effects of an act long after the act has passed, as fewer Americans now know the bad side effects of government takeover of care for the elderly poor (in social security). As time passes it seems to me that people forget the particulars of the debate.

And worse, they forget that there ever was a debate. Fewer people question zoning than social security because, I propose, zoning has had longer to seep into the public mind. Still fewer people question bankruptcy law, and government-granted protection of intellectual property. Almost no one questions whether government needs to run courts of law; this, you see, was one of the earliest ways that government metastasized.

Okay, now that I have given you my excuses for failing to find more material on the topic, "Business in a Free Nation," I will proceed to give you some of what I, personally, have come up with.

CHANGES IN THE GENERAL BUSINESS ENVIRONMENT

Law

In several ways, the business climate would be more favorable in a free nation than in America. Perhaps the most significant of these ways pertains to enforcement of contracts. In a free nation I am quite sure that contracts would be enforced more effectively. Let me explain why I believe this.

Whenever a contract is broken someone is hurt. Someone has been promised something that he or she has not received. Now, when someone is cheated, he usually can be expected to seek redress, if means of redress are readily at hand. If however, there are no means readily at hand, or if, which has the same effect, the means available are prohibitively expensive, then the wronged person is just whistling in the wind, and has no effective recourse.

In a great many of cases, where the wronged person is powerless to seek recourse, the government can be blamed; some act of state has removed from the wronged person the power that person would have had in voluntary society.

Consider the government-monopoly system of law. Generally, someone wronged in a business deal in America must work through the government court

system, and that system is so inefficient and expensive that it is pointless for anyone to seek redress unless they have been wronged in excess of, say, \$1000. This means that there is a whole class of little crimes which go largely unenforced. While businesses usually have things they can do to try to protect themselves from these little frauds, still, in too many cases, businesses must be prepared to accept losses in this range.

Now this problem might not cripple business in America as much as we might first think because, I am learning as I study human institutions, order grows where it is needed. Even where government has done something to bollix up the works, the current of enterprise often finds a way to flow around the blockage, to satisfy the demand for a good or service. For example, I am struck that credit card companies have done a good job of creating inexpensive ways to settle disputes between vendors and customers.

So in order to find the aspects of business which I posit would work better in a free nation, we need to look in places where free enterprise has not flowed around government blockage. Such places will exist where government requires that business deal with it in one stage of the process. For instance, to repossess an automobile, or to evict a tenant, often a government court order is required, and this process of seeking justice then becomes the sort of action that costs \$1000 or more. Businesses doing this sort of business simply have to assume that values of less than \$1000 cannot be recovered, and must adjust their practices accordingly, possibly passing the expected cost on to a broad class of customers, or perhaps taking steps to avoid doing any business with a suspect class of customers.

So, in the free nation, more businesses will readily sell to suspect classes of customers, because those businesses will have access to less expensive, and more reliable, means of seeking justice.

In the free nation, the extension of law into the policing of low-cost transactions would allow the growth of certain businesses which are not possible in America. To illustrate, I speculate about an industry in single-trip car rental.

When I go to the airport, to a shopping mall, or to an office in a crowded downtown, I think I should be able to rent a car, economically, for just that one trip. And

then rent another car for my return trip. When I arrive at my destination, why should I have to go through the hassle of finding a place to park, and then pay to park, when at about the same time other people are leaving there to go to somewhere else. There should be some business which takes the car I am done with, rents it to somebody else, saves the hassle and expense of parking, makes more efficient use of the capital invested in the car — and makes a profit. And this should be cheaper for me than taking a taxi, because I would not be paying the driver. But there is no such business, because, I believe, of a swarm of acts of state.

Let us focus, in particular, on the government-monopoly legal environment and its ramifications. A business that rented cars routinely and rapidly, in this way, would need efficient recourse against a fraud who took a car under false pretenses and wrecked or stole the car. Not in America.

Furthermore, a business that rented cars in this way would need legal support to enforce many little, but necessary-for-the-business, provisions of the rental contract. Probably this business could not work if renters routinely abused the cars and got away with it. So the business probably would need to screen its customers, and probably would need efficient restitution for nuisances, such as \$5 soda spills and \$50 paint scratches. Not in America. But in a free nation I think it would be possible.

Cities

Businesses in a free nation could work in cities which were densely populated, clean, and safe. Here I explain why, and contrast cities in the free nation with cities in America.

Since trade among people became established, cities have formed spontaneously because transactions costs decrease as trading partners come nearer to each other. Creation of wealth, through specialization and trade, occurs with more efficiency in cities. People, wanting a share of the wealth, have moved to cities.

Unfortunately governments also grow, almost spontaneously it seems, in human populations which attain certain levels of density and wealth. Thus, if I am not mistaken, governments grew first and fastest in cities. And governments, when they reach a certain size, become a fatal cancer. This, in my view, is what happened in most

large American cities during this past century. The cancer of government crippled the natural institutions of voluntary society first and worst in cities. The cities became unlivable.

But since, for FNF work, we assume that we will have mastered the factors which promote growth of that species of tumor called government, cities in the free nation will not degrade but will, more likely, improve constantly.

In a free nation there would be less flight from cities. In America many middle and upper class people have fled the inner cities for a mix of reasons, notably: a desire to be safe from criminals; and aesthetic attraction to nature in rural settings. The first reason would not drive people out of cities in a free nation, because I would expect cities to be more safe than the countryside, not less. Most services, including security services, can be more efficiently provided in dense populations.

Regarding the second reason, attraction to rural settings would still draw people out of cities. But, not being driven out by fear, I think people would travel to countryside less often, and would make the trip only when it really did provide a refreshing change from the city.

With highways provided by free markets, and with the costs of those highways charged more directly to the users of highways, I expect in the free nation there would be fewer superhighways constructed for the needs of commuters.

Help

In the free nation it will be easier to hire help, because the hiring process will not be crippled by government regulation. Notably, it will be easier to hire inexpensive and unskilled help. There will be no minimum wage, so employers will be able to hire workers to complete low-valued tasks, assuming willing workers can be found. And there will be no immigration restrictions, so employers will be able to hire help from anywhere in the world, assuming those workers can get free.

Also, the process of hiring will be more relaxed in the free nation because, in the free nation, employers need not fear firing a worker who has not worked out. In America, most employers find hiring has become a risky process, because the employer may wind up with a counterproductive employee that the employer does

not dare to fire. Consequently, employers are reluctant to hire, and many tasks for which they might hire help, if hiring were a non-threatening process, go undone or understaffed.

The flip side of this is that workers wanting work would find it easier to find work, because employers would be more casual about hiring, because hiring would not be such a big risk to them.

All in all, in a free nation, the work force would be more mobile. And the paperwork burden, which government places upon the decision to hire, would not exist.

COMMENTS UPON SPECIFIC FORUM QUESTIONS

Protection of Stockholders From Liability

In outlining the topic of this Forum, I asked, in the third question, "If the state does not intervene (through legislation) to protect stockholders from liability for failings of corporations ... how will investors satisfy their need for protection from liability?" I now believe that probably I was wrong in assuming that the protection from liability originated with legislation.

Robert Hessen, in his book *In Defense of the Corporation*, tells that this protection originated as a kind of contract between business partners. One partner, being active in the business, would promise another partner, not active but nonetheless maintaining an interest, to assume responsibility for all liability. The corporation, with numerous inactive and immune-from-liability shareholders, grew out of this origin in limited partnerships. It started as a voluntary contract between partners.

But still I smell the stench of state in an institution which allows someone to act without being responsible for the consequences. Consider an example: Someone is offering \$5,000 each to carry old nuclear warheads, which probably will not detonate, from one side of a city to another. Suppose I do not care for this job myself, but I have an old truck and I can find an immigrant who will gladly drive the truck for \$1000 per trip — and who will even sign a contract with me saying that he will take responsibility for all liability. What kind of court would shield me from liability because of my contract with the truck driver? A government court perhaps, but not an honest court.

In voluntary society I believe that liability will be assigned to people who have made the choices which led to an injury. Surely, if the institutions are honest, a person who chooses to invest in a business which may injure third parties must feel the burden of that risk. In a free nation I expect that insurance companies, if deregulated and thus able offer coverage where it is wanted, would gladly offer policies to protect investors from liability. The price of the insurance would pressure investors to choose wisely. This pressure on investors would translate into pressure on managers in the business, to make responsible choices.

Insurance

The fifth question, outlining this topic, deals with insurance. "With the insurance industry deregulated ... what new offerings can we expect ... what needs will we satisfy through voluntary institutions for sharing risk?"

In a free nation I think insurance policies would tend to apply pressure on people making choices which involve risk. This pressure would come to bear on many choices which the government in America regulates, such as construction of buildings to minimize risk of fire, and such as wearing seat belts.

Here is an example. In a free nation, I think we might see a clause such as this in an auto insurance policy:

The insured, in order to enjoy a 30% discount in premium, consents to electronic monitoring by the insurer of the insured's adherence to the agreement to buckle seat belts. The insured also consents to installation, in his vehicle, of electronic equipment which may, if detecting an infraction, disable the vehicle. The insured understands that any attempt on his part to defeat or circumvent the electronic monitoring may result in his permanently forfeiting bond, as specified in section X, as well as temporarily forfeiting insurance coverage during the infraction. The insured agrees, in all disputes relating to this contract, to accept the judgement of arbitration agency XYZ.

This is what I call insurance with teeth. Notice that it is voluntary. And notice that I am not advocating the wearing of seat belts. Decisions about whether to buckle up will be influenced by calculations made by

insurance companies, and choices made by cost-aware drivers.

I think the whole undertaking of regulating safety, which government in America has arrogated to itself, would be performed more efficiently, providing more safety at lower cost, by insurance-like businesses in a free nation. These businesses would respond to honest market forces, not to political pressure and sound-bite journalism.

NOTABLE DIFFERENCES IN A PARTICULAR INDUSTRY, RESIDENTIAL BUILDING

Perhaps because I have worked as a residential builder, I have seen ill effects of regulations that most libertarians have not noticed. In this section I will show how government has distorted residential accommodations in America, and speculate on what would come to exist in a free nation.

Whoops. Already I see I have fallen into a government-created channel of thought. I have written "residential" building, as though building of residences were a specialty separate from other building. Well, in America it is a separate specialty, but mostly because of government regulations. Government requires different licenses (for the builders and licensed crafts), different standards (codes and bonds), and different locations (land use zones). Because of all these arbitrary interventions, residential building has separated from the larger industry, more than it would separate in natural circumstances.

Historically, in most cities, before government grew big, most human functions, including residence, retailing, education, and industry, mixed together freely in buildings and in neighborhoods. The need for commuting and for parking spaces was not so great, because many people could work, learn and play within walking distance of where they lived.

The need for police patrols was not so great because there were not commercial zones which emptied out (of law abiding citizens) at night, or residential zones which emptied out during working hours; most neighborhoods were occupied and observed most of the time by residents who, because it was their home, cared about the lawfulness of the place.

In a free nation I expect this mixing of

functions would return to most communities. There would be less invested in commuting, and in highways and vehicles required by commuting.

Government Regulators Embrace Two Damaging Notions

In America I think that our masters in government have fixated upon two notions, much to the degradation of our quality of life.

The first notion is that residential units should be designed, in terms of rooms and facilities, to serve a prototypical family of the all-American sort. Each family is assumed to have two parents and possibly a few children. Furthermore, each family is assumed to live separate and independent from other families, such that each residential unit needs, in addition to bedroom(s), its own dedicated kitchen, dining, bathing, and possibly laundering facilities. Ninety percent, I would guess, of all residential units in America were designed to accommodate such stand-alone family groups.

Now our masters, being broad minded and all that, understand that not all of us live at present as part of one of their ideal family groups, so they allow housing units to accommodate singles or remaining fractions of family groups. But almost no housing units will be found which were designed to accommodate groups of people other than a traditional family or remaining fraction thereof. For the most part, any group of people other than the traditional family has to fit somehow into a residential unit which was designed for a traditional family.

As an illustration, in my experience it is quite difficult in America to get the government's permission to add additional quarters onto existing residences, especially if the addition contains an arrangement of furnishings and appliances which the government deems to be a kitchen, because if the government decides you are adding a kitchen, you have just entered a new realm of government love, called multiple-unit dwelling, regulated by different code books. But don't worry about the different code books, because probably, in any case, the zoning board will not permit a multiple unit on your lot.

The second damaging notion is that, to fight bias, residential units should be available to all persons. Real estate and rental

agents generally live in fear of the state, with its agenda to homogenize humanity, and typically they must allow residence to anyone whom the state would regard as qualified.

As a consequence of this well-intentioned idiocy, few of us find ourselves living next door to, or even in the same neighborhood with, good friends or family members. Instead our closest neighbors are an eclectic mix. They are mostly good people, I would bet, but they are not people with whom we would have any reason to feel close. As such, when we want to be with people to whom we do feel close, but who do not live within our own single-family-sized residential unit, we must, for the most part, get in our cars and take a trip.

Another consequence is we need good locks at the exterior perimeters of each of our residential units. Our next door neighbor, whom the government deems qualified, may be a newly released multiple rapist, or worse.

And finally notice that the second notion makes part of the first notion true. Because government mixes us up in an eclectic mix, I am unlikely to find myself living near people with whom I might happily share child care facilities or a kitchen. Wasteful duplication of these facilities becomes more necessary because of government's agenda to homogenize us.

A Free Market in Building will lead to Better Lives

In the free nation I expect there would come to be community dwellings which house people in numbers of perhaps 10 - 100, perhaps roughly the number we associate with a clan. For privacy, these community dwellings would have private units within them. These private units would provide nuclear families, singles, or other groupings, with lockable and separate quarters consisting of any number of rooms. But also, I expect, there would be a number of community rooms, such as child-care, kitchen, dining, living, guestrooms, porches. There might be only one ample lawn, one driveway, and one good-sized parking garage. Probably the entire community could be served by only a few washers and dryers. Perhaps the whole community would be situated together under one roof, in a large building such as a dormitory or hotel, or perhaps there would be several separate buildings on a lot, connected by paths or

covered walkways.

Certainly it is not for me to say how such a community would be owned and organized. It might be a business which catered to a particular clientele. Or it might be the natural community of an aging matriarch, including: children, grandchildren, extended family, and a few good friends. It might be a group of libertarians, or even a bunch of socialists whose thing in life is to bring back zoning and building codes.

Before leaving this topic I want to predict that such community housing would be less expensive, not more expensive, than most of our living arrangements now in America. It might be reasonable for you to think it would be expensive, because the closest parallel in your experience in America might be places such as a retirement community or a hotel, places which tend to be expensive. But in America government strictly zones, licenses, and regulates such places. They are built to often ridiculously-expensive commercial standards, they tend to be allowed only in zones of prime real estate, and they are required to operate to standards which would not be chosen voluntarily by either the owners or the residents of the community. In the free nation, such community dwellings could be built almost anywhere. Compared with present arrangements in America, there would be savings in all the shared facilities. And all these savings would be passed on to the residents.

Greater Mobility Would Ease Consolidation of Communities

On a related issue, I believe people in a free nation would be more mobile, would face less barriers in choosing to move to be among compatible people. In America, government and its attendant parasites have affixed themselves onto moving, making moving much more expensive and difficult than it would be in a free nation. To move you have to pay taxes growing out of real estate transactions, and you have to work through government-created monopolies (brokers, lawyers) to trade real estate. Government-licensed and -regulated banks can take weeks to make simple decisions. And you have to work through the bureaucracy of government-monopoly utility companies.

If you have been or will be a tenant, lease

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The Athenian Constitution: Government by Jury and Referendum

by Roderick T. Long

*"Each single one of our citizens,
in all the manifold aspects of life,
is able to show himself the rightful
lord and owner of his own person,
and do this, moreover, with exceptional
grace and exceptional versatility."*

— Perikles (c. 495-429 BC)

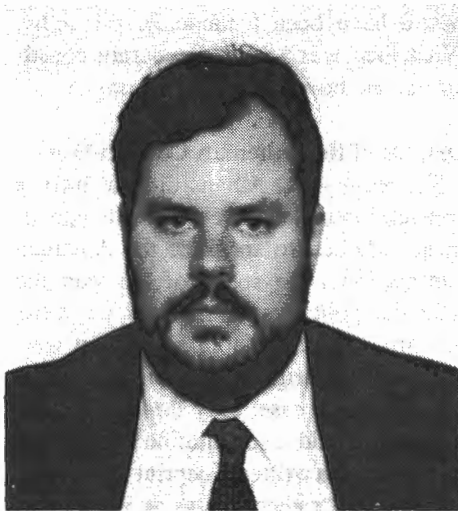
Athens: A Neglected Model

Those engaged in the project of designing a constitution for a new libertarian nation can learn from the example of previous free or semi-free nations. In previous issues of *Formulations* we have accordingly surveyed sample constitutions ranging from the mediæval Icelandic system of competing assemblies to the U. S. Articles of Confederation. One example that is not often considered when libertarians discuss constitutional design is ancient Athens.

In a way this is not surprising. Athens in the fifth and fourth centuries BC is famous for being the purest, most extreme form of democracy in human history. Most libertarians get understandably nervous at the thought of unlimited majority rule. Moreover, the leading thinkers of the classical liberal tradition, from Montesquieu and Madison to Isabel Paterson, learned their Greek history from upper-class writers like Thucydides and Xenophon, Plato and Aristotle, Polybius and Plutarch, and absorbed from them their bias against the democratic institutions of Athens. (The anti-Athenian bias in Alexander Hamilton's capsule history of the Peloponnesian War in the *Federalist Papers* is so extreme as to be ludicrous;¹ and Madison is not much better.)

Nevertheless, the Athenian constitution deserves our consideration. In its heyday, Athens was the freest nation in the world. The Athenian definition of "liberty" was, in private matters, "living as one pleases," and in public matters, "ruling and being ruled in turn." By and large Athens lived up to these ideals. The Athenian statesman Perikles, in a famous funeral oration,

boasted that in Athens no one even got sour looks from his neighbors if he chose to live his own life in his own way — an exaggeration, no doubt, but one with which Athens' critics agreed, charging that Athens was, in



Roderick Long

Plato's words, a supermarket where everyone could pick his own constitution, as if each person were living under a different regime of his own choosing. Unlike most Greek states, Athens exercised no control over education; to the consternation of the philosophers, who favored the Spartan system of compulsory state indoctrination, parents could arrange to have their children taught what and as they pleased. Moreover, the Athenians prided themselves on being as strict with their public officials as they were lenient toward their neighbors; according to Perikles, "we are free and tolerant in our private lives; but in public affairs we keep to the law." (Thucydides, II. 37.)

Athens was especially famous for its intellectual freedom. This freedom had its limits, of course; unpopular thinkers, for example, were sometimes prosecuted for departing from religious orthodoxy (Sokrates being the most famous case). Still, Athenian freedom of thought and speech was robust enough to attract controversial thinkers and teachers from all over Greece. The Ionian cosmologist Anaxagoras had admittedly been run out of Athens for the crime of claiming that the sun was a giant burning rock rather than a god; but Plato tells us that Anaxagoras' treatise was nonetheless readily available

in the public marketplace for one drachma per copy. Athenian playwrights like Aristophanes mercilessly lampooned the political leaders of the day, apparently with impunity. Philosophers freely taught courses, and published tracts, on the evils of democracy. The orator Demosthenes noted, in a remark later applied *mutatis mutandis* to the United States and the Soviet Union, that the crucial difference between Athens and Sparta was that one was free to praise the Spartan constitution in Athens, but not vice versa.

The execution of Sokrates, for undermining traditional values through his persistent questioning, was an unspeakable crime, but we must remember that someone like Sokrates would have been silenced much earlier in any other Greek state; and even in Athens it took the intense paranoia caused by a recent and bitter civil war to bring the lifelong gadfly at last to trial (where he lost by a slim margin only — 280 to 221 votes).

The Athenian cultural scene was one of intense intellectual ferment, one that laid the foundations for Western art, literature, and science for the next two and a half millennia; and Athenian curiosity, and enthusiasm for intellectual discussion and debate, were a byword. Even four centuries later, the apostle Luke could still say, with a slight sniff of disapproval, that the Athenians "spent their time in nothing else, but either to tell, or to hear some new thing."

Nor was Athenian freedom confined to the marketplace of ideas. A commercial empire, Athens encouraged trade (unlike its rival, Sparta, where commerce and even money were banned). Its economic policies would hardly count as laissez-faire by libertarian standards, but they were liberal enough to attract merchants from all over the Mediterranean world. By Greek standards, Athens was a sparkling metropolis; the historian Thucydides remarked caustically that future generations, seeing the glorious ruins of majestic Athenian buildings, would overrate Athens' importance (and underrate Sparta's, since the Spartans put their money into instruments of conquest rather than into luxurious living). Athenian Magistrates, upon entering office, had to take a vow that no Athenian citizen's land would be confiscated or redistributed.

The Athenian semi-free market unleashed an unprecedented flood of pro-

ductive energy that transformed Greek civilization. The Corinthians, allies to Sparta and enemies of Athens, grumbled:

"An Athenian is always an innovator, quick to form a resolution and quick at carrying it out. ... if their enterprise is successful, they regard that success as nothing compared to what they will do next. Suppose they fail in some undertaking; they make good the loss immediately by setting their hopes in some other direction. Of them alone it may be said that they possess a thing almost as soon as they have begun to desire it, so quickly with them does action follow upon decision. ... seldom enjoying their possessions because they are always adding to them. Their view of a holiday is to do what needs doing; they prefer hardship and activity to peace and quiet. In a word, they are by nature incapable of either living a quiet life themselves or of allowing anyone else to do so." (Thucydides, I. 70.)

Above all, oppressive oligarchies like Korinth and Sparta feared Athens' tendency to export democratic ideals, awakening democratic and revolutionary aspirations in the common people throughout Greece. When Perikles called Athens "a school for all Greece," it may sound like idle patriotic piety to us, but to Athens' oligarchic neighbors it meant something definite and worrisome. The Athenian empire, which the oligarchs constantly denounced as tyrannical, seems to have been in many ways a liberatory force, and one welcomed by the democratic elements in the areas where it held sway (cf. Forrest (1975)) — which is *not* to say that Athens never abused its imperial power!

We cannot forget, of course, that the benefits of the Athenian constitution were restricted to free adult males. Women and slaves were largely excluded. But this flaw is one that Athens shared with its neighbors. That women and slaves were oppressed in Athens is nothing remarkable; what is remarkable is the amount of freedom available to Athenian males who were not slaves.

How did Athens achieve such a free and prosperous society? What system of government made this possible? We call Athens a democracy, and think we know what we mean. After all, we all live under the same system, don't we?

But to the Athenians, democracy (*demokratia*, "rule by the people") meant something quite specific, and importantly different from the political system of any nation today. Athenians would have guffawed at the notion of calling the United States, for example, a democracy; by their standards it would have been a moderate oligarchy. What, then, was Athens' democratic constitution, and how can we learn from it?

Origins of the Athenian Constitution

To begin with, Athens did not have a constitution in the sense of a written document. Rather, to speak of the Athenian constitution is to speak of the way the Athenian polity was *constituted*, i.e., what the structure of the political system was. (This was the original meaning of "constitution" in any case; only through etymological drift did a constitution come to be thought of as a written blueprint for a political structure, rather than as an instance of that structure.)

The Athenian constitution originated in class warfare. The three basic socioeconomic classes of Athenian society were the "Horsemen," the "Yokemen," and the "Menials." The Horsemen were the richest class; they got their name, originally, from the fact that they could afford to own horses. At one time the Horsemen had been the aristocratic class, and Greek names with *hippos*, "horse," in them (e.g., Hippias, Hipparchus, Pheidippides) continued to have an aristocratic flavor to them, just as last names beginning with "Von" or "De" do today; but as trade brought socioeconomic mobility, a fair number of *nouveaux riches* found their way into the Horsemen class. (In early times the top stratum of the Horsemen was distinguished as a separate class, the "500-measure-men," based on the amount of grain their estates could produce; but this distinction became lost as its political significance faded, and I shall ignore it.) Composing the middle class were the Yokemen, deriving their name from the fact that they could afford a yoke of oxen. Unlike the independently wealthy Horsemen, the Yokemen had to work for a living, usually as merchants or farmers; the Greeks used oxen rather than horses for plowing, so horses were a luxury in peacetime, while an ox paid for itself in farm work and so was a more easily affordable possession. In the poorest class were the Menials, those who worked for hire rather than being self-em-

ployed like the Yokemen.

This socioeconomic division translated, at least roughly, into a military division. The Horsemen had horses, so they naturally supplied the ranks of the cavalry. The Yokemen, of moderate means, could afford heavy armor and weapons, and so made up the infantry. (In ancient times, soldiers were generally expected to provide their own equipment.) The Menials could not afford any military equipment, and so generally served as rowers in the navy.

The three classes contributed to the rise of the democracy in two ways. First, members of the ruling class (the Horsemen) often found it useful to grant political rights to the lower orders — first to the Yokemen, then eventually to the Menials — in order to win popular support in their intestine struggles for power with *other* members of the ruling class. Kleisthenes, the traditional founder of the Athenian democracy in 508, was simply the last in a long line of glad-handing aristocrats doling out political largess to the masses in exchange for their backing him against his aristocratic rivals; he shot himself and his entire class in the foot by finally giving the lower orders a few powers too many, thus making them rather than the Horsemen the effective masters of the state and so changing the rules of the game forever. (For a spirited analysis, see Forrest (1975).) Second, because Athens was predominantly a naval power, it depended more highly on its rowers than on its cavalry and infantry, and this gave the Menials crucial leverage against the Horsemen and Yokemen.

Thus, Athenian democracy was born. But how did it work?

The Legislative Branch

The Council

In the Athenian state, as in any other, we can distinguish legislative, judicial, and executive functions. The Athenian legislative branch consisted of two bodies, a Council of 500 and an Assembly of 6000. At first glance, this system resembles the American bicameral legislature, with a small, select upper house and a larger, more popular lower house. But this appearance is deceptive.

To begin with, neither the Council nor the Assembly consisted of elected representatives. The members of the Council were selected not by election but by

sortition — i.e., by lot. In other words, the 500 Councillors were selected *randomly* from the (male) citizen population. (And no Councillor could serve more than two terms.)

The practice of selecting government officials randomly (and the Athenians developed some fairly sophisticated mechanical gadgets to ensure that the selection really was random, and to make cheating extremely difficult) is one of the most distinctive features of the Athenian constitution. We think of electoral politics as the hallmark of democracy; but elections were almost unknown at Athens, because they were considered paradigmatically *anti-democratic*. Proposals to replace sortition with election were always condemned as moves in the direction of oligarchy.

Why? Well, as the Athenians saw it, under an electoral system no one can obtain political office unless he is already famous: this gives prominent politicians an unfair advantage over the average person. Elections, they thought, favor those wealthy enough to bribe the voters, powerful enough to intimidate the voters, flashy enough to impress the voters, or clever enough to deceive the voters. The most influential political leaders were usually Horsemen anyway, thanks to their social prominence and the political following they could obtain by dispensing largesse among the masses. (One politician, Kimon, won the loyalty of the poor by leaving his fields and orchards unfenced, inviting anyone who was hungry to take whatever he needed.) If seats on the Council had been filled by popular vote, the Horsemen would have disproportionately dominated it — just as, today, Congress is dominated by those who can afford expensive campaigns, either through their own resources or through wealthy cronies. Or, to take a similar example, in the United States women have had the vote for over half a century, and yet, despite being a majority of the population, they represent only a tiny minority of elected officials. Obviously, the persistence of male dominance in the economic and social sphere has translated into women mostly voting for male candidates. The Athenians guessed, probably rightly, that the analogous prestige of the upper classes would lead to commoners mostly voting for aristocrats.

That is why the Athenians saw elections as an oligarchical rather than a democratic

phenomenon. Above all, the Athenians feared the prospect of government officials forming a privileged class with separate interests of their own. Through reliance on sortition, random selection by lot, the Council could be guaranteed to represent a fair cross-section of the Athenian people — a kind of proportional representation, as it were. Random selection ensured that those selected would be representatives of the people as a whole, whereas selection by vote made those selected into mere representatives of the majority.

The Council's duties were modest. It exercised some judicial and executive functions, but its main job was to prepare business for the Assembly (which met less often). The Council was convened by its President — a post that rotated among the membership. And I do mean rotated: "every fourth adult male Athenian citizen could say, 'I have been for twenty-four hours President of Athens' — but no Athenian citizen could ever boast of having been so for *more* than twenty-four hours." (Hansen (1991), p. 314.)

The Assembly

Athenians did not trust their representatives; they gave them as little power as possible. While the Council was in charge of day-to-day business, all really important issues were decided not by representatives but by the people themselves (or as many as chose to show up) in the Assembly, of which every adult male citizen was a member. The Council could prepare legislation to be voted on in the Assembly, but the Assembly was not bound by the Council's agenda.

The Athenians would have agreed wholeheartedly with Karl Hess' critique of representative democracy:

"In politics a person is not a citizen if the person's only function is to vote. Voters choose people who, in turn, act like citizens. They argue. They establish the forms within which people live their lives. They make politics. The people who merely vote for them merely make politicians. People who argue for their positions in a town meeting are acting like citizens. People who simply drop scraps of paper in a box or pull a lever are not acting like citizens; they are acting like consumers, picking between prepackaged political items. They had nothing to do with the items. All they can do is pick what is. They cannot actively

participate in making what should be." (Hess (1995), p. 10.)

We should not infer that everyone in the Assembly was equally active, however. As in any group, there were some people who spoke all the time, some who spoke once in a while, and some who never spoke but simply voted yea or nay. Those who spoke all the time were called Rhetors, "speakers," and references to Athenian "politicians" or "political leaders" almost always refer to this group of self-appointed leaders who generally held no official position in the government. These Rhetors were prominent citizens who had gained a popular following; they would rise in the Assembly to propose a new statute or course of action, or to speak for or against someone else's proposal. The job was not risk-free; no one could be made to answer for how they had *voted* in the Assembly, but politicians could be prosecuted for making an unconstitutional proposal, or for deceiving the people with false promises. (Imagine what our own political system would look like if politicians could be prosecuted for false promises!)

The meeting area for the Assembly seated 6000, whereas the number of those eligible to attend has been estimated at anywhere from 20,000 to 60,000. Obviously, not everyone could realistically hope to participate. (If the Athenians were reinstating their system today, they might solve this problem through telecommunications technology and electronic voting — though they would have a healthy paranoia about the dangers of electronic vote-tampering.) One had to arrive early to be sure of a seat. But we should not picture the entire population of Athens battering on the gates of the Assembly, trying to get in and exercise their political rights. Athens was a large nation, comprising not only the city of Athens proper but the entire plain of Attika, and not all the citizens would have felt like trudging all the way in from the countryside before dawn to vote on trade agreements with some dinky island in the Aegean, or whatnot. (If the issue concerned going to war with Sparta or something of that sort, no doubt there was more interest.) In the early days of the Assembly, often not enough people showed up, and guards had to be sent to round up citizens in the marketplace in order to ensure a quorum for the Assembly. After pay was instituted for

participating in the Assembly, this problem vanished! (Most state offices in Athens came with a salary, so that less affluent citizens could afford to participate without financial sacrifice; this was yet another stratagem to prevent the rich from dominating the political process.) It's unlikely, then, that very many citizens who strongly wanted to participate in the Assembly were barred from doing so.

The ideological complexion of the Assembly might vary somewhat from session to session, depending on what else was going on. For example, Athens was a naval power, and preferred to fight its battles at sea rather than on land; during wartime, then, the fleet was more likely than the army to be away, and so Menials would then be under-represented in the Assembly in comparison with Horsemen and Yokemen. The absence of the rowers could thus give the Assembly a temporary oligarchic bias. Apart from the closing years of the Peloponnesian War, however, this does not seem to have been a major problem.

In the fifth century, the Assembly had complete power to pass or repeal legislation. In the fourth century, however, it was decided (by the Assembly itself) to limit this power in order to ensure greater constitutional stability (something that had been sorely lacking during the crisis-fraught closing years of the fifth century). A distinction was drawn between two kinds of legislative acts: decrees, and laws proper. A law, in the strict sense, had to be general in scope and open-ended in duration; anything else was a decree. So, for example, "everyone must wear polka dots from now on" would be a law, whereas "everyone must wear polka dots for the next five weeks" and "Demosthenes must wear polka dots from now on" would be decrees. In any conflict between a law and a decree, the law was taken to have precedence, regardless of which was passed first (just as, in the United States, constitutional law always overrides statute law — at least in theory!). The Assembly retained the power to pass and repeal decrees, but in order to make a change in the laws the Assembly now had to go through the Legislative Courts (about which more below).

The Judicial Branch

Arbitration

In Athens, most disputes were settled through arbitration rather than in the Jury

Courts. There were two kinds of arbitration: public and private. In private arbitration, the two parties to the dispute would select a mutually agreeable third person or persons to decide the case; the results of private arbitration were recognized in the law as binding and final, and no appeal was permitted (unless malfeasance could be shown on the part of the arbitrator). Alternatively, the contending parties could bring their dispute to a state-appointed public Arbitrator. (The board of public Arbitrators consisted of all male citizens in their sixtieth year.) Because the disputants had no choice about which Arbitrator was assigned to them, and might end up with a dud, it was thought only fair in the case of public arbitration (unlike private arbitration) to allow the Arbitrator's decision to be appealed to the Jury Courts. The choice between private arbitrators, public Arbitrators, and Jury Courts introduced a salutary competitive element into the Athenian judicial system.

The Jury Courts

The Jury Courts were also staffed by sortition, picked daily from a pool of 6000 volunteers (a favorite number with the Athenians, apparently). Juries were large, ranging from several hundred to several thousand depending on the seriousness of the charge to be considered; typical numbers were 401, 501, and 1001. The numbers were large in order to ensure a representative sample of the Athenian population (arguably an improvement over the current U. S. system), and uneven in order to avoid ties (though sometimes they used even-numbered juries, in which case a tie was interpreted as acquittal). Jurors were paid, once again to ensure an adequate representation of the poor on juries. There was no judge to restrict the jury's power. No Athenian juror was ever subjected to compulsory empanelment, voir-dire, or sequestration, nor was any Magistrate empowered to decide what evidence the jury could or could not be allowed to see. Jurors, like voters in the Assembly (and unlike Rhetors and Magistrates) were not accountable for their decisions.

Potential jurors swore the following oath: "I will cast my vote in accordance with the laws and decrees passed by the Assembly and Council. On any point where the law is silent I will give judgment in accordance with my sense of what is most just, without favor or enmity. I will vote only on the

matters raised in the charge, and I will listen impartially to accusers and defenders alike." However, jurors could not be penalized for their vote — unless it could be shown that they had accepted bribes; but the practice of selecting juries randomly on the morning of the trial made bribery difficult, and the sheer size of juries limited the effectiveness of bribery in any case.

Many ancient observers considered that the Jury Courts, rather than the Council or Assembly, were the true governing powers in Athens. For one thing, the Jury Courts had the power of judicial review. The opportunity to exercise this power came when a politician was prosecuted for having proposed an unconstitutional law or decree in the Assembly. A politician could be prosecuted whether his proposal had passed or not; but if it had indeed been enacted into law, and the proposer was found guilty, the law was automatically repealed. The juries made frequent use of this power: "The Supreme Court of the United States has had the power to test and overthrow Congressional Acts since 1803. In the period 1803-1986 that power was used 135 times: our sources show that at Athens that figure was nearly reached in two decades, let alone two centuries." (Hansen (1991), p. 209.) Thus, a few hundred ordinary citizens could strike down, as unconstitutional, legislation enacted by an Assembly of 6000 people. The notion that Athenian democracy meant the unrestrained tyranny of the majority is clearly a myth. (The Athenian system also allowed for a second kind of judicial review, to be discussed below.)

There were no lawyers in an Athenian courtroom. The plaintiff and defendant each had to conduct their own case, though they could hire someone to help them write their courtroom speeches. (Only in rare cases was a third party allowed to speak on a disputant's behalf.) Prosecutors could be prosecuted for bringing a frivolous charge (defined as one that could not win over even a substantial minority of the jurors). There was also no distinction between crimes and torts; all trials were treated as civil suits, with the victim (or, in murder cases, the victim's family) rather than a public prosecutor directing the prosecution's case. The closest equivalent to a crime/tort distinction was that between private prosecutions, where the aggrieved party was an individual citizen, and public

prosecutions, where the aggrieved party was the city as a whole. Even in the latter case, though, the charge had to be initiated and argued by a private citizen on behalf of the city, so it was really more like what we would call a class-action suit.

Trials were swift, lasting no longer than a day. (Trials today can be criticized for excessive length, but to my mind the Athenian alternative goes too far in the opposite direction — as in fact Sokrates complained at his trial.) If the jury found the defendant guilty, the next phase of the trial concerned sentencing. Some crimes had penalties predetermined by law, but in most cases the choice was left up to the jury, thus avoiding the modern problem of having jury verdicts unduly influenced by the jury's expectation of the likely severity of the penalty.

The procedure worked as follows: The prosecutor would propose a penalty, and the defendant would then respond with a counter-proposal, obviously of a lighter penalty. The jury would then choose between the two penalties. (Having the jury come up with a penalty of its own would have required discussion and debate impracticable under the circumstances, given the size of the jury.) Prosecutors were prevented from proposing excessively harsh penalties by the fear that this would make the jury more likely to choose the defendant's milder proposal; defendants were likewise prevented from proposing excessively mild penalties by the fear that this would make the jury more likely to choose the prosecutor's harsher proposal. This was an ingenious way of ensuring moderation in punishments. (Giving juries the power to decide both verdict and sentence also avoided the modern problem of sentences that defy the jury's intentions, as in the recent case of the jurors who found the survivors of the Waco massacre not guilty of all but a handful of minor counts, only to learn with dismay that those few counts would send the Branch Davidians to prison for many years.)

The most common penalty was a fine. (In addition, the loser paid the winner's court costs.) The severest penalties were enslavement and capital punishment (the latter being inflicted in a number of ways ranging from poison to crucifixion). Intermediate penalties were exile and "dishonor." "Dishonor" is sometimes described by modern scholars as loss of citizenship,

but it was actually much more severe; it meant exclusion from the political, economic, and religious life of Athenian society: dishonored citizens, unlike exiles, were allowed to continue residing in the city, but could not vote, hold office, serve on juries, set foot in the marketplace, or bring a case before a courtroom. (This last prohibition meant they were effectively outside the protection of the laws.) Imprisonment was unknown as a penalty. Athenian prisons were only temporary holding cells; thus Athens was spared the staggering expense of housing and feeding criminals for years on end. Any criminal too dangerous to be allowed on the streets was either executed or exiled.

Libertarians today are conflicted on the issue of jury rights. On the one hand, libertarians generally favor the jury's right to nullify laws, as a check on legislative abuse of power. On the other hand, many libertarians of late have jumped on the conservative bandwagon of imposing limits on the amount of money juries can award in a civil suit. I myself referred to excessive jury awards as a "pressing problem" at the first FNF Forum:

"In recent years, absurdly high awards for damages have demonstrated the risks of a jury system, and the attractions of adjudication by experts. Yet juries remain an essential bulwark against state tyranny, a role government-approved experts are ill-suited to play. Competition among judicial systems would allow whichever mix of trial-by-jury and trial-by-experts best satisfied the needs of the public."

("The Rationale of a Virtual-Canton Constitution," *Proceedings of a Forum on the Subject of Constitutions*, Autumn 1993.)

I still endorse the point about the value of competition, but over the past few years I have become convinced that the excessive-damages issue has been overstated. The notorious examples of abuse appear to be exceptional, and even many of those do not stand up to close scrutiny. (For example, everyone knows about the woman who sued McDonalds because she spilled some coffee and burned herself; but how many know that McDonalds had received and ignored thousands of complaints about unusually hot coffee (185°, enough to cause

serious damage at even a second's exposure) prior to her case, or that her coffee was so hot that it burned through three layers of skin, so that the woman required skin grafts and remains permanently disfigured in the genital area?) In many cases, the "excessive awards" are swallowed up by the government, and the victim never sees a penny of it. Placing a cap on awards because of a handful of abuses seems like exactly the sort of favoritism toward the rich that the Athenians were above all concerned to prevent. I admit to some nervousness about this conclusion, in the light of such recent anti-libertarian trends as cigarette smokers suing tobacco companies and gunshot victims suing arms manufacturers; but I would prefer to address this problem through legislation defining product liability so as to exclude liability for defects that are common knowledge (e.g., the addictive and carcinogenic properties of tobacco) or for "defects" inherent in the proper as-advertised good working order of the product (e.g., the fact that you can injure or kill people by shooting a gun at them), rather than through putting caps on jury awards.

The rule of evidence is a particularly delicate issue for libertarians. On the one hand, the idea of a dangerous criminal getting off on a technicality is distasteful. On the other hand, giving law enforcement officials carte blanche to violate the law goes against everything we stand for. Yet the judge's power to rule on the admissibility of evidence is being increasingly abused, and may be a luxury we can no longer afford. Two recent examples of this:

1) During the O. J. Simpson trial, the jury was allowed to learn that the police detective who found the main evidence against Simpson had lied about using racial epithets — but they were not allowed to learn that he was a virulent racist who had bragged on tape about planting evidence and beating up minorities. I did not follow the Simpson case closely enough to have any opinion as to what verdict the jury should have reached (I may be the only person in America without such an opinion!), but it seems to me that when the main evidence against a black defendant depends on the testimony of a man who says all blacks should be killed, and who admits having planted evidence in the past, that

is clearly *relevant* to the defense's case, and something the jury ought to be told — but the judge decided to exclude the tape.

2) Several years ago in Massachusetts a Christian Science family was prosecuted for having relied on Christian Science treatment rather than medical care for an ill child who subsequently died. That sort of case raises complicated legal, moral, scientific, and religious issues which I won't address now. What concerns me at present is the fact that there was a Massachusetts statute on the books which specifically exempted Christian Scientists from the requirement that parents provide their children with medical care, and the jury was not allowed to know about that statute; the judge refused to permit the defense lawyers to inform the jury about it. (Testimony defending the reliability of Christian Science healing was also excluded.) The jurors were "instructed" that they had to find the defendants guilty, and they did so, tearfully and reluctantly; they were furious afterward, when they learned the truth. When *the law itself* can be excluded as inadmissible evidence, clearly the judge's power to exclude evidence has gone too far.

To my mind, the most attractive solution to the problem of admissibility is one suggested by Eric Klien and Mike Oliver in the Constitution of Oceania:

"The jury may not at any time be removed from the courtroom during a trial to prevent them from hearing evidence. ... The judge has no power to strike any evidence from the record. It is expected that juries are reasoning Adults who are as competent as the judge to decide who is lying and who is not. Evidence uncovered by an illegal search WILL be allowed in Court. Unlike corrupt countries that allow both the criminal and the arresting officer to go free when an illegal search is made, Oceania will prosecute both."

This is very much in the spirit of the Athenian jury system.

The Athenians would have been horrified at the extent to which our government today has encroached upon the jury's au-

thority with *voir-dire*, rules of evidence, and the like. The 19th-century libertarian theorist Lysander Spooner, a hero of today's jury-rights movement, in his famous *Essay on the Trial by Jury* defended the idea of jury sovereignty in terms quite similar to the thinking of the Athenian democrats:

"To secure this right of the people to judge of their own liberties against the government, the jurors are taken ... from the body of the people, *by lot*, or by some process that precludes any previous knowledge, choice, or selection of them, on the part of the government.

This is done to prevent the government's constituting a jury of its own partisans and friends; in other words, to prevent the government's *packing* a jury, with a view to maintain its own laws, and accomplish its own purposes.

It is supposed that, if twelve men be taken, *by lot*, from the mass of the people, without the possibility of any previous knowledge, choice, or selection of them, on the part of the government, the jury will be a fair epitome of 'the country' at large, and not merely of the party or faction that sustain the measures of the government; that substantially all classes of opinions, prevailing among the people, will be represented in the jury; and especially that the opponents of the government ... will be represented there, as well as its friends A trial by such a tribunal is, therefore, in effect, 'a trial by the country.' ...

But all this 'trial by the country' would be no trial at all 'by the country,' but only a trial by the government, if the government could either declare who may, and who may not, be jurors, or could dictate to the jury anything whatever, either of law or evidence, that is of the essence of the trial.

If the government may decide who may, and who may not, be jurors, it will of course select only its partisans, and those friendly to its measures."
(Spooner, pp. 122-123.)

(And of course Spooner's argument for selecting jurors by lot applies *mutatis mutandis* to the selection of legislators.)

The Athenian court system did not operate according to precedent. No jury was bound by the decisions of previous juries in previous cases. This is a striking difference

between Athenian law and more familiar systems like Roman law or the English common law. Whether this was a good or bad thing is hard to say. On the down side, the refusal to rely on precedents deprived the Athenian legal process of the valuable attribute of predictability. Reduction of uncertainty is ordinarily a virtue in any legal system. Moreover, case law, evolving in response to the needs of day-to-day life, can serve as a useful check against an arrogant and unrestrained legislature; and case law can also serve as a storehouse for the accumulated wisdom of many generations of judges. On the positive side, the jury's freedom to decide cases according to their common sense rather than adhere to judicial precedent ensured that people would be judged according to the well-understood and widely-accepted customs and moral sense of the average citizen, rather than according to the arcane criteria of a jurisprudential elite. (My impression is that case law is preferable so long as it retains a strong competitive element, and becomes a maze of impenetrable jargon only when that element is removed.)

The Areopagos

The Jury Courts formed the core of Athens' judicial branch; but another court, the Areopagos, was also highly respected. The Areopagos, so called because it met on the Hill of Ares, was a survival from an earlier period; before the establishment of democracy, the Areopagos had been the old aristocratic senate, the most powerful body in Athens. Democratic reforms transferred most of the Areopagos' powers to the Council or the Assembly, transforming the Areopagos into a court with fairly limited jurisdiction (whose extent appears to have fluctuated over the years).

These reforms also changed the Areopagos' composition from a body of hereditary nobles to a board consisting of former Magistrates. The Areopagites held office for life, an extremely unusual provision by Athenian standards — but since the Areopagites were drawn from the Magistrates, who in turn were chosen by lot, the Areopagos, like the Jury Courts, could be expected to represent a fair cross-section of the Athenian population, while the fact that all Areopagites had served as Magistrates guaranteed that they would have more political experience than the average jury. The Areopagos seems to have enjoyed a

kind of mystique, and its decisions were highly respected.

During the Roman period, after Athens had ceased to be a democracy, the Areopagos recovered many of its old aristocratic powers, and became once more the supreme power in Athens. That is why, in the first century AD, the apostle Paul was brought before the Areopagos ("Mars' hill"), rather than the Council or Assembly, to explain his doctrine. (Acts 17: 15-23.)

The Legislative Courts

At the beginning of the fourth century, after a decade of unprecedented constitutional crisis, the Athenians decided to add a stabilizing factor: the Legislative Courts. Each year, the Assembly conducted a review of all the existing laws (in the narrow sense, excluding decrees), voting each one up or down. If a law was approved, it was retained without change. But if it was disapproved, the Assembly could not simply abolish it as they could with decrees; the Athenians did not want to run the risk that the Assembly might be pressured or intimidated into abolishing Athens' democratic institutions, as they had in 411. If the Assembly wanted a law revised or repealed, they had to convene a Legislative Court.

Cases before the Legislative Courts were conducted like regular jury trials, except that it was the law, rather than an individual, that stood accused. Those favoring repeal acted as prosecutors, those opposing repeal argued the defense. Instead of choosing between penalty and counter-penalty, the jurors (called "Legislators," but drawn by lot from the same pool of volunteers as the ordinary Jury Courts) chose between the existing law and the proposed revision. The Legislative Courts thus acted as a second forum for judicial review.

The Executive Branch

The Magistrates

The remainder of government business was conducted by a host of commissioners, functionaries, and minor officials, known collectively as the Magistrates. These too were generally chosen by lot, and restricted to a one-year term; an important exception was the Board of Generals, who were elected by popular vote (this was one office the Athenians could not

afford to fill with inexperienced people chosen at random) and could be re-elected indefinitely (term limits for a successful General in the middle of a war didn't make sense).

Contemporary critics regarded the practice of appointing Magistrates by lot as sheer lunacy. Most of these critics were oligarchs who shuddered at the thought of offices being filled from the ranks of the rabble, but at least one critic, the anonymous author of the fourth-century treatise *Dissoi Logoi*, attacked sortition on democratic grounds: Since oligarchs are a minority of the population, elections will keep them out of office, whereas sortition could easily place such people in positions of power, thus imperilling the city's democratic institutions. Most Athenians, however, were inclined to view elections as *more* likely than sortition to bring oligarchs to power, given the influence that wealth can have on elections.

In any case, there were safeguards against the danger that the lot would bring too many knaves and fools to power:

"It was not 'the rulers of the city' who were chosen by lot, but officials charged with limited routine duties, for which little more than 'a sense of decency and fair play' was required. Furthermore, it must be remembered that a magistrate had to pass a preliminary examination, which was, it is true, usually formal, but gave his enemies an opportunity for raking up his past; was liable to be deposed by a vote of the assembly taken ten times a year; and after his year was subject to a scrutiny in which his accounts were audited and any citizen could charge him with inefficiency or abuse of authority." (Jones (1957), p. 48.)

Law Enforcement

Law enforcement was not one of the services offered by the Athenian state. Athens had no actual police force; the nearest equivalent was a few hundred guards — slaves owned by the state — but their main task was keeping order at public meetings. The notion of an elite enforcement corps, with broader authority than the average citizen, would have been anathema to the Athenians. "No classical state ever established a sufficient governmental machinery by which to secure the appearance of a defendant in court or the execution of a

judgment in private suits. Reliance on self-help was therefore compulsory" (Finley (1994), p. 107.) Victims had to rely on friends and relatives to enforce judicial decisions; if these lacked sufficient force, it might be necessary to appeal to a powerful patron, though the role of patronage in law enforcement never reached the level of formalization that we find in, for example, mediæval Iceland. (Still, in light of this recourse to private law enforcement, it's debatable whether Athens really counts as a *state*.)

Ostracism

The Athenians did not take their democracy for granted. They were all too conscious of the exceptional and fragile nature of their political system, and they built in as many safeguards as they could devise against the growth of an oligarchic elite. This fear was not idle; they saw that those few political leaders who were not appointed by lot — the Generals and the Rhetors — came overwhelmingly from the wealthier classes. Clearly, social prominence and economic patronage, combined with the eloquence and persuasiveness available to those who could afford to pay teachers of rhetoric, could provide a path to political power for the rich. The Athenians knew the early history of their city, when tyrants won power by posing as champions of the people, and they were determined not to let it happen again.

One of the safeguards they adopted was formal ostracism. This allowed the Athenian people as a whole to vote for the expulsion from the city of any citizen they chose, for a period of ten years. Unlike exile, ostracism was not a penalty for a crime; also unlike exile, it was applied only to the prominent and powerful — those that the people feared might be positioning themselves for a coup. The procedure was that someone would propose to hold an ostracism, the Assembly would vote on it, and if the proposal won then an ostracism would be scheduled. On the day of the ostracism, every adult male citizen could turn in a ticket (literally a potsherd, *ostrakon*, whence the name) inscribed with the name of the person they thought Athens could best do without, and the person whose name got the most votes had to leave the city for ten years.

A famous anecdote about the Athenian statesman Aristides, popularly known as

"Aristeides the Just," is that one day when Athens was holding an ostracism, an illiterate farmer came up to him, not knowing who he was, and asked him for help in inscribing his ostracism ticket. Aristeides agreed to help, and asked whose name the farmer wanted to inscribe. "Aristeides!" the farmer said. When asked what he had against Aristeides, the farmer replied that he was sick of hearing Aristeides called "Aristeides the Just" all the time. So Aristeides duly inscribed his own name on the ticket, and in fact was ostracized. (It would be particularly poignant if his ostracism had carried by one vote, but it seems not. The whole story is usually assumed to be apocryphal; however, Hansen points out: "oddly enough, there does survive one *ostrakon* on which the name Aristeides was started in a shaky hand and crossed out and begun again in a firm, legible one." (Hansen (1991), p. 312.))

This anecdote is often appealed to (e.g., by Isabel Paterson) as evidence that people were ostracized for frivolous reasons; but I think this fails to see the farmer's point. The farmer was not simply being cantankerous, envious, or malicious; when a prominent politician gets a name like "the Just" or "the Great" popularly attached to his name, thus being treated with the kind of reverence and deference more appropriate to a king than to a fellow-citizen, from the Athenian point of view this is a danger sign that the individual is getting too powerful and poses a danger to his nation's freedom. The formal ostracism was a kind of pre-emptive strike.

Ostracism was fairly common in the fifth century, but seems to have been abandoned in the fourth, when prosecution for unconstitutional proposals became the more common way of curbing the power of politicians. This is arguably preferable, in fact, since it requires charging the accused person with a definite infraction and proving him guilty, and so seems less arbitrary and more in accordance with the traditional Athenian respect for the rule of law.

Athenian Democracy and Its Critics

Ancient Critics

Not all Athenians had a high opinion of their constitution. Thucydides, for example, blamed the loss of the Athenian Empire on incompetent leadership, enter-

ing the Peloponnesian War rashly and then waging it in an erratic and irresponsible fashion. This in turn he thought was the inevitable result of allowing the ignorant masses to outvote the educated and respectable citizens. For a long time modern historians accepted this judgment, blaming Athenian democracy both for starting the war and for losing it. But recent historical research has shown that these charges are largely unfounded; I won't take the space to go into details here, but check the bibliography entries for Forrest and Kagan. Recall, too, that if it was under democracy that the Athenians lost their empire, it was also under democracy that they won it — not once but twice.

Another common charge in antiquity — found in Plato's *Republic*, for example — was that democracy leads to tyranny. All Greeks knew of examples where ambitious men had won dictatorial powers by posing as champions of the poor. The opponents of democracy reasoned that this should be all the more easy in democratic states, because the poor — the natural supporters of such a champion — have more clout and so can bring their champion to power more easily.

But a study of history does not seem it bear this theory out. It is certainly true that in *non*-democratic societies, unscrupulous politicians have often exploited democratic aspirations on the part of the poor in order to gain power for themselves; think of Julius Cæsar, or in more recent times Juan Perón. But this is far less common in a genuine democracy, precisely because the poor have access to established constitutional means for redressing their grievances and so have less need of such a champion. And the two brief coups that occurred in the history of the Athenian democracy were both carried off by avowed oligarchs who made no pretense of democratic sympathies.

One charge brought by some of the more extreme critics of Athenian democracy, like Plato in the *Republic*, or the anonymous author called the "Old Oligarch," was that under democracy there was too much freedom. People made their own choices and lived as they pleased, without being directed and supervised by the state; and they showed insufficient deference to their social superiors. Of course, the fact that Athenian democracy attracted this sort of comment is precisely why libertarians should take it seriously as a model!

Critics of democracy regarded politics as

the rightful domain of an educated elite, a domain in which the lower orders had no business meddling. Indeed, "minding one's own business" became an oligarchic code phrase for depriving the lower class of political rights, prompting Perikles to snap in response:

"Here [in Athens] each individual is interested not only in his own affairs but in the affairs of the state as well: even those who are mostly occupied with their own business are extremely well-informed on general politics — this is a peculiarity of ours: we do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all." (Thucydides, II. 40.)

This retort has sometimes been misread as an endorsement of collectivism and compulsory political participation; in fact it is simply a rejection of the notion that slavish deference to one's class superiors is an appropriate attitude for a free citizen.

Plato's main criticism of the Athenian system was that, in politics as in every other field of endeavor, decisions should be made by experts rather than by voting. We do not decide how to treat a disease, or build a house, or solve a mathematical problem, by putting the matter to a vote or picking people at random; instead we appeal to those who have knowledge, and accept their decision, ignoring everybody else's. Why, he asked, should we not behave likewise in politics, giving supreme power to a handful of experts while denying any voice in the matter to the ignorant masses?

The obvious response, of course, is to ask, first, how these experts are to be recognized and identified, and second, even if their expertise is genuine, how they are to be trusted to rule in the common interest rather than exclusively in their own. Athenians had a skeptical attitude toward professional politicians:

"They went on the basis that, given the chance, every one of them would have his hand in the till and make a profit out of political activity, and they took every possible means to limit the chances. ... Athenian leaders were called to account more than any other such group in history: to be a *rhetor* or a general was to

choose a perilous career that could easily lead to condemnation and execution — if you failed to flee into exile in time." (Hansen (1991), p. 310.)

Plato has Sokrates remark in his defense speech that if he had been a politician rather than a philosopher he would have been executed a lot earlier, since no Athenian politician who opposes the will of the people can expect to escape with his life. (Plato means this as a complaint against Athens; from our perspective it may look more like praise.)

Plato would have agreed that politicians are generally untrustworthy, but he would have blamed this on the fact that they had been improperly brought up. This was another quarrel that Plato and other critics had with democracy: the absence of public education. The teaching of children was left up to their parents to arrange; Plato was convinced that if this power were taken away from the arbitrary and ill-informed decisions of parents and transferred instead to the state, so that future leaders could be subjected from birth to a rigorous program of moral training and indoctrination, the problem of untrustworthy politicians would be solved.

Plato seems to have seen few limits to the capacity of human nature to be shaped and molded. Not all of his students agreed. Aristotle, for example, though also an advocate of public education, favored a narrower scope for it than Plato had, and made more modest claims on its behalf. To justify his skepticism Aristotle pointed to the example of Sparta, on whose education system Plato's was largely modeled; the Spartans, he noted, behaved with inflexible virtue and iron discipline when they were being observed by their peers, but once they traveled outside of Sparta they were notorious for being the most corrupt crooks in Greece.

Most critics of democracy were less extreme than Plato. They did not generally advocate giving absolute power to an elite and disenfranchising the common people utterly. Instead, they advocated a system which has come to be known as a *constitutional republic*. Even Plato eventually came around, in his later years, to this model.

The function of a constitutional republic is to balance the interests of the wealthy minority against the interests of the less

affluent majority, so that neither side can run roughshod over the other's rights. Xenophon, for example, argued that since it is agreed that it is wrong for the rich to oppress the poor, it should also be agreed that it is wrong for the poor to oppress the rich. Aristotle made the same point from the opposite angle: since it is agreed that it is wrong for the poor to oppress the rich, it should also be agreed that it is wrong for the rich to oppress the poor. (Perhaps they were addressing different audiences?) In addition to being more just, such a system was also likely to be more stable, since the interests of the two classes most able to overthrow the constitution (the rich, powerful because of their wealth, and the poor, powerful because of their numbers) would both be addressed.

How would such a constitutional republic be structured? There were different proposals, but many of the moderate critics of democracy converged on a model called the Mixed Constitution. (Some Athenians called it the "ancestral constitution," on the basis of a certain similarity to the precepts of the early Athenian lawgiver Solon.) Thucydides and Aristotle favored this system, for example, as did such later Aristoteleans as the historian Polybius, who looked to the Roman Republic as a successful example; and the Mixed Constitution has continued to cast its spell well into the modern era, influencing such figures as Machiavelli, Montesquieu, and Madison.

The idea behind the Mixed Constitution was to combine elements of democracy with elements of oligarchy, the theory being that this was the best way to achieve the goal of balancing the interests of the many against the interests of the few. Different versions of the Mixed Constitution were proposed, but the following four points are fairly representative:

1. *Abolish sortition in favor of election by vote.*

As we've seen, election was regarded as a move away from genuine democracy because it favored the wealthy and prominent over the average citizen. The moderates condemned selection by lot as foolish, since it gave more qualified candidates no advantage over less qualified ones, and they hoped that an electoral system would bring a "better class of people" into office.

2. *Abolish pay for government officials*

and jurors.

Advocates of the Mixed Constitution saw government salaries as favoring the poor over the rich and the middle class, since poor people would be disproportionately attracted to them — especially the very poorest, the marginal, unemployable, disreputable "rabble."

3. *Deprive the Menial class of all political rights.*

This is in the same spirit as point 2. The theory was that political sense and political virtue were the product of education and experience, and so required leisure. Those who engaged in manual labor did not have the time to develop the political skills necessary for an informed vote. In addition, servile laborers — i.e., those who worked for hire rather than being self-employed — were regarded as being dependent on their employers and thus too analogous to slaves to qualify as complete citizens. Finally, it was thought that the poverty of the Menials made them potential traitors to the regime, since it would be easier to bribe them; the city would be more stable if political rights were reserved to those who had a financial stake, a kind of investment, in the preservation of the constitution.

4. *Give both the Horsemen and the Yokemen the right to vote, but ensure that only Horsemen hold office.*

There were two possible ways of doing this. The most obvious would be to simply exclude Yokemen from office by legal fiat. A subtler way would be to rely on step 1, using the social prominence and economic patronage of the Horsemen to guarantee that offices would nearly always go to them anyway, even if Yokemen remained technically eligible as well.

The reason for reserving governmental offices for the Horsemen class was the usual one that political wisdom requires education, which requires leisure, which requires wealth. Why, then, allow Yokemen the vote? Why not let the Horsemen monopolize all political rights? Because the Mixed Constitution is intended to be a combination of oligarchy and democracy, not a pure triumph for oligarchy. To exclude the respectable middle class — the Yokemen — from all political rights would be unjust, as well as threatening the stability of the regime by giving the armed

infantry (drawn predominantly from the Yokemen) an incentive to rebel.

In addition, Aristotle advanced a subtler reason for not disenfranchising the Yokemen. He agreed that the more prosperous citizens were likely to be wiser; but, unlike Plato, he thought that a large number of individually unimpressive people might, by pooling their collective experience, turn out to be wiser than a single wise individual. (A modern confirmation of this is that, e.g., if people who have no idea how tall Mount Everest is are nevertheless asked to guess, any individual guess is likely to be wildly wrong, but as the sample increases, the average of all the guesses converges with astonishing accuracy on the correct figure.)

How well founded were these four proposals? Not very. If sortition brought such useless people to power, how was Athens able to dominate Greece? Complaints about the inefficiency of the lot seem to be rather exaggerated. And many of these complaints missed the point anyway:

"... how absurd it is, says Sokrates, to pick the magistrates by lot when you would not pick a helmsman, or whatever, in that way. [Sokrates' fallacy] resides in the unstated premise that the magistrates have the same power to steer the ship of state as a helmsman has to steer his ship. But the Athenians chose their magistrates by lot precisely to ensure that they should *not* be steersmen of the state: one of the purposes of the lot was to diminish the powers of the magistrates. The lot was based on the idea not that all men were equally expert, but that all men were expert enough at what they were chosen for, and that by the use of the lot magistracies would cease to be attractive as weapons in the struggle for power." (Hansen (1991), p. 236.)

Nor is there any evidence to suppose that the poor were over-represented in political offices or on juries. Jurors in particular were drawn largely from older, retired citizens, who had the necessary leisure to serve all day as jurors, and many were drawn to the job for its psychic rewards — put bluntly, an opportunity to wield power — rather than for the modest wages. As for the proposal to exclude the poorer classes from some or all political rights, the notion that wisdom and virtue are correlated with

wealth and education is a dubious one that history does not seem to support; and Aristotle's suggestion that manual laborers are on a par with mental defectives is such an obvious product of class bias that it is difficult to take seriously. Moreover, the idea that the poor are the most likely to turn traitor is particularly ludicrous, given that Athens' most famous traitors — men like Alcibiades and Hippias — came from the aristocratic class. Indeed, one could argue that the poor were the class *least* likely to be tempted to betray their country, as they had the most to lose if the democratic constitution were overturned.

These theorists were right to favor the notion of a constitutional republic, where neither the rich minority nor the poor majority could gain the upper hand and play the role of tyrant. Their mistake lay in thinking that the Mixed Constitution, a combination of democracy and oligarchy, was the best way to implement the republican ideal. On the contrary, the Athenian democracy *was* a constitutional republic already. Thucydides has one spokesman for democracy, a Sicilian Rhetor with the suspiciously apposite democratic name of Athenagoras, point out that *demokratia* — rule by the people — means empowering the people as a whole, not just the majority:

"There are people who will say that democracy is neither an intelligent nor a fair system, and that those who have the money are also the best rulers. But I say, first, that what is meant by the *demos*, or people, is the whole State, whereas an oligarchy is only a section of the State; and I say next that though the rich are the best people for looking after money, the best counselors are the intelligent, and that it is the many who are best at listening to the different arguments and judging between them. And all alike, whether taken all together or as separate classes, have equal rights in a democracy." (Thucydides, VI. 39.)

The Athenian playwright Euripides likewise describes the democratic ideal not as domination by the majority but as equality before the law:

"Your start was wrong, seeking a master here.
This city is free, and ruled by no one man.
The people reign, in annual succession.

They do not yield the power to the rich;
The poor man has an equal share in it. ...
People of small resources and the rich
Both have the same recourse to justice.

Now
A man of means, if badly spoken of,
Will have no better standing than the weak;
And if the little man is right, he wins
Against the great. This is the call of freedom:
'What man has good advice to give the city,
And wishes to make it known?' He who responds
Gains glory; the reluctant hold their peace.
For the city, what can be more fair than that? ...
But when one man is king, he finds this hateful,
And if he thinks that any of the nobles
Are wise, he fears for his despotic power
And kills them. How can a city become strong
If someone takes away, cuts off new ventures
Like ears of corn in a spring field? What use
To build a fortune, if your work promotes
The despot's welfare, not your family's?"
(Euripides, *The Suppliant Women* 404-451.)

The advocates of the Mixed Constitution, on the other hand, saw democracy as rule by the poor majority. Since they knew that oligarchy was rule by the rich minority, it was not unnatural for them to conclude that the best way to balance the interests of both factions was to design the constitution so as to embody a mixture of democratic and oligarchic elements. Their error lay in seeing a symmetry between democracy and oligarchy that did not exist.

Why was this an error? Because severing the *official* link between wealth and political power did not deprive the wealthy of all their power, but only of some of it. The riches of the upper class still provided them with a great deal of influence, even under democracy. As I have argued elsewhere:

"The city-states of the ancient world ... had surprisingly weak and decentralized governments, with nothing we would recognize as a police force. ... Yet these

city-states were class societies, with a powerful and effective ruling class. Where did the power of the ruling class come from, if not from a powerful state?

The historian M. I. Finley has studied this question, and come to the conclusion that the ruling classes maintained their power through the device of *patronage* In effect, the wealthy classes kept control by buying off the poor. Each wealthy family had a large following of commoners who served their patrons' interests (e.g., supporting aristocratic policies in the public assembly) in exchange for the family's largess." ("Can We Escape the Ruling Class?," in *Formulations*, Vol. II, No. 1 (Autumn 1994); cf. Finley (1994).)

The Athenian democrats were well aware of the dangers from patronage. They could have attempted to meet this problem by simply abolishing inequalities of wealth and redistributing the oligarchs' riches to the masses. Indeed, the upper class was fond of accusing the democrats of planning to do this. But in fact the Athenian democrats were far too committed to the ideals of individual rights and the rule of law to contemplate such a measure. Rather than eliminating economic inequality itself, they sought to combat its *effects*. That is why they relied on sortition rather than election — so that the rich could not use patronage to buy their way into office. Likewise, all the Athenian experiments (mild by today's standards) with welfare statism were attempts to fight patronage by providing the poor with a source of revenue that would not make them dependent on their class opponents.

Athens' democratic institutions weakened the effects of patronage, and so largely prevented the rich from oppressing the poor. But they did not do away with the effects of patronage entirely, and so the poor were not thereby empowered to oppress the rich. The result was a balance between the interests of the two classes, just as the advocates of the Mixed Constitution recommended. Those advocates did not recognize Athens as an instance of their ideal of a constitutional republic, because they did not sufficiently appreciate the power of patronage. Their favored remedy, the Mixed Constitution, tilts the scales of power decisively in favor of the rich once the power of patronage is taken into

account — the Roman Republic being an obvious case in point.² Because they underestimated the political clout that wealth brings, their recommended system of checks and balances overcompensates for the power of the poor and undercompensates for the power of the rich.

Modern Critics

Athens has its modern critics also. One common criticism of the Athenian system of direct democracy is that such a high level of participation requires a great deal of leisure, and that the citizens enjoyed this leisure only because they could rely on the unpaid labor of women and slaves. Thus, it is claimed, the Athenian political system inherently requires involuntary servitude as its economic base. By contrast, in a representative system, the level of participation demanded is lower, and so citizens do not have to spend all their time discussing politics; they can work for a living, and so do not have to depend on exploiting the labor of a large class without political rights.

I think this objection is mistaken. It is certainly true that in Athens, as in other Greek states, women and slaves were excluded from the benefits of democratic rights. But this was not essential to the system. The amount of leisure that the Athenian system required has been grossly exaggerated. Most Athenians worked for a living. The heaviest labor was performed not only by slaves but also by Menials, who were generally too poor to own slaves; to the Menials, the notion of Athenians as a bunch of leisured gentlemen relying on the labor of slaves would have seemed a bad joke. The Yokemen did ordinarily have slaves, but they themselves worked too, as farmers or tradesmen, often right alongside their slaves. The only class of which the "leisure" stereotype is at all true is the Horsemen, and they were a minority of the Athenian population. There was no significant conflict between political participation and earning a living. Serving as a Councillor or Magistrate was a temporary position; the Assembly met infrequently, and most people attended only occasionally anyway; and the judiciary was manned primarily by retirees. So the Athenian system would not have been noticeably hampered if slavery and sexual inequality had been banished.

One prominent modern critic (modern in the sense of post-Renaissance) of Athenian

democracy was James Madison, father of the U. S. Constitution. In the *Federalist Papers*, he wrote:

"... a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole ... and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. ... "

(*Federalist* §10.)

But this image of Athenian democracy is not a realistic one. Property rights and personal security were as secure in Athens as anywhere else, if not more so; and the constitution was a relatively stable one by Greek standards. The Athenian democracy is generally regarded as beginning in 508, with the reforms of Kleisthenes, and ending in 338, when Athens like the rest of Greece fell under the yoke of the Macedonian Empire. During that period — over a century and a half — all the political convulsions that Athenian critics like to point to were crammed into a single decade at the end of the fifth century: the Crisis Years of 413-403. These years saw the destruction of most of Athens' fighting force during the Sicilian expedition; an oligarchic coup and democratic counter-coup; the mass trial of the Arginusai Generals; Athens' defeat and occupation by Sparta; the installation of the bloodthirsty dictatorship of the Thirty; and a violent civil war which restored the democracy. It was in the wake of this crisis period that Sokrates was sentenced to death by a harrowed and paranoid jury in 399. Athens has been indicted on the basis of a quite short and atypical period of its history (cf. Finley (1969), p. 72.). Nor did the Athenian democracy die in political convulsion; it rebuilt itself from the ashes and flourished for another three quarters of a century, before finally succumbing not to domestic turmoil but to an outside threat that swal-

lowed up all of Greece.

In any case, it is risky to judge Athens on the basis of notorious incidents like the Arginusai mass trial or the execution of Sokrates. As one scholar points out:

"Excesses and illegalities are all too common in the history of peoples and governments roused to anger by sorrow, tension, and passion. In despotisms they rouse little attention and are not long remembered, for arbitrary and excessive behavior is their normal pattern of life. In constitutional, moderate, lawful states, however, they are seized upon as outrages and never forgotten, precisely because they stand out so sharply as contrary to what is usual."
(Kagan (1987), p. 374.)

So it was in Athens.

Madison perpetuates the stereotype of Athens as an unruly mob, gripped by irrational whims:

"In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."
(*Federalist* §55.)

O Fortunate Athens, that by amazing luck or the favor of the gods was able to gain ascendancy over half the Greek world, to defy first the Persian and then the Spartan war machine, and finally, after being conquered, to rise again to a level of power and prestige almost equal to what it had lost — all under the guidance of passion rather than reason!

Madison's suggested cure for the alleged evils of democracy draws heavily on the tradition of the Mixed Constitution:

"A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. ... the delegation of the government ... to a small number of citizens elected by the rest [serves] to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love

of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose."
(*Federalist* §10.)

Of course, Madison realizes that this is not the only possible outcome:

"On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people."
(*Federalist* §10.)

But Madison argues that this problem can be avoided if the republic is sufficiently large. (In this respect he is departing from the traditional republican position, which held that a republican system could avoid collapsing into oligarchy only if the republic were fairly small in territory and population.)

"...as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. ... A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project,

will be less apt to pervade the whole body of the Union than a particular member of it"
(*Federalist* §10.)

This idea of Madison's was a brilliant one. Unfortunately, experience has shown it to be mistaken. As I wrote in the premiere issue of *Formulations*:

"Such was the intent of the Framers of the U.S. Constitution the broad base of representation was expected to ensure that no special interest could succeed in manipulating the government. ... As we have since learned all too well, the experiment eventually proved to be a failure. Madison and his colleagues could not foresee the logrolling process whereby ... special interests ('factions') that were intended to hold one another in perpetual check instead made concessions to one another's ambitions in exchange for like concessions to their own."
("Virtual Cantons: A New Path to Freedom?," *Formulations*, Vol. I, No. 1 (Autumn 1993).)

The large size of the American republic only made things worse, as the widely dispersed majority were distant from their representatives and unable to concentrate their voice.

The last modern critic of Athenian democracy that I shall consider is Isabel Paterson, whose 1943 book *The God of the Machine* (published the same year as Rose Wilder Lane's *The Discovery of Freedom*, Ayn Rand's *The Fountainhead*, and Albert Jay Nock's *Memoirs of a Superfluous Man*) remains one of the classics of 20th century libertarian thought. Paterson is obsessed with the importance of political structure — an obsession I share. To quote my first *Formulations* article once more:

"What would the constitution of a free nation look like? In trying to answer that question we immediately think in terms of a Bill of Rights, restrictions on governmental power, and so forth. And any constitution worth having would certainly include those things. But if a constitution is to be more than a wish list, it must also specify the *political structure* necessary to ensure that these freedoms are not eroded or ignored. Consider the old Soviet Constitution, which

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guaranteed all sorts of fine-sounding freedoms for its citizens — but which in practice proved only a empty promise, since its interpretation and enforcement lay in the hands of an unfettered monolithic centralized state.

Framing a constitution is an exercise in public-choice economics; politicians react to incentives, and so the political incentive structure must be designed in such a way that those in authority cannot profit by the aggrandizement of state power."

This is a lesson I first learned from Paterson. It is also central to Madison's way of thinking. Where Paterson goes wrong, I think, is that she, like Madison, fails to recognize the political structure that existed in democratic Athens.

Paterson condemns Athens for a lack of checks and balances. As she sees it, Athenian democracy represents pure majority will, without any countervailing power to offset it: "dislocated mass," Paterson calls it. But this is a mistake. I will admit that I would be more comfortable with the Athenian system if proposals in the Assembly and verdicts in the Jury Courts had required a supermajority rather than a bare majority in order to be enacted. But all the same, the power of the majority could hardly be described as unchecked.

For one thing, the Athenian judiciary had the power, as we've seen, to strike down unconstitutional legislation. For another, the wealth of the rich minority enabled them to exert a serious influence to balance against the will of the less affluent majority. Paterson fails to recognize patronage as playing a role in the constitutional structure, as she often fails to see structure that is informal and not codified into law. (This is why she wrongly rejects anarchism as incompatible with political structure; but that's another story.)

Pursuing this no-structure critique, she also faults Athens for not attaching representation to regional bases, something she sees as crucial for stability. Here she is simply misinformed; members of the Athenian Council represented not a mass aggregate of citizens, but regional districts called demes.

Paterson also complains that the Athenians had no notion of individual rights — that nothing, in principle, was beyond the scope of the democratic government's au-

thority. She grants that Athenian law left a wide area of freedom to the individual, but she insists that this was a matter of custom, not something regarded as a right. This charge is difficult to assess; the Athenians did not have a written constitution, and so had nothing like a Bill of Rights. But — Paterson to the contrary notwithstanding — they did generally think that there was a moral standard beyond custom, to which custom had to answer in order to be legitimate. The Athenian playwright Sophokles expresses the common view:

"— You knew the order not to do this thing?

— I knew, of course I knew. The word was plain.

— And still you dared to overstep these laws?

— For me it was not Zeus who made that order.

Nor did that Justice who lives with the gods below mark out such laws to hold among mankind.

Nor did I think your orders were so strong that you, a mortal man, could over-run the gods' unwritten and unfailing laws. Not now, not yesterday's, they always live, and no one knows their origin in time." (Sophokles, *Antigone* 447-456.)

A similar point is made by Perikles:

"... in public affairs we keep to the law. This is because it commands our deep respect. We give our obedience to those whom we put in positions of authority, and we obey the laws themselves, especially those which are for the protection of the oppressed, and those unwritten laws which it is an acknowledged shame to break." (Thucydides, II. 37.)

Moreover, as Hansen (1989) has shown, the Athenian democrats operated with a firm distinction between the public sphere, which was the legitimate province of state action, and the private sphere, which was not the state's business. It was the Athenian *philosophers*, largely oligarchic in their sympathies, or at least in favor of a Mixed Constitution — and deeply alienated from their own society, for a mix of good and bad reasons — who denied the public/private

distinction; but the Athenian *democrats* had a different outlook.

Like other anti-Athenian theorists we have looked at, Paterson has an enormous admiration for the Roman Republic. (Indeed, despite my great admiration for her book as a whole, I must say I find her pro-Roman bias so pronounced as to be extremely tiresome!) She sees the contrast between Athens and Rome as one of arbitrary rule versus respect for law. She is uncomfortably aware, however, that Roman law was generally more brutal and oppressive than its Athenian counterpart; but she dismisses this as irrelevant:

"To sentimentalize Roman law and gloss over its harsh and faulty aspects is to miss the point. Its solid virtue was its mere existence, since at worst it proved preferable to the unpredictable will of either king or people. In their ordinary conduct the Athenians were probably more humane, or easygoing, than the Romans; but the quality of Roman law was that it was dependable." (Paterson (1993), Ch. 3.)

But this ideal of dependability and predictability was not a Roman monopoly; Kleon, one of the most prominent leaders of the Athenian democrats, made precisely the same point:

"And this is the very worst thing — to pass measures and then not abide by them. We should realize that a city is better off with bad laws, so long as they remain fixed, than with good laws that are being constantly altered" (Thucydides, III. 37.)

Stability of the law was an Athenian ideal no less than a Roman one.

It is true that Rome probably did have greater reverence for the strict and exact letter of the law than Athens did. But this legalistic attitude is not necessarily to Rome's credit. For example: at one point Rome had a law saying that it was illegal to execute a virgin. Presumably the intent of the law was to protect virgins; but the result was that, in order to abide by the letter of the law while evading its spirit, executioners were legally authorized to rape virgins before killing them. It is very difficult to imagine the Athenians standing for this sort of thing.

Paterson does think Athens was lacking in the rule of law:

"Though the anecdote may have been invented as a joke which related that an Athenian voted for the banishment of Aristides because he was tired of hearing Aristides called The Just, the thing was not impossible by the democratic system. In Roman law a man must be charged with a specified act having known penalties, and convicted on something more positive than opinion, to incur sentence. He could not be guilty for no cause."

(Paterson (1993), Ch. 3.)

But this contrast is unfounded. The Athenians were as committed to the rule of law as the Romans were. The ostracism example is a rather bad one, because ostracism was the *only* case in which an Athenian citizen could be exiled for no crime, and it was used very infrequently. (And of course, as we've seen, Paterson misses the point of the Aristides anecdote.) In the pages of Thucydides one finds that it is the Athenian democrats above all else who are the most likely to praise the idea of respect for law. And it is odd that Paterson so roundly condemns the Athenian practice of ostracism, when she praises the Romans' habit, during the Imperial period, of assassinating their Emperors (about a third of all Roman Emperors died by assassination) as a useful constitutional adaptation, akin to a letting a fuse blow to protect a circuit in event of a short. Surely the Greek *ostrakon*, whatever its faults, was a more civilized response to the threat posed by powerful individuals than the Roman dagger.

We should also not be too quick to agree with Paterson that the *content* of the law is relatively unimportant so long as the law is stable and its enforcement predictable. It is useful to remind ourselves of what some of the laws were under Paterson's beloved Roman Republic. The common people were forbidden to assemble in large numbers except on official state business; magistrates could impose penalties on any citizen, without due process or the right of appeal; military discipline was arbitrary and brutal; and male heads of households were authorized to put their wives and grown children to death if they so pleased. Roman women were mere adjuncts of men, and were not even allowed to have names.³

On just about any comparison between

Athens and Rome, Athens comes out rather well.

What Can We Learn From Athens?

Today we call the United States a democracy. But the Athenians would have called it an oligarchy—or at best a Mixed Constitution. They would have seen our reliance on an electoral system as reinforcing the power of a wealthy, privileged elite whose manipulation of the media and restrictions on ballot access ensure continued success at the polls. The notion that America is run by majority rule is one the Athenians would have found ludicrous; they would have seen that America is run by a tiny minority consisting of public officials and the wealthy interests that support them.

Libertarians are fond of echoing the conservatives' dictum that America's founders wanted a republic, not a democracy. What we mean when we say this is that they wanted a system in which neither the majority nor the minority could run roughshod over the other, rather than a system that simply empowers the majority. To that extent, they were right. But for the founding fathers, or many of them, this translated into a preference for a constitution based more on the Roman model than on the Athenian; and this last preference may well have been the fatal error that opened the door to an American Leviathan.

What does the Athenian constitution have to teach us? Which successful features of Athenian law could be usefully borrowed by those seeking to establish a free nation? Here, I think, are some of the lessons that we can learn from that free-nation experiment of two and a half millennia ago:

1. Take the dangers of patronage far more seriously than libertarians are accustomed to doing, and try to devise methods of circumventing its influence.
2. Select a substantial number of government officials by lot in order to break the power of special interests and make the government more representative of the governed. (Just consider: under the Athenian system there would *already* be libertarians in Congress!)
3. Impose strict term limits on public offices.
4. Make sure the salaries for public office

are high enough to ensure that those who are not independently wealthy can afford to serve. (Out of understandable frustration at the cupidity of our rulers, many libertarians have suggested that public officials should be paid little or nothing. It's an attractive idea, but I think the Athenians were right in regarding it as a dangerous mistake.)

5. At the end of each term, subject officials to a public review of their conduct in office.
6. Make it a prosecutable offense for legislators to pass unconstitutional laws or to win votes through deception.
7. Increase the scope of citizen referendum.
8. Increase the sovereignty of juries by eliminating compulsory empanelment, voir-dire, rules of evidence, and the like. (Though I resist, on egalitarian grounds, the Athenian idea of making juries not legally accountable for their decisions, unless such an exemption is agreed to by both parties to the dispute. Also, a right of appeal would be nice.)
9. Give juries the power of judicial review. (This goes one step beyond the power, already advocated by many libertarians, to nullify the application of a law in a particular case, to the power to actually strike down the law and in effect repeal it for everybody. But an exemption should be made for laws that are, e.g., basic constitutional guarantees of rights.)
10. Make juries extremely large, so that they will be more representative.
11. Treat all cases as civil cases, with the victim rather than the state directing the prosecution.
12. Replace criminal cases with class-action suits.
13. Let juries decide between alternate penalties suggested by prosecutor and defendant.
14. Offer exile (temporary or permanent) as a cost-effective alternative to imprisonment.
15. Foster competition among systems of

dispute adjudication.

16. Shift the focus of law enforcement from governmental police to self-help.

It seems appropriate to give the last word to Perikles, the most articulate and inspiring defender of the Athenian constitution:

"Let me say that our system of government does not copy the institutions of our neighbors. ... Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. ... everyone is equal before the law ... what counts is not membership of a particular class, but the actual ability which the man possesses. No one, so long as he has it in him to be of service to the state, is kept in political obscurity because of poverty. And, just as our political life is free and open, so is our day-to-day life in our relations with each other. We do not get into a state with our next-door neighbour if he enjoys himself in his own way, nor do we give him the kind of black looks which, though they do no real harm, still do hurt people's feelings. We are free and tolerant in our private lives; but in public affairs we keep to the law. ...

When our work is over, we are in a position to enjoy all kinds of recreation for our spirits. ... in our own homes we find a beauty and a good taste which delight us everyday and which drive away our cares. ...

Our city is open to the world, and we have no periodical deportations in order to prevent people observing or finding out secrets which might be of military advantage to the enemy. ... The Spartans, from their earliest boyhood, are submitted to the most laborious training in courage; we pass our lives without all these restrictions, and yet are just as ready to face the same dangers as they are. ... There are certain advantages, I think, in our way of meeting danger voluntarily, with an easy mind, instead of with a laborious training, with natural rather than state-induced courage. ...

We regard wealth as something to be properly used, rather than as something to boast about. As for poverty, no one need be ashamed to admit it: the real shame is in not taking practical measures to escape from it. ... We Athenians, in

our own persons, take our decisions on policy or submit them to proper discussions ...

Taking everything together then, I declare that our city is an education to Greece, and I declare that in my opinion each single one of our citizens, in all the manifold aspects of life, is able to show himself the rightful lord and owner of his own person, and do this, moreover, with exceptional grace and exceptional versatility. ... Mighty indeed are the marks and monuments of our empire which we have left. Future ages will wonder at us, as the present age wonders at us now. ...

What I would prefer is that you should fix your eyes every day on the greatness of Athens as she really is, and should fall in love with her. ... Make up your minds that happiness depends on being free" (Thucydides, II. 37-43.) Δ

Notes

1 "The celebrated Pericles, in compliance with the resentment of a prostitute, at the expense of much of the blood and treasure of his countrymen, attacked, vanquished, and destroyed the city of the *Samnians*. The same man, stimulated by private pique against the *Megarensians*, another nation of Greece, or to avoid a prosecution with which he was threatened as an accomplice in a supposed theft of the statuary of Phidias, or to get rid of the accusations prepared to be brought against him for dissipating the funds of the state in the purchase of popularity, or from a combination of all these causes, was the primitive author of that famous and fatal war, distinguished in the Grecian annals by the name of the *Peloponnesian* war; which, after various vicissitudes, intermissions, and renewals, terminated in the ruin of the Athenian commonwealth." (Alexander Hamilton, *Federalist* §6.)

Here Hamilton relies not even on the moderately biased account of Thucydides, but the centuries-after-the-fact gossip and speculations of the Platonist historian Plutarch. For a more balanced assessment of the origins of the Peloponnesian War, one that shows Perikles' policy to have been primarily a defensive rather than an aggressive one, see Kagan (1969).

2 The only version of a Mixed Constitution for which much can be said is the old Icelandic constitution, with Chieftains being analogous to Horsemen with the right to hold political office, heads of households being analogous to Yokemen with the right to choose such officers but not to become them, and everybody else being analogous to Menials entirely dependent on the good will of the other two classes. If the Icelandic constitution was more favorable to freedom than the Roman one, it is only because it had less centralization of power. (And if Iceland was a more anarchistic version of Rome, perhaps what lovers of freedom need is a more anarchistic version of Athens.)

3 Roman men had names like our own — a first name peculiar to oneself, and a last name repre-

senting one's family. (Sometimes a nickname, either of the individual or of the family, was added as a third name.) But women had only a last name — their father's family name — but no personal name. So, for example, if a man was named Marcus Sempronius, his son might be named Gaius Sempronius or Lucius Sempronius or Titus Sempronius, but his daughter would simply be named Sempronia (the feminine version of Sempronius). If he had several daughters, they would all be named Sempronia. Parents told their daughters apart by *numbering* them; for example, the fourth daughter of Marcus Sempronius would be named Sempronia Four. The position of Athenian women was nothing to brag about, but at least Greek women were regarded as having enough of an independent identity to be worthy of having *names*. (Nor were their husbands authorized to execute them.)

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The Anticrime Industry in a Free Nation

by Roy Halliday

I believe the founders of a free nation will decide to prohibit punishment when they understand the implications outlined in this article. First, let me explain why punishment of criminals poses a major problem for a free society.

The Existing Monopoly

Libertarians have used economic arguments and historical evidence to show that the free market can deliver education, roads, money, mail, and other useful things more efficiently than the state can. Some libertarians have gone further by asserting that defense, like any other legitimate service, could be provided better by a competitive market than by a state monopoly. This claim, however, is not as radical as you might think. You don't have to be an anarchist to agree with it. For one thing, the state does not, in fact, monopolize all defense services. The state is often involved in the defense business and it closely monitors and regulates private suppliers of defense services, but it is not always the exclusive supplier of defense services. In the United States, for example, citizens are allowed to defend themselves. They can own weapons. They can hire bodyguards, watchmen, and private investigators. They can install burglar alarms, keep their valuables in vaults, purchase insurance policies, and so on. With all this in mind, it is hard to see why anyone would consider defense to be a state monopoly. Libertarians are attacking a straw man when they argue that there need be no monopoly of defense services; there is none!

Why then do so many people regard defense as the *raison d'être* of the state? If defense means protection from attackers, preservation of property, and repossession of stolen goods, then the claim that private enterprise cannot provide defense is unwarranted, because private enterprise already does provide defense to a significant extent. However, if "defense" means not only protection against attackers and repossession of stolen goods, but also punishment of criminals, then it makes sense to claim that the state is necessary for "defense." The state does maintain a mo-

nopoly on the punishment of criminals. Those who "take the law into their own hands" by punishing criminals as they see fit are in turn punished by the state when they are caught. Punishment rather than

hibit punishment.

1. Private Punishment

Private punishment would lead to so much instability in society that the nation would not remain free for very long.

a. Private defense services would be severely restricted

If the state did not maintain a monopoly on punishment of criminals and if private individuals had the right to administer retribution, it would never be proper for a third party to come to the aid of someone who is being attacked, because it would be impossible to know whether the attack was a crime or a punishment.

If someone is acting on the eye-for-eye principle, there might be no visible difference between a crime and its punishment. The intent of this principle is to make the punishment be as much like the crime as possible, so a mugging would be indistinguishable from eye-for-eye punishment of a mugger. An apparent rape could actually be an act of personal revenge justified by the right to punish rapists.

Third parties could not know whether a person being attacked has ever committed a crime, and they could not know whether the person being attacked deserves to be punished. So, they could not know whether the attack is a crime or a punishment. If it is a punishment, they could not know whether it is excessive. Without knowing these things, third parties could not know whether they have the right to intervene.

In other words, if we regard everyone as innocent until they are proven guilty and if we approve of private punishment, we would have to regard an obvious attacker and his victim as equally innocent, and we would be morally bound to refrain from taking sides.

Watchmen or guards would have to enquire of any trespasser, "Is this an ordinary criminal invasion, or is it a retaliation for a crime?" If the trespasser says he is administering punishment, the guard would have to give him the benefit of the doubt and not intervene. This would have a devastating effect on the ability of private industry to provide defense services. Before you could agree in good conscience to protect a prospective client, you must be sure that the prospective client has a right to be protected. To know this, you have to know that he never committed any crime for which he



Roy Halliday

defense poses a problem for those who want to privatize everything.

Thesis

Let us assume that we belong to a heterogeneous group of libertarians who are starting a free nation and that, even though we all understand English, we do not have a common religion or a common cultural tradition with regard to how criminals should be punished. Assume we have to decide how to treat criminals based only on reason and human nature, disregarding all influences from particular cultures and traditions. Then, we would have three basic options for punishing criminals:

1. Let criminals be punished by private individuals and businesses.
2. Let the state control the administration of punishment.
3. Prohibit punishment.

The choice we make will have a significant effect on the ability of the free market to provide protection from criminals. My thesis is that when libertarians understand the moral and practical implications of each of these alternatives, they will choose to pro-

has not been punished in full. To know this, you would have to know his entire life history. This is such a stringent requirement that it would prohibit crucial functions of the protection industry.

Consequently, the right to private retribution would negate the practical benefits of delegating the right to self-defense. Individuals would only have moral authority to defend themselves. If they tried to defend anybody else, they would risk violating a crime-victim's right to administer punishment. To do so would jeopardize their own right to self-defense. If private punishment were legitimate and you violated someone's right to punish a criminal, you would become a criminal yourself, and you would lose your right to defend yourself from punishers.

The right to punish criminals would leave innocent people to their own devices for self-defense. Individuals could not cooperate for mutual defense. Criminals, being criminals, would not be inhibited by these moral considerations and would be able to cooperate with each other and be partners in crime, but noncriminals could not cooperate in defense against them.

However, the right to punish criminals, unlike the right to self-defense against criminals, could be delegated to others. This means that private firms could legitimately punish criminals for profit as long as they only punish people who have objectively been proven criminals. A victim of a crime who personally witnessed the crime would be sure of his personal right to retaliate against the criminal, but a punishment firm could not be sure it had the right to assist him unless there is enough evidence to objectively prove who committed the crime.

b. Some people would be singled out for their punishment-entertainment value

Competing punishment businesses would arise, financed by the patrons of retribution. The most profitable of these would be the ones that did the best job of satisfying their customers. If it were allowed, every form of punishment for which there is a demand would be provided by the free market. Punishment would probably become a form of entertainment. Money could be made by charging an admission fee to witness retribution. Punishment parlors and theaters might open up in every city. Competitors could devise imagina-

tive new punishments to attract and titillate audiences. Special prices could be charged to witness "adults only" orgies of punishment on Saturday nights. X-rated punishment shows might become a popular attraction.

It is likely that there would be a particularly high demand to see justice done to pretty girls. One probable consequence would be that pretty criminals would be apprehended more often than other criminals, because there would be more profit in punishing them. It would be in the economic interest of punishment companies or bounty hunters to closely observe the activities of young women, so that as soon as they commit any infraction, they can be scheduled for punishment in the most profitable way.

Pretty girls might be followed and spied upon in hopes of witnessing them commit crimes, capturing them, and selling them to the punishment firm that bids the highest price. Pretty girls would have to be extremely careful and wary of entrapment so they do not become the stars in the Saturday night retribution show.

c. Punishment would be unequal and unpredictable

Such practices would lead to economically justified inequities in punishment. If punishment were not regulated by strong traditions or religious authorities or a coercive monopoly, it could not be uniform or predictable. If sentencing schedules were not publicized, people could not know in advance what kind of punishment they risk. Criminals would be punished in different ways for the same crime, depending on who did the punishing. Some people would try to enforce the eye-for-an-eye principle. Others might demand two eyes for an eye. Some might argue that imprisonment is better than mutilation, and others might not be satisfied with anything less than the death penalty for all criminals.

To avert unprofitable wars, competing punishment organizations could agree to some general rules. A sensible rule for them to adopt would be to allow the victim of the crime to determine the punishment. Punishment parlors could suggest or demonstrate a variety of popular or fashionable punishments. They might publish illustrated catalogs of imaginative and enticing penalties. The customer would make the final decision and get exactly the justice he pays for. Other punishment organizations, by

prior agreement, would honor the chosen punishment as sufficient to negate the particular crime of that particular criminal, regardless of any disparity between this punishment and punishments chosen for other criminals who commit similar crimes. There would be no uniformity of punishment for similar crimes and no general proportionality between punishments and crimes.

d. People would demand a different system

The inequities of free-market punishment would soon become apparent to everyone. People would demand that the punishment system be changed. Those who feel that some criminals are being punished too severely would seek to restrain the punishers. Prudes who disapprove of X-rated punishments would protest them. People who are upset by the destruction of the protection and insurance industries, would demand a uniform system of punishment that would allow these industries to function again. The arbitrary and unfair nature of punishment would become clear to everyone. This would lead to demands for the abolition of punishment on the one hand and for the adoption of a uniform punishment code on the other. Pressure would mount to ban some punishments and to standardize the whole punishment process.

Because there is no rational basis for choosing one punishment theory over another, the only way to have a uniform punishment system in a heterogeneous society is to impose one by force. People would demand that the state enforce punishment standards and monopolize the whole business. Only a state, an organization that maintains a coercive monopoly on invasion, can enforce its standards of retribution and prevent everyone else from enforcing other standards. Only a state can give the appearance of fairness to an arbitrary penal code by imposing it on everyone.

2. State Punishment

It is not necessary to describe state punishment in detail, because we are very familiar with it already, having lived under such a system all our lives. Theoretically, the state can make punishments uniform by enforcing a written penal code. Then, the state could establish procedural rights and

administer punishment in a distinctive way so that punishment could be distinguished from assault and battery, kidnapping, and wrongful imprisonment. This would allow private citizens to know when they can defend one another without obstructing justice.

When the laws are enforced by a state that recognizes procedural rights, people are only punished after they have been found guilty of violating a publicly declared law. The state (ideally) protects people who have not been proven guilty in the courts. A state monopoly of lawmaking and punishing allows people to make plans to avoid punishment.

The uniformity intended, if not actually provided, by the rule of law would help to make the infliction of punishment seem equitable.

By maintaining a monopoly on the administration of punishment, the state makes it possible for defense agencies to function. For example, if a private guard came upon a man mercilessly beating a helpless old lady, the guard would know right away that the attack was not a legitimate punishment. He would know that only the state can legitimately punish criminals and that they can only do so after a formal trial with a lot of pomp and ceremony. So, the private guard can provide more protection against invasion when the state monopolizes punishment than he can in a society that permits unregulated, private punishment. For this reason, the statist's solution to the punishment problem is more practical than any system of free-market punishment.

3. No Punishment

In a voluntary society where crime is defined as the initiation of force and where the only legitimate use of force is to stop crime, anyone who tried to impose physical punishment by force would be recognized as a criminal, and everyone would have the right to use force to stop him.

When we regard punishment as unlawful, then we are no longer terrified by the idea of allowing people to take the law into their own hands. If we reduce law to simple justice, as defined by the right to self-defense against aggression and the right to do anything peaceful with one's legitimate property, then it becomes legitimate for people to take the law into their own hands.

Vindictive practices would be restricted in a voluntary society, but if we defined

"punishment" broadly, not all "punishments" would be outlawed. The kind of punishment that justice prohibits is the kind that involves physical harm to someone's body or other property without their consent. Corporeal punishment, imprisonment, and fines are prohibited by the basic right to self-defense against aggression. However, there are other vindictive things that you would be able to do to people legitimately. With a little ingenuity and determination, you can get some satisfaction without violating anyone's rights. For example, you could make those who offend you feel ashamed by publicizing their crimes. Or you could organize a boycott or try to persuade others to isolate a criminal from society. If you really wanted to be mean, you could lure someone into a trap, get him to commit a crime, and then jump in with superior force to stop him. The force you use must be for defense, but you might enjoy it while it lasts—you might get lucky and leave a scar or other permanent damage.

Crime would be kept in check without punishment in a society based on the right to self-defense, because, first of all, each person could defend himself. Second, people could voluntarily help defend each other. Third, people could hire professionals to defend them.

Protection agencies would have a legitimate place in such a society. They would not have to know the past history of their clients in order to know that their clients have a right to be protected from all invaders. They would only need to stipulate that they will protect each of their clients except while the client is breaking the peace. The protection agencies would not have to know whether their clients have ever committed crimes for which they have not been punished. The protection agencies would only have to be concerned with their client's actions now.

This would allow professional defenders to take immediate actions on behalf of their clients. This is important because now is when the client wants protection from threats. Now is when all the pertinent facts are evident and can be evaluated. Now is the best time to make moral judgments, not later in a courtroom after the crisis is over and circumstances have changed, when the evidence is old and might not matter anymore.

The law administered by all firms in a free society would be the same. What would

vary from one firm to another would be such things as their profits and losses, the quality of the services they provide, the prices they charge, and the technologies they use.

They would differ from states in that they would not be monopolies, and they would use the economic means instead of the political means. Consequently, they could not impose taxes, they could not suppress competition, they could not punish anybody, they would not have subpoena power, and they could not empanel juries by force.

In a free society, no one could be dragged into a courtroom to testify, to judge the facts, or to stand trial against his will. Any courts in a free society would be set up solely for the convenience of disputing parties who mutually agree to arbitration. No one would be obligated to use such courts.

Protection agencies might be hired by individuals or by insurance firms acting on behalf of their clients. Insurance companies would have a vested interest in returning stolen property to its rightful owners if they are obligated by contract to pay compensation for stolen goods not returned. Insurance firms might hire detectives to retrieve stolen goods. They might hire guards and watchmen to prevent crime. They might finance the development of new methods to prevent or stop crime. They could hire scientists to invent methods for identifying insured property and even finding it when it is lost or stolen. Perhaps a device could be invented that could distinguish any particular registered piece of property from all others and make it easier to track it down.

If possible, the insurance companies should return the same physical item that was stolen. If this is not possible, or if the property can only be returned in a damaged condition, then the insurance policy should spell out the method for determining compensation.

Those insurance firms that gain a reputation for providing good protection, fair settlements, and reasonable prices will do the most business. Thus, in a free nation that recognized the right to self-defense and that outlawed punishment, the free market could provide a great deal of protection from crime.

Conclusion

From a practical point of view, it would be better to forbid all punishment than to

(continued on page 27)

Free Nation Foundation Touches Base With the Republic of Texas

by Richard O. Hammer

In early June, Richard Hammer visited the publishers of *Republic of Texas Magazine*. Taking a ten-day driving trip westward from North Carolina, he met the publishers in their home town of Post, Texas, and conversed for many hours, about constitutions and about the situation in Texas, with Charles Duncan, one of the publishers.

Rich's trip was scheduled so that he also took in some sessions, on 7-8 June, of the convention of the Libertarian Party of Texas, which met in Lubbock. At that convention he heard speeches by, and met, Archie Lowe, President of the Republic of Texas, and Richard McLaren, Chief Foreign Legal Officer. On the suggestion of Wesley Burnett, the second publisher of *RT Magazine*, Rich wrote a report on his trip for inclusion in the August issue of *RT Magazine*.

In order to inform FNF supporters of events in Texas, Rich bought seventy copies of the June issue of *RT Magazine*, and distributed these, along with a written report, in a mid-June mailing to FNF Directors, Members and Friends.

Since Rich was traveling that far anyhow, he took the opportunity to go on a little farther, and visit his sister who lives in Santa Fe, New Mexico. While there, he met Spencer MacCallum in Albuquerque. And, since he was traveling that far anyhow, he went another day westward, to visit with Spencer at his home, in Pine Hill, New Mexico (in Navajo country, just east of the Arizona line). Spencer was just packing up that house, in anticipation of a move to a new location suitable for his wife's work.

As was reported in the Summer issue of *Formulations*, the Republic of Texas is a movement in Texas which is seeking to reestablish separation of Texas from the U.S. The movement, which has many libertarian elements, asserts that the incorporation of Texas into the United States, during the mid-1800s, was achieved without constitutional authority in either of the joining partners.

Republic of Texas Magazine may be contacted at: 118 S. Avenue N, Post, Texas

79356; 806-495-4135.

The Republic of Texas has a web page at: [HTTP://Texas.by.net](http://Texas.by.net). Δ

FNF News Notes (from p. 1)

ard Hammer will also send Marc copies of FNF publications in his possession.

- Congratulations to Marc Joffe, Director of the New Country Foundation, who will be married to Susan Cheng Pingmin, in Northern New Jersey on 1 September.
- FNF Member Robert Mihaly, a sculptor, has been awarded the position of Artist in Residence at the Washington National Cathedral in Washington, D.C. Robert, who comes from Durham, N.C., will begin the one-year long post in October. Δ

October Forum (from p. 1)

nametag.

During the day we will break for lunch. Oliver's gives us the room with the understanding that many of us will buy lunch, or something. Oliver's is a steak and seafood restaurant with a buffet. The buffet costs \$7. Δ

Spring Forum (from p. 1)

nation will impose no agenda upon family structure and family life. So we will explore questions such as:

- Will most people marry in churches and couple in traditional long-term monogamous relationships, or will there be Heinlein-style "line marriages," or group marriages? What contracts and what enforcement mechanisms do we foresee?
- What supports, if any, will exist for abandoned partners, notably parents of young children, who find themselves cut off from their expected primary source of support?
- Will there be orphanages? Will children be sold? Δ

ROH on Business (from p. 6)

negotiations, between landlords and tenants, are likewise stilted by government. The process of resolving disputes about leases has been seized and rendered almost

worthless by government. As such, landlords and tenants do not always negotiate in a context in which they are dealing simply with the other party, seeking some win-win arrangement, but instead take positions which they can take, or feel they must take, because of the way that government law operates.

Many people, who would like to move to be nearer their friends, do not do so, because to move is such a cumbersome thing. And much of this difficulty, I assert, has been created by government. In a free nation, many more people would, because of the unregulated ease of moving, find themselves living in closer contact with people with whom they felt compatible. Δ

Richard O. Hammer, of Hillsborough, NC, for the time being works full-time on the Free Nation Foundation. In the past he has worked as a residential builder and engineer.

Anticrime Industry (from p. 26)

allow it to be administered privately, because allowing private punishment would ruin the protection industry and lead to chaos. Allowing the state to have a monopoly on punishment solves some problems, but it can lead to other undesirable state activities such as taxation, repression, and warfare.

From a moral point of view, libertarians should work to discredit retribution by pointing out that (1) it violates the right to self-defense against aggression, (2) it is not within human abilities to objectively administer proportional punishment, and (3) there is no nonarbitrary way to decide what the proportion between punishment and crime ought to be.

Administering proportional punishment requires omniscience. Those who believe in it must be content to hope that there is a god who also believes in it and who will administer it in the afterlife. In this world, punishment should be regarded as a criminal activity like censorship, taxation, war, and other uniquely state functions that have no place in a free nation. Δ

Roy Halliday is a longtime libertarian who works as a technical editor for a major software development company in Research Triangle Park, NC.

Optionality: Beyond Law and Order

by Ben Mettes

THE FUTURE OF BUSINESS

Optionality is the perspective from which consultancy company Quintessence approaches issues and topics. Quintessence also publishes a magazine called *Optionality*, which has appeared monthly since January 1991. In *Optionality*, topics such as the establishment of a "Free Nation" as well as the future of business have received quite a bit of attention; over the years, the following questions have come up in that discussion:

1. Will there be money (currency) in a Free Nation?

At the moment, currency is strictly regulated by central banks in each country. The Government both monopolizes local currency and determines its value to a large extent. Without government intervention, will money look the same? What will be the difference between money and shares, IOUs, promissory notes, checks, stamps, gold or a bus ticket? Years ago, an article in *Optionality* speculated that shares will become the dominant form of payment in future (e.g. one pays for a service with, say, 300 shares IBM, or the equivalent in other acceptable shares, say 268 SONY shares). If this happens, then we should no longer be talking about money, but we should properly call it shares.

2. Will there be property (ownership) in a Free Nation?

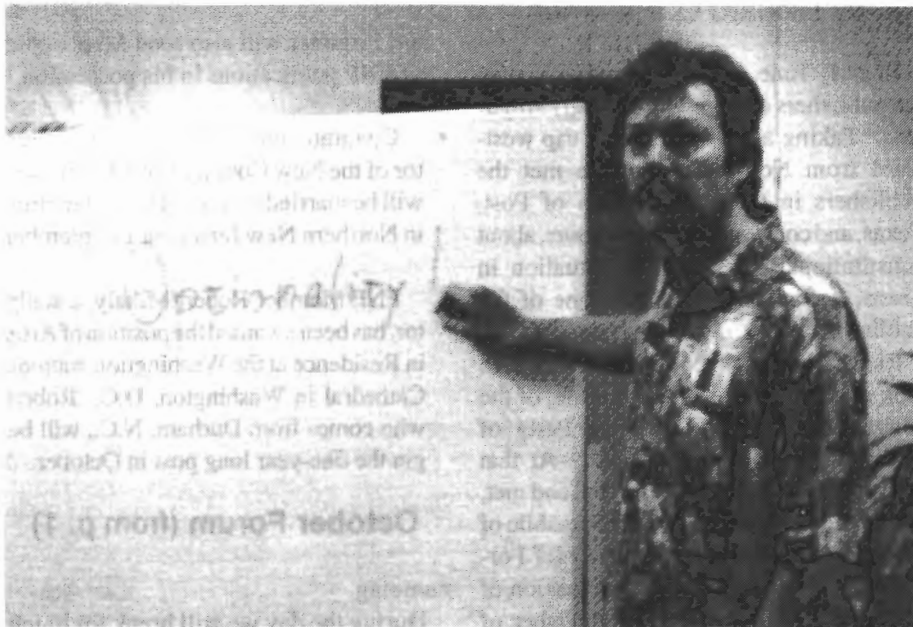
At the moment, ownership is determined (in case of disputes) by courts. Will a "Free Nation" have courts and laws? If not, how will property disputes be settled, if at all? If multiple owners can coexist (each with a claim on a specific thing, without wanting to share, as shareholders do), will this transform the concept property? If the concept of property changes in character, should we then still talk about property? Perhaps the term "claim" is more appropriate, or, should I say, more claimable.

3. What will trade look like in a Free Nation?

At the moment, disputes about (all) con-

tracts are similarly settled in court. Trade could be regarded as transfer of ownership in a broad sense; even employment can be regarded as a form of trade; labor contracts are essentially a trade of future work for a

venes in the free market. Subsequently, methods to establish such a nation have been discussed, including a suggestion to back a party aiming to democratically end the government, e.g. by liquidating the



Ben Mettes, Quintessence's Managing Director, presenting Don Paragon's Vision of the Future at Novotel's Twin Waters Resort at Queensland's Sunshine Coast, 15 November 1995

future salary; future labor could thus be seen as owned by the worker, until the owner (worker) signs away (part of) the rights to an employer. In this broad sense, our current society is dominated by trade, given that trade encompasses not only financial transactions and transfer of property, but also employment contracts and other contracts.

A NUMBER OF VISIONS

The magazine *Optionality* has drawn the conclusion that if one takes away the government, concepts such as trade, property and money are likely to take on an entirely different meaning, if not lose their meaning. The magazine *Optionality* does not pretend to know exactly what will happen, it is just trying to discuss these matters in a way that makes sense. In that process, a number of "visions" have come up as to what the future may look like.

1. The "Action Man" Approach

One of these visions is that all such matters should be left to market forces and that the thing to focus on is how to establish a nation that has no government that inter-

government as if it were a defaulting company. In the magazine *Optionality*, this has been referred to as the "Action Man" approach. In a recent version of this approach, it was suggested that a State without government could participate in not one, but multiple Federations of States, which would prevent any Federal Law from going beyond the level of the lowest common denominator.

2. Don Paragon's Vision

The magazine *Optionality* currently favors Don Paragon's *Vision of the Future*, that anticipates a shift away from activities such as trading, making profits, earning money and making investments for the sake of dividends, towards activities that strengthen one's talents, name and profile, and broaden one's horizon, by developing ideas for the sake of personal fulfilment and appreciation. In Don's Vision, trade will continue in future, but without the dominance it has today; Don envisages developments such as more intense competition, on-going progress in technology and growing globalisation to make it ever easier for consumers to achieve a similar standard of living that now costs a large

part of people's money. With more "free time" to spend for the bulk of people and with less profits to be made in trade, more and more people will seek to interrelate on the basis of mutual and voluntary agreement to achieve what they jointly appreciate. Don anticipates the Government as an institution to become less and less relevant due to such developments. Don Paragon is a composer and musician, who sees his "Vision of the Future" primarily expressed in the lyrics of his music, rather than in articles.

3. Differences Between These Two Visions

These visions have some elements in common, e.g. they both reject government intervention. However, the "Action Man" approach seems incompatible with the globalization aspects of Don Paragon's Vision. Also, any territorial approach depends on the implementation of borders, which implies the use of force to ensure that people respect such borders. In Don Paragon's Vision, the use of force becomes a less and less attractive solution to whatever is perceived to be a problem; the concept of crime resolves itself in the light of global exposure and of a change in focus from possession of physical objects towards appreciation of creativity. A focus on specific borders inherently is a legalistic approach, a "law and order" solution with entrenched values that are out of step with the developments as pictured by Don Paragon.

IS OPTIONALITY A VISION?

1. What is "Freedom"?

Interestingly, the concept of optionality plays an important role in both the "Action Man" approach and Don Paragon's "Vision of the Future." The issue of coining names should be of concern for supporters of a "Free Nation." The "Action Man" approach does not regard the concept "freedom" as its ultimate vision. Instead, the "Action Man" approach claims that its ultimate vision is "optionality" as a global concept, rather than "freedom."

Ironically, it was Don Paragon who first suggested that the concept "optionality" is superior to the concept "freedom," as "optionality" is a positive concept, whereas "freedom" is essentially a negative concept, in that it focuses on what one does not want.

By contrast, Don Paragon regards "optionality" only as part of his Vision;

Don's Vision also describes what will be the most common practice in future, i.e. how people will interrelate, what their activities will be and what will be the measures of success and prosperity. "Optionality" represents only the ideological part of Don Paragon's Vision; or, if you like, the dominant belief of the future.

2. The Territorial Debate

Both in the "Action Man" approach and in Don Paragon's "Vision of the Future," the concept "optionality" is seen as superior to the concept "freedom," as discussed above. The "Action Man" approach further uses the term State instead of Nation. A State can be part of a Federation that looks after issues such as Constitutions, relations with other nations, borders, etc.

This may be regarded as semantics, as a cosmetic discussion over terminology. Even so, the difference with Don Paragon's Vision is of a fundamental nature. Don Paragon rejects any territorial focus. In Don Paragon's Vision, globalization will make territorial borders (and subsequently the Government as an institution) less and less relevant in future. Don Paragon thus rejects the territorial focus of the "Action Man" approach as a paranoid regression into isolationism.

Don wonders: "Does anyone who appreciates 'freedom' really want to restrict 'freedom' to one specific nation?" In the case of the "Action Man" approach, the territorial focus was to be the first step in a broader vision that ultimately advocated "freedom" (or rather "optionality") beyond the borders of this initial State without government. But Don Paragon rejects even such a staged approach. Don Paragon wonders again why establishing freedom initially in only one specific territory is preferable to advocating it worldwide in the first place. Is this territorial approach perhaps a compromise, a concession, in the sense that

what one really (ultimately) wants to achieve is global freedom, i.e. optionality? Is choosing to establish freedom locally first not inconsistent, similar strategically to libertarian politics, where people argue against interventionist government, yet choose to become part of an interventionist governmental system with the strategy to make the government less interventionist? Can any "free territory" be part of a global vision of optionality? Not in the eyes of Don Paragon, who regards globalization as an essential element in the evolution of his Vision.

3. Relevance for the "Free Nation" Concept

The idea behind this article is to assist people in considering the implications of terminology on anticipated scenarios. As discussed above, the very terminology "Free Nation" leans towards one specific scenario. The "Action Man" approach, as described above, presents a slightly different scenario, that similarly has a territorial and legalistic focus, yet regards "optionality" as its ultimate vision. Personally, I prefer Don Paragon's Vision and, as mentioned above, "optionality" represents only part of Don's Vision of the Future. In the end, however, I believe that people should not be coerced into choosing for any one scenario. I like to avoid saying that all approaches are wrong except for that one specific approach that is the only right way to go; I don't want to be locked into any one scenario. Quintessence uses "optionality" as a perspective in consultancy, which implies comparison of a number of scenarios, a number of visions; for me, this is the essence of optionality. Δ

Ben Mettes is Managing Director of Quintessence, a private marketing and consultancy company.

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Business in a Free Nation

by Philip E. Jacobson

Unlike most of the essays I have written for *Formulations*, this one is in direct response to a series of questions raised for a FNF Forum. Thus it is more like a list of answers than the development of a thesis. Nevertheless, there is a thesis which I think will characterize the shift of business activity from a statist society to a free nation. The thesis is that the business climate in a free nation will tend to encourage businesses to adopt a strategy of mutual self interest with their customers (and with many other businesses) instead of the antagonistic one which is encouraged by state interference. The form of the paper will follow the list of "official forum questions." I will first attempt to comment on each of the questions. Then I'll add some points not raised by the questions. Finally, I will comment again on the general theme.

Comments on the Five Forum Questions

1) *With no bankruptcy law (with the state not intervening to protect, and provide comfort to, those who fail, cheat, or pollute), what effect will this have upon investors, managers, customers, and neighbors? What institutions will emerge to ameliorate the problems which bankruptcy laws were intended to satisfy?*

What are these "problems which bankruptcy laws were intended to satisfy"? Supposedly the idea of a bankruptcy law is to give a person a chance to start over, free from an "excessive" burden imposed by that person's debts. The main protection provided is protection from the state itself. The state is seen, in most debt situations, as protecting the creditor's right to collect, via the state's function as an enforcer of contracts. With bankruptcy law, the state absolves itself of this responsibility. When bankruptcy is declared a creditor will usually have made no other provision for contract enforcement, thus the debtor is freed from his obligation to pay. In a free nation with an advanced division of labor economy, contracts would still have to be made and some mechanism of contract

enforcement would have to be established. To the extent "excessive burdens" ought to be removed from debtors, such removal would have to be coordinated through the new contract enforcement mechanisms.



Phil Jacobson

Many libertarian theorists have discussed the idea of private arbitration as a method for resolving contract disputes. In such a system a contract would be enforced, in the event the parties to it disagreed, by an arbitration service designated in the contract itself. Such contracts would include all forms of recorded property title transfer (like deeds) and would be filed with the arbitration service or an allied record-keeping service. It is assumed in discussions of private arbitration that the two parties would feel morally obligated to abide by the decision. Despite moral pressure there would be some cases where a party to a dispute would fail to abide by the decision. What then? Possibly a bond would have been posted by one or all parties to the contract. Bonds could be held by the arbitration service and used to pay for non-performance of the contract.

Another useful mechanism would be for a second service to be provided, which I will call a "credibility bureau." This new service could be provided by the arbitration service or separately. A credibility bureau would hold files in the same way that credit bureaus do now. A person's credibility bureau file would contain any arbitration judgments against him. The credibility bureau file could also contain information

about successfully completed contracts. Credibility bureaus serving different communities could share file information, as credit bureaus do now. When persons sought to make contracts with others they would be able to consult these files. A bad credibility bureau rating might be the basis for refusing to do business with someone or for asking for a very high bond to be posted. In this way the "enforcement" system would emphasize avoiding contracts which are likely to be defaulted rather than punishing defaulters by force after the fact (as state-based systems do).

With respect to the notion of bankruptcy, not everyone agrees that bankruptcy laws should exist. A free nation's institutions should not force everyone to respect the notion of bankruptcy, but should allow for those who do see value in the idea of bankruptcy to use it in voluntary relations with others. This would be possible with the institutions described above. Some arbitration services could state that under certain conditions they would accept a plea of bankruptcy from a debtor. Contracts filed with such an arbitration service could include the provision that bankruptcy pleas would be possible. Even without such a contract, a debtor could have his case heard by the arbitration service which agreed to hear such pleas. If the arbitration service granted a bankruptcy, any contracts which indicated a respect for the notion of bankruptcy which had been filed with that arbitration service would be treated accordingly. The case would be filed with the credibility service. Those who respected the notion of bankruptcy would be able to take it into account when dealing with the debtor in the future.

It is not clear that many instances of bankruptcy would occur using this system. If there were very few of them, it would be an indication that the people of the free nation did not really have much use for the institution. But it is conceivable that an ethic of charity could emerge such that people would pledge to respect the notion of bankruptcy as a token of goodwill towards their fellow men. It would probably emerge from an interest group's public campaign to make this charitable attitude look especially virtuous and to encourage people to do business only with firms which took the pledge. If anyone took such a pledge it could be recorded at the credibility bureau and used by arbitration services,

as a factor in judgments involving the pledger.

This is another advantage to a free nation's business climate over that of a statist society. Citizens would not be lulled into the belief that they can be protected only by state action. The energy currently going into lobbying the state would be applied to mobilize direct citizen action via ostracism campaigns against businesses with undesirable practices. As an example of this type of activism consider the results of pressure from animal rights activists on the tuna industry with respect to dolphin-safe fishing. Industry lobbyists successfully fended off government intervention against them, but activists got change through direct appeals to the consumer. It did not take even a majority of consumers changing their buying habits before the pressure worked. It became clear that tuna company's without dolphin-friendly policies had less profit than companies with dolphin-friendly policies. It is now hard to find tuna for sale which does not contain a claim that the fish were caught without harming dolphins. Any firm making such a claim falsely would be open to charges of fraud. In a free economy where a firm's credibility was being actively monitored and recorded, the firm's credibility would be more closely linked than now to its actual behavior. It would be much more difficult to regain market-share through public relations campaigns once a bad credibility record had been acquired and this data could be shared across many communities.

What advocates of statist philosophy often fail to realize is that it is usually easier for organized citizens to affect profits via boycotts than to affect legislation in a democracy. When a boycotting consumer takes his business away from a firm, that firm's profit drops faster than its sales drop. This is because many of the firm's costs are fixed and cannot be avoided even when sales are low. So the loss of even a significant minority of customers will greatly damage profit and can even produce losses for the firm. Laws, on the other hand, are passed by a majority in legislatures. And before voting for a law, a legislator must feel that support of a law will be helpful in getting support from a majority of voters at the polls.

If the abolition of state intervention caused citizens' energies to be redirected

from lobbying the state for laws into organizing boycotts, the energies spent by business on lobbying would also be redirected. Businesses would be inclined to try to anticipate boycotts before profits were hurt. After monitoring the activists' groups for a while, the businesses would eventually be motivated to negotiate with the activists, before a boycott was called. Eventually firms would begin to realize that they could get a jump on their competitors by reacting early to activists' concerns, then receiving the activists' endorsement, which could be turned into an advertising plus. To some (and perhaps a great) extent, the formerly antagonistic relationship between activist groups and business leaders could become one of cooperation and mutual self-interest.

2) If the state does not give special legal status to corporations, what sorts of business organizations will form? With no legislated boundary between insiders and outsiders, what relationships will evolve between insiders and outsiders?

I do not see much of a problem here. At present, corporations must say that they are corporations when doing business. In a free nation a group of people could still sign a contract with one another and call themselves a corporation. As long as someone who represented the corporation in a business deal made it clear that this was the case, any customer would be free to deal with them or not. It would probably become customary for the terms of any contract with a corporation to include a reference to any limitations on the liability that the corporation's members were assuming. I would not expect an arbitration service to enforce the notion of limited liability unless the contract specifically included this provision.

People do business with corporations now. Some people would probably continue to do so in a free nation. Of course the willingness of individuals to do so might be influenced by the rating a corporation had with a credibility bureau. Corporations would be more likely to need to post bonds in order to get contracts, until they had a long successful track record.

The biggest differences in the corporate environment I would expect to emerge in a free nation would be in the forms that corporations took. Currently, the state insists that corporations be run as a democracy

among shareholders with each shareholder getting as many votes as they have shares. A majority of voting shareholders can use the assets of the company with no input from the rest of the shareholders and no requirement to issue dividends. This is not the only conceivable method of organization. Churches, for instance, use a much wider variety of control mechanisms. Some churches give their members (or even their priests) far less input in policy than corporations give stockholders, while other churches give each member one vote in policy decisions regardless of financial contributions or ecclesiastic rank. Other financial arrangements are also possible. Instead of issuing stock a limited liability company might, for instance, borrow from a money market fund in exchange for a percentage of profits.

Another organizational option which should be more attractive in a free nation than in a statist society would be businesses owned and operated by workers. With the state intervening in labor-management relations, both sides try to lobby the state to take their side. For labor this means a labor union which presumes conflict between the ownership of production and labor. Despite the Marxist or other socialist roots of many unions, it is rare that the union leadership wants to take on the responsibility of actually managing production. Instead union leaders act as politicians seeking special favors. The union leaders' behavior actually promotes workers' alienation from the means of production. Without the ability to ask the state to intervene, union leaders would find it far more tempting to establish worker control by using union funds to start factories owned by the unions. How successful this would be would be for the market to determine, but without the special favors granted by government to many stockholder-owned firms, firms with well-motivated worker-owners would stand a better chance.

In a free nation, corporations would be free to structure themselves any way they liked. Again, customers could deal with them or not regardless of their structure.

3) If the state does not intervene (through legislation) to protect stockholders from liability for failings of corporations, will it be possible to assemble the capital necessary for large business ventures? How will investors satisfy their need for protection

from liability?

Again, there is nothing to prevent people from voluntarily agreeing to do business with an organization which insists on making limited liability a part of all its business dealings. It is only important that such a firm make this policy known to those who do business with it, so that it cannot be accused of fraud.

With respect to the raising of capital, it seems that this might be easier in a free nation. Corporations, partnerships, or other businessmen could still borrow money by issuing bonds or through other mechanisms. But additionally, as mentioned above, a limited liability business could offer a share of profits in exchange for a loan without offering any form of "ownership" or other control of the firm. If insufficient money came from individual investors, it could still be solicited from collective sources via banks or money market funds.

4) With no state meddling in decisions to extend credit, what institutions will emerge to satisfy customers' needs for financial privacy, while at the same time satisfying vendors' need to collect debts?

Credit and credibility bureaus, along with performance bonds and arbitration services will probably satisfy the needs described in the question. But in the absence of government involvement other systems will probably emerge to provide greater assurances of privacy and security. A business could probably attract more customers by promising not to give out information about any customer without that customer's permission, as long as the customers fulfill their own contractual obligations. Yet statistics about a firm as a whole could still be collected, then used internally or given to outsiders.

5) With the insurance industry deregulated, and with the state no longer setting itself up as everybody's protector of last resort, what new offerings can we expect from the insurance industry? What needs will we satisfy through voluntary institutions for sharing risk?

The biggest change in the insurance industry in a free nation may simply be the ease of entry. Government regulation of insurance is extreme and arcane. To enter

the industry it is not enough to be skilled in the calculation of risks and the investment of funds. The would-be insurance entrepreneur must be familiar with the art of lobbying. Entrepreneurial energy is largely confined to lobbying and to local agents' efforts at aggressive high-pressure salesmanship. One would expect a lot more choice of insurance policies, and more effort to match the customer's real needs to the policy.

Innovations ought to include efforts to associate insurance policies with services which physically address the risks concerned. Professionals in the medical community, for instance could work with insurance companies to reduce customers' health risks and thus their insurance premiums. Currently, both professionals and insurers tend to wait for physical problems to fall upon the customer before providing more than a brief health exam and a lot of paperwork. Professionals and insurers enter into conflict with one another once remedial health care is needed as each seeks to maximize profits. The professionals seek to provide as much service as possible while the insurer seeks to minimize the service paid for under the customer's policy. In the case of the medical industry, insurers should work with doctors to give policy holders incentives to use more preventative medicine. The three elements of the relationship - customer, professional, and insurer — would thus enter into an win-win (positive sum) relationship rather than the current antagonistic one.

The same benefits could be gained in other arenas. Private security guards and insurers could work together with homeowners to make homes more burglar proof. Similarly firefighters could work with insurers to reduce the risk of fire. Car manufacturers and local mechanics could work with insurers to encourage customers to keep their cars safe. Customers could be encouraged to minimize the effects of natural disasters by insurance companies allied with contractors who build in places or in ways which minimize such risks.

Government functions to create antagonistic relationships between the insurer, the physical service professional, and the customer. Increased regulation encourages citizens to feel that only government can make choices about the services they receive, that government must fight with service providers if quality service is to be

obtained.

A service provider learns that it is easier and more productive to lobby for legislation which favors the service-providing firm at customers' and other firms' expense than it is to build customer confidence with better service. The role of the insurance company is often to compensate customers who are the victims of poor service either by government or private firms. In doing so the insurers still need to calculate risks in order to set premiums, thus giving them valuable data on how such risks could be minimized. But the incentives of government regulation motivate insurers to concentrate their efforts on pressuring legislators for undeserved favors and customers for overpricing contracts and underpaying service, pitting the insurer against the customer and the service provider.

Other Institutional Changes

In addition to those institutional changes noted in answers to the "official FNF forum questions," there are other institutional changes that would occur in a free nation's business environment. Business involves the exchange of property. Usually this involves finance. It always involves the need for clear titles.

The notion of finance which is not a function of state-owned or state-licensed institutions has been addressed under the heading of "free banking" by many libertarian theorists quite thoroughly. I do not have a lot to add to it. The biggest change might be restoring the right of private banks to issue currency with no connection to a state, and restoring to citizens the right to accept or reject a given currency as they see fit with no official "legal tender." As with insurance, the fact that the state is no longer regulating financial institutions will result in easier entry by new firms. Membership in a credit union, for instance will be determined by policies set by the credit bureau itself rather than being artificially limited by government to those who are members of occupational or other special groups. Again, credibility bureaus could play a major role in helping consumers choose which firms to trust.

Clear entitlement to property is a topic which libertarian theorists discuss far less than finance. At a minimum two trading parties need to anticipate that they will retain possession of the properties and/or services being exchanged. Usually a ser-

vice, once provided, cannot be lost by the recipient. But tangible property can lose its utility to an owner if that owner's right to exclusive use of it is disputed. In statist societies, the state claims the right to resolve property disputes. In fact property title held in a statist society is retained through other means as well. Ultimately, the best protection an owner has to his property title is the respect of his fellow citizens for that title. If the general citizenry does not respect property titles, as defined by the state, that citizenry will conduct a kind of guerrilla war (largely non-violent) to redistribute property (or to block its redistribution by the state). Black markets and smuggling, among other institutions, arise as vehicles for this war.

How would a free nation guarantee property rights to its citizens? Advocates of statist societies argue that a stateless society is simply a surrender to chaos, a surrender to the guerrillas. One flaw in this argument is the claim that there needs to be a monopoly on the power to enforce property rights, that this function cannot be decentralized. The very fact that there is more than one state society on the surface of the earth proves that monopoly is not necessary. But the primary flaw in the argument for state monopoly is that it assumes that there is one absolute "proper" or "natural" distribution for property which everyone can agree to. Throughout the history of civilization, indeed throughout the known history of mankind, this has never been the case. Most societies are composed of many smaller communities each with different views on what a proper property code should be. A state's effort to enforce a single code on all of these communities is either an effort to elevate one of the them to an elite status by enforcing its code on the others, or a compromise wherein each community's local code is suppressed to some extent. In either case the result is the guerrilla war mentioned above.

The challenge of a free nation is not to end the differences between the communities, as states have tried to do, but to accommodate them. This is a problem for a "diplomatic system," not for a "judicial system." The main innovation required has been mentioned above — a system wherein private agencies keep records of contracts. Each arbitration service will

tend to do this as well as to develop a relationship with specific communities which it serves. The arbitration service will need to learn the property code of each local community in order to properly interpret contracts made within each community. Probably this will evolve as a form of precedent-based or "common" law.

Additionally, arbitration between people from different communities will have to be done from time to time, which will require that each arbitration service have some degree of familiarity with neighboring property codes. And the style of arbitration between communities will have to be seen as a diplomatic rather than a judicial process. The pattern for this at a very formal level has already been established between local jurisdictions within many large statist nations as well as between statist societies internationally. At an informal level this pattern has already been in effect since the beginning of human society.

For the citizens of small nations, international commerce has been an economic necessity for centuries. They have witnessed the benefits of lowering the governmental barriers to international commerce. And they have learned to thrive while doing business between communities with differing legal traditions. Citizens of larger nations have traditionally been able to conduct a great deal of commerce without crossing international borders. But in recent years, international trade has become vital to even the giant states. It may be that the style of international commerce will become common world-wide even before a free nation emerges. Either way, it is clear that the need for businessmen to think internationally is increasing for purely economic reasons and will continue to increase independently of the success of our movement to create a free nation. The fact that businessmen in a free nation will need to behave like today's international traders rather than like traditional local businessmen under the regime of a huge state is not a problem for the development of a free nation. It is an asset. It means that the image of a free nation is, at least in this one way, already guaranteed to be an image of the future.

In statist societies, business is seen as being plagued by "bad" people who are always looking for a chance to steal or

defraud. The state's philosophy about this problem is that the bad people should be punished after they have hurt others. Often this takes the form of seizing the funds of people who have allegedly profited from "bad" economic transactions in the past and passing a part of the seized funds to alleged "victims." An additional "service" of the state is to seize funds from overly "lucky" people to give to "unlucky" people. While "fixing" the problems caused by "bad profit" and "too much" or "too little" luck, the state manages to put more money into the hands of bureaucrats and lobbyists than into the hands of the "victims" and the "luckless." In statist societies, the state pits citizens against one another, encouraging them to view both politics and economics as a zero-sum game, one where the growth of the economy is not a real factor in players' decisions, where one player's profit is usually produced by reducing another player's piece of a limited pie.

Relations between people should be based on voluntary cooperation rather than coercion. A free nation would not have a place for lobbyists to ply their trade. Entrepreneurs would compete (but also cooperate) with one another and with customers to create more products and services for each unit of customer spending rather than seeking to make laws which force customers to spend more for less. In other words, business would be a positive sum game, a game where the players create more value as they play. The institutional changes mentioned above, like credibility bureaus and alliances between insurance companies and service providers, would still allow for the punishment (via ostracism) of people who victimize others or present bad risks to others, but they would also allow the rewarding of behavior which enhanced customer satisfaction — something the negative incentive-based systems of government rarely achieve. Δ

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Constitutions: Written and Actual

by Richard O. Hammer

Is a constitution worth anything? Two recent articles in *Formulations*, one by Randy Dumse¹ and another by Jim Davidson², have raised important issues. Here I add a few thoughts. Within limits I believe that a written constitution could advance our interests.

First, notice that the word "constitution" has several meanings. To us the word most commonly refers to a document, to the written constitution of a nation. But notice that the word can also refer to the structure of something. Every organization has a structure. (If an organization did not have structure, it would not deserve the name "organization.") Therefore every organization has a constitution, whether written or not. I will distinguish this meaning of "constitution" by calling it an "actual constitution."

An actual constitution includes formal structure, the sort of thing that might be shown by an organization chart, but only to the extent that formal structure influences events. More importantly, an actual constitution includes mechanisms, ways that people in the organization work to get things done. And, as we all know, ways that people actually work in an organization often differ from ways that would be suggested by the formal structure of the organization.

I believe we can use this distinction between two types of constitution, written and actual, to inform our discussion of whether it might be wise to write a constitution for a nation. We are painfully aware of organizations, such as the U.S.A., where the actual constitution differs from the written constitution. And from this experience we might infer that it is pointless to ever write a constitution for an organization. But consider this example which illustrates one extreme:

An outsider admires an organization, and asks, "How do you do it?"

An insider responds, "Well, we never wrote it down. But we could. For your sake we will."

With this example I mean to show that there does not have to be a difference

between a written constitution and the actual constitution; the writing of a constitution could simply portray what exists.

Now a question may arise: If the writing merely describes an actual constitution, if the writing does not attempt to change that actual constitution, why write? What good will it do?

I answer: Since the outsider asked, the outsider must have some need. People sometimes hunger to know how an organization works. Examples are:

- people starting a new organization want to emulate some or all of the characteristics of an existing organization;
- people moving into an organization want to become part of that organization and are eager to learn its ways;
- people within an organization come into conflict and want to know the tradition in the organization as it bears upon their case.

We see a demand for information. Where success of an organization suggests that the organization must have a good actual constitution, people will demand copies of that constitution — in writing.

So, can a written constitution change anything? Yes, I think, within limits. A written constitution will change things to the extent that it shows people how they can actually advance their ends.

Every organization will contain interests which possess, or which can assemble, power to change the actual constitution. And these interests will change the actual constitution as they like whether we like it or not. Given this reality, a written constitution may survive, in that it will continue to portray the actual constitution, if it gives, to those interests with power to change the actual constitution, mechanisms to accordingly amend the written constitution.

This may sound like a gloomy statement, offering little hope for us idealists of non-coercion. But, as I have argued elsewhere, I believe the greatest powers in nature stand on our side.³ These powers will go to work for us when we constitute low-transaction-cost ways to confront aggression from the state.

Join me now in using these ideas to evaluate the most commonly-clamored-for section of a written constitution, a bill of

rights. The typical plank in a bill of rights says something like:

"Government shall never, never, under any circumstance do X."

I believe such a plank is almost worthless. Taken alone the plank does nothing to place power in the hands of the victims of X. The victims, not having power to defend themselves, can only hope they have friends who have power and who will use that power on behalf of the victims.

A constitution needs mechanisms, not rhetoric.⁴ Better would be something like this:

"Any citizen, considering himself to be a victim of X on the part of an agent of the government, may present evidence to any Certified Board of Arbitration. If that Board finds the evidence convincing then: the agent, along with all superiors of the agent cognizant of X, shall be immediately removed from government service; and the government must submit to arbitration if the citizen chooses to sue for damages resulting from X."

So our challenge becomes to discover mechanisms which empower people to do what we want them to be able to do (and which they also want to do). These mechanisms, taken together, and assuming they work, constitute an actual constitution. When we write a description of this actual constitution we will have a written constitution.

Then, hopefully we will find people who hunger for knowledge of the organization described therein. Δ

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¹ Randy Dumse, "Constitutions: When They Protect and When They Do Not," *Formulations* Vol. III, No. 2.

² Jim Davidson "Constitutions Are A Beginning," *Formulations* Vol. III, No. 4.

³ See my "Might Makes Right: An Observation and a Tool," *Formulations* Vol. III, No. 1; and also my FNF working paper "Win-Win Society is Possible."

⁴ This idea came to me from both Roderick Long, in his FNF writings about constitutions, and Isabel Paterson, in *The God of the Machine*.

Everyone at Risk

by Dennis Riness

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So what do things look like in freedom?
GOOD question.

But first: What IS freedom? May I offer a definition? Freedom is the societal condition that exists when all interactions are voluntary. Place your emphasis, please, on "all." This means no coercion, ever, for any reason.

But what, exactly, is coercion? Coercion is the initiation of physical force or fraud. Physical force used in defense against the initiation of physical force is not coercion. The threat of physical force in the employ of contract enforcement is also not coercion. The threat of physical force, voluntarily subscribed to, is the administration of physical force.

The political state practices coercion. Free market governments practice the administration of physical force; done, of course, on a voluntary, subscription, fee-for-service basis. We have the political state, we need government. (Those of you calling yourselves anarchist, implying, I assume, no need for third-party contract enforcement, have obviously never been in a production contract and been at risk. Come back when you have been financially cleaned out and we will discuss the virtues of no government.)

The FNF Agenda for October 1996 raised five specific questions: What about (1) bankruptcy, (2) corporate structure, (3) liability protection for investors, (4) financial privacy vs. creditors' need to collect and 5) without coercion, what forms will insurance take?

In all cases, the solution is to have individuals enter into contractual agreements on whatever terms are suitable to both parties. The terms and conditions of any particular contract are limited only by the imagination of the two parties involved. In freedom, there will be a wide spectrum of contracts covering all conceivable situations. The common denominator is the need for contract enforcement. Given human nature, this means the administration of physical force if need be.

The best mechanism for voluntary, subscription, fee-for-service government is that discovered in 1976 by Gordon W.

Smith Jr., a close friend of mine. Smith proposed the insurance mechanism but in a new way. Rather than a policy that compensates for a loss sustained when the other party reneges on a contract, Smith proposed that the threat of physical force was really the only true means of enforcing a contract and a policy should be used to fund the bounty that would be placed on a con man. The bounty money is paid out to fund the capture, trial (proof package) and punishment of the con man. The exact terms of capture, trial and punishment will be worked out in the marketplace; it is whatever the two parties agree to when entering into the contract. The highest probability of removing all fraud is when all parties are at the highest degree of risk, namely the death penalty.

The exquisite balance of this mechanism of contract enforcement (and coercion prevention) will bring about a stable, durable civilization. I have had the intellectual pleasure of working through all its ramifications these last 20 years and can attest that it is what we have all been looking for: the control of physical force through the market (voluntary) process, not the age-old attempt to control coercion by coercing. Δ

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Athenian Constitution (from p. 23)

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**The purpose of
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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.**

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Who Are the Realists?

by Roy Halliday

When people first hear an anarchist calling for abolition of the state, they think of all the valuable services that the state provides, and they come to the state's defense, because they want those services to be continued. They may readily agree with the anarchist when he says taxes are too high, wars are evil, there are too many restrictive laws, and the government has taken away too much of our freedom. But they assume that abolition would entail foregoing all the valuable government services, and that is too high a price to pay for the additional freedom. They do not ask, "Who will systematically steal our wages? Who will start wars and conscript our young men to fight in them? Who will deprive us of our freedom after the state is abolished?" because they would like to do without these government services as much as the anarchist would. Instead, they criticize the anarchist for overlooking the positive contributions of the state. They think that the anarchist has not thought through the consequences of his position.

After a moment's consideration, the average person believes he has discovered insurmountable objections that the anarchist has not thought of. The average person then tries to show the holes in the anarchist position by asking a series of questions about practical matters. The dialogue goes like this:

"If we abolish the state, who would collect the garbage, deliver the mail, and educate our children?"

"Garbagemen, mailmen, and teachers of course."

"Yes, but who would pay for it?"

"People who want their garbage collected, mail delivered, or children educated."

"Yes, but who would pay for the people who want these services and don't have the money?"

"Friends, neighbors, relatives, charitable organizations, or nobody."

"Can't you see that the government has to provide these services?"

"No."

Sooner or later the average person comes to the conclusion that the anarchist is hopelessly blind to the obvious need for the state and goes away shaking his head. What the average person doesn't realize is that the services he is concerned about have been provided privately in the past and could be provided privately again if the state didn't prevent it.

The state jealously guards its coercive monopoly of the services it provides. Many attempts have been made to replace or circumvent the government by free-market alternatives only to be driven underground. In *Uncle Sam the Monopoly Man*, William Wooldridge provides historical examples of commercially successful private mail delivery companies in the 1840s that were put out of business only by special acts of Congress.¹

Wooldridge also provides examples of successful private businesses engaged in minting coins, building and owning roads, providing education to poor children in urban ghettos, and even arbitrating disputes and dispensing justice in private courts. All of these businesses were able to compete successfully with the government despite the legislative roadblocks put in their way deliberately to discourage them.

We do not have to resort to theoretical arguments to prove that the state is unnecessary. There are historical examples of societies that functioned quite well without a state. The people of Ireland had a society for 1000 years without a state.²

Two points that people often bring up are that man is not perfect, and that there will always be crime. They assume that anarchists overlook these basic facts. This is particularly annoying to individual-rights-based anarchists, because our anarchism is fundamentally an anticrime philosophy. The primary reason we oppose the state is that the state is a criminal organization. It is precisely because we are aware of man's moral weakness that we want to make the powerful machinery of the state unavailable to evil men.

Individual-rights-based anarchism, rather than being opposed to all law, maintains that there are objective, eternal, and universally valid principles of law. Anarchists use

the natural law to judge the legitimacy of the various man-made laws. It is the statist, not the anarchist, who denies natural law and imposes an artificial, temporal, inconsistent, and often arbitrary set of "laws" on society. Any system of so-called "law" that opposes voluntary associations is opposed to the real laws of society.³

Anarchism can be thought of as a philosophy of law and order. Like most other legal philosophies, anarchism is opposed to private crimes such as murder, kidnapping, rape, assault, and robbery. However, anarchists differ from other people by continuing to oppose these activities even when they are engaged in by authorized agents of the state. Anarchists judge all actions by the same principles, whether the perpetrator is acting on behalf of the state or as a private citizen. It doesn't matter whether he wears a badge, or dog tags, or lives in the White House, a criminal is a criminal.

The amount of money stolen by private individuals each year is tiny compared to the amount confiscated by the state. The number of private murders committed by civilians does not approach the number of innocent people murdered by agents of the state. According to R. J. Rummel's book *Death by Government*, in the 20th century, states have murdered 169,198,000 of their subjects. If we add the military combatants who died in wars, the total is 203,000,000 people.⁴

Anarchists are accused of being utopian or unrealistic because they do not believe in the theories, fictions, and myths used to justify the state, all of which are attempts to obscure or deny the historical evidence that the state has its origin in conquest and confiscation and that it maintains its existence by violence. The people who deny the facts, the statist, are the unrealistic ones. Δ

Notes

¹ William Wooldridge, *Uncle Sam: The Monopoly Man*, p. 24:

"To recapitulate the extraordinary: in five years private competition captured between a third and a half of the American letter-carrying business, drove postage down to one-eighth of its former maximum, and brought the United States Post Office within sight of extinction."

² Joseph R. Peden, "Stateless Societies: Ancient Ireland," in *Libertarian Forum*, April 1971.

(continued on page 37)

The Sense of Right and a Man-to-Man Talk With Archy About Women

by Richard O. Hammer

The other day Archy and I were talking about women.

But before proceeding let me explain that Archy, so far as I know, exists only in imagination. I met him in a series of poems, written in the early decades of this century by Don Marquis. Archy, you will need to understand, finds himself living this current life in the body of a cockroach. However, since he possesses the transmigrated soul of a human poet, I can commune with him.

Back to the women. Archy tells that he has taken a liking to a shiny and smart young roachess who lives over behind the cabinet. I tell that my fancy has been caught by a female of my present species.

If beauty is beauty, you might think that Archy and I would fight over the same lady. Yet Archy seems not the least tempted by mine. And I can not say that I feel anything for his. So what is going on here?

Well, probably it is obvious. It has to do with survival. We are each programmed to seek females with whom our genes might, well, carry on. So, when one of us says that he sees beauty, that tells of more than just the attractiveness of the lady, it tells also of the needs of the one who sees the beauty. Beauty exists, partly at least, in the eyes of the beholder.

Now Archy and I both understand this. Being cultivated, civilized, and all that, we do not fall into bitter dispute because we disagree about which lady is more beautiful. We laugh about the difference, because we see ourselves as pawns in the greater game of survival.

But we do get into a tiff sometimes when our other senses, especially our senses of right, recommend different rules of conduct. The other day, for instance, we were discussing regulation of traffic in public thoroughfares. We differed on the question of whether it is right for a human to sound warning before walking onto the kitchen floor. I argued it was a waste of time. Archy thought it absolutely essential. Archy, in fact, got heated about it.

But then, you know Boss, I was thinking. Maybe this sense of right, which causes me

to form opinions about how I should regulate my actions in order to consider the needs of others, has been programmed into me, just like my sense of beauty. Maybe I have it because it helps my kind survive. Maybe my genes have figured out that they have a better chance of surviving if human individuals are programmed to hunger for rules of behavior which favor cooperation over conflict. Well, if that is true, then we who are cultivated, civilized, and all that, can add some objectivity to our discussion of what is right.

This of course does not change what we feel. We still sense right and wrong. But, given understanding that our sense of right, just like our sense of beauty, derives from demands of survival, we are given greater power. We can temper our prescriptions with reason. Δ

References

You can meet Archy in, for instance, *archy and mehitabel* by Don Marquis, Doubleday, 1930.

I do not think I can claim to have originated the idea presented here. It seems an obvious extension, if not a downright theft, of ideas presented in books such as: *On Aggression* by Konrad Lorenz, *The Selfish Gene* by Richard Dawkins, and *The Lives of a Cell* by Lewis Thomas.

Realists (from p. 36)

³ Leo Strauss, *Natural Right and History*, p. 103:

"But the city would seem to be a conventional or fictitious unity. For what is natural comes into being and exists without violence. All violence applied to a being makes that being do something which goes against its grain, i.e., against its nature. But the city stands or falls by violence, compulsion, or coercion. There is, then, no essential difference between political rule and rule of a master over his slaves. But the unnatural character of slavery seems to be obvious: it goes against man's grain to be made a slave or to be treated as a slave."

⁴ These numbers are from a review by Richard Ebeling of R. J. Rummel's book *Death by Government*, which appeared in the October 1994 edition of *Freedom Daily*.

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Beyond the Boss: Protection from Business in a Free Nation

by Roderick T. Long

What would life be like in a libertarian society — a society with a completely unregulated, *laissez-faire* market? One worry that many critics have is that, without the various government regulations that aim to protect the weak from being exploited by the strong, consumers would be at the mercy of producers, employees would be at the mercy of employers, debtors would be at the mercy of creditors, and tenants would be at the mercy of landlords.

Some libertarians, of a rightward-leaning bent, are unmoved by these criticisms, because they regard the regulations that currently exist as stacking the deck in favor of consumers, employees, debtors, and tenants. The removal of regulations, as they see it, would simply restore equality. Such libertarians reject the leftist notion of business interests as a powerful and potentially dangerous force in modern society; they tend instead to agree with Ayn Rand's characterization of Big Business as "a persecuted minority." (Rand also referred to the military-industrial complex as "a myth or worse.") Leftists find this blindness to the power of business so baffling that they tend to dismiss libertarians as apologists for the ruling class.

But libertarians have not always been so friendly to business interests. Adam Smith fulminated against what he called the "mercantile interest"; more recently, libertarian authors like Karl Hess, Paul Weaver, and Mary Ruwart have denounced the pernicious effects of big business. (And even Ayn Rand was sensitive to the problem *in her novels*, though for some reason not in her nonfiction.)

I believe we are seeing the beginning of a resurgence, within the libertarian movement, of the egalitarian, compassionate, "bleeding-heart" libertarianism that characterized the libertarian movement through most of its history, from the Levellers of the 17th century to the individualist anarchists of the 19th century. When our opponents today charge us with elitism and lack of compassion, they are *mostly* wrong (for a discussion of why they are wrong, see my "Who's the Scrooge? Libertarians and

Compassion," in *Formulations*, Vol. I, No. 2 (Winter 1993-94) — but there is an uncomfortable kernel of truth. Many libertarians in this century have been, in my view, insufficiently sensitive to the perspective of the poor, of laborers, of women, of minorities. But I view this as a historical aberration, brought about by the fact that a) the triumphant advance of socialism pushed libertarians into a century-long alliance with conservatives, and some aristocratic, patriarchal, un-libertarian attitudes rubbed off; and b) when the libertarians did re-emerge from the conservative movement in the last quarter of this century, they did so under the influence of Ayn Rand's hard-edged ethic of rugged individualism. But these distorting influences are, I think, starting to fade, and the day of a "kinder, gentler," green-spectacled libertarianism, truer to its historical roots, is beginning to dawn.

The new libertarianism, then, must take more seriously the left's concerns, for in many ways they are its own concerns also. But can it answer them?

Consumers and Producers

In a free nation, will consumers be at the mercy of producers? With no government agencies to monitor quality control, prohibit price gouging, and the like, won't it be easier for businesses to exploit their customers?

On the contrary, I think it will be *less* easy. The greatest threat to such exploitation is competition. The more businesses there are competing for customers, the more difficult it will be for any one business to get away with mistreating its customers.

Consider: The easier it is to start up a new business, the more new businesses there will be. So what determines how easy or difficult it is to start up a new business? Two factors: inherent transactions costs, and government regulations.

Government regulation has the same effect on the economy that molasses has on an engine: it slows everything down. The more hoops one has to jump through in order to start a new venture — permits, licenses, taxes, fees, mandates, building codes, zoning restrictions, you name it—the fewer new ventures will be started. And the least affluent will be hurt the most. The richest corporations can afford to jump through the hoops — they have money to

pay the fees and lawyers to figure out the regulations. Small businesses have a tougher time, and so are at a competitive disadvantage. For the poor, starting a business is close to impossible. So the system favors the rich over the middle class, and the middle class over the poor.

In a free nation, by contrast, new businesses would be sprouting up at a rate we can barely conceive, and would be run primarily by the poor and the middle class. No company could afford to treat its customers like dirt, as so many companies do today, because it would be so much easier to start up a rival company that treated its customers better.

As for the other variable affecting ease of start-up, namely transactions costs, modern electronic communications technology will drastically lower such costs — so long as government refrains (as it would in a free nation) from interfering with networks like the Internet. In addition, the ease of organizing and coordinating a boycott against an obnoxious business is greatly reduced by the capacity for computer networking.

Many on both the left and the right are fearful of free trade because, while they grant that free trade lowers prices and so is beneficial to citizens in their role as domestic consumers, they fear that this benefit may be offset by the loss in income suffered by those same citizens in their role as domestic producers.

For example, suppose big corporations decide to cut costs by increasing their reliance on inexpensive foreign parts and labor. Domestic laborers and producers of parts will suffer an income loss as the price of their goods and services is pushed down by foreign competition. Ah, but that loss in income will be offset by lower prices? Well, that assumes that the corporations will pass their savings on to their customers. Will they?

That depends. If domestic competition is vigorous, then when MegaCorp tries to pocket its savings, another firm will muscle into the market to purchase those same foreign parts and labor and then undersell MegaCorp. And a third will enter to undersell the second. Any savings not passed along to consumers are like a giant magnet for entrepreneurs. Such competition will quickly ensure the transfer of MegaCorp's savings from its hands to those of its customers.

But what if the domestic economy is

highly regulated, and MegaCorp is largely insulated from the threat of competition? Then it can pocket the savings with impunity. Citizens will receive lower incomes in their role as producers, without seeing any compensating drop in prices in their role as consumers. In such a case, the protectionists are quite right to see free trade as a redistribution from small manufacturers to giant corporations. But the fault lies not with free trade (the presence of foreign competition) but with regulation (the absence of domestic competition).

Consumers would also find their privacy more secure in a free nation. In a free society, one might expect that businesses, unable to rely on as high a level of policing by government, but at the same time being freer to police on their own, would demand more from their customers in the way of IDs, credit checks, bonding, and the like. But it seems that the opposite is true: in the days when government's leash was shorter and private enterprise's leash was longer, businesses demanded far less security of their customers than they do now. As government has grown snooper and more intrusive, the snooping and intrusiveness of private business has grown, not shrunk. It seems that the growth of government power fosters a kind of authoritarian culture that then infects the entire society. People who are used to being ID'd, stamped, and inspected by the government will not balk at similar treatment from their store or bank — particularly when thanks to governmental strangulation of competition, they have nowhere else to take their business.

Employees and Employers

In a free nation, will employees be at the mercy of employers? The issue of racial and sexual discrimination in hiring I have dealt with elsewhere ("Good and Bad Collective Action," *Formulations*, Vol. III, No. 1 (Autumn 1995)), so at present let me focus on the issue of how employees are treated once they are hired. Under current law, employers are often forbidden to pay wages lower than a certain amount; to demand that employees work in hazardous conditions (or sleep with the boss); or to fire without cause or notice. What would be the fate of employees without these protections?

I presumably don't need to explain to readers of *this* publication why minimum wage laws hurt the poor. In any case, with

more businesses competing for workers (just as they will be competing for consumers), wages will be driven up. More employees will be becoming employers anyway. And employers will be able to pay the new, higher wages because the economy as a whole will be more thriving and prosperous.

Employers will be *legally* free to demand anything they want of their employees. They will be permitted to sexually harass them, to make them perform hazardous work under risky conditions, to fire them without notice, and so forth. But bargaining power will have shifted to favor the employee. Since prosperous economies generally see an increase in the number of new ventures but a decrease in the birth rate, jobs will be chasing workers rather than vice versa. Employees will not feel coerced into accepting mistreatment because it will be so much easier to find a new job. And workers will have more clout, when initially hired, to demand a contract which rules out certain treatment, mandates reasonable notice for layoffs, stipulates parental leave, or whatever. And the kind of horizontal coordination made possible by telecommunications networking opens up the prospect that unions could become effective at collective bargaining without having to surrender authority to a union boss.

One beneficial result of a competitive economy would be a reduction in the petty tyrannies of the job world. Many workplaces are all too reminiscent of the comic strip "Dilbert," with bosses micromanaging processes they do not understand. I once knew of a company that deliberately set its photocopier to be slower than average, as well as mandating that workers using the photocopy machine could copy only three pages at a time; the idea was to cut down on unneeded copying. But most of the copying was *necessary*, so employees had to waste time going through the line again and again.

A family member of mine once worked for a law firm that had clerical workers in two buildings, but lawyers in only one of them. In the building with no lawyers, the clerical workers had very little supervision: they were free to set their own priorities, to share tasks with each other as their schedules demanded, and so forth. As a result, they got much more work done, a lot more efficiently, than in the other build-

ing where the clerical staff was micromanaged by the lawyers. Such micromanagement is inefficient, but without a lot of competition managers can afford some inefficiency by indulging their desire for control. I think that, with more worker clout, the structure of the average workplace would change, with workers being given more authority to supervise themselves.

Debtors and Creditors

In a free nation, would debtors be at the mercy of creditors? Government currently offers to protect debtors by limiting the extent to which creditors can harass their debtors (no calls to the debtor's place of work, no calls in the middle of the night), limiting the extent to which creditors can garnish their debtors' wages, mandating that bad credit ratings expire after a certain period, and offering those crushed under a heavy burden of debt the chance to escape through bankruptcy. How would debtors fare without these protections?

Well, for one thing there would be fewer debtors in a free nation. With greater prosperity it would be easier for people to pay off their debts. The odds that a given defaulter is defaulting through dishonesty rather than bad luck would be significantly higher than it is in today's society.

But there would still be some bad-luck debtors in a libertarian economy. How are they to be helped?

For one thing, I think a libertarian justice system would probably recognize some limitations on the right to garnish wages. Even when A has a right to recover some property in B's possession, there are limits to the harm A can inflict in exercising this right. If you swallow my diamond ring, I do not have the right to cut you open to get it out, possibly killing you or causing serious injury. If you are trespassing on my property, I do not have the right to shove you off my front lawn and onto the street at the *precise moment* that a truck is coming that would flatten you. I think similar considerations would limit the percentage of a poor person's wages that a wealthy creditor could legitimately claim. In addition, companies with obnoxious collection methods could be boycotted.

As for debt relief, I suspect that, with the explosion of prosperity that libertarian economic theory teaches us a free nation would see (and if libertarian economic theory is wrong the free nation movement is doomed anyway), the scope of private charity and

mutual aid would dramatically increase, so that debtors would soon find their way out of debt in a manner that (unlike bankruptcy) would benefit both debtor and creditor.

Tenants and Landlords

In a free nation, would tenants be at the mercy of landlords? Government currently offers many protections to tenants—sometimes at serious cost to landlords (the movie *Pacific Heights* offering a chilling example). But what makes these laws seem necessary is the greater bargaining power that landlords typically have vis-à-vis tenants. And this, as in the previous cases, is the product of low competition due to a slow economy. So the government simultaneously "helps" tenants by means of rental laws, and "helps" landlords via regulations that strangle competition in the housing market. It's the typical government trick: poison you, and then dole out the antidote.

In a libertarian society, landlords would have more freedom, but with landlords competing for tenants they would also face stronger economic incentives to please their tenants. Rental contracts would cease to be as one-sidedly favorable to the landlord as they often are today. Landlords might have the right to evict at will (subject to the ring-swallowing sorts of restrictions), but they might find themselves economically compelled to sign contracts waiving that right.

Beyond the Boss

Throughout our economy, economic relations have been forced into an authoritarian model closely similar to that of the reigning statist paradigm. Corporations pattern themselves along the lines of armies; supermarkets herd shoppers into long waiting lines for the privilege of buying their food; employers and landlords grow increasingly intrusive and controlling. But business acts like this for the same reason government does: lack of competition. The economy of a free nation will, I predict, see a complete restructuring of ordinary business relationships. These relationships will become more like relations among equal partners than like relations between superior and subordinate. Employees will be treated as independent contractors rather than as servants, and so forth. Power structures will become horizontal rather than vertical; communication and influence will be two-way rather than one-way. The concept of the boss will be obsolescent. Δ

Seeking a Free Nation



After the elections in November, where will you look for hope?

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The Free Nation Foundation starts with a different assumption. We who want strictly limited government can build it, leasing it like a new Hong Kong if need be, if we will come together and work together. We have sufficient resources.

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