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FOR LIFE, LIBERTY AND PROPERTY

PRIVATELY PRODUCED LAW

TOM W. BELL

The revolutions which have recently swept through Central and Eastern Europe have deal a killing blow to socialist ideology. State-ownership has been tried and discarded. Cries of "Privatize!" herald the dawn of a more free and prosperous age. But the light of this new day reveals a vexing question: "Privatize what?"

Virtually everyone in these newly freed countries agrees that farms, steel mills, ship yards, and other manufacturing industries ought to be privatized. Some go further and argue for the privatization of industries that are often state-owned in the West: railways, television, and radio. A very brave few, secretly influenced by long-banished libertarian authors, call for an unprecedented leap to private schools, postal services, and social security insurance.

We should ask ourselves the same question: "Privatize *what*?" If those who have known only totalitarian socialism can imagine a society less statist than our own, we ought to be able to conceive of a society even more free. Why stop at private schools, postal services, and social security? Why not privatize *everything*?

That is what anarcho-capitalists would have us do. Their extreme position puts them even further from conventional discourse than their libertarian kin who advocate a minimal state. Minimal statists argue that some services *must* be nationalized. Usually anarchocapitalists and minimal statists debate about whether or not national defense *could* be privatized, and whether or not police protection *should* be privatized. Less frequently, they argue over who should issue currency (discussing this topic requires a good deal of economic expertise).

Useful and interesting though these debates may be, they fail to resolve the fundamental conflict between anarcho-capitalism and minimal statism. A state could contract out its national defense, its police forces, and its mint and still remain a state - *so long as it held onto the law*. Soldiers, cops, and minters just follow orders; the law is the real source of the state's power. Strip away its flattering pretenses and you'll find only raw, brutal force.

That's the real issue here: who is going to lay down the law? Statists or consumers? I am going to argue on behalf of the latter.¹

Note that I am not calling for the abolition of all laws. Humans cannot live in complex societies without the guidance of laws. They can, however, live without the coercive imposition of laws. This is an essential distinction, for anarcho-capitalists are often misunderstood as denying the validity of laws *per se*. Nothing could be further from the truth. Anarcho-capitalists see the state as a criminal organization. In their eyes, state law is essentially *lawless*.

What is the alternative to state law? Overlapping jurisdictions or privately produced law in free and open competition - a *polycentric* legal system. In what follows, I will provide a brief introduction to the history and principles of privately produced law, and argue that it offers a more efficient and just alternative to state law.

LAW PRIOR TO THE STATE

Friedrich A. Hayek finds the origins of law in the natural selection of social orders. Not all types of behaviour support social life, he explains. Some - like violence, theft, and deceit - render it impossible.

Society can thus exist only if by a process of selection rules have evolved which lead individuals to behave in a manner which makes social life possible.²

The development of these rules predates courts, written law, and even the concept of law itself:

At least in primitive human society, scarcely less than in animal societies, the structure of social life is determined by rules of conduct which manifest themselves only by being in fact observed.³

Because such customary laws exist prior to state laws, they have attracted the attention of those who research polycentric legal systems. In *The Enterprise of Law*, Bruce Benson concentrates on the legal system of the Kapauku Papuans of West New Guinea. This "primitive" legal system exhibited some remarkably sophisticated qualities. It emphasized individualism, physical freedom, and private property rights; sorted out fantastically complicated jurisdictional conflicts; and provided mechanisms for "legislating" changes to customary law. In a separate work, 'Enforcement of Property Rights in Primitive Societies: Law Without Government', Benson points out similar

features in the legal systems of the Yuroks of Northern California⁷ and the Ifuago of Northern Luzon.⁸

David Friedman adopts medieval Iceland as his favorite example of a polycentric legal system. He writes that it

... might almost have been invented by a mad economist to test the lengths to which market systems could supplant government in its most fundamental functions.⁹

Murray Rothbard backs up his arguments for privately produced law by pointing to a thousand years of Celtic Irish Law. 10

These and many other examples of customary legal systems demonstrate that we don't need states to have laws. They also tell us what sort of laws arise free of state interference. After an extensive review of customary legal systems, Benson finds that they tend to share six basic features:

- 1) a predominant concern for individual rights and private property;
- 2) laws encorced by victims backed by reciprocal agreements;
- 3) standard adjudicative procedures established to avoid violence;
- 4) offenses treated as torts punishable by economic restitution;
- 5) strong incentives for the guilty to yield to prescribed punishment due to the threat of social ostracism; and
- 6) legal change via an evolutionary process of developing customes and norms. 11

ANGLO-SAXON CUSTOMARY LAW

The ancient Anglo-Saxon legal system gives us a particularly good example of customary law. Under this system a set of ten to twelve individuals, defined at first by a kinship but later by neighborhood, would form a group to pledge surety for the good behaviour of its members. The group would back up this pledge by paying the fines of its members if they were found guilty of violating common law. A surety group thus had strong financial incentives to police its members and exclude those who persistently engaged in criminal behaviour. Exclusion served as a powerful sanction:

Every person either had sureties and pledge associates or one would not be able to function beyond one's own land, as no one would deal with one who had no bond or who could not get anyone to pledge their surety to them.¹²

Such reciprocal voluntary agreements have a certain timeless appeal. Consider the modern parallels:

like insurance agencies, the surety groups helped members to spread risks by pooling assets; like credit bureaus, they vouched for the good standing of their own members and denied access to outsiders who had demonstrated their untrustworthiness. ¹³

The Anglo-Saxon courts, called *moots*, were public assemblies of common men and neighbors. The moots did not expend their efforts on interpreting the law; they left that to custom. The outcome of a dispute turned entirely on the facts of the case, which were usually established through ritual oathgiving. The disputants first swore to their accusations and denials. Each party then called on oath helpers (including members of their surety groups) to back up these claims with oaths of their own. For the court to accept any one of these oaths, it would have to be given flawlessly - though the poetic form of the oaths made it easier to meet this requirement. Deadlocks were often settled by ordeals of fire or water.

Anglo-Saxon law had no category for crimes against the state or against society - it recognized only crimes against *individuals*. As in other customary legal systems, the moots typically demanded that criminals pay restitution to their victims - or else face the hazards of outlawry and blood-feud. Murderers owed *wergeld* (literally, "man-gold") to their victims' kin, while lesser criminals owed their victims lesser fines, elaborately graded according to the victim's status and the importance of the limb, hand, digit, fingertip, etc., that had been lost. In recognition of the importance of private property, heavier penalties were also imposed for crimes, heavier penalties were also imposed for crimes occurring in or about the home.

Like the surety groups, these courts depended on voluntary cooperation. Berman writes that:

... jurisdiction in most types of cases depended on the consent of the parties. Even if they consented to appear they might not remain throughout, and even if they remained, the moot generally could not compel them to submit to its decision. Thus the procedure of the moot had to assume, and to help create, a sufficient degree of trust between the parties to permit the system to operate ...¹⁴

This Ango-Saxon customary legal system protected the liberties of the English long and well, but eventually it was consumed by royal law. The story of this downfall tells us much about the contrasting natures of private and state law.

THE RISE OF STATE LAW

In many societies, state law has advanced rapidly on the heels of military conquest. It entered England, however, with almost imperceptible subtlety. Two factors prepared the stage. Firstly, the constant threat of foreign invaders, particularly the Danes, had concentrated power in the hands of England's defenders. Secondly, the influence of Christianity imbued the throne with a divine quality, enshrining the king as vicar of Christ. Onto this stage strode Alfred, king of England during the last quarter of the ninth century.

Prior to Alfred, men served their kings voluntarily. A king had to offer battle gear, food, and plunder to get others to follow him into battle. More importantly, he volunteered to champion the cause of the weak - for a fee. Weak victims sometimes found it difficult to convince their much stronger offenders to appear before the court. Kings balanced the scales by backing the claims of such plaintiffs. This forced brazen defendants to face the court, where they faced the usual fines *plus* a surcharge that went to the king as paying for his services.

This surcharge, called *wite*, made enforcing the law a profitable business. King Alfred, strengthened by the threat of invasion and emboldened by his holy title, assumed the duty of preventing all fighting within his kingdom. He declared that anyone found guilty of assault owed him *wite* for violating the king's peace. Alfred lacked the ability to back up this claim, however, and it went largely ignored. But he had set a trend in motion. Over the next few centuries royal law would grow stronger - especially after the Norman invasion of 1066. Eventually it consumed virtually all of England's legal order, as did the royal law of countries throughout Europe. But first royal law would have to contend with some stiff competition.

FROM POLYCENTRIC LAW TO STATE LAW

A legal revolution swept through Europe in the years between 1050 and 1200. While the power of the Church rose to rival that of kings, the law of the church, inspired by the newly rediscovered Justinian codification of Roman law, rose to new levels of sophistication. But the Church's new-found independence helped to develop the state, as kings reformed royal law to give it the order and strength of ecclesiastical law.

Other legal systems entered the fray. Thousands of new cities and towns sprang up, leading to new centers of power and the development of urban law. The support of the church and a labor shortage introduced an element of reciprocity to the relations between peasants and lords, triggering the emergence of manorial law. Vassals likewise won standing in the separate jurisdiction of feudal law. And the rise of a populous, mobile merchant class promoted the evolution of the law merchant.¹⁵

Berman provides the single best source of information about this legal tangle in his magisterial *Law and Revolution*. He there explains how competition between jurisdictions helped to protect individual liberty:

A serf might run to the town court for protection against his master. A vassal might run to the king's court for protection against his lord. A cleric might run to the ecclesiastical court for protection against the king. ¹⁶

For the most part, royal law won this competition among jurisdictions. It had two important advantages over its rivals. The power to tax allowed it to subsidize its legal services. Royal courts absorbed the local functions of the law merchant, for instance, by adopting its precendents and offering to enforce them at bargain rates. Royal law also wielded far greater coercive power than competing legal systems, which depended on reciprocity and trust for their operation. Consider Henry II's effective resolution of his bitter struggle with Archbishop Thomas Becket over the proper boundary between royal and church jurisdictions: he had Becket killed.

Through this and other measures Henry II rapidly extended England's royal law. He established a permanent court of professional judges, the use of inquisatorial juries, and regular circuits for itinerant judges. The latter measure, in particular, reveals Henry's motivations; his itinerant justices also served as tax collectors.

The legal conquests of King Henry II and kings thoughout late-medieval Europe established a reign of state law that has lasted to this day. Although grafted to the good stock of customary law, state law grew in strange, twisted ways. It classified murder, rape, theft, and so on as crimes against the state, rather than as crimes against individuals. Fines went to the king. Victims got only the satisfaction of seeing criminals suffer corporal punishment. Dissatisfied individuals continued to seek restitution out of court, so state officials forbade them to take justice into their own hands. This sharply reduced victims' incentives to pursue criminals, and statutes demanding the victims' cooperation had little effect. The state therefore developed the police powers necessary to enforce its laws on criminals and victims alike.¹⁷

THE ERSISTENCE OF POLYCENTRIC LAW

Although state legal systems have amassed immense monopolistic powers, they have never entirely quashed competition among legal systems. States themselves compete to attract human and finacial capital. And the law merchant has continued to survive in that realm safely beyond the reach of any one state's laws: international trade. But even within state boundaries polycentricity has survived.

The United States in particular has enjoyed a rich variety of competing jurisdictions. Each federal, state, county, municipal, and military court system has its own substantive and procedural rules - rules that often come into conflict. But these "official" jurisdictions

barely scratch the surface. In *Justice Without Law?* Jerold S. Auerbach records several groups that produced systems of private law: the early Puritan, Quaker, and Dutch settlers; the many various nineteenth century utopian communes; the newly-freed slaves; the Mormons; the Chinese, Jewish, and other immigrant communities; merchants; and uneasy labor/management couplings.¹⁸

Pioneers moving beyond the reach of state law also created their own private legal systems. Terry L. Anderson and P. J. Hill provide an excellent summary of the laws of the land clubs, cattlemans' associations, mining camps, and wagon trains. ¹⁹ See Benson for a fascinating account of vigilante justice on the western frontier. ²⁰

Privately produced law continues to thrive in the U.S. and gives every indication of growing stronger. Americans have a special knack for forming private organizations, each of which produces a set of rules we can justifiably call "law". Leon Fuller explains:

If the law is considered as "the enterprise of subjecting human conduct to the governance of rules," [Fuller's definition] then this enterprise is being conducted, not on two or three fronts, but on thousands. Engaged in this enterprise are those who draft and administer rules governing the internal affairs of clubs, churches, schools, labor unions, trade associations, agricultural fairs, and a hundred and one other forms of human association ... there are in this country alone "systems of law" numbering in the hundreds of thousands.²¹

Many of the organizations that Fuller lists provide law in areas that the state has overlooked or willfully ignored. In recent years, however, privately produced law has grown most rapidly in an area where it competes directly with state law: commercial arbitration.

Private arbitration has removed entire classes of disputes from state courts. The insurance, construction, stock exchange, and textile industries (among others) all make heavy use of arbitration.²² There are currently about 600 arbitration associations in the U.S. The largest of them, the American Arbitration Association, reported 52,520 case filings in 1989 - up more than 36% from 1980's figures. Overall, some 90,000 cases were filed with arbitrators in 1989.²³ Why are state courts losing so much business? Because private courts offer greater speed and efficiency than state courts.

THEORIES OF PRIVATELY PRODUCED LAW

Economists since Adam Smith have argued that competition in production serves consumers' interests, while monopolies tend toward sloth and waste. Gustave de Molinari was probably the first legal theorist who dared to ask why this should not be as true of the

law as it is of apples, cotton, and iron. He argued that under the state's monopoly of law:

Justice becomes slow and costly, the police vexatious, individual liberty is no longer respected, [and] the price of security is abusively inflated and inequitably apportioned ...²⁴

He therefore advocated a non-monopolistic legal system and projected that once

... all artificial obstacles to the free action of the natural laws that govern the economic world have disappeared, the situation of the various members of society will become *the best possible*.²⁵

Since de Molinari, other scholars have developed sophisticated theories of polycentric law. In addition to the work drawing on customary law referred to above, the work of Randy E. Barnett and Morris and Linda Tannehill merits special attention. Barnett criticizes the state's monopoly in law from first-hand experience and promotes a forward looking polycentric alternative. Although Ayn Rand supported state law, the Tannehills employ her objectivist ethics to derive the moral superiority and basic features of a system of privately produced law.

The polycentric legal systems advocated by these theorists share several features: the protection of individual rights and private property; voluntary agreements for the provision of security; non-violent dispute resolution; restitution (backed up by insurance against crime losses); compliance enforced primarily through the threat of ostracism; and the evolution of legal norms through entrepreneurial activity. Note that these are essentially modernized versions of the six features that Benson discovered common to all customary legal systems (above).

Advocates of polycentric legal systems disagree about how to justify these common features, however. Rothbard, for instance, argues that private courts would have to obey a precise legal code

... established on the basis of acknowledged libertarian principle, of nonaggression against the person or property of others; in short, on the basis of reason rather than on mere tradition.²⁷

Friedman, on the other hand, argues that the market in law will tend to protect individual rights because people

... are willing to pay a much higher price to be left alone than anyone is willing to pay to push them around.²⁸

These two forms of justification represent extreme versions of two approaches to the study of polycentric law: the philosophical/normative approach and the economic/descriptive approach. Although many legal theorists mix these two methods, they provide useful means of classifying research in polycentric law.

In *Anarchy, State and Utopia* Robert Nozick employs the philsophical/normative approach to impugn the desirability of a polycentric legal system.²⁹ His work has triggered a number of defenses of privately produced law couched in terms of moral rights.³⁰

Fuller's *Morality and the Law* introduced polycentric law to mainstream legal philosophy.³¹ Fuller defines "law" in terms broad enough to encompass privately produced law (as we saw in the quote above), and criticizes legal positivism's authoritarian tendencies. Barnett argues that Fuller's assumptions should lead him to repudiate monopolistic legal systems altogether and outlines a program for bridging the gap between the two contrasting approaches that I have descibed.³²

Researchers of polycentric law employ the economic/descriptive approach more often than the philosophical/normative one. Barnett and Benson apply public choice arguments to analyze the actions of state agents and critique the perverse incentives created by state legal institutions. Gerald J. Postema and Robert Sugden support Hayek's theory of the spontaneous development of law with game theoretic proofs of the important role social conventions play in coordinating behaviour.

Economic analysis cuts both ways, however. The most sophisticated critique of polycentric law comes from William M. Landes and Richard A. Posner, who argue on economic grounds that private adjudication depends on state courts to back up its decisions; that it under-produces precendents; and that it creates a confusing hodge-podge of conflicting jurisdictions.³⁶ Benson offers convincing counter-arguments to these claims, calling in part on examples of successful private legal systems like the law merchant mentioned above.³⁷

Advocates of polycentric legal systems have yet to employ the economic/descriptive approach to their fullest advantage. The analogy between the private production of law and the private production of money deserves further attention.³⁸ Note, for example, that courts in a polycentric system do not simply sell judgements. Anyone can name one party of a dispute "the winner". By demonstrating wisdom and impartiality, private courts sell judgements that people will *respect*. Consider the parallel with privately produced money: anyone can call a piece of paper "money", but people will only respect the currency of banks that demonstrate adequate reserves and good management.

The analogy goes still deeper. Banknotes represent claims to commodities. In a free banking system, only those banks that successfully back up their claims will be able to keep currency in circulation. Bruno Leoni explains the law in simlar terms: "Individuals make the law insofar as they make successful claims." By this he means that legal norms arise out of the sorts of

claims that have a good probability of being satisfied in a given society. This takes polycentricity to its logical extreme; there are as many potential sources of law as there are individually successful claims.

As we have been seen, polycentric legal systems tend to generate successful claims to restitution. Just as the claim to a commodity can be transferred from one party to another (via the exchange of banknotes), so too the right to restitution can be transferred from one party to another (via the exchange of "courtnotes" we might say). For example, individuals in a polycentric legal system would probably buy insurance to protect themselves against losses due to others' illegal activity (in addition to buying insurance to cover their own liability). When insurance companies had to cover their clients' losses they would assume the rigth to demand restitution from the responsible parties. The claim to restitution would thus transfer from the original victim to the insurance company. Insurance companies would probably transfer claims to restitution among themselves to settle their accounts, giving rise to features analogous to those that arose among private banks: transferable courtnotes, clearinghouses, and client information bureaus.

THE FUTURE OF PRIVATELY PRODUCED LAW

Having learned something of the history of privately produced law and the theories that explain its operation, we can now look into the future to see what sort of legal system might arise in a free society. This is highly speculative, of course, for we cannot tell exactly what legal entrepreneurs will come up with. But we can paint a plausible picture of the future development of privately produced law by borrowing from Barnett, Friedman, Rothbard, and the Tannehills.

Disputes arising out of contractual relations usually won't present too much of a problem, since contracts can simply stipulate that all disputes be settled before a named arbitrator. As mentioned above, this is a practice which is already common to many areas of trade and rapidly spreading to others.

But what if you signed a contract without such a stipulation and a dispute arises? You and the other party to the dispute can always agree to take your dispute to a private court after the dispute arises. There should be no shortage of objective courts to choose from - biased courts would go out of business rather quickly.

But what if the opposing party knows he will probably lose and thus refuses to go to court? This is where the insurance companies alluded to above come into play.⁴⁰ Like most people in a society where law is produced privately, you will have bought legal insurance for just such occasions. You tell your insurance agent of the other party's recalcitrance, file a

claim under your policy, collect compensation for your losses, and leave the matter in your agent's hands.

The right to take the other party to court now transfers to your insurance company, which contacts his insurance company (or whatever organization through which he purchases legal representation) and arranges a hearing. Upon losing, your opponent can expect his legal insurance premiums to skyrocket - if he does not lose his policy altogether. In either case, if he tries to get a policy from another insurance company he will find that it has heard of his behavior through a legal credit bureau set up and run by the insurance industry. Such consequences will prevent most people from refusing to go to court voluntarily.

But what if your opponent doesn't have any legal insurance to lose? In that case, you probably wouldn't have done business with him in the first place, having discovered that upon your request he couldn't give a legal proof of legal coverage. What if you forgot to check? Firstly, you can expect your own insurance premiums to increase for having engaged in such high risk behavior. Secondly, your insurance company will assume the right to demand restitution once again this time they'll go after the scoff-law himself, rather than his insurance company. Or, if they don't handle such dirty work, they might sell the right to restitution to a private police agency or a free-lance bounty-hunter.

Whoever catches the outlaw will not want to punish him; there's no profit in pointless suffering. Rather they will want monetary restitution. If there are no assets to seize, they will reserve the right to garnish the outlaw's paycheck. In the worst-case scenario, they will place him in a workhouse until he works off his debts. Such unpleasant consequences should convince most people to take out legal insurance or otherwise obtain legal representation.

Disputes arising out of criminal activity will unfold in much the same way, though criminals' uncooperative disposition will probably put such cases in the hands of insurance companies, private police agencies, or bounty hunters rather quickly.

Where do the laws come from in this system? From the desires of consumers. You'll get to choose the court of law, and hence the legal system, under which your cases are heard - subject, of course, to the agreement of the party opposing you. This unanimity requirement, combined with the economic benefits of following general standards, will probably result in a basic legal code accepted by almost all courts. (Some courts will still of course offer specialized laws for particular sorts of cases.) What will this basic code look like? Rothbard probably has it right when he claims that it will follow the principle of nonaggression against the person or property of others - but

Friedman is probably right to point out that it will look this way for reasons of economics, not ideology.

What happens when legal systems conflict? Most people fear that war would erupt in a system of purely private law, but such fears are ill-founded. First of all, note that war is expensive. Those who produce laws in a private system can't depend on taxes for their income; they have to find willing purchasers of their product. But warlike law-merchants are at a competitive disadvantage, for they must subsidize their aggression by offering less or lower quality legal services per unit of purchasing power. Military dictators would quickly go bankrupt in a polycentric legal system. But what if one who aspires to military dictatorship tries to alleviate his cash-flow problem by introducing taxation, thereby turning his customers into slaves? In that case he will have reestablished a state - and its warts can hardly be taken to impugn a system of privately produced law.

We should still be concerned, however, if a system of privately produced law made it easy for military dictators to succeed in reestablishing states. But this does not seem likely. In a polycentric legal system, power is widely dispersed. There are no borders to violate, no capitals to seize, no leaders to assassinate. And yet the would-be tyrant faces countless obstacles, for each coercive step he takes in a free society incurs the wrath of a private protection agency. Together or apart, these agencies would hold the tyrant and his servants⁴¹ responsible for correcting every wrong they commit.

Of course, no one can guarantee that privately produced law would work. The success of any social organisation depends on the attitudes and beliefs of those who take part in it. If most people feel that they need and want coervicely imposed laws, they shall have them. But if a certain critical mass of people not necessarily a majority of the population - believe that they should be free to choose their own legal standards, then privately produced law has a good chance at taking off. And take off it has. A polycentric legal system has already taken root in the cracks of the state's legal monolith. The greater efficiency, justice, and resilience of purely private law gives it a good chance of shooting skyward. Its continued growth will split the state's power asunder, and leave us free to enjoy the sweet fruits of a legal system based on real consent.

NOTES

- I do not consider myself to be an anarcho-capitalist. Until I hear a convincing justification of statism, however, I will continue to advocate the idea of real consent in all human relations - including the law.
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- 17. For a paricularly shocking account of the treatment of victims in the U.S. legal system, see William F. MacDonald, 'The Role of the Victim in America', in Barnett and Hagel, eds., Assessing the Criminal: Restitution, Retribution, and the Legal Process.
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- 22. Benson, The Enterprice of Law, p. 219.
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- 25. Ibid., p. 15, de Molinari's emphasis.

- 26. Randy E. Barnett, 'Pursuing Justice in a Free Society: Part One Power vs. Liberty', *Criminal Justice Ethics*, Summer/Fall 1985, pp. 50-72; 'Pursuing Justice in a Free Society: Part Two Crime Prevention and the Legal Order', ibid., Winter/Spring 1986, pp. 30-53.
- 27. Rothbard, For A New Liberty, p. 230.
- 28. Friedman, The Machinery of Freedom, pp. 127-128.
- 29. Robert Nozick, Anarchy, State and Utopia, Basic Books, New York,
- 30. You will find several of these critiques conveniently gathered in one place; see Randy E. Barnett, 'Whither Anarchy? Has Robert Nozick Justified the State?', Journal of Libertarian Studies 1, Winter 1977, pp. 15-21; Roy A. Childs, Jr., 'The Invisible Hand Strikes Back', ibid., p. 22-23; John T. Sanders, 'The Free Market Model Versus Government: A Reply to Nozick', ibid., pp. 35-44; and Murray N. Rothbard, 'Robert Nozick and the Immaculate Conception of the State', ibid., pp. 45-47. For another series of articles triggered by Nozick's work, see George H. Smith's excellent mix of rights-theory and economics, 'Justice Entrepreneurship in a Free Market', Journal of Libertarian Studies, Vol. 3, No. 4, 1979, pp. 405-426, and its accompanying commentaries.
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- 33. Barnett, 'Pursuing Justice in a Free Society: Part One Power vs. Liberty'; Barnett, 'Pursuing Justice in a Free Society: Part Two Crime and the Legal Order'; and Benson, *The Enterprise of Law*.
- 34. Gerald J. Postema, 'Coordination and Convention at the Foundations of Law', *Journal of Legal Studies* 11, January 1982, pp. 165-203.
- 35. Robert Sugden, *The Economics of Rights, Cooperation and Welfare*, Blackwell, Oxford, 1986.
- William M. Landes and Richard A. Posner, 'Adjudication as a Public Good', *Journal of Legal Studies* 8, March 1979, pp. 235-284.
- 37. Benson, The Enterprise of Law, pp. 221, 277-281, 299-300.
- 38. The private production of money is often called "free banking". For excellent works on free banking see Lawrence H. White, Free Banking in Britain: Theory, Experience, and Debate, 1800-1845, Cambridge University Press, 1984; George A. Selgin, The Theory of Free Banking: Money Supply Under Competitive Note Issue, Rowman and Littlefield, Totowa, New Jersey, 1988; and, as a general overview, Kurt Schuler, 'Free Banking', Humane Studies Review 6, Fall 1988, p. 11.
- 39. Bruno Leoni, 'The Law as the Claim of the Individual', Archives for Philosophy of Law and Social Philosophy 40, 1964, p. 58.
- 40. Of course you might have taken your dispute to the insurance company as soon as the dispute arose if your policy so allowed. Policies calling for such attention would of course cost more than those requiring you to make good faith efforts to settle the dispute on your own.
- 41. Holding the tyrant's servants fully responsible is perhaps even more important, from the public choice point of view, than holding the tyrant responsible. The servants would realize that they cannot escape liability by hiding behind their uniforms, and would thus hesitate to take the tyrant's orders.