SOCIAL SOVEREIGNTY

HOW REASON AND THE *INVISIBLE HAND* MAKE LAW

"GOVERNMENT IS NOT REASON; IT IS NOT ELOQUENCE; IT IS FORCE! LIKE FIRE, IT IS A DANGEROUS SERVANT AND A FEARFUL MASTER."

-----GEORGE WASHINGTON

Key Amendments to the Constitution:

Article IX

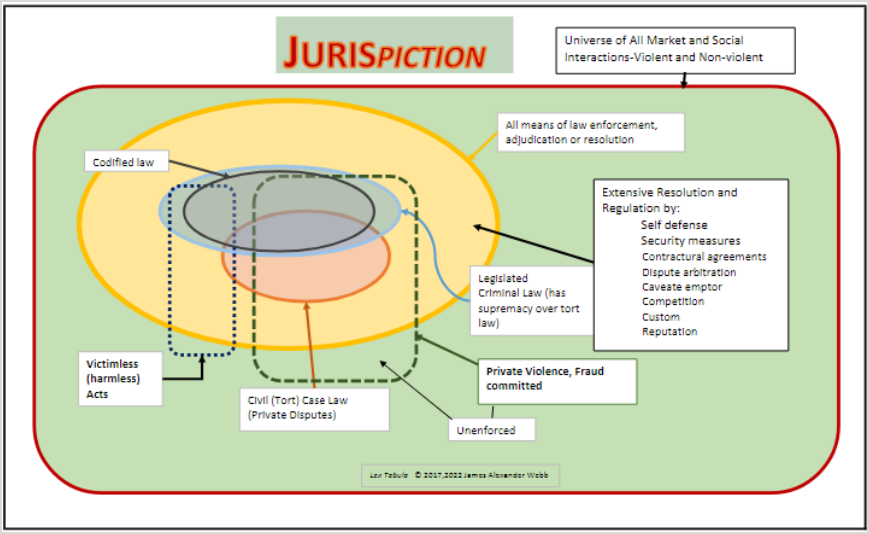
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article IVX

Sect. 1. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.


JURISPICTION
Universe of All Market and Social Interactions-Violent and Non-violent
All means of law enforcement, adjudication or resolution
Codified law
Extensive Resolution and Regulation by:
Self defense
Security measures
Contractural agreements
Dispute arbitration
Caveate emptor
Competition
Custom
Reputation
Legislated Criminal Law (has supremacy over tort law)
Victimless (harmless) Acts
Civil (Tort) Case Law (Private Disputes)
Private Violence, Fraud committed
Unenforced
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Contents

INTRODUCTION

These essays summarize important insights by writers who deserve a full hearing on some subjects that are central to formulating an informed political philosophy. We start with some definitions and observations.

The economy is constituted by a government sector and a market sector. The term "market sector" is preferred to "private sector" since historically the state acts privately as well as publicly. Private vested interests, private elite rulers, entrenched bureaucracies effectively run the state. It is no exaggeration to say that at least half of the business sector enjoys and promotes government contracts, or monopolies of licensing or regulatory protection.

The ***Invisible Hand*** is the agent of emergent order championed by Adam Smith. One of the precepts this book incorporates is that ***governance*** can be optimized for broad areas of social and community interaction in ways that need not make use of government compulsion.

Statism

The 20th Century witnessed increased intrusion into economic life by the state. Such growth of government follows from its nature as an institution based on force, in sharp contrast to other forms of organization that flourish without the need to compel membership.

It enjoys general acquiescence in its use of compulsion, a tool unavailable to all other peaceable social institutions. One is forcibly compelled to pay taxes, or prevented from leaving the country without a passport. There is no right to opt out such as with a membership in a health club, country club, or any sports or religious organization or church. These have rules, but they depend on voluntary association.

The state expands to excess, not from forces originating in social life, not from plans required to be carefully formed, nor from lack of prudent intentions of its personnel, but because it commands the advantage in the power of acquiring wealth and from the dynamics of its own contribution to interruptions of social order.

It grows to restrict markets to benefit insider capitalists who use it to block competition; it grows when it convinces the public that its role is to limit the greedy; it grows with the growth of fear; it grows when there is more crime or more enemies. By promoting conflict, or fomenting fear it can enhance its health; the good services it provides need not be produced with economic efficiency.

It grows by legislation; it grows by reacting to its earlier mistakes arising from attempts to find solutions to social problems through the facile resort to the force of law; it grows to administer the administration of its laws, and to correct them with more laws. These trends either accelerate, or are overthrown for a time, but never cease.

In the last century Europe witnessed the emergence of enthusiasm for modern statist authoritarianism under the guise of social evolution.

Also over the course of the 20th Century the world witnessed widespread growth of new forms of economic intervention. Dominant economic doctrine supplied a rationale for growth of centralized power and absolutism.

But world war and destruction of civilized life under these regimes resulted in disillusion and rejection, and the return to a more civil authority. However, academia, relying heavily on funding that includes various state, local and federal sourcing, could not be unaccommodating to an accretion of state power.

And, just as significantly, even the most skillfully crafted regulations and government policies interfere more than assist the less visible forces for stability in the market. Here, unacknowledged but superior governing forces produced by the market have proven to ameliorate cyclicality and promote competition where government techniques failed.

Sovereignty

In the present context the term ***social sovereignty*** is used to describe a political system consonant with freedom of the individual, order and civilization. The ultimate legal authority in a jurisdiction, i.e. ***sovereignty***, conventionally resides in political units or entities. The term *sovereignty (*of individuals), in a world of almost universal politically or violently imposed inequities, such as in remnant feudalism, may imply a level of exclusivity and privilege; *sovereignty* of political rulers or privileged corporations implies subjugation.

Used herein, *Social sovereignty* refers to naturally cooperative, mutually respectful, customarily derived rules of social order with minimal imposition of artificial constraints in governing society. *Social sovereignty* promotes the most promising and proven environment for complex balanced economic progress, and is described as:

The socio-political framework predominantly based on spontaneous social production of law and on authority of a decentralized, competitive system of courts and police services.

Neither the individualism of privileged private or corporate power, nor the enforced collectivism of political power is likely to produce a non-coercive or just outcome. They fail as a substitute for the moral and practical strengths of a system publically and socially organized from emergent forces.

On the Continent law is typically derived from Roman origins and is denoted ***Civil*** Law. In Anglo-Saxon countries the English ***Common***-law system prevails. Scholars of law will note weaknesses in both of the modern systems of jurisprudence. The former often suffers from inefficiencies of formality, while the latter from rigidity in adoption of rational reform.

Both of these institutional systems of law have been transformed by compulsory, monopolistic imposition or transplantation. Neither resembles a genuine market based system under healthy competition that would be primarily oriented as a service to customers, i.e. the public.

A recent study in the Quarterly Journal of Economics comparing the two systems found that in civil law countries "the expected duration of dispute resolution is often extraordinarily high, suggesting significant inefficiencies." (Tullock, 2003: 44) Reform, implied by the study included "the reduction of procedural formalism."

In comparison the U.S. system adopted from the English common law model suffers in numerous respects, one from a self-reinforcing phenomena of an excessive number of lawyers per capita, another from the Jury selection process and from the rules imposed on juries. "It is beyond rational logic to justify the prohibition imposed on United States juries from taking notes, reviewing evidence, asking questions and having access to basic information resources." (Tullock, 44). The veto power over laws on a case by case basis through jury nullification had been an important check and balance over the other branches of government that produced

new statutory law. It has been suggested that this grass-roots power constituted a 4th branch of government until it had been gradually suppressed in the courtroom.

Any attempt to reform these systems of jurisprudence without first questioning their foundational legitimacy would be futile. Even reasonable reform that introduces new technology or efficiencies readily available would, because it is a change, generate political opposition by those adversely affected. And because these decisions are made in a political rather than market arena, small numbers would have sway: organized lobbies trump dispersed majorities. Hence, reform would best follow restructuring the judicial system and the political system in the direction of competitive markets to reduce the centralization of political power while enhancing the prerogatives of customers and the public. The less power is centralized, the less the stranglehold over reform.

In the following pages we make reference to both civil law and common law, describing two types of essentially criminal law as adopted internationally. This use of the term ***civil*** is not to be confused with the terms as used in the U.S., the distinction there being between ***criminal law***, and ***civil or tort law***.

Previous Systems

Some historical examples of systems with genuine elements of social sovereignty will be indicated below. It will be argued that in many important facets current institutions of modern systems of jurisprudence and law-making in both civil and common law countries have retrogressed from earlier forms that were functionally superior.

Reflecting on the insights from Thomas Kuhn's *The Structure of Scientific Revolutions,* we might see that the historical evolution of social,

political or even scientific systems should not be expected to improve linearly from primitive to advanced. Judgment of the efficacy of traditional systems no longer found should not be biased on the basis of their inability to survive in the course of political history. The more extensive record demonstrates that socially sovereign systems enjoyed remarkable internal stability for centuries on end until outside pressures were imposed.

The fact that a social system was displaced by invasion or other forces would not automatically lead to the conclusion that it was inferior. Neither should earlier periods be compared with later simply on the basis of improvements in modern comforts of life. There are examples of systems of socially sovereign peoples economically and culturally advanced for their time. The Saga period of Iceland survived for three centuries. Celtic Ireland, for example, maintained a sophisticated system of jurisprudence until British intervention in the 17th Century. Centralized systems, though surviving into the 20th Century have no claim to the term "evolved", given that they produced some of the most brutish regimes in history, and not without the intellectual groundwork that attempted to justify them. Even with the winning of the war of ideas, beginning with Ludwig von Mises, and Friedrich A. Hayek in the economic calculation debates in the 1930's, it took the physical disintegration of the Soviet planned economy, and the extraordinary success of free market experiments such as Hong Kong in the 1980's, fifty years later, to win respect in academic circles for the free market as a solution to social organizing. Although old systems of oriental despotism seemed stable, they were stagnant, and uninspiring, and are being challenged by the technological and information revolutions.

Reform

The reform proposals highlighted here are institutional and structural, achieved not simply by new laws alone, or by replacing those in leadership positions. Dysfunctional existing law would be seen as products of a

flawed institutional governmental structure, not flaws of conduct by participants.

Effective reform looks beyond a change in regimes or the existing physical apparatus of government and the governing of the nation with its various branches employees etc. The form of government i.e. democratic, authoritarian etc. has importance; or more specifically the process of creating the physical institution and the processes of governing, not those institutions and regulations themselves.

Reform will center on how laws themselves are adopted, whether through legislation or judicial decision, whether democratic or autocratic; it will look to remove hindrances to social improvement through socially based means, contrasted with improving government by looking to behavioral changes by people, more public participation, or a change in leadership. For example, allowing a sports federation of teams and owners to formulate rules, penalties and referees, produces the required structure for orderly interaction on a non-compulsory basis. It allows members to opt out or form alternative associations. This is the very essence of non-government governance. And more than that reform would rely less on positive law and more on customary law, or law as developed through judicial dispute resolution.

The nature of government

Government has been defined as a monopoly of force, but more than simply this, at the same time it is a system of order and a system of justice. It circumscribes which activities are crimes, invokes the instrument of credible force, and rightfully or wrongfully, thereby defines its role in society. Government oversees social conventions, applies the existing legal norms and enforcement of law, which, through the police power and court jurisdiction, defines a system of justice.

Some Constitutional scholars have labelled some jurists *strict constructionists*. Yet this is a term without defined meaning. We don't apply the term to those who adhere to the wording in contracts and other documents for good reason. One can either agree or not agree to abide by the wording and intent of a document. Differences of opinion in interpretation are not what this is about, it is about wording that is clear. Of course differences exist among jurists as to their interpretations, but changing the intent of a document has allowed, in the case of the U.S. Constitution, a reversion to illiberal practices of power. Certainly there are instances where the document could be more protective of freedoms, but the amendment process allows for flexibility here. This does not mean that one is always wrong to go outside of these strictures, but this certainly compromises keeping the peace through what has been seen as the general social contract.

A good case can be made that the document is not binding as a contract since those alive were not signatories on the document. But should this exception then exclude its rejection by office holders who have sworn an oath to uphold it? To reject or re-interpret its meaning because of a disagreement with its position on an issue weakens the ability to then call on other parts of the Constitution. Is it permissible to impose it as the **law of the land** to be binding on others that may opt not to be under its control? Does invoking the Constitution on issues in which one agrees with its meaning as written a tacit agreement with the entire document? One could feel bound to the Constitution to avoid rejecting entirely the rule of law it provides and could proceed with the assumption that the Constitution applies as written, of course with its' built in process for amendment.

It should be kept in mind that the wording of the document was devoid of the standard legal phraseology of the day that would have been incomprehensible to the common citizen. Hence, the document was intended from the outset to be read, understood, and acted on by the citizen without the need for interpretation by a priesthood of judicial scholars or justices, even if their input no doubt could be useful.

As expressed in part by the doctrine of separate and countervailing powers authored by Montesquieu, it would appear that some concerns at its writing were well advised. It defined the basic legal landscape of a society, its major function being to set limits on government power. This is why attention is given to constitutional matters in the proposals set forth below. Experience in the more than 200 years since the writing of the Constitution for the U.S. has demonstrated that early misgivings about the possibility of keeping a government under limits were well founded. After several centuries under the form of a republic, Rome devolved into an empire, and finally met its demise from internal political discord and decay. This could not have gone unnoticed to the founders in the formulation of their new republic.

Constitutional change

One might question the wisdom of amending the scope of government power as set forth by the U.S. Constitution. However, exclusive of the Bill of Rights, 16 amendments have been added since the original 1787 ratification of the Constitution. New proposals are constantly offered and often adopted by those wishing to extend power to the government. And further, and most importantly, several fundamental extra-constitutional expansions on powers of the government, undertaken without the proper amendment process, have gone unchallenged. A few brief examples of extra-constitutional usurpation of power serve to make this point:

1) Power over the states was usurped with a tortured and deliberate misreading of the wording in the commerce clause.

2) Administrations engaging unlawfully in war without Congressional declarations of war in Korea, Vietnam, the Gulf, Afghanistan, Iraq, and numerous other foreign military interventions.

3) Evisceration of the 5th amendment protections for taxpayers by IRS intimidation of citizens into signing complicated statements of financial condition under penalty of perjury and self-incrimination.

4) Negligent and deliberate contravention of the 9th and 10th amendments in passing Federal drug prohibition legislation. This is in contrast to lawmakers who in 1919 passed the 18th Amendment to enable the Volstead act criminalizing the production and transport of alcoholic beverages, in recognition of the need for the amendment process to grant such power.

5) Due process violations under civil forfeiture, privacy invasions and unprovoked forced entry.

Revamping the Constitution, of course, does not guarantee its limits won't continue to be breached. But a cogent position for further limitations by constitutional means can be stated.

Misinformation

1) According to U.S. Census data, combined Federal, State, and local taxes were 8% of incomes in 1902. By 2000 it was 47%.

2) Claims are made that we are in an all-time prosperity yet the average work week, i.e., working for pay, keeping house, and going to school, rose to 50.8 hours in 1997 from 40.6 hours in 1973. Leisure time fell from 26.2 hours/wk. to 19.5 in the same period. (Wall Street Journal Almanac 1999: 231.) Little improvement has occurred since.

3) Claims are made that proliferation of private ownership of firearms contributes to violence, yet, states which introduce more freedom for citizens to own guns have dramatically less violent crime, while the showcase of gun control--Wash. D.C. has the highest murder rate in the U.S.

4) After having been deceived with a deliberate fabrication about an attack on U. S. Naval forces in the Gulf of Tonkin to justify U.S. intervention, as recently admitted by then Secretary of Defense Robert McNamara, we were told during the ten years of the Vietnam War the Government was

steadily winning the war until it conceded defeat in the mid 1970's. We are told that conscription requires broad participation and thus prevents unpopular wars, yet it is hard to see how support for such an extended, unpopular conflict not in the Country's interest could have been maintained without forced participation.

5) Claims are made that use of drugs must lead to addiction, yet addiction occurs only for a small minority, even for heroin users as was demonstrated when heavy use during the Vietnam War was almost universally discontinued by returning Veterans on their own volition, contrary to expert predictions. Little recognition is given for personal discretion limiting drug use altogether, or to recreational levels. Such an outcome has occurred even though availability and even a promotional element exists due to the profit in vending prohibited substances.

6) We are told that using force against drug use will deter violent crime, yet the strong correlation between legality of drugs versus violent crime is exactly opposite to what we are told, prohibition produces more crime, a direct result of prohibition's artificially lucrative drug market and the need for predation on innocent civilians by addicts to pay for artificially high drug costs. After the Controlled Substances Act of 1970 rates of murder per 100,000 are 50% higher than in the pre-prohibition 1950's. Combined property and violent crime was 1,887 per 100,000 in 1960 and grew to over 5,000 per 100,000 by 1975 and remained above 5,000 per 100,000 through the late 1990's. Acceleration of total expenditures on crime from $35.8 billion in 1982 to $103.5 billion in 1994 left crime rates virtually unchanged. (Source: U.S. Justice Department)

7) Proof of the ineffectiveness of enforcement is seen in the fact that drug prices have fallen. If anything, a maturing black market tends to become more immune to disruption over time as it gradually corrupts and incorporates enforcement authority and may accompany a lower occurrence of violence as a result of fewer turf wars. Lower use of crack cocaine merely reflects the fact that it was a creature of prohibition and only a substitute for higher priced cocaine that now is more available.

8) People are told that the criminal justice system protects them from harm, whereas there is little police involvement in preventing offences against the innocent. There is in fact no general mechanism for restitution of victims, while increasingly the general provision by courts is incarceration (of mainly non-violent transgressors of often politically misguided laws) into institutions widely acknowledged to be training schools for hard criminals.

9) Not surprisingly, contrary to what we are told, markedly increased use of incarceration has not made the streets any safer. Total prison population in 1986 was 522,084 and the violent crime rate was 617 per 100,000. Total prison population in 1996 was 1,138,984 while the violent crime rate was 634 per 100,000 (Source U.S. Justice Department). This trend has continued into the 2000's. In 2015 with 5% of the world's population the U.S. imprisons 25% of the world's total prison population.

10) Government civil courts purportedly allow citizens to protect themselves from damage through tort claims. But the individual cannot recover against corporate air and water polluters, nor from bad engineering which contributes to many of the 41,200 (1998) deaths on the government highways, neither from wrongful prosecution and imprisonment nor from unwarranted government seizures and takings. In fact, through the doctrine of legislative supremacy civil remedies are regularly denied or made subject to the perverse usurpation of power by statutory law, sovereign immunity, and by biased or uninformed government monopoly judges and juries.

11) Government schools spend double the money per child over that spent by private schools, with inferior results. Could bloated, entrenched bureaucracies in education that take half the funds for education and oppose introduction of market competition explain why the U.S. has ranked below many European countries world in literacy? This in spite of the fact that, according to the U.S. Department of Education inflation adjusted expenditures per pupil for Government schools rose from $3,000 in the

1960's to over $7,000 in the 1990's, to over $11,000 by 2014 (in constant dollars). (Source U.S. Dept. of Education)

12) Most local governments proudly claim to be a force for improving the physical quality of commercial and residential neighborhoods yet encourage degradation of buildings by taxing improvements and encourage neglect by property owners through protecting under-utilization of land.

13) While purported to be fair, local property taxes and zoning is regularly unfair and unequal. The accepted practice of taxing use rather than value of the raw component of land (i.e. site value) is promoted by speculators who, holding land idle, hope to profit only out of the proximity of land holdings to community spurred development, rather than from their own efforts or work.

14) At the inception of the Medicare program (1965) the Government projected (inflation adjusted) cost for 1998 was $12 billion. Actual cost for 1998 was $78 billion.

15) Instead of simply providing a modest social dividend to every citizen, as if by design welfare programs and income taxes create disincentives to work, and instead of helping the poor, predictably produced an even larger underclass, thus conveniently sustaining the illusory rationale for even more programs run from Washington.

16) Lack of respect by citizens for legislated victimless crime laws is considered anti-social and dangerous while lack of respect by legislators and government officials for the rule of law by flaunting the written meaning of Constitution is excused on grounds of expediency.

17) We are led to believe that, because legislation can be a careful process that includes committee review and expert participation, the results can be reasonably functional. In fact, legislation regularly creates absurd results even when well intentioned, as exemplified by E.P.A. endangered species regulations that can destroy homes and property for the sake of an insect habitat.

This list of examples could be lengthened by citing the rich literature; the foregoing partial list of instances of misinformation serve simply to challenge the comfortable acceptance of the social and political status quo in the U.S. today.

Theories of ownership

The classical liberal Herbert Spencer was aware of the need to protect the common people from the monopolization of land ownership by law, which leaves feudal power intact even with otherwise free markets. Land taxes with revenues generally distributed were seen by some to redress this inequity. Even Revolutionary war patriot Thomas Paine, aware of the need to redress this problem, advocated redistribution of wealth in the form of the estate tax.

The following will reference freedom based on social and legal conventions that evolved among the ancestors of European peoples and other cultures as well. In Europe, although challenged by despotic forces from the Roman campaigns of Julius Caesar, the Norman Conquest in England, and the doctrine of absolutism recently manifested in Marxist Socialism and National Socialism, the strain of freedom resurfaced wherever habits of free thought were allowed to flourish.

Legislation

Errors have been adopted in the very fiber of modern jurisprudence. But there is a way out of the overproduction of law by legislation. Errors were brought about by a false enlightenment that naively treated law as a remedy for correcting social ills. Errors were compounded by an unawareness of the treacherous nature of the dynamics of human uses of the ability to instantly make law. In even a well-functioning democracy options are

chosen that lack the checks and balances that routinely follow prudent conduct in buying and selling goods and services. When funds are available from sources divorced from the connections between spending and benefits that we control with dollar votes, gross distortions of cost become possible. People can express a political desire to interfere with their neighbor's personal choices that result in expenditure of their tax money that they would never have thought deserving of such expense if asked to pay directly for their share of the cost. Likewise are expenditures especially with regard to foreign policy.

The present system is medieval at root. We have the specter of involuntary taxation and a selective service law that when activated virtually creates involuntary servitude. Even among most indigenous peoples this was anathema to their reliance on voluntary recruitment for campaigns of war. We have control of arbitrarily designated substances such as marijuana, destroying the hemp paper and fiber industries, and injuring the unorganized, powerless small farmer only to enrich companies profiting from destruction of our forests and polluting our air and rivers with synthetic textile production. We have speciously justified ballooning, militarized enforcement agencies unmotivated to prevent violence against citizens.

We have perverse consequences of legislation in the use of plea-bargaining that takes an end run around one of the purposes of the 5th amendment protection against self-incrimination. As aptly stated recently by Paul Craig Roberts and Lawrence M. Stratton (2000: 18, 19) in explaining English protections against abuse by the government:

> The injunction against self-incrimination ruled out the possibility of plea-bargaining. Plea-bargaining is akin to torture, because it can be used to extract false confessions from the accused so that they can avoid being charged with major offenses. Without a trial in which the government was forced to prove its case, false pleas

> would crowd out truth. Therefore, there could be no trial without proof that a crime occurred and evidence that the defendant committed it...

Further summarizing the authors demonstrate:

> Americans' growing vulnerability to injustice as prohibitions against crimes without intent, retroactive law, and self-incrimination are removed, along with restraints on prosecutorial powers. Each of these legal protections, which took centuries to achieve, has taken a ferocious beating in twentieth-century America. Today even wealthy and prominent Americans are less secure in law than unemployed English coal miners were in the 1930s. (Xiii.)

There has been considerable emphasis on legislation as a tool for achieving agendas for every sort of cause. A false legitimacy for this democratic process, which increasingly incorporates public opinion polling, sustains popular support. But every legislated law by-passes the legitimate channels for social decision-making–channels less visible but with an imposingly superior track record. Legislation forecloses on the body of originary common law, i.e., law arising genuinely independent of politicians, bureaucracies and autocrats; it forecloses on use of a distributed intelligence that cannot come down a hierarchical chain, but rather coalesces out of sometimes immeasurably greater thoughtful effort filtered and refined through a competitive selection process; it forecloses on free market options guided by dispersed price signals that no instituted authority has at its disposal; it forecloses on the power of consumer knowledge that unseats services and products unable to survive the rigors of dispassionate consumer choice.

The discussion to follow will expand on the root causes of the increasingly apparent but unnecessary flaws in the application of government to social problems; mere criticism would not be productive. An attempt has been made to identify problems and to recommend initial solutions based on a reorientation in the legal landscape and the mechanics of lawmaking.

Sometimes words lack clear definition or encompass conflicting meaning. Centuries ago traditional regimes of law enforcement centered on restitution of the victim. These were replaced by regimes imposed by conquest. Ruling elites and monarchies re-directed penalties for various offences to serve purposes in line with revenue generation (fines) and control (punishment) no longer for the sake of restoring the victim, often for selective private largess, monopoly of commerce etc. Old *offenses* were redefined as *crimes*. And so we have consensual activities, often strictly a matter of personal lifestyle labelled crimes. The pejorative term has been inherited without reflection. Hence, we now have the labeling of many harmless activities as crimes, activities that society, on its own, under the original legal regime of victim restitution, had no incentive to make illegal.

Exchange

When the principle of free exchange between consenting adults is overruled the result is a disturbance of the peace. It can be interference with exchanges between neighbors, residents of separate towns, or even between consenting adults on other continents. It can be by organized power, whether from a local war-lord, majority political body, an autocrat or a federation against a smaller unit.

Giving up freedom for security gains no security but that of tyranny.
"**Differences in civilization are not due to differences in individuals, but rather to differences in social organization;"** Henry George xvi preface -*Progress and Poverty*

On Law

I. SYSTEMS OF LAW

We now turn to the lawmaking process. Positive or legislated law can be contrasted to case law that develops out of judicial precedents. Criminal law encompasses both processes. Modern common law and civil law countries rely heavily on legislation of criminal law. Both systems rely on a history of statutory law codification of older derived case law.

The term "civil" has come to also be used to designate non-criminal or tort law. Contract law is subsumed under civil law. In the U.S. we are familiar with the difference between civil and criminal litigation. For instance, civil suits are won with a preponderance of the evidence with one person (plaintiff) against another (defendant), precedents allow for evolution of decisions for specific application; criminal law deals with prosecution of violations of statutory law with the state as plaintiff, the defendant presumed innocent, and requires guilt beyond a reasonable doubt for conviction. The system is adversarial in that both parties are, in theory, given equal consideration in presenting their case. Use of precedents has been found to be one most valuable aspect of law.

It will be argued, following a position put forward by Peter J. Ferrara (1982), that to the extent that a legal system employs 'criminal law" it does so best by confining its role to retributive action against the perpetrator of a violation of another's rights, with the plaintiff defined as the victim not the society represented by the state. Further, in keeping with Ferrara's formulation, retributive justice must be ancillary to restitutional justice, i.e. that the focus is first on the tort claim brought by a victim and then on the retributive criminal aspect. Further yet, no victimless "crimes" could be the subject of prosecution.

This system of jurisprudence is based on civil action. It is far removed from current implementation of criminal law. This fresh concept of jurisprudence would confine the designation of what constitutes a criminal act to only a subset of its present scope. Identifying an act as deserving retribution better defines what should be prosecuted than the use of the term *criminal*. It applies more consistently than the term criminal in cases where the perpetrator knowingly acted in a wrongful manner.

Ferrara distinguishes between restitution law and retributive law:

> Thus the crucial question in a criminal case is the intent of the criminal (which shows the degree of moral condemnation necessary), whereas the crucial question in the tort case is the damage caused (which shows the amount of restitution which must be made) …tort law gives the victim what he deserves and the criminal law gives the criminal what he deserves. (129)

It may come as a surprise to some readers that entire societies functioned for generations under judicial systems that were without our contemporary concept of legislated statutory or criminal law. Violations of laws were violations of rights of individuals by other individuals. The purpose of litigation was restitution. Law developed through customary rather than political processes, evolving out of disputes under a legal environment of civil contract.

Common law today includes statutory codification and definition of customary law and is different from early common law. Earlier law, if codified, strictly defined measures of restitution required of an offender. It addressed any debt created out of wrongful action against a victim or plaintiff. For example, early Welsh law, with pre-Roman conquest origins "ordered the payment of exact sums in compensation for specific injuries," (Pennick, 1997: 32).

Only gradually did the concept of law change as monarchies turned law to their advantage. The idea of a debt to society or the state evolved after first taking form as debt or tribute to a conquering king or monarch. Fines and punishments for customary infractions against the crown or common citizens were imposed by monarchs in order to have a source of revenue and power.

This early usurpation of both ancient Anglo-Saxon and Celtic law, for which the original purpose was restitution to the victim remains essentially unremedied. Recent concern over victims' rights is in part a recognition of the neglect of restitution in contemporary criminal law, yet legislated law continues to be been used as a means of transferring wealth from one group to another. (Benson, 1990)

Current uses and practices in criminal law in the Anglo-Saxon western countries were born from this earlier co-opting of the original law of restitution. Consequently, exploration of the implications of this imposed transformation of a popularly based customary civil law regime raises questions as to the appropriateness, efficacy and legitimacy of the predominance of modern statutory, criminal law regimes characterized by an emphasis on prosecution by state rather than by or in behalf of the victim. This encompasses questioning continued profligate creation of victimless crimes. Even though legislative processes have replaced lawmaking by edict of autocratic rulers (in the West), a civil law continues to be perversely superseded by any criminal, under the absolutist doctrine of legislative supremacy. This can either favor or disfavor the perpetrator.

There exists a conflict between constructivist and spontaneous philosophies. 20th Century scholars Bruno Leoni and F. A. Hayek, demonstrated that contemporary practices in law making were inferior to some earlier traditional, spontaneous systems; that even the most well-intentioned modern legislative and judicial review processes in the making of law can fall far short of more measured, careful establishment of law

through an evolutionary traditional process. Deliberate, “rational”, constructivist legislating has been, in Hayek's terms, a "fatal conceit."(Hayek, 1988)

Non-legislated law arose out of decisions by professional jurists, made case by case, and only adopted as convention as it may apply to decisions of a similar nature. This resulted in a body of practice much more stable and more likely to be tailored to the needs of justice than law imposed on a jurist or judge from a law making authority. As Benson explained,

> ...two parties may enter into a contract, but something then occurs that the contract did not clearly account for. The parties agree to call upon an arbitrator or mediator to help lead them to a solution. The solution affects only those parties in the dispute, but if it turns out to be effective and the same potential conflict arises again, it may be voluntarily adopted by others. In this way, the solution becomes a part of customary law. In effect, then, private arbitrators/mediators have no authority beyond what individuals voluntarily give them.” (283)

Thus, many decisions, seemingly wise at the time, are discarded over a longer, more thoughtful selection process that makes full use of precedents.

Early on, simple non-contradictory precepts of justice, such as *equal protection of the law* and *equal rights*, began to take hold in the legal philosophy of a number of early societies. Provision of arbitration and justice to citizens seeking resolution of conflicts evolved into predictable customary provision of a needed order, an order that provided stability often extending over centuries. Specifically, historians have shown that the Roman Empire, the Saga period of Iceland, Celtic Ireland, and Anglo-Saxon England among others developed legal systems based primarily on originary

common law to the virtual exclusion of legislated formulation of new statutory law.

From Aristotle ‘Greed law’ was thought to have come down from the gods, and new laws were thought as something outside of the purview of man. Amazingly "(w)e have records of only about 50 statutes enacted by the Roman legislative posers relating to private relationships among citizens throughout their history--embracing more than 1000 years.”(Leoni, 1991: 208)

Reciprocity characterized systems where individuals joined with others for mutual advantage. After 1066 when Anglo-Saxon restitution law was replaced by a Norman system of fines and punishments much of the civil arrangements that society normally makes use of such as mutual protection, insurance, and even citizen initiated prosecution was lost. Pre-Norman conquest Anglo-Saxon Britain had no unified government and lacked a fully developed sense of justice as use of trial by ordeal and combat was apparently extant. But the Lord had limited authority over the manor or Hundred and judicial determinations rested on local consent. Much of the freedom of the village and in the home that characterized later British and American concepts of freedom had roots in this period. (Russell Kirk, *The Roots of American Order*). Benson notes:

> The Norman kings also brought the concept of felony to England, by making it a feudal crime for a vassal to betray or commit treachery against a feudal lord. Feudal felonies were punishable by death, and all the felon’s land and property were forfeited to the lord. (Benson, 1990, 50)

The tithing (a term for Anglo Saxon mutual assurance associations) was replaced by the compulsory frankpledge, a feudal institution, which holds the group liable for any member’s actions, a tool used in the 20th century by various totalitarian regimes (Benson 49).

Proposals in recent U.S. anti-terrorist legislation appear to revert to this medieval precept of guilt by association. RICO (racketeering laws) purportedly to be used only against organized crime now bring back to any defendant this old tool of past absolutism--that of finding defendants guilty of crimes committed by another person entirely based on a tenuous link of association. Conspiracy charges are brought without necessary corroboration of evidence, simply requiring testimony as evidence. People have been given long prison terms without evidence of possession of contraband. Real offence sentencing by judges also added prison time outside of the due process requirement of proof and conviction for only alleged activities, this last power only to be overturned by the Supreme Court in 2005 after decades of abuse. Crime legislation packages, literally overnight, have returned prosecutorial power to the government that took centuries to win on the part of the people.

Of the Statutes of William the Conqueror, now over a thousand years old, number 8 was according to Henderson (1998) as follows:

Every man who wishes to be considered a freeman shall have a surety, that his surety may hold him and hand him over to justice if he offend in any way. And if any such one escape, his sureties shall see to it that, without making difficulties, they pay what is charged against him, and that they clear themselves of having known of any fraud in the matter of his escape. The hundred and county shall be made to answer as our predecessors decreed. And those that ought of right to come, and are unwilling to appear, shall be summoned once; and if a second time they are unwilling to appear, one ox shall be taken from them and they shall be summoned a third time. And if they do not come the third time, another ox shall be taken: but if they do not come the fourth time there shall be forfeited from the goods of that man who was unwilling to come, the extent of the charge aginst him,-"ceapgeld" as it is called, -and besides this a fine to the King.[1]

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[1] Henderson, Ernest F.
Selected Historical Documents of the Middle Ages

And Russell Kirk noted that the common law...is the 'people's law,' so to speak, for it has grown out of practical cases of actual contest at law, over centuries, and is sanctioned by popular assent to its fairness. There is no need for ratification of the common law by the Crown or Parliament or by some comparable political authority...judges...must abide by the accumulated experience of legal custom, so that the law will be no respecter of persons, and so that people may be able to act in the certitude that the law does not alter capriciously. (185)

London: George Bell and Sons, 1890.

II. THE RULE OF LAW

The enemies of liberty have always based their arguments on the contention that order in human affairs requires that some should give orders and others obey. Much of the opposition to a system of freedom under general laws arises from the inability to conceive of an effective co-ordination of human activities without deliberate organization by a commanding intelligence.[2]

Supremacy of general law over government

The struggle to limit the sphere of government intervention was opposed openly by autocratic rulers and more covertly by factions or vested interests. In Europe natural rights and constitutions evolved painstakingly out of centuries of political experience and the need for protection of minorities and individuals from precipitous action by the king and later unjust action and legislation by Parliament. But even the gains in political freedom won by the barons at Runnymede in 1215 were couched not to upset the feudal order of their landed aristocracy. A long-standing tenant of common law was the supremacy of law, i.e., that government could not arbitrarily override, nor ignore established law. At the inception of the U.S. Constitution government was limited to a concern for the general welfare, not the individual welfare of factions or special interests; the philosophical basis deriving from Locke's Law of Equal Freedom.

Over the last century there was a falling away from the doctrine of constitutionally limited government, especially in terms of limits on legislatures, and even to some extent as witnessed by the rise of initiative and

[2] Hayek (1960:159)

referendum when used to legislate rather than limit or veto new laws. This trend, evolved as an innocuous extension of the democratic ideal–democratic in the sense of government of the people. The result could be more accurately described as a retrogression to pre-Eighteenth Century undemocratic political paradigms, which had lost insights from preceding, sometimes ancient, originary, popular based, systems of law development.

F.A. Hayek observed that reversion to the triumph of unchecked parliamentary lawmaking over natural law, i.e., the rejection of constitutional barriers to government power, lay the groundwork for authoritarianism in both Germany and the Soviet Union early in the 20th Century:

> The possibilities which this state of opinion created for an unlimited dictatorship were already clearly seen by acute observers at the time Hitler was trying to gain power...The increasing concern over these developments which Hitler was finally to complete was given expression by more than one speaker at a congress of German constitutional lawyers. But it was too late; the anti-libertarian forces had learned too well the positivist doctrine that the state must not be bound by [natural] law. In Hitler Germany and in Fascist Italy, as well as in Russia, it came to be believed that under the rule of law the state was 'unfree,' a 'prisoner of the law,' and that, in order to act 'justly,' it must be released from the fetters of abstract rules. (1960, 239)

The legislating of majority will has been elevated to a cannon of good government. The power to express majority belief in the form of legislated law, purportedly to overcome factions or special interests, was mistakenly promoted as part of the democratic ideal. Rather than taking on special interest though, legislatures have succumbed to special interest pressure against the interest of the unorganized dispersed majority, or the " *general*

welfare" (as opposed to specific), notwithstanding some recognition of the dangers of a majority tyranny.

Limitations on legislation of law need not be seen as limitations on the ability of a society to develop a rich and extensive system of jurisprudence. A more fundamental democracy arises out of a broad definition of government of the people or social sovereignty. Paradoxically, and contrary to received wisdom, the ideal was ill served within the conventional political arena of direct or representative democratic government. Even within Constitutional Republics, lawful adherence to constitutional limits eroded, while careless, detrimental statutory lawmaking became excessive and endemic.

Historically, the democratic ideal as applied to lawmaking, more genuinely arose from the people in the form of a civil or customary body of law resulting from real disputes where actual damages could be accounted for. After litigation of a series of cases, well-established judicial determinations would gradually become accepted as precedents. What this "Darwinian" evolutionary process produced had a better chance to conform to the real world as well as to natural law. Then legislative codification or clarification would be of some value, albeit less effective than private codification. In the words of Leoni (88) "The fact that the process of lawmaking is, or was, essentially a private affair concerning millions of people throughout dozens of generations and stretching across several centuries goes almost unnoticed today even among the educated elite."

To be sure, rational distillation of Centuries of legal and political wisdom in the form of guiding principles are what underlies the Constitution for the United States of America–principles primarily aimed at setting absolute limits to Government power and mechanisms to discourage lawmaking proper. Yet, the idea that even rational political processes can routinely and instantly produce good law is a throwback to the doctrine that edicts from the King should make law, not the people. Deliberate formulations of law by authority, whether of the electorate, or by oligarchy, or a dictator, deny the lessons of history. Laws promoted through careful

propaganda by special interests in the usurpation of power and imposed out of the legislative processes or by edicts are generally qualitatively inferior to, and demonstrably more likely to generate unintended consequences and to wrongly and unnecessarily invade areas of freedom, than those precepts arising spontaneously out of time tested customary acceptance. There is a literal message in the term *trial and error*.

This is not to say that this kind of law making, i.e. customary law by precedent, is accidental or unconscious. To the contrary. More thought will be applied to the measured process of competitive trial and error than to declarations by legislating authorities. Certainly the discovery by jurists of customary and common law through a decentralized case-by-case process involves principles arrived at by application of thought more deliberate than dictates by legislation.

A portion of a body of positive statute law may have been intended to promote principles that preserve freedom and fairness, clarify common law, or even overturn or amend legislation or judicial interpretations deemed injudicious. However, just as lawmaking by a monarchy was finally rejected (in the West) even though good laws were possible under a monarchy, the system of relying on the use of positive law may be finally seen as obsolete. As the record is examined, it will also be seen to have failed.

By their nature statute laws are rigid and therefore often unjustly applied to cases for which they are not well suited. With tort and originary common law, judges can rely on precedent as applicable to an individual case without being bound to proscribed outcomes. Injustices that are inevitable through careless (political) positive law making have grown beyond any sense of proportion, making the case for restoration of a traditional originary judicial system all the more compelling.

One finds the same kinds of failures and unintended consequences emanating from a command and control legislative or executive approach to developing a legal edifice as characterized the now discredited attempts

at command and control over economies during the 20th Century. Successful economic systems make the most use out of the spontaneous decentralized decision-making process arising in the free market. Successful legal systems will make the most out of contributions by the decentralized, even market competitive, litigation process freed from statutory dictation. Historically, progress followed freedom, whereas imposed power preceded artificial distortions in both economies and legal systems.

As noted, stable private provision of justice employing customary law exclusive of positive (government produced) law altogether, prevailed for centuries in both Iceland and Celtic Ireland. In England, following the 1066 Norman invasion, already well evolved customary Anglo-Saxon restitution based law was forcibly and improperly supplanted by Norman kings with an unpopular system that would benefit the rulers with, as Bruce Benson (1990: 47) notes: "...fines and confiscations along with corporal and capital punishment."

Benson further notes:

"Henry and his judges defined an ever-growing number of actions as violating the king's peace. These offenses came to be known as 'crimes,' and the contrast between criminal and civil causes developed, with criminal causes referring to offenses that generated revenues for the king or the sheriffs rather than payment to the victim." (53)

Indeed, the creation of criminal law appears to have generated greater social disorder precisely because victims were no longer 'restored' to their original level of satisfaction and therefore became more likely to demand severe physical punishment. (71)

California's recent popular, but embarrassingly ill conceived "three strikes and you're out" and draconian State and Federal mandatory minimum sentencing, were just two examples of an excessive and improper political reactionary response to the lack of basic protection against crime afforded by current government monopolized, compulsorily funded judicial systems. Rather than looking for solutions through introduction of freedom of choice and competition in police and justice (courts) services,

solutions increasingly seen as progressive in breaking the monopoly in government school systems, and in redirecting enforcement towards protecting victims, political leaders succumbed to the political expediency of an imposed system of justice, while also illegitimately, even recklessly, inventing more crimes.

In the Nineteenth Century, U. S. legislated criminal law such as the fugitive slave laws were routinely overturned by juries of common people acting from a sense of customary justice. In their constitutionally empowered role in acquitting–by finding not guilty, those who committed these crimes, crimes such as aiding in the Underground Railroad effort–juries came down on the side of the democratic ideal against politically imposed positive (formal) law. Fourteenth Amendment equal protection of the law was recognition of the fact that state or local legislated law can be excessive and must not be unchecked.

What has held back civilization has not been the lack of legislation, but the imposition of arbitrary power, whether by elite oligarchies or an electorate. Too often this power was in the form of edicts and legislated law imposed from the established authority of Kings or Parliaments against the rule of fundamental natural or consistent constitutional law. Unfortunately, the momentum, not only of the habit of passing laws but of power from the enormous legislated extensions of the domain of the State in recent decades is building the groundwork for an emerging Police State, threatening the fragile secular historical trend toward freedom.

That the academic system, set up to be linked to the taxing authority for funding churns out students steeped in the idea that the role of the legislative branch is to enact laws and programs comes as no surprise. The result is an epidemic of unintended consequences and unfortunately intended corporatist accommodations.

As an example, the increasing criminalization of citizen ownership of firearms requires a conscious dedication to the wrongful use of force (or first use of force, as defined by natural law theory) against the innocent act

of ownership for mere defensive use. This was ethically inappropriate regardless of the fact that enforcement was in the name of the state. Gun control means actual decontrol from dispersed ownership by citizens to an irresponsible ownership in the hands of agencies increasingly accustomed to the exercise of police actions unrestrained by due process at home and unlawful adventurism abroad.

Because most gun control measures were actually measures that advocate the centralization of power exclusively in the hands of the few, rather than the many, it was a policy eminently hostile to the democratic ideal. Where neighbor has not been moved to initiate civil action against neighbor just for owning firearms, how valid as a measure of sincerity is some registering of opinion in either the voting booth or an opinion poll? The ideal of democracy was never to make choices collectively in every matter, but rather to carefully enumerate where such collectivization of choice making was commonly agreed to be of benefit to everyone. Further, because legislatures act as "representatives" even unpopular laws can be enacted, going even beyond a tyranny of the majority.

Under the rules of contract and association there should be opportunities to create gun-free zones, such as has been accomplished in communities, shopping centers, universities, etc. But these will either succeed or fail on their own merits governed by voluntary participation and competition, not by compulsion that imposes norms with no room for opting out.

More sensibly, systems of civil law result in the cost of enforcing laws being born by those who wanted them. If allowed to retain the savings directly, few would want to pay for enforcing puritanical strictures on lifestyles of others, or for the costs of enforcing victimless crime laws.

Given the foregoing portrayal of the superiority of a civil over criminal evolution of jurisprudence, one might ask--why there isn't today more resort by the public to civil dispute resolution rather than a reliance on existing statute law?

First, there is no way to measure the beneficial effect that the ability to pursue civil remedies already contributes to social order. There tends to

be a general adherence to orderly interactions, and indeed, if given a chance, there is no doubt a level of harmony that would be achieved without criminal law at all. If there were freedom of choice to assign some of an individual's tax money to the system of law of his choice, i.e. such as vouchers, as a first step, competition would reduce the need for government enforcement of law. A citizen could apply his voucher to civil litigation expenses or even private arbitration where previously agreed by both parties.

Civil remedies unfortunately remain under the dominion of the political state where statutes negate civil solutions. Under the present regime, statute law trumps customary civil remedies to the detriment of the public well-being. Credit and bankruptcy laws allow civil defendants to escape debts and restitution judgments for those who have committed fraud or violence against their fellow man. Criminal remedies then seem necessary to bring offenders to justice but do little for the victim.

All too often government courts look at the limits set by law as sanctioning pollution or other environmentally negligent activities that stay within the regulatory bounds even though without such statutes more stringent limits may have resulted from tort action. This is particularly true in environmental protection legislation where it has been a primary reason for lack of adequate corporate water and air pollution abatement. Additionally, under influence from growing industrial interests in the last two centuries, judicial and legislative decisions influenced by politics, weakened customary tort law that had previously allowed victims to enjoin polluters for damages: no longer could an individual sue for individual damages if the damage was not different in kind or significantly more than that suffered by others in society. A "Public" nuisance (affecting the general public) could only be addressed by public authority (Amador 19, 22).

Nor are the mechanical components of either the criminal or civil judicature conducive to efficiency of outcomes. Jury selection allows elimination of the most discerning citizens in favor of those most easily influenced by spurious argument.

Moreover, given below market cost government provision of protective services, however inefficient, both under-investment by individuals for their own needs and over-consumption of public services have resulted. Rather than being a public good externality it constitutes rather a common pool problem. (Benson 275). Again, taxpayer funded criminal law enforcement, a form of socialism for legal services, leaves civil litigation remedies dependent on private expenditure and thus at a competitive disadvantage.

Finally, legislation disrupts previously accepted customary rules, and even encourages abandonment of customary trust and social mores as a result of the uncertainty engendered by the precariousness of unpredictably overturning long standing conventions. (Leoni, 17).

Not surprisingly, ancient customary remedies in law were well adapted to the needs of the people. Earliest spontaneous legal systems were in fact successfully employing civil resolutions to wrongful acts. Post-Norman invasion medieval England witnessed an accelerated artificial legal apparatus imposed by the invaders that supplanted established legal proceedings. According to Benson (62,63) "royal law created the crime of 'theftbote,' making it a misdemeanor for a victim to accept the return of stolen property or to make other arrangements with a felon in exchange for an agreement not to prosecute....civil remedies to a criminal offense could not be achieved until after criminal prosecution was complete; the owner of stolen goods could not get his goods back until after he had given evidence in a criminal prosecution; and a fine was imposed on advertisers or printers who advertised a reward for the return of stolen property, no questions asked. "

The question that needs to be answered today is: How much unnecessary and cumbersome legal baggage must be carried on as a result of centuries old forcefully imposed legal conventions suppressing the civilizing thread of evolutionary law that arises naturally from a condition of free social order?

In this report instances of formulating and amending constitutions and restorations of guiding principles and reforms are proposed. Natural law precepts rationally applied are deemed necessary to restore the traditional western process of lawmaking, elements of which can be traced to their beginning in Anglo Saxon Britain and a number of Celtic societies before being overthrown by conquest from outside force.

One might well argue that old conventions in common law contained some illiberal elements that were rightly purged by statute or proclamation. But as civilization has progressed, there is less need to correct socially based customs and improprieties. The most brutal outcomes in modern times resulted from over-production of statutory law. It was the philosophy that the legislative prerogatives of the state should not be inhibited that provided the rigidity of both extreme leftwing and extreme rightwing police states in the 20th Century.

III. OFFICIAL VIOLENCE

This discussion centers on violence by instituted authority as opposed to the common criminal. The common criminal will be seen as less effectively managed or deterred in a system made dysfunctional by political rather than market solutions to the provision of justice and law enforcement. Some of the recommendations may appear to weigh on the side of the rights of common criminals rather than society. But this impression is mistaken. A society that tolerates injustice and human rights abuses as part and parcel of its institutions can't expect, and won't receive, respect for rules in general from the individual.

Consider the collateral damage of thousands of innocent victims by the 1989 U.S. forces in Panama to extricate Manuel Noriega, one purported king pin in the drug trade, of non-combatants in Vietnam, Iraq, or

the thousands of children separated from their parents incarcerated for non-violent drug convictions.

> But if you say, you can still pass the violations over, then I ask, hath your house been burnt? Hath your property been destroyed before your face? Are your wife and children destitute of a bed to lie on, or bread to live on? Have you lost a parent or a child by their hands, and yourself the ruined and wretched survivor? If you have not, then are you not a judge of those who have. But if you have, and can still shake hands with the murderers, than are you unworthy the name of husband, father, friend or lover, and whatever may be your rank or title in life, you have the heart of a coward, and the spirit of a sycophant. (Paine, 1976, [1776] p 23)

The unconscionable 2001 World Trade Center attack, was by no stretch justified by U.S. foreign policy, but certainly was a result of the fact that the extreme Islamic fundamentalists perceived U.S. policies in the Middle East inimical to their goals. This is more than their merely being resentful of our culture and standard of living, which is shared by Canada, Switzerland, and other European non-interventionist countries, which were not targeted. As to emergency suspension or abandonment of basic civil liberties resulting from reaction to such crises, it may be useful to hear the words of Thoreau:

> I wish my countrymen to consider, that whatever the human law may be, neither an individual nor a nation can ever commit the least act of injustice against the obscurest individual, without having to pay the penalty for it. (1993, 22)

Some have said that detainees at Adu Graib or Guantanamo, being combatants out of uniform in a war theater, are not entitled to P.O.W. status under international conventions. One would wonder, however, how this could be but a police action since no declaration of war has been made, and as such what authority, if any, one government has over citizens of another.

In both foreign and domestic policy, as has been argued extensively in works referenced in the appendix, a market liberal alternative to the government imposed monopoly in the provision of justice will provide better services and avoid the imposition of wrongful force and be more in conformity with the needs and desires of the people than a non-market system. Historically, the withdrawal of government imposed law enforcement monopolies has allowed the free market to generate the provision of private protection against criminals. This eliminates dysfunctionality in the lack of competition and accountability to the citizenry as well as the misallocation and over-use that characterizes services free to the public.

Further, the unnecessary and wrongful pursuit of puritanical prohibition of victimless activities would lose support if enforcement expenses were not paid by funds under control of the political state. Under customary law, in which costs of enforcement are paid by those receiving real services, little would be earmarked for enforcement where no one receives material benefits. For instance, a market- customer driven justice system would not waste money pursuing lifestyle prohibition. Enforcement efforts would reverse the current practice of inadequate compensation and protection for victims or potential victims of violence and fraud.

It can now be said that when drug warriors or gun control agents sweep in and forcefully invade homes, even In cases where legal warrants have been issued, and even when public opinion appears to be in support of such actions, they in fact are empowered only because the institutions of government have been unduly constituted by essentially undemocratic

interests and justified by an illegitimate system of jurisprudence. This outcome results directly not from the quality or conduct of personnel in government or the competence of elected politicians but from institutions.

Powerful economic interests can remain hidden behind criminal law designed to interrupt competition and insulate them from the market. Thus activities are made illegal that would never be brought to litigation in a system of customary law based on restitution of victims of wrongdoing. As we have seen, with the inception of positive, criminal law systems, an individual's debt for wrongdoing was co-opted by the State to directly benefit those in power.

By contrast in, for example, Celtic and Anglo-Saxon restitution law, the debt was to an injured party. The onerous fugitive slave law criminalized acts of those helping run-away slaves and thereby subsidized slavery in the 19th Century. Because it would be difficult to claim that aiding a runaway slave created a debt to the slave holder, it follows logically that powerful slaveholding interests simply asked, because they could, for a criminal law to do what civil law would not.

Clearly the availability of criminal (as opposed to civil) production of law provides the unscrupulous with a tool for consolidating economic power. For example had there been a regime of simple civil jurisprudence in the 20th Century, growing or trafficking in hemp or marijuana could not be adjudicated as a debt or as actionable damages to the alcohol industry, or the synthetic fiber industry. These industries would have been unable to put the judicial system to use in enhancing their profitability. Yet each of these industries indeed gained economically by promoting the criminalization of marijuana under a criminal law regime. Given this insight it is not hard to see why political figures, depending on financial support by special corporate interests, go against even such increasingly popular reforms as decriminalizing medical marijuana. In its present form the criminal law system is not the people’s legal system.

Similarly, restitution law would be of less use for landlords in a feudal setting, much better for them to have all of the duties and obligations of

the common people set down in statutory law as opposed to having to demonstrate injury or recover losses as a result, for example, of their subjects' lack of obeisance to the system.

Even modern governmental protections of land ownership offers, below cost, criminal trespass and property title defense to the benefit of the often absentee landowner who may not be able or willing to afford to protect holdings at his own expense. This is not to imply that private property in land is outside of customary civil law protection, but such law, unadulterated by imposition of political interests had in fact, upheld universal common rights to the unused aspects of ownership. Natural rights were never deduced for property in land or territory in the way it was for the product of labor. In these words of John Locke:

> As much as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, as much is his Property. He by his Labour does, as it were, inclose it from the Common.

Murray Rothbard (1998) argued for a more inclusive "homesteading" principle by extending the same logic of establishing rights by mixing ones labor in land. As a leading libertarian theorist, his attention to this matter underscores the need to define the principle of absolute legal property ownership. Today his position seems as polar in its neglect of common rights to the value in land not attributable to the owners' efforts as was Henry George's solution to appropriate 100% of land rental value through taxation. But certainly the natural endowment under a just system of social organization would be subject to some fee based element of commonality in use. The most viable suggestions would be for a land value tax below a level that would result in expected loss of title to the property. After all it was the power of monarchy after the Norman Conquest that was responsible for the enclosure movement that disenfranchised the common people from the use of the land–the *Commons*.

The legality of titles need not be overturned. The jurisdictional authority is already the recipient of property taxes, titles would remain in private hands, (see Land tax as Consumption Tax in Appendix)

The widely acknowledged failure of the Socialist command economies of Eastern Europe and Russia as compared to more market based economies, reinforces the argument against instituted State-run services as opposed to incentive based market services. Commenting on the contribution made by government to the failure of order in society, James Bovard (1999: 136) perceptively observed that:

> Pervasive government intervention undercuts people's incentives to reach voluntary agreements among themselves. Instead, each side in a dispute will seek to capture the machinery of government to jam their preferences down the other side's throat. Efforts that could have been directed towards reaching peaceful accommodations are instead spent pursuing political power.

Harry Gunnison Brown succinctly expressed the perverse social phenomenon of the inverting of criminal and victim made possible through legislative power in taxation:

> When individuals or small groups succeed by burglary, picking pockets or holdups, in abstracting wealth from others, those who are robbed at least have law on their side. But what if a larger and politically powerful selfishly interested group succeeds, by ...sophistical arguments... or by legislative bargaining with other groups seeking privileges at the expense of the general public, or merely by gaining the support of legislators who are more afraid of losing the votes of an active and well organized privilege-seeking minority than of an unorganized and

> comparatively unaware and inert majority–what if such a group thus succeeds in using the tax system and the legislative appropriation machinery to abstract wealth from the rest of the people! In such a case, those from whom the wealth is being abstracted find that even the law is against them and that, if they refuse to make the required tax contribution, it is they, and not those profiting at their expense, who are considered the criminals.[3]

This effect of pervasive government intervention reaches into the arena of corporate power. One measure of the extent to which corporate power is politically reinforced may be the inflated level of compensation offered certain CEO's for their connections to power rather than their business expertise. Inevitably, dependency feedback loops develop in the Corporate State between government and corporations, a current example of which is the partnership between the current major news media providers and the status-quo in political power, resulting in what many observe as skillfully managed rather than balanced news reporting. It should not be forgotten that in the taxonomy of political systems another word for the Corporate State is fascism.

Certainly the income tax plays a part. Stock holders, rather than receiving dividends, opt to buy common stock that appreciates with the increase of retained earnings and only matters for the less costly prospect of

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[3] (Basic Principles of Economics, 2nd edition. Columbia, Mo., Lucas Bros., 1947, pp.171-2. Quoted in 1980 *Selected Articles of Harry Gunnison Brown,* The Case for Land Value Taxation, N Y: Robert Schalkenbach Foundation pp. 169-170.

capital gains taxes. The result is excessive retained earnings by corporations that permit inflated executive compensation or otherwise unwarranted financial strategies such as in certain mergers and acquisitions.

State capitalism may be more descriptive of our economic system today. Without state ordained corporate protection of limited liability, the inattention to corporate conduct by investors would be less, as would be the numbers of willing investors that constitute the bulk of owners in many large corporations. It is well known that control is often exercised with as little as 5% stock ownership because most shareholders are non-participants in the business of the corporation. Interlocking directorates result. Concentration of control pervades many industries. It is no secret that corporate players in the media industry have in the last few decades become overly concentrated, to the detriment of healthy competition.

Europe seemed incapable of becoming the home of free states. It was from America that the plain ideas that men ought to mind their own business, and that the nation is responsible to Heaven for the acts of State– ideas long locked in the breasts of solitary thinkers, and hidden among Latin folios,–burst forth like a conqueror upon the world they were destined to transform, under the title of the Rights of Man. …..Lord Acton

IV. DEFINING POLITICAL POWER

Any criterion for measuring the loss of freedom can be elusive. Americans enjoy the exercise of freedom in many areas. Limited raw government tyranny and injustice, being in part a product of the collective will, need not be all pervasive to constitute a potential threat to the civil liberties of every citizen. Acts of violent suppression on the part of any government may not be widespread even where ultimate power is absolute. Power in place whether unleashed or not is never-the-less potential, intimidating, and menacing, and as history has shown, its control cannot be entrusted to mere in-house checks and balances. Even simple loss of privacy and increased surveillance by authorities sets the stage for usurpation of power; it therefore becomes imperative to limit state power well before it becomes visibly oppressive. New legal authority on paper that subverts freedom must be taken seriously before it creates a climate allowing authorities to feel unrestrained in power.[4]

Different thresholds of tolerance of the misuse of power among different individuals are understandable. Less understandable or acceptable is denial, or deliberate accommodation of wrongful acts for personal gain. And more than that is the conscious avoidance, however convenient, of insisting on integrity and restraint in the exercise of public policy by those who should know better.

Errant government employees and private collaborators are hardly the cause of the deterioration of freedom. Rather the institutions of government, its form, and its command system of laws often encouraged by private or corporate special interests are primarily responsible. The official

[4] The U.S. Patriot Act, among other things provided for the collection of information on individuals as to their reading habits from public library records to be supplied upon request to the federal government.

who overtly acts outside of constitutional limits, even if under orders, may have to answer to a civil accountability; yet even those who may have deliberately contravened their oath to uphold the constitution are but proximately responsible, the ultimate and dominant responsibility resting on the institutional composition of the system.

It would be a mistake to attribute the onerous, pervasive and expansive nature of these institutions to conscious intention or design. Once created, interventions into the market, transfer payments based on coercion, and bureaucracies grow in size and power automatically largely because of the microeconomic internal incentives that are an integral part of their existence. Systems spontaneously gravitate to more order, market systems settle into cooperation through mutually beneficial association. Systems granted monopoly control, i.e., government systems, fill in power vacuums extending and refining their control much as in the biological realm where predator species fill niches left open for the exploitation. Opportunistic species of prey proliferate following environmental changes such as loss of natural barriers of protection.

Unlike jurists under market incentives, such as professionals in organizations such as the American Arbitration Association, government judges, for example, are not paid according to the quality of decisions they render (Benson, 1990: 97). Acts of police brutality, reckless invasion and destruction of private property escape restitution to the victim through statutory protection from civil liability. Instead of awarding damages against agencies and government entities as a deterrent to such activity, the judicial system is built to protect executive branch excesses.

One excuse raised for poor performance in protecting the public is the exclusionary rule, when due process protections allow guilty offenders to escape justice. This limit to police excesses, unfortunately provides no corrective disincentive or penalty for wrongful police behavior. But without the rule, the Fourth Amendment would be undermined with grave consequences already proven by history.

F.A. Hayek, in his best-selling 1944 *Road to Serfdom* explained ‘how the worst get on top’ and noted that agencies, engaged in enforcement in a climate without effective restraint, such as in a police-state, require certain jobs to be done that, in private life, most people would consider odious, but which if towards a perceived higher end some would be willing to do, especially if following orders. Those most willing to participate in unsavory behavior remain in the track to the highest positions of power. Hence, over time these agencies unconsciously and automatically evolve to take on a more sinister tone and composition.

Responsibility for acts of wrongful force resides ultimately in the willingness of the body politic to acquiesce in compromise of guiding principles, or in the lack of attention to principles themselves. This is evidenced by the widespread enabling of politicians, whether of majority or minority party, who unabashedly defend the wrongful force status quo. A more insidious result arising from state organization is that we are all the victims of institutions, which have evolved out of control without purposeful direction, or only incrementally conscious efforts, and without any orchestrated human agenda originating from participants. The structure of institutions should have constraints that do not provide avenues for abuse of power.

One attribute of progress most easily unnoticed is the principle of spontaneous organization provided by civilized market environments. In circumstances lacking customary respect for free choices in markets, attributes of tyranny arise spontaneously and inexorably without need for a master plan. When we add to this the fact of regulatory capture by private factions, and perverse incentives made possible through legislation, the resulting constant tendency toward unsavory politicized outcomes should be no surprise. Of this the founders were clearly aware.

V. POSITIVE TRENDS

In the West the last Millennium has witnessed the overthrow of the politics of superstition, divine right of rulers, monarchy, state sanctioned chattel slavery, and national and Marxist socialism. It is true these forms of absolutism are yet to be vanquished worldwide, but the accelerating spread of ideas bodes well for their eventual demise barring the imposition of a despotic world government.

More intransigent are the institutionalized suppression of minority and women's rights and other cultural intolerance, feudal and tax exploitation, and the quest for territorial conquest often driven by corporate entities. Most urgently, the persistent level of armed conflict worldwide underlines the need to address solutions to the age-old scourge of territorial conquest.

Increased awareness of the transgressions undertaken to engross an oligarchy of global corporate interests is most immediate. Conflicting claims by various peoples to legitimate dominion over territory also drives conflict. Here it would be difficult or impossible to base solutions strictly on first claim by looking back a generation, not to speak of a millennium, to justify such claims. Does any present territorial or natural resource claim have an ethically clear chain of title? When originating from conquest, even if later purchased or inherited, it would seem that the status quo in ownership as a practical choice can only be defended in absolute terms only where no dispute arises. The history of man is inseparable from the history of conquest.

Some writers maintain that the need for justice in land reform and for fairness in political control of territory transcends the need to merely introduce the efficiency of free markets. Modest proposals for attenuated rather than absolute possessor property rights in naturally endowed land and resources, such as ownership fees, and freedom in markets and the Internet, have been suggested. Private ownership of land, i.e. of a part of

the earth's surface, can be made less exclusive through endowing the general public with a minimal claim to rent or funds generated by value inherent in land, based on modest, non-confiscatory fees to land ownership. With the advent of the cyber-economy, importance of place will be seen to diminish. Returns to productivity need not be allowed to accrue fully to land as a co-factor of production. Site values may fall in previously important locations for commerce and rise in previously less important. Thus, given the trend towards free trade and integration of capital markets internationally, if the cyber-economy and its technology is left free of taxation and control, and with realistic marginal relaxation of exclusivity in ownership of the non-produced wealth of the earth, the economic advantage of dominion over territory will continue to radically diminish, and with it the prospect for peace everywhere may increase. Coupled with this trend, the world's dependence on industrialized market systems locks in the need for free flow of information in a decentralized, flexible manner which may inadvertently yet inevitably set the stage for the flowering of political freedom. On this latter point see economist Murray Rothbard's (1973) insightful predictions.

From this standpoint not only will place become less important but also the ability of the Nation State to take advantage of its former monopoly jurisdiction over an individual and his estate will become less important. Because freedom flows around obstacles in its path, with the breakout of information dissemination through technologies such as encryption and the Internet, a transformation forced by individuals skillfully exercising financial and political choices will result. With persistent diligence by those who value freedom, old institutions of authoritarian government will, in this vision, finally be replaced with more compassionate market alternatives. This will be spurred on to the extent that the scope of competition both politically and economically avoids authoritarianism as well as such failures as democratic parliamentary wasteful spending on pork and special interest logrolling. It requires the reversal of trends that

enmesh every sort of enterprise in a quagmire of legal barriers erected to protect the status-quo from the threat of competition.

VI. THE TASK AT HAND

There are examples of government failure that need addressing. One compelling example involves the May 14 2001 Supreme Court ruling upholding Federal legislation making the use of cannibus illegal. Some claim this is a clear-cut case in point of unlawful usurpation of authority by the Congress and abdication of responsibility on the part of the Supreme Court. The legal challenge to the advocates of prohibition is in the words of the 9th and 10th articles of the Bill of Rights and in the commerce clause. Is there room to construe that the Constitution allows Federal intrusion in this matter? History documents that in 1919 lawmakers knew they had to pass an amendment (18th) before prohibition (of alcohol).

Unfortunately, marshalling opposition to every newly introduced piece of legislation in Congress is no longer an effective check; no amount of resources within the reach of opposition watchdog groups can take on all of the special interests. Massive legislation containing thousands of pages are routinely passed without any pretense that members be familiar with the contents; in many cases bills are passed before copies are made available to lawmakers. Often the general welfare is neglected because if society-wide, those injured by a new program are only incrementally affected and thus unorganized and diffused. Special interests on the other hand are fewer with more to gain individually and thus push for legislation favorable to them.

Restoration of the written intent of the U.S. Constitution, as a start, would go a long way toward eliminating the current growth of government

failure in the prevention of wrongful force. After that, restoration of an originary, non-governmental, competitive legal system, i.e. one driven by an apolitical, unorganized litigation process could be encouraged. Legal action would only be initiated by individuals or their sureties needing to resolve actual disputes and disagreements, and not by political philosophizing on the part of voters, representatives, or monarchs, or by overzealous prosecutors.

In short, wherever power exceeds Constitutional limits it could be deemed illegitimate. Special emphasis should be given to the Ninth Amendment affirmation that rights, whether or not specified in the Constitution or the Bill of Rights, are retained by the people and that powers are given to government only where enumerated in the Constitution as provided in the 10th amendment. Given the article five amendment process, orderly methods of change are available. In accordance with the powers retained by the people as affirmed by the Tenth Amendment, the Citizenry possesses original juridical authority to effect change without the permission of the government. However, practically will be confined to working through the amendment process. Citizens may entreat for immediate recognition of the areas of power to be resisted as unlawful, i.e., that are not enumerated as powers granted to the government by the Constitution. Such assertion needs no endorsement from so-called constitutional authorities since the simple wording of the 4th and 10th amendments was clearly meant for and understood by the general electorate before ratification of the constitution in 1789. The Citizenry is then superior and prior to all the branches of government together.

Some have suggested convening a people's constitutional court as a remedy for unconstitutional acts by officials when no other avenue is open for redress of grievances. But how do we avoid giving license to carrying out implementation of structural changes it may recommend without a loss of orderly process? Any legitimacy assigned to the Constitution derives from its ratification by the electorate acting as a whole. A proclamation

intended to override the Constitution outside of duly adopted amendments, certainly must have less legitimacy.

Comparison of the complex, eloquently obscure language of legal documents of the day with the deliberately plain English of the Constitution is certainly testimony to the fact that the framers did not intend to go over the heads of the citizenry, or intend to confine interpretation to lawyers nor to only the Supreme Court.

In principle, eradication of wrongful force should preferably be undertaken without concession to gradualism. In the section on reform, proposals to soften or re-direct perceived wrongful government activities might be interpreted as an endorsement of only partial correction of these activities. These proposals might instead be necessary steps to a) reduce harm as soon as is practicable, b) buy time for even more innovation in provision of public services through the market and for the necessary development of an infrastructure of market institutions especially in such areas as financial markets, provision of money, and judicial services, and c) allow for constitutional amendments if needed, with the ultimate goal of effective diminution of the monopolistic character of government institutions.

VII. POLITICAL VS. CUSTOMARY LAW

To summarize: customarily derived common law reflects genuine community values in a way unattainable by political statute law. Political law characteristically usurps the interest of the people, initially arising out of attempts by monarchs or kings to extend their influence from their original military position to an economic and judicial role forced on the general society against its will. It enabled regularized plunder.

Law emanating out of political power, whether from referenda, elected representatives in a congress or parliament, elected or politically appointed justices, or executive branch authorities such as monarchies, etc. or their administrative agencies, although claimed as legitimate, lacks the more comprehensive grounding in custom and social harmony found in common law. Laws and precepts derived from an accepted, time-tested, series of case-law decisions, made by professional arbiters and jurists or judges subject to the competition of consumer choice, emerge predominant as a consequence of serving the public.

Even more fundamentally, politically derived criminal law, while often codifying pre-existing customary law, has a record of extending its reach beyond the needs of the people into matters outside of civil concerns and outside of those arising from prosecution of tort claims under customary law. Customary law required a victim before action can be taken in his behalf for redress of losses against the actions of the perpetrator. Thus, under a regime of politically derived (positive) law typically a plethora of half-baked crime legislation favoring the use of force against one faction or another, or some cultural prejudice, or some need to aggrandize state power, may become law that would not occur under customary law. Implementation of power often involves the prohibition of competing private and originary institutions of jurisprudence. Such power results from the same monopoly system that stands to gain by the application of its laws,

i.e. by insiders controlling the state, without the accountability to the people that competition brings.

Certainly existing statutory law may incorporate elements of genuine customary law through codification. The difficulty in reform is in sorting out the good law from the bad. An improvement might be to require super-majority passage with sunset provisions of any measures that define new crimes, and for previously enacted measures that are contested by some small minority in congress. Sunset provisions would ensure on-going super-majority confirmation for each generation.

Refinement of customary law occurs slowly and deliberately. Reconstructing a body of case law submerged after preemption by often-flawed statutory law may make any timely transition difficult. First steps at reform may include adoption of codified laws that more closely reflect outcomes that are based on established principles of jurisprudence. Although not considered here, Gordon Tullock (1997) has suggested the adoption of some of the approaches in codified law practiced on the Continent as an alternative to the run-away system of legislation now found in the U.S. We cannot expect present institutions to be self-correcting. Any successful move will require a clear vision of the final goal.

As we have seen, originary or customary law is differentiated from common law in that not all of common law was customary law, some evolved politically. Much of politically derived law (or legislated law broadly defined) manifests as statute law, some is made by a supreme court, and some is made by executive edict, some by initiative and referendum. Civil or tort law was distinguished from criminal law in that criminal law need not require a plaintiff or victim other than in the person or behalf of the state. Originary common or customary law inherently discourages the abuse of liberty; politically derived law encourages that abuse.

As previously noted, Bruce Benson (1990) elucidated these distinctions in repudiating the idea that the people are well served by legislated law. Majority will, opinion polls, and powerful lobbying routinely produce

bad law when allowed to be expressed by politicians, who, by nature look for short term popularity or support in selling what they produce, viz., legislation. In the long-run the people's will was more closely reflected in case and customary law than legislated law.

In customary tort law, someone (the plaintiff) has to initiate litigation. To develop new law, courts, through trial and error, produce a body of case law precedents. The incentives in this system discourage development of law against victimless behavior. Even if the behavior is unpopular, litigation requires actionable violations that motivate some individual or group to seek redress. Neighbors are unlikely to care enough about each other's commission of victimless crimes to take matters on themselves, even though not approving of certain actions or lifestyles. And courts would have difficulty in finding damages.

Such is not the case if the making of law is politically created, driven by unpredictable legislative action and the fickleness of public opinion or a ruling elite rather than by actionable damages. One logical consequence of such instant manufacture of law is that extensive, incomprehensible, and voluminous laws and regulations characterized by unintended consequences are now the order of the day.

Undisturbed by outside violence or force, human systems of law have, in more than one instance, tended in the direction of meeting needs for social order through spontaneous mutually advantageous institutions such as insurance associations and arbitration associations. Much of contract law arose from the privately evolved law merchant, arising from the needs of commerce. In the post-classical world, criminal law has been promoted by the powerful as necessary for freedom; whereas, as we have seen history demonstrates exactly the reverse: the degree of freedom of a people is inversely related to the dominance of criminal law over civil.

In transformation from one regime of lawmaking to another, numerous complications, objections, and technical barriers will arise. But acknowledgement of the inevitability of complexity in the task at hand

should not allow loss of focus on the immediate need for restoration of a ‘genuine democratic’ jurisprudence.

Alternative Solutions

Any reform project is open to the charge that it may tacitly affirm what is not reformed. We give stature to the underlying proposition that forceful action is okay if not challenged. Policies appear to have the stamp of approval by "the people" when in actuality the effects of government are by nature not unanimously instituted and thus include injustice against the losers in the game of politics. By force of show of hands we sanction group transgressions of civilized behavior that we disallow on a personal level.

More than this, careless reform may even impede proper juridical protections that at least in the short run only government can effect under the present set of social conventions.

If we keep in mind the Golden Rule and other similar statements of the wisdom of the ages summarized by the Lockean Law of Equal Freedom--that a man shall do what he wills so long as he infringes not on the equal freedom of any other man—our choice of action excludes non-defensive use of force or threat of violence.

A more thoughtful measure could, while not aimed specifically at any one problem, allow for the supremacy of tort action for citizen recovery of damages from government entities that invoke harmful laws. Instead of repealing a law against owning a defensive weapon in one's home, the victim of an invasive act prevented from defending herself from the attacker should be allowed to bring action against the applicable government entity or entities. The substance "abuser or provider" who can show damages by having his freedom proscribed should be able to pursue remedies in civil litigation with a Jury of his peers, not impeded by government prerogatives in jury selection. Such power would be afforded those who now cannot bring action against a judge or other officials for arbitrary decisions such as indiscretion in using "contempt of court" where it negates due process.

With such avenues to justice, victimless crime laws, as well as laws ill crafted for their intended purpose, or even crafted to gain unfair advantage for those with the most clout, would be under a new scrutiny unavailable through appeal to lawmakers. Such tort action alternative would allow for jury review of wrongful action. An appeal to reason through usual political avenues, has little chance when such appeal must necessarily go against the inherent instituted entrenched interests in our system of politics.

The underlying element constituting victimless crimes could be recognized in economic regulations that preserve monopoly power, and in taxing authority over produced income. This element underlies actions and edicts that removed anciently evolved personal rights such as to title of commodities used in finance or bank deposits. Other fundamental innovations in reform not contemplated by anyone today will certainly emerge under a climate of tolerance for removal of obsolete applications of absolutist power hidden behind the chimera of good government.

Taxes

The Single-tax movement of Henry George championed replacement of all taxes with a tax on the value of land, specifically its unimproved value increment. It has been referred to as a land value tax (LVT). For those who see no justification for any tax, a consistent opposition to state power would seem to necessitate opposition to taxes on land. Acknowledgement of common ownership in land has been seen as inimical to a true free market economy. Complete privatization has been seen as the cure.

Clearly, such a tax would be unfair to present owners of land who would face a loss in value in the raw (ground) component of their holdings. Any positive results of even a tax phased in over ten years, must be weighed against the negative impact on present owners, or may involve some measure of compensation to owners during the phase-in period.

Some Geo-economists take the position that socializing the ownership of land, to the extent of applying a tax on land improves efficiency in the market by forcing better use of land, and at a lower price. Further that site value fees are based on the underpinnings of a free society as expressed in the John Locke libertarian **law of equal freedom** as stated by Herbert Spencer.[5] They maintain that labor and productive effort certainly provide a justification for private property in the works of man, but that raw, unimproved land and resources should belong equally to all. Spencer (1970, p.281), referring to socialist theories, mentions that they are …"*nearly related to a truth. They are unsuccessful efforts to express the fact that whoso is born on this planet of ours thereby obtains some interest in it, may not be summarily dismissed again, may not have his existence ignored by those in possession*."

Geo-economists tend to regard these outcomes as market failure. But can a case be made that attributes these problems not to market failure but to consequences from imposition of statutory or administrative interference in long established social norms? There are considerations surrounding the justification for land titles enforceable by the State.

One prominent writer, Murray Rothbard (1962), has maintained that no violence to equal rights results when ownership is claimed through application of labor to unowned land. This homestead principle then explains the origin of appropriate grounds for absolute title to land. It also avoids the problem of *tragedy of the commons*, where unowned land can be overexploited by a multitude of users who have no stake in its future productivity.

Moreover it would seem that Rothbard has easily countered another claim made for common ownership. Some LVT advocates point to external benefits that land owners enjoy from development in proximity to their

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[5] …"*every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man."*(1970, p69)

property, especially in urban areas, that enhance the locational or site value of land. But external benefits accrue to all persons in a capitalist world where past capital formation has raised the standard of living for all. It should be evident that there can be no obligation on the part of beneficiaries from such a general source of benefit since they result from voluntary association. Certainly land owners who do not recognize a debt of this nature are not guilty of theft as some LVT advocates would have it.

But there remains an argument on the side of LVT advocates regarding origin of titles that seems plausible. It has to do with unwarranted imposition of a system of private titles gained by capture of political power through the State by the landed elite.

Free market proponents often tire of defending positions they take that avoid fixing problems with government regulations wherein problems could be better solved by removing a prior government intervention, even though not easily visible as an originating cause. For instance, Rothbard (*America's Great Depression* 1963) has amply illuminated the culprit in business cycles as the boom produced by money and credit infusions orchestrated by government central banks allowed to expand credit beyond what would be allowed by social convention.

Accordingly, where the free market position fails to point to the cause of a problem due to interference by the State, it would seem that proponents would be eager to correct such an oversight adopting the explanation that lays the blame on prior government intervention.

Advocates of the single tax or LVT see the problem with the present state of affairs as three-fold: First, the harm done by other forms of taxation that could be practically eliminated with some other form of revenue (i.e. the LVT); and second, unfairness in exclusive private use of land to those not endowed with property in land; and third, by easily demonstrated widespread gross inefficiencies in markets.

Even Rothbard has acknowledged the masterful treatment of the first problem in Henry George's *Progress and Poverty.* We will not have space here to elaborate, but suffice it to say that both Paul Samuelson and Milton Friedman voiced their belief that the least bad tax was the LVT.

Not so evident to the free-market advocate is why there is any essential difference between private property in material goods--an essential condition for a prosperous economy--and private property in land. Free market advocates would most likely accede that joint ownership, such as with a corporation or any other voluntary association also has its place in the free market. Other forms of common ownership are also possible.

It may be true that the ability to use land (to have some place to stand or work) is a prerequisite for the enjoyment or even the right to life. But this does not prove that absolute title to land is necessary, nor the other way around, that the government must possess the ability to hand out rights to everyone, so that no true private rights to land can exist.

Rothbard contends that prior use is sufficient grounds for absolute private title to land. But even if we assume that all titles to land were appropriately acquired through first use, or purchase, or default and abandonment on the part of an unknown earlier owner, there are yet major efficiency problems to resolve.

If the exclusive use by an individual, or corporation of a parcel of land enjoys significant external benefits, simply from location, not from entrepreneurial foresight or improvement to the land, then is private ownership the most efficacious means of handling the property from a social welfare perspective? For any parcel there is a market valuation related to its future rental income stream, or to prospective income. It has been shown that these valuations have as a rule increased during booms to the detriment of the economy, and have been repositories of wealth to the extent that owners have been unmoved to allow others to put the property to use. Certainly, higher valuations exclude a number of uses in any case.

For almost any urban location a fixed rate tax on the appraised site value of the property would be a subtraction from the rental accruing to the owner without any means of shifting that to other factors of production. Hence, property values would not rise to the extent they would without the tax. Even if the ownership title were considered just, so would the recovery of a fee to the community for the amenities and services that apply, for without the provision of all of the amenities not only would the property be less valuable, the owner would almost certainly not be able to alone

afford to defend the property from every possible threat without an association for adjudication that would certainly not be provided free of charge. Also an owner would likely face an insurance policy that could be prohibitively expensive. The enjoyment of entitlement to the property, unless disclaimed by the property owner, should be grounds to expect an obligation to the municipality in the form of a fee for roads and amenities such as utilities and protection by a police presence.

What is missing in the discussion is that land has qualities that uniquely set it apart from the other forms of property. This may explain why the evolution of property titles in land were not parallel to other private property titles. The differences were manifest in the normal form of entitlement that arose in early societies--communities throughout history were anciently rooted in forms of common ownership in land.

It should not matter what specific legal designation of titles to land are claimed. In the U.S. and Britain the *fee simple* title implies some original and superior reserved rights in the Crown, or State attached to grants of land, this includes the right to tax and eminent domain. Only *Allodial* title would be free and independent from the State. But, since the State acquired its rights through conquest, (in Britain in 1066 by William the Conqueror, and in the U.S. by British land grants, railway grants, and homestead grants), no *ethical* grounds exist to allow one to trace a property history to an unclouded past.

Hence, any exclusive title would have devolved from past organized violence. Here, the institution of voluntary social exchange is absent. This was not the same for other possessions. Mises expounded the regression theorem of money that demonstrated how titles to specie based money developed apart from government. Others explained how labor and effort mixed with natural materials established ownership (but not necessarily value) in goods.

But the work by Henry George and Franz Oppenheimer, uncovered an aristocratic or oligarchic form of ownership overturning anciently rooted convention. They revealed the historical link of commonality in land, and how titles privately bestowed were usurpations thrust on com-

munities under duress or subjugation. Oppenheimer details how pre-Roman, or early Roman law was eviscerated by landlord interests vested in Roman politics. It was government through and through that nurtured the developed Roman law that was adopted down through the ages and then throughout the world by landlord cronyism. So the end result is that the form of ownership in land that exists today, not at all from a freedom based emergent order, undoes the basis of the homesteading principle or even purchase of land titles that cannot be said to be free of indisputable ethical encumbrances.

Some would disagree. One (Public Choice) perspective would see ownership as private whether in the hands of single landowners or whether publically managed, that it can never be managed for 'society' as a whole, because governments necessarily concentrate disposition of assets under the purview of bureaucrats and private influences through the political machinery where influence peddling is the norm, 'society' is not regarded.

But such an encompassing view fails to account for institutions that have prevailed for ages where dispersed control and power over land holdings coexisted. The church, in the Middle Ages in Europe was vested with tithes required of landed aristocracy, and had duties to provide for the indigent and infirm. The Crown was vested with vassal obligations of military service tied to the granting of a fief (land). The Yeoman in England had rights for use of the vast commons up until the enclosure movement.

Land titles were thus not sovereign titles of ownership. Hence, title to land was never private title in the manner that private ownership for other material property has been understood. And so the principle of homesteading cannot rest on the lack of rights to seemingly unowned land simply because those rights are not recorded as a title at a local government courthouse. Governments, no more than private individuals, would have had no precedent in historical social convention to hand over absolute title to land. That could arguably be a form of unwarranted government intervention. Land should never have been deemed as unowned simply from government edict or statutory act. Native Americans had a form of common ownership, slaves were certainly due some rights to lands they worked.

Clearly, the difficulty of establishing specific property rights in land justifies the institution of a system that recognizes shared ownership in some increment of the rental income that raw land and resources produce. How this works is easily understood by looking at the existing arrangement in Alaska that shares its permanent fund accruing from State owned resources amounting to over $1,800 per person in 2014.

Some Geo-economists have posited a form of proprietary community as the answer to providing a solution that would envision fees instead of taxes, but only marginally capturing rent, and allowing market forces to continue to work so that entrepreneurial allocation of land to its most productive use could be combined with its increased affordability and insulation from speculative excesses. Whether common ownership might be exercised through any existing government of jurisdiction remains to be resolved. But that original juridical grounds exist for disenfranchising any person of some share of space and unproduced resource wealth on the planet through exercise of State power to enforce titles seems to never have been demonstrated. These are the considerations leading Georgists to propose a tax or fee on the value of land attributable to its site value that yet preserves most of the benefit of ownership to the title holder, known as the single tax or LVT.

Georgist position of 100% tax on ground rents.

Fresh from the struggle of the Revolutionary war, and its unifying sentiment, the 1777 Articles of Confederation excluded taxing labor and commerce of the rank and file. Only property would be taxed.

A Georgist tax shift need not take 100% of rent in taxes to deliver benefits. Even half of rental on land or a fixed (inflation adjusted) rate of 2.5%, for example, would, in most venues reorient land usage in beneficial ways.

In *Power and Market* Rothbard remarked that, if the tax were 100%, the capitalized value of the land would be wiped out leading to a zero price for the parcel, and so no rental return could yield any tax at all.

If the land were simply capital to be rented, this would be true, and it would be of no market value.

But land is an original and necessary factor of production. Should the title holder merely abandon the title, and the land then became free to any user, the title could revert to the state (escheat) and so any new occupant would be charged the original rental established when the lot had been appraised before such tax was imposed. In fact this fee could be adjusted in the market simply by auctioning the right to occupy the space in terms of the requisite rental amount. In a sense the entrepreneurial assessment of its return to a user would arise out of the competitive market among potential users.

Yet the proposals extant for tax reform of this sort would be sure to leave at least a portion of the rent to the superintendence role of the title holder, any new tax could be phased-in to facilitate workability.

Rothbard's critique was of the 100% tax on rent. Hence, it failed to accede to any effect on softening land prices, and discouraging speculative holding of land off of the market. It couldn't address under-use or no use (vacant) lands.

However, without Rothbard's critique, the private ownership contribution to propitious allocation of land would be less evident. The entrepreneurial and appraisement role that anticipates unforeseen valuations require that the property owner be able to speculate.

Ending the income tax by replacing it with a narrowly confined consumption tax as specified below would produce two enhancements to the economy at once:

First, it would only raise less than 1/2 the revenue now extracted with the income tax, so it would necessitate a major reduction in taxes.

Second, without judging the ethics attached to types of taxation, it reduces economic disincentives to productive work and profit-seeking exacted by the income tax.

Can the Income Tax be Replaced with a Sales Tax?

Advocates of taxing consumption hope to replace the income tax with a sales tax. However such a tax is problematic for a number of reasons well spelled out here by Murray Rothbard.

Rothbard, fond of no tax, demonstrates that a general consumption tax cannot be shifted forward (to the consumer); logically it is shifted back to the factors of production, land and labor. It thereby lowers wages and reduces the return (rent) on productive land and hence cannot be a direct tax on consumption as maintained by its supporters, but is technically a tax on income. Easy to see, the (sales tax) cost to the retailer cannot be shifted to the consumer for, if the retailer could simply raise the sales price at no loss, he would have already done so.

Rothbard notes that for a general tax applying upward sloping supply curves is inappropriate, these are for partial equilibrium analysis. Such an elastic (Marshallian) curve implies time adjustments in supply, whereas the appropriate curve is practically inelastic (vertical) because supply would be only reduced slightly (as lower wages would reduce employment only marginally). Ultimately, with demand given, and no essential shift in supply, a general sales tax cannot raise prices. Keep in mind, only an increase in the money supply (assuming stable demand to hold money) provides the mechanism for higher prices in general.

Rothbard disputes the contention that a consumption tax encourages saving: saving is undertaken to be able to consume in the future, which then would also be impacted by the same rate of taxation, hence there is no motive to save to avoid the tax.

In essence, taxes may only be shifted back to factors of production, not forward to the buyer. Mason Gaffney was aware of this in his treatment of the land value tax (LVT).

Gaffney contends that land can be thought of as consumed when tied up over time by the title holder. Land and resources in their pure form are not products of labor, but a bounty of the earth, its use being a form of

consumption. Think of a reserved city parking space or a theater seat reservation: each is a form of consumption, whether occupied or not, in that they use up the space-time element they command irretrievably.

Rent would be a measure of this consumption, but rent is not always evident. It can only be implied in cases where the owner gains the implicit rental return by his own use, as for a home owner. An owner might forego rent if holding the land vacant when banking on rising land prices.

Gaffney proceeds to express ground rent in terms of the average market return on investments, determined by the price of land times the real interest rate, standing in for rent.

As an example, first, the real interest rate does not always correspond to what is seen in the market, which is the nominal rate. Real rates have over long periods of time conformed to the social time preference rate which is 3-5%.

So using 4%, the proxy for rent on a $100,000 lot would be $4,000.

Avoiding, for practical reasons, the Henry George proposal for taxing rent 100%, better explained again by Rothbard here, a more workable 50% consumption tax on the rent for the lot would amount to $2000/year.

Such income could be subject to the 16th Amendment (ratified-1913):

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Applied to the title holder, whether individual or corporate, advocates for the (LVT) indicate that low income owners could be exempt up to a point, or be allowed to postpone accrued tax payments until the next sale of the property. If local taxes on buildings were eliminated in accordance with advocates of the LVT, in not every case would a home owner see a net reduction in property value—Mason Gaffney, in Daniel Holland (ed.), *The Assessment of Land Value*. Overall, lowered land prices have the benefit of making this essential factor of production more affordable.

An estimate for total private land values in 2009 was $21.2 Trillion. If currently at say $25 tn., a tax of 50% on estimated rent would yield yearly revenue of 25x.50x.04=$500 bn. This could be supplemented by fees on titled broadcast frequencies, and bringing up to market equivalence mineral rights granted on public lands as well as extraction taxes and pollution fees. The initial tax of 2% on ground land (rent) would reduce the capitalized value of land so that once phased in, it would constitute 4% of the reduced market price, remaining at half the total yearly yield from land.

Replacing the current $1.6 tr. income tax with a LVT, while reducing revenue would save the economy an estimated $409 Bn. (2016) of income tax compliance costs according to the Tax Foundation.

In sum, the so-called consumption or general sales tax is yet another (income) tax on productive factors; the LVT on rental income is an option for the replacement of the income tax and could be inferred as a tax on consumption.

Of historical note, Article VIII. of the Articles of Confederation, (1781), specified that revenue needs

…shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon…

It not only wisely delimited Federal financing to a dependency on the states, it eschewed all other taxes, preserving a sentiment for the working rank and file yet not forgotten in the memories of the Revolutionary War, a war of secession from the Crown and its supportive base of landed aristocracy.

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Land Tax, Slave Tax

The Confederacy imposed a 5% tax on land and slaves in 1864. Both were seen as capital, but from an economic standpoint that is a misnomer.

It is important to distinguish between assets such as capital that are the product of labor, and assets acquired by claim that are to be found in nature, or in an unowned state initially. (For business accounting land and produced goods for production can be included as capital.) Land should be seen as different from other capital in that holding onto capital goods requires maintenance expenditures. Holding onto land may require no provision of maintenance.

Land clearly exists whether or not owned. In economics land also includes resources, minerals etc. found in place on or below ground. Establishment of ownership from theft does not make for a separate category that is not land, but only to subcategories, such as perhaps justly acquired land or unjustly acquired land.

From this definition, in the case of slaves sought by an individual, other individuals would be a part of the natural environment to be exploited and so would be economically rendered as land in conditions that allowed this kind of (certainly unjust) ownership title stolen from the individual enslaved by the subsequent owner. To the extent the slave or the subsequent owner contributed to the slave's value as an asset, there could be an element of human capital as well.

If the tax is on the slave owner, on the owner's property in slaves, could this be, rather than just a tax, instead, a charge for creating a cost impacting others in the same manner as a pollution tax?

This is not a hypothetical question. There were slaves and their owners were taxed. Was this tax in itself, if a substitute for other taxes, counterproductive or wrong? There had been resentment on the part of workers who had been taxed previous to the slave-ownership tax.

The practical reasons for such a tax are many. First, the capitalized value of the slave as an asset would be reduced. Manumission (the purchase of the slave's freedom by his/her own means) would be less expensive. A tax high enough would extract all of the surplus derived by the owner and so could have been a device to accelerate the end to slavery. Moreover, such a tax can always be tied to a revenue neutral stipulation by attaching an equivalent tax reduction from other sources.

Shifting to a slave tax, away from the income tax on wages and labor (taxes on factors of production cannot be shifted), would have raised real wage returns to labor while not raising wage costs to hire labor. This would have further allowed for slaves to earn side money for manumission.

So if, in certain circumstances, taxation may be on the table, are there any other taxes than those on slaves that would fit the bill? How about land? Nobody made land, all land has been owned by claim.

The first question might be can land be jointly owned by a large association and yet be employed as a factor of production? Do slaves have to be owned? If laborers can be rented out (i.e. paid for rendering their labor), then land can be rented out, and is. When people work for pay they exchange or rent out their labor.

How about the owner of land, need it always be exclusively one person who has first claim to the land or who paid someone who acquired it from the first claimant? Why can't a corporation of share-holders be the owner of land? And why can't the law simply state that every citizen is an equal share holder?

Although some opt for such reform, implementation raises too many questions. But, there yet remains the solution of taxing land according to its ground-rent potential determined by normal means of land assessment. And benefits arise immediately even for a tax that could be phased in and set at less than the full potential rental. Just as with slaves, with rent amortization, land would fall in price, making it more affordable. Rents would fall both for those needing land for business and residential uses. Unused land or underused land, especially in urban locations would be more costly to hold as an asset for wealth, and so put on the market. Other benefits have been fully analyzed elsewhere.

Another economic result of slavery was that slaves were considered property and so counted as capital wealth by slave owners. Had they merely been hired laborers but with wages no different from the cost to the slave owner for their maintenance, planters may have spent money on other capital.

Likewise is the result of owning land. When generally appreciating in value, it will be treated as wealth, although not having represented any gain to society for its benefit potential. As far as its other similarities to slavery, one only needs to go back in time to find that little of what is held in title today has a chain of title that did not begin with conquest, just as with slavery.

Less understood are increases in productivity available in shifting tax burdens off of labor and capital, buildings etc. onto site value of property that would reduce (ground) rental costs that now accrue in large measure to shareholders of corporate urban real estate often experiencing exponential growth in value due to external benefits far out of proportion to other factors of production. Urban property especially can be held either unused or grossly underused with full sanction and expenditure and free legal protective services of government at the expense of tax burdens on the other factors of production. This is in contradistinction to fair usage per John Locke, or Murray Rothbard's homestead principle whereby use of land validates private use if not already in use, whether "titled" by the state as owner (i.e. often private interests that pose as the people's agents) or as a private party outright.

Consider the following: First, that the term rent is reserved to its normal usage, not as defined in economics (economic rent): a return to monopoly power or privilege from special interest legislation. Rent can be seen as a return to ownership of land. But suppose we widened the definition of land as alluded to above so that it included humans, just as we would consider wild horses to be land in the sense of being a natural resource.

Now for the sake of argument we may say that each person has come into ownership of his own body, or perhaps if captured as a slave someone else has ownership of his body, and it can provide a return that we call

labor that can be said is a rental return on the body. And now that we see that in a free market owners of bodies that provide labor are able to benefit from selling labor on the market according to the rules of supply and demand. In other words labor earns its marginal productivity. As it can be combined with other factors such as capital, but always mixed with land or location, and combined technologically with capital that has proven to constantly increase the MP of labor (or more precisely DMVP–discounted marginal value productivity per Rothbard (who notes that returns to investing labor must be discounted according to the time that elapses until their product is marketed).

The great strides in the wage of labor or its MP is known to have been a windfall for those of us lucky enough to live under capitalism (here defined as a free market in which reasonable security of ownership and freedom of information etc. have been available). Hence we can easily see that in the definition above that a person owning property in his body collects a rent that he can charge due to the MP he can provide to capitalists/entrepreneurs for labor.

Now the point of this is to show that labor plays a parallel role to land in production, capital goods being only a form of labor/land embodied in an employable asset. Both land (which includes resources) and labor then are both a form of land, both earning a rent. It is the interplay of each of these types of land that then must be paid rent by a producer to produce goods. Each of these subfactors, (there only being one original factor of production in our definition—land) earns its MP or rent according to supply and demand, but both benefitting through the natural tendency of the profit rate to be reduced over time through competition between the capitalist/entrepreneurs to the level of a uniform rate of return that will tend to comport with the interest rate and time preference of society.

The upshot of this boils down to the fact that owners of land (in its two forms) gain a windfall return that cannot be captured in equilibrium by owners of capital. And it is this reason that taxation is thought to be fair when applied to the surplus return gained by both types of land.

But this story is by no means finished. If we adhere to the law of equal freedom we see that what becomes important is the right to ownership, the

state of which makes all the difference. If a person can simply claim by might another person as a slave, thereby establishing a property right, society can then proceed to acknowledge property as such just as we have seen historically. But the ideas of equal freedom have supplanted this more primitive precept in society so that today slavery as a system of ownership cannot be defended. We need not go into justifying this on ethical grounds for this discussion because such a position has been universally acceded to in modern society.

But if the natural occurrence of persons (a subcategory of land) is not to become property of claimants in the way the wild horses still might be, then how must we treat the other category of land (as site and resources in place)? Should it be as we used to treat persons claimed as slaves by right of force? And if so claimed and titled to the owner, and he transfers (through the property respecting-market) that claim, is the later rejection of such origination of claims not also enough to reject the title transferred to the new owner, even if that owner had exchanged value (paid for) that title? In other words if we acknowledge that long ago titles to terra-firma were gained inappropriately by claim of force, can we rightly uphold titles to land today that descended in a chain of title from such original claim? Need we be blind to this contradiction in treatment of ownership simply for convenience sake? Was that not the thinking that existed in the ante-bellum period in this country? Was the work of abolitionism not carried to its logical conclusion?

Without explanation, the present discussion will avoid considering the obvious answer to the ownership question of trusting it to the state. The reason cannot be given in a short answer other than to point out that the state and society are not the same entity, and historically the state has done as much to destroy the harmony of society as it has to enhance it. However, by moving in the direction of substituting taxes on people to taxes on land, one could, without engrossing the government with more power over the purse, gain a closer approximation to solving this question.

This brings us to the question of a proper procedure for ownership. For persons it requires not much thinking, we have answered that question. For (impersonal) land we have had good precedents that amount to what

John Locke referred to as ‘mixing one’s labor’ with the land. Here we already have property in things made from resources that are fairly well established. Ownership and contract law do us reasonably well.

It seems clear, however, that one cannot make a parallel argument for land ownership, other than land improvements, using the Lockean proviso of mixing labor, that can be made in creation of title to goods in general. Rothbard makes this argument based on lack of the ability to trace linkages of existing land back to previous owners who may not even have descendants, and commonly cannot be known, as is made. That is the practice for goods that the present possessor has appropriate claim in our legal system. The difference here is that land provides continued utility arising from its provision of the fortuitous bounty of the earth. As such, present occupants of the planet cannot be excluded from a share of this endowment, an ongoing provision of nature. After all, it seems quite unreasonable to allow a first claimant of a parcel of land to thenceforth be able to extend this claim to descendants for eternity.

The homestead principle has also been reasonably based on universal ethics, but in its simple form never addressed the need to sustain a title to land through continued usage. Much land is now held without any usage by the owner, or grossly underused by the owner for purposes of future gain, or simply as a form of wealth preservation. But the taxation of land based on assessment of its potential rental value (excluding of course improvements such as houses or buildings), has been applied with success in a number of instances documented here. That land owner have a stake in the capitalized value being positive is seen from the need to have some management of the land with respect to its future value.

A Simple Tax Reform

Recent events in the news regarding the exercise of political targeting against anti-tax groups by the IRS have stimulated a debate over alternatives to the income tax as a means of financing the Federal government. In the immediate future, whatever the outcome of that debate, and whether or not drastic downsizing on the Federal level is in the cards, some arrangements could be easily implemented without overhaul of existing institutions.

Some simple tax structure reforms, with a proven track record known to be of benefit for communities, have been undertaken on the local level. Analysts concluded that the popular perception of tax increases under these changes (changes made without any concomitant reduction in Federal taxes) explains the lack of their popularity. But that was before recent revelations that have brought attention to the negative outcomes associated with channeling tax money through the IRS.

We now have an opportunity to communicate some reforms that are relevant to fixing the immediate problem with the IRS. It would responsibly enhance local revenue by relieving taxpayers of some of their federal tax burden, so that the change would be not only acceptable, but also desirable from a community standpoint, and likely to gain support locally.

Known as a two-tier property tax, such a local tax rate structure would involve some increases and some reductions in the composition of local property taxes. If this were coupled with a change in Federal taxes, the result could be of local and national benefit. Here any Local tax rate net increase would be linked to additional compensating Federal tax credits accomplished with some simple steps by Congress. Acting on the Federal level would facilitate changes in local tax structures that work best if carried out nationwide.

But what makes this a win-win proposal derives from gaining benefits, not from more funds, but from improving the use of land and resources. Market forces would be released that would work to eliminate

under-utilization of good sites for development while reversing the incentives for sprawl in a way that avoids the political fracturing produced by zoning and regulating by city, county, state or federal governing bodies.

Energy usage would improve, infrastructure demands would decline, environmental impacts would be decreased, and jurisdictions would be less financially stressed both from expenditure demands and revenue sources.

Even future extra-speculative bubbles in real estate would be moderated. So the proposal would contribute to needed regulatory reform on a macroeconomic level that would lessen the upswing in the business cycle.

The proposal would allow an income tax credit on federal individual and business tax returns to offset increased local property tax rates on land and site values. It would apply only for those jurisdictions wanting to participate. For property owners to qualify for a Federal tax credit it would require that local (usually county) jurisdictions maintain at least a 3% annual tax rate on site valuation while also conducting reassessments at market value at least every 2 years.

This would create a two-tier property tax. It would not affect rates on improvements such as buildings or houses, but would not prevent these rates from being reduced. The benefits of such a change are not evident without further discussion, but first a concrete case:

A $200,000 house is assessed with the lot valued at $50,000, the house separately at $150,000. Current property taxes are 1% (2010 median U.S. property tax rate on homes was 1.14%) or $2,000 and thus $500 of the existing tax is for the lot usually assessed separately from the house.

The rate is then increased 2% on the lot. But the rate on buildings or improvements would be the same or very possibly reduced from 1% to 2/3%. 2% of $50,000 is $1,000. 2/3% of $150,000 is $1,000. So this owner's taxes are increased by $1,000 on the lot but reduced $500 on the house, hence the site tax is $1,500 and the total property tax is $2,500, the tax on the house is $1,000.

The tax credit would be allowed on 100% of the increase in local taxes, with another 100% on the first year as an incentive. This owner would then pay $2,500 in property taxes and save $500 on her Federal

taxes except this would be doubled in the first year, in this case reducing Federal taxes by $1,000 in the first year. But the overall burden for this owner would stay at $2,000, the original tax on the property.

The credit would not transfer with sale or transfer of the property, so that a new owner would have the same higher tax rate and pay no more than $2,500 in property taxes. The expectation would be that the new owner would acquire the property at a modest discount on its original value due to the increased tax impacting on present value and so pay under $2,500.

In this way the burden of the local tax increase on property owners would be largely compensated by the Federal income tax credit.

Although the homeowner has only a first year net gain from the change, the fiscal position of his community would be considerably enhanced and residents would see that as a positive outcome.

Local jurisdictions would benefit in a time when most are stressed for more revenue. For those who dislike any and all taxes, relying on local property taxes has an advantage: A local property tax is the least likely to get out of hand since it is highly visible and subject to local citizen control. We also know that citizen input and participation has more clout in trimming government excesses at the local level than in Washington.

From the viewpoint of Congress, this would relieve pressure for Federal bailouts to local governments and municipalities. Note that the site value tax increases are not on earnings but asset values and to that extent are of a progressive nature. For those owners of limited fixed incomes localities would likely defer the increased payment until the time of next transfer of the property.

Federal revenues would temporarily be reduced, but other likely changes at that level could certainly include eliminating deductions such as mortgage interest above a certain limit that tend to contribute to housing bubbles. Moreover a more flat income tax eliminates dead weight loss; more savings will accrue in tax preparation expenses.

And since user fees can be more easily handled in a digital age, much of the funding on the federal level could be switched away from the income tax altogether. For instance, the expenses of keeping a military base

to benefit the host country could be charged to that country or simply closed. Royalties on resource extraction on federal land could be brought in line with the private sector. Why should not the public interest be sought out with a fee or rental for private use of the broadcast airwaves, or by treaty for fishing rights, and to step up compensation for toxic air and water pollution?

With respect to the IRS we need not be reminded of a system inimical to our basic sense of propriety; a system that oversteps centuries of hard won barriers between overt power and the defenseless citizen. One need only point to the requirements in the tax return. Filers are compelled to produce testimonial information in direct defiance of Fifth Amendment protection against self-incrimination. But what else is the nature of the mandatory signature on a tax return (that can be used for prosecution based on felony perjury for even careless omissions) than an imposition of the highest affront to natural liberty?

We should keep in mind that other taxes such as on land value provide little latitude for tax avoidance and so require no intrusive self-reporting.

Any permanent reduction on the rate of return on an asset reduces its present value. When interest rates rise future cash flows are discounted lowering asset values. Taxes on cash flow also reduces returns in a similar fashion.

For capital, lower valuations represent a loss in social wealth. If taxes are raised on buildings, for instance, valuations fall. This reduces incentives to invest, hence discouraging saving.

What is more, this leads to diverting funds to taxes that had been earmarked for capital consumption allowances for maintaining investments, leading to negative capital formation.

Unlike land, capital must have cash flow to pay interest and to reproduce itself.

By contrast, taxes on land, while also lowering present value, have the effect of raising savings allocations.

Lowering land prices through taxation avoids capital depletion, and stimulates savings due to the wealth effect. The result is more capital with which to raise worker productivity and wage rates.

When land prices rise, old buildings are subject to locational obsolescence. Either rising land prices, or rising rent drives capital out of production. Rent devours capital consumption allowances, just as do taxes on capital.

Higher site values spur more substitution of capital for land. More is spent on upgrading rather than making use of vacant land. Capital for other purposes is less available.

Boom conditions typically generate higher land prices and consequently higher expenditure on high priced sites, more high-rises. These are an indicator of capital malinvestments that usually cannot be recaptured during subsequent downturns, since buildings are forms of capital that are illiquid.

For building owners that also are the land owners, the higher price of land is seen as appreciation for the property as a whole, which is frequently attributed to the building as well. This results in diversion of funds from capital consumption allowances (equity withdrawal) because the higher overall property values are seen as adequate equity for any needed future maintenance or repairs. When land values fall, previous allocations on extravagance, ephemeral consumption goods etc. adds to negative capital formation in other sectors.

Policies to stimulate a faltering economy that take the form of raising demand for capital destructively draws funds away from its best use.

Income taxes have become not merely a pecuniary burden, but also oppressive of political expression.

Taking a first step challenging the intractable institution of federal taxing authority may open the door to other innovative means of eliminating tax burdens on productive effort. This could include indexing income (but not the tax bill) with the CPI so that an individual's taxes would fall over time at the same rate of inflation: With 3% inflation $60,000 income would become $120,000 in 24 years, but if it were indexed to remain at $60,000 in real income, then a 20% tax amounting to $12,000 (not rising in money terms) would only be $6,000 in real purchasing power after 24 years. With 10% inflation this time frame would be only 7 years.

Suggestions have been made to phase out the income tax through progressively increasing the amount for the standard deduction, or exemptions. But this fix might be negated through bracket creep should high inflation rates return. Moreover, it would be an incentive for authorities to increase inflationary policies rather than diminish them, and thereby once again might provide the inflationary impetus for the next speculative boom.

The method of downsizing, proposed above, might avoid drastic cuts for civil servants who would have been caught up in layoffs through no fault of their own under a more hurried transition away from the income tax. Alternatively, and in spite of this consideration, for those who hold that reductions in government revenue can come none too soon, there could be a move to add an acceleration of the indexed reduction by any factor Congress could be persuaded to include.

The above proposal to increase local tax rates on site values concerns the integrity and stability of the entire economy. The benefits to local fiscal needs are joined by benefits from avoidance of volatility in the national economy. Real estate cycles would be damped to a degree during times of euphoria. As the increase of assessment valuation keeps pace, instead of land values doubling and tripling or even quadrupling during the next boom, values would be subject to proportionate increases in taxes, so in our case above, if the underlying lot value were to double to $100,000, it would face a $1,500 increase per year tax for the lot itself. This would help to stem the run up in value before it could rise that far, and discourage boom conditions to that extent. During the housing boom, it wasn't the cost of building a house that constituted the inordinate increase in residential home values but the appreciation of the land underneath.

Major business cycle booms rely in part on escalating collateral backing for financial credit expansion. This reform could be useful in reducing volatility stemming from this important source. After the Great Recession it became evident to the unbiased observer that those who tried to justify boom conditions as normal failed to understand that an economy could become too accustomed to rosy outlooks. Debt and unbalanced spending were part of the problem. Monetary policy that inappropriately promoted

credit had help from an infectious climate of optimism and overconfidence--producing a real estate bubble.

Under the present proposal those depending on government largess and sensitive to the flow of revenue to the Treasury would thereafter be aware of some loss of advantage to inflationary policies.

On the local level, to the extent that vacant property holders experience this tax increase to 3% instead of the lower rate that generally currently prevails, where lots have higher values, such as in urban areas, they would be likely to be released for more productive use. A million dollar vacant lot may face a tax of $30,000–up from maybe $10,000 even before a property boom got underway. Vacant lots, lots with dilapidated buildings, and even parking lots would now be less desirable vehicles for appreciation, held idle as a repository of wealth.

To the extent that lot prices ease from the higher carrying cost and as more of these go on the market, the affordability for productive entrepreneurial use improves. Yet for some homeowners in for the long run, the drop in site value would moderate the tax increase. And by not increasing rates for improvements, incentives would remain for upgrading of houses or buildings.

By providing such an option with Federal legislation, states and localities would act to enable their own tax structure reform or miss out on the benefit. It's ironic that we treat property in raw land, something hard work does not create, with more reverence than property in earnings and wages, something hard work does create. Distribution of earnings through taxes should give us more pause than allowing each of us some of what accrues to holders of titles to our natural endowment, especially when privileged by provision of law enforcement services and publicly provided infrastructure.

Concrete examples of just such two tier rates on local property have amply demonstrated the effectiveness of this simple adjustment. Jurisdictions such as Harrisburg Pennsylvania successfully accomplished urban renewal through a two-tier approach. This required no intrusive zoning ordinances. According to information provided by *The American Journal*

of Economics and Sociology, (April, 1997), the number of vacant structures, was over 4200 in 1982, but less than 500 in 1994. With a resident population of 53,000 in 1994 there were 4,700 more city residents employed in 1994 than in 1982. The crime rate dropped 22.5% from 1981 and the fire rate dropped 51% from 1982 to 1994.

The overall effect of this change decreases the incentive for developers to seek land in far-flung locations often in agricultural use, or in forests or pasture in search of lower land prices. It helps correct the tendency towards sprawl and towards unbalanced public spending on new infrastructure, stimulating development away from centers of activity. In some cities 25% of the land goes underutilized with of absentee ownership holding out for property value appreciation.

The reader is asked only to take a minute to think about urban or city property in her own vicinity that sits undeveloped, or with buildings in a blighted state. These sites, while enjoying low tax rates on land value, fetch prices kept from falling due to availability of public amenities for which costs are not shared (by the idle land) since taxes are expected to rise considerably when structures are built. At the same time one need not look very hard to find roads and highways constructed at great expense to reach and accommodate more remote locations not viable without such help.

Under the present proposal, since a low tax rate would apply for buildings, the disincentive to new building on the lot would be removed. Instead of incentives for urban flight the change would help correct unnecessary urban decay.

In short the proposal would provide a motive for urban infilling as an alternative to the incentives that have heretofore produced environmentally unsound sprawl, while even remaining largely tax and revenue neutral if so desired.

On the Right of Secession

More than a few terms have evolved, not from a natural development of language, but deliberately out of a need for concepts conducive to the perpetuation of ruling elites, monarchies, or governments that oppress minorities in the name of democracy and the majority: Hence the term *sovereign state*. Plainly, this term conveys the meaning given to it by those in and around power. One state respects the independence of another and so is respected in kind.

Out of this follows the concept that states (or would-be states) have rights, one being, popular among some libertarians, the right to secession. My present purpose is to contend that under examination, this claim to a right lacks grounding in natural rights theory. Only individuals, not states, have rights.

It will be helpful to begin with a discussion of natural rights and the principle of methodological individualism. First, we can establish that, although a government may enjoy a "consensus" of support, all governments as instituted suffer from less than universal consent—they enjoy consent either by majorities or by ruling minorities, or some individuals, but not by unanimity. Whether any society can achieve unanimity of consent by participants in its all of its social and economic organizations and institutions need not be settled here. Such a conclusion in the affirmative has been reached by a number of libertarian writers who hold that without compulsory institutions, society can achieve consent consistently—effectively governing interactions among its members exclusively through free associations and institutions, but these societies would not then have the compulsory power that is the essence of states and which defines states.

We can specify that individual sovereignty, under natural rights theory, refers to individuals, or by extrapolation, non-compulsory associations of individuals. To be sure, the term secession applies to acts by states or political entities, not to individuals. Logically then, do states, including breakaway states, really possess such (consensual) sovereignty? If not, do they possess a pure natural right of secession, or rather, because states have only derivative rights from the individuals under their jurisdiction, does the term *right* apply at all?

To see the position that assigns no special rights to collectives above and beyond the entirety of the individuals composing them we turn to a more general treatment of methodological individualism by Ludwig von Mises in Human Action (1949):

> First we must realize that all actions are performed by individuals. A collective operates always through the intermediary of one or several individuals whose actions are related to the collective as the secondary source. It is the meaning which the acting individuals and all those who are touched by their action attribute to an action that determines its character. It is the meaning that marks one action as the action of an individual and another action as the action of the state or of the municipality. The hangman, not the state, executes a criminal. It is the meaning of those concerned that discerns in the hangman's action an action of the state. A group of armed men occupies a place. It is the meaning of those concerned which imputes this occupation not to the soldiers on the spot, but to their nation. If we scrutinize the meaning of the various actions performed by individuals we must necessarily learn everything about the actions of collective wholes. For a social collective has no existence and reality outside of the individual members' actions. The life of a collective is lived

> in the actions of the individuals constituting its body. There is no social collective conceivable which is not operative in the actions of some individuals. The reality of a social integer consists in its directing and releasing definite actions on the part of individuals. Thus the way to a cognition of collective wholes is through an analysis of the individuals' actions. (42)
>
> [And further:]
>
> It is illusory to believe that it is possible to visualize collective wholes. They are never visible; their cognition is always the outcome of the understanding of the meaning which acting men attribute to their acts. We can see a crowd, i.e., a multitude of people. Whether this crowd is a mere gathering or a mass (in the sense in which this term is used in contemporary psychology) or an organized body or any other kind of social entity is a question which can only be answered by understanding the meaning which they themselves attach to their presence. And this meaning is always the meaning of individuals. Not our senses, but understanding, a mental process, makes us recognize social entities. (43)

If understanding collective action requires understanding the meaning attached to it by the participants, clearly then all collective rights are illusory unless derived from the rights of individual members to be conveyed to the collective by individual consent. Universal individual consent, though, has been antithetical to the foundation of states. What made them states as opposed to associations of free individuals was their compulsory and monopolistic nature, their over-riding of individual rights. Hence states are not strictly associations of like-minded people since by

definition they include non-consenting individuals within their jurisdiction.

However impractical and unwise it may seem in most circumstances, individuals or groups of consenting individuals would, in this analysis, retain a right to separate from any government regardless of its perceived level of abrogation of rights—for what agency, under civilized principles of law and reason, has the right to speak for or act in their behalf without first obtaining their expressed consent?

By the same analysis, individuals or groups would have no derived right to establish another government that subjugates other non-members of their group against their will. Secession (by states or would-be states) would carry no guarantee as to the universality of consent, and of course, as with revolution, would run the risk of jeopardizing individual rights. Moreover, political secession, more than mere disassociation, is geopolitical: It rearranges access and control of land and resources, not always more equitably. For instance, should some consideration be given to partially universalizing claims to monetary returns on land and natural resources that accrue simply as a result of ownership, especially when (as is commonly the case) a history of conquest, accidental or arbitrary assignment, pre-dates present ownership claims?

Aside from these considerations, the right of secession might be valid in principle for the special Rothbardian case where it is applied consistently by the secessionist territory to allow secession from itself by any of its regions and of those by any sub-region and so on down to each individual; but this gets away from the understood definition of succession. Further, in practice, unless a genuine change in the public's perception of the role of government preceded the change, dissolving all political bonds at once would be untenable.

In addition, to invoke the right of succession, there would be a need for preparation of substitute (market) institutions. A consistently thorough revamping would find the very laws holding up the former illegitimate

regime, including whole financial structures such as banking, fiat currency, and outstanding government obligations etc., to be in question. Regeneration of an authentic public (as opposed to the private ruler or vested interest) system of laws and market based courts requires a discovery process to construct a body of customary restitution based civil case law (to replace positive criminal law) taking possibly decades or more. No hastily crafted new law code would be immune from the weaknesses of conventional legislative or statutorily imposed systems of jurisprudence which suffer the same fatal flaws as have economic systems based on centralized command.

This said, in the practical world of ubiquitous, increasingly interventionist, self-perpetuating government power, a consistent stance in favor of secession whenever and wherever possible, may ultimately result in more progress toward freedom than in weighing specific, local, often short-run outcomes, but such a stance could not be defended on natural rights grounds alone because each case is about real individuals whose rights must be respected. From a consequentialist standpoint, the question of the usefulness of secession remains an open one. Before the creation of a breakaway state, at least what is certain is that the existing state of affairs lacks universal consent, and that at least the likelihood of improvement on this score exists for the seceding majority seeking "self"-determination, but mitigated by possible political instability, geopolitical inequities, and the reality that rights of minorities might be overlooked, even unacceptably.

In sum, secession as conventionally defined would be no simple act, commanding no *a priori* status as a fundamental principle from a natural rights or individual sovereignty standpoint; yet at the time of its inception, a break-away region may command more, less, or the same status promoting individual rights as commanded by the parent state. In this sense the right of secession differs from the right of individual separation; political succession lacks a consistent natural rights basis and therefore new political states must not be presumed superior in this measure to parent states.

AFTERWARD

The existing body of common law, or even customary law, lacks a consistent correspondence with the natural law most serviceable to society. However, because of evolutionary pressures that select for improvement of social institutions, it may be that law-making will gradually become more genuinely democratic, adopting the evolutionary developmental process of customary or originary common law. Constructive approaches to address government failure will recognize that positive or political law is the vehicle for State power; that the law-and-order propaganda by the State coupled with too much legislative law, have become the enemies of liberty; that the State in sum is many-fold more the perpetrator of violent crime than is the citizenry; and that, over time, without legislation, order in society establishes itself spontaneously, as evidenced in the rich body of customary law completely independent of State criminal law. One may see such a social structure as only an ideal, never possible in the real world. Addressing this, Thomas Paine wrote in 1792 (*Rights of Man*):

> …the laws which common usage ordains, have a greater influence than the laws of Government…society performs for itself almost everything which is ascribed to Government....For upwards of two years from the commence-

> ment of the American War, and to a longer period in several of the American States, there were no established forms of Government. The old Governments had been abolished, and the country was too much occupied in defense to employ its attention in establishing new Governments; yet during this interval order and harmony were preserved as inviolate as in any country in Europe. There is a natural aptness in man, and more so in society, because it embraces a greater variety of abilities and resources, to accommodate itself to whatever situation it is in. The instant formal Government is abolished, society begins to act: a general association takes place, and common interest produces common security.
>
> Man, with respect to all those matters, is more a creature of consistency than he is aware, or that Governments would wish him to believe. All the great laws of society are laws of nature. Those of trade and commerce, whether with respect to the intercourse of individuals or of nations, are laws of mutual and reciprocal interests. They are followed and obeyed, because it is the interest of the parties so to do, and not on account of any formal laws their Governments may impose or interpose.

One strategy for restitution or constructive reform may only involve reducing the ability of the State to enforce (criminal) law, so that de-facto repeal can be effected. A climate allowing for displacement of, and disregard for some criminal law accomplishes what would be much more difficult to accomplish in marshaling support or lobbying to prevent passage of or to repeal a law. Should only a fraction of the laws on the books be fully and efficiently enforced, most citizens would no doubt be facing long prison sentences. Consequently, an effective strategy for liberty may include the following: freeing up the legal restrictions on the provision of

private, competitive services in customary law enforcement and adjudication; relying on no more than a 50% sharing of the rents or returns to site ownership in land and resources so that the institution of private property, and the right to entrepreneurial gain, in such ownership transfers is preserved; reducing taxes, requiring balanced budgets, and reducing budgets for state supported police, state attorneys and prosecutors, law enforcement services and the state courts; withdrawing funding toward making the governmental enforcement apparatus more efficient in those areas that it creates a net loss to the economy through over-regulation or mis-regulation. State power was never truly erected to serve to protect property rights or the general welfare. The state's historic tendency has been to enhance the property values of the financially powerful.

It might be preferable to have state money squandered on welfare or other transfer programs or spent on public works etc., than on producing better "law" enforcement. This idea does not necessarily imply the desirability of these expenditures when that support might mean justifying the present tax system. It also does not say that in and of itself all or most of government enforcement effort lacks socially redeeming value

Our approach to explaining political problems should not be seen as implying that the public or society is inherently disharmonious. It suggests that systems don't fail because people fail, rather they fail because they are bad systems. Legislative establishment of laws or rules cannot be truly democratic even if well intended:

> No public opinion polls, no referenda, no consultations would really put the legislators in a position to determine these rules, any more than a similar procedure could put the directors of a planned economy in a position to discover the total demand and supply of all commodities and services. The actual behavior of people is continuously adapting itself to changing conditions. Moreover, actual

> behavior is not to be confused with the expression of opinions like those emerging from public opinion polls and similar enquiries, any more that the verbal expression of wishes and desires is to be confused with 'effective' demand in the market. (Leoni 1991: 20).

Hierarchically organized socialist economies fail because of their structural, albeit artificial, oversimplification. They fail in part because of the mistaken idea that centralizing decision making can efficiently allocate resources in an economy of diverse knowledge where that knowledge can never be assembled in one place, let alone one mind. Precipitous law-making fails precisely for the same reason. The unintended consequences of this process are incontrovertible.

Whatever approach to reform is taken, changing political personalities, without changing political structures, would be but a futile strategy. The climate of freedom allows for maximum evolution of the potentials in each individual, but more importantly, diminishes the mistreatment of man by man that corrodes and corrupts the very soul of everyone who knowingly stands aside and ignores his own conscience in countenancing the institutionalization of wrongful force by the body politic.

This vision, while hopeful, is not Utopian. As discerned by Murray Rothbard (1998, 259): "The goal of immediate liberty is not unrealistic or 'Utopian' because--in contrast to such goals as the 'elimination of poverty'–its achievement is entirely dependent on man's will. If, for example, *everyone* suddenly and immediately agreed on the overriding desirability of liberty, then total liberty *would be* immediately achieved."–Nothing more than a mere change of will is required to gain the fast-track toward market-liberal alternatives. Reduction of the unnecessary harm caused by organized systems employing unprovoked, wrongful force requires no miracle, only the chance to open a discourse that can point the way out.

There's a better way to do it, find it.
—Thomas Edison

Some Constitutional Questions

The overall purpose of these proposals was to enhance the case for the primacy of social power over political-economic power; it could remove special economic privilege by ending subsidies or anti-competitive regulations; through jury nullification it could end various exceptions granted that have overturned accepted standards in commercial common-law jurisprudence; it could point the way to an end to suppression of the anciently derived people's case-by-case veto of unreasonable application of law. It could correct "special moral hazard problems that allow for excesses in financial, banking and nuclear power industries by removing deleterious protections against bankruptcy and commonly accepted, and anciently derived conventions of proper employment of tort liability.

Discussion:

First we note that **t**he first sentence in the first article has the words: "All legislative Powers herein granted" which clearly presumes the prior sovereignty of the people, not the government.

Article I, Section 8. uses the lanquage: "coin [not print] money and regulate" which means make regular (which it has failed to do). In the same

sentence it states "and fix the Standard of Weights and Measures."—clearly referring to standardizing, not debasing etc.

Suggestion: At end of 2nd paragraph insert: ***No law requiring any penalty or punishment shall be valid in any jurisdiction of the United States or of the Several States for any action unless such action also constitutes a cause of action for damages..***

No law takes judicial precedence over relief granted in suits at common-law.

Article III. Section 2. could be changed from: "The trial…shall be by Jury and" to ***The trial…shall be by Jury as to Law and Fact and…***

Article IV. Section 2. The statement regarding the [pre-Thirteenth Amendment] requirement to deliver up escapees from service or labour to the ("party to whom such Service or Labour may be due.") regardless of presumed intention on the part of writers of the Constitution clearly can only be interpreted such that the term "due" holds to its common definition implying contractual obligation. That clearly could not be construed to have meant that an escaped slave must be delivered to such claimant as implied by Section 2. Here it is important to see that the Constitution as a document is of force only as written in the context of the language used at that time when employing any term that was unambiguous even at that time. That the wording was not careful is no defense of a possible intended meaning over its stated meaning for we don't know that such wording was agreed to by some signators only because of its stated meaning.

Article V. Section 2.

Change "The Trial of all Crimes…by Jury and…" to: the Trial of all Crimes…by Jury ***both as to Law and Fact*** and…"

Article VI. reads: "…in Pursuance thereof..." not '…in Pursuance thereof *as determined by the Supreme Court*.' Hence a reasonable reading of the

commerce clause can in no way authorize the vast powers now attributed to it. (i.e. the Supreme Court cannot amend the constitution, only rule on laws).

For clarification, to avoid a common misreading, not for any change in stated meaning, the word *of* should be inserted after the words "any Thing in the Constitution". Hence: "…any Thing in the Constitution **of** or Laws of any State…notwithstanding."

Also change 'and the Judges…notwhistanding…" to Judges ***but not Juries…***

Amendment V.

To avoid abusive use of plea bargaining, which can be no different than threat of torture, change "…nor shall be compelled in any criminal case to be a witness against himself…" to: ***nor shall in any criminal case be a witness against him (her) self…***

Proposal for an Amendment:

A 60% supermajority shall be required in each house to pass any law.

Allow for automatic repeal of any measure of any enforceable statute upon 25% co-sponsorship in either house of Congress unless re-enacted by 60% majorities within 90 days.

Other remarks:

Note comments by Roger Pilon on 2nd par. Of p. 5 (Cato Institute U.S. Declaration and Constitution booklet) regarding General Welfare Clause, and Commerce Clause.

Note that trial by Jury is a further check and perhaps branch of government.

Terms

Natural law: a body of law or a specific principle held to be derived from nature. It may be thought as property binding upon human society in the absence of or in addition to positive law.
Positive law: law established or recognized by governmental authority.
Tort*:* a wrongful act for which a civil action will lie except one involving a breach of contract.

..... *Webster's Seventh New Collegiate Dictionary*

Originary Common Law: Law developed by decisions in cases which originate in civil actions and which come to be commonly accepted–also customary law.
Political Law: Law developed or adopted through statute by government authority as in **positive law**.
Freedom: Freedom from man not from needs.
Law of Equal Freedom: Stated by Herbert Spencer:

Every man has the right to act as he wills provided he infringes not on the equal right of any other man.

The classical liberal concept based on common natural rights. It is consistent with the Confucian proverb: "do not unto others as you would not wish others to do unto you." and actually rests on principles where even the criminal will have agreed previously to condemn similar actions of other criminals therefore being unanimous and thus "common "law. (6) Leoni p. 15.

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SOCIAL SOVEREIGNTY

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