The Voluntaryist

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Pursuing Justice in a Free Society: Part II—The Liberty Approach

By Randy E. Barnett

[Editor's Note: Excerpts from Part I of this article appeared in the prior issue of THE VOLUNTARYIST. The following excerpts were taken from the author's "Pursuing Justice in a Free Society: Part II—Crime Prevention and the Legal Order," 5 CRIMINAL JUSTICE ETHICS, Winter/Spring 1986, pp. 30-53. Footnotes have been deleted, although they appeared copiously in the original. The author is currently the Austin B. Fletcher Professor, School of Law, Boston University. Reprinted by permission of the author and The Institute of Criminal Justice Ethics, 989 Tenth Avenue, New York, NY 10019.]

A Non-Monopolistic Legal Order

> A possible... objection to the view [of law] taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple legal systems do exist and have in history been more common than unitary systems.

What kind of legal order is consistent with the rights and remedies described in Part One of this article? Two constraints on our choices immediately present themselves.

First, the legal order must be financed by noncoercive means. The confiscation or extortion of one person's rightful possessions to finance the defense of that person's rights or those of another is itself a rights invasion. Second, the jurisdiction of each court system cannot be a legal monopoly. It would be inconsistent with the rights and remedies of the Liberty Approach to impose legal sanctions on someone solely because he has attempted to provide judicial services in competition with another person or group since such an attempt would itself violate none of the rights specified by the Liberty Approach. I shall consider each of these constraints in turn.

Noncoercive Sources of Funding

There is no reason why either a law enforcement agency or a court system cannot charge for its services, in much the same way as do other "essential" institutions, such as hospitals, banks, and schools.

Each business requires expertise and integrity, and institutions engaged in such activities must earn the trust of the consumer. Hospitals, banks, and schools, however, rely primarily on fees charged their customers, though payment of these charges can be made in a variety of different ways.

The very large and largely unanticipated expenditures for emergency hospital care are financed by insurance arrangements, by conventional credit and, of course, by cash payments. Banks raise the bulk of their revenue from the difference between the interest they charge borrowers and the interest they pay depositors, and where this differential is narrow, service charges may be imposed as well. Schools which do not receive tax receipts rely largely on tuition payments made by parents and students out of savings or from the proceeds of long-term loans. A significant portion of both educational and health services is subsidized by private charitable contributions.

It takes no great imagination to envision competitive law enforcement agencies providing police protection to paying subscribers—especially in a society where streets, sidewalks, and parks are privately owned. (Park and road owners could, for example, bundle the provision of protective services with their other transportation and recreational services.) Such a system would probably include agreements between agencies to reimburse each other if they provide services in an emergency to another firm's client. Competitive court systems could utilize many of the same techniques as hospitals to fund their services: insurance, credit, cash, and charity. Prepaid legal service plans or other forms of legal insurance are also possible and, where permitted, sometimes are available even today.

In addition, court systems could profit by selling the written opinions of their judges to law firms (or to the various retrieval services on which lawyers rely). Such opinions would be of value to lawyers and yield a profit to the court system which sold them only to the extent that they are truly useful to predict the future actions of these judges. So to fully profit from such publications, each court system would have to monitor and provide internal incentives to encourage its judges both to write and to follow precedential decisions.

At present, attorneys bill clients by the hour or collect a percentage of the damage awards they succeed in obtaining. They also work *pro bono*—that is, they donate their services in the interests of justice. Except in unusual cases, however, those who successfully bring or defend lawsuits in the United States today cannot recover their legal fees from those persons who either violated their rights or who wrongfully brought suit against them.

In contrast, a Liberty Approach requires restitution to compensate as completely as possible for *all* the determinable expenses which result from a rights violation. Therefore, in a legal system that adheres to a Liberty Approach, the loser of a lawsuit must be liable (at least prima facie) for the full legal costs of the prevailing party. In the absence of such a rule, the innocent party would be made to absorb some of the costs of the other party's wrongdoing. And such a legal rule would also serve both to protect innocent persons from the expense and injustice of baseless lawsuits by increasing the costs of losing weak cases, and to help pay for meretricious winning lawsuits brought by people who could not otherwise afford the legal costs.

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Moreover, it is important to note that consumers using such institutions as hospitals, schools, and banks must now pay both for the services of doctors, bankers, and teachers and for the overhead of the facility (the hospital, the bank, or the school) where these professionals practice. With the legal profession, however, we are accustomed to privately paying for lawyers, while providing the capital and labor used by lawyers—courts and court personnel—by tax receipts. This "public good" arrangement encourages overuse by some until court backlogs and overcrowding create queues that substitute for prices or fees to clear the market.

Some people worry that allocating court resources by means of a market price mechanism will unfairly reward the rich. But the system as it now exists rewards those litigants who are better able to wait out the imposed delays and penalizes those who for any reason require a fast decision. Who is more likely to be in each group, the wealthy, or the poor, a company or an injured consumer, the guilty or the innocent? Remember also that in a Liberty Approach, the loser would have to reimburse the prevailing party for court costs, including costs caused by delaying tactics. The most likely result of adopting a competitive legal order with market-based pricing is that all legal costs would be greatly reduced from their present level, and successful litigants would be able to keep a higher proportion of whatever damages awards they recovered.

In short, the financing of legal services is neither a very different nor a more serious problem than the financing of many other public services that rely only minimally, if at all, on tax revenues and that sometimes even now must compete against tax-subsidized competition to survive. Whatever problems may exist in providing indigents with legal and judicial services exist as well with hospitals and schools. But such problems do not justify taxation as a means of providing these services to everyone, whether indigent or not, nor, as was suggested above, must these services be provided in kind.

No Jurisdictional Monopoly

The argument that law enforcement and adjudication are so important that they must be provided by a coercive monopoly is ironic. If one had to identify a service that is really fundamental to social well-being, it would be the provision of food. Yet no one (in this country) seriously suggests that this service is "too important" to be left to private firms subject to the market competition. On the contrary, both theory and history demonstrate that food production is too important to be left to a coercive monopoly.

The more vital a good or service is, the more dangerous it is to let it be produced by a coercive monopoly. A monopoly post office does far less harm than monopoly law enforcement and court systems. And a coercive monopoly might go largely unnoticed if it were limited to making paper clips—that is, the inferior and/or costly paper clips inevitably produced by such a monopoly might not bother us too much. It is when something really important is left to a coercive monopoly that we face potential disaster.

Moreover, upon closer examination the seemingly radical proposal to end the geographical monopoly of legal systems is actually a rather short step from the competitive spirit to which we have been, and to some extent still are, accustomed. In the long history of English law, royal courts competed with merchant courts; courts of law competed with courts of equity. "The very complexity of a common legal *order* containing diversely legal *systems* contributed to legal sophistication." Even today, the federal system in the United States preserves a degree of competition between state and federal courts. We are accustomed to the idea of "checks and balances" among governmental power centers that is said to be embodied in the constitutional framework. And private adjudication and arbitration organizations routinely compete with government courts for commercial business.

In evaluating the merits of a nonmonopolistic legal order we must be careful always to take a comparative approach. It is tempting but ultimately fruitless to compare any proposal to an ideal that no other possible legal order could more closely achieve. When comparing the realistic prospects of a legal order made up of diverse legal systems with those of a monopoly legal system, the advantages can readily be seen.

Without a coercive monopoly, actual or potential competition provides genuine checks and balances. In a competitive legal order, an individual excluded from or oppressed by one legal system can appeal to another; an individual shut out of a monopoly legal system cannot. People are extremely reluctant to "vote with their feet" by leaving a country because doing so means abandoning one's friends, family, culture, and career. And yet people do so if things get bad enough. By having the choice to shift one's legal affiliation without having to incur the substantial costs of expatriation means that things do not have to get nearly so bad before a change in affiliation occurs.

Contrary to contemporary preferences for a unitary legal system, it is the *pluralism* of the Western legal order that

> has been, or once was, a source of freedom. A serf might run to the town court for protection against his master. A vassal might run to the king's court for protection against his lord. A cleric might run to the ecclesiastical court for protection against the king.

Law will remain supreme in a society if, and only if, a unitary legal system does not develop.

> Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. It is this plurality of jurisdictions and legal systems that makes the supremacy of law both necessary and possible.

The modern monopolistic conception of a unitary legal system threatens this vital diversity.

Moreover, while we are accustomed to thinking about a single agency with a geographical monopoly—such as county government—providing both the judicial system and the police agency to enforce its orders, in a competitive legal order no such combination is either likely or desirable. Wholly different skills and resources are needed to efficiently render just decisions than are needed to efficiently enforce such decisions as are rendered by a court.

For instance, an efficient judicial system must accumulate and organize the historical information and legal analysis needed to do justice between contending parties, and it must also demonstrate to the relevant social group that justice is being done. A successful court system must fulfill at least two distinct functions: the *justice function* and the *fairness function*. The justice function consists of devising and implementing reliable means of accurately determining facts and law. The fairness function consists of convincing the practicing bar who must recommend where to initiate lawsuits, the litigants who must suffer the consequences of this choice, and the general public who must acquiesce to the enforcement of legal judgments in their midst that the procedures it has employed have produced justice. A legal system will not provide a service worth paying for if it fails to fulfill either function. Additionally, some kinds of procedural safeguards may be mandated not only by market demands but by principles of justice as well.

Efficient law enforcement, on the other hand, involves the least costly use of coercion (a) to protect people from harm, (b) to seize and sell property in satisfaction of judgments by a "recognized" court, or (c) to administer a system of productive enterprises where persons who are either unable or unwilling to make payments from regular earnings can be employed under controlled conditions and paid market wages from which reparations are deducted until their debt to the victim is satisfied. It is implausible that a single agency would provide any two of these services. The fact that an institution performs one of these functions well would seem to be unrelated to its ability to effectively perform any of the others. It is even more implausible that a successful law enforcement agency would also most efficiently supply judicial services.

As important as the balance maintained by a competitive legal order are the constraints provided by the requirement that legal systems contract with their clientele. Deprived of the power to tax and the power to coercively impose their services upon consumers, legal systems which must depend upon market-based fees and prepaid insurance would have to be comparatively more responsive to the needs and desires of their consumers than agencies with the right to collect their revenues at gun point. The fact that individuals and firms respond to the incentives provided by competition is acknowledged to be true in every other area of human endeavor. Human nature does not suddenly change when one gets a job providing law enforcement and judicial services.

Where opportunities for better service are perceived by entrepreneurs, the capital markets permit enormous amounts of money to be raised in a short period of time, either to purchase existing firms which are mismanaged, to start a new firm, or to diversify from one area of law enforcement into another. Each legal system would be constrained by the knowledge that alternative systems exist, in much the same way that individual states in a federal system are constrained in how they make corporation law by the knowledge that it is always possible for companies to reincorporate in another state without moving their assets. Even a rumor of unreliability can be expected to shake the biggest of companies.

In short, there is an increased likelihood that a competitive legal order would be far more responsive to the consumer than a coercive monopoly. In fact, when one seriously compares the potential responsiveness of each system, many readers may concede the point and offer the opposite objection: Competing jurisdictions would most-likely be too responsive to their customers, and this would inevitably lead to injustice and serious conflicts among agencies, creating serious social disruption. What is to prevent one judicial organization from fighting with or ignoring the rulings of another? Why should any organization heed the call of another? These are serious questions deserving serious answers, but first some perspective is needed.

We now have fifty (state) court systems in the United States, each with its own hierarchical structure, plus twelve Federal Circuit Courts of Appeals. There is no general right to appeal from the decision of any one of them to the Supreme Court of the United States. (With few exceptions, the Supreme Court of the United States must choose to accept a petition for review.) And the situation is, in fact, still more diverse. For within each state, there are often numerous appellate court jurisdictions from whose judgment one has no general right to appeal to the supreme court of that state. (Again, with few exceptions, the supreme courts of each state must choose to accept a petition for review.) Moreover, the federal as well as many state appellate court districts are divided into "panels" of judges, who are randomly assigned to hear cases arising from the same jurisdiction. Add to this diversity the many municipal court systems and courts of limited jurisdiction—such as bankruptcy courts—and the image of a unitary court system begins to blur.

The abolition of *geography-based* jurisdictional monopolies would mean only that jurisdictional conflicts would arise between persons who had chosen different court systems *by contract*, rather than as now between persons who have decided to live in different places. Where two disputants have chosen the same court system, no jurisdictional conflict is presented. Where individuals have chosen different systems, conflicts between the two disputants would be governed by the same type of preexisting agreements between the court systems that presently exists between the court systems of states and nations.

Extended conflict between competing court systems is quite unlikely. It is simply not in the interest of repeat players (and most of their clients) to attempt to obtain short-run gains at the cost of long-run conflict. Where they have the opportunity to cooperate, in even the most in-

tense conflicts—warfare, for example—participants tend to evolve a "live and let live" philosophy. Most successful lawyers do not today go to any lengths to pursue a given client's interests: they must live to fight another day and to preserve their ability to effectively defend other clients. Likewise, it is not in the interest of any judge or court system to use or threaten force to resolve a legal or jurisdictional conflict in any but the most serious of circumstances.

Courts and judges have therefore, traditionally found peaceful ways to resolve the two questions most likely to lead to conflict when multiple legal jurisdictions exist: Which court system is to hear the case when more than one might do so? And which law is to be applied when more than one law might be applied? Much of the court-made law of "civil procedure" addresses the first question, and an entire body of law—called the conflict of laws—has arisen spontaneously (that is, it was not imposed by highest authority) to provide a means of resolving the second of these two questions. As one commentator wrote:

> What is the subject matter of the conflict of laws? A fairly neutral definition is that the conflict of laws is the study of whether or not and, if so, in what way, the answer to a legal problem will be affected because the elements of the problem have contacts with more than one jurisdiction.

How much greater the incentive to cooperate would be if competing judicial services did not have access to a steady stream of coercively obtained revenue—that is, by taxation. Those contemplating such a conflict would know that the resources available to fight would not exceed those on hand and those which people were freely willing to contribute to the fight. Unlike national governments, they could not obtain by coercion—that is by draft—personnel to enforce their judgment.

A "renegade" judicial system or law enforcement firm, no matter how financially well endowed it might be as compared with any single rival, would undoubtedly be dwarfed by the capital market as a whole. Imagine the Cook County Sheriff's Office fighting all the other sheriff's offices in the region, state, or country with only the resources it had on hand. (Actually, the jurisdictional dispersion of a non-monopolistic legal order makes McDonald's declaring war on Wendy's and Burger King a far more apt analogy.)

The argument that we need court systems with geography-based jurisdictional monopolies does not stop at the border of a nation-state. Any such argument suggests the need for a single world court system with one Super-Supreme Court to decide international disputes and its own army to enforce its decisions. After all, the logic of the argument against a competitive legal order applies with equal force to autonomous nations. Yet, although governments do go to war against one another—of course, they can tax their populations and draft soldiers—few people favor the coercive monopoly "solution" to the most serious problem of war. Rather than invoking the Power Principle that would mandate the creation of a hierarchy, most people favor the use of "treaties" or agreements—contracts, if you will—between nations to settle their conflicts. That is precisely how a non-monopolistic legal order should and would resolve their conflicts as well.

To better understand the case for a non-monopolistic legal order and the deficiencies of a monopolistic system, posit what most people fear would happen if a unitary international "one-world" court system and police force were adopted. The same fears should apply with equal force to a national monopoly court system, except for the fact that some people have the ability to flee if a single country becomes too tyrannical. The abolition of geography-based jurisdictional monopolies would simply strengthen the constraints on tyranny by making alternative legal systems available without leaving home.

In sum, conflicts between court systems whose jurisdictions geographically overlap present no huge practical problem. It is more reasonable to expect a never-ending series of "little" problems around the edges. Information must be shared; duplicated efforts avoided; minor conflicts settled amicably; and profit margins preserved. As with any other organization, the normal problems confronting business and political rivals—who must constantly strike a balance between competition and cooperation—would have to be managed. How these edges would be smoothed would sometimes require ingenuity. There is no good reason, however, to refrain from seriously pursuing this alternative to the Power Principle.

Imaging a Non-Monopolistic Order

It is no easier to predict the formal organization and division of labor of a future legal order than it is to predict the formal organization of the personal computer market ten years from now. (Of course, ten years ago the challenge would have been to predict the very *existence* of a personal computer market.) Difficulties of prediction notwithstanding, some speculation is needed, for without a conception of what such a legal order would look like, few will be inspired to move in the direction of a Liberty Approach. However, rather than attempt the impossible task of comprehensively assessing the limitless possibilities that freedom makes possible, let us instead imagine that somewhere today there exists the legal order that I shall now describe.

In this hypothetical world, the vast majority of people who work or who have spouses or parents who work are covered by health insurance arrangements (like those provided in our world by such companies as Blue Cross/Blue Shield). In return for a monthly fee, if they are ever sick they receive medical attention by simply presenting their membership card to an approved doctor or hospital. In this hypothetical world, many people also carry a Blue Coif/Blue Gavel card ("Don't get caught without it!") as well. If they ever need legal services, they present their card to an approved lawyer and court system. Of course, as with medical insurance, not all kinds of legal actions are covered and there may be limits to some kinds of coverage; and not everyone makes use of this type of system.

Others belong to a "Rights Maintenance Organization" (or "R.M.O."). These firms keep lawyers on staff as salaried employees (rather than as partners) providing "preventative" legal services. Costs created by needless or hopeless litigation are said to be more tightly controlled than is possible with conventional legal insurance arrangements, and this permits an R.M.O. to offer more coverage for a lower premium. Legal disputes between members of the same R.M.O. are very expeditiously handled internally. And when it is necessary to go to an outside court, the R.M.O. will pay the court fee (having arranged group discounts for its members in advance). On the other hand, the freedom to pick your own lawyer within an R.M.O. is

necessarily limited, and this feature will not satisfy everyone. Another drawback is the fact that the client is more dependent on the R.M.O.'s determination that a lawsuit is cost justified than is a client who has coverage by Blue Coif/Blue Gavel.

Large retailers (like Sears) who sell insurance (Allstate), investment (Dean Witter), and real estate (Coldwell Banker) services also sell legal services, as do some bank and trust companies. Most offer in-house revolving charge accounts as an alternative to insurance and other kinds of credit arrangements. Law firm franchises dot the landscape with well-lit (some think garish) "Golden Scales of Justice" signs prominently displayed at street-side. Located in shopping malls and along busy streets, these firms advertise nationally and specialize in high volume (some say homogenized) practices, handling routine legal matters at standardized fees. (They accept Blue Coif/Blue Gavel and major credit cards.)

Such mass merchandising is not for everyone. Many clients still prefer the personal touch and custom-tailored work of solo practitioners who thrive by providing a more individualized approach. Some of these independent lawyers offer more specialized expertise than the chains; others try to be "generalists" and claim that they can spot interrelated legal problems that the lawyers who only handle certain kinds of less complicated legal matters often miss. Most large companies with commercial legal problems prefer the elegance, prestige, and economies of scale of large, traditionally organized high-rise law firms. (Some things never change.)

Other means of financing lawsuits besides insurance are also available. A few credit card companies offer extended payment plans when used for legal services. Contingency-fee-based entrepreneurs (who, like everyone else, can and do advertise widely) serve many who cannot or choose not to advance the money for legal services. (However, to help minimize the number of improvident lawsuits, some court systems have established rules restricting such practices in a manner similar to the rules established in our world by private stock and mercantile exchanges.) Such legal entrepreneurs are a bit more risk averse than they are in our legal system since, if they lose, their clients will be liable for the full legal expenses of the other side. Still, they provide an important service to many who could not otherwise afford legal services.

The judicial order mirrors the diversity of the legal profession as a whole. There are well-known and well-advertised national judicial centers, with regional and local offices, that handle the bulk of routine commercial practice. (These firms sometimes attempt to satisfy the fairness function by hiring lay jurors to decide simple factual matters.) There are small firms that handle specialized legal matters like maritime cases and patent or mineral disputes. (These firms almost never use lay jurors, but rely instead on panels of professional experts who receive retainers from the company.) And there are thousands of individual judges who hang out a shingle in neighborhoods after registering with the *National Registry of Judges and Justices of the Peace*, which requires of its members a minimum (some say minimal) level of legal education and experience. Many of these judges share the ethnic heritage of the community where their offices are located. Many of these judges are multilingual.

Individuals and businesses tend to avoid judges and judicial systems which lack some significant certification of quality. *The Harvard Law School Guide to the American Judiciary*, for example, is one useful source of information (but it is occasionally accused of being somewhat elitist). *Who's Who in the American Judiciary*, published by a nonacademic publishing firm is another. Others prefer the annual guide published by the Consumers Union (it accepts no advertising). Still others prefer the *Whole Earth Catalog of Judges* (though it usually is a bit out of date). *The Michelin Guide to International Law Judges* uses a five-star rating system. Even with all of these publications providing information about the legal system that is unavailable to us in our world, newspapers and television "news magazines" never seem to tire of stories about judicial corruption. Such exposés sometimes lead to reforms by the various rating agencies.

To attract business most judges obtain enforcement of their judgments by subscribing to services offered by police companies. Otherwise only the moral authority of their rulings would induce compliance. Since all law enforcement agencies are legally liable to those who can prove to the satisfaction of a special appellate system that an erroneous judgment had been imposed upon them, no enforcement company will long maintain a relationship with an unreliable judicial agency or an unregistered judge. (Some judges even advertise to law enforcement firms and the general public: "Judgment affirmed or your money back!") Until a few years ago, several large judicial agencies owned their own police company (more on this development in a moment).

Surprisingly, however, not every judge utilizes the services of an enforcement agency. *The American Association of Adjudicators* (AAA) does not promise enforcement but only a fair and just decision. All parties must contractually agree to binding adjudication in a form recognized as enforceable by other courts who do have enforcement arrangements and who will only on rare occasions fail to summarily honor an AAA adjudicator's decision. Other judges don't rely even indirectly on law enforcement agencies. In some discrete communities—like the diamond trading community in our world whose judges apply a variant of Jewish law—social sanctions are all that are required to effectively enforce judgments.

The enforcement agencies themselves tend to specialize in what we call criminal or civil cases. The distinction between these areas is not considered to be a theoretical matter, but turns instead on the differing enforcement problems that necessitate a division of labor. Those firms specializing in "criminal" matters either catch criminals or provide work to those who may not be able to earn enough to satisfy the judgment against them if left on their own. The "civil" agencies must be adept at sorting through paper arrangements to locate assets that can be legitimately seized and sold to satisfy judgments. Occasionally, when a civil agency is done with a convicted defendant, the case must be turned over to a criminal agency to collect the balance. To be sure, conflicts between enforcement agencies have arisen. Most have been quickly resolved by the agencies themselves. Some have required other agencies to intervene.

In addition, all law enforcement agencies subscribe to one of two competing computer networks that gather and store information about individuals who have been convicted of offenses (in much the same manner as govern-

ment police departments and private credit rating agencies share information in our world). Such services provide their clients with near instantaneous information about individuals and firms that they might be contemplating doing business with (something like the information that local Better Business Bureaus in our world claim to provide) and persons whom they might consider excluding from their property.

While it does not directly concern the legal order, some may be interested to learn that most common areas in this world are as accessible as private shopping centers and other commercial and residential developments are in ours. Smaller parks, however, tend to be for the exclusive use of those neighborhood residents and their guests who pay annual fees; larger parks issue single admission tickets and season passes. People who do not use the parks at all are free to spend their money on other goods and services.

Intercity highways charge tolls. Urban commuter highways issue license plates that vary in price (and color) depending on whether or not they can be used during "rush hours." (Price rationing has eliminated regular traffic jams. For example, as with long distance phone service, usage between 8:00 p.m. and 6:00 a.m. is heavily discounted.) Tourists can obtain temporary permits at outlying toll booths. Some firms in this world are now experimenting with electronic systems that monitor highway usage—with rates that can more precisely reflect such factors as distance, time, and day—and send monthly bills to users. With road use subject to market pricing, competing private train and bus firms seem to do better in this world than in ours, where road use is rationed by gas prices and a queue.

All new commercial and residential developments must build their own roads, and all leases and land titles include both contractual rights of access and stipulated maintenance fees. Ownership of formerly public streets has been assigned to road companies. Stock in these companies belongs to those who own commercial or residential property adjacent to the streets, and these property owners also receive contractual rights of access and egress. These companies have continued to merge and break up with one another until their sizes and configurations are economically efficient.

(Aside: What now follows is a worse case scenario offered only to show the stability of such a legal order. What makes the story particularly unlikely to occur in a nonmonopolistic legal order is that its ending would be so easily foreseeable.)

Some years ago, one quite serious problem with the legal system did develop, however. About ten years after the monopoly legal system was ended, "TopCops," one of the country's largest law enforcement agencies (commanding about one-third of the national market in protective services) merged with Justice, Inc., one of the largest court systems. Many observers were quite disturbed by this development, and the other judicial companies and law enforcement agencies also became concerned. Since the merger violated no one's rights, no legal action against this new institution could be taken. The fears, however, turned out to be well founded.

Initially the operation of this organization appeared to be unobjectionable, but after a time rumors began to circulate that when subscribers to TopCops came into conflict with subscribers to other agencies, Justice, Inc., sided with TopCops in some highly questionable decisions. In response to these rumors, both the Chief Judge of Justice, Inc., and the corporate president of TopCops denied that any lack of fairness existed, and they publicly promised an internal investigation. Still the rumors persisted and took a new turn. Officers of TopCops were said to have been accused of committing crimes, but Justice, Inc., rarely if ever found for their accusers.

Unbeknownst to the general public, in response to these rumors a secret task force was formed by a consortium of major rival enforcement agencies and court systems to devise a strategy to deal with the problem. (It was thought at the time that secrecy was important so as not to shake the faith of the general public in the legal structure as a whole.) The following policies were quietly adopted and implemented:

> First, no subscriber of a court system belonging to the consortium would submit to the sole jurisdiction of Justice, Inc. This had not been the usual practice formerly because avoiding duplicate legal actions saved costs for both sides.
>
> Second, all decisions of Justice, Inc., that were in conflict with a decision of a court belonging to the consortium were to be automatically appealed to a third court system according to the appellate structure established by the Cambridge Convention (of which Justice, Inc., was a member).
>
> Finally, no decision of Justice, Inc., that conflicted with that of a member court would be recognized and enforced by a member law enforcement agency.

Smaller court systems and law enforcement agencies quickly got wind of the new policy and began emulating it. The immediate consequence of these actions was a drastic increase in the adjudication and enforcement costs incurred by Justice, Inc., and TopCops. A backlog of cases began to develop, and the rates of both companies eventually had to be raised. As a result, subscribers began switching to alternative services. A major faction of the board of directors of TopCops resigned when the board refused to adopt any significant reforms. Instead, the remainder of the board voted to sever their affiliation with the Cambridge Convention and began to search for alliances with other companies. (The true reason for this apparently irrational behavior was discovered only later.)

Several small enforcement companies and even one medium size company were induced to affiliate with TopCops, forming the *Confederation of Enforcement Agencies.* It was rumored that some had been intimidated to affiliate. These alliances, however, did little more than make up for the steady drop in both subscribers and revenues. At its zenith, the entire Confederation controlled about a third of the enforcement market—about the same share of the market that TopCops alone had previously controlled.

In response, the Cambridge Convention formally severed relations with the members of the Confederation and went public with its factual findings. Notwithstanding the Confederation's public protests, its already jittery subscribers began to repudiate their contracts in large numbers. The Confederation first announced that it would no longer give pro rata refunds for subscription fees. When resignations nonetheless persisted, the Confederation announced that because they were a result of "unfounded panic," it

would not recognize them as valid until the "rumor-mongering" of the "Cambridge Cartel" ceased.

Then a new and frightening story broke. It was learned that the board members of TopCops who had pioneered these developments were secretly affiliated with members of the remnants of the old "organized crime syndicate." Since all victimless crimes—crimes involving drugs, gambling, prostitution, pornography, and so on—had long ago been abolished, the syndicate's power and income had drastically declined. It obtained what income it received primarily from organizing and attempting to monopolize burglary, auto theft, and extortion activities. Of course, even these activities were not as profitable as they had once been because preventative law enforcement efforts had greatly increased, and the corruption of law enforcement officers had become much more difficult. Hence the scheme to infiltrate TopCops was hatched.

A search by independent investigative journalists of the court records made available by the consortium revealed that the syndicate-affiliated criminals had received unjustifiably favorable treatment by Justice, Inc. With this news, the Cambridge Convention communicated the following extraordinary order to all law enforcement agencies and to the general public:

> No order of Justice, Inc. is to be recognized or obeyed. Free protection is to be extended to any subscriber of TopCops who is threatened in any way. Any victim of a burglary or auto theft whose case had been adversely decided by Justice, Inc., is entitled to a rehearing, and all previously acquitted defendants in such cases are subject to immediate re-arrest and re-trial. All TopCops employees are to be placed under immediate surveillance.

With this action, Justice, Inc., was forced to close its operations because of lack of business. The remainder of TopCops' honest subscribers repudiated their affiliation, and scores of burglars and auto thieves were placed under arrest. (Several of TopCops' employees turned out to have been acquitted burglary and auto theft defendants.) Without a cash flow, and with the risk of personal liability now present, TopCops' employees began quitting the company in very large numbers. Since TopCops had been a national organization, it did not have a single location that was strategically defensible, so there was little armed resistance to the law enforcement actions of the consortium members. In most instances, TopCops facilities were within a few blocks of other agencies. Within a matter of weeks, the TopCops organization had been disbanded and its assets auctioned off to provide funds to partially reimburse persons whose rights it had violated. Soon, offices formerly operated by TopCops were reopened for business as new branches of other established companies.

The entire unhappy episode had taken not quite six months to unfold, but some important lessons were learned. First, the initial euphoria surrounding the abolition of the archaic monopoly legal system was tempered. People realized that a non-monopolistic legal order was no panacea for the problems of law enforcement and adjudication. Diligence was still required to prevent injustice and tyranny from recurring. Second, the Cambridge Convention announced that in the future it would not recognize any court system created or purchased by a law enforcement agency. Court systems were still able to administer a small enforcement contingent, but strict guidelines were formulated for such arrangements. Third, organized burglary, auto theft, and extortion rings had been dealt a serious financial blow. (They still persist, however.)

Finally, after all the turmoil and talk of "crisis" had subsided, most people came to realize that their new legal order was far more stable than many of the "old guard" who had grown up under the ancient regime had expected it to be. The entire unhappy incident had unfolded in a matter of months and had been successfully and largely peacefully resolved. And this realization extended to members of the law enforcement community as well, making any future forays into aggressive activities much less likely than ever before.

Conclusion: Beyond Justice in a Free Society

We are now in a position to provide new answers to the three problems of power that were posed in Part I of this article.

Who gets the power? Those court systems whose jurisdiction people agree to accept and those law enforcement agencies to which people are willing to subscribe.

How do you keep power in the hands of the good? By permitting people to withdraw their consent and their financial support from those who are perceived to be corrupt or to be advantage-takers and letting them shift their support to others who are perceived to be better. The potentially rapid swing of resources and the ability of law-abiding organizations to organize their resistance to aggression can help assure that swift preventative measures will be smoothly implemented.

How do you prevent holders of power from receiving undue legitimacy? No non-monopolistic court would have any special legal privileges. Stripped of the legitimacy traditionally accorded rulers, private court systems would be constantly scrutinized to detect any self-serving behavior. Their legitimacy would depend solely on their individual reputations. While a tradition of integrity would heavily shape a reputation, an effective court system would need to ensure that its current practices and policies did not jeopardize its reputation in any way.

Two final questions remain to be addressed. First, how can we expect that the substantive rights and remedies suggested by a Liberty Approach will be the law adopted by a non-monopolistic legal order? After all, these rights go far beyond the simple abolition of monopolistic legal jurisdictions. As a practical matter the answer is quite simple. It is hard to imagine a society that did not adhere to some version of the rights and remedies prescribed by a Liberty Approach ever accepting a non-monopolistic legal order in the first instance. In other words, a societal consensus supporting these rights and remedies would seem to be a precondition for ending the monopolistic aspect of our legal system. Moreover, the inherent stability of a competitive system is likely to preserve this initial consensus. In the last analysis, where no consensus about liberty and individual rights exists, it is unlikely that a coercive monopoly of power will do much to prevent violations of these rights violations from occurring.

Second, while acknowledging that only a summary description of a Liberty Approach has been presented here, even the most open-minded reader is likely to have a lingering doubt. There may remain a sense that a Liberty Approach— even if it operated as advertised—may somehow not be *enough*; that to achieve the kind of society to which we aspire requires more than the rights, duties, and

legal order of a Liberty Approach.

In an important respect, I think that such a doubt is entirely justified. A Liberty Approach alone is not enough to ensure that a good society will be achieved—a world with culture, with learning, with wisdom, with generosity, with manners, with respect for others, with integrity, with a sense of humor, and much more. A Liberty Approach neither includes such values in its prescriptions nor seems to assure that by adhering to its prescriptions such a world will be attained. So what does a Liberty Approach have to offer to those who share these values?

Lon Fuller once distinguished between two moralities—the morality of aspiration and the morality of duty:

> The morality of aspiration... is the morality of the Good Life, of excellence, of the fullest realization of human powers. [A] man might fail to realize his full capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing. ...
>
> Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. ... It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living

A Liberty Approach, if correct, is a morality of duty. It purports to specify what justice is and how it may best be pursued. It is not an entire ethical system for achieving a good society. Adherents to a Liberty Approach seek to identify "the basic rules without which an ordered society is impossible." They believe that to legally require any more than this—to attempt to enforce a morality of aspiration as we would a morality of duty—will ultimately undermine both projects. They do not deny that more than justice is important. Nor do they deny that the pursuit of justice will be influenced by the extent to which people adhere to a morality of aspiration. But they believe no less firmly that the framework of justice provided by a Liberty Approach offers humankind the best opportunity to pursue both virtue and justice.

If the morality of aspiration is not enforced by a coercive monopoly in a Liberty Approach, then what kind of institutions would enforce it? In a society that rigorously adhered to a Liberty Approach, the so-called "intermediate" institutions that have traditionally bridged the gap between individual and State—schools, theaters, publishers, clubs, neighborhood groups, charities, religious and fraternal groups, and other voluntary associations—would continue to serve their vital function of developing and inculcating values. But in a completely free society, they would do so unburdened by the forcible interference of third parties that is made possible by an adherence to the Power Principle. Because they are noncoercive, these institutions—like the market process—are inadequately appreciated by many. But it is no coincidence that totalitarian regimes invariably strive to regulate, co-opt, subvert, and ultimately to completely destroy these institutions.

Are such voluntary institutions enough? We have no way of being sure. But, as I have repeatedly stressed here, a system based on the Power Principle offers no guarantees either. Even an ideally wielded coercive monopoly of power is only as "good" as the persons wielding the power. But power corrupts those who wield it, and virtue is its first victim. Our values come not from coercion but from the exhortations and examples set by countless individuals and groups.

The rights, remedies, and legal order specified by a Liberty Approach will not end all injustice. There will always be injustice, just as there will always be corruption and advantage-taking. But although a Liberty Approach offers no guarantees, it does enable us to better *pursue* justice in a free society by providing a clear idea of what we are pursuing and how we may best pursue it without undermining our precious freedom in the process. For those who believe in liberty and justice for all, a Liberty Approach may be an idea whose time has come. V

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