# Humane Studies Review

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### A Guide to Research and Study

**Inside HSR:**

- Do the production and enforcement of law require a monopoly? Tom W. Bell examines the history, economics, and philosophy of "polycentric" law and proposes exciting research in jurisprudence and legal history.

- How do trust, honesty, and security arise? What provides the stability of modern society? Albert Loan examines the spontaneous rise and growth of the institutions of "suretyship" and "assurance" and presents a set of problems for scholars in the humane disciplines.

- Anthony de Jasay's book *Social Contract, Free Ride* argues against the claim that the state is necessary to solve the "public goods problem." Robert Sugden, in reviewing the book, claims that Jasay's "whole argument misses the point." Jasay responds.

***CURRENT ISSUES IN LAW***

## Polycentric Law

### *by Tom W. Bell*

As any cynic will confirm, money and law have a lot in common. But their ties run even deeper than most suspect. Money and law had similar origins: both arose spontaneously out of the undirected actions of individuals seeking common standards for mutual coordination. Money and law developed in parallel fashion, too: medieval Europeans enjoyed competition in currencies and legal systems until monarchies took over both fields. And state monopolies in money and law now present common hazards: they are imposed by fiat, inefficiently operated, and (as the cynics point out) jointly corrupting. However, a new generation of scholars has come to question the need for state monopolies in money and law. In the place of central banks they advocate a free banking system. In the place

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***BOOK REVIEW***

## Suckers, Free Riders, and Public Goods

### *by Robert Sugden*

**A review of Anthony de Jasay's, *Social Contract, Free Ride* (New York: Oxford University Press, 1989)**

In political and economic theory, it is a commonplace to say that government is necessary because of the existence of public goods. These are goods which everyone wants but which, because of the free-rider problem, it is not in anyone's interest to bear the costs of supplying. This justification for government dates back to Hobbes, who argued that civil order was a public good that could be supplied only by a sovereign with a monopoly in the use of force. Thus, according to Hobbes, rational individuals in a "state of nature" would enter into a social contract by which each would submit to an absolute sovereign, provided everyone else did the same. Modern contractarian writers, such as John Rawls and James Buchanan, have developed variants of this argument to justify governments which, although subject to more constitutional constraints than Hobbes' Leviathan, are responsible for producing a wider range

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**To our readers:**

This issue of ***Humane Studies Review*** comes after a longer hiatus than we had expected. This hiatus encompasses, roughly, the period of the ongoing revolutions in central and eastern Europe. During this time, the Editor of ***HSR*** was busy assisting a new network of scholars, students, journals, and institutes, and arranging translations of textbooks and important works in the classical liberal tradition. With the appointment of Michael Brown as Managing Editor, the ***Review*** resumes publication, and will continue on a schedule of three issues per academic year.

*The Editors*

**IHS The Institute for Humane Studies at George Mason University**

*Polycentric Law (Continued from page 1)*
of state legal systems they advocate overlapping private jurisdictions in free and open competition—a *polycentric* legal system.

This article offers an introduction to polycentric law. It begins by reviewing research on customary legal systems, using Anglo-Saxon law as an exemplar. Then the article traces how state law rose to domination in the competition among medieval European legal systems. This account reveals that privately produced law survived the state's onslaught and has recently enjoyed a resurgence. After surveying current theories of polycentric legal systems, I will suggest another parallel between money and law: just as research in free banking has recently enjoyed a surge of interest, so too the study of polycentric law stands on the verge of new and rapid growth. (In this article I employ "polycentric law," "privately produced law," and "purely private law" interchangeably. Others use "non-monopolistic law." See Randy Barnett, "Four Senses of the Private-Public Law Distinction," in *Harvard Journal of Law and Public Policy* 9 [Spring 1986, pp. 267-276].)

**Law Prior to the State**

Friedrich A. Hayek finds the origins of law in the process through which complex social orders naturally evolve by a manner akin to natural selection. Not all types of behavior support social life, he explains. Some—like violence, theft, and deceit—undercut it. "Society can thus exist only if by a process of selection rules have evolved which lead individuals to behave in a manner which makes social life possible." (F. A. Hayek, *Law, Legislation, and Liberty*, Vol. 1 [Chicago: University of Chicago Press, 1973], p. 44) The development of these rules predates courts, written law, and even the concept of law itself: "At least in primitive human society, scarcely less than in animal societies, the structure of social life is determined by rules of conduct which manifest themselves only by being in fact observed." (Hayek, 1973, p. 44) Because such customary laws exist prior to state laws, they have attracted the attention of those who research polycentric legal systems.

Bruce Benson examines the customary legal system of the Kapauku Papuans of West New Guinea in his recent book on purely private law. (Bruce L. Benson, *The Enterprise of Law*, [San Francisco: Pacific Research Institute, 1990], pp. 15-21) This "primitive" legal system exhibited some remarkably sophisticated qualities. It emphasized individualism, physical freedom, and private property rights; sorted out fantastically complicated jurisdictional conflicts; and provided mechanisms for "legislating" changes to customary law. (For detailed information about the Kapauku legal system turn to Benson's main source: Leopold Popisil, *Anthropology of Law: A Comparative Theory* [New York: Harper and Row, 1971].) In a separate work, Benson points out similar features in the legal systems of the Yuroks of Northern California and the Ifuago of Northern Luzon. (Bruce L. Benson, "Enforcement of Property Rights in Primitive Societies: Law Without Government," in *Journal Of Libertarian Studies*, Vol. 9, Winter 1989, pp. 1-26. For more detailed accounts, see Benson's main sources: Walter Goldschmidt, "Ethics and The Structure of Society: An Ethnological Contribution to the Sociology of Knowledge," in *American Anthropologist*, Vol. 53, October-December 1951, pp. 506-524; E. Adamson Hoebel, *The Law of Primitive Man* [Cambridge, MA: Harvard University Press, 1954]; R. F. Barton, "Procedure Among the Ifugao," in Paul Buchanan, ed., *Law and Warfare* [Garden City, NY: The National History Press, 1967]. See also Benson's article, "The Lost Victim and Other Failures of the Public Law Experiment," in *Harvard Journal of Law and Public Policy* ,Vol. 9, Spring 1986, pp. 399-427.)

David Friedman adopts medieval Iceland as his favorite example of a polycentric legal system. He writes that it ". . . might almost have been invented by a mad economist to test the lengths to which market systems could supplant government in its most fundamental functions." Friedman summarizes and interprets research on Icelandic law in the piece quoted above and, more briefly, in a later, larger work. (David D. Friedman, "Private Creation and Enforcement of Law: A Historical Case," in *Journal of Legal Studies*, Vol. 8, March 1979, p. 400; *The Machinery Of Freedom*, 2nd ed. [La Salle, IL: Open Court, 1989]) Several recent or forthcoming works give outstanding introductions to the legal system that flourished in Iceland during the "free state period," all highlighting the system's effectiveness and flexibility. These sources also describe the relations between Iceland's legal system and the other institutions of this essentially voluntaristic, stateless society. Note that, contrary to popular assumptions, the system did not depend upon a kinship or territorial/tribal social structure. (William I. Miller, *Bloodtaking and Peacemaking* [Chicago: University of Chicago Press, 1990]; Birgir T. Solvason, *Ordered Anarchy and Rent-Seeking: The Old Icelandic Commonwealth, 930-1262* [Fairfax, VA: George Mason University Department of Economics Doctoral Dissertation, forthcoming]; Jesse L. Byock, *Medieval Iceland* [Berkeley, CA: University of California Press, 1988])

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

Celtic Ireland's polycentric legal system has also attracted a great deal of attention. This system flourished for a longer time than any other of which we have detailed knowledge, and has left a truly massive amount of records. (For an introduction to this see Joseph R. Peden "Property Rights in Celtic Irish Law," in *Journal Of Libertarian Studies*, Vol. 1, 1977, pp. 81-95. A more detailed source is the work of D. A. Binchy, ed., *Studies in Early Irish Law* [Dublin: Irish University Press, 1936] . See also his "Ancient Irish Law," in *The Irish Jurist*, Vol. 1, 1966, pp. 84-92.)

Diligent researchers will find still other historical examples demonstrating the viability of privately produced law. See for instance Harold Berman's discussion of the European folk law and mercantile law, or E. Adamson Hoebel's description of
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***BIBLIOGRAPHIC ESSAY***

# Institutional Bases of the Spontaneous Order: Surety and Assurance

## *by Albert Loan*

Systematically explaining the emergence of spontaneous orders by "invisible hand" processes has been, since Adam Smith, an integral part of the research program of economics. Cooperation is shown to emerge in a society of self-interested individuals, who spontaneously create a peaceful and productive social order through their repeated interaction with each other, without consciously intending to do so. Since the writing of David Hume's *Treatise On Human Nature* in 1740, many social theorists have elaborated on the way rules that promote social order emerge without deliberate attempts to create them. In a community of people who interact frequently, the principle of reciprocity serves to reinforce cooperative behavior since the benefits of cheating are often outweighed by the cost of losing the trust and the business of other members of the community. Even in instances where strict reciprocity does not occur, due to the number of individual actors being large or because contacts between any two individuals are typically "one off," mechanisms can emerge to coordinate activity on a voluntary basis. (For recent treatments of spontaneous social order theory see Robert Axelrod, *The Evolution Of Cooperation* [New York: Basic Books, 1984]; Robert Sugden, The *Economics of Rights, Cooperation, and Welfare* [Oxford: Basil Blackwell, 1986]; Anthony De Jasay, *Social Contract, Free Ride* [New York: Oxford University Press, 1989]; and David Schmidtz, *The Limits of Government* [Boulder, CO: Westview Press, 1991]. For a view of the spontaneous emergence of arrangements for dispute settlements, see Peter Stein, *Legal Institutions: The Development of Dispute Settlements* [London: Butterworths, 1984], and *Legal Evolution* [New York: Cambridge University Press, 1980].) These writers have sought to show how the rules on which such an order is founded, such as the observance of property rights and the performance of promises, could result from rational self-interested behavior, despite the apparent incentives to cheat and to "free ride."

This paper examines some historical evidence that supports this recent body of work. It examines how the institutions of suretyship and assurance spontaneously emerged as the unintended result of self-interested action and how they embodied the stabilizing tacit norms of trust, fellowship, and thrift, which served to promote and preserve these institutions.

**The Nature of Suretyship and Assurance**

Suretyship and assurance are closely related institutions in which each member of a group assumes some form of responsibility for the others in the group, thereby diffusing among the group the burden of risks which might otherwise fall on a single individual. Suretyship involves members of the group assuming some degree of responsibility for any unpaid debts, defaults on agreements, negligence, and so forth of other members of the group. In the case of assurance members pool resources to provide for relief from a hazard they face in common as members of that group. Both, though the precursors of the modern institutions of insurance, are in their purest form reciprocal arrangements, whereas insurance generally involves one party (designated in advance as the insurer) assuming some of the risk faced by another (the insured) in exchange for a monetary premium. All three institutions operate on the principle of diffusing the burden of various kinds of risk, but in the case of insurance it is a specialized intermediary who manages the diffusion of the risks and in the end takes final responsibility.

The earliest well-documented instances of suretyship in the West are traceable to forms of fellowship within the Saxon clans of England and their tribal Germanic forbears, and to tribal Celtic society. The *borh* system and *frankpledge* are notable examples of early forms of suretyship in medieval England, while other instances can be found in the experience of Medieval Iceland and Celtic Ireland. There are isolated documented examples of assurance dating back to as early as the 10th century BC in the Eastern Mediterranean. (For a useful account of the assurance of sea voyages during this time and of marine insurance in general see William Winter, *Marine Insurance: Its Principles and Practice* [New York: McGraw-Hill, 1952].) In many cases there is considerable controversy over the origins of particular forms of suretyship and assurance, partly because many types date back to periods for which records are very scarce.

The rules and norms that characterized these institutions allowed them to function and survive, in one form or another, centuries of political and social change. They owe their origin to a spontaneous informal process reliant on custom and traditions, the functions of which were unknown to those whose welfare they increased. What P.H.J.H. Gosden wrote with regard to assurance within the British friendly societies of the 18th and 19th centuries applies as well to other forms of mutual risk-bearing:

> they do not owe their origin to parliamentary influence; nor to private benevolence; nor even to the recommendation of men of acknowledged abilities, or professed politicians. [They] originated among the persons on whom chiefly they were intended to operate: [these men] foresaw how possible, and even probable, it was that they, in their turn, should ere long be overtaken by

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***Polycentric Law (Continued from page 2)***

Comanche law. (Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* [Cambridge, MA: Harvard University Press, 1983]; E. Adamson Hoebel, "Law Ways of the Comanche Indians," in P. Buchanan [1967]) Berman points out that in Western legal history, pluralism is the rule and monopoly the exception. See also the accounts of the development of a customary legal system in the mining camps of the old West in Terry L. Anderson and P. J. Hill, "An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West," in *Journal of Libertarian Studies* (Vol. 3, 1979, pp. 9-29). Still more customary legal systems wait to be researched. (For an anthropological study of systems of mutual responsibility, see Sally Fox Moore, *Law as Process: An Anthropological Approach* [London: Routledge & Kegan Paul, 1978].)

What do these many historical examples of polycentric law tell us? After a wide review of the field, Benson concludes that each customary legal system has six basic features:

1) a predominant concern for individual rights and private property;
2) laws enforced by victims backed by reciprocal agreements;
3) standard adjudicative procedures established to avoid violence;
4) offenses treated as torts punishable by economic restitution;
5) strong incentives for the guilty to yield to prescribed punishment due to the threat of social ostracism; and
6) legal change via an evolutionary process of developing customs and norms. (Benson, 1990, p. 21)

**Anglo-Saxon Customary Law**

The Anglo-Saxon legal system gives us a particularly good example of a legal system embodying the six features Benson finds throughout customary law. A system of surety, known as borh, provided the foundation of Anglo-Saxon law. Under the borh system a set of ten to twelve individuals, defined at first by kinship but later by contractual agreement, would form a group to pledge surety for the good behavior of its members. The group would back up this pledge by paying the fines of its members if they were found guilty of violating customary law. A surety group thus had strong financial incentives to police its members and exclude those who persistently engaged in criminal behavior. Exclusion served as a powerful sanction: "Every person either had sureties and pledge associates or one would not be able to function beyond one's own land, as no one would deal with one who had no bond or who could not get anyone to pledge their surety to them." (Leonard P. Liggio, "The Transportation of Criminals: A Brief Political-Economic History," in Randy E. Barnett and John Hagel III, eds., *Assessing The Criminal: Restitution, Retribution and the Legal Process* [Cambridge, MA: Ballinger Publishing Co., 1977])

*The Anglo-Saxon legal system gives us a particularly good example of a legal system embodying the six features Benson finds throughout customary law.*

Such reciprocal voluntary agreements have a certain timeless appeal. Consider the modern parallels: like insurance agencies, the surety groups helped members to spread risks by pooling assets; like credit bureaus, they vouched for the good standing of their own members and denied access to outsiders who had demonstrated their untrustworthiness; like credit card companies, they stood behind the claims and acts of their members. Whether ancient or modern, these common solutions to common problems all arose out of the free and spontaneous cooperation of self-interested agents. (For in depth treatment of the borh system and its replacement after 1066 by the related but distinct and *non-voluntary* system called frankpledge, see William A. Morris, *The Frankpledge System* [New York: Longmans, Green & Co, 1910], and J. E. A. Jolliffe, *The Constitutional History of Medieval England* [New York: W.W. Norton & Co, 1961].)

The Anglo-Saxon courts, called *moots*, were public assemblies of common men and neighbors. The moots did not expend their efforts on creating or codifying the law; they left that to custom and to the essentially declaratory law codes of kings. The outcome of a dispute turned entirely on the facts of the case, which were usually established through ritual oath-giving. The disputants first swore to their accusations and denials. Each party then called on oath helpers (including members of their surety groups) to back up these claims with oaths of their own. For the court to accept any one of these oaths, it would have to be given flawlessly—though the poetic form of the oaths made it easier to meet this requirement. Deadlocks were often settled by ordeals of fire or water. Berman points out that the ambiguity of oath taking and ordeals left room for flexible judgements, while the fear of supernatural retribution and the vital importance of a good reputation made perjury a matter that no one would take lightly. Consequently, these procedures were not simply mystical or "crazy." Similar points apply to most studies of customary law.

Anglo-Saxon law had no category for crimes against the state or against society—it recognized only crimes against *individuals*. As in other customary legal systems, the moots typically demanded that criminals pay restitution or composition to their victims—or else face the hazards of outlawry and blood-feud. Murderers owed *wergeld* (literally, "man-money") to their victims' kin. Lesser criminals owed their victims lesser fines, elaborately graded according to the victim's status and the importance of the limb, hand, digit, fingertip, etc., that had been lost. In recognition of the importance of private property, heavier penalties were also imposed for crimes occurring in or about the home, the most serious being *hamesucken*, i.e. smashing up someone's house. This emphasis on the home reflected Anglo-Saxon law's concern with protecting property rights, including the notion of a protected private space. The law codes of early medieval Europe consisted largely of lists of offenses and the corresponding schedules of payments. In issuing these, Kings were not legislating in the modern sense: they were rather codifying and declaring already existing custom and practice.

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

> Jurisdiction in most types of cases depended on the consent of the parties. Even if they consented to appear, they might not remain throughout, and even if they remained, the moot generally could not compel them to submit to its decision. Thus the procedure of the moot had to assume, and to help create, a sufficient degree of trust between the parties to permit the system to operate. . . .(Berman, 1983, p. 56)

This Anglo-Saxon customary legal system protected the liberties of the English long and well. Royal law rose to domination only after a bitter struggle, and even then the lasting imprint of customary law helped England to remain a relatively free society.

*The same person, in different capacities (merchant, cleric, vassal, townsman, etc.), enjoyed a significant degree of choice among legal systems, forcing them to compete. This competition for "customers" and the interaction among rivalrous legal systems resulted in many of the legal innovations that we take for granted today.*

**The Rise of Royal Law**

In many societies, state law has advanced rapidly on the heels of military conquest. It entered England, however, with almost imperceptible subtlety. Two factors prepared the stage. First, the constant threat of foreign invaders, particularly the Danes, had concentrated power in the hands of England's defenders. Second, the influence of Christianity imbued the throne with a godly quality, allowing kings to claim a divine mandate. Onto this stage strode Alfred, king of Wessex, during the last quarter of the ninth century.

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

This surcharge, called *wite*, made enforcing the law a profitable business. King Alfred, strengthened by threat of invasion and emboldened by his holy title, assumed the duty of preventing all fighting within his kingdom. He did this by extending the special jurisdiction which the king had always exercised over his own household to cover the old Roman highways and eventually the entire kingdom. In effect, the boundaries of the royal household expanded to encompass the entire realm, and the protection of the peace and safety of private households was subsumed into that of the king. Alfred declared that anyone found guilty of assault owed him *wite* for violating the king's peace. He lacked the ability to back up this claim, however, and it went largely ignored. But he had set a trend in motion. Over the next few centuries royal law would grow stronger, with later monarchs such as Athelstan and Knut creating the skeleton of a royal legal system. This reflected the reality that almost half of England under the later Saxon kings was conquered territory (the Danelaw, the Five Boroughs, and York) which had been overrun by the Vikings after the great invasion of 853 and then regained by Alfred's successors as kings of Wessex. Faced with the problem of governing territory where the old Saxon institutions had disappeared, they were driven to create a governmental and legal system which was, for the time, unusually uniform and centralized (e.g. in its use of a standardized unit of law and administration, the *hundred* ). This centralization received a major boost with the Norman conquest of 1066, when an alien minority of rulers found the system they inherited highly congenial. Eventually royal law consumed virtually all of England's legal order, as it did in countries throughout Europe. But first royal law would have to contend with some stiff competition.

**From Polycentric Law to State Law**

A legal revolution swept through Europe in the years between 1050 and 1200. While the power of the Church rose to rival that of kings, the law of the church—inspired by the newly rediscovered Justinian codification of Roman law—rose to new levels of sophistication. The key events in this process were the Gregorian reforms and the Investiture Crisis of the twelfth century. The actual issue, whether kings could invest bishops with the symbols of their office and so "make bishops," may seem obscure to us, but it had profound effects. These events transformed the church into an independent institution, distinct from monarchies and staffed by a clergy who formed an independent order in society, marked off by their vow of celibacy. (In marked contrast, the church in Byzantium remained the creature of the emperor and never gained independence.) Following its achievement of independence, the church created the great system of canon law, with commentators from Gratian onwards turning a haphazard collection of edicts into a massive, sophisticated intellectual system. A major impetus to this process was provided by the previously mentioned rediscovery of Roman law in the form of Justinian codes, which were a compilation of the decisions of Roman jurists. The Church's new-found independence in turn helped to develop the state, as kings reformed royal law to give it the order and strength of ecclesiastical law.

Other legal systems entered the fray. Thousands of cities and towns sprang up, leading to new centers of power and the development of urban law. The support of the church and a labor shortage brought an element of reciprocity to the relations

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between peasants and lords, triggering the emergence of manorial law. Vassals likewise won standing in the separate jurisdiction of feudal law. And the rise of a populous, mobile merchant class promoted the evolution of another form of privately produced law, the law merchant. (See Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* [Littleton, CO: Fred B. Rothman & Co., 1983]. For studies of the way this pluralistic system worked see these excellent collections: John Bossy, ed., *Disputes and Settlements: Law and Human Relations in the West* [Cambridge: Cambridge University Press, 1983]; Wendy Davies and Paul Touraine, eds., *The Settlement of Disputes in Early Medieval Europe* [Cambridge: Cambridge University Press, 1986].)

Berman provides the single best source for sorting out this legal tangle in his magisterial *Law and Revolution.* He there explains how competition between jurisdictions helped to protect individual liberty: "A serf might run to the town court for protection against his master. A vassal might run to the king's court for protection against his lord. A cleric might run to the ecclesiastical court for protection against the king." (Berman, 1983, p.10) The same person, in different capacities (merchant, cleric, vassal, townsman, etc.), enjoyed a significant degree of choice among legal systems, forcing them to compete. This competition for "customers" and the interaction among rivalrous legal systems resulted in many of the legal innovations that we take for granted today.

For the most part, royal law won this competition among jurisdictions. It had two important advantages over its rivals. The power to tax allowed it to subsidize its legal services. Royal courts absorbed the local functions of the law merchant, for instance, by adopting its precedents and offering to enforce them at bargain rates. Royal law also wielded far greater coercive power than competing legal systems, which depended on reciprocity and trust for their operation. The overarching or paramount power of monarchs enabled them to restrict competition to their jurisdiction, with force the ultimate support for royal action. Thus in England Edward I was able to restrict the growth of private jurisdictions through the *Quo Warranto* procedure created by the Statute of Gloucester in 1278. (This growth, however, was not restricted entirely: see Robert C. Palmer, *The County Courts of Medieval England* [Princeton, NJ: Princeton University Press, 1982].) So-called "weak" monarchs, i.e. those who lacked the physical force to be able to aggrandize their power in this way, were often those whose reigns saw greater prosperity and, not coincidentally, growth of private legal systems. (For an example of this see the account of late medieval Scotland, supposedly plagued by "weak kings," given by Jenny Wormald in "Bloodfeud, Kindred and Government in Early Modern Scotland," in *Past and Present,* No. 87, 1980, pp. 54-97, and in *Lords and Men in Scotland: Bonds of Manrent 1442-1603* [Edinburgh: John Donald, 1985].)

Henry II stands out as the central figure in the history of English royal law. Through measures such as the *Assize of Clarendon* he established a permanent court of professional judges, the use of inquisitional juries, regular circuits for itinerant judges, and a system of standardized forms of action via writs. The system of itinerant justices, in particular, reveals Henry's motivations; these justices also served as tax collectors.

The legal conquests of King Henry II and kings throughout high-medieval Europe established a reign of state law that has lasted to this day. Although grafted to the good stock of customary law, state law grew in strange, twisted ways. This transformation reflected the royalists' original motives for establishing a monopoly in law and the secret key to their success: restructuring property rights. Customary legal systems viewed crimes as violations of individuals' property rights, including rights to "personal peace"; hence the emphasis on restitution for victims, with the accompanying incentive for individuals to enforce the law. The new royal law classified murder, rape, theft, and so on as crimes against the *state*, rather than as crimes against individuals. Fines went to the king. Victims got only the satisfaction of seeing criminals suffer corporal punishment. Dissatisfied individuals continued to seek restitution out of court, so state officials forbade them to take justice into their own hands. This sharply reduced victims' incentives to pursue criminals, and statutes demanding the victims' cooperation had little effect. The state therefore developed the police powers necessary to enforce its laws on criminals and victims alike. (For an overview of this transformation see Geoffrey Parker and Bruce Lenman, "The Judicial Revolution," in N. G. Parker, B. P. Lenman and Victor A. C. Gatrell, eds., *Crime and the Law: The Social History of Crime In Europe Since 1500* [London: Europa Press, 1980]. For an account of the U.S. legal system's poor treatment of victims see William F. McDonald, "The Role of the Victim in America," in Barnett and Hagel 1977, pp. 295-307.)

*The new royal law classified murder, rape, theft, and so on as crimes against the state, rather than as crimes against individuals. Fines went to the king. Victims got only the satisfaction of seeing criminals suffer corporal punishment.*

The change from customary to state law did not happen suddenly and finally, nor did it flow in a smooth, one-way process. The change took a very long time, its two main active periods coming during the eleventh and sixteenth to seventeenth centuries. The latter period saw the appearance of centralizing, absolutist monarchies and the so-called "reception" of Roman law, with customary systems replaced by uniform ones derived from Roman principles. The most notable example of this was the *Carolina*, a system of romanized criminal law imposed in Germany by Charles V. By contrast, the later Middle Ages had seen a recession of royal power, and the revival of customary law systems in many places.

**The Persistence of Polycentric Law**

Although state legal systems have amassed immense monopolistic powers, they have never entirely quashed competition among legal systems. States themselves compete to attract



human and financial capital. And the law merchant has continued to survive in a realm safely beyond the reach of any one state's laws: international trade. But even within state boundaries polycentricity has survived into modern times. For example, recent work shows the persistence and even revival of polycentric law in England in the eighteenth and nineteenth centuries. H. W. Arthur's *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) looks at the growth of private arbitration services in Victorian England and the revival of old jurisdictions as ways of circumventing the state system. Parliament later terminated this process through the Judicature Acts. Douglas Hay and Francis Snyder have edited a collection containing several papers that look at the way private action supplied services such as law enforcement. (Hay and Snyder, eds., *Policing and Prosecution in Britain, 1750-1850* [Oxford: Oxford University Press, 1989])

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The United States in particular has enjoyed a rich variety of competing jurisdictions. Each federal, state, county, municipal, and military court system has its own substantive and procedural rules—rules that often come into conflict. But these "official" jurisdictions barely scratch the surface. In *Justice Without Law?*, Jerold S. Auerbach records several groups that produced systems of private law: the early Puritan, Quaker, and Dutch settlers; the many various nineteenth century utopian communes; the newly-freed slaves; the Mormons; the Chinese, the Jewish, and other immigrant communities; merchants; and labor/management councils. (Jerold S. Auerbach, *Justice Without Law?* [New York: Oxford University Press, 1983])

Pioneers, moving beyond the reach of state law, also created their own private legal systems. Terry L. Anderson and P. J.. Hill provide an excellent summary of the laws of the land clubs, cattlemans' associations, mining camps, and wagon trains. See Benson as well for a fascinating account of private justice on the western frontier. (Anderson & Hill, 1979, pp. 9-29; Benson, 1990, pp. 312-321)

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

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

> If the law is considered as "the enterprise of subjecting human conduct to the governance of rules," [Fuller's own definition] then this enterprise is being conducted, not on two or three fronts, but on thousands. Engaged in this enterprise are those who draft and administer rules governing the internal affairs of clubs, churches, schools, labor unions, trade associations, agricultural fairs, and a hundred and one other forms of human association . . . there are in this country alone "systems of law" numbering in the hundreds of thousands. (Lon L. Fuller, *The Morality of Law* [New Haven, CT: Yale University Press, 1969], pp. 124-125)

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

By the seventeenth century royal courts had absorbed or abolished the local functions of the law merchant. But disruptions in trade caused by the American Civil War triggered a resurgence in commercial arbitration. The war had clogged English courts with cases relating to the uncertain U.S-British cotton trade. Members of the Liverpool Cotton Association tried inserting arbitration clauses into their contracts. Their experiment succeeded, and soon arbitration spread to other trade associations, professions, and countries. (See William C. Woolridge, *Uncle Sam, The Monopoly Man* [New Rochelle, NY: Arlington House, 1970], pp. 94-110.)

The growth of private arbitration has since removed entire classes of disputes from state courts. The insurance, construction, stock exchange, and textile industries (among others) all make heavy use of arbitration. There are currently about 600 arbitration associations in the U.S. The largest of them, the American Arbitration Association, reported 52,520 case filings in 1989—up more than 36% from 1980's figures. Overall, some 90,000 cases were filed with arbitrators in 1989. (See Andrew Patner, "Arbitration Settles A Lot, Unsettles A Few," in the *Wall Street Journal*, April 13, 1990, p. B1.) Why are state courts losing so much business? Because private courts offer greater speed and efficiency.

**Theories of Polycentric Law**

Economists since Adam Smith have argued that competition in production serves consumers' interests, while monopolies tend toward sloth and waste. Gustave de Molinari, editor of the *Journal des Économistes*, was probably the first legal theorist who dared to ask why this should not be as true of the law as it is of apples, cotton, and iron. He argued that under the state's monopoly of law "Justice becomes slow and costly, the police vexatious, individual liberty is no longer respected, [and] the price of security is abusively inflated and inequitably apportioned. . . ." He therefore advocated a non-monopolistic legal system and projected that once "all artificial

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***Polycentric Law (Continued from page 7)***

obstacles to the free action of the natural laws that govern the economic world have disappeared, the situation of the various members of society will become *the best possible*." (Gustave de Molinari, *The Production of Security*, translated by J. H. McCulloch [New York: Center For Libertarian Studies, 1977], pp. 14-15. For a more detailed exposition, see Molinari's *Society of Tomorrow* [New York: G. P. Putnam's Sons, 1904].)

Since Molinari, other scholars have developed sophisticated theories of polycentric law. In addition to the work drawing on customary law referred to above, the work of Randy E. Barnett and Morris and Linda Tannehill merits special attention. Barnett criticizes the state's monopoly in law from first-hand experience as a former prosecuting attorney, and promotes a forward-looking polycentric alternative. (Randy E. Barnett, "Pursuing Justice in a Free Society, Part One: Power versus Liberty," in *Criminal Justice Ethics*, Summer/Fall 1985, pp. 50-72; "Pursuing Justice in a Free Society, Part Two: Crime Prevention and the Legal Order," in *Criminal Justice Ethics*, Winter/Spring 1986, pp. 30-53) The Tannehills employ Ayn Rand's objectivist ethics to derive the moral superiority and basic features of a system of privately produced law. (Morris and Linda Tannehill, *The Market For Liberty* [New York : Libertarian Review Foundation, 1984 repr. of 1970 ed.]) The polycentric legal systems advocated by these theorists share several features: the protection of individual rights and private property; voluntary agreements for the provision of security; non-violent dispute resolution; restitution (backed up by insurance against crime losses); compliance enforced primarily through the threat of ostracism; and the evolution of legal norms through entrepreneurial activity. Note that these are essentially modernized versions of the six features that Benson discovered common to all customary legal systems (above).

Advocates of polycentric legal systems disagree about how to justify these common features, however. Murray Rothbard, for instance, argues that private courts would have to obey a legal code "established on the basis of the acknowledged libertarian principle, of nonaggression against the person or property of others; in short, on the basis of reason rather than on mere tradition. . ." (Murray N. Rothbard, *For A New Liberty* [New York: Collier Books, 1978], p. 230) David Friedman, on the other hand, argues that the market in law will tend to protect individual rights because people "are willing to pay a much higher price to be left alone than anyone is willing to pay to push them around." (Friedman, 1989, pp. 127-128)

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

*This raises a crucial issue for any advocate of polycentric law: the question of common standards. Put simply, will a polycentric legal system tend to agree on a common body of law that all of the various jurisdictions recognize? If not, then there will be serious problems, e.g. one jurisdiction regarding adultery as an offense while others do not. In that instance the case for a single definitive source of law, regardless of how many enforcement agencies there may be, becomes very persuasive.*

In *Anarchy, State, and Utopia*, Robert Nozick employs the philosophical/normative approach to argue against the desirability of a polycentric legal system. (Robert Nozick, *Anarchy, State and Utopia* [New York: Basic Books, 1974]) His work has triggered a number of defenses of privately produced law couched in terms of moral rights. (Several of these are gathered in the special issue of *Journal of Libertarian Studies*, Vol. 1, Winter 1977. This contains articles by Barnett, Roy A. Childs, John T. Sanders, and Rothbard. See also George H. Smith, "Justice Entrepreneurship In A Free Market," in *Journal of Libertarian Studies*, Vol. 3, Winter 1979, pp. 405-426.) Outside of this debate, few philosophers have yet to employ philosophical/normative arguments with the sole intent of justifying or refuting polycentric law. The vast literature concerning attempts to justify the state contains arguments that touch on the subject, however—particularly those that address rights to personal autonomy.

Fuller's *Morality and the Law* introduced polycentric law to mainstream legal philosophy. Fuller defines "law" in terms broad enough to encompass privately produced law (as we saw in the quote above), and criticizes legal positivism's authoritarian tendencies. In "Toward a Theory of Legal Naturalism," Barnett argues that Fuller's reasoning should lead him to repudiate monopolistic legal systems altogether. Barnett then sketches a plan for developing an organic legal philosophy capable of unifying the two contrasting approaches to polycentric law described here. (Randy E. Barnett, "Toward a Theory of Legal Naturalism," in *Journal Of Libertarian Studies*, Vol. 2, Summer 1978, pp. 97-107)

In the long run, polycentric law poses an interesting problem for philosophers. A great deal of political and legal philosophy aims at justifying the imposition of state law. (Quite a bit less tries to show that no such justification is possible.) But a purely private legal system threatens to render these efforts meaningless. Need one justify that which is freely chosen? Addressing such questions promises to cast light on the means and ends of justification, and on the nature of political and legal philosophy in general.



Researchers of polycentric law employ the economic/descriptive approach more often than the philosophical/normative one. Barnett and Benson apply public choice arguments to analyze the actions of state agents and criticize the perverse incentives created by state legal institutions. Research by Gerald J. Postema and Robert Sugden supports Hayek's views on the spontaneous development of customary law with game theoretic proofs of the important role that social conventions play in coordinating behavior. (Gerald J. Postema, "Coordination and Convention at the Foundations of Law," in *Journal of Legal Studies*, Vol. 11, January 1982, pp. 165-203; Robert Sugden, *The Economics of Rights, Cooperation and Welfare* [Oxford: Basil Blackwell, 1986]. See also Robert Axelrod, *The Evolution of Cooperation* [New York: Basic Books, 1984]; Lawrence Becker, *Reciprocity* [Chicago: University of Chicago Press, 1986]; and Michael Taylor, *The Possibility of Cooperation* [New York: Cambridge University Press, 1987])

*Leoni distinguishes between law, which arises out of individual claims, and legislation, which is consciously designed to serve the wishes of those in power. In Leoni's view law emerges spontaneously and adapts to change, while legislation is engineered to constrain behavior within rigid, unchanging limits.*

Economic analysis cuts both ways, however. The most sophisticated critique of polycentric law comes from William M. Landes and Richard A. Posner, who argue on economic grounds that private adjudication depends on state courts to back up its decisions; that it under-produces precedents; and that it creates a confusing hodgepodge of conflicting jurisdictions. This last objection, in particular, raises a crucial issue for any advocate of polycentric law: the question of common standards. Put simply, will a polycentric legal system tend to agree on a common body of law that all of the various jurisdictions recognize? If not, then there will be serious problems, e.g. one jurisdiction regarding adultery as an offense while others do not. In that instance the case for a single definitive source of law, regardless of how many enforcement agencies there may be, becomes very persuasive. (William L. Landes and Richard A. Posner, "Adjudication as a Public Good," in *Journal of Legal Studies*, Vol. 8, March 1979, pp. 235-284) Benson offers convincing counter-arguments to these claims, calling in part on examples of successful private legal systems like the law merchant mentioned above. (Benson, 1990, pp. 221, 228, 277-281, 299-300) Nonetheless, Landes and Posner set a standard of research that those who champion polycentric legal systems would do well to emulate.

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

The analogy goes still deeper. Banknotes represent claims to commodities. In a free banking system, only those banks that successfully back up their claims will be able to keep currency in circulation. Bruno Leoni explains the law in similar terms: "Individuals make the law insofar as they make successful claims." By this, he means that legal norms arise out of the sorts of claims that have a good probability of being satisfied in a given society. Leoni thus takes polycentricity to its logical extreme: there are as many potential sources of law as there are individually successful claims, each of which might serve as a precedent for later cases. Building on this, Leoni distinguishes between *law*, which arises out of individual claims, and *legislation*, which is consciously designed to serve the wishes of those in power. In Leoni's view law emerges spontaneously and adapts to change, while legislation is engineered to constrain behavior within rigid, unchanging limits. (See Bruno Leoni, *Freedom and the Law* [Indianapolis: Liberty*Press*/Liberty*Classics*, 1991].)

As we have seen, polycentric legal systems tend to generate successful claims to restitution. Just as the claim to a commodity can be transferred from one party to another (via the exchange of banknotes), so too the right to restitution could be transferred from one party to another (via the exchange of "courtnotes," we might say). For example, individuals in a polycentric legal system would probably buy insurance to protect themselves against losses due to others' illegal activity. When insurance companies had to cover their clients' losses they would assume the right to demand restitution from the responsible parties. The claim to restitution would thus transfer from the original victim to the insurance company. Insurance companies would probably transfer claims to restitution among themselves to settle their accounts, giving rise to features analogous to those that arose among private banks: transferable courtnotes, clearinghouses, and client information bureaus. This transfer of claims to restitution was an important feature of the stateless legal system of Medieval Iceland, allowing relatively weaker victims to gain the support of stronger champions in exchange for a share of the restitution. Even today, law firms often undertake cases in exchange for a portion of the court's award.

Those who advocate free banking can justify it on the grounds that it brings the economy nearer to a perfect market at general equilibrium. No such ideal yet exists in the law. There are important differences between banknotes and judgements or courtnotes, but combining Leoni's theory of successful claims with the concept of transferable rights to restitution suggests the possibility of a model for the legal market. The existence of such a model would allow those who advocate a polycentric legal

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*Polycentric Law (Continued from page 9)*

system to justify it on the grounds that it brings the law nearer to its ideal.

Consider, for instance, how we might use this approach to counter the claim that a polycentric legal system would generate conflicting legal standards. In the case of free banking, economic forces lead to a convergence of the various issuing banks on a common standard unit of account and circulation. We should expect a similar process to apply in the case of polycentric law, such that overlapping jurisdictions would converge on a shared set of legal standards. History supports this view, providing several examples of legal systems that coexisted in spite of having quite different contents in certain areas. Consider Gaul and Italy during the early Middle Ages, when Roman and Germanic laws existed side by side with people opting to define themselves as either Romans or Franks/Burgundians/Lombards—something that became increasingly a matter of choice as time passed. In practice, there is a strong tendency for overlapping legal systems to agree in most areas of civil and criminal law. A problem may sometimes arise with regard to "moral offenses" however, due for the most part to the existence of an actual monopoly resulting from attempts by activist coalitions to seize control of the system.

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**Future Growth in the Study of Polycentric Law**

The powerful parallels between free banking and polycentric law suggest a further parallel: the two fields may come to share a similar intellectual history. Although it followed important works by Vera C. Smith, Friedrich A. Hayek, and others, Lawrence H. White's *Free Banking in Britain: Theory, Experience, and Debate, 1800-1845* (Cambridge: Cambridge University Press, 1984) triggered a surge of interest in free banking. Within a few years of the publication of White's book, free banking had earned the endorsements of two Nobel Prize-winning economists, coverage by the business press, and even the attention of the World Bank. (See also White's *Competition and Currency* [New York: New York University Press, 1989].) New scholarship has blossomed, and scholars like George A. Selgin (*The Theory of Free Banking: Money Supply Under Competitive Note Issue* [Totowa, NJ: Rowman and Littlefield, 1988]) have developed solid theoretical foundations for free banking. Kurt Schuler reviews these trends in "Free Banking," a summary of theory and practice in that field, and predicts that "As the idea of free banking continues to gather momentum, it will become one of the three or four most widely debated topics in economics." (Kurt Schuler, "Free Banking," in *Humane Studies Review*, Vol. 6, Fall 1988, p. 11)

The study of polycentric legal systems stands ready to experience a similar surge in interest. Benson's new book, *The Enterprise of Law*, promises to do for privately produced law what White's work did for free banking. As the many references above to *The Enterprise of Law* attest, Benson has produced a carefully researched and comprehensive introduction to polycentric law. It is sure to stimulate further work in the field.

Interested in studying polycentric law? Don't be put off by the number of works listed here. A few "must-reads," can provide you with a good introduction. I suggest Benson's *The Enterprise of Law* as the best general overview of the field; Berman's *Law and Revolution* as the most complete historical study of a polycentric legal system; Fuller's *The Morality of Law* and Barnett's "Toward a Theory of Legal Naturalism" as preliminaries to further legal philosophy on the subject; and Landes and Posner's "Adjudication as a Public Good" as the most sophisticated critique of privately produced law.

The study of polycentric law offers many rich opportunities for academic entrepreneurs. For all of the systems of customary law that have been the subject of research, many more wait to be discovered. Interesting historical puzzles remain unanswered: Why did eighteenth century rulers give up the revenue acquired by fining criminals in exchange for corporal punishment? What factors mark the transition from customary to state law? Why has state law won its competition with privately produced law in some areas (as in criminal law) and lost in others (as in certain trades)? And as I've already indicated, the theory of polycentric law opens fresh vistas to scholars ready to carry out Barnett's program for developing a new school of jurisprudence or to those intrigued by the prospect of modeling a market in law.

In conclusion, the study of polycentric law offers the opportunity to research fascinating questions from a fresh point of view. More importantly, however, it offers the opportunity to help discover and develop the legal foundations of a free society based on consent, reciprocity, and justice.

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*Public Goods (Continued from page 1)*

of public goods. In this ambitious book, Anthony de Jasay tries to show that this whole line of argument is a mistake: "there is no public goods problem in Hobbes' fatal sense" (p. 4).

The book starts well, with a broad-brush critique of the contractarian view of the state. Jasay proposes a two-way classification of political and economic relationships: there are relationships of *contract* and ones of *command*. In the case of contract, there is a presumption of mutual benefit; in the case of command, there is not. In opposite ways, Marxists and contractarians conceal this distinction. Marxists claim that wage contracts in a capitalist society are instances of command: sellers of labor may appear to be free, but really they are coerced. Contractarians claim that our submission to government is an instance of contract; we may appear to be subject to command, but really we have (or it is as if we had) agreed to the rules that we are compelled to obey. Jasay asks us to reject both claims as "special pleas" (p. 17). In particular, we should see Hobbes' contractarianism as an historically located special plea for the strong states which established themselves in Europe after the Middle Ages.

*He tries to maintain that each public good has a definite threshold of "critical supply," even if it is impossible for us to be sure where it is.*

In a brief but powerful section of the book, Jasay offers us a picture of the late Middle Ages as a golden age of economic development and dispersed power. Contracts were enforced by self-help and by a variety of quasi-judicial institutions with overlapping jurisdictions; there was no single Hobbesian sovereign. It is an historical fact that a system of strong states displaced this more anarchic order, and this fact requires explanation, but we have no reason to presume that the change was generally beneficial. Jasay suggests instead that strong states were parasitic on their host populations; they established themselves by military force, which they used to disarm rival centers of power and to enforce their commands. From this perspective, contractarianism is an ideology which, by presenting command as disguised contract, serves to reconcile people to an irrevocable loss of independence.

*This whole argument seems to me to miss the point.*

In the main part of the book, Jasay takes on modern contractarian theories more directly, arguing that they fail on their own terms. This part of the book is much less successful. Jasay has little sympathy with modern work in political science and economics, which is "increasingly dreary" and pursues "technicalities of dubious import" (p. 8). Yet the core of the book is an abstract theoretical model, of precisely the kind that economists use. Given that he has chosen to work with such a model, and that he is trying to show that the standard conclusions of public goods theory are invalid, we are entitled to expect him to have mastered the technicalities of economic theory, however dreary he may find them. But he seems to have made little attempt to come to grips with the existing theory, and repeatedly takes short cuts rather than pursuing the logic of his own model. As a result, he makes crucial mistakes. His main conclusions, I think, are wrong.

In one standard model of the public goods problem, there is a single public good which is finely divisible. A group of many individuals jointly derive utility from the public good, with each person's utility being a continuous and increasing function of the quality of the good that is being supplied. Each person is free to choose how much, if anything, to contribute towards the cost of supplying the good; the amount supplied is determined by the total of everyone's contributions. Thus, if each person takes the behavior of the others as given, she can see that the net effect of her own contribution is to bring about only a small increase in the supply of the public good, the benefits of which are divided among all individuals in the group. Because each contributor pays for benefits which accrue mainly to others, it is typically not in anyone's interest to contribute anything: this is the public goods problem.

Jasay accepts the validity of this analysis, but questions the realism of the assumptions of the model. He does not question the assumption that each person pursues her own interests, taking the behavior of the others as given. (He does not claim that this provides a true picture of human motivation, but says that "the least semblance of founding our argument on the decency, far-sightedness, and considerateness of human nature must be avoided" [p. 126]. Any theory of public goods, he says, should be robust enough to cope with selfish behavior.) Instead, Jasay challenges the assumption of continuity, arguing that public goods are intrinsically indivisible.

At this point, I run into a difficulty. It is hard to give a brief summary of a complex argument that one believes to be fallacious. Roughly, the argument goes as follows. A public good, by definition, is a good that is supplied jointly to a group of individuals, with no one being excluded from the benefits. But if non-exclusion is to mean what it says, enough of the public good must be supplied so that there is no (or not too much) congestion among consumers; extreme congestion is a form of exclusion. Hence a "public good has a critical supply; less of it causes crowdedness and jeopardizes non-exclusion, more produces questionable additional benefit" (p. 144-45). In response to the thought that crowdedness is itself a continuous variable, Jasay offers the argument that "at a given level of civilization, with habitual norms and habits in the use of private substitutes, a community is likely to have reasonably specific ideas about the standard that public provision of a good must meet" (p. 160). He then gets sucked into the Sorites paradox (when does a pile of stones become a heap?) as he tries to maintain that each public good has a definite threshold of "critical supply," even if it is impossible for us to be sure where it is.

This whole argument seems to me to miss the point. Consider the example of parks in a city. Take a park to be an area of open ground which everyone is free to use. Then the quantity of parkland is measurable on a continuous scale (say, hectares). As

*(continued on page 14)*

# Crosscurrents

### Classical Liberalism and Modern Political Thought

Two recent books on modern political thought, both by writers hostile to classical liberalism, are worth attention for their extended treatment of classical liberal ideas.

The first, Will Kymlicka's *Contemporary Political Philosophy: An Introduction* (New York: Oxford University Press, 1990), contains a lengthy discussion of libertarianism. Kymlicka discusses both the work of Robert Nozick and of more "economistic" classical liberals, such as Buchanan, Gauthier, and Narveson. Kymlicka raises a variety of problems concerning such views, blending arguments of his own with points drawn from a large range of recent work. His discussion will give classical liberal scholars a good picture of what--in the view of someone hostile to these ideas--is the current state of the argument. His discussion will thus form a useful point of reference for scholars wishing to enter this discussion, whether in term papers or journal articles. Those considering a response to the arguments as he presents them, however, might well think in terms of criticizing his assumptions. A good place to begin is Kymlicka's presentation of the state of the argument between classical liberals and their opponents.

The second book, Raymond Plant's *Modern Political Thought* (Oxford: Basil Blackwell, 1991), strikingly integrates a treatment of classical liberal writers with a more general discussion of current issues in contemporary political philosophy. Thus, rather than their appearing—as in Kymlicka--in a ghetto of their own, Plant's discussions of Hayek, the earlier John Gray, and Narveson, can be found alongside issues raised by such people as Dworkin, Rawls, Raz and Gewirth.

This offers a useful opportunity for the classical liberal scholar to engage in contemporary debate without necessarily appearing in a self-conscious way as a spokesman for one or another form of classical liberal views. Plant himself has a wide range of interests, and his treatment of classical liberal writers is interesting not only for his criticisms, but also for what he appreciates. Classical liberal scholars who are interested in how to bring their interests to bear upon more mainstream work in moral and political philosophy might look to Plant's discussion for some useful indications of how this can be done.

### Liberty, Values, and Virtue

While William Galston is not himself a classical liberal, his latest book should be worthwhile to anyone interested in the defense of liberty. *Liberal Purposes* (Cambridge: Cambridge University Press, 1991) is useful to those with an interest in classical liberalism for three reasons. First, it offers an interesting engagement, by an intelligent writer, with much of the best of contemporary American political philosophy. By reading Galston's text, and by following up his copious references, the reader will receive an introduction to many of the more important current debates. (One notable--and telling--exception is a complete absence of references to the literature on public choice; on this, the reader might usefully consult Dennis C. Mueller's *Public Choice II* [Cambridge: Cambridge University Press, 1989]).

Second, Galston, while a modern American liberal rather than a classical liberal, advances some good criticisms of contemporary forms of illiberalism, including those of Sandel, MacIntyre, and Unger. Galston also, in a way that is both stimulating and challenging, criticizes the widespread identification of liberalism with the ideal of neutrality. He here takes issue with a range of important writers, from the political philosophy of Charles Larmore, Ronald Dworkin and John Rawls, to the pragmatic relativism of Richard Rorty. Galston also offers an alternative to the moral non-cognitivism and relativism which has played such a large role in recent accounts of liberalism, and claims that we can have (limited) moral knowledge, and that liberalism is best understood in terms of such a moderate "perfectionism." However, his argument would have been strengthened had he engaged here more directly with writers such as Buchanan, Gauthier and Narveson who disagree with him on this point. The merits of Galston's case on these philosophical issues, however, must be balanced against his willingness to marry these ideas with the view that it is legitimate for the state to use its coercive powers for such projects as forcing everyone to contribute to a public system of health care. (His liberalism reasserts itself, in that he thinks that people should not be forced to *use* it, so long as they still pay!)

Third, Galston raises the interesting issue of liberal virtue: the problem of the cultivation of the dispositions, on the part of citizens, needed to sustain a liberal society. He also has some interesting things to say about the tensions between liberalism and traditional religion in the United States. Galston poses these problems in forms which classical liberals will find unacceptable, by virtue of what he packs into his account of liberalism. But his discussion raises interesting issues for classical liberals, too. For example, parents in a free society will be able to educate their children as they see fit. But the ideas into which those children are educated may not themselves be supportive of the ideals of a free society. If a classical liberal society is a cultural achievement, what can be said about the problems of sustaining that culture in a free society?

One final reason for commending Galston's book is that it includes a discussion of Stephen Macedo's *Liberal Virtues* (Oxford: Clarendon Press, 1990). This discussion emerged from a seminar on Macedo's work at the Institute for Humane Studies.

### Championing Modernity

One very widespread theme in contemporary social thought is the critique of modernity. Modern society, often identified explicitly with liberal capitalism, is portrayed as atomistic, destructive and futile. It is contrasted with the "organic" society of the pre-modern age, to the great advantage of the pre-modern. (See, for example, James C. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* [New Haven, CT: Yale University Press, 1976].) Such ideas are found in many parts of the political spectrum: they are a central part of much feminist and environmentalist argument, but also have a prominent role in conservative thought, as for example in the works of the late Richard Weaver.

Now, in her new work *In Defense Of Modernity* (Stanford: Stanford University Press, 1991), Rose Lamb Coser mounts a strong defence of modernity which most classical liberals should find highly congenial. Her central thesis, derived from Erving Goffman, is that true individual flourishing requires role differentiation, i.e. the division of one's life into separate areas, in each of which one plays a different role. Such differentiation leads to a much more varied life experience and both the possibility and the need for greater choice-making by individuals. Consequently, the identities and life paths of individuals are much more a matter of personal choice and self-determination than in a "traditional" society, where they are determined at birth by one's social status, occupation, and so forth. The "rootlessness" of modernity so reviled by its critics is for Coser the main source of autonomy. She argues that the traditional community or "Gemeinschaft" is a "greedy" institution which seeks to tie all areas of life into one whole, thus preventing autonomous action.

The feminist element in the work is Coser's argument that the traditional family is also a "greedy" institution, a hangover from the pre-modern, and that women benefit less from modernity than men because of their traditional family role. The conclusion of her thesis is that capitalist modernity is a liberating force which has undermined the restrictive structures of traditional society. Women are in a worse position than men because they are less involved in modernity. The corrollary, of course, is that it is modern market society which is the liberating force for women. Coser herself remarks that her argument is unusual coming from a "leftist" position, making it yet another sign of the quiet intellectual revolution now going on.

### Liberalism and the Humane Sciences

Another work which casts light on modernity and its intellectual history is Woodruff D. Smith, *Politics and the Sciences of Culture in Germany 1840-1920* (New York: Oxford University Press, 1991). Smith's concern is the emergence in early nineteenth century Germany of the "cultural sciences" such as anthropology, sociology, economics, and literary studies, and the relation between these academic disciplines and political/philosophical systems. When the cultural sciences first appeared they were closely associated with liberalism and in particular with one of the great works of nineteenth century liberalism, the *Staatslexikon*. The underlying assumptions of the cultural sciences at that time were those of the liberalism of the *Staatslexikon* and its editors, Karl Rotteck and Karl Theodor Welker. These were: rational individualism, i.e. assuming a trans-historical human reason and human nature as well as methodological individualism; what Smith confusingly calls the nomological mode of analysis, i.e. the natural law tradition; and a perception of history as a dialectic of change and equilibrium, leading to a notion of historical development.

After about 1862, German liberalism entered a period of crisis and decline and, simultaneously, the cultural sciences fragmented and became dominated by theories which were profoundly anti-liberal, such as relativism, collectivism, historicism and, above all, nationalism. This in turn directed German public argument and discourse into an essentially anti-liberal pattern. Significantly, these are the normative assumptions of much contemporary social and cultural science. There is much else that is useful in this work, including perceptive accounts of the social and historical theories of German classical liberalism and a shrewd analysis of the disastrous impact of Darwinism on liberal ways of thinking. Altogether a book to strongly recommend.

### Classical Liberalism and the New City

A book that has received a lot of attention recently is Joel Garreau's *Edge City: Life on The New Frontier* (New York: Doubleday, 1991). This is a journalistic work, but is very well researched and written. It is of great interest to classical liberals, both for its content and for what it shows about the changing intellectual climate. Garreau's subject, "edge cities," are the new urban developments, combining offices, housing and malls, which have sprung up on the periphery of older metropolitan areas, usually on major freeways. The book lists the features of an "edge city": office space; retail space; a population that increases during working hours; a mixture of uses (entertainment, work, residence, and shopping); and novelty (twenty or thirty years ago it did not exist). Garreau studies examples of these in nine regions of the United States; particular instances discussed are Walnut Creek near Oakland, the Galleria in Houston, and perhaps the best known "edge city," Tysons Corner in Virginia. As Garreau points out, cities in the West and Southwest such as Phoenix, Houston, and Los Angeles no longer have a recognizable, old-style downtown. Instead, they are clusters of "edge cities," linked together by freeways.

Unlike most commentators, Garreau does not bewail this trend. His assumption is "that Americans are pretty smart cookies who generally know what they're doing." For Garreau, "edge cities" are the urbanism of the future, and are a rational and humane solution to the problems and circumstances of late twentieth-century life. They are unplanned, undirected phenomena which, however, give order and structure to the modern city—a classic example of spontaneous order.

One of the most interesting features of the book is his account of how developers, motivated by strictly economic concerns and signals, have wrought a major social transformation—one which Garreau regards as generally beneficial. He points out that the "edge cities" not only provide clean, safe, and convenient working and living space, they also promote diversity and help both individuals pursuing personal projects and varied ethnic and lifestyle groups to live together harmoniously.

For classical liberals, an important aspect of the book is Garreau's discussion of what he calls "shadow governments." These are the private institutions such as covenant committees, neighborhood associations, and development corporations which have come to provide most of the functions we traditionally associate with government, from infrastructure to policing. The book is interesting in giving a snapshot of profound social change, change which is both an example of a relatively free society at work and which is also promoting and enhancing classical liberal values. Important applications of these insights into spontaneous order can also be made in the area of urban history. (See Donald Boudreaux and Randall Holcombe, "Government by Contract," in the *Public Finance Quarterly*, Vol. 17, No. 3 [July 1989], and David Beito, "Voluntary Association and the Life of the City," in *Humane Studies Review*, Vol. 6, No. 1 [Fall 1988].)

*Public Goods (Continued from page 11)*
the area of parkland increases, parks will become less crowded, more pleasant, and more varied. Thus we should expect each person's utility to increase continuously as the area of parkland increases; there is no obvious reason to expect sudden discontinuities. This is all that the conventional theory of public goods requires. If the supply of parks was determined by the total of individuals' voluntary contributions to a park fund, and if everyone acted according to self-interest, there would be a free-rider problem. Of course, if total contributions were very small, the "parks" would be overcrowded, trampled areas, and we might argue about whether they could properly be called parks. But even if we decide they must be called something else, say "public open space," there is no exclusion in the sense that matters for economic theory. All that matters is that no one is excluded from the benefits created by an increase in the supply of the good.

The existence of discontinuities matters to Jasay because he believes that there is no public goods problem for indivisible goods. He begins by considering a game in which there is an indivisible public good and two potential contributors. Each player has to choose one of two strategies, "subscribe" or "not subscribe." For each player, there are four possible outcomes: that he subscribes while the other does not (S, the "sucker" outcome), that the other subscribes while he does not (F, the "free rider" outcome), that both players subscribe (M, the "fair mixed regime"), and that neither subscribe (E, the "exchange regime"). If each player's preference ranking, in descending order, is (F, M, E, S), then we have the familiar Prisoners' Dilemma, in which not subscribing is the dominant strategy. But Jasay asks us to consider the case in which each player's ranking is (F, M, S, E). He calls this the "straddle" ranking; economists and game theorists will recognize it as the game of Chicken. In this case, there is no dominant strategy. Each player prefers not to subscribe if he expects the other to subscribe, but prefers to subscribe if he expects the other not to do so. What each person will do will depend on his estimate of the probability that the other will contribute, and on his own attitude toward risk. So if the problem takes the form of a Chicken game, it is possible that self-interested individuals might choose to contribute towards the cost of supplying the public good. There might still be free riders and suckers, but (Jasay seems to suggest) the suckers would have no grounds for complaint. A sucker is someone who chose to subscribe because he judged this choice to be in his own interests: he could have chosen not to subscribe, as the free rider did, but preferred not to take the risk.

This analysis provides the kernel of Jasay's attempted resolution of the public goods problem. But, as he says, the two-person model is "a reference framework only" (p. 138); if he is to succeed in his objective, he must extend the analysis to the case of a public good with many potential contributors. The way in which he tries to do this can be explained by means of an example.

Consider a public good that is genuinely indivisible. Suppose a private collector offers a famous painting to a public gallery for a fixed sum of money; if the gallery does not pay, she will export the painting. The gallery has no funds of its own, but launches an appeal to raise the money. Here there is a public good with an obvious "critical supply." Jasay proposes a procedure for supplying public goods like this from individual contributions. With only slight simplification, we can represent this procedure by the following model.

Suppose the cost of the painting is 100 units. The fund-raisers invite individuals to make "pledges"; a pledge is a promise to pay up to 2 units towards the cost of the painting. If less than 50 individuals come forward, the pledges are not called up. If 50 or more individuals come forward, the painting is bought, and the cost is divided equally among those who have pledged money. Clearly, this procedure has an advantage over the one assumed in the standard model of public goods; it sets limits on the extent to which anyone can be made into a sucker. Free riding is still possible (you may not make a pledge, while 50 or more others do), but no one will have to pay anything unless at least 49 other people do so. More importantly for the theory, non-contribution may not be the dominant strategy.

Suppose there are 100 identical art-lovers, each of whom would gain a benefit of v if the painting were acquired by the gallery. Assume that v is greater than 1, so that everyone would be better off if everyone pledged money than if no one did (that is, provision of the public good is Pareto efficient). Now consider any one individual who is deciding whether or not to make a pledge, without knowing what the others are doing. From his point of view, there are three possibilities: the number of other people making pledges may be less than 49, exactly 49, or more than 49. In the first case, it does not matter what he does: the fund will not reach the target. In the third case, the painting will be bought whether he makes a pledge or not, so it is in his interest to take a free ride. But in the second case, whether or not he makes a pledge will determine whether or not the painting is bought. By making a pledge he incurs a cost of 2 (his share of the cost when there are exactly 50 pledges) and gains v (the benefit of the painting to him). *In this case*, the individual's contribution is not (as Jasay says of contributions in the standard model) a mere "driblet," whose benefit is spread over many individuals, but is decisive in getting the public good supplied at all. Thus, provided v is greater than 2, non-contribution is not a dominant strategy: there are circumstances in which an individual would benefit by contributing.

So far, so good. But now Jasay takes a series of illegitimate short cuts. He asserts that "broadly speaking," if a person thought that most other people would not make pledges, it would pay him to make a pledge, while if he thought most other people would make pledges, it would pay him not to (p. 154). He seems to see this as showing that there is a symmetry between pledging and not pledging. Somehow, he manages to avoid any use either of the theory of probability or of the standard game-theoretic concept of a mixed-strategy equilibrium. (Failing to find what a game-theorist would call a pure strategy equilibrium, he gets bogged down in the "all Cretans are liars" paradox; his attempts to escape are not entirely convincing.) It is not quite clear what conclusion Jasay wants to draw from his model, but presumably he wants to claim that in typical cases, enough pledges will be made for the public good to be supplied. (Recall that the whole point of the book is to show that there is no public goods dilemma.)

Would it pay an individual in the model to make a pledge? If we are to answer this question properly, we must ask *how probable* it is that exactly 49 other people will make pledges (the case in which it pays to make a pledge), relative to the probability that more than 49 will make pledges (the case in which it pays to free ride). Let us call this the *critical ratio*. Given the probability that any one person will make a pledge, working out the critical ratio is a straightforward theoretical exercise. For example, if each person is as likely to make a pledge as not, the critical ratio is approximately 0.16. So unless v, the value of the public good to the individual, is large, it will pay an individual to take a free ride. It turns out that v must be greater than 13.5 in order for pledges to be worthwhile in this case. In other words, the total benefit of the public good must be 13.5 times greater than the total cost. If v were equal to 13.5, then, it would be possible to have an equilibrium in which each individual was indifferent between pledging and free riding, and in which the probability that any individual made a pledge was 0.5. Then there would be a slightly better than even chance (0.54, to be precise) that the public good would be supplied. This is not a particularly reassuring conclusion to draw about a case in which the benefits of the good are so many times greater than the costs.

If the ratio of benefits to costs was smaller, the probability that the public good would be supplied would be correspondingly less. If, for example, the benefits of the public good were five times greater than the costs, the probability of its being supplied would be less than 0.03. If the benefits were twice the costs, the probability of its being supplied would be zero.

Of course, these are little more than back-of-the-envelope calculations, using very specific assumptions. But there is a perfectly clear general principle behind them. It pays to make a pledge only in the event that the number of other people making pledges is *exactly* equal to some critical value, while it pays to free ride in the event that there is *any* larger number of pledges. If there are many individuals and if there is to be a reasonably high probability that at least the critical number of pledges will be made (and thus a reasonable chance that the public good will be supplied), the probability of the first event must be low, relative to the probability of the second. This is an inescapable consequence of the laws of probability. And so it will not be in anyone's interest to make a pledge unless the benefit she derives from the public good is much greater than her share of the costs.

So it seems that Jasay's line of enquiry is not going to provide an escape from the public goods problem. If I am right, the central project of the book must be judged a failure. Nevertheless, Jasay is right to remind us that public goods can sometimes be provided without the intervention of a Hobbesian sovereign. The difficulty is to explain how this happens, and to distinguish the circumstances under which private provision of public goods succeeds from those under which it fails. To a greater extent than Jasay seems to think, economists and political scientists are tackling these questions. Much of the work of these disciplines might indeed be said to be drearily technical. But Jasay's book gives us no reason to think that there is any easier way forward.

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***RESPONSE***

# Indivisibility, Probability and Game Theory

## *by Anthony de Jasay*

### A rejoinder to Robert Sugden's Review

The central project of my book is to prove that, contrary to conventional theory, the public goods or "collective action" problem is not a dilemma. Thus, if providing a good publicly is superior to falling back on market substitutes for it, it would not be unreasonable to expect the good to be voluntarily provided (if the state were not there to provide it anyway). In his review, Dr. Sugden judges this project to be a failure, partly because he disagrees with my assumptions, partly because he finds my argument defective in the techniques of economics and game theory. I have some sympathy with his general verdict, for I do not think that mine is the definitive statement; most radical first attempts fail in that sense. It is not hard to find serious weaknesses in my admittedly (and regrettably) complex construction. The ones Dr. Sugden found, however, are not among them.

With regard to our assumptions, we have what seems to me a legitimate difference of view that cannot be resolved by recourse to logic. Some goods are physically indivisible, or "lumpy." A bridge that is too short to reach the other shore, a fire brigade lacking a fire engine, a workers' cafeteria where last-comers get no main course, a school without a teacher just won't do, and I imagine that Dr. Sugden, too, would concede that such goods yield a drastically reduced marginal utility short of a critical threshold quantity. Others, however, are physically divisible, their supply is continuously variable both ways and so is their utility. Yet if their relevant "public" is given, and no member of this public must be excluded if he wishes to use the good, even such goods must be supplied in a minimum size, flow or standard; to be truly public, the television or radio transmitter must afford reception to every home, the national health service must keep waiting lists short enough not to drive people to private health insurance, and so forth. My contention is that indivisibility in this latter sense is implicit in publicness. Dr. Sugden, invoking parks, denies this.

I would be content to agree to differ, not so much about the physical world, but about the relevant customs and social ethics. But there is a rub: the reviewer is out for more. For he declares that my argument *misses the point*, the point being that public goods *are* divisible, each marginal contribution to their provision *does* yield a marginal benefit according to some continuous function relating the two, and since each marginal benefit is dissipated among many beneficiaries, no non-altruist in his senses can possibly choose to contribute unless forced; q.e.d.

Now this, of course, is merely asserting once more, in different words, that public goods present a prisoners' dilemma, which is the very assertion I am contesting and in whose stead I
*(continued on page 16)*

***Response (Continued from page 15)***

propose to put a competing and, I believe, richer theory. Whatever my argument does, and whatever other points it misses, it cannot be said to miss *this* one. In claiming that it does, Dr. Sugden is stubbornly trying to steer public goods theory back into its old prisoners' dilemma channel, where the free rider conduct of *homo oeconomicus* is pre-ordained, and voluntary provision can only be explained by ascribing to people psychological properties transcending economic man. He is clearly entitled to do this, as I am entitled to my less heroic psychological assumptions. But since an argument that misses the point is a defective one, we look to Dr. Sugden to show the defect. Changing assumptions, and doing it above board, is not one.

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The review is no more successful in proving defects and "crucial mistakes" when it invokes probability and game theory. Its verdict of failure, if just, is just for the wrong reasons, and is very much the kettle calling the pot black. Dr. Sugden believes that he is vindicated by an "inescapable law of probability." But there is nothing inescapable about the law on which he rests his case. The law, as he phrases it, applies in the special case where the probability distribution is not skewed in favor of any subset of the set of alternatives. It is the classroom world of the unbiased die, the perfect roulette wheel and the randomizer. In general theory, as in the real world, there is room for any shape of (statistical or subjective) distribution. If there are reasons for it to be skewed in a particular way, no "inescapable law" will prevent it.

Consider, however, the example of the random distribution chosen by Dr. Sugden, and the question of symmetry. There is symmetry between pledging and not pledging in the following sense: for all alternatives where some number of other people from 0 to 49 make the pledge, making it is *weakly* superior to not making it. At worst, the pledge is not called up; I get no benefit and pay no cost. At best, I cause the critical number of pledges to be reached, get the benefit and pay its cost. For all alternatives where between 50 and 100 other people make the pledge, not making it is *strongly* superior, for I get the benefit and do not pay the cost. It is obviously possible, however, for a rational person to hold that the probability distribution is markedly skewed towards fewer than 50 people making the pledge, in which case his superior strategy is not to bank on the chance of free riding, but to play it safe and pledge.

Back-of-the-envelope calculations can be perfectly suited to unmask a plainly defective argument. But they must not start off with a gross error of logic in formulating the problem. If, in a cost-benefit calculation, an uncertain benefit is to be deflated by its probability (in the unskewed example, 0.16), so must the uncertain cost be, since it may or may not be incurred. Inexplicably, however, Dr. Sugden's numbers show it as certain (probability of 1) that the pledge will be called up. Hence, it would take an *uncertain* benefit of 13.5 (for 0.16 times 13.5 makes 2.16) to offset the *certain* cost of 2. The whole "point," however, is that the pledge is not certain to be called up, and, to use his parlance, this point has been missed. If this is the result of "mastering the techniques" of probability theory, the effort hardly seems worthwhile.

In any event, even without its misunderstood laws and mistaken calculations, Dr. Sugden's analysis does not encompass the really interesting question, which is the relation of the expected utilities of the dovish (to pledge) and the hawkish (not to pledge) strategy. The former aims at the inside, moderate pair of possible payoffs, the latter at the more extreme pair which "straddles" them. The former is the "sucker," the latter the "free rider" strategy. Their expected utilities vary as the probability distribution of alternative behaviors by others varies. As argued in the book, the free-rider utility function intersects the sucker utility function from below. This is the crux of the matter. The review ignores and sidesteps it. Dr. Sugden merely notes the Cretan Liar-type paradox involved, as he does the Sorites-problem involved in indivisibility, and opines that I get bogged down in both. This is as it may be, but it is not the main part of the story.

Now, a word on game theory. "Straddle" indeed has the same payoff structure as "Chicken" or "Hawk-and-Dove." An appendix in the book is mostly devoted to discussing their differences. What we need to note here is that in Straddle, the interactions of the participants are parametric, not strategic. Consequently, to borrow Dr. Sugden's reproving language again, if he had "mastered the technicalities," he would not be asking me for a strategy equilibrium in the Nash sense. In a parametric interaction, I have the best strategy given what I expect others to do. I do not expect them to choose the strategy that would seem best for them if they expected me to choose my best one. Whether parametric or strategic is the right way to go is perhaps arguable, but--as economists and game theorists could tell Dr. Sugden--they should not be confused.

Lastly, dreary technicalities aside, I cannot disprove that in the absence of a state, voluntary provision of public goods might fail unless the benefit were much greater than the cost. But unless it were much greater, compulsory provision by the state would be hard to justify, too, unless coercion were regarded as harmless and costless in terms of our conceptions of morals, justice, and welfare. Against public goods that fail to meet the test of voluntariness, the school of Murray Rothbard and David Friedman, and lesser pro-marketeers, may well have a nearly cast-iron case.

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***Surety and Assurance (Continued from page 3)***

> the general calamity of the times and wisely made provision for it. (P.H.J.H. Gosden, *Self-Help: Voluntary Associations in the 19th Century* [London: Batsford Press, 1973, p. 91])

The earliest examples of suretyship are connected with the enforcement of customs and laws. In many societies, laws have existed and been enforced in the absence of anything which we would call a state, by purely voluntary action. In Anglo-Saxon England there existed a well developed system of customary law. (For an excellent discussion see Bruce Benson, *The Enterprise of Law* [San Francisco: Pacific Research Institute for Public Policy, 1990, pp. 21-30].) Similar and even more elaborate systems of surety and customary, non-state law flourished in Iceland and Celtic Ireland. (For these, see Jesse L. Byock, *Medieval Iceland* [Berkeley, CA: University of California Press, 1988]; William I. Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland* [Chicago: University of Chicago Press, 1990]; and D. A. Binchy, ed., *Studies in Early Irish Law* [Dublin: Irish Universities Press, 1936].) Enforcement in all of these cases was informal and primarily governed by custom, rather than by a state.

The dominant type of "peace-surety" in pre-Norman England was the borh. Borh was an institution for "securing peace observance among the lower classes," and was regarded at the time to be "the base of social order." (William Alfred Morris, *The Frankpledge System* [New York: Longmans, Green & Co., 1910, p. 25]. This is an extensive and rigorous historical treatment of the borh system and its later development into frankpledge. Other accounts can be found in T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. [Boston, MA: Brown, Little & Co., 1956, pp. 628-32], and Helen Maud Cam, *The Hundred And The Hundred Rolls* [London: Methuen, 1930].) The borh system was a voluntary form of peace surety and lasted until the Norman conquest of 1066. In its earliest form, it consisted of a group of twelve neighbors, often, though not always, members of the same clan or kin-group. It provided that if an individual committed a crime, disturbed the peace, or was delinquent on a debt, there was a group of individuals (the borh) who would share the burden of tracking, capturing and bringing that delinquent person to justice.

An individual's borh also served as a kind of credit reference and guarantee by vouching for his integrity and agreeing to make recompense in his stead if the situation required. The members who stood as borh were able to bear such risks for two reasons. First, the burden was dispersed among them and second, the frequency of contact and the voluntary nature of the bond helped deter actions in violation of custom. Kinsmen or neighbors were not under obligation to agree to stand as surety for an individual whose reputation they questioned, which made the maintenance of one's reputation of paramount importance and further restrained dishonest or criminal behavior.

*Kinsmen or neighbors were not under obligation to agree to stand as surety for an individual whose reputation they questioned, which made the maintenance of one's reputation of paramount importance and further restrained dishonest or criminal behavior.*

It is true that some form of suretyship was required by the crown at various times in medieval English history, but there was usually no stipulation as to the form of organization to be employed for ensuring accountability among the people. More importantly, since "social relations were maintained only with people who shared surety protection," there were strong incentives to engage in these voluntary associations even without the mandate of the crown. (Leonard Liggio, "The Transportation of Criminals: A Brief Political Economic History," in Randy E. Barnett and John Hagel III, eds., *Assessing The Criminal: Restitution, Retribution, and The Legal Process* [Cambridge, MA: Ballinger Press, 1977, pp. 273-94]) The importance of reputation and good character were essential for the establishment of credit and to secure prospective partnerships for negotiations and exchange.

> Because others in the group provided insurance (credit) for all members...they would not accept or keep someone who was not of good character. Consequently, members of a surety organization could disclaim someone who committed an egregious wrong, providing strong incentives to abide by the law...In effect, everyone who wanted to participate in and benefit from the social order was bonded. (Benson, 1990, p. 23)

It is clear from this that the borh system was sustained by self-interested behavior, but to show how it was in an individual's interest to participate in the institution *once it was established* is not the same thing as providing an invisible-hand type explanation of how the practice *first emerged.* Such accounts must go beyond a merely functional explanation of the institution to identification of the process by which it became established. The challenge in identifying how a practice such as that of borh was initiated lies in the fact, well known since the time of Hobbes, that in the absence of an established convention of mutual cooperation it appears that cooperative behavior (such as willingness to stand as surety for a family member) is *not* self-reinforcing and could not gain a foothold in society. This conclusion derives from the observance that, regardless of whether others behave cooperatively or not, an individual may gain an advantage for himself by cheating on a cooperative arrangement or by not participating in one while gaining the benefits. The claimed result is the irony of the well-known "prisoners' dilemma" game in which the players rationally choose not to cooperate with each other even though this

*(continued on page 18)*

***Surety and Assurance (Continued from page 17)***
outcome is less beneficial than mutual cooperation.

Robert Sugden and Robert Axelrod utilize game theory to point out, in the tradition of David Hume, that the uncooperative equilibrium that would seem to preclude institutions such as suretyship need not obtain in a situation where individuals expect to interact with each other repeatedly. In such a case, the short-run benefits of avoiding the cost of cooperating must be weighed by "the shadow of the future," the expectation that noncooperation may result in retaliation in future interactions, while cooperation may foster similar behavior in others. Sugden reasons that even in a world where most individuals obstinately refuse to cooperate, if the expectation of future interactions is high a growing minority may find that a strategy of "Tit-for-Tat," which bravely initiates cooperation while retaliating against defection, can result in a successful convention of cooperation. Axelrod likewise illustrates how a "cooperative cluster" of as little as two individuals following a Tit-for-Tat strategy may grow in number and establish a general convention of cooperation even in a community initially composed of unconditional non-cooperators. Hayek, in a recent work, argues that communities which develop voluntarist means of coordinating actions and regulating behavior will be more successful than others which, for one reason or another, fail to do so. (F. A. Hayek, *The Fatal Conceit* [London: Routledge, 1988]) This implies that Axelrod's model of the emergence of cooperative clusters or communities may be tied into an evolutionary model of historical development.

*When individuals know that a good will not be provided unless they cooperate, the incentive to do so may be strong enough to lead to such cooperation, even when not everyone in the group goes along.*

Moreover, work by Brubaker, Goldin and, most recently, Schmidtz suggests ways in which cooperation can arise even when strict interpretation of the prisoners' dilemma would suggest that no individual has any strong incentive to cooperate with others to supply some collective good. (Kenneth S. Goldin, "Equal Access vs Selective Access: A Critique of Public Goods Theory," and Earl R. Brubaker, "Free Ride, Free Revelation, or Golden Rule?", both in Tyler Cowen, ed., *The Theory of Market Failure* [Fairfax, VA: George Mason University Press, 1988, pp. 69-92 & 93-110]; Schmidtz 1991, passim but particularly pp. 92-111) When individuals know that a good will not be provided unless they cooperate, the incentive to do so may be strong enough to lead to such cooperation, even when not everyone in the group goes along. One crucial factor is the capacity to create a mechanism to exclude non-cooperators and, even more important, punish defectors. (A key argument here is that of Goldin, that most goods can be made exclusionary, i.e. non-public, hence the key decision is whether or not to supply the good on an exclusionary or open basis.)

Civil peace within a community, such as was maintained by the borh system, is the classic example of a collective good being provided through voluntary action. A community would collectively bind themselves, usually by oath, to live together in peace and punish malefactors. In one of the most dramatic examples, the formation of urban communes in medieval France and Italy, this was symbolized by the erection of walls which separated the cooperating community from the outside non-participants. Another example was the movement for the "Peace of God" and "Truce of God" in northern Europe during the twelfth century, where large numbers of lords and cities would collectively bind themselves not to war against each other and to cooperate in punishing anyone who reneged on the agreement. Institutions such as outlawry and excommunication evolved to enforce these "conditional assurance contracts," as Schmidtz terms them. (Schmidtz, 1991, pp. 66-79. For historical examples of this kind of process see Henri Pirenne, *Medieval Cities* [Princeton, NJ: Princeton University Press, 1925], Charles Petit-Dutaillis, *Les Communes Francaises* [Paris: Albin Michel, 1947]; W. F. Butler, *The Lombard Communes* [New York: Haskell House, 1969 repr. of 1906 ed.]; and, for the "Peace of God" movement, Harold Berman, *Law and Revolution: The Formation Of The Western Legal Tradition* [Cambridge, MA: Harvard University Press, 1983].)

Anthony de Jasay goes further and argues that even when there are free riders on the public good supplied by others' free cooperation, it may still be in the interests of the cooperators to supply the good and carry the free riders--to be "suckers" in the usual terminology. Again, the key factors are the knowledge of the actors that the good will not be supplied at all in the absence of their cooperating, the existence of a mechanism to ensure that it will be supplied if a given number cooperate, and some means of identifying the cooperators.

*Voluntary social organization of this kind is compatible with large, complex societies, and is not found only in "face-to-face," "tribal" communities.*

These theoretical treatments of the process by which cooperation, conventions or institutions emerge spontaneously are perfectly compatible with the historical treatments of the borh system, which emphasize the role played by reciprocity and the importance of ties such as kinship and geography which would guarantee frequent interaction. The Icelandic example shows how surety and other cooperative relations could evolve and sustain themselves even where the individuals involved were not necessarily connected by kinship ties or geographical contiguity.

After about the year 960 Iceland was divided into thirty-nine chieftaincies, each headed by a chieftain or *godi* (plural *godar*). Each godi had authority over a *thing*. This was an association of individuals or households who voluntarily chose to be bound to a particular godi. Among its many other functions, the thing acted as an instrument of collective surety, in the same way as the borh. It was also the main agency for settling legal disputes, seen purely as private affairs between individuals. The chieftaincies were grouped into thirteen *varthings*. The meetings of things and varthings were judicial assemblies at which disputes were heard and settled, with serious matters held over to the collective meeting of all the godar at the annual *althing*. The thing was not a geographical entity; at the local level the thingmen of various godar were intermingled with no clear geographical base for any one thing. Also, things did not necessarily correlate with kin-groups. Although in the beginning things were primarily composed of kin-groups, they later expanded to include members without kin relations. (Byock, 1988, pp. 55-76, 108-36; Miller, 1990, chs 6-8, pp. 179-300)



The Icelandic case also shows the importance of another factor: the use of representation or fictive collective individuals in reducing the number of those who must decide to collaborate to an optimum level. There being only thirty-nine godar made the decision to outlaw any defector easier to arrive at. Other examples of this were the leagues of cities which were a feature of the middle ages, the most notable being the Hanseatic League. Here the number of individual merchants and operatives bound by the collective agreements of the league (to mutual peace, collective security, and common commercial law) was very large, but the actual entities making up the league were a manageable number of cities. This also demonstrates the point that, contrary to much ignorant or malicious comment, voluntary social organization of this kind is compatible with large, complex societies, and not found only in "face-to-face," "tribal" communities. In fact, as Hayek and others have argued, in the "great" or "extended" society of modernity, free and voluntary cooperation becomes more, not less, important. Voluntary cooperation through these kinds of networks and institutions is what enables use to be made of the great mass of tacit knowledge scattered throughout the population, so making modern society possible and more social than its "primitive" forbears. (Hayek, 1988, passim but especially pp. 15-19)

*The elimination of the element of choice and the replacement of kinship and friendship relations as the basis of suretyship with an arbitrary group decided by the authorities eviscerated suretyship by removing the crucial voluntary element.*

Moreover, such systems are also adaptable to changing political and demographic conditions. The Anglo-Saxon borh is a good example of this. With time, it came to be based less and less on actual (as opposed to fictive) kin ties, if indeed this had ever been dominant. Benson argues that the borh system came to lose its family character because of the increased mobility of the population, which caused kinship reciprocity to break down while making reciprocity among friends and neighbors of the same church or vil more significant (1990, p. 23). Maitland, by contrast, argued that the system had never been purely, or even primarily, kin based. (Sir Frederick Pollock & Frederic William Maitland, *History Of English Law To The Time Of Edward I*, 3rd ed. [Cambridge: Cambridge University Press, 1968, pp. 568-71]) Either way, borh was sufficiently robust as an institution to cope with great social change.

**The Replacement of Borh by the Frankpledge System**

The Anglo-Norman scheme of suretyship called *frankpledge* is sometimes confused with the borh practices from before the Norman conquest. Like borh, frankpledge involved a group of men pledging or bonding an individual, although the groups established for suretyship under frankpledge were the groups of ten known in medieval society as the *tithing*, not necessarily friends or relatives. Although similar in purpose and in many particulars, there were two crucial differences between borh and frankpledge: first, frankpledge seems mainly to have been an institution imposed by the crown; secondly, whereas an individual could decline to stand as surety in another's borh on the basis of knowledge of that person's character, those who stood as suretyship under frankpledge had no choice in the matter. Morris notes that:

> Between the voluntary pledging of a man by his neighbours in 1030...and the duty, in 1115, of every man in a tithing to serve for every other man in the tithing without right of refusal or withdrawal, no matter what the character of the associates, is a break that can be explained only by governmental action of a deliberate and rigorous nature....(p. 29-30)

This change was significant. The effectiveness of the borh system had been due to everyone's knowing that the likelihood of receiving suretyship from his neighbors depended on his own actions and reputation. The elimination of the element of choice and the replacement of kinship and friendship relations as the basis of suretyship with an arbitrary group decided by the authorities eviscerated suretyship by removing the crucial voluntary element. The borh system had developed spontaneously, largely the result of voluntary intercourse and probably a considerable amount of trial and error over a century and a half of Anglo-Saxon legal history. It was both adapted and adaptable to the changing demography and political environment of medieval England. Frankpledge, on the other hand, was imposed by William I for reasons of expediency and greed. Frankpledge was intended "to invoke a more stringent borh system" (Morris, p. 31), and also served the purpose over the eleventh and twelfth centuries of diverting compensation into fines paid to the crown, so swelling the King's revenue. By supplanting a voluntary system, dependent on a composite of tacit rules of trust which had developed spontaneously over centuries and had proved to be beneficial and progressive, with a compulsory arrangement, essential elements which made borh

*(continued on page 20)*

***Surety and Assurance*** ***(Continued from page 19)***

an effective surety system were lost. Benson recounts how under the Normans voluntary participation in the maintenance of civil peace declined and had to be replaced by the extension of more authoritarian methods of keeping the peace, such as the introduction of local sheriffs with broad powers of law enforcement. The “shadow of the future” which had reinforced voluntary participation in the maintenance of order was diminished under frankpledge. Thus, frankpledge could not function in the way that borh had, since it drastically reduced the role of reputation that had been at the heart of the Saxon legal system.

*The success of the medieval fairs is not hard to understand, and the function they served is of interest for understanding the further development of mutual risk-sharing practices.*

**Suretyship and the Growth of International Trade**

The social function that suretyship served is illuminated by a look at the cultural and commercial history of Europe as a whole. By the twelfth century, networks of trade were being extended deeper into England and the continent from commercial centers in Northern Italy and coastal cities on the Mediterranean. The uncertainties associated with international commerce during this time were considerable. Not the least of those were risks relating to the trustworthiness or prudence of prospective transactors. These were often high because of the tenuous and infrequent nature of trade in the more isolated regions of Europe. An examination of the emergence of suretyship within the context of expanding medieval markets is especially important. It is even more interesting when viewed in light of the argument that the expansion of the groups within which people interact and the resulting decrease in the frequency of interaction between individuals endangers social stability. It is a significant point that the problem of increasing anonymity is not new to modern civilization, and that history provides examples of how it has been effectively dealt with by practices such as suretyship.

The extension of markets into previously isolated inland regions of France and Britain during the 11th and 12th centuries often took the form of periodic fairs for which merchants traveled great distances to sell their merchandise. These fairs were invaluable institutions for coordinating trade between people from distant parts of Europe and beyond. The famous fairs of Champagne, which ran almost continually, alternating in one of four towns of that region, attracted merchants from all parts of the Western world during the twelfth and thirteenth centuries. As a result, they became “a sort of clearing house for merchandise and currency exchanges between the Mediterranean and the North Sea basin.” (Robert Lopez and Irving Raymond, *Medieval Trade in the Mediterranean World* [New York: Columbia University Press, 1990 repr of 1955 ed., p. 80]. This is a very thorough documentation of medieval trading practices. Ellen Moore's *The Fairs of Medieval England* [Toronto: Pontifical Institute of Medieval Studies, 1985] examines these practices as they occurred in England.)

The success of the medieval fairs is not hard to understand, and the function they served is of interest for understanding the further development of mutual risk-sharing practices. To appreciate the role played by such practices, it is useful to examine how the fairs came to be in the first place. In the absence of efficient communication, large towns, and well developed permanent commercial establishments in these regions, there was a tremendous amount of uncertainty associated with trade, especially international trade. The prospects of buyers and sellers meeting were low and difficult to ascertain, credit arrangements were extremely risky, and the problem of differing currencies was serious--all of this since the scope and frequency of personal interactions between transactors were severely limited. In this context, the actions of the merchants exemplify Sugden's arguments about cooperative clusters. Merchants must have attempted to seek out locations that were central and accessible, and recognized as such by other merchants as well as the local population. Small groups of merchants who converged on a particular place and time in this attempt would have done well to agree to return again at a specified time and to announce this to other merchants and to the locals. Such groupings would consolidate and grow as word of the time and place of their meeting spread both locally and internationally. As the same merchants (or their agents) returned again and again and the amount of trade grew sufficiently to lead to convergence on certain standards of trade and currency exchange, the uncertainty of trade in these regions was greatly reduced, and transactions that were too costly or risky to be undertaken before were now regular occurrences.

*The fairs made it possible for commercial relationships between individuals to develop, for reputations to be established and for accepted practices for assuring performance of contract to evolve.*

The fairs made it possible for commercial relationships between individuals to develop, for reputations to be established and for accepted practices for assuring performance of contract to evolve. Most notably, they led to the emergence of the *Law Merchant*, a transnational system of customary law enforced by informal courts of Piepowder (from *pieds poudres*, or dusty feet), which first appeared at the Champagne fairs and soon spread all over Europe, becoming more systematic as they did so. (For accounts of the Law Merchant and its origins, see Wyndham Anstis Bewes, *The Romance Of The Law Merchant* [London: Sweet & Maxwell, 1986 reprint of 1923 ed.]; William Mitchell,



*An Essay On The Early History Of The Law Merchant* [New York: B. Franklin, 1969 reprint of 1904 ed.]; and L. E. Trakman, *The Law Merchant* [Littleton, CO: F. B. Rothman, 1983].) The spontaneous appearance of the Law Merchant and its surety mechanisms is particularly interesting as an instance where such an institution evolved despite the lack of repeated contacts between players, showing that anonymity does not necessarily lead to a crippling “prisoners' dilemma.” (For a discussion of this point see Paul R. Milgrom, Douglass C. North, and Barry R. Weingast, “The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs,” in *Economics and Politics*, Vol. 2, 1990, pp. 1-25.)

*Membership in a merchant guild was very valuable since it communicated one's trustworthiness to other merchants. Members were thus discouraged from taking actions that might endanger their continued acceptance within the guild.*

Nor was the Law Merchant the only institution to evolve from the fairs. In the fairs of medieval England, rules were established that further reduced the uncertainty of itinerant trading by extending the liability for repayment of debts to any merchant within the guild of which the original borrower was a member. The guilds were local voluntary associations whose members practiced the same trade. Craft and merchant guilds served to set standards of workmanship, rules of the business, terms for apprenticeship, and conventions for adjudicating disputes. By providing suretyship among members, the guilds converted costly international disputes into more manageable disputes within the local guilds and reduced the scope for defaulting on agreements. The custom of mutual liability for debts among members of the guilds was advantageous because frequent interaction, reciprocity, and bonds of fellowship between members greatly reduced the gains that could be had from defaulting on a trading obligation. Membership in a merchant guild was very valuable since it communicated one's trustworthiness to other merchants. Members were thus discouraged from taking actions that might endanger their continued acceptance within the guild. (See Antony Black, *Guilds and Civil Society* [Ithaca, NY: Cornell University Press, 1984].)

The importance of mutual accountability for promoting trade in England was demonstrated by the contraction of trade that occurred after 1275, when the First Statute of Westminster legally abolished the practice. By 1283, Edward I was dismayed

> ...because merchants who in the past have lent their substance to various people are impoverished because there was no speedy law provided by which they could readily recover their debts on the day fixed for payment, and for that reason many merchants are put off from coming to this land with their merchandise to the detriment of the merchants and of the whole kingdom. (Moore, p. 120)

Before continuing, it is important to take notice of the social dynamics underlying this historical account. The search for new profit opportunities led entrepreneurs in the established European centers of commerce to try to expand their trade into the hinterland of the continent. A new market institution evolved—the fair, which made this expansion possible by establishing a process of expanding trade geographically. Yet, the physical distance and cultural differences that separated merchants gave rise to problems of accountability. The problem was that the expansion of the groups within which people interacted diluted the influence of reciprocity. The response was twofold: first, the extended, expanded trade was preserved by returning the function of deterring dereliction to smaller, localized social units that could bring reciprocity and fellowship to bear on their members. The second response was the emergence of impersonal voluntaristic institutions such as the Law Merchant which, like modern credit bureaus, transmitted and pooled information about individual merchants, making it available to their fellows even when they seldom met face-to-face. Contemporary institutions such as credit card companies and bureaus are in fact excellent examples of private solutions to apparently insuperable public good problems, occurring in a system marked by anonymity and ephemeral contact: again this demonstrates that such solutions are not purely a feature of “primitive” societies. (For an excellent discussion of the theoretical problems involved in credit, and the appearance of the credit bureau as a solution, both historically and in modern society, see Daniel B. Klein, “Cooperation Through Collective Enforcement: A Game-Theoretic Model of Credit Bureaus,” forthcoming in the *Journal of Economics and Politics.*)

Two complementary forms of institutions, then, tend to emerge together and reinforce each other. On the one hand are institutions (like media of exchange, standard forms of contract, and fairs) which are comprised of conventions that guide people's expectations for the coordination of their plans. On the other hand are institutions (like courts, credit bureaus, police, and in the present context, guilds), which reinforce cooperative rules of conduct typically susceptible to breakdown due to shirking or free riding. As development of the former coordinating institutions fosters the extension or dispersion of markets, they create the need and incentive for reinforcing institutions that bring problems of accountability back to a level where reciprocity and fellowship are effective and enable individuals meeting for the first--and maybe only--time to discover each other's past records.

One important conclusion to be drawn from the history of the extension of commerce in Europe and of suretyship in England is that voluntary risk-shifting institutions such as suretyship serve the overall order of society in ways that reach beyond what we normally think of when we speak of “the reduction of uncertainty.” Most notably, they allow for both the extension of the market order and improved social stability. Contrary to the arguments of some historians, such institutions do not imply a *(continued on page 22)*

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holistic or collectivist view of identity. Rather, they enable individuals to pursue their own ends more effectively by acting cooperatively with others. As one author puts it, "The crucial point about both guilds and communes was that here *individuation and association went hand in hand* ... One achieved liberty *by belonging to* this group." (Antony Black, 1984, p. 65, emphasis original)

**The Emergence of Assurance: British Friendly Societies**

The roots of the friendly-society sort of mutual assurance against the risks of illness, accident or other disability appear to be closely connected with earlier institutions of suretyship, although they served a different purpose. While suretyship arrangements operated primarily by reducing the risks imposed on those who would trade with members of the group, assurance served to cope with the risks faced by the group members themselves. The history of these assurance institutions bears out the fact that spontaneous ordering processes like those identified as the source of voluntary suretyship can explain the existence of assurance institutions as well. By the 16th century, the power of the guilds in England had grown so great that they were seen as a threat to the rule of the crown and the government undertook to suppress them. But as the guilds declined, a new form of fellowship arose to replace them. The "friendly societies," as they were called, were voluntary associations of working men organized "to meet their social and convivial needs as well as to insure against the hazard of sickness and death." (P.H.J.H. Gosden, *Self-Help: Voluntary Associations in the 19th Century* [London: Batsford Press, 1973, p. vii]. See also Gosden's *The Friendly Societies in England 1815-75* [New York: Augustus M. Kelley, 1967]; two works by William H. Beveridge, *Voluntary Action* [London: George Allen & Unwin, 1948], and, with A. F. Wells, *The Evidence for Voluntary Action* [London: George Allen & Unwin, 1949]; and two older works: Samuel Smiles, *Self Help* [London: J. Murray, 1958], and Frederick Eden, *The State Of The Poor* [London: J. Davis, 1797]. These make up the classic literature on friendly societies. For more recent work, see David G. Green, *Working Class Patients And The Medical Establishment: Self-Help in Britain from the Midnineteenth Century to 1948* [New York: St. Martins Press, 1985], and the same author's *Mutual Aid or Welfare State: Australia's Friendly Societies* [Sydney, NSW: Allen & Unwin, 1984]; and Ian R. Christie, *Stress and Stability in Late Eighteenth Century Britain* [New York: Oxford University Press, 1984, ch. 4]. In the American context, see David Beito, "Mutual Aid for Social Welfare: The Case of American Fraternal Societies," in *Critical Review*, Vol. 4, No. 4, 1991, pp. 709-36.)

There is disagreement over whether direct historical connections may be drawn between the friendly societies and the merchant and craft guilds that came before them, but, as F. H. Eden observed, there is

> an extraordinary coincidence between the rude simplicity which pervades the ordinances of [some of] the Saxon Guilds, and some of the modern friendly Societies. (Eden, 1797, p. 590)

*In Britain, the societies were able to provide the full range of medical services, since by pooling their resources they were able to build and run dispensaries and to retain a panel of doctors on a permanent basis.*

Unlike the merchant and craft guilds, however, their membership was not dominated by any one trade, but was comprised of men of all trades and work backgrounds. The friendly societies charged their members regular subscriptions so that the pooled funds could be used for the relief of members who were unemployed or who, because of illness, injury, old age or other misfortune, could not support themselves or their families. (The wide occupational spread of the membership was of great assistance here: as each occupation tended to have its own trade cycle it was unlikely, barring a major catastrophe, that all or a majority of the societies' members would be unemployed at any one time.) These societies were numerous and large during the 18th and 19th centuries. Eden estimated in 1801 that there were about 7,200 societies with a total of 648,000 members (Eden, 1797, p. 7). By the end of the 19th century, the number enrolled in the great "Affiliated Orders" such as the Oddfellows, Druids, and Forresters ran to several million (Gosden, 1967).

By the late 19th century, most friendly societies supplied not only financial relief to those whose circumstances required it, but offered treatment by a medical practitioner when needed (Gosden, 1973, p. 112). In Britain, the societies were able to provide the full range of medical services, since by pooling their resources they were able to build and run dispensaries and to retain a panel of doctors on a permanent basis. Because the societies exercised customer control over the doctors, they were able to keep down medical prices to an affordable level, as well as control the service provided by the medical practitioners and so check the cartelizing tendencies of the organized medical profession (Green, 1985, passim).

*Early self-help groups were fiercely individualistic and resisted all external attempts to regulate them.*

Early self-help groups were not, as one might expect, politically collectivist in their organization or intent. Rather, they were fiercely individualistic and resisted all external attempts to regulate them. These organizations, priding themselves on their autonomy, consciously fostered among their members the ethics of self-reliance, prudence, and frugality. Unlike the compulsory insurance schemes of later years, friendly societies were not established for the purpose of the redistribution of wealth. (Black, 1984, pp. 177-81; Gosden, 1973, p. 10; Hayek, 1960, p. 287-89)



Like the guilds that were their historical predecessors, the friendly societies were viable because their rules and organization assured close and frequent contact between members, offering the maximum scope for reciprocity and the development of reputations. The development of affiliated orders provided a mechanism for transmitting information about a person's character and reputation to those who did not know them directly. In much the same way that reciprocal and reputational dynamics discouraged guild members from defaulting on loans or failing to perform contracts, they counteracted the temptation of individuals in a mutual-aid situation to free-ride on the contributions of others in the group. Ties of fellowship were strengthened by the fact that the friendly societies organized not just for the purpose of mutual indemnity but as centers of conviviality and friendship, just as their name implied. This factor was usually overlooked by Parliament, which on some occasions tried to copy the success formula of the friendly societies when establishing compulsory mutual aid societies for various groups of citizens. In reference to a 1792 Act of Parliament, which attempted to set up a compulsory mutual society for the relief of skippers and keelmen employed in the coal trade on the river Wear, Eden claimed that "one of the most important functions of local friendly societies, for which the Act obviously made no provision...was to bring men together to spend a convivial hour with their neighbours...." (Gosden, 1973, p. 8) Like other legislative forays of this sort, this mandatory society was unsuccessful, apparently because it was seen as a tax on the workers and not as a vehicle for social intercourse (Eden, 1797, pp. 614-615).

*Eden was convinced that the state should not attempt to regulate friendly societies, for if it did so "the inclination of the labouring classes to enter them will be greatly damped, if not entirely repressed." In this he was entirely accurate in his observations.*

> Eden was convinced that the state should not attempt to regulate friendly societies, for if it did so "the inclination of the labouring classes to enter them will be greatly damped, if not entirely repressed." In this he was entirely accurate in his observations, for in the next century even that mild form of state protection offered by registration was to be found objectionable by many members and even in the later 19th century, the Chief Registrar believed that there were probably as many members of unregistered as of registered societies." (Gosden, p. 10)

This evidence appears to highlight the importance not only of the frequency of association, but its voluntary nature for the nurturing of reciprocity and friendship.

The parallel between the character of the social rules involved in assurance and in suretyship is clear. Each harnesses the influence of reciprocity and reputation to reinforce cooperative behavior. Each strengthens the function that trust serves in social relations by maintaining close interaction among individuals through practices based on fellowship. Not surprisingly, explanations of the emergence of assurance have been made along very similar lines to those discussed for suretyship. Sugden provides an invisible hand explanation of the development of mutual aid societies which runs exactly parallel to the process he identified for the establishment of cooperative conventions in the prisoners' dilemma game. (See Sugden, 1986, ch. 7 for this discussion.)

**Conclusion**

Suretyship and assurance may seem dry, narrow topics, of interest only to the specialist. In fact, as this paper demonstrates, they are basic institutions for any liberal order, and their study can cast light on many questions of vital import to those interested in understanding and promoting the classical liberal ideal of a free society. The voluntary cooperation of individuals through these institutions has played a crucial role in the historical development of free societies. In the economic arena, they have been essential to the expansion of trade and the economic empowerment of individuals through greater wealth and a more flexible and productive economy. They have often been central to the maintenance of social peace and civil order. They have been the mechanism for protecting individuals and communities against hazards through the provision of a wide range of benefits and services, from unemployment insurance through old age provision to health care.

Moreover, all of this was done on a voluntary basis, without any resort to coercion or forced redistribution of resources. The historical evidence presented here should force us all to reexamine many common presumptions: that such "services" as law and police can only be provided by the state, that social welfare is best provided by some form of forced redistribution, and that voluntary cooperation in civil society labors under the burden of a crippling prisoners' dilemma.

All of this means that much of our currently accepted social and economic theory is contradicted by the facts of history. Consequently, there is a wealth of areas open to the eager iconoclast, for anyone who wishes to demonstrate that the idols of the modern academy have feet of clay. In economics and game theory, there is clearly a need for work which takes into account the actual historical experience, rather than trying to force it into the discredited model of classical public goods theory. We need in particular more work along the lines of that of Schmidtz, Klein, and some of the contributors to the Cowen volume. This work should seek to explain the precise mechanisms and dynamics involved in voluntary cooperation. One important question is that of the role and impact of technology; another, that of whether there may be an optimum number of participants for the formation of such voluntarist institutions as those described here.

History and sociology also have many opportunities for

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