BOOK REVIEW

FOR A NEW LIBERTY. By Murray N. Rothbard. The MacMillan Co., New York, N.Y., 1973. Pp. 327. $7.95.

Murray Rothbard hears a different drummer. He and his libertarian band march to music tapped out by the invisible hand of Adam Smith. They believe—and this is the central thesis of his "libertarian manifesto" *For a New Liberty*—that "no man or group of men have the right to aggress against the person or property of anyone else."[1] Whether or not his clarion call to anarcho-capitalism will crumble the walls of governmental regulation that imprison the creative energies of humanity, his argument will sound sweetly in the ears of those weary with worn-out formulas of both the left—ask what your country can do for you—and the right—ask what you can do for your country.[2] The libertarian alternative, which is but a simple elaboration of the above thesis, offers a startling, though by no means novel, insight into a wide range of problems that bedevil contemporary society. To acquaint the unfamiliar reader with the libertarian perspective, and to illustrate its particular interest for the lawyer, this review will focus upon Mr. Rothbard's analysis of a specific problem, that of police discretion.

The *President's Crime Commission Task Force Report* on the police concedes at the outset that the police exercise enormous discretion in deciding whether to invoke the criminal process,[3] even though

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1. M. ROTHBARD, FOR A NEW LIBERTY 8 (1973).

2. The economist Milton Friedman, who presently languishes in the libertarian doghouse for his apostate advocacy of the negative income tax and the educational voucher system, nevertheless gave the libertarian answer to both formulas:

> The free man will ask neither what his country can do for him nor what he can do for his country. He will ask rather, 'What can I and my compatriots do through government' to help us discharge our individual responsibilities, to achieve our several goals and purposes, and above all, to protect our freedom? And he will accompany this question with another: How can we keep the government we create from becoming a Frankenstein that will destroy the very freedom we establish it to protect?

M. FRIEDMAN, CAPITALISM AND FREEDOM 2 (1962).

3. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 21 (1967) [hereinafter cited as TASK FORCE REPORT].

they are theoretically committed to full enforcement of the criminal law.[4] Thus, the police may take a young white boy suspected of larceny home to his parents but drag a similarly suspected black youngster by the neck to police headquarters and charge him with delinquency.[5] They may respond immediately to a call for help from a distraught suburban wife whose drunken husband is threatening her but delay their arrival at the ghetto doorstep because "blacks solve their problems with violence."[6] The police may decide not to arrest "minor" narcotics offenders who agree to inform on "more serious" offenders.[7] They may look the other way when a church organization stages a bingo party that admittedly violates applicable gambling statutes but refuse to close their eyes to the well-known operation of a numbers racket unless and until the operator crosses their palms with enough silver.[8] A good-looking cop may linger at a urinal in a public restroom hoping to solicit a homosexual overture, or the police may adopt a live and let live policy vis-à-vis the gay community.[9] They may drive the drunk businessman home but throw the skid row bum into the cooler.[10] They may periodically arrest prostitutes with no intention of prosecuting but rather to compel medical examinations in order to insure that the ladies are undiseased.[11] Whether any or all of these policies are justified is irrelevant to my point, which, to repeat, is that the police enjoy a largely untrammeled discretion to enforce or to ignore the criminal law. As the President's Commission concluded, the officer on the beat tends to decide these questions on the basis of his individual biases and prejudices.[12]

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4. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 557 (1960), documents the pervasive statutory requirements that police "at all times diligently and faithfully . . . enforce all . . . laws . . . ."

5. *See generally* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

6. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 122-23 (1966).

7. A federal judge has described the usual practice as follows:

> The method chiefly used in apprehending sellers of narcotics, for instance, is the employment of addicts to make purchases from suspects in the presence of federal officers who are secreted or in disguise. . . . The addict is given barely enough money to live on and supply his need for narcotics for a few days. . . . If the addict succeeds in landing some of the criminals the Government is after, he is well paid and his services will continue.

Williamson v. United States, 311 F.2d 411, 446 (5th Cir. 1962) (Cameron, J., dissenting).

8. *See generally* Bloche, *The Gambling Business: An American Paradox*, 8 CRIME & DELINQUENCY 355 (1962).

9. *E.g.*, N.Y. Times, May 11, 1966, at 36, col. 2 (Policemen forbidden to entrap homosexuals to make arrests).

10. *See generally* R. NIMMER, TWO MILLION UNNECESSARY ARRESTS (1971).

11. Professor Wayne LaFave describes one instance of this practice in ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 452 (1965).

12. TASK FORCE REPORT, *supra* note 3, at 15. Professor Davis can scarcely contain his alarm:

> The harms from police violations of clear statutes are multiplied when

Consequently, concerned citizens have formulated various schemes by which the community can structure this exercise of discretion. The most popular of these schemes among the sophisticated intellectuals who fancy themselves the molders of public opinion calls for the police to establish enforcement policies whose substantive content and application would then be subject to judicial review. The President's Commission recommended that the police enunciate policy guidelines which "adequately deal with the complex problems involved and . . . do so in terms that are clear, sufficiently precise, and meaningful to the officer at the operating level whose job it will be to implement it."[13] Fearing that the police might muff such a task, the Commission of course adds the usual caveat that the operations of the police must be subject to judicial review and control where the police are left with discretion to develop their own policies within broad legislatively or judicially fixed limits.[14] Professor Davis, the reigning pooh-bah of administrative law, seconded the Commission's proposal and then added an even more explicit amendment: "[T]he police should do a large portion of their policymaking through rule-making procedure along the line of what is required of federal agencies by the Administrative Procedures Act."[15] Opportunity for judicial review inheres in the idea of rulemaking, and Davis does not flinch from that consequence. Indeed, he embraces it enthusiastically.[16]

What is the libertarian alternative? First, the libertarian would preclude the police exercise of discretion in a wide range of circumstances simply by wiping many criminal prohibitions off the statute books. Others—generally liberals—have also urged the abolition of at least some "victimless" crimes, but the reasons which underlie the libertarian position differ radically from liberal assumptions and merit some exposition. Listen to Professor Rothbard on pornography:

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the policy-making power is exercised by individual policemen. *The system is atrociously unsound under which an individual policeman has unguided discretionary power to weigh social values in an individual case and make a final decision as to governmental policy for that case, despite a statute to the contrary, without review by any other authority, without recording the facts he finds, without stating reasons, and without relating one case to another.* Yet that is precisely what happens when the legislation makes the act a crime, when the police department leaves the degree of enforcement to the judgment of the individual policeman, and when the policeman refrains in some cases from full enforcement, on the basis of his own ideas about social values.

K. DAVIS, DISCRETIONATY JUSTICE 88 (1969).

13. TASK FORCE REPORT, *supra* note 3, at 27; *accord* MODEL CODE OF PRE-ARRAIGNMENT § 1.03 (Tent. Draft No. 1, 1966).

14. TASK FORCE REPORT, *supra* note 3, at 32-33.

15. K. DAVIS, *supra* note 12, at 80 (footnote omitted).

16. In the face of increasing criticism of the administrative process in general and the rulemaking process in particular, Professor Davis insists: "I repeat my view that rule-making machinery, such as prescribed by the federal Administrative Procedure Act, is one of the greatest inventions of modern government." K. DAVIS, *supra* note 12, at 92.

> [T]he good, bad, or indifferent consequences of pornography, while perhaps an interesting problem in its own right, is completely irrelevant to the question of whether or not it would be outlawed. . . . It is not the business of the law—even if this were practically possible, which is, of course, most unlikely—to make anyone good or reverent or moral or clean or upright. This is for each individual to decide for himself.
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> It should be clear . . . that prohibition of pornography is an invasion of property right, of the right to produce, sell, buy, and own.[17]

On prostitution:

> If labor and persons in general are to be free, then so should there be freedom for *prostitution.* Prostitution is a voluntary sale of a labor service, and the government has no right to prohibit or restrict such sales.[18]

And on gambling:

> In New York State, a particular form of imbecility developed over the years: until recent months, all forms of horse betting were illegal *except* those made at the tracks themselves. Why horse betting at Aqueduct or Belmont race track should be perfectly moral and legitimate while betting on the same race with your friendly neighborhood bookie should be sinful and bring down the awful majesty of the law defies the imagination. Unless, of course, if we consider the point of the law to force betters [sic] to swell the coffers of the tracks. Recently, a new wrinkle has developed. The City of New York has *itself* gone into the horse-betting business, and betting at city-owned stores is perfectly fine and proper, while betting with competing private bookies continues to be sinful and outlawed. Clearly, the point of the system is first to confer a special privilege upon the race tracks, and then upon the city's own betting installation.[19]

In short, the libertarian considers these "crimes" voluntary exchanges between consenting adults who ought to be able to purchase whatever they want from whomever is willing to sell the desired goods at whatever price they can agree upon.

The libertarian would consequently characterize a far wider range of criminal conduct as victimless than would his occasional liberal bedfellow. Usury illustrates the point. Although the liberal would denounce it in biblical tones that would evoke the image of Christ

17. M. ROTHBARD, *supra* note 1, at 116-17.
18. *Id.* at 119.
19. *Id.* at 123-24.

driving the money lenders from the temple, it is nothing more than *A* agreeing to loan *B* a specified amount of money at a specified rate of interest. Like any other vountary contractual arrangement, it ought then to fall outside the purview of the criminal law.[20] Drug traffic is still another example. While a good many liberals echo the libertarian refusal to criminalize marijuana use, some would still throw the seller in jail. Very few would stand with the libertarian, who would likewise refuse to criminalize the producer, seller, or user of any drug from marijuana or LSD to heroin. The libertarian would finally part company with even the last of the stalwart liberals when they insisted, as they always do, on state regulation of drug sales.

Furthermore, the libertarian analysis alone explains why the police will *always* abuse their discretion and why corruption will *inevitably* flourish wherever the criminal law seeks to prevent the voluntary exchange of goods and services. While able to distort the operation of a market, government can never suppress it entirely. If the man who wants to look at filthy pictures cannot browse in an adult bookstore on Times Square, he will find his seller in a back alley. Two inevitable consequences flow from police enforcement of such criminal prohibitions. As usual, the poor suffer disproportionately. They are either priced out of the market or find themselves more easily apprehended because they must conduct their transactions in semi-public places. Second, the police must resort to tactics ranging from entrapment to electronic surveillance in order to catch these "criminals," because no party to the transaction ever complains.[21] The police abuse their discretion whenever they enforce the law against some but not others and whenever they play Big Brother in the pursuit of their prey.

However, the police are not always implacable bloodhounds. A few dollars will often throw them off the scent, so long as they are not chasing the perpetrator of some violent crime.[22] Reflecting on the Knapp Commission hearings which revealed widespread corruption among New York police, Mr. Rothbard observed that the police cannot

20. The use of violence to back up the shylock—which results from usury laws having driven the high-interest loan market into the hands of the underworld—would of course be anathema to the libertarian principle of sanctity of person and property from violent invasion. *See* M. ROTHBARD, *supra* note 1, at 23.

21. One of the more ludicrous lines of cases, for example, arises out of police surveillance of "tea rooms," public restrooms frequented by homosexuals. The police resort to tactics such as these: installing one-way mirrors behind which they observe users; concealing themselves above false ceilings and peering through fixture openings, standing on ladders and peeking through transom windows located high on walls. Do such tactics violate the users' rights to privacy? *See generally* Note, *Decoy Enforcement of Homosexual Laws*, 112 U. PA. L. REV. 259 (1963).

22. The President's Crime Commission reported that the police maintain a relatively high apprehension rate of violent offenders. TASK FORCE REPORT, *supra* note 3, at 1. Recurrent corruption charges almost never allege that the police accept bribes from murderers, rapists, or other perpetrators of violent crimes.

resist the temptation to profit from the use of their discretionary powers, and they use their authority in a way that inflates the cost of the service:

> [P]olice corruption occurs in those areas where entrepreneurs supply voluntary services to consumers, but where the government has decreed that these services are illegal: narcotics, prostitution, and gambling. Where gambling, for example, is outlawed, the law places into the hands of the police assigned to the gambling detail the power to sell the privilege of engaging in the gambling business. In short, it is as if the police were empowered to issue special licenses to engage in these activities, and then proceeded to sell these unofficial but vital licenses at whatever price the traffic will bear.
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> At best, the result of these actions is the imposition of higher cost, and more restricted output, of the activity than would have occurred in a free market. But the effects are still more pernicious. Often, what the policemen sell is not just permission to function, but what is in effect a privileged monopoly. In that case, a gambler pays off the police not just to continue in business but also to freeze out any competitors who might want to enter the industry. The consumers are then saddled with privileged monopolists, and are barred from enjoying the advantages of competition.[23]

The abolition of victimless crimes does not, however, entirely dispose of the police discretion problem, for the libertarian subscribes to a minimal criminal code that outlaws only crimes of violence, such as theft, rape, and murder. Although the police less frequently exercise their power not to enforce the law prohibiting these offenses, they still have discretion in the formulation of policies to prevent and investigate them: *e.g.*, should police patrol high crime areas on foot or in squad cars? The police must also decide many other policy questions that have little to do with effective law enforcement but nevertheless generate considerably community concern: *e.g.*, should squad cars be integrated? How can we structure police discretion in these remaining circumstances?

The second libertarian point—and the answer to the last question—is to treat police protection like any other labor service: let the consumer purchase whatever amount and whatever kind of police protection he desires. The person startled by such a proposition should recognize that, as governmental police protection has dwindled in efficiency

23. M. ROTHBARD, *supra* note 1, at 127.

and reliability, many consumers have already turned to the private market.[24]

A free market in police services solves the discretion problem for one reason: he who pays the fiddler calls the tune. Since there are no "right" answers to the allocation of scarce resources except in the eyes of the proponents of one allocation rather than another, the police understandably shy away from any explicit public statement of policy about how they will allocate resources. Whatever they decided would anger somebody—and most likely many somebodies. Imagine, if you can, a rulemaking hearing of the kind Professor Davis envisions designed to formulate policies governing police interrogation of individuals on the streets of Harlem. One can thus sympathize with the police disposition to let sleeping dogs lie, but the unfortunate consequence is that the consumer shells out his money for an unknown and unknowable service.

Rulemaking would admittedly make the service provided knowable, though not necessarily rational. Whenever the supplier of a service can ignore market pressures, he may freely indulge his own whims in the allocation of resources. And whenever judges, who are seldom graced with the expertise necessary to make intelligent choices, may dictate the allocation of resources, rationality is a chimera.[25] Thus, critics of the "Warren Court" criminal law decisions allege that the Court, unfamiliar with the problems of the lowly patrolman, has shackled the police with ineffective and inefficient procedures that impede their enforcement of the criminal law.[26]

In any case, would rulemaking satisfy the taxpaying citizen who believes that the police should exercise their discretion differently? Under such a system he is compelled to finance police practices that he believes inefficient or unreasonable. Under a libertarian system he could simply purchase protection service from a competing company whose enforcement and investigative policies he preferred. In Rothbard's words, "The consumers who just want to see a policeman once in a

24. TASK FORCE REPORT, *supra* note 3, at 215. Private citizens now spend half again as much for private protection services as government treasurers pay out for public police services. *Id.*

25. Every time the Supreme Court hands down a tax decision one of my colleagues mutters that the Court has never written an intelligent tax opinion. Can we expect any nine men, however well-trained and well-intentioned, to understand the economic complexities of, for example, an anti-trust case? Oliver Wendell Holmes encapsulated the point with his usual succinctness: "Judges are apt to be naif, simple-minded men." O.W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295 (1920).

26. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L.C. & P.S. 85 (1962). *But see* Kamisar, *Some Reflections on Criticizing the Courts and "Policing the Police,"* 53 J. CRIM. L.C. & P.S. 453 (1962). Mr. Warren's successor was among the most prominent critics of the Court's decisions. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964).

while would pay less than those who want continuous patrolling, and far less than those who demand twenty-four-hour bodyguard service."[27] The libertarian alternative thus insures disclosure of protection policies because the consumer will naturally demand to know what he purchases; for the same reason it insures that the police will exercise their discretion as their subscribers demand.

While most libertarians would agree that the state need not supply police services any more than it need supply fire protection, mail delivery, or garbage pickup, not all libertarians agree with Rothbard that judicial services may be similarly purchased on the free market. In fact, of course, businessmen commonly do so through resort to private arbitration;[28] and it is not uncommon for businessmen to specify even "the law" that the arbitrator will apply.[29] Recently, non-libertarian scholars have asserted that such "private ordering" reflects the genius of the American legal system.[30] Rather more prosaically, I would argue that it reflects widespread dissatisfaction with the state-managed judicial system which cannot resolve disputes quickly or intelligently. It is a fact worth emphasizing that the vast majority of individuals, not just businessmen, resolve their disputes privately rather than through the courts.

Admittedly, this does not prove Mr. Rothbard's case. Neither the murderer, rapist, nor thief engages in a voluntary transaction with his victim. Victim and victimizer may not share an overriding interest in resolving disputes and getting on with the business as would a manufacturer and his supplier or dealer. While that mutual interest will motivate the latter's resort to courts, what interest would prompt the alleged murderer, rapist, or thief to submit to third party judgment? Here, if nowhere else, must not the sovereign operate compulsory courts behind whose verdicts stand the state jailer and hangman?

Mr. Rothbard answers with a resounding no; and while I am not

27. M. ROTHBARD, *supra* note 1, at 220.

28. Being voluntary, the rules of arbitration can be decided rapidly by the parties themselves, without the need for a ponderous, complex legal framework applicable to all citizens. Arbitration therefore permits judgments to be made by people expert in the trade or occupation concerned. Currently, the American Arbitration Association, whose motto is "The Handclasp is Mightier than the Fist," has 25 regional offices throughout the country, with 23,000 arbitrators. In 1969, the Association conducted over 22,000 arbitrations. In addition, the insurance companies adjust over 50,000 claims a year through voluntary arbitration. There is also a growing and successful use of private arbitrators in automobile accident claim cases.
M. ROTHBARD, *supra* note 1, at 229-30.

29. Specification of the governing "law" is even more common in arbitral agreements between nations. Article 2 of the International Law Commission Model Rules on Arbitral Procedure states that "the *compromises* shall include . . . [t]he rules of law and principles to be applied by the tribunal." 2 Y.B. INT'L L. COMM'N 83 (1958).

30. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND ADJUDICATION OF LAWS 207-365 (tent. ed. 1958).

yet prepared to accept his answer, I would concede that a plausible argument may be offered in its defense. One cannot appreciate the argument, however, until he divorces himself from the matrix of our own legal system and looks instead to the international legal system, which alone offers a reasonable model of the voluntary system of criminal justice that Mr. Rothbard hypothesizes. He himself senses the forcefulness of the analogy, though he does not develop it.[31]

In the international legal system no ultimate sovereign issues commands which are obeyed by nation-states because backed by the threat of punishment. Although law in the Austinian sense does not therefore exist,[32] it does develop through the interaction of the parties themselves as they discover one rule rather than another "just" or useful or both.[33] Since neither party can take refuge in the fiat of some sovereign authority, both must resolve their dispute through compromise.

Such compromise probably approximates justice far more closely than would a fixed statutory code enforced by judges. The alleged rapist, after all, may assert that the young lady invited his attention, and the court must then determine whether the warmth of his embrace exceeded the scope of her invitation. Similarly, the alleged murderer may assert that he killed in self-defense; the thief, that he took the property under claim of right. In our legal system, one theoretically either wins or loses such arguments, however ambiguous the facts may be. Although such win-lose decisions are not unknown in the international legal system, disputants characteristically neither win nor lose: the quid pro quo rule insures that each party salvages something from the disagreement.[34]

The reality of the criminal law is that compromise in fact usually

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31. [W]e must recognize that there is at present no overall world court or world government enforcing its decrees; yet while we live in a state of "international anarchy" there is little or no problem in disputes between private citizens of two countries. . . . In Europe after the Roman Empire, when German tribes lived side by side and in the same areas, if a Visigoth felt that he had been injured by a Frank, he took the case to his own court, and the decision was generally accepted by the Franks. Going to the plaintiff's court is the rational libertarian procedure as well, since the victim or plaintiff is the one who is aggrieved, and who naturally takes the case to his own court.

M. ROTHBARD, *supra* note 1, at 232.

32. Austin called international law "positive morality," and a latter day doubting Thomas, the late Dean Acheson, once aroused the ire of his fellow international lawyers by asserting that "[m]uch of what is called international law is a body of ethical distillation, and one must take care not to confuse this distillation with law." Remarks by the Honorable Dean Acheson, 57 PROC. AM. SOC. INT'L L. 13, 14 (1963).

33. The most penetrating analysis of this process of interaction may be found in the works of Professor Myres McDougal and his colleagues at Yale University. *E.g.*, M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); M. MCDOUGAL AND ASSOCIATES, in STUDIES IN WORLD PUBLIC ORDER (1960).

34. *Cf.* F. IKLE, HOW NATIONS NEGOTIATE 104 (1964). Although Mr. Ikle endorses the quid pro quo rule, he nevertheless raises some troubling questions about its validity.

prevails.[35] The libertarian would not shrink shamefacedly from such reality, but the statists, who equate the majesty of the law with an abstract sovereign who cannot compromise his demand for obedience from his subjects, will not recognize the justness of a compromise system. Several decades ago, Thurman Arnold put his finger on the very point:

> In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute . . . finds itself in the field of criminal law, 'Law Enforcement' repudiates the idea of compromise as immoral, or at best a necessary evil. The 'State' can never compromise. It must 'enforce the law.'[36]

Thus the debate ought not to focus on the desirability of compromise, for compromise is a given in the present as well as the libertarian system. Rather, the debate should center on the more difficult question: which system would produce the more just compromises? While an answer to that question is beyond the scope of this review, I hazard the guess that the libertarian system would at least produce no more absurd results than the present.[37]

Moreover, the disputants in the international legal system who claim injury demand compensation rather than punishment.[38] Unless the victim derives psychic satisfaction from seeing his assailant put behind bars, he almost never receives compensation in our domestic legal system. Interestingly, as Mr. Rothbard points out, private insurance investigators succeed in recovering far more property than do the police.[39] Unconcerned with the ritualistic sacrifice of the criminal for the protection of "society" (an impossible abstraction to the libertarian),[40] the private investigator concentrates on getting the owner's property back. If he succeeds, has justice triumphed any less than

35. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 62 (1968).

36. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 19 (1932).

37. One lawyer complains that today the professional criminal "is more likely to get the special break of a significantly lesser plea than is the person who less frequently . . . has been in the criminal dock." He suggests that our present plea system may foster criminality. Kuh, *Plea Copping*, 24 N.Y. CTY. B. BULL. 160, 161-62 (1966-67).

38. The Permanent Court of International Justice summarized the principle of reparation in the *Chorizow Factory* case:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

Case Concerning the Factory at Chorizow (Merits), [1938] P.C.I.J. ser. A, No. 17, at 47.

39. M. ROTHBARD, *supra* note 1, at 222.

40. *Id.* at 38-40.

when the thief is imprisoned while the hapless, uncompensated victim is asked to foot, through his taxes, the cost of feeding, clothing and housing the convict? My point is simple enough: a system of criminal law that seeks to make the victim whole makes more sense than one which punishes the criminal.[41]

Although there is an International Court of Justice in the international legal system, judges and courts play only a minor role in the resolution of international disputes.[42] This may puzzle the American accustomed to judges who arrogate unto themselves the authority to decide not only particular cases but the broadest questions of public policy, but it confirms the fact that judges and courts as we know them are scarcely indispensible. The Chinese, for example, abhor them.[43] Participants in the international legal system employ negotiation, good offices, mediation, and arbitration far more widely than judicial settlement. During any given period one technique rather than another may be more widely used as shifting perception of its utility and cost influences resort thereto.[44] Similarly, we cannot predict the institutional patterns of settlement that would emerge from a free market in judicial services.

We can say, however, that although participants in the international legal system shun courts which can give only win-lose decisions, they do not shrink from the resolution of disputes. The same pressures which drive states to compromise their competing claims would operate upon individuals who disagree in a libertarian society. Of all these pressures, the strongest is the threat of exclusion. Professor Wolfgang Friedmann, who coined the term "the international law of cooperation" argued: "[T]he day can be foreseen when . . . the stigma of noncompliance will mean exclusion. . . . [E]very state, big or small, is today very reluctant to abandon the benefits of participation in international organization."[45] Mr. Rothbard's explanation of why individ-

41. Penologists have long questioned the usefulness of punishment as a deterrent, although many continue to favor confinement for "rehabilitative" purposes. Now that ideal has begun to tarnish as the evidence mounts that prisons remain, as they have always been, schools for crime.

Even if social scientists could engineer the character and personality changes the rehabilitive theory envisions the libertarian would object. By what right does the state decree that we shall all be productive, middle-class citizens? Frankly, I don't know anyone in my circle of middle-class acquaintances of whom I would like to see numerous reproductions, and they find one of me more than enough.

42. The ICJ must be the only court in the world whose complaint is too little rather than too much work. While we study ways to reduce the workload on our justices, those who concern themselves with such problems at the United Nations are busy as circus barkers, trying to drum up business for the justices at The Hague.

43. A Chinese proverb holds in part: "[I]t is better to be vexed to death than to bring a lawsuit." *Quoted in* Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966).

44. For a description of the fluctuating popularity of arbitration see H. FOX & J. SIMPSON, INTERNATIONAL ARBITRATION (1959).

45. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 90 (1964).

uals—even those accused of crimes—would submit voluntarily to a court parallels the Friedmann argument. After describing the medieval enforcement of commercial law through ostracism, Mr. Rothbard points out, "Nowadays, modern technology, computers, and credit ratings would make such nationwide ostracism even more effective than it has ever been in the past."[46]

Moreover, a system of criminal law animated by some purpose other than deterrence, rehabilitation, or retribution might well insure the reintegration of the "offender" into community life quickly and effectively. Professor Griffiths, in a provocative article that merits far more discussion than it has received, has proposed just such a model.[47] Professor Griffiths concedes that other models might well exist, including what he styles the "Puritan" model. The Puritans, who abhorred the subordination of one man to another, viewed law as a guide to the conscience which would dictate obedience without governmental enforcement.[48] This approaches the libertarian model hypothesized by Rothbard.

Although *For a New Liberty* is not just a compilation of libertarian solutions to contemporary social and political problems, that focus constitutes the bulk of the work—and is in my judgment its most satisfying part. In fact, one of my few regrets about this book is that the author paints with such a broad brush across the whole canvas of contemporary social and political life. Here Mr. Rothbard writes with his polemical rather than professorial pen, and he does not hesitate to sacrifice precision and accuracy for the well-turned phrase. Some will arch

46. M. ROTHBARD, *supra* note 1, at 231.

47. Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970).

48. Whether a "Puritan-like" system could function in a community with less uniformally adhered to values has been doubted, as Griffiths recognizes. *Id.* at 391. But listen to this description of a "family" system which we once found workable and abandoned only because we succumbed to the profoundly anti-libertarian thesis that we could and should remake man in our own image.

> Most men lived comfortably with the thought that every human community was bound to have its share of luckless, needy, strange, or dissolute persons: This was the natural condition of human life, part of God's design for the universe. The colonists therefore found it completely fitting that people who stumbled into trouble should be absorbed into the everyday life of the community and be tended by their neighbors, although the notion of "neighbor" was somewhat circumscribed. The poor could be subsidized in their own homes, the incompetent placed under supervision in sympathetic households, the errant chastised in the stocks or at the whipping post, and the homeless young apprenticed to tradesmen or taken in by local families. From time to time, of course, serious acts of wickedness required that the community execute or banish an offender. Occasionally a community might protect itself from future harm by excluding strangers with improper credentials or poor manners. But on the whole, people did not seem to feel that deviant or dependent individuals represented a real challenge to the integrity of the community.

Erikson, Book Review, 82 YALE L.J. 402, 403 (1973). *See also* Danzig, Toward the Creation of a Complementary Decentralized System of Criminal Justice, 26 STAN. L. REV. 1 (1973).

a scholarly eyebrow at this journalistic quality, but I see no reason to suppose that the dessicated language of the law review reveals any more immutable truths than does partisan propaganda. And the latter entertains. How can one nod off when he reads:

> For centuries the State has enslaved people into its armed battalions and called it 'conscription' in the 'national service.' For centuries the State has robbed people at bayonet point and called it 'taxation.'[49]

Nor does Mr. Rothbard mince words when criticizing the proponents of a contrary viewpoint:

> The fashionable attack on growth and affluence is palpably an attack by comfortable, contented upper-class liberals . . . . For the mass of the world's population still living in squalor such a cry for the cessation of growth is truly obscene; but even in the United States, there is little evidence of satiety and superabundance. Even the upper-class liberals themselves have not been conspicuous for making a bonfire of their salary checks as a contribution to their war on 'materialism' and affluence.[50]

Throughout Mr. Rothbard clothes his argument in such strikingly simple language that the casual reader may confuse it with the simplistic or simple minded; yet his sentences are often gems which radiate insight if the reader will but reflect upon their trenchant meaning.

Unfortunately, the other principal section of the book—the introduction in which Professor Rothbard seeks to "prove" the validity of the libertarian axiom that no person or group of persons may aggress against the property or person of anyone else—seems less satisfactory. I cling to my libertarian convictions on subjective, intuitional grounds although I justify them to others on utilitarian grounds wherever possible. In other words I simply feel in my bones or heart or wherever my feelings are lodged that nobody has a right to use force against anyone else except in self-defense. As my long-suffering parents will attest, I've been anti-authoritarian since birth. I bridle whenever anyone tells me to do something. And although I consider myself reasonably intelligent, I can scarcely keep my own life on an even keel. Managing anyone elses staggers me. I couldn't do it. Consequently, I am a libertarian. I concede Mr. Rothbard's observation that while "[my] intense emotion might seem a valid basis for [my] own political philosophy, this can scarcely serve to convince anyone else."[51]

Therefore, I use the utilitarian argument that, as Mr. Rothbard characterizes it, "liberty will lead more surely to widely approved

49. M. ROTHBARD, *supra* note 1, at 49.
50. *Id.* at 257.
51. M. ROTHBARD, *supra* note 1, at 23.

goals: harmony, peace, prosperity."[52] On a much more specific level the "Chicago studies" and others prove the libertarian case. The minimum wage produces unemployment.[53] Compulsory taxation for public education favors the middle and upper middle classes.[54] The welfare state subsidizes the rich far more than the poor.[55] So far from scorning such utilitarian arguments, Mr. Rothbard bolsters his case with them even as I would. But Mr. Rothbard does not believe either the intuitive or utilitarian ethic adequately sustains the libertarian thesis. He wants to transform it into an eternal verity, and so he turns to natural law philosophy. With all due respect, the natural rights argument has always seemed to me a retreat to my own position with the added caveat, "I sense the truth so keenly that it must be the truth." He who supports the natural rights theory inevitably, in his selection of evidence, his interpretation of it, and the conclusions he deduces from it, must reflect his own subjective values. Rothbard fritters away his extraordinary abilities when he forgets that libertarianism is a secular political philosophy, not some mystic cult.

We nevertheless remain confident that, as Rothbard concludes:

> libertarians are squarely in the great classical liberal tradition that built the United States and bestowed on us the American heritage of individual liberty, a peaceful foreign policy, minimal government, and a free-market economy. Libertarians are the only genuine current heirs of Jefferson, Paine, Jackson, and the abolitionists.
>
> And yet, while we are more truly traditional and more rootedly American than the conservatives, we are in some ways more radical than the radicals. . . . Only we wish to break with *all* aspects of the liberal State: with its welfare *and* its warfare, its monopoly privileges *and* its egalitarianism, its repression of victimless crimes whether personal *or* economic. Only we offer technology without technocracy, growth without pollution, liberty without chaos, law without tyranny, the defense of property rights in one's person *and* in one's material possessions.[56]

If even one strain in this libertarian chorus appeals to you, you should read *For a New Liberty.*

*James E. Bond**

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52. *Id.*

53. G. Stigler, *The Economics of Minimum Wage Legislation,* 36 AM. ECON. REV. 358 (1946).

54. The Supreme Court has recently grappled with the equal protection implications of this fact in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

55. The resulting phenomenon is aptly characterized as an "upside down welfare state."

56. M. ROTHBARD, *supra* note 1, at 316-17.

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