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Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion

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It is not actually possible to describe what a system of privately produced law and order would be like in modern society because one cannot describe what does not exist, and, more fundamentally, guesses based on historic privatized systems (and there have been many; some are referred to below) or current trends in privatization may miss the mark substantially. The sophisticated crime protection and prevention equipment and the level of training and skill possessed by many crime prevention specialists today may be archaic compared to what would emerge as a result of the incentives created by full privatization. At the turn of the century, who but the wildest, most fantastic science fiction writers could have predicted the revolution in communications and computer technology we are seeing today, for instance? Some will consider the arguments that follow to fit in the category of science fiction too, but an attempt will nonetheless be made to describe how a modern society *might* function under a system of customarily produced and privately enforced and adjudicated laws. Some of the following predictions are made with considerable confidence after an extensive study of the scholarly literature on historical customary law systems, modern arbitration and mediation processes, and other related issues, but others are no more than educated guesses.

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It should be added that mine is not the first effort to visualize such a system, so the following discussion draws heavily from work by people like Barnett, Friedman, Rothbard, Tucker, Smith, Sneed, Becker, and Stigler, among others.

Customary Law: The Unwritten Social Contract

James Buchanan posed the following question: If government is dismantled, "how do rights re-emerge and come to command respect? How do 'laws' emerge that carry with them general respect for their 'legitimacy'?"[1] He contended that collective action would be necessary to devise a "social contract" or "constitution" designed to define the rights of the people in the first place and to establish a limited government to enforce them.[2] However, customary laws emerge spontaneously as a consequence of cooperation induced by reciprocities.[3] Reciprocity, in fact, provides the basis for recognition of duty or oblilgation under customary law.[4] Cooperation does not require collective (governmental) action. Furthermore, the rules of obligation recognized under all the customary law systems that have existed have always focused on individual rights, including the right to private property. That has been the basis for customary laws from primitive societies[5] through the Middle Ages,[6] and for all the remnants of such law that exist today. As Tucker pointed out, in a free society without government imposition or enforcement of laws, "man's only duty is to respect others' rights . . . [and] man's only right over others is to enforce that duty."[7] The many reasons to expect private property rights to be recognized as the dominant rules of obligation in a customary law system will become apparent in the following discussion. Such law requires neither a written constitution nor legislative authority. Indeed, as Hayek suggested, "Individual freedom, wherever it has existed, has been largely the product of a prevailing respect for such principles which, however, have never been fully articulated in constitutional documents. Freedom has been preserved for prolonged periods because such principles, vaguely and dimly perceived, have governed public opinion."[8]

Lon Fuller maintained that customary law is appropriately viewed as

> a branch of constitutional law, largely and properly developed outside the framework of our written constitutions. It is constitutional law in that it involves the allocation among various institutions . . . of legal power, that is, the authority to enact rules and to reach decisions that will be regarded as properly binding on those affected by them.[9]

Indeed, a privatized system of customary law based on reciprocity is not only possible, but has strong historical precedents.[10] The fact is that through much of history custom has been much more important in determining rules of conduct than written constitutions, legislation, or precedent.

Even members of primitive groups face strong incentives to develop a system of norms that, given enforcement, protects the rights and property of individual

members of the group.[11] Cooperative establishment of rules of conduct based on individual freedom and private property creates significant reciprocal benefits. The incentives for such development and the process itself are not much different from those of other institutions that promote effective and efficient cooperation within the system.[12] A spontaneous law-making process can be viewed as similar to the spontaneous development of language. Indeed, Fuller described customary law as a "language of interaction."[13] No government was ever instrumental in the development of a language. Languages in both spoken and written forms develop over time through the spontaneous interactions of many independent individuals—individuals with strong incentives to develop a common language that facilitates interaction and cooperation. In fact, many other arrangements develop spontaneously for the same reasons—trading systems and markets, religious systems and congregations, extended family systems, clans, villages, cities, transportation routes *and* customary law. Customary law based on widely held norms and equity emerges, as Berman wrote, "on the ground"; it is "less programmatic" than legislative law imposed from above.[14] Actually, many of the laws in modern societies that are widely respected and adhered to (that is, violated *relatively* infrequently) are laws that developed from the "ground" because legislation is often codification of customary law.[15]

Characteristics of Customary Law

Offenses in a stateless legal system would be treated as torts. Many "crimes" would still be illegal, of course, particularly if they have victims. Nonetheless, certain types of activities that are currently defined as criminal would probably be allowed. Activities currently carried out in black markets (gambling, prostitution, the use and sale of marijuana and most other drugs) would probably be legal, for instance, since these actions generally do not have identifiable victims, and few people are likely to be willing to pay for their enforcement.

Of course, it is possible that a group may *voluntarily* cooperate (as opposed to being coerced into cooperating) to enforce a law where no identifiable victim exists if virtually everyone in the relevant group believes that the law should be enforced. But in a stateless system of law *and* enforcement, the allocation of enforcement resources would be determined by individual willingness to pay rather than by political strength or bureaucratic discretion over common pool resources.[16] "People who want to control other people's lives are rarely eager to pay for the privilege. They usually expect to be paid for the service they provide for their victims."[17] A private system of law would clearly be strongly biased toward individual freedom when individual action does no harm to another's physical person or property.

The possibility of a community having its own law, differing substantially from other communities, does not mean that an irrational patchwork of entirely dif-

ferent law systems will exist. History demonstrates that standardization of many aspects of customary law over very large geographic areas would arise.[18] There certainly may be relatively minor differences, but perhaps even less differentiation would occur than exists from state to state and even city to city under the political system of law we currently have. Consider the privately developed English language, for example. The basic rules of English are such that people from Maine can communicate with people from Alabama, New York, Minnesota, Texas, Nebraska, and from the regions of Great Britain, Canada, Australia, New Zealand, and South Africa. Tremendous levels of standardization dominate all the regional differences in language, *and* in customary law.[19]

Punishment for Law Breakers

A significant advantage of a "victim oriented" system of law is ". . . that specifying the victim has the practical function of giving someone an incentive to pursue the case."[20] This incentive arises because of the nature of the "punishment" that would exist. The goal of the private enforcement system, given a violation of the law, would be restitution for the victim, and thus punishment would typically take the form of a fine (payable to the victim) of at least sufficient magnitude to compensate the victim for all losses and cover the full cost of bringing the offender to justice. This prediction finds strong support in the historical evidence. All systems of privately enforced customary law have been restitution oriented in this fashion, with fines as the major form of punishment.[21]

Fines are very efficient compared to modern methods of punishment such as imprisonment, which use up resources like guards and other personnel, the capital and resources needed to build the prisons, *and* the prisoners' time.[22] Fines consume far fewer resources. Some offenders may require close supervision in prison-like work places to ensure payment, as noted below, but the prisoner's own time is not wasted in that he is working to produce goods and services that can be sold in order to pay off the debt.

Appropriately set fines can also provide a significant deterrent. Suppose fines are set equal to the full cost to the victim plus the full cost of bringing the offender to justice, all divided by the probability that the offender will be brought to justice, as suggested by Becker and Stigler.[23] Consider for example the fine for stealing a car. If half the car thefts are solved, costs borne by the victim and incurred in law enforcement would be divided by one half or, in effect, multiplied by two. The fine would be double the damages. The benefit to the offender of stealing the car is the value of the car. Obviously, the expected cost of the crime is greater than the expected benefit if the courts set the same probabilities that the offenders perceive. Offenders, of course, may and probably do have a different perception of risk than victims, and perhaps judges, but the actual fine would still be quite large relative to the gain for the robber since the probability would clearly be

less than one. Private courts may not determine fines in precisely the manner discussed here,[24] but private citizens who contract with courts and enforcers would be attracted to those firms that are effective at preventing (deterring) offenses—that is, to enforcers who make significant efforts to recover for the victim and judges whose fines are clearly high enough to compensate the victim and the enforcer. (Naturally a judge will be concerned about recovering his own costs as well since the loser will pay the court costs under this sort of system.)

The fine and victim restitution emphasis of privately enforced law provides another reason to suspect that few laws against victimless crimes would arise, and even if they did, few resources would be devoted to their enforcement. It is certainly possible that fines could be dictated by some tightly knit community. Incentives could be created to enforce such laws as well, if, for instance, a right to the collected fine is given to a successful enforcer. Again, laws against drugs, prostitution, gambling, and so on, *could* arise under a system of customary law—they are simply not nearly as likely to arise as laws against the violation of another individual's rights.

Activities that clearly would be finable, and therefore deterred, are offenses by private law enforcers against innocent citizens. Since falsifying violations, falsely charging innocent people of wrongdoing, and bullying citizens violate the rights of those who are innocent, a private, victim-oriented system of law would require full compensation from enforcers for anyone acquitted of a charge or mistreated. This implies that the loser in a court case would pay the full cost of the court appearance.

Fines as a primary form of punishment would also create incentives for those guilty of committing an offense to avoid unnecessary uses of court time, since fines levied by the courts would include court costs. Thus unsuccessful efforts by a guilty party to hide his guilt or drag out a trial would result in higher fines. This would encourage out-of-court settlements between offender and victim. Of course, this out-of-court settlement would not be like the plea bargaining of today's system. Victims would receive satisfactory restitution under private out-of-court settlements because the bargain would be between the victim and offender, not between the offender and a *public* prosecutor. The offender simply would avoid the higher payment to cover court costs in this case, while modern plea bargaining typically "forgives" a criminal for a certain portion of crimes committed in exchange for willingly admitting to and accepting punishment for the rest. Thus some victims do not even receive the satisfaction of knowing that the criminal has been punished, much less any restitution. Differential fines for those who admit guilt and those who try to hide it may even become a formal part of the customary law system. Such was the case in medieval Iceland's system of privately produced and enforced law, for instance, where ". . . the difference between two sorts of offenses provided a high 'differential punishment' for the 'offense' of concealing one's crime, an offense which imposed serious costs. . . ."[25]

The preceding discussion suggests advantages to fines as the primary form of punishment for the offender as well. Imprisonment not only fails to compensate the victim, but typically requires the victim to bear more costs (e.g., the cost of cooperating in prosecution). Under these circumstances, "it is not surprising, therefore, that the anger and fear felt toward ex-convicts who in fact have not paid their debt to society have resulted in additional punishments, including legal restrictions on their political and economic opportunities and informal restrictions on their social acceptance."[26] But because fines for restitution would "restore" the victim, incentives for further revenge are significantly reduced.

Fines would be the primary type of punishment in a system of privately enforced customary law, but they might not be the only type of punishment. Pre-thirteenth century Icelandic[27] and primitive Kapauku[28] systems of law considered capital punishment appropriate for some crimes, for instance. Whether such punishment would arise in the customary law system of a modern society is difficult to predict. It is possible that the life of a perpetrator of a capital offense would be committed to working where the payments for such labor go to the victim or the victim's family, even though full restitution could never be achieved.

One individual property right that the law would recognize, as explained above, is the right to restitution when one's rights are violated. As with any private property right, the right to restitution would be transferable, which has been the case in virtually all the systems of privately produced law that have existed.[29] A marketable claim by a victim implies that it can be sold to someone willing to pursue and prosecute the alleged offender.[30] This, in turn, could produce arrangements under which violators of the rights of the poor and the weak would be pursued and prosecuted. Private enforcement arrangements can be anticipated that would serve the poor, the wealthy, and those in between.

Private Law Enforcement Mechanisms

A wide variety of individual and cooperative arrangements can be anticipated that would emphasize the protection of persons and property (prevention) and the recovery of losses suffered by victims. Individuals may choose to protect themselves and their property by owning guns, installing burglar alarms, building fences, barring windows, and so on, much as they do today. The rights to do such things are private property rights that clearly would be supported by privately enforced customary law.

Cooperative arrangements by groups would also arise. The benefits to be shared by watching and patrolling geographic areas are considerable, and thus incentives are strong to support such efforts. In some communities or neighborhoods where individuals budget constraints are more binding than time constraints, residents would contribute their time to a voluntary patrol. In others, where budget constraints are less binding, people would contribute money to hire a private

security firm or firms, which in turn would furnish patrols, watchmen, guards, electronic watching devices or whatever the community wished to pay for.

Although there may be free-rider incentives inherent in such localized watching,[31] over time contractual arrangements would probably arise to internalize the deterrent benefits of patrol systems, thus eliminating the free-rider problem. This development might not actually take long in a highly mobile society like ours. Enterprising residential and business real estate developers would quickly see the benefit of establishing developments that offer, as part of the purchase price of a home or business location, a guarantee that everyone in the development has signed a legally binding contract to contribute to the community's security arrangements. Such communities already exist, of course. In some areas a person who buys property has to agree to pay a fee that covers the cost of the private guard and patrols (as well as street maintenance, street lighting, etc., if the entire community is privatized). As people move, for whatever reason, these sorts of contractual arrangements would attract increasing numbers, since such communities would be relatively safe from violations of individual property rights. This is particularly true since those least likely to free ride because of their strong concern for protection would find such contractual arrangements quite attractive, leaving relatively large numbers of free riders in other, non-contracting neighborhoods.

Voluntary arrangements without legally binding contracts (that is, those that allow free riding) would become relatively less effective, and neighborhoods so characterized would face relatively greater threats to persons and property. As the threat increased more people would move out, or the cost of free riding would increase to a level such that more and more of those who remain would be willing to contract for joint purchase or production of protection. Free riders would face the increasing ire of their neighbors, ultimately backed by ostracism, and be prevented from consuming any benefits of living in the area that they can be excluded from. Communities that fail to internalize the benefits of group protection because of free riders would find themselves at a competitive disadvantage with those that eliminate free riding. Property values would fall. The cost of free riding would rise tremendously under privatization. None of this means that *all* free riding must be eliminated as *every* individual (or even every community) contracts to internalize the deterrent benefits of protection, of course. Communities may conceivably exist and survive without developing such security systems, although their "citizens" would probably have either very high levels of self-protection or have little they feel is worth protecting. (There clearly are people who have opted out of the current legal and social system roaming the streets of most major cities and many of the nation's wildernesses).

Individual security firms may simply offer protection services like patrols and guards, but they may also be vertically organized to offer recovery of losses (or restitution) as well. Some advocates of private law enforcement have theorized

that the private security market would be organized much like a mutual insurance market. A firm or a cooperative surety (or pledge) group organization would insure individuals and their property against violations.[32] This firm or organization would therefore have strong incentives to prevent offenses by supplying police services with an emphasis on patrolling, watching, and other deterrents. If an offense occurs against a subscriber to these services, the insurance would pay the subscriber's claim unless they recover all losses. In paying the subscriber, the firm or organization, in effect, would purchase the right to collect at least some portion of the fine from the offender. Strong incentives would therefore exist to pursue the offender and to gather evidence for court prosecution.[33]

Of course, such insurance arrangements with vertically organized firms providing both protection and investigative services may not arise in every (or even any) case. Individuals may buy protection from one company, and in the event of an offense, contract with another to pursue the offender or offer a reward to attract the attention of a number of specialized thief-taking firms. Market forces of demand (reflecting the preferences of consumers) and supply (reflecting production technologies and costs) would dictate the actual industrial organization that evolves.

Numerous other contractual arrangements can be anticipated under a system of private enforcement of law. For one thing, the contract with a particular protection firm may include an arbitration clause so that disputes between clients of that firm would be settled internally. The company may provide an arbitrator or arbitrators or contract with a particular dispute resolution firm. (The market for adjudication is examined in more detail below, following further consideration of enforcement.) An arbitration clause in a legal contract also would mean that refusal to submit to arbitration is unlikely since it would probably result in ostracism by the rest of the members of the community, loss of protection services, and perhaps of ownership rights to property purchased under the contract (e.g., a residence or business location).

Similar contractual arrangements would probably arise *between* different communities and their (perhaps different) protection agencies. And even if a formal contract did not exist, the desire to avoid violence would lead to submission to arbitration in most instances. Such arrangements might be likened to formal or informal extradition treaties among political entities. Consider first an offense (or alleged offense) by a member of one group against a member of a different law enforcement organization (firms, communities, etc.) where both law systems hold the act to be illegal. The organization whose member is alleged to be the offender would have strong incentives to allow their member to be arrested and to apply considerable pressure on that individual to submit to arbitration. Sneed noted that a protection organization (or firm) that refused to allow the arrest of a member (or client), given good cause, would suffer in several ways: (1) other organizations would similarly resist attempts to arrest *their* clients, and thus the

organization's ability to protect its members would be reduced and the chances of violent confrontations would rise; either violent confrontations or reciprocal impotence would cause loss of membership (or clients); (2) reciprocal working relationships for the pursuit and capture of geographically mobile offenders (cooperative information and apprehension networks, or an inter-group bounty system) would be very valuable, and without doubt, they would develop, but refusal to cooperate in other areas would jeopardize the chance to participate in such arrangements; and (3) an organization that refused to turn over members who committed offenses would tend to attract members who intended to commit offenses, thus placing the organization in jeopardy because of ever-increasing confrontations.[34] These incentives apply whether the member to be arrested is guilty or innocent.[35] Thus every policing organization would probably explicitly state that disputes between members of different organizations must be decided by impartial private courts or arbitrators.

That arrangements such as those envisioned by the Sneed argument, whether formal or informal, would arise is supported by historical evidence. For example, the extended families of the primitive Ifugao applied pressure to their members to yield to mediation procedures when a dispute arose with a member of another family.[36] Formal procedures existed for resolution of disputes between members of different congregations in medieval Iceland[37] and various *tuatha* in Ireland prior to subjugation by the British.[38] Jurisdictional rules were well defined among the primitive Kapauku[39] and the Anglo-Saxons before the Norman conquest.[40] Medieval mercantile law was customary law enforced by the merchants themselves, and it was applied evenhandedly to foreign merchants and domestic merchants alike.[41]

Sneed also suggested that bail bonds might be posted by an accused offender's protection company or organization,[42] and this too has historical precedent. Under the surety system in medieval Ireland, a large fine levied against a member of a particular *tuath* might be paid by the group as a whole, and they in turn could collect from the offender.[43] Similarly, Icelandic society prior to the fourteenth century "provided their members with money to pay large fines."[44] The Anglo-Saxon tithing system that existed before the Normans imposed their will on England also included effective credit and bonding.[45] Such bonding or credit arrangements have some very significant advantages. First, the victim's enforcement organization would require a bail sufficient to compensate the victim or his heirs, and cover the organization's cost associated with the case. Consequently, the victim and his organization would be relatively unconcerned if the accused fails to appear. In fact, it would be the accused's own defense organization who would be responsible for collecting from him if he is guilty. Ostracism must play a predominant role in inducing someone (particularly someone who is guilty) to submit to arbitration. This bail bonding arrangement makes ostracism possible. If the members of an accused offender's own community or other mutual defense

group have strong incentives to apply pressure on the accused to submit, then ostracism can be effective. Furthermore, in contracting with a particular organization or firm for the option of bail, should it be required in the future, the individual may voluntarily agree to submit to confinement or yield a portion of his future income to repay the bond, should he be found guilty. At any rate, the onus would be on the members of the accused's organization to collect if he is guilty, rather than on the victim.

A second desirable characteristic of the bail (or credit) arrangement as part of a contract with a particular protection firm or organization is that organizations would have incentives to work on behalf of the accused in an effort to recover the bond. (Recall also that those who are acquitted of a violation would have the right to restitution of costs, including the cost of any investigation on his behalf.) Thus someone accused of an offense would "regularly have investigative agencies working on his behalf which wield powers of the same order as those of the arresting company. Deliberate as well as accidental conviction of the innocent would be far less feasible. Falsification of evidence would be considerably more risky."[46]

The preceding discussion of reciprocal arrangements between different communities and different law enforcement organizations assumed that the violated law was common to both communities and their enforcement organizations, although, as observed earlier, some differences in law could arise across communities or groups. How might the private sector handle a member of one legal organization who, while traveling in some distant community, violates a law unique to that legal organization? Several possible arrangements can be conceived. For instance, a risk-averse individual who expects to be in situations where he may inadvertently violate an unknown law could insure himself against that possibility. Thus his protection company would pay his fine (or bail) and he would not suffer any exorbitant personal loss. Under this scenario, the relevant law is that of the group being violated rather than that of the violator.

A particular community's law could involve a fine that most people outside that group considered unreasonable, or the law itself may be commonly held to be unreasonable. However, if such a law is violated by someone from another community, both groups still would have strong incentives to avoid a violent confrontation. Imposition of laws on outsiders that are way out of line with those that exist in most communities clearly increases the chances of violence, and thus a negotiated or arbitrated settlement would, in most cases, lower the cost to the accused and his insurers below that which would induce violence. A community that insists on strictly imposing its own morality and heavy penalties on outsiders would initially face continual clashes, followed by boycott sanctions as residents of other communities refuse to travel to or trade with them, or to enter into reciprocal arrangements to yield accused violators of their laws. A community that isolates itself would not survive in a competitive, free-market environment.

Those who weakly adhere to the norms the community wishes to impose would leave first, and as property values and trade-generated incomes declined, others would follow. In fact, then, if a community wishes to impose laws differing substantially from the norm, they would have strong incentives to inform outsiders of the differences in order to avoid conflict and minimize the difficulty of maintaining non-standard laws. Part of the reciprocal agreements with other communities and enforcers for extradition, etc., may be explicit recognition of differences in laws and procedures for treating conflicts that arise under the different laws.

Undoubtedly some individuals would not join any cooperative law enforcement arrangement and refuse to recognize any rules of law. After all, there are thousands of such people today. The incentives to cooperation and contract would be considerably stronger under a system of customary law and private enforcement than under public law and law enforcement (and, under a system dominated by private property, all those millions of acres of publicly owned land would not be available for such people to free ride on), but a relevant question remains: How would these people be treated under privatization? First, they would be left alone unless they violate someone else's rights. Second, they would have to defend their person and property on their own, given their refusal to cooperate. But what would happen if they violated a law by infringing on someone else's rights? No form of ostracism or boycott sanction would be effective in inducing them to submit to arbitration or to pay whatever fine is levied, should they be found guilty. Actually, the same question applies to anyone who refuses to submit to the pressures of ostracism and pay a fine (or perhaps, to go to arbitration).

The ultimate threat that underlies any system of property rights is that of violence. If someone refuses to yield to arbitration and/or accept the judgment of the courts, the system (*any system, including government*) moves to violence.[47] An individual who commits a major offense against someone else and then further refuses to yield to the legal justice system would be an outlaw. In primitive legal systems (as well as others that have not drawn their authority from a central state government), anyone was free to take an outlaw's life and property.[48] Such a contingency would probably arise in a modern system of privatized law and order as well.

Private Courts

It was suggested above that contractual arrangements for arbitration would probably arise within and between the groups and communities that organize for joint security. Furthermore, these various communities and agencies would have very strong incentives to seek out judges for both inter- and intra-community dispute resolutions who not only have reputations for impartiality, but for issuing clear, easily interpretable opinions available as a guide in settling future disputes—

that is, precedents. Judges who provide such opinions would garner much more business (if not all the business) than judges who issue vague, uninterpretable, or secret opinions. Why? Simply because disputes are costly and always raise the specter of potential violence. Both would be avoided if at all possible by private sector law enforcers. Note that the concern for a security agency or community representing some victim would be much stronger in this regard than the concern of *individual* disputants in our current system, since these firms or communities represent many potential victims and offenders, and therefore many possible future confrontations.

There is a second reason, beyond minimizing the cost of future disputes, for demanding clear, well-founded decisions. Smith referred to it as the "verification aspect."[49] In order for a dispute to end satisfactorily, a decision has to be acceptable—verifiable—not just to the parties most directly affected, but to the groups or firms representing these parties *and* to groups who, although not directly involved, might be drawn into a confrontation with one of the groups in the dispute under consideration. The willingness of various other firms and organizations to enter into and honor reciprocal arrangements, such as extradition contracts, with those involved in the dispute would depend, in part, on the way this and other disputes are handled.

These contractual arrangements between dispersed organizations to encourage arbitration of disputes between their members also would increase the likelihood of standardization of certain aspects of law. In effect, law would develop through dispute resolution to facilitate the interaction *between* groups—law based on common custom as reflected in previous judgments. Aspects of a particular group's law that prove to be efficient would be revealed to another group in the process, and they could adopt it in turn, if they wished. Such a process characterized the standardization of the Law Merchant throughout Western Europe during the eleventh and twelfth centuries, for example.[50] Efficient rules adopted by one merchant community tended to spread to other communities quite rapidly.

Critics of private adjudication systems are sometimes fearful that two desirable institutional arrangements of modern public courts might disappear in a private system. First, would there be trial by jury? If jury trials are demanded they would be supplied, assuming that the demand is sufficiently strong to pay the full cost of such a trial. Of course, our current system rarely comes close to reimbursing jury members for their time and effort. Jury trials would be relatively more expensive than judge-only trials, and consequently, they are relatively less likely under privatization. This is not necessarily bad, however. As Person noted, jury trials ". . . are of great importance in the government courts as a means of protection from a hostile judge but of less importance when parties select their own judges."[51] Indeed, juries were developed by Norman kings for inquisitional purposes and were ultimately accepted as a desirable institution *because* they served as a counter force to another royal institution—the judges of the king's courts.[52]

As a consequence, the demand for jury trials is likely to be considerably weaker in a privatized system, and when this is combined with their relatively high cost they become relatively unlikely.

The second institutional question that often arises is, would there be courts of appeal? Again the answer is, if they are demanded. There would not be a single monopolized "supreme court," of course, but there might be competitive appeals courts just as there would be competitive judges for the initial consideration of a dispute. Naturally, the next question is, given the existence of appeals courts but no supreme court of last resort, what will prevent a continuous, never-ending process of appeals so that an offender avoids submitting to a decision but is not declared an outlaw. The contractual arrangements for dispute settlement within a particular community or security organization would, in all likelihood, specify an appeals procedure and put a limit on the number of appeals (the medieval Law Merchant allowed no appeals, for instance, because the costs in terms of delay and disruptions of commerce were considered to be too high[53]). Since formal and informal contracts would arise between groups to establish procedures for intergroup dispute resolution, appeals procedures may be established for those disputes as well. Alternatively, as part of the agreement to submit to arbitration when prior arrangements do not exist, the parties may specify an appeals procedure and cutoff point.

Ostracism, Boycott Sanctions, Private Prisons, and the Collection of Fines

Why would someone pay a fine or pay off any debt if the coercive power of the state did not exist to force payment? The answer is basically the same as for the question of why someone, particularly someone guilty of an offense, would submit to arbitration in the first place—ostracism and boycott sanctions would convince many to pay their debts. The potential effectiveness of ostracism and boycott threats is enhanced under the contractual arrangements predicted above. If indeed part of the insurance arrangement is the provision of credit to pay bails or large fines, then the responsibility of collecting from the offender is shifted from the victim to the offender's own security organization. Ostracism by one's own community can be an extremely effective method of inducing payment of debt. Outlawry would be the most severe form of ostracism, but less severe threats would often be sufficient to induce compliance.

Although ostracism has been effective through history as a means of inducing compliance with private court judgments,[54] some might argue that it would not be effective in our modern mobile society. On the contrary, ostracism is likely to be even more effective today than it was in the historical situations alluded to here: "Nowadays, modern technology, computers, and credit ratings would make such . . . ostracism even more effective than it has ever been in the past."[55]

This does not mean that some guilty offenders would not flee and attempt to hide, just as many criminals do under our governmental system of justice. It simply means that, given the communications technology now available, the network of cooperative, reciprocal contracts between various communities and their justice agencies would probably prevent such an individual from obtaining the benefits of joining some other community, or at least severely limit the likelihood of such an occurrence. The Anglo-Saxon tithing arrangement excluded anyone from entering or dealing within a community who could not demonstrate that he was a member in good standing of some surety group.[56] With modern communications technology, checking any stranger's claims of insurance would be much easier than it was then.

A more relevant concern is that offenders may be unable to meet their obligations. If an offender cannot be appropriately fined, would such a system break down? That was not the case historically. For example, Friedman, in his examination of medieval Icelandic justice, suggested that a variation on the Icelandic debt-thralldom would solve the problem of judgement-proof offenders. In particular, he proposed that "an arrangement which protects the convicted criminal against the most obvious abuses would be for the . . . criminal . . . [to] have the choice of . . . accepting bids for his services. The employer making such a bid would offer the criminal some specified working conditions (possibly inside a private prison, possibly not) and a specified rate at which the employer would pay off the fine. In order to get custody of the criminal, the employer would have to obtain his consent and post bond with the court for the amount of the fine."[57] The offender would face a choice between ostracism or voluntarily working off the fine. Contracts between the debtor and the victim, or more likely the debtor's insurers, would specify the work conditions. If the insurers perceive little risk that a debtor will renege, they might simply allow him to continue in his trade and make periodic payments. If the risk of reneging is perceived to be large, varying degrees of security and supervision may be provided for in the contract. For example, the debtor may agree to report to a supervisor once a week or once a month (e.g., as parolees report to parole officers) or to return to and remain in a secure facility each evening (e.g., as in work-release programs that are sometimes available today).

If the risk of reneging is large enough, however, a "penal specialist" would be employed. The protection agency-insurance company may have its own specialized penal subsidiary, of course, or separate firms may specialize in providing such services. Sneed predicted that a competitive penal system would arise wherein several firms would bid for employment of the convict under secure conditions.[58] Furthermore, the insurance company/convict would have the right to withdraw from the resulting contract if the prison firm did not live up to its agreement, a right that would guarantee that the convict would make the highest possible wage (e.g., be paid his marginal product) so he could earn his way out of

prison as quickly as possible. Whether exactly these sorts of contractual arrangement arise or not, it is clear that the private penal system would differ from current public prisons.

One important difference between prisons under a fully privatized system and current government prisons is that those who run private penal firms would have strong incentives to treat prisoners well. Such incentives are enhanced by an arrangement that ensures prisoner mobility, as Sneed emphasized, but they exist even without a high degree of mobility. After all, a person's productivity, and therefore the rate of debt repayment, under such a system is likely to be significantly influenced by his treatment. Since the penal firm would either contract with the debtor to assume the risk of debt payment or contract with insurers (or perhaps victims) who want the debt paid off as quickly as possible, a firm that has a reputation for mistreating prisoners in such a way as to reduce their productivity would clearly not receive much business. Along these same lines, increased effort by a prisoner would reduce the period of confinement, so the length of the term would be at least partly self-determined. Prisoner morale would improve, making eventual rehabilitation easier.

There actually are a number of reasons for expecting that rehabilitation would be far more effective under such a system than it is with current efforts, beyond the more humane treatment of prisoners and their relatively better morale.[59] Productive use of inmate time would provide them with incentives to develop new or strengthen existing marketable skills, and teach them the discipline needed to hold a job in the market place after their release.[60]

Under the current system, prisoners are idle; they are bored. This idleness and boredom reflects a lack of constructive outlets, and therefore encourages other outlets. In particular, violence and drug abuse are both significant problems in modern prisons. Neither are as likely in a privatized system. Drugs may reduce productivity and delay release, for example, and the risk of injury from a violent confrontation that significantly delays release, would provide a substantial deterrent to violence.

In Sneed's words, "our analog to prison would not be, as today, a brutal institution primarily functioning to teach brutes how to be more brutish, but would become almost a treatment center, a place to learn how to live peaceably in outside society. Our present system only teaches a person how to live in prison."[61] This is an important consideration for those who question the effectiveness of ostracism and boycott sanctions as sufficient inducements for offenders to submit to arbitration judgments, which may imply working under the supervision of a private penitentiary until the debt is paid off. The "prison" experience under privatization would not be at all comparable to the situation a convict faces in our "modern," governmentally produced prisons. The incentives to avoid such "punishment" would, therefore, be considerably weaker than under the current system.

Conclusions

The argument outlined above is that a system that emphasizes individual responsibility and liberty can be established under customary law with private sector institutions for enforcement and adjudication. Such a system may not be perfect—e.g., some free riding may occur.[62] Thus some may suggest that limited government involvement, where government does those few things that it might do better than markets, would be superior to complete privatization. Friedman answered this question in the following way:

> Perhaps it would be—if the government stayed that way. . . . One cannot simply build any imaginable characteristics into a government; governments have their own internal dynamic. And the internal dynamic of limited governments is something with which we, to our sorrow, have a good deal of practical experience . . . the logic of limited government is to grow. There are obvious reasons for that in the nature of government, and plenty of evidence. Constitutions provide, at the most, a modest and temporary restraint. As Murray Rothbard is supposed to have said, the idea of a limited government that stays limited is truly Utopian.[63]

Every aspect of government involvement in law and order started out to be *very* limited (or nonexistent). Royal courts in England, for example, initially had very limited jurisdictions.[64] Then they began competing with other courts in adjudicating increasingly more diverse laws. They had a "competitive" advantage in that part of the cost of using them was not born by litigants. Various interest groups were happy to shift their costs for protection services and the enforcement of their laws onto others by using government courts, and later government watchmen, police, prosecutors, and so on. Government entities were happy to oblige. The combination of power seeking and bureaucratic growth by government officials and transfer (or rent) seeking by interest groups inevitably turns limited government into big government.

NOTES

1. James M. Buchanan, "Before Public Choice," in Gordon Tullock, ed., *Explorations in the Theory of Anarchy*, (Blackburg, Va.: Center for the Study of Public Choice, 1972), 37.
2. Ibid., and see Buchanan, *Freedom in Constitutional Contract* (College Station, Tex.: Texas A&M University Press, 1972).
3. See, for example, Bruce L. Benson "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (January 1989): 644–661; Benson, "Enforcement of Private Property Rights in Primitive Societies: Law Without Government," *Journal of Libertarian Studies* 9 (Winter 1989): 1–26; Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute, forthcoming); or Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).
4. Fuller, ibid., 23–24.
5. Benson, "Enforcement of Private Property Rights in Primitive Societies"; and Benson, "Legal Evolution in Primitive Societies," *Journal of Institutional and Theoretical Economics* 144 (December 1988): 772–788.

6. David Friedman, "Private Creation and Enforcement of Law: A Historical Example," *Journal of Legal Studies* 8 (March 1979): 399–415; Joseph R. Peden, "Property Rights in Celtic Irish Law," *Journal of Libertarian Studies* 1 (1977): 82–94; and Benson, *The Enterprise of Law.*
7. Benjamin R. Tucker, *Instead of a Book* (New York: Benj. R. Tucker, Publisher, 1893), 59.
8. F. A. Hayek, *Law, Legislation and Liberty,* Vol. 1 (Chicago: University of Chicago Press, 1973), 55.
9. Fuller, *The Morality of Law,* 128–129.
10. Benson, "Enforcement of Private Property Rights in Primitive Societies"; Benson, "The Spontaneous Evolution of Commercial Law"; and Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Col.: Fred B. Rothman & Co., 1983).
11. Benson, "Enforcement of Private Property Rights in Primitive Societies."
12. See Hayek, *Law, Legislation and Liberty,* Vol. 1; Fuller, *The Morality of Law;* Fuller, *The Principles of Social Order,* Durham, N.C.: Duke University Press, 1981.
13. Fuller, *The Principles of Social Order,* p. 213.
14. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Cambridge, Mass.: Harvard University Press, 1983, p. 274.
15. Benson, "The Spontaneous Evolution of Commercial Law"; and Benson, *The Enterprise of Law.*
16. For discussions of various aspects of government law enforcement as common pool resources, see Benson, "Corruption in Law Enforcement: One Consequence of 'The Tragedy of the Commons' Arising With Public Allocation Processes," *International Review of Law and Economics* 8 (June 1988): 73–84; Benson, *The Enterprise of Law;* Benson and Wollan, Laurin A., Jr., "Prison Crowding and Judicial Incentives," *Madison Paper Series,* No. 3 (May 1989): 1–21; and Richard Neely, *Why Courts Don't Work* (New York: McGraw-Hill, 1982).
17. Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism* (New York: Harper and Row, 1973), 173–174.
18. Benson, "The Spontaneous Evolution of Commercial Law"; and Benson, *The Enterprise of Law.*
19. Ibid.
20. Friedman, "Private Creation and Enforcement of Law: A Historical Case," 414; also see Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87 (July 1977), 293.
21. For example, see Benson, "The Spontaneous Evolution of Commercial Law"; Benson, "Enforcement of Private Property Rights in Primitive Societies"; Friedman, "Private Creation and Enforcement of Law: A Historical Case"; and Peden, "Property Rights in Celtic Irish Law."
22. See for example, Friedman, "Private Creation and Enforcement of Law: A Historical Case," 408; and Barnett, "Restitution: A New Paradigm of Criminal Justice," 291.
23. See Gary Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76 (March/April 1968): 191–193; and George J. Stigler, "The Optimum Enforcement of Laws," *Journal of Political Economy* 78 (May/June 1970): 531.
24. For other possibilities see Barnett, "Restitutions: A New Paradigm of Criminal Justice," 288.
25. Friedman, "Private Creation and Enforcement of Law: A Historical Case," 409.
26. Becker, "Crime and Punishment: An Economic Approach," 194.
27. Friedman, "Private Creation and Enforcement of Law: A Historical Case."
28. Benson, "Enforcement of Private Property Rights In Primitive Societies."
29. Benson, *The Enterprise of Law;* and Friedman, "Private Creation and Enforcement of Law: A Historical Case."
30. Friedman, Ibid., 414.
31. In this regard, see Benson, *The Enterprise of Law,* where the potential for the free-rider problem is shown to be quite small *relative* to the externality problems associated with public sector law enforcement.
32. See, for instance, Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism;* Murray Rothbard, *For a New Liberty* (New York: Macmillan, 1973), 222–228; and Clarence L. Swartz, *What is Mutualism?* (New York: Vanguard Press, 1927), 155–166.
33. Rothbard, Ibid., p. 222.
34. Sneed, J. "Order Without Law: Where Will Anarchists Keep the Madmen?" *Journal of Libertarian Studies* 1 (1977): 119.
35. Ibid.

36. Benson, "The Lost Victim and Other Failures of the Public Law Experiment," *Harvard Journal of Law and Public Policy* 9 (Spring 1986): 399–427; and Benson, "Enforcement of Private Property Rights in Primitive Societies."
37. Friedman, "Private Creation and Enforcement of Law: A Historical Case."
38. Peden, "Property Rights in Celtic Irish Law."
39. Benson, "Enforcement of Private Property Rights in Primitive Societies."
40. Benson, *The Enterprise of Law.*
41. Benson, "The Spontaneous Evolution of Commercial Law"; and Trakman, *The Law Merchant: The Evolution of Commercial Law.*
42. Sneed, "Order Without Law: Where Will Anarchists Keep the Madmen?", 119.
43. Peden, "Property Rights in Celtic Irish Law."
44. Friedman, "Private Creation and Enforcement of Law: A Historical Case," 400.
45. Benson, *The Enterprise of Law.*
46. Sneed, "Order Without Law: Where Will Anarchists Keep the Madmen?", 120.
47. Benson, "Enforcement of Private Property Rights in Primitive Societies"; Benson, *The Enterprise of Law;* and John Umbeck. *A Theory of Property Rights With Applications to the California Gold Rush* (Ames: Iowa State University Press, 1981).
48. See for example, Benson, Ibid.; Peden, "Property Rights in Celtic Irish Law"; and Friedman, "Private Creation and Enforcement of Law: A Historical Case."
49. George Smith. "Justice Entrepreneurship in a Free Market," *Journal of Libertarian Studies* 3 (Winter 1979): 422–424.
50. Benson, "The Spontaneous Evolution of Commercial Law"; and Trakman, *The Law Merchant: The Evolution of Commercial Law.*
51. Carl Person. "Justice, Inc.," *Juris Doctor* (March 1978): 34.
52. Benson, *The Enterprise of Law.*
53. Benson, "The Spontaneous Evolution of Commercial Law"; and Trakman, *The Law Merchant: The Evolution of Commercial Law.*
54. See for example, Benson, Ibid.; Benson, "Enforcement of Private Property Rights in Primitive Societies"; Benson, *The Enterprise of Law;* Peden, "Property Rights in Celtic Irish Law"; and Friedman, "Private Creation and Enforcement of Law: A Historical Case."
55. Rothbard, *For a New Liberty,* 231.
56. Benson, *The Enterprise of Law.*
57. Friedman, "Private Creation and Enforcement of Law: A Historical Case," 415.
58. Sneed, "Order Without Law: Where Will the Anarchists Keep the Madmen?", 122–123.
59. See Barnett, "Restitution: A New Paradigm of Criminal Justice," 293, for discussion of physiological factors not discussed below.
60. In fact, Sneed logically suggested that since the penal firms will be producing marketable products they will probably offer offenders continued employment after they have retired their debts ("Order Without Law: Where Will Anarchists Keep the Madmen?" 123):

> It would be foolish to in effect fire a worker with experience simply because he has now regained his freedom. He will still remain employed by the penal agency but will become free of security restrictions and will be an ordinary worker. Indeed, an agency which does provide employment for "graduated" convicts would have a strong competitive edge in the recruitment process.

This potential clearly reduces the likelihood of a return to illegal activities by a released prisoner and adds to the superior rehabilitation under privatization, since many now return to crime out of virtual necessity—they have no marketable skills after release from prison and therefore they cannot support themselves in legal activities.

61. Ibid., 123.
62. Benson, *The Enterprise of Law.*
63. Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism,* 200–201.
64. Benson, *The Enterprise of Law.*