

THE PRICE OF PRIVATE LAW

*A Critical Analysis of Murray Rothbard's Model for
Common Law Juridical Systems in the Free Society*

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Abstract:

This paper seeks to understand and critique the model of privately administered justice outlined and defended by Murray Rothbard (and subsequently adopted and extended by others following Rothbard). By sketching briefly the system Rothbard suggests and exploring the historiographical and praxeological defenses he offers in support of his system, the paper aims to illustrate several shortcomings inherent in both Rothbard's system and his particular defenses. Moreover, after critically reviewing the historical examples Rothbard cites in defense of a fully market-based legal order, and after subsequently examining his model for private law in detail, it is argued that there is an important connection between the logical and historiographical errors which lie in Rothbard's argument. Regarding Rothbard's historical case, the central assertion is that Rothbard misreads or misinterprets the evidence upon which he relies, which in turn leads him to perceive the existence of stable private law orders in times and places where, the evidence shows, none existed. Concerning Rothbard's positive model, it is argued that Rothbard has not, as he implicitly claimed, found a solution to the long-disputed dilemma regarding the adaptive character of common law; instead, it is maintained that Rothbard's system does not convincingly prove how his model would preserve the liberty of producers and consumers of justice while ensuring that the libertarian axiom remains the primary canon of law in the private order. Finally, it is argued that Rothbard's prima facie case for the superiority of private law does not hold, insofar as his system does not effectively prevent or even reduce the calamities all legal orders are designed to minimize, several of which are considered in detail.

INTRODUCTION

Despite the sharp divisions revealed by the debate in the early 1970s within and around the public choice movement over the provision of public goods, especially collectivized defense of person and property, the disputants seemed to share at least one parcel of common ground. Wherever one consigned the provision of defense services in society—whether in the hands of the state, directly or indirectly (through regulation), or in the trust of private enterprise—it was clear that the supplying of such protection was at most the marginal case. That is to say, at least within the professional mainstream of the *laissez-faire* establishment, it was apparent that private defense (and its extension in the form of private law) must represent the limit of the market's ability to provide stable institutions (Osterfeld 1989, p. 47). Thus, safety and justice, if they could be provided at all on the market, were neither central nor obvious products of the libertarian order, but indicated instead the maximum degree to which free, uninhibited exchange could stretch.

While this point of consensus enabled a temporary armistice between the *laissez-faire* factions, rejecting it outright was the starting point for Murray Rothbard's analysis of market-provided justice. First in the disquieting exordium to *Power & Market*, the addendum to his treatise *Man, Economy, and State*, and later as elaborated in *For a New Liberty*, Rothbard characteristically upended the discussion by denying firmly that defense represents the margin of the market's unmatched powers. Rothbard held instead that justice and security, indeed essential components of a stable society, *must* be provided privately to avoid the "insoluble contradiction" which so readily ensnares unwatchful *laissez-faireists* (1977, pp. 2-3). Not only are protection and arbitration services not a 'stretch' for the market to provide, he insisted, but moreover they provide the exemplar for privately arranged social institutions.

In laying out his argument supporting the feasibility and desirability of a truly non-state defense and justice system, Rothbard depends essentially upon both a historical case testifying to the workability and efficiency of private legal frameworks as well as upon his own deduction of how a hypothetical libertarian justice model could overcome the numerous challenges facing any system, public or private, which supplies legal protections of property and individual rights. Despite the general rigor with which Rothbard seeks to endow both lines of reasoning, a number of critical oversights and logical missteps can be highlighted. It is argued here that once set in proper perspective, the sum of these errors reflects at least one crucial deficiency of Rothbard's

general theory of private justice, which if not a truly “insoluble contradiction,” presents at the very least a paradox for which neither Rothbard nor his successors in championing the private law argument have yet provided a resolution.

The core of this essential difficulty with Rothbard’s theory connects his and others’ historical analysis of private law to his positive model of a market legal order. A conflation of legal methodology and processes in historical cases with the foundations of various legal systems’ sovereignty leads Rothbard and others to ignore the discrepancy between the two divergent candidates for the purpose of a common law system: namely, either a system where judges are authorized to deduce a legal code, one case at a time, from immutable, self-evident axioms, or a process governed entirely by market forces wherein the content of the law is dictated only by consumer preferences and the corresponding incentives for efficiency which arise naturally in the market. In sum, Rothbard asserts a theoretical compatibility between these two models which he claims is corroborated by legal history. It is contended below, however, that such compatibility exists neither in history nor even in theory.

Since this central flaw depends on a close analysis of both Rothbard’s use of legal history and the logic he and others offer to define a positive model for private justice, each of these fundamental elements of the argument will be explored in turn. After first summarizing Rothbard’s assertions regarding the history of private law and his basic outline for a stateless legal order, and contrasting it briefly with the alternative Hayekian formulation, critical attention will be directed at Rothbard’s understanding of the historical record and his detailed outline of a hypothetical libertarian justice system. At several junctures, the work of others who have pursued reasoning and analysis similar to Rothbard’s will be highlighted and discussed, as they may illustrate difficulties which are either inherent in Rothbard’s own analysis but which are not immediately visible or which would flow logically from Rothbard’s argument, were it extended further.

As each leg of the analysis proceeds, various potential shortcomings in Rothbard’s analysis and their contribution to the central problems of the work—the process-origin conflation and the common law paradox—will be explored. With regard to the historical argument, it will be argued that the evidence is either misrepresented or misinterpreted by many proponents of an anarchist legal order, with two direct effects. First, the historical precedents of fully functioning private legal systems are not nearly so resounding in their success as some suggest. Second, as

noted above, the particular misinterpretations discernible in such analyses as Rothbard's open the door to the unique fallacies evident in his evaluation of the feasibility of the positive model for stateless law.

In discussing Rothbard's proposed model, as outlined in *Power and Market* and *For a New Liberty*, and elsewhere by his colleagues, the common law paradox itself will be examined. The discussion of this primary flaw is followed by brief treatments of several other difficulties conceivably intrinsic to the libertarian legal system as proposed. These include in particular the market's limited ability to prevent outright 'civil war' between competing defense agencies, the difficulties of abandoning any notion of agency in a private law system, and the consequences of the proposed shift to complete reliance upon common law restitution as the sole remedy for injury to person or property.

ROTHBARD'S ARGUMENT: AN OVERVIEW

Historical Argument

The historical case given by Rothbard to support the feasibility of truly private legal systems is straightforward, providing a simple framework followed by later commentators.¹ By way of introduction, Rothbard's brief treatment of legal history in *Power and Market* indicates that most observers have simply failed to recognize how significant "freely competitive judiciaries" have been in the development of Western law and history (1977, p. 5). The thrust of his more expanded exposition is clear enough:

Are such stable and consistent law codes possible, with only competing judges to develop and apply them, and without government or legislature? Nor only are they possible, but over the years the best and most successful parts of our legal system were developed precisely in this manner. (1978, p. 238)

In particular, Rothbard adds, the Anglo-Saxon common law (in addition to the *lex mercatoria* and admiralty law) was "developed over the centuries by competing judges applying time-honored principles rather than the shifting decrees of the state" (p. 232).

Though those following Rothbard's reasoning have broadened the base of historical evidence from which to support the general argument, Rothbard himself relies primarily upon two of the better-known contributors to legal history from libertarian perspectives. On the property law of ancient Celtic Ireland, he makes use of Joseph Peden's historical work. On

¹ Osterfeld (1989) is the clearest example of these; his reasoning and language demonstrate considerable similarity to Rothbard's.

Anglo-Saxon common law, and to a lesser degree regarding Roman civil and common law, he turns to Bruno Leoni's work combining history with libertarian legal theory.

It warrants attention, however, that Rothbard offers a pointed criticism of Leoni's high esteem for the Roman civil law tradition. Though frequently scholars, including Leoni, allude to the significance of the Roman law—especially the Roman law as rediscovered by medieval jurists²—Rothbard rejects such praise on the grounds that the Roman civil and common law was part and parcel to an extremely invasive, oppressive state apparatus. In fact, Rothbard does not even explicitly define the causal dimension of the connection between a given law system's utility and its relation to an interventionist backdrop; the very fact of the highly correlated coincidence of statist repression with any system of justice is sufficient for Rothbard to dismiss the system, in this case the Roman law, as a jurisprudential catastrophe (1962, pp. 37-38).

Positive Model

Rothbard outlines the essential model for private justice in a similarly forthright manner. Assuming the development of privately owned and operated protection firms, or “defense agencies” as the first market response in the absence of state-supplied security, Rothbard suggests court systems will arise as an extension or affiliate of each such agency. While contracts for protection may be based largely on the basis of individual subscriptions, payment for legal services might require a per-use fee structure.

When a dispute arises regarding either a set of conflicting opinions of individual rights in a certain property interest or an actual (alleged) invasion of one or more individuals' rights, it is presumed that each will turn first to his own defense agency to provide relief. As the system evolves, each agency's in-house ‘trial court’ would investigate and adjudicate the case, with or without the participation of the client's opponent or his respective defense firm. Assumedly, each defense agency court would have an incentive rule in favor of its client in the first iteration of the trial, after which the parties would both appeal to an impartial arbitrator to settle the dispute, where the findings of each party's defense agency become the case presented by each side (1977, p. 6). Thus, the defense agency's trial apparatus devolves into an advocacy firm, backed by defense capability, in support of its client. This, taken together with the common inference that the defense agencies evolve along lines similar to the model of private insurance

² See Cutler (1999, p. 68) in particular.

companies operating on subscription terms, suggests that at the first-order ‘appellate’ level, the dispute becomes a special case of ordinary subrogation.³

Argument in Context: Hayekian Perspective on Law and Liberty

Perhaps the most pertinent alternative to Rothbard’s formulation of both the justification and analytics of private justice is the Hayekian position, which emphasizes the natural order of efficiency in tandem with imposed legal codes preserving individual freedom (to maximize the natural order’s efficacy). The basic Hayekian model—wherein unique caches of knowledge are dispersed widely among individuals enabling and necessitating a natural, “spontaneous” order—does not, of course, begin from a set of self-evident axioms regarding human liberty. Instead, it is concluded that the utility of natural orders consisting of human interaction is maximized when individual freedom is secured: “[U]nless property rights are protected by law, individuals will have little incentive to utilize their knowledge efficiently, and to search for what would otherwise be profitable exchange opportunities” (Dorn 1981, p. 378).

In the Hayekian equivalent of the ‘state of nature,’ the natural order created by human interaction may approximate a libertarian legal order, but only insofar as “individuals understand [that] their opportunity sets are expanded under the rule of law” (Dorn 1981, pp. 375-78). As Hayek (1961, p. 28) explained in response to Ronald Hamowy’s (1961) criticism of his definition of freedom as “the condition of men in which coercion of some by others is reduced as much as is possible in society”:

Such a happy state of perfect freedom (as I should call it) might conceivably be attained in a society whose members strictly observed a moral code prohibiting all coercion. Until we know how we can produce such a state all we can hope is to create conditions in which people are prevented from coercing each other. But to prevent people from coercing others is to coerce them. This means that coercion can only be reduced or made less harmful but not entirely eliminated.

Thus if a libertarian law code does not arise naturally under this condition, an imposed framework of legal principles is potentially permissible, so long as it conforms to the four criteria

³ Rothbard does, it seems, leave open the possibility of the courts remaining independent from the defense agencies. Even if this is granted, however, Rothbard does assert that both parties to a dispute, if they cannot agree on a venue to try their case, will each independently pursue their cause of action in a separate court. Whether the courts are an extension of the defense agencies or not, they are still employed at the pleasure of their patrons; while they must presumably maintain some level of impartiality, the precise degree of this impartiality will be determined by the market. Thus each court employed by the parties may investigate their patron’s claim even in the absence of their client’s opponent, but there is no reason to believe that this process will be fundamentally different from the present process by which law firms evaluate potential cases before accepting a retainer. This first layer of courts, then, functions as a set of advocates for the parties, whether they are tied to a defense firm or not. For a discussion of why this model wherein defense agencies would devolve ultimately into a layer of advocates, see Appendix A, at p. 46.

which comprise Hayek's own understanding of the "rule of law." These criteria limit commanded legal orders to those whose laws are: applicable to the whole of society, including the state's officers; applied "equally" without special grants of privilege; "certain" to the degree necessary that entrepreneurs' ability to forecast market conditions and rewards for investment are not inhibited; and, "just," meaning that violations of individuals' property rights are not permitted (Dorn 1981, pp. 376-77).

Though arguments might be offered to single out any of the four criteria as the most essential for the development of economically useful laws, Baumgarth (1978) and several others argue at length that the comparative certainty of law's future effects on property rights should receive primary consideration.^{4,5} As J. A. Dorn (1981) notes, Hayek permits a lamentably extensive catalog of exceptions to these criteria in cases where state intervention, either through regulation or public enterprise, "is deemed socially beneficial," Hayek's litany includes "non-coercive" endeavors such the establishment and operation of a monetary system, the determination of weights and measures, geographical and statistical data-gathering, and education (p. 379). Additionally, health services, roads, and municipal "amenities" are also open to exception under Hayek's formulation (p. 380).

Beyond these difficulties—and even beyond Hayek's exceptions to the rule of law, wherein a higher intensity of state intervention is tolerated than in Rothbard's formulation⁶—the Hayekian model differs fundamentally from that of Rothbard and those following him in both the understanding of what man inherits from nature and the subsequent function of law. For Hayek et al., as noted, natural order will only function at its peak in human economic affairs when the preservation of basic liberty is *imposed*, with or without the consent of every participant in society. For Rothbard et al., by contrast, the axiom of self-ownership is itself the subject of preservation, preventing any such imposition of legal rules except those chosen voluntarily (i.e. without any violations of individuals' self-ownership). Thus while Hayek's formulation of the "rule of law" may be the functional counterpart of the immutable axioms in Rothbard's analysis,

⁴ See also Homer Hoyt (1918, pp. 179-180) for a more extended discussion of certainty's value.

⁵ In addition to purely speculative analyses of certainty, one might consider through empirical study the effects of uncertainty vis-à-vis both legal codes and extent of enforcement in economies where rapid, revolutionary change has left entrepreneurs with little idea of what to expect from the law. Post-1991 Soviet-type transitioning economies seem to provide the ideal example, with the added complexity of inherited systems of 'private' (criminal) legal systems.

⁶ Hamowy (1978) provides a cogent and very detailed criticism of Hayek's formulation of the "rule of law."

Hayek acknowledges that his overriding principle will have to be imposed in some way *over and against* individuals' opposition, whereas Rothbard gives no concrete indication of how the axioms' supremacy will be preserved.

The importance of this last distinction brings into view for the first time the gap that separates immutable axioms of human freedom (and the corollaries of justice that flow from these axioms) from the spontaneous order that arises in a market-based justice system, where the changing will of consumers drives producers' needs, in turn changing the producers' demands for principles and procedures of justice. While some have attempted to reconcile this gap within the Hayekian tradition by crafting a holistic legal code which "reminiscent of ecological biology strives to keep man in touch and in *harmony with nature*," (Barnett 1978, p. 104; emphasis in original) this effort seems to conflate the compatibility with nature *qua* goal and the evolutionary process itself. It is also noteworthy that while the Hayekian tradition has generated efforts to bridge this gap, the separation is not even *acknowledged* in the work of Rothbard and those following him.⁷ This, as will be seen below, contributes substantially to the primary paradox inherent in Rothbard's positive model of private common law justice.

HISTORICAL ARGUMENT: ANALYSIS & EVALUATION

Importance to the Analysis

As noted earlier, Rothbard utilizes the historical record primarily to bolster the plausibility of a fully functioning, fully private system of justice. Overcoming the understandable initial skepticism regarding this feasibility in the mind of his audience leads him to place considerable rhetorical emphasis on familiar examples from legal history, backed by hard evidence. It is hoped, then, that if indeed Rothbard has either misunderstood the evidence or misapplied it in reference to supporting his positive model, then pointing out this error will be instructive in identifying a corresponding deficiency in the logical argument itself.

⁷ The critic and defender of Rothbard's exposition of his system may inquire at this point why Rothbard might not merely assert that the 'separation' need not exist because the principles of justice which he aims for his model to consistently apply happen to be objective moral claims which all well-reasoned individuals (who possess a correct view of morality) would be forced to accept. This critique would be potent, had Rothbard himself not constructively foreclosed this line of reasoning (or, at the very least, not contradicted himself in this regard). Though Rothbard does on occasion, as discussed below, maintain that in some historical contexts, certain general principles about justice were known intuitively by members of the community, he notes at other times and with greater vehemence that this is not frequently the case. See his own words on this subject at p. 24. Additionally, for example, he asserts (as is discussed later) when addressing arguments made by the Chicago school concerning the presumption of judicial rationality that it is unrealistic to suppose that individuals actually situated to decide such cases will consistently apply a set of abstract legal principles (1978, p. 220).

Along these lines, each of the major areas of legal history examined by Rothbard and those following a similar scheme of thought is analyzed here. These include the legal systems of several ancient and/or “primitive”⁸ societies such as the Roman republic and the tribal communities established by the Celts, Yurok Indians, the Ifugao of Luzon, and the Kapauku Papuans. Also explored below are the Anglo-Saxon and early Norman common law traditions in the British Isles, the medieval *lex mercatoria* (Law Merchant) on the Continent, and the systems developed in Iceland in the “Free Commonwealth” period. Finally, the trend in recent decades towards systems of privately mediated arbitration will be studied.⁹ It is certainly not assumed that merely correcting or refuting the examples provided by Rothbard of effective, efficient private law systems in history (if it is possible to refute them) would mean that no such system could ever develop. Rather, precisely because Rothbard chooses to rest a substantial part of the plausibility of the argument on historical precedents, defects in his historical analysis would mean that his overall argument loses that much structural support.

“Primitive” and Ancient Legal Anthropology

The importance ascribed to the Roman civil and common law traditions in Rothbard’s own analysis is notably less than in similar treatments. As noted above, one frequently cited dimension of its significance, whether beneficial or detrimental, is found in its relevance to the Middle Ages. As Cutler (1999, p. 68) explains:

The reception of Roman law with its notions of unconditional and absolute ownership was an important development in Western Europe, replacing medieval conceptions of conditional and contingent property rights and facilitating the centralization of political control.

This last element naturally supplies the spark for intense controversy: if it enabled greater, more concentrated political control when absorbed by medieval societies, how could it provide a valuable libertarian precedent in its original iteration? Rothbard’s (1962, p. 38) aforementioned criticism of Bruno Leoni’s praise for the Roman legal apparatus is instructive:

[P]erhaps the weakest aspect of [Leoni’s volume *Freedom and the Law*] is Leoni’s veneration for the Roman law; if the Roman law provided a paradise of liberty, how account for the crushing taxation, the periodic inflation and currency debasement, the

⁸ The appellation “primitive” originates with the scholars who have conducted and/or made use of these analyses, such as Bruce Benson (1989), not Rothbard or the present author.

⁹ Rothbard refers on several occasions to the case of relations between nation-states, asserting that a worldwide state of anarchy exists which testifies to the viability of thoroughly-private legal systems. This case is addressed below in reference to Rothbard’s various arguments defending private law’s ability to minimize armed violence. See discussion beginning on p. 35.

repressive network of controls and ‘welfare’ measures, the unlimited imperial authority, of the Roman Empire?

Importantly, as early as the fifth century B.C., supporters of a written Roman constitution recognized this dimension of the developing legal order. As John W. Burgess (1915, p. 53) portrays it, “It was evident that the fundamental principles of Individual Immunity against government power must be agreed upon and reduced to a written form.” In a variety of forms, notably including the question of “[w]ho should say when a Magistrate was acting arbitrarily,” the expressed need for the imposition of *limiting* rules of law suggests the absence of anything resembling a truly market system of justice (p. 53).¹⁰

In all events, Rothbard’s handling of the facts and fiction of Roman legal history should be instructive for the student of private legal history in general. That is to say, as Rothbard all but concedes, historical cases in which a given legal order is observed against a backdrop of state coercion and interfering influence cannot rightfully be rendered ‘private law.’ First, by Rothbard’s definition, any significant affiliation with a system of oppression and coercion taints the particular legal order itself. Second, there is no way to definitively determine how the legal order in question might have developed in the absence of a coercive state; it can only be hypothesized, in which case the student has abandoned genuine historical inquiry and has instead returned to abstract speculation.

Rothbard also makes use of Joseph Peden’s legal studies of Celtic property rights and contractual arrangements to further bolster his historical case in *For a New Liberty*. According to Peden (1977, pp. 81-86), the central features of the Celtic legal model for several centuries were the key political unit, the *tuatha*, the specialized ‘private’ judges who administered the common law, the *brithim* or brehons, and the contractual device of suretyship of varying kinds. Each *tuath* was a distinct, voluntary, non-geographically bounded political tribe with its own ruler, and the courts operated by brehons were not immediately subject to control by the kings of the *tuatha*. Peden notes that these *brithim* displayed several characteristics of common law

¹⁰ Before turning to the other examples from “primitive” and ancient legal history which Rothbard and those extending his argument have cited most frequently, it may be helpful to consider a broad objection which Rothbard and/or those following him might raise against not only the foregoing discussion of Rothbard’s treatment of Roman law, but against all analyses which advance in the same strain in critiquing Rothbard’s inquiry. For a discussion of this objection, see Appendix B, at p. 49.

judges, yet despite ‘market’ pressures numerous codes of justice prevailed, the use of which was divided along both geographic and demographic lines.¹¹

The legal process by which rights were formally pursued hinged on a complex network of sureties, not entirely dissimilar from the modern concept in Anglo-American common law. In one of three basic patterns, the surety would attach himself to the claim or suit of his client, and either would assist in trying the case and enforcing a judgment or would provide a property guarantee to its client from its own resources if the party ordered to pay restitution was unable to do so. It is noteworthy that even at this primary phase of legal arrangements in the history of Irish law, the consequence of replacing all other forms of determining punishment and the actual substance of restitution is already visible. Once a society permitted the establishing of generally accepted ‘prices’ set by the brehons for various offenses, the price of theft was fixed. In the Celtic order, for instance, the fine levied for wrongful death was determined by a person’s social standing to a certain degree, known as the victim’s *dire* or “honor price.” More generally, Peden remarks, “the jurists established fixed penalties for specific crimes and enforced them equally,” regardless of the actual market value of an injury or loss (p. 86).

Bruce Benson’s (1989) close study of scholarly anthropological analyses of three slightly more obscure cases of quasi-libertarian legal anthropology also merits attention. While any accurate historical account of private law institutions warrants notice, the study of primitive societies in particular does not require that one discount historical findings of free market legal forms in light of a coercive, statist environment. Among the historical cases Benson recounts are the Yurok Indians, notable for their use of legal agents, known as “crossers,” similar to the Celtic sureties. The key difference in the case of the Yurok was that these “crossers,” though each would be hired by one litigant or the other, would come together with those hired by their

¹¹ Peden, and especially Rothbard, emphasize the *tuath* and the general social structure consisting of only voluntary states and law tethered only by custom as ‘received’ by each generation of the brehons, who, they stress, were largely disassociated from the kings of the *tuatha*. However, with regard to these voluntary states, Peden (1977, p. 81) himself acknowledges that real understanding of what little evidence remains from this period is very scarce. The language is so complex that only a few specialists can even attempt to really work with the texts. Peden begins his analysis with the following disclaimer: “It is impossible at the present time to present a systematic, coherent description of the ancient Irish law of property. The reason is that a considerable portion of the sources have not been published in modern scientific textual editions and translations....The later editors...were, with one exception, almost wholly ignorant of the Irish language...and the printed texts themselves were full of glaring errors.” Thus, one must at least acknowledge the possibility that the institutions which Peden calls “a body of persons voluntarily united for socially beneficial purposes and the sum total of the landed properties of its members constituted its territorial dimension” (1971, pp. 3-4) could in actuality have been nearly as “statist” as the *miry* of early Kievan Rus. The key is that, by Peden’s admission, no definite answers to a number of questions are yet available.

client's opponent and adjudicate the dispute, serving in the roles of advocate *and* judge. These decisions were backed by the threat of ostracism, which required the cooperation of the community as a whole (p. 8).

The Ifugao of Luzon employed a similar agent to mediate their disputes, known as a *monkalun*. However, this arbitrator "had no vested authority to impose a solution on disputants" (p. 14). In general, concludes Benson, the plaintiff and his family had two alternatives: "He could find a new *monkalun* and hope for a peaceful settlement, or he and his family could begin preparing to ambush the defendant" (p.15). Without the threat of social ostracism, the Ifugao relied partially on litigants' faithfulness to their pledge to obey the mediator's decision, and partially on the family of the *monkalun* himself, who would wage war on any litigant who refused his decision and chose to incite violence instead.

The historical case of the Kapauku Papuans, of West New Guinea, brings an additional element to light. Primitive societies, in some cases, had even developed schools of judicial thought, wherein a judge, a *tonowi*, "simply lost his following" as an effective mediator and discerner of 'legal truth' if he turned sharply from accepted legal principles (p. 18). In this and the preceding two cases, it should be clear that primitive societies may well have exhibited some of the market-law characteristics Rothbard and others suggest. Even if they provide a workable historical case, however, the applicability of tribal relations to comparatively enormous and complex modern states is at least debatable.¹² While in abstract terms all legal arrangements can be broken down into an array of simple contractual claims, it cannot be ignored that the feasibility of some legal forms depends in large part on the cultural context in question. An oral society, for instance, would presumably experience great difficulty maintaining a system of law which changes rapidly across a wide region.¹³

¹² It might be suggested, alternatively, that while the comparatively strong common worldviews espoused in a particular tribal community could not function on a much larger scale, nonetheless a shared metaphysical or philosophical vantage point which is less specific and concrete might serve an analogous function. For instance, it might be contended, a generically 'Christian' ethos in a particular society might provide a strong enough 'nuclear force' within such a society for that culture to succeed in boycotting unjust judges, for instance. However, it must be recognized that this is the same argument already entertained, simply in disguise. In sum, widely diffused and largely uniform adherence to civil religion, for instance, merely constitutes a sociological basis for widespread support of a particular meta-rule of law. See also note 13.

¹³ Rothbard's examples of oral cultures' legal systems emphasize this very tendency to maintain a slowly-changing body of law. It was for this reason that the *Corpus Juris* was grafted back into the common law in the middle ages.

Common Law of Britain: Anglo-Saxon and Early Norman Principles

The example from legal history given the greatest weight in Rothbard's analysis in *For a New Liberty* is the common law system of Anglo-Saxon and early Norman England. Since this period seems to provide both the factual origins of the oft-mythologized British common law and represents the most *laissez-faire*-compatible stripe of England's legal history, Rothbard and others explore it as the quintessential example of what non-legislated lawmaking can accomplish. While the larger fallacy of confusing legislation with state-imposed law is particularly evident in Rothbard's and others' analysis,¹⁴ the Anglo-Saxon common law tradition provides a special case where the possibility of misreading and misinterpretation is heightened. With this in mind, the historical record must be briefly reviewed.

Even before their conquest of Britain, the ancestors of the invading Angles and Saxons on the Continent had already exhibited a somewhat rigid social and even political apparatus. Within each local community, a tribal assembly or council was formed which made and applied the law for the tribe, subject to virtually "no limitation on its powers" and empowered to appoint and remove an executive authority—the prince (Burgess 1915, pp. 74-76). Though much development is discernible once the tribes migrated to the British Isles, the key social and political fixtures remained. Indeed, the *witans*—the councils which assisted the Anglo-Saxon monarchs for centuries and chose the successor—reflect strong similarities even to these earliest tribal institutions.

Once firmly planted in Britain, still long before the Norman Conquest, whatever truly private legal order had existed was transformed into an agent of the state.¹⁵ From the early stage of tribal organization described above, the regional kings began to issue written commands and charters through the agency of royal chaplains. As tribal configurations developed into the several kingdoms at the peak of the early Anglo-Saxon period, the new social unit of shires developed. Each shire held its own court, administered by a royally-appointed *ealdorman* from

¹⁴ As above, Osterfeld (1989) is a prime example. The nature of this fallacy is explained more clearly below (see p. 21). Briefly, Rothbard and others make use of two basic definitions of "legislation": one referring to the declaratory acts of the state (whether controlled by a legislature or an autocrat) which impose an arbitrary will on society, and the second referring to the particular process by which representative assemblies produce generalized rules applicable to all cases in their jurisdiction. These definitions are then conflated in developing arguments for private, judge-made law. One key consequence of this confusion of terms is that leads the student to associate harms and benefits derived from one concept of "legislation" with the other definition, and vice-versa. It is in this way that Rothbard's particular error of historical interpretation is connected to a shortcoming in his proposed model of private law.

¹⁵ The same pattern is discernible in the *lex mercatoria* as well. See Cutler (1999).

the ranks of the nobility (Roberts et al. 2002, p. 48). The particular origins of royal distributions of judicial authority to the nobility are both important and frequently overlooked. As Helen Cam (1963, pp. 28-30) explains:

From Alfred onwards, the kings accepted the responsibilities later formulated in the coronation oath, of upholding peace, forbidding robbery and seeing that justice was done to all men, and did their utmost to enforce order and punish theft....If the kings had taken on the responsibility for putting down fighting, peacebreaking, robbery by violence and harbouring of outlaws, it was only sound policy to give the great landholders a money interest in punishing these offences.

Thus, centuries prior to the Norman invasion, a certain variety of feudal tenures seems to have developed (p. 44).¹⁶

As the complexity and intensity of judicial and police duties expanded, the duties of legal administration and governance were passed onto the shire reeves, or sheriffs. The bailiffs of these sheriffs, in turn, served as the direct judicial authority for every “hundred” (the most basic unit of social organization of the time), thus making the sheriff the direct link between local judiciary and the crown (Roberts et al. 2002, p. 48; Knappen 1942, p. 38). In addition to a royally appointed executive administrator, “to assist him there was always a court or a council—the terms are interchangeable in medieval times....Probably it was the direct descendant of the old popular assembly of the Germans” (p. 40).

Against this backdrop of institutional forms, the actual Anglo-Saxon legal process took shape. In cases of significant injury to person or property, blood feuds were the main deterrent threat to provide security. The Anglo-Saxon kings even provided systematic rules for such feuds (Roberts et al. 2002, p. 48; Knappen 1942, p. 67). Eventually, the blood feud was replaced by direct restitution in the form of financial compensation for losses. In cases of wrongful death, restitution, known as the *wergeld* or “life price” was determined (as in the case of the Celtic “honor price”) on the basis of the victim’s social status. For damage or loss of property, a *bot* was paid to the property owner. In either such case, a special fine, the *wite*, was paid to the court’s proprietor (p. 63, 68).

Actual litigation, then, took place within this framework. The process of a civil trial, from beginning to end, was both incomparably complicated and rife with superstition and myth. Beginning with formal, elaborate, and patently inefficient protocols for notifying one’s opponent

¹⁶ Perhaps the most notable adherent of this view was Maitland, who maintained that the “facts of feudalism” were evident, if not the “theory” (Cam 1963, p. 44).

and compelling his appearance at court (by winning a right to seize his property or have him branded an “outlaw” for noncompliance), the process included pleading, *preliminary* judgments, the rigorous examination of witnesses, compurgation, the “ordeal” (in which an all but tortuous circumstance was used to determine the guilt of the defendant), and ultimately the *final* judgment (Knappen 1942, pp. 57-62). Though officially no recourse to appeal a decision truly existed within the formal legal framework, the king himself and potentially the witan would hear cases and frequently intervene, with or without clear justification of their authority to do so (p. 56, 64).

Several additional errors embedded in Rothbard’s analysis regarding the interpretation of the general structure of Britain’s system over time also warrant notice. Rothbard, and others like David Osterfeld following very similar arguments, seem to implicitly expect that market incentives, broadly defined, would raise up a troupe of legal professionals with specialized knowledge of legal principles and procedures. Unsurprisingly (in light of this expectation), both are convinced upon reading the evidence that such an ensemble of professionals did arise. However, their claim is debatable at best, and more likely simply unfounded. M. M. Knappen (1942, p. 64) states it quite concisely: “There were no professional lawyers or judges in Anglo-Saxon times.” Precisely because “the law was supposedly buried in the breast of every Englishman,” the “reeves, sheriffs, earls and others who headed up the courts...had no formal legal training for their positions.”

To be sure, the existential absence of a legal professional elite in this period of Anglo-Saxon legal history would certainly not automatically efface the feasibility of all private market justice. The primary point, rather, is that Rothbard and Osterfeld assume such a group would develop if this particular justice system were indeed a true exemplar of viable private justice arrangements. Since such a learned elite did not arise, one must necessarily consider *why* it did not. Given the sources and structure of legal authority extant even before the Anglo-Saxon conquest, the solution is evident: the Anglo-Saxon common law order was not, regardless of whatever particular “law-finding” processes or structures it came to employ, a self-supporting, private legal order. The reeves, sheriffs, and earls mentioned above—appointed either by the crown or his clients—still “exercised a good deal of influence on the decisions rendered” (Knappen 1942, p. 64) despite their ignorance of the law.

J.G.A. Pocock’s (1967, p. 50ff.) groundbreaking research into English historiography in the early seventeenth century confirms this aspect of Knappen’s generalization. The British had

been thoroughly steeped in the view that judicial custom from “time out of mind” provided the foundation for English law, and therefore English political organization, and also insulated England (though not Scotland) from foreign systems and models of legal society.¹⁷ This heritage was significantly shaped and manipulated in the pre-Revolutionary period, though it was not a complete fabrication of the common lawyers and legal historians writing in the seventeenth century. Whether their own view of their juridical past was accurate (or even politically engineered, to a degree, by historians of the Revolutionary generation), the British for centuries prior to the Revolution believed they had inherited an organic, immemorial law which it was the king’s and lords’ (and their proxies’) duty to administrate. It was in this capacity that the state apparatus could manipulate the content of the customary legal tradition.

Far from being tangential, this point is crucial to critically assessing Rothbard’s argument. The Anglo-Saxon order presumed the existence of overarching legal principles implanted in the heart and mind of every member of the race, and yet the interference of legally inept officials immediately affected the consequent legal code amalgamated in common law rulings. If Rothbard’s system is to function without internal inconsistency, the overriding axioms of liberty which he defines as the only unchanging tenets of law would have to be similarly “buried in the breast” of each participant in a given libertarian legal order. However, even if there existed an exact one-to-one correspondence between these libertarian axioms and the juridical *volksgeist* embedded in each citizen (of which Rothbard himself admits skepticism¹⁸), the arbitrary intervention of royally appointed jurists still constitutes an artificial state intrusion into the libertarian order. As such, the Anglo-Saxon system which Rothbard and Osterfeld esteem so highly cannot satisfy their own criteria for historical evidence of the viability of private justice.¹⁹

¹⁷ Pocock, whose initial work established an entire subdiscipline of Revolutionary historiographical studies (and in English legal history), puts it most clearly: “[t]he English supposed that the common law was the only law their land had ever known, and this by itself encouraged them to interpret the past as if it had been governed by the law of their own day; but in addition the fact that the common law was a customary law, and that lawyers defined custom in a way which heavily emphasized its immemorial character, made even more radical the English tendency to read existing law into the remote past” (1967, pp. 30-31).

¹⁸ See discussion below at p. 31ff.

¹⁹ One might conjecture that this historical case illustrates a system which, though it falls short of Rothbard’s model, could have been modified to meet the conditions of truly non-state law. However, as has already been asserted, Rothbard makes clear that the record of history is important in testifying to the credibility of the model he offers. If none of the historical instances to which he refers actually illustrate his system functioning fundamentally as he proposes, then history cannot add weight to his argument. Moreover, since Rothbard’s particular argument is that

While the Anglo-Saxon common law structure, even irrespective of its particular law-finding process, may represent the strongest case one might craft from English history, some attempt a weaker case on the basis of the common law after 1066. The contention that any real system of genuinely private law existed under Norman feudalism is easily dispelled. The main local legal institution for several centuries “was a feudal court in which the lord, by virtue of his lordship, exercised jurisdiction over his vassals in civil pleas, especially those concerning lands” (Roberts et al. 2002, p. 76). The system was premised upon “the right of a lord to summon his tenants to a court and the duty of a lord to see that justice was done in that court” (Cam 1963, p. 30).

In addition to these fundamentally feudal legal structures, the nobility gradually assimilated “franchisal jurisdiction [sic]” from the crown’s arsenal of legal authority, thus winning for themselves the royal prerogative of coercive control of the courts established for each *hundred* (Roberts et al. 2002, p. 76). The crown still developed its own proprietary means of ensuring control over the provision of justice. The infamous “justices of the peace,” the first formalized system of English circuit courts,²⁰ and ultimately the entirely artificial devices of the King’s Bench and the Court of Star Chamber, to list just a few, all developed after 1066.

Law Merchant

References by Rothbard and others to the medieval *lex mercatoria*, or Law Merchant, are exceedingly brief. In general, the allusions are offered with the suggestion that this amorphous, private, market-based law developed *by* merchants *for* merchants in the Middle Ages, which also reflected the infusion of received Roman legal principles into merchant law (Cutler 1999, p. 68), provides the ideal example how justice might be developed on an international scale. Rothbard in particular claims to draw his summary of the Law Merchant and admiralty law from Bruno Leoni, but this link is tenuous at best.²¹

the overwhelming majority of historical evidence supports his position, the fact that so few if any historical cases come close to his model leaves unpromising prospects for the historical dimension of his case for private law.

²⁰ Osterfeld (1989, p. 50) ascribes the circuit courts inherited by modern British and American law to the Anglo-Saxons; while jurists may have traveled to various sites to dispense rulings (usually within a narrow radius and only at existing loci of judicial authority, such as the *hundred* courts), the tradition of formal circuits traveled by jurists which survived is that of the Normans. See Roberts (2002).

²¹ In *Power and Market*, Rothbard cites Leoni (1961) and his own review (1962) of Leoni as the foundation for his abbreviated claims regarding the “common law” (which he fails in this instance to limit to a particular historical definition, viz. Anglo-Saxon, Norman, American, etc.) as well as admiralty law and the Law Merchant. Oddly, Leoni provides little if any direct exposition of either of the latter two subjects, focusing instead of various iterations of the common law, and Rothbard’s review of Leoni also ignores admiralty law and the Law Merchant.

Rothbard's failure to thoroughly explicate his grounds for upholding either the *lex mercatoria* or admiralty law as an archetype of libertarian border-indifferent legal codes is understandable to a degree. As Cutler (1999, p. 59) concedes, the function of "international commercial norms...or private international trade law...is obscure and little understood by students of international relations." Historiographically disentangling the Law Merchant, for example, from the oversight and local jurisdiction of existing political entities in various regions of Europe can be extremely difficult for a variety of reasons. While the romanticized vision of the Law Merchant as entirely distinct from political control may be appealing, the "most characteristic advantage of the Law Merchant as administered in local courts...was generally lost when cases were taken up to the superior common law courts," where cases "dragged on for years" as merchants and common lawyers wrestled with "very difficult questions," such as "disputed accounts between partners or between masters and their factors [sic] or servants, especially when foreign merchants were involved" (Tait 1931, 642).

This latter historical feature—appeals from the merchant courts to higher authorities—may surprise some observers, yet there is strong evidence that "local political authorities did exercise a very broad jurisdiction over the activities of foreign merchants," especially "in terms of regulating piracy" (Cutler 1999, p. 69). As one might conjecture in cases of the Law Merchant—as well as disputes arising under the slowly developing law of the sea, admiralty law—the difficulty for local judicial authorities, both merchant or civil courts, of dealing with divergent business practices from different regions could provide a great deal of inefficiency and complication. Non-merchant courts battled with competing commercial arbitration institutions for control both in cases involving foreign litigants and in instances where particular divergent standards of business practice were on the margin of commercial and non-commercial jurisdiction (Tait 1931, 642).²²

Not only did these ambiguities concerning the overlap of political realities and cross-border enterprises bring local intervention, but they opened the door for "great merchants and foreign potentates," given a climate of "frequent wars and disturbance of trade, which were

²² One might consider, from this evidence as well as from a more general analysis of the Law Merchant's operation, that the effectiveness of the Law Merchant in purely commercial cases (if such a limit could be defined) speaks little of its potential value for handling other cases of invasions of rights. Precisely in cases where individuals violated the rights of others outside of a business context, e.g. rape or murder, the processes of 'law-finding' of the *lex mercatoria* (and almost certainly its ability to enforce its edicts) might prove patently ineffective. Again, that the likelihoods of such possibilities have not been sufficiently explored is part of the difficulty.

sometimes too much for the fair and borough courts,” to exercise considerable “influence with the Crown” (Tait 1931, p. 642). More generally, in any environment where institutional frameworks have resulted from a substantive combination of international armed conflict (the threat of such war) and political manipulations of free exchange—obviously including conventional monarchies, for example—the ‘unimpeded’ market institutions which develop will be prone to distortions given the coercive elements.

Iceland’s “Free Commonwealth”

Perhaps the historical case which comes closest of any to approximating the model offered by Rothbard is that of Iceland during the three centuries of “Free Commonwealth” era. Though not addressed by Rothbard, many supporting similar models rest the historical dimension of their arguments upon the comparatively decentralized quasi-feudal political and legal order that was formalized in 930 A.D. and which prevailed until King Haakon of Norway brought the island back into the Norwegian fold. While the Icelandic case does include many of the features Rothbard heralds as the hallmarks of private law, it does not reflect an instance where truly stateless law provided a fully stable order. Iceland’s system, in fact, was neither truly stateless nor fully stable throughout its duration.

As David Friedman (1979) outlines the system’s key features, the Icelandic order consisted of an array of regional and local chieftaincies which, though not feudal in the strict sense, exhibited many of the features distinctive to feudal tenures. The relationships between the various orders of chieftains—*thingmen* and *godar*, respectively—were contractually arranged, and one’s allegiance could be switched from one chieftain to another of similar rank, although Friedman is unclear on the allegiances and obligations assigned to each.²³ Each of these chieftaincies was a marketable commodity in a sense, in that one could sell both the land and the attached title from which one’s powers *qua* chieftain were derived. However, as both Friedman and Roderick Long (1994) acknowledge, the number of chieftaincies was not an outcome determined by the market, but was fixed by law from the formalization of the system in 930 A.D. Thus, regardless of the private law dimensions of the chieftains and their powers, they were established and maintained by state authority, and thus resembled licenses or state-granted franchises (with local or regional monopoly rights) to administrate law.

²³ In particular, Friedman appears to equivocate on whether a *godri* or a *thingman* was the superior partner, though it seems apparent that *thingmen* were recognized as the wealthier, more powerful party to the arrangement.

The nation did lack a powerful national government, and had no national executive power, but it did maintain both an active legislature, the *lögrétta*, which drafted all of the nation's statutes, and an elaborately tiered system of courts and local assemblies. The chief judicial figure—the *logsogumadr* (law-speaker)—kept the oral tradition of the nation's statutes alive through recitation and application to national judicial disputes. The *logsogumadr* was elected triennially by the inhabitants of one of the island's four quarters (on a random basis), but his recitations and interpretations of the nation's law were binding for all Icelanders. Aside from this figure, courts at each level of the feudal structure administered justice for their respective jurisdictions. Though much attention is given to the private nature of prosecution and trial in the Icelandic system, only the lowest levels were truly private. The judges presiding at all of the superior layers were appointed or elected by state assemblies or officials.

Two particular features which do reflect aspects of Rothbard's model are evident in Iceland's legal order. First, as Friedman notes, an array of primitive defense agencies, or "coalitions," arose to provide mutual protection against aggressors and a more potent threat of effective prosecution, both of which were seen as deterrents. These agencies also provided a certain degree of emergency credit financing for indigent convicted criminals.²⁴ Aside from participation in these informal agencies, victims could sell their rights to restitution to a third party. Though many of the details of this procedure are unclear, its thrust seems to reflect a medieval practice akin to subrogation of rights in modern legal systems. Second, Friedman observes, a system of generally proportional fines provided the basis of punishment and restitution for *inter vivos* harms. While Rothbard permits non-monetary restitution (which is simply a subset of proportional retribution), the correspondence between harm and punishment embodied in the fine structure seems consonant, on the surface, with Rothbard's model. However, the proportional nature of these fines was likely distorted in cases where the probability of detecting and apprehending the perpetrator was low. In such cases, the statutory fine was set artificially high as a deterrent, regardless of the harm incurred.

While the Icelandic Free Commonwealth may illustrate the case in recorded history which most closely approximates the private justice model suggested by Rothbard and others, it still does not provide a case of purely stateless law functioning effectively and with stability

²⁴ In a sense, such financing provided the medieval equivalent of malfeasance (or 'intentional malpractice') insurance coverage.

(Long 1994). First, as noted above, the establishment of a generally fixed, nationwide network of chieftaincies, in combination with the national legislature and judicial apparatus, suggests the presence of a real state, however weakened in executive powers. Unlike Rothbard's preferred paradigm, the Icelanders relied not on a slowly adapting common law, but on the edicts of a legislature. As indicated, while the various chieftaincies could be marketed, their number was fixed from the initial founding of the Commonwealth in 930 A.D.

Second, though Friedman, Long, and others may emphasize the civil character of Icelandic law's punishments during the period, involving only the Icelandic equivalent of tort restitution, this characteristic does not at all guarantee that the system was truly private. Indeed, the punishments leveled against perpetrators did include society-wide sanctions. Moreover, while Rothbard indicates a strong inclination towards pecuniary restitution, his primary concern is evidently the proportionate nature of all punishments, whether consisting of payment for damages *or* equivalent harm inflicted upon the tortfeasor (including physical violence, at the victim's option).

Third, while the Free Commonwealth did persist for more than three centuries, its demise was attributable not to spontaneous foreign intervention but to inherent, festering instability. To be sure, as Long indicates, much of the imbalance evident in the Icelandic system by the early thirteenth century arose as the *storgodhar* ("Big chieftains"), who had acquired Churchsteads²⁵ from the state, increased their wealth and power rapidly. Unlike the stateless society suggested by Rothbard, it should be added, the Icelanders were, after 1097 A.D., required to support the church through compulsory tithes, but they could not even select the particular Churchstead to which their tithe would be channeled (Long 1994). Indeed, this arrangement eventually helped to fulfill the fear shared by many that those with exceptional power or wealth would become above the law (Friedman 1979). Thus, regardless of whatever virtues it may appear to reflect (by comparison to other legal systems, whether past or present), Iceland in the Free Commonwealth era does not provide a clear instance of stateless law functioning as Rothbard's model purportedly would operate.

Current Trends in Alternative Dispute Resolution: Arbitration

Rothbard's discussion (1978, pp. 227-28) of the prevailing trend in business practice to have professional arbitration agencies mediate commercial disputes is especially pertinent in light of

²⁵ A distant cousin of the monastic manors in much of Britain.

the Law Merchant and Icelandic systems. Though Rothbard acknowledges that parties turn to the public courts to enforce arbitrators' rulings, thus limiting one's appraisal of their true effectiveness, he maintains that this was not the case before 1920. Even if one grants Rothbard's contention—indeed, even, to a degree, if the courts had not begun lending their authority to arbitrators' decisions after 1920—one might still argue that distorted incentives for private justice created by the mere existence of any coercive, state-operated system of law enforcement and dispute resolution should bar consideration of commercial arbitration as a fully viable, independent system of law. That is to say, while Rothbard explains (p. 227) that businesses have turned to “private arbitrators as a cheaper and far less time consuming way of settling their disputes,” it may be more than the inefficiencies and artificial transaction costs of state-governed litigation which businesses (and the courts as well) are seeking to avoid.²⁶

In sum, even if arbitration would operate smoothly in a perfectly free market, all the empirical data and observations available to-date represent scenarios qualitatively different than the model Rothbard is attempting to construct. In other words, the core of the *ceteris paribus* assumption which validates the translation from historiographical inquiry to thought experiment disappears. This difficulty, as noted earlier,²⁷ pertains to the whole of Rothbard's historical analysis. If none of the historical examples he offers actually parallel the truly stateless legal order he proposes, then the whole of his historical argument devolves into an appeal to partial reform of the legal order to the degree that the historical cases manifest. Since partial reform is ostensibly not his objective,²⁸ a deficiency in the historical analysis seems apparent.

Fatal Fallacies: Equivocation and Amphiboly

In addition to all the above criticisms offered regarding the credibility of Rothbard's reading and application of the historical evidence, one further, more serious dysfunction is discernible. The conflation of the *process* of legal decision-making with the *foundations* of state sovereignty and

²⁶ Courts, for example, and specifically judges seeking re-election or higher appointments on the basis of their records as efficient court-managers, may well have a strong incentive to move, by decree or by offering incentives, corporate and other disputes out of their dockets and into a private or quasi-private arbitration process. This case would represent an inflating distortion (either by force or by public subsidy) with respect to arbitration agencies.

²⁷ See note 20 above on p. 16.

²⁸ Indeed, an argument for partial reform would be an argument for a scenario characterized by at least partial intervention. In such a scenario, the Misesian assumption of inherent instability derived from the partial intervention begs the question of whether such a state would likely lead to more or less intense intervention. Again, since the historical record gives little or no indication of such interventions noticeably regressing, and instead points frequently to cases of progressing intervention (the examples of Iceland, Celtic Ireland, etc. described above), any case for partial reform seems to falter from the start.

practical authority is hovering just below the surface of Rothbard's historical argument. The same fallacy is expressed in more explicit terms by Osterfeld, and thus the latter treatment will provide further grounds for analysis. In short, Osterfeld and others use the term 'legislation' to mean two different things: first, the process utilized by councils and assemblies to impose *statutory* law, and second, in broader terms, any act of a 'governmental' authority to *impose* law on society, whether through edict, judicial decision, or the resolution of a representative assembly (i.e. everything except custom and voluntary contractual arrangement). By confusing these two ideas, and by consequently misstating with reference to historical cases which one actually existed in a given society, Osterfeld and others misrepresent history itself, the true aims of dedicated supporters of stateless law, and the feasibility of an anarchic legal order.

Moreover, as will be seen in the next section, by identifying this particular defect in Rothbard's analysis, the difficulties intrinsic to Rothbard's positive model become easier to recognize and appreciate. Specifically, equivocal or ambiguous conceptions of common law, legislation, and natural law may add to the paradox of judge-made law in Rothbard's system. While observers such as Randy Barnett (1978, pp. 103-04) have commented that the actual processes by which courts 'create' law, as opposed to the substance itself, deserve greater attention than most contemporary natural law theorists have afforded them, this should by no means be construed as proper license to confuse content with method.

The error in question unfolds as the major premise is provided, which in Osterfeld's version of the argument reads: "It is clear from any careful reading of anarchist literature that what anarchists oppose is not law but *legislation*" (1989, p. 49; emphasis in original). The very word Osterfeld aims to stress is the term he (as well as Rothbard, though he through less explicit use of the term) employs with shifting meanings. In particular, Osterfeld exploits the semantic gap between legislation *qua* arbitrary *imposition* of a ruling authority's *will*—whether that of an autocrat or a deliberative, even representative assembly—on society, and the particular *process* by which an executive and a law-making council *produce* written statute law.

When Osterfeld (1989, p. 49) makes historical references to the development of "the power to legislate"—meaning specifically the capacity to form a new, written law through the process commonly understood as "legislation"—he maintains that *this*, and not the more general class of imposed laws forced upon society by coercive rulers, is the object of anarchists' disdain. However, at earlier points, both Osterfeld's own argument and the writings of many others who

support a stateless legal order use the term “legislation” to mean any ‘imposed’ law backed by coercion. In this way, Osterfeld all but equates any “command from above” with “statute” law, clearly shirking the distinction the terms imply in nearly any familiar historical context. This same amphiboly appears, though given less explicit expression, in Rothbard (1978).

The consequence of this equivocal use of terminology is that it leads Rothbard and Osterfeld to conflate legal process with the ‘legitimacy’ and grounds for legal authority (specifically, the absence of such grounds). Thus, in their eloquent praise of the ‘law-finding’ accomplished by Roman and Anglo-Saxon common law jurists (in which transcendent principles of liberty were merely discovered, rather than manufactured) the direct and indirect origins of the jurists’ authority are overlooked. In a direct sense, landlords were themselves entitled to hold courts for their own *demesne*, and they frequently sent retinues of armed, and often liveried, *retainers* to ensure, in a ritual known as “maintenance,” that not only judges (when the nobles themselves did not preside over the manor courts) but witnesses and juries as well, obeyed their will (Roberts et al. 2002, p. 200). In a less direct sense, royal grants of lordship (‘packaged’ with judicial prerogative in some cases, as described above) provided non-private foundations for the common law as an authoritative code of justice.

Thus, however the jurists went about discovering the law and dispensing decisions, including adherence to *stare decisis* parameters and limiting the applicability of their rulings to the actual litigants, their authority was based and maintained by coercion. One can conceive of a variety of hypothetical cases in more modern terms to illustrate this point.²⁹ To be sure, both private law and public law systems may rely on physical force to implement their decisions, once reached. What distinguishes private and public law in this respect, however, is how they reach their position in the first place. How the overarching libertarian axioms could be maintained at the same time, if only the *process* of legal decision-making is held constant (by limiting legal decisions to market-based courts), is a problem for which Rothbard’s system must provide resolution, as seen below.

²⁹ If the Supreme Court of the United States, for instance, arrives (through ‘law-finding’ techniques of deductive discovery) at a particular decision abominable to anarchists, yet does so while following precedents and limiting its rulings to the litigants at hand, no anarchist would justify the ruling merely because of the particular philosophical *method of discovery* of the law used by the jurists. Rather, the anarchist would object that the Supreme Court’s authority was *established* by force or the threat of force. Moreover, even if the ruling handed down by the Supreme Court mimics the ruling which would have been reached on the free market had a private court been consulted, the coercive nature of the establishment of the Court’s authority makes such a market-mimicking transaction nothing more than a involuntarily-subsidized exchange.

POSITIVE MODEL OF PRIVATE JUSTICE: CONTRADICTIONS & CONSEQUENCES

Form vs. Function Dilemma: Choosing a Role for the Common Law

At the center of the private legal order set forth by Rothbard (1978, p. 235ff.) is the one feature—specifically, the process—which will, he contends, both (1) preserve the tenets of libertarian doctrine and (2) allow practical principles for adjudicating disputes to be formulated and applied. This key feature is the institution of a private version of judge-made law, parallel in some respects to the Anglo-Saxon tradition discussed above. Consistent with its historical antecedent, Rothbard’s system would adhere to the *stare decisis* principle.

The foremost difficulty with Rothbard’s model derives from the nature of common law structures. On the one hand, he extols the virtue of a truly market-generated legal order, developed by privately-competing judges as part of the joint, voluntary efforts by disputants to settle disagreements. The quintessential benefits of a private system, of course, center around the unique capacity of the market to provide maximally efficient standards based on the will of individual consumers. Thus the “laws” decreed by judges in such a system must be those that best satisfy, directly or indirectly, the preferences of both parties to each dispute. On the other hand, Rothbard (1978, p. 235) firmly maintains that the common law must be a safeguard for the central libertarian principle—“nonaggression against the person or property of others”—in addition to any of its corollaries. The system would be established “in short, on the basis of reason rather than on mere tradition, however sound its general rules.”

It is at this point where the paradox appears. Whether reasonable market participants ought or ought not to conform their preferences to the libertarian axiom is immaterial: if they do not, for better or for worse, a wholly private justice system must respond or go out of business. Importantly, Rothbard (1962, p. 38) acknowledges that systems based on custom or tradition—cultural expressions of popular will—have *not* always been consistent with the prime directive of liberty:

It is a *happy accident* of history that a great deal of private law and common law is libertarian, that they elaborate the means of preserving one’s person and property against ‘invasion.’ But a good deal of the old law was anti-libertarian, and certainly *custom can not always be relied on to be consistent with liberty*. Ancient custom, after all, can be a frail bulwark indeed; if customs are oppressive of liberty, must they still serve as the legal framework permanently, or at least for centuries? [Emphasis added.]

The inconsistency, then, lies in the tension between (A) the overriding axioms which Rothbard believes will somehow supersede any conflicting preferences by consumers, and (B) market

forces shaping law to the will of market participants,³⁰ whether that will is libertarian in principle or not.

To properly analyze the dimensions of this dilemma, each of the ‘horns’ will be briefly examined. First, the normative element, based on libertarian ethics, which Rothbard expects the law to preserve, will be considered. Second, the efficiency-driven market dynamics of private law will be taken up. Ultimately, if both components cannot be reconciled and thus preserved simultaneously, adherents to Rothbard’s model must acknowledge that the opportunity cost of converting to truly private law is precisely the loss of the *guaranteed* supremacy of the libertarian axiom.³¹

In light of his aforementioned sharp criticism (1962, p. 38) of Leoni, a fellow libertarian scholar who firmly supported private law (whom Rothbard critiqued *inter alia* for his failure to sufficiently outline the *content* of law in the market-based system he proposed), Rothbard’s earnestness in highlighting the preeminence of the self-ownership axiom as the core principle of non-state law is understandable. Rothbard (1997a, p. 127) stated the central principle with great clarity:

³⁰ “Market participants” is intended to mean those with economic ownership of property of value in the market who directly or indirectly, by their consumption *and* production, determine the dynamics of the legal order.

³¹ One might maintain that market-provided legal orders would yield a scenario where the law more *closely* matches the desired libertarian axioms. The critical point, however, is that such an order cannot *guarantee* anything at all because of its intrinsically *adaptive* character. Thus, private law cannot offer a guarantee that it will preserve liberty any more than public law can promise that what it actually enshrines (in immutable, generalized rules) will be liberty.

To be sure, it might be objected that Rothbard’s argument stands on much firmer ground insofar as he advances a *comparative* claim of the relative superiority of a private law system in guaranteeing stable liberty. While such an objection certainly has merit, at least four responses must be noted. First, much of Rothbard’s argument makes no such graded claim, but rather rests on absolute assertions of functionality and superiority. Second, it may be that the key criterion for evaluating the preferability of a given legal order is not one which admits of degrees. In other words, it might be the case that, at least with respect to a given individual or society, the ability or inability to make any guarantees about the content and structure of a system of jurisprudence is a binary variable—i.e., there are only two possibilities, and perhaps the ability to make such a guarantee is an absolute necessity in the minds of those selecting a legal order. Third, Rothbard’s argument on this point seems to take too little account of the instability of an even mildly interventionist scenario, as Mises so adroitly recognized the phenomenon. That is to say, nothing short of totally private law can possibly persist, via the instability of intervention, yet at the same time fully private law may be unfeasible. Finally, and perhaps most significantly, it is a matter of both concrete practical and ultimate philosophical significance *how* Rothbard would intend for his system to arise. Specifically, first permitting Rothbard to assume that there *exists* some way in which the aforementioned paradox could be resolved, Rothbard might begin his argument from the hypothetical scenario wherein the resolution to that paradox was already accounted for by the reigning legal order. This represents a potentially catastrophic error, however: stating even for purposes of argument that we have solved a given problem, without complete knowledge of what were the conditions precedent to that resolution, opens the door for such conditions which, though unknown to us, might yield other conditions subsequent impossible or impaired.

The normative principle I am suggesting for the law is simply this: No action should be considered illicit or illegal unless it invades, or aggresses against, the person or just property of another....The invasion must be concrete and physical.

More specifically, the above principle provides an explicit *rule of law*, in the sense used by legal theorists.³² Rothbard elucidates its role in this respect without hesitation:

[W]hatever positive or customary law has emerged cannot simply be recorded and blindly followed. All such law must be subject to a thorough critique grounded on such principles. Then, if there are discrepancies between actual law and just principles, as there almost always are, steps must be taken to make the law conform with correct legal principles. (1997a, p. 126)

Given this straightforward stipulation for the primary rule of law, Rothbard can legitimately be classified within a special branch of natural law theorists, as he demonstrably satisfies Barnett's (1978, p. 98) elementary definition: "Natural law theorists are mainly concerned with the substantive content of positive law and its congruence with morality. Law which does not conform with justice is not properly law at all, but simply naked force."

Rothbard's view of common law judges in history, and specifically the connection between their reliance upon precedent and their role as protectors of liberty, as discussed above, is particularly relevant here in that it further testifies to his adherence to natural law doctrine, albeit a very particular stripe within natural law theory:

The idea of following precedent was developed, *not* as a blind service to the past, but because all the judges of the past had made their decisions in applying the **generally accepted** common law principles to specific cases and problems. For it was universally held that the judge did not *make* law (as he often does today); the judge's task, his expertise, was in *finding* the law in accepted common law principles, and then applying that law to specific cases or to new technological or institutional conditions. The glory of the centuries-long development of the common law is testimony to their success. (1978, p. 233; all emphasis in original)

Thus, in parallel to any more familiar adherent to natural law doctrine of one variety or another, Rothbard holds firmly to an unchanging rule of law—the libertarian principle—which must of necessity transcend any developed legal code.

³² For those familiar with the debate in its broader context within legal philosophy as a discipline, the shorthand terminology may prove efficient. Thus, in Hartian terms, Rothbard's system might be said to suppose that the primary rules of law are immediate derivatives of Rothbard's immutable axioms, while the secondary rules are determined by the market process. In order to convincingly demonstrate that the latter will not necessarily come to control and recast the former, Rothbard must suppose some intermediate force or mechanism, which might be the shared legal philosophy 'buried in the breast' of the members of society (perhaps as a consequence of the objective reasoning faculties shared by all of humankind).

The crucial question should now be apparent: What will ensure that Rothbard's proposed system remains anchored to libertarian principle in place once an unhampered market is allowed to operate? Once the controls of statist monopoly on justice and defense are let go, what prevents any principle Rothbard sets forth, if it is not deemed efficient by the aggregate will of consumers in the market some participant in the market, from being removed or changed?³³ Indeed, Rothbard (1997a, p. 126) specifically challenges the conclusion reached by the Chicago school "that over the years common-law judges will always arrive at the socially efficient allocation of property rights and tort liabilities," on the grounds that such a view "adds an unwarranted historical determinism, functioning as a kind of invisible hand guiding judges to the current Chicago school path." As he states it most simply, "on the free market, *what would be enforced is whatever the customers are willing to pay for*" (1978, p. 220, emphasis added).

It is noteworthy that this would be the case not only because private suppliers of justice will seek the most cost-efficient mode of providing defense and arbitration services that is still consistent with consumers' demands. It would *also* be true, Rothbard asserts (1978, p. 234), that the "imposed personal views of the judges" would be automatically be "kept to a minimum" for a variety of reasons. First, judges could only rule on actual, concrete disputes, and their rulings would extend no further than the litigants themselves and their particular circumstances. Second, adherence to precedent would disable large-scale shifts from traditionally-accepted legal rules. Third, following Leoni, Rothbard observes that unlike legislatures, in which the majority can guarantee success by silencing the minority and diminishing its influence,³⁴ "judges, by their very position, are constrained to hear and weigh the arguments of the two contending parties in each dispute."

One might object that this component of the dilemma overemphasizes the role of consumers in shaping what the market provides. In other words, asserts the objection, certain features of the market structure, such as private property, would be beyond the reach of what

³³ This question applies to purely procedural as well as substantive elements of the law (i.e. to non-superstructural secondary rules of law, to again apply the Hartian framework.) For instance, any of the rational rules of evidence or the legal tests for negligence (vs. strict liability) would naturally remain in force only insofar as the parties agreed to them—thus, they cease to be an underlying, immutable principle, and are merely a transitory tenet of justice which will change, conceivably, with every shift in consumer preferences.

³⁴ This would, of course, provide the only apparent instance where Rothbard or those following him correctly contrasted legislative and common-law *procedure*, as opposed to distinguishing a legislative process from a purely libertarian order.

consumer preferences—the “ultimate data” of the law, to use Leoni’s language—can direct.³⁵ However, if law and defense are rendered purely as business enterprises, then the preferences of those with economic ownership of the property would be just as sovereign as they are in all other cases.³⁶ That is to say, both the subject of business ventures and the methods, or business practices, by which firms pursue these ventures will be shaped by the intersection of scarcity and consumer preferences. If all businesses enterprises’ activities must be efficient in the face of consumer preferences, then the provision of law and defense must as well. Whether customers believe a particular law code (and thus the private legal organizations that abide by it) to be desirable because it is inherently more efficient, or whether customers prefer it for some other psychological reason (e.g. it is in accord with their metaphysical or ethical belief system), the important fact is that they prefer it to other systems, and will pay a premium for its provision.

Considering this objection from a different angle may appear to render it more forceful, however. While it is undeniable that in order for their enterprises to survive, such endeavors must be efficient in the face of consumer preferences, it may be objected that this merely creates incentives for the producer to generate certain kinds of legal and defense services, and does not reflect an absolute barrier nor directive. For example, a group of several justice and/or defense producers, all of whom believe certain types of defense protection, to be immoral or illicit, might form an entrepreneurial association barring all of its members from providing such services. Consequently, the ‘preferences’ of the producers in this case, not the consumers, would serve eliminate, at least to some degree, the provision of the services in question. To be sure, as the objection would concede, such an association would constitute a certain form of cartel, and thus either a producer party to the cartel or an outsider might violate the ordinances of the association and provide the condemned varieties of defense services. Nonetheless, continues the objection, such producers would likely serve only a small niche segment of the market.

³⁵ While one might conjecture that some components of the market order are simply impermeable to consumer preferences, it stands to reason that unrestricted actors could create synthetically, via complicated contractual arrangement, virtually any business arrangement. That is to say, if one truly espouses absolute definitions of property rights, then one must accept that consumers may effectively adopt any model for cooperation they choose, by creating contractual relationships which mimic the desired scenario.

³⁶ A further objection might fairly be raised that market-based law is not alone in its vulnerability to the influence of ‘consumers’ of justice. Certainly, it must be conceded, any state-run system is subject to corruption, wherein parties or other participants either legally or illicitly exert influence over the administration of justice. However, in comparative terms, the case remains clear: in a market-based system, influence by ‘outsiders’ would be almost impossible to insulate against, as a matter of course, whereas in a public justice setting at least the possibility of curbing or eliminating outside influence exists.

A response to this more formidable version of the objection should first take note of Rothbard's own analysis of the intersection of producers' and consumers' preferences. Indeed, Rothbard (1997b, pp. 61-62) explicitly addresses the case where producers of a good or service incorporate their own consumer-like preferences into their enterprise, and specifically considers the instance where, "because a certain line of product is considered immoral by the owners," such entrepreneurs forego its production.

Here once again, these are two sets of consumers—the buyers of the product, and the producers or owners themselves. Because of his own values as a "consumer," the owner decides to forego monetary profit because of his own moral principle. . . . In either case, the owner is foregoing some monetary profit in order to achieve psychic profit. Which motive will dominate depends on the facts of each particular case. *Since the market is generally characterized by a division of labor between producers and consumers, however, the general tendency will be for monetary profit, or service to nonowning [sic] consumers, to dominate the decisions of business firms.* (Emphasis added.)³⁷

Ultimately, it is true that the producers can choose to offer defense and/or legal services which exclude those services such producers do not prefer. However, unless such producers can rely on another source of income to sustain their operations, their enterprise will likely be short-lived. Thus, this iteration of the objection is correct insofar as it observes that the control held by the producers over their property means that producers cannot be compelled to provide the services they find to be so objectionable. However, by the same token, consumers cannot be compelled to purchase what the producers prefer to provide.

In all events, the logical difficulty is striking: how can a legal system in the market, where arbitrators craft the law, arrive at any other set of rules than the one which, at a given moment in time, law-producers believe *ex ante* will best please market participants? When this question is expressed in more general terms—viz. 'How can an immutable axiom of law be consistent with any shifting common-law order?'—it becomes clear that the challenge confronting Rothbard is far from novel. Indeed, the late nineteenth and early twentieth centuries in American jurisprudential thought witnessed the rise and fall of a movement—legal formalism—which sought to answer precisely this question.

As David Sikkink (2003) depicts the development, the religion-steeped traditionalist school of jurists—dominant long before Coke, Burke, or Blackstone—slowly gave way to the "science-of-law" movement, which in the late nineteenth century transformed legal education and subsequently permeated the larger fabric of American legal thought in the minds of judges

³⁷ See Rothbard's discussion of dominating wills in consumer behavior (1997b, pp. 61ff).

and attorneys. According to those leading the charge to “reform” legal thought to conform to the new scientific mode of legal thinking, which brought as one of its practical methodologies the “case method” made popular by Christopher Langdell of Harvard and others, “the task of the academic lawyer, then, was to discover the general principles within the common law, and create a rational system of universal legal principles” (p. 312-13).

Described in simplest terms, the broader movement, known as “legal formalism,” began to falter after the turn of the century under concerted attacks from the legal academy, including the deliberate efforts of Holmes, Pound, and later Frankfurter. As Sikkink (p. 322-23) summarizes, “In a nutshell, the conflict within the legal field was between those who argued that judges ‘find’ law and those who thought judges should ‘make’ law,” thus providing the historical context for the great naturalist-positivist debate. The key, with respect to Rothbard’s perceived duality of common law and self-evident truths of liberty, is that one of the most significant watersheds in modern jurisprudence turned on a parallel dispute between overarching principles of law and the particular decisions of individual judges, whether these rulings reflect the judge’s own will (in the legal positivist view) or a response to consumer demand in the market (in Rothbard’s understanding).

In sum, for purposes of Rothbard’s argument, there are only two options. On the one hand, Rothbard argues (again following Leoni), there is “an alternative not only to administrative decree or statutory legislation, but even to judge-made law.” As Rothbard (1962, p. 40) perceives it:

In practice, this means taking the largely libertarian common law, and correcting it by the use of man’s reason, before enshrining it as a permanently fixed libertarian code or constitution. And it means the continual interpretation and application of this libertarian law code by experts and judges in privately competitive courts.

In other words, Rothbard is convinced that “*steps must be taken* to make the law conform with correct legal principles” (1997a, p. 126; emphasis added) in order to “establish a code of law that will be an unbreachable and unflawed fortress for human liberty” (1962, p. 40). That is, given Rothbard’s assertion that the Chicago school is wrong to assume that “that over the years common-law judges will always arrive at the socially efficient allocation of property rights,” it becomes clear that some overriding principle of law must be *applied* to society (1997a, p. 126). In Rothbard’s ideal case, this consists of a logically unblemished legal code, impervious in its

very structure to the contamination of statist juridical philosophy, which would presumably be imposed by some kind of authority, without immediate regard for consumer preferences.³⁸

Since this seems contrary to Rothbard's general philosophy, and since he neglects to give any detail regarding the "steps" to be performed, this alternative seems less than entirely feasible. Rothbard's noted preference for educational persuasion—"lobbying through learning", in effect—suggests that these "steps" would not be "taken" so much as encouraged. That is to say, those who shape the law before or after it is implemented must be shown the utility of making law as private as possible. This approach seems the only one consistent with Leoni's warning against adopting any prefabricated legal framework. Law, Leoni warns, is very similar to language in many respects: unless one is in a position to create both man and language *ex nihilo*, they cannot match in static terms, and must therefore adapt to one another. The same, Leoni asserts, is true of law. It must grow organically, almost symbiotically, with those who use it (1961, p. 218ff).

On the other hand, a second alternative is that the overriding legal axioms could be reconciled with the constraints on legal systems of performing efficiently (relative to market demands) *if* consumers universally preferred the proposed overarching axiom as a practically desirable principle of law.³⁹ Along these lines, one might conjecture that a slight alteration in Rothbard's particular program for the content of the transcendent rule of law could reconcile the immovable axioms with the unstoppable force of changing consumer demands. Specifically, if one altered the essential principle enshrined in common law to instead preserve economic efficiency instead of solely safeguarding individual liberty (on the quasi-Hayekian assumption that the motive to maximize the former would necessarily imply the latter) one might hope that the overriding principle of economic efficiency would accord harmoniously with market preferences.

However, Rothbard himself (1997a, pp. 124-27) closes the door to serious consideration of this alternative in his refutation of assumptions made by the Chicago school along precisely these lines:

³⁸ Randy Barnett (1978) proposes a very similar program, which he entitles "legal naturalism," wherein a legal code would simply be "crafted" to accord with the evolved dynamics of human nature. Here, as in Rothbard, how the system would be developed and imposed is not truly addressed, leaving the same dilemma again: either the system develops voluntarily, or it is coercively commanded from above.

³⁹ The same would hold, of course, if consumers demanded goods and services of particular types which would in turn drive entrepreneurs to demand a purely libertarian order.

But even if the concept of social efficiency were meaningful, [the members of the Chicago school] don't answer the questions of why efficiency should be the overriding consideration in establishing legal principles or why externalities should be internalized above all other considerations. We are now out of *Wertfreiheit* and back to unexamined ethical questions.

Specifically defending the role of law as “a set of normative commands” restrained Rothbard from permitting a value-free legal order from replacing the fundamental axiom of liberty. Thus, the paradox of how private common law as proposed by Rothbard can achieve the dual purpose for which he designed it becomes plainly evident.

Prospects of Private Interagency Violence

This paradox is by no means the only logical difficulty intrinsic to Rothbard's system. Even if one conjectures, for the sake of argument, that a system *could* arise in the market whereby the immutable libertarian legal maxims are upheld within an entirely ‘free’ private justice system, Rothbard's and others' exposition of his model reveals several additional, potentially serious problems. The first such puzzle arises in the description of the appeals process, specifically its presumed point of termination. Rothbard maintains, in each rendition of his outline for the libertarian legal system, that “some sort of socially-agreed upon cutoff point” must arise in the appealing of court's decisions to higher courts (1977, p. 6). Before one accepts this presumption, closer scrutiny should be directed to potential alternative results.

Conceivably, in an entirely private market order, three *additional* possibilities could hypothetically develop as litigants sought to appeal unsatisfactory decisions reached by ‘lower’⁴⁰ courts, each of which will be considered here. First, in the absence of any coercively imposed rule of juridical procedure, either party to a legal dispute *could* appeal their case indefinitely. Second, the parties may find themselves unable to agree on a court of appeals, thus yielding a judicial stalemate (e.g. each may accept the ruling of their own private defense agency's internal court system but the two could not compromise on a ‘neutral’ court to arbitrate the dispute). Third, armed conflict could result, especially as the parties' defense agencies each seek to enforce the property rights of their clients over and against their clients' opponents. Violence

⁴⁰ To call these ‘lower’ in the sense applied to governmentally-administered tribunals in the United States, for example, would be partially misleading, in that only consumers can determine, at each moment in time, which private arbitration agency is to serve as a check on which previously-consulted court. Thus, a completely rigid concept of judicial hierarchy is inappropriate, since on the market consumers might support a community of courts any one of which could be consulted to review, as a peer, the decisions of another.

might also erupt in a more general fashion, as one party simply unwilling to accept the conclusion of an appeals court chooses to take the unwritten, unbinding law into his own hands.

The possibility of ‘infinite appeals’—‘infinite’ insofar as no binding check would necessarily arise to end the chain—might be challenged by some on the grounds that in a free market, incentives would exist making such a drawn-out process cost-inefficient. Before one accepts this *prima facie* challenge, one must explore what these incentives could be. For instance, appeals could generally be thought to arise either on grounds of misapplication of agreed-upon legal principles (viz. both the laws themselves and the accepted standards for evidence acquisition, etc.) or in situations where the parties disagree as to the proper content of the law itself.

In the former case, Rothbard might rejoin, incentives would almost certainly arise for the justice-dispensing processes provided on the market to be free from technical errors of ‘misapplication’ of legal principle. To bolster this, one might conjecture, ‘judicial auditing’ or ‘accrediting’ firms could arise with the express purpose of performing close, critical appraisals of various court systems’ adherence to applicable legal principles. Consumers, in turn, would only demand the services provided by such impartially ‘accredited’ firms, thus removing for practical purposes the worry of misapplied law.

In response to such an argument, while such a potentiality must be conceded in the abstract, its realization (viz. the diminution of technical legal errors through private accreditation) would not, on its own, guarantee a smoothly operating private legal system. To be sure, disputes might arise over the effect of ‘accreditation’ procedures in validating decisions of lower courts when those courts’ decisions come under consideration in other private jurisdiction. Moreover, the potential multiplicity of justice codes—which could arise for various reasons, such as different demands of consumer litigants and commercial litigants, despite Rothbard’s presumption that the codes would tend towards uniformity—and the possible disputes between accrediting firms themselves could conceivably complicate the case.⁴¹

⁴¹ See the discussion above (p. 28) regarding the primacy of consumer preferences in determining law providers’ business practices. As noted in that discussion, Rothbard explicitly acknowledges that psychological preferences can and do direct both consumers and entrepreneurs to select certain ways and means to achieve satisfaction which are not maximally efficient in monetary terms. It is especially noteworthy that Rothbard indicates that it is consumers’ values which “dominate” in a case of conflicting psychological preferences. See Rothbard (1997b, p. 62ff.).

In the latter case, of course—where substantive disputes between parties regarding the content of the law are appealed to ‘higher’ courts—only cost-efficiency and adherence to convention could actually achieve the “socially-agreed-upon cutoff point” Rothbard maintains are common to “*every legal system*” (1977, p. 6; emphasis in original). Aside from the limits of market efficiency, the only absolute boundary limiting such appeals would be the supply of appeals processes. Clearly, however, no compelling reason is offered to suppose that providers of such processes will limit their provision except in response to consumer demand. Though a truly ‘infinite’ series of appeals is naturally impossible, the fact is that nothing but a profit calculation assessed as of the time of each additional appeal will determine whether the case continues.

Additionally, it must be recalled, as was discussed above, that appeals are made for far more than mere discontent on the part of one of the parties. Appeals, in some ways an arbitrary phenomenon, may be raised in response to a variety of errors committed by the lower adjudicator or in order to correct an extant precedent which has since been discovered untenable. Naturally, the Agencies might agree in advance to limit their appeals, but short of incurring an armed response from the opponent, nothing but an assessment of costs balanced against the potential recovery creates an *absolute* bar on appeals.

In addition to ‘limitless’ appeals, legal disputes could also, as noted above, devolve into a state of stalemate or outright armed conflict between private defense agencies. The former, of course, would result only if the parties perceived their respective transaction costs of appeals as greater than the probable reward for a successful appeal. In fairness, except for the distorted cost structure resulting from state provision of justice,⁴² this potentiality is no different from the current legal system.

Perhaps the most alarming alternative to an appeals cutoff point, infinite appeal, or stalemate is interagency war. As Rothbard (1978, pp. 224-25) himself frames the problem, “Wouldn’t the agencies always be clashing? Wouldn’t ‘anarchy’ break out, with perpetual conflicts between police forces as one person calls in ‘his’ police while a rival calls in ‘his’?” More bluntly, he grants that he does “not assume that the lion will lay [sic] down with the lamb”

⁴² These cost distortions arise from two causes. First, of course, the socialization of court costs makes lawsuits appear more economically efficient than they are in fact. Second, the availability of ‘free’ enforcement of judgment claims once handed down by a court (through liens, police seizures, garnishments, etc.) distorts the cost calculus of the parties to the suit.

(p. 239). While one cannot ascribe the impulses which drive humans to armed conflict to their respective legal environment—this may well be merely a function of human nature—such an extant framework can undoubtedly fail, on account of internal deficiencies, to achieve its chief end of limiting such abominable uses of armed force, and could presumably foment such conflict in some cases.

Rothbard provides at least five arguments defending his model’s ability to minimize armed conflict, though their individual and aggregate effectiveness seems insufficient. First, Rothbard comments on several occasions that the model for peaceful coexistence among defense agencies can be compared to the international stage, where peace, he maintains, generally predominates, without any superstructure of a world government. In fairness, Rothbard may well have intended this argument as a *reductio ad absurdum*, but the logic he temporarily adopts has been utilized by others, and warrants attention here. In his own words,

We must never forget that we are all living, and always have lived, in a world of “international anarchy,” in a world of coercive nation-states unchecked by any overall world government, and there is no prospect of this situation changing. (1978, p. 225)

The key misunderstanding within the parallel Rothbard wishes to draw—almost explicit in his own expression—is that the “peace” achieved as individual states impress their will by force is almost exactly the opposite of the peaceful order he wishes to create. If all the states of the world were private, market ‘states’, the case might be different. Since they are not, however, the hypothetical model of private law is intrinsically incomparable with the international order of nation-states. Precisely because a relative monopoly on legal violence is the hallmark of all state organs, the international order of nation-states and the hypothetical model offered cannot be viewed in any parallel or even comparative terms.⁴³

Regardless of this difficulty, however, Rothbard (p. 224-25) acknowledges that the result in modern history has been “the horror of interState [sic] wars, with their plethora of massive, superdestructive, and now nuclear, weapons.” In terms of their actual destructive results, Rothbard asks “isn’t it painfully clear that the number of people killed in isolated neighborhood

⁴³ In essence, Rothbard is equivocating on the aggressive nature of the nation-state: overarching sets of rules imposed by a state on its people (backed by the threat of violence) are reprehensible and inefficient, yet the same state threatening the same (or more likely more massive) preponderance of force against another nation reflects an instance of peaceful, unsupervised anarchy. On the contrary, if one nation subjected others to its will by the threat of military invasion (doubtless a commonplace in world history), coercion has taken place. To call the resulting situation the peaceful fruits of anarchy is misleading if one assumes, with Rothbard, that the peace will be mutually beneficial to the parties.

‘rumbles’ or conflicts is as nothing to the total mass devastation of interState [sic] wars?” The past half-century, wherein one or two (prior to 1989) predominant states, each surrounded by a bloc of client nations, have achieved their will by the threat of force, can hardly be the ideal parallel Rothbard conceives it to be.⁴⁴

A second argument Rothbard proffers is derived from the historical phenomenon of ostracism as an acceptable legal penalty. Instead of the threat of armed conflict, a state seeking to deter others from invading its rights may achieve the cooperation of other states in threatening commercial ostracism against any legal opponent who shirks the ruling of a court. However, replacing legal remedies with legal penalties is contrary to Rothbard’s general theory of legal restitution: only repayment of loss can fully satisfy a defrauded party (1997a, p. 58).

A third response from Rothbard, though not technically a defense, leads one to view his general argument as an enthymeme, containing a vital but unstated premise regarding the resultant market structure for defense services. In essence, Rothbard (1978, p. 225) assumes that all interagency conflicts will be local in scale since the prevailing market model will itself be localized, and thus the wars which take place will be less severe. Perhaps Rothbard fails to explicitly state this premise precisely because he recognizes it is poorly founded. This assumption, it should be noted, stands in contrast to the view taken by Robert Nozick, who maintains that the pressures each “protective association” exert on an “outlaw” defense agency will be insufficient in many cases to prevent a powerful outlaw from rising to the position of a coercive state.⁴⁵ All that such a “dominant” agency requires to establish its statehood are the existentially exercised power to determine who may enforce their own rights through force, and a geographic monopoly on the provision of protection services (1975, pp. 15-24).⁴⁶ As John Sneed, discussing the particular question of how private legal systems will handle punishment and incarceration of prisoners, recognizes, “the differences in individual firm structures will obviously follow client preferences for protection supplied by the various types of firms” (1977, p. 118).

⁴⁴ Another difficulty here, of course, is that Rothbard is either treating nation-states as ‘actors’ in a certain regard—thus denying the presupposition that only *humans* are the subject of action—or instead he is instead ignoring that the ‘peace’ achieved comes at the cost of coerced membership in civil society of the citizenry of every state.

⁴⁵ It is interesting to note that Nozick acknowledges that it was direct dialogue with Rothbard circa 1969 which initially led him to consider the subject of law and defense provision in a stable anarchic order (1975, p. xv).

⁴⁶ It should also be noted that Rothbard’s own examples, with very few exceptions, represent territorial jurisdiction patterns, entirely contrary to his own supposition.

Rothbard offers a second consequence from this same presupposition of the market structure. In a stateless society, especially one consisting of private local states too small to command genuine ‘national identity,’ he argues, no combatant would have real cause to harm the clients of a defense agency. Whereas in modern political states the citizens of a nation are often the ideal target for acts of violence intended to disrupt the state’s government, the market would not have a parallel experience, according to Rothbard. This reasoning also seems flawed, however. One presumable motivation for committing acts of violence against the citizens of a state rather than its government apparatus is the resultant decrease of public trust in the state’s ability to protect its citizens.⁴⁷ The same motivation could arise in the market as Firm A, wishing to execute punishment on Firm B, actively demonstrates shortcomings in B’s security services by committing violence against B’s customers.

Fourth, Rothbard upholds his defense system on the grounds that defense agencies ‘abusing’ their coercive capacity will be checked by other defense agencies. Thus, while conceding that “of course, some of the private defense agencies will become criminal,” Rothbard insists that “in a stateless society there would be no regular, *legalized* channel for crime and aggression” (1977, p. 7; emphasis in original). The difficulty here, clearly, is that in this context the definition of ‘legalized’ violence is the category of coercive invasion of individual rights which go unchecked by one of the private legal and defense apparatuses. If two defense firms are engaged in a truly ‘local’ dispute, and the remaining firms are not convinced that either their own interests will be affected or that systemic destabilization will result if the conflict continues, then the costs of intervening and ending the interagency war could presumably bar such third parties from stepping into the crossfire.

Fifth, following in part the same reasoning as the response to his fourth defense, Rothbard argues that the fundamental barrier to interagency war is their high cost, both in terms of capital and labor *and* the risk of loss. As he summarizes the situation:

To assume that police would continually clash and battle with each other is absurd, for it ignores the devastating effect that this chaotic “anarchy” would have on the business of

⁴⁷ This is especially conceivable in cases of revolutionary or partisan guerilla movements. While Rothbard seems to ignore the effectiveness of underground gangs of ‘bandits’ in garnering “legitimacy” in the eyes of the public, history suggests many such insurrectionist groups have been successful. Whether or not they *were* legitimate in any conventional philosophical sense, or even if the people do not believe them to be rightly entitled to govern, their ability to either provide for public needs (e.g. protection services provided through extortion, though perhaps provided at little or no cost in the early phases to gain public trust) and their actions to sabotage the perceived effectiveness of the incumbent regime could launch such a group into publicly supported (or tolerated) power.

all the police companies. To put it bluntly, such wars and conflicts would be bad—very bad—for business. Therefore, on the free market, the police agencies would all see to it that there would be no clashes between them, and that all conflicts of opinion would be ironed out in private courts, decided by private judges or arbitrators. (1978, p. 225)⁴⁸

Again, however, Rothbard is explicitly relying on a particular market model (and ignoring the reasons which would compel such agencies to engage in costly violence despite the expense, as discussed below). In this case, he extends his general assumption that “business firms in the free market earn their keep, *not* from wealthy customers, but from a mass market by consumers.” In more familiar terms, he adds that “Macy’s earns its income from the mass of the population, not from a few wealthy customers” (p. 240). Presuming thus that defense providers know that they must offer ‘quiet justice’ to their customers, they will avoid war at almost any cost.⁴⁹

Why such justice providers will necessary conform to this market model is not explained by Rothbard, however. Conceivably, of course, while consumers indirectly drive the provision of all goods and services, some services such as defense may yield great utility as an intermediate service (i.e. provided to producers of consumer goods for the protection of their assets, executive human capital, trade secrets, inventory, etc.). As such, an enormous multinational corporation may be the major, even only, client of a particular defense agency, in which case the inhibitions applicable to providers of consumer defense services (e.g. multiple clients to satisfy simultaneously, “quiet” justice provision, etc.) would not create a restraint on these specialized corporate defenders. Moreover, there may be ways for such agencies to minimize their costs in a variety of contexts. For instance, an agency wishing to exact retribution upon an offending party might instigate sabotage or mask the identity of its personnel in what amounts to a terrorist attack upon its enemy.

However, setting aside the reasons for which Rothbard maintains such widespread conflict and turmoil would *not* take place, it is also necessary to consider the affirmative reasons for which defense agencies *would* engage in such conflict. First, such an agency might view the undertaking of violence in a particular case as a form of deterrence-by-example. In broad parallel to the common law doctrine that a party which fails to prosecute its rights vigilantly

⁴⁸ To presume that war is fundamentally irrational, given its generally astronomical costs, would be inaccurate. Insofar as agencies calculate the probability of victory and determine the highest prices they will pay for different components of engaging in war, their act is an ordinary risk—a gamble, but still a calculable risk—their acceptance of which the size and probability of reward will determine.

⁴⁹ As noted earlier, of course, this could include avoiding wars between other defense agencies not estimated to affect the firm in question.

forsakes those rights, the experience of history illustrates that deterrence is often most inexpensively achieved by making an example of a single target. Second, alternatively, defense providers may be willing to prosecute cases to the point of ‘all-out’ violence in cases where the stakes are extremely high, especially when the conflict arises from a genuine dispute as to the parties’ entitlements.

Third, the subjective preferences of the defense provider—in this event, acting in part as a consumer of his own services—for a particular kind of resolution, perhaps as a matter of honor or culturally defined morality, must also be taken into account. Finally, in some such contexts, agencies which have expended large amounts of resources in the earlier phases of prosecuting a claim may be faced with an accelerating incentive to pursue the claim further. By its prior action, such an agency may have effected an increase in the *ex ante* net benefit of further action. That is to say, its prior investments in prosecuting the claim have brought the agency much closer to succeeding on the claim, with the effect that at the moment of action in question, the cost of action expected to be sufficient to succeed on the claim has decreased, while the revenue from a successful prosecution presumably remains the same.⁵⁰ Thus, as the foregoing illustrates, Rothbard’s assumption that society will naturally determine a workable “cutoff point” in the appeals process hides at least three potential alternative results: infinite appeals, stalemate, or war.

Consequences of Abandoning Agency

Beyond the more serious problems outlined above—especially the prospect of interagency war—other difficulties arise regarding more practical concerns of market operations. For instance, in his lengthy evaluation of strict and vicarious liability as principles of law, Rothbard finds much common ground with Dean Prosser, Thomas Baty, and even part of the Holmesian framework on liability (1997a, pp. 143ff). In particular, Rothbard finds no compelling reason to permit any liability relation to encompass any party besides the immediate physical actors whose action resulted in an injury to person or property.

⁵⁰ Put in slightly different terms, an agency which expends considerable resources without reaching a conclusion places increases its own potential risk of loss (i.e. the same likelihood of loss, with a greater maximum potential loss). Thus, conceivably, a comparatively smaller amount of resources—the amount needed to carry forward the in-progress claim to a successful conclusion—can be expended in hopes of recovering what was already spent. That is to say, the fact of prior expenditure does not directly affect the action at this intermediate stage, but rather affects both what action is needed to successfully complete the claim *and* potentially the value the entrepreneur places on recovering on the claim (as the resources he expended were more valuable to him than the same amount of resources in expected profit).

The issue is pertinent in that it points to a broader difficulty within Rothbard's system. By enshrining in legal doctrine the self-evident truth that only humans *qua* individuals engage in "purposeful behavior," and by adding legal depth by eliminating any notion of liability-by-right-of-agency,⁵¹ Rothbard necessarily invalidates any legal recognition of action by affiliations of individuals, namely corporations and corporate-type partnerships. Without the limitation on agent-only liability (i.e. the agent's master is freed from legal responsibility), the result would presumably be that every party with a legal claim against a 'corporation' would decompose into claims against every one of the corporation's shareholders, the corporations' debtors, and the shareholders' debtors (and presumably all assets and debtors of these, *ad infinitum*).

One might reasonably object that the corporation *qua* business model would be needless in Rothbard's framework. It is of course true that the primary motive for incorporating an enterprise is, *ceteris paribus*, the opportunity to limit shareholder liability. Likewise, one might conjecture that given perfect freedom to form contractual arrangements, individuals might shape a partnership or other business arrangement which could synthetically mimic the features of a corporation by simple contractual assignments and counterassignments of liability. Indeed, if such arrangements could not be made, individuals' property rights would already be subject to a substantial hindrance.⁵²

If this is true, why is it significant that the corporate form would disappear in Rothbard's model? An argument might be raised in defense of the corporate form on ethical grounds. Once the rule of vicarious liability is eliminated, as Rothbard proposes, wrongful actions by officers or agents of a corporation become fully the fault of the acting agent alone, leaving the plaintiff unable to win restitution from the corporation itself, thus unable to attach a judicial lien to its assets. In many cases this may seem reasonable: a corporate official who commits battery, for instance, perhaps *ought* not to incur liability on the corporation's behalf. However, it is at least debatable whether the owners of a corporation defrauding a customer, for instance, when large sums of money are at stake, should be able to escape liability, while the plaintiff can only attach liens to the personal assets of the defrauding corporate officials.

⁵¹ "Agency," "agent," and "master," are used as legal terms of art in this context.

⁵² However, the very question of how far the prevailing axioms, including the prohibition against vicarious liability as a principle of law, would go in nullifying contractual arrangements which simply artifice the corporate form. This problem stems from the central paradox expounded above regarding the precise relationship of overarching axioms and principles of law and the market-driven dynamics of law provision.

To approach this ethical dimension of the question from the opposite angle, why would Rothbard, in the course of his defense of absolute individual liberty, argue *against* the right of individuals to form whatever contractual arrangement they wish? In other words, it must be asked of Rothbard, why can an individual sign a contract assigning various rights and liabilities and waiving some claims for liability altogether, and yet *not* be entitled to permanently waive his right to raise a claim for his opponent's liability? In all events, the critical point is to be aware of what the Rothbardian model asks the citizen to forfeit and for what reason.

However, the ethical justification notwithstanding, the importance of the corporation may be evidenced much more simply. Despite the artificial disadvantages to incorporating rendered by the corporate tax code, corporations have proliferated exponentially since the simplification of incorporation procedures. While the opportunity to create synthetic corporate models, without formally incorporating under state law, has been available to firms for a considerable period, firms still elect to be subject to large taxes on net income in order to secure a limited degree of liability for shareholders. Thus, it seems, some substitute for the corporate model must be available in any proposed model.

The Restitution Paradox

This puzzle of liability and channels and obstruction to recompense, in turn, begs the larger question of how Rothbard's general model for restitution would function. As noted earlier, Rothbard's guiding principle is 'double restitution': punishments for interpersonal harms should correspond to the damage done, such that the victim receives compensation and is then entitled to inflict the same level of damage on the perpetrator.⁵³ While Rothbard abstractly permits this to include a variety of forms of retribution, both he and the overwhelming majority of those who support a system similar to his demonstrably prefer that the punishments for all 'criminal' actions would devolve into tort liabilities in a market justice system (Rothbard 1978, p. 226). Indeed, many are far more adamant than Rothbard that the system of punishments must be minimally intrusive into the affairs of the perpetrator (Sneed 1977).⁵⁴

⁵³ It should be noted that comparatively little effort is made by scholars other than Rothbard himself to justify 'double restitution' as a principle of ethics in determining restitution. Adopting this principle seems to assume a particular purpose which punishment is intended to serve, yet this purpose (perhaps the motive to return all relationships as closely as possible to the status quo) is only implicit at best.

⁵⁴ Rothbard argues (1998, pp. 92ff), *inter alia* (aside from his general condemnation of a rehabilitative purpose of retribution, and more particularly incarceration), that a certain deterrence paradox is created by systems like that in place in the United States at present. First, he contends, the general inhibitive instincts shared in common by 'most'

With this in mind, Rothbard must acknowledge that the level of restitution in the form of money or other assets will be assessed by the private arbitrator consulted. The question is clearly significant, as arbitrators will not be able to forge compromises agreeable to both sides without knowledge of the degree of injury, and as defense agencies which are commissioned to ‘extract’ from the perpetrator’s holdings in realty or personalty equivalent or greater in value than the loss incurred will not know how much property to confiscate.

This could take place in several ways. On one hand, the historical cases of Celtic property law explored by Peden, the system of law in Iceland described by Friedman and Long, and Anglo-Saxon common law explicated by Leoni and others (upon which Rothbard relies), as seen above, incorporated fixed restitution prices for injury, depending on the social standing of the victim (and, to a degree, the kind of offense). Quite obviously, this method is fraught with difficulties. First, a genuine market order is unlikely to attach material legal distinctions as a function of the victim’s membership in a class or caste of some kind. Second, a fixed restitution framework denies the subjective value placed on the property lost by the invasion of rights. That is to say, there is no reason to suppose there is a direct connection between the amount of monetary restitution actually awarded to the victim and the loss incurred, as the victim might have valued the item far less or far more than he values the fixed restitution amount.

On the other hand, a more flexible approach could prevail on the market, whereby the ‘actual’ market value lost as a result of the injury must be doubly recompensed. It is here that the real difficulty begins. The actual value lost could be approximated (though not precisely determined) by its known prevailing market price, but unique items or those never offered in

ordinary people—which, playing the role of their conscience, bars them from immoral conduct in proportion to the reprehensibility of that conduct—seems to work at cross purposes with a system of punishment wherein ‘serious’ crimes receive more serious punishment (i.e. an individual has greater natural inhibitions preventing him from committing murder than those which steer him from petty theft or jaywalking; thus, Rothbard argues, more serious punishments would be necessary, if severity of punishment were considered as the sole variable in deterrence, for small crimes than for larger ones, a possibility which Rothbard then dismisses as ridiculous). Second, in support of his first contention, Rothbard relies on the presumption that the severity of punishment has much less deterrent effect than other factors, such as the likelihood of detection and prosecution of crime. (This line of thinking stretches back, of course, to the research of social economists and others in the nineteenth century, such as Chadwick.) A response to this line of argument might answer twofold that: (1) the deterrent effect of a given scheme of punishment is a necessary but insufficient condition for the acceptability of that scheme (i.e. a punishment must have a deterrent effect, but it must also adhere to the standard of morality—which, in Rothbard’s system, means a fully objective, rational morality—upon which the system is grounded); and (2) as unwise as reliance on the ‘general inhibitions’ of the populace may appear, it still amounts to no more than a reliance on some shared and widely diffused common ethos or morality ‘buried in the breast’ of the citizenry. Since his historical examples fail to demonstrate the possibility of the latter, in addition to his own skepticism, it seems difficult to take this argument at face value.

exchange (more specifically, never offered for exchange under comparable market conditions) would not be measurable by this method. In this case, one might simply presume the arbitration arrangement agreed upon by the disputant parties to reflect all privately, voluntarily mediated contracts. That is, as Benson (Benson 1989, p. 8) phrases it: “Individuals must expect to gain as much or more than the costs they bear from voluntary involvement in the legal system.” In other words, the victim would, conceivably, agree to accept the maximum feasible amount of restitution, so long as this amount is greater than the value lost by the invasion of his rights, plus legal transaction costs.⁵⁵

In trying to reach a settlement of this type, however, several difficulties arise. First, it may be that no more valuable good exists than the property lost, in the eyes of the victim. In the cases of both theft or physical harm done by the criminal to the victim, this may be especially true. There may be no comparable good to recompense a loss, even if a monetary value could be fixed. Additionally, certain physical crimes are such that given a certain type of criminal and a certain type of victim, there would exist no way for the victim to render onto the criminal anything resembling the damage done to the victim. (Such would likely be the case in rape cases.) Second, the court cannot prevent the victim from overstating the value of his loss. That is, if the victim believes the court will decide that a higher amount of restitution is deserved if the victim is able to convince the court that a higher loss was incurred than actually took place, the victim will likely attempt to inflate the value of the loss suffered. To avoid this dilemma, general rules might be established regarding the restitution value of certain kinds of goods, but this would lead back to the first alternative of ‘price-fixed’ restitution, along with its general problems.

Alternatively, firms might seek to avoid this dilemma by requiring property values to be declared and verified when ‘insurance’ coverage begins. This too, however, presents difficulties. The problem arises in that neither the owner of the property nor the defense agency would have an overwhelming disincentive to inflate the value of property. What ostensibly prevents such inflation in many modern legal systems is the fear that litigation will only yield a certain maximum net return when stolen or damaged property is restituted. Since the defense agency,

⁵⁵ Rothbard’s libertarian legal structure would ostensibly abandon the principle known as the “American rule,” which stipulates that litigants provide for their own legal costs except when mandated otherwise by statute. A potential difficulty arising from this position is that if the winner to a lawsuit were guaranteed that the loser would pay for all legal costs, then the winner would have an intense *ex ante* motive to hire the most capable legal advocacy firm (or defense firm, if the conflict devolves to armed battle) regardless of cost.

however, can collect its clients' restitution directly from the perpetrator, and since its fees must be paid by the perpetrator as well, the agency has little disincentive, barring collaboration with other agencies, from actively or passively inflating the value of its clients' lost or damaged property. While such an arrangement would involve a transaction—the purchase of protection services by the client—which is the only way to accurately gauge consumer valuations, it falls short at least in that both client and defender are not effectively restrained from collecting, potentially, any amount of restitution they desire.

Additionally, if the courts adopted, as a rule of remedy-determining procedure to combat overstatement of loss by victims, merely *maximum* levels of restitution possible for various invasions of rights, the result would be a cost ceiling on theft. That is to say, if the remedy for stealing an object X is prohibited by all private legal codes⁵⁶ from exceeding \$1000 inclusive of legal transaction costs, then any would-be thief who values X at greater than \$1000 (e.g. if the market price is greater than \$1000) will be willing to steal X, netting for himself the difference between his perceived value and the \$1000 maximum restitution.

Moreover, at least two further difficulties with Rothbard's 'double proportionality' plan for restitution are manifest. First, while many within the libertarian movement call for the victim to be permitted to enslave the defendant until the defendant's obligation to the victim was paid in full, under Rothbard's view of social organizations, no such system which perpetuates 'involuntary servitude' at the victim's can be ultimately binding.⁵⁷ Second, the 'fear premium' of which Rothbard makes mention appears problematic. On the one hand, Rothbard refuses to recognize assault as defined at common law—in this context, the intimidation by the criminal of the victim of imminent harm—as an independent tort, but yet is willing to alter the otherwise 'objective' liability matrix he devised to account for the creation of fear in a plaintiff-victim, where such fear is directly tied to the criminal. Moreover, Rothbard's treatment of such a fear premium does not take into account the potential fears of even those *committing* the crimes in question. Thus, at the very least, it should be granted that several significant questions arise in Rothbard's framework for privately-assessed restitution, each of which requires an answer.

⁵⁶ On Rothbard's assumption that varying codes will trend towards uniformity.

⁵⁷ That is to say, an extrapolation of Rothbard's view appears to proscribe the possibility of an individual truly *alienating* his right to self-ownership, and thus even his willingness to participate in a particular legal order (which, of course, is a fundamental prerequisite of the legitimacy of that order with respect to that individual) cannot permanently bind him to involuntary servitude.

CONCLUSION

The aim of the foregoing analysis has not been to discredit or dismantle Rothbard's (and others') hope for minimized state control of justice. Rather, the goal has merely been to bring within the scope of scrutiny the arguments Rothbard presents for the viability of private systems of justice and defense provision which he expects would arise on the free market. To be sure, neither the more general, overarching errors evident in Rothbard's historical case and his logical analysis, nor the narrower, more particular deficiencies described above should be neglected in this pursuit. Each case-specific deficiency, insofar as the foregoing has demonstrated its presence in Rothbard's thinking, contributes materially to the broader misunderstandings reached by Rothbard's system. Similarly, the plausibility achieved, however superficial, by incorporating the more general errors highlighted above—viz. the conflation of legal processes with legitimate foundations of legal authority, as well as the paradoxical understanding of the libertarian common law's role—can incline the observer to overlook the smaller shortcomings. It is not denied that the challenge facing Rothbard, and others following in this vein, is tremendous. However, successful articulation and defense of Rothbard's system requires that it be overcome.⁵⁸

⁵⁸ To be sure, the future of freedom lies in the hands of those who take up the task pursued so diligently by Rothbard. Leoni's words are most appropriate: "It seems to be the destiny of individual freedom at the present time to be defended mainly by economists rather than by lawyers or political scientists."

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APPENDIX A

The question might well be raised why such defense agencies would tend towards partiality with respect to their clients. In other words, one might contend that defense firms could become profitable enterprises by establishing a reputation for ‘impartiality’, whereupon both parties to a given lawsuit would be willing to entrust the outcome of the case to such an agency. However, although it is not crucial to resolve the issue at this juncture, several responses to this line of critique warrant attention. First, Rothbard himself appears to expect defense agencies to tend towards a certain partiality toward their clients, necessitating some form of appellate superstructure (indeed, Rothbard shares this expectation with others, such as Robert Nozick).

Second, the assertion that ‘impartial’ courts would be *ipso facto* more profitable begs the question of what ‘impartiality’ could mean in this context. One potential working definition which has been suggested identifies as ‘impartial’ a defense agency whose decisions in its clients’ cases are comparatively seldom overturned on appeal. However, this definition does not end the inquiry, as it further begs the question of which cases would be appealed and overturned. Such a group must undoubtedly include cases reversed on technical or procedural grounds, cases where the prevalent rule of law (applied by the first court) is no longer in step with the demands of consumers of legal services, and cases where the client is simply dissatisfied with the outcome. Moreover, factors which make such appeals appear worthwhile to the client-appellant would include *inter alia* the degree to which a given case has ‘precedent value’ and the extent to which the logical and/or factual questions raised are ambiguous to the point that the ‘reasonable person’ envisioned by the law could easily rule either way on a given case (and thus the appellant has the incentive to lay his case before as many such ‘reasonable persons’ as possible).

The point, in sum, is that the cases which are successfully appealed would mostly likely *not* be those where the facts are all agreed upon and the application of the ‘law’ is obvious and perfunctory or mechanical. Rather, as is the case in the state-supported legal apparatus operating in the present, cases which reach the appellate level would be cases on the ‘margin’ of the law in some respect, representing an opportunity for boundaries within the law to shift, depending upon the outcome reached by the appellate court. Indeed, it is likely that this sort of ‘marginal’ case will comprise the majority of cases which are litigated in the first place, from which appeals can be made. It is a fact consonant with reason that where parties’ rights are clearly known and

where the practical enforceability of those rights can also be accurately predicted, litigation is far less likely. Instead, cases where parties turn to an independent mediator to resolve their dispute tend towards “hard cases”, to borrow the favorite phrase of Ronald Dworkin.

How specifically ‘impartiality’ of some definition could become a component of profitability also warrants attention. Certainly, ‘impartial’ courts might be more profitable because they are better able to minimize costs, or perhaps because consumers of defense agencies’ services hold ‘fairness’ as a virtue in the abstract. Ultimately, however, profitability on the basis of impartiality reflects, to an extent, the trust of the losing party that the system he has chosen to adjudicate his case is wiser than he, the consumer. This, in turn, leads to a paradox, if not a contradiction. On the one hand, a litigant believes *ex ante*, and even *ex post*, that he is capable of evaluating the a given defense agency’s ability to decide his case ‘impartially’. On the other hand, by believing his case should be resolved in a way different than that reached by his defense agency deciding his case, but yielding to his agency’s determination, he acknowledges that he himself is not capable of reaching the ‘correct’ finding for his case. Thus, in other words, the consumer in question believes he is wise enough to pick his own judge, but yet is not wise enough to correctly decide his own case.

Thus, it may sound reasonable at first glance to assume that ‘impartial’ defense agencies—meaning those whose decisions concerning their clients’ causes of action are rarely overturned on appeal—would be more profitable as a matter of course. However, as the foregoing suggests, it would not appear that it is a question of ‘partiality’ versus ‘impartiality’ which determines whether a given agency’s cases are frequently reversed by the appellate court; rather, such reversals more likely reflect the nature of the *case*, not the *court* which initially tried the matter. Therefore, it may well be true that clients would prefer to subscribe to defense agencies whose cases are rarely overturned, but not because this attests to the agency’s impartiality. Instead, the consumer would favor such an agency both for the certainty it offers and, so long as the defense agency ruled in his favor in the first place, for the persuasiveness such a firm must possess in order to repeatedly defend its own internal decisions successfully before an appellate court.⁵⁹ Consequently, it is by no means unreasonable to presume, at least as a viable possibility, that defense firms will tend more and more to take on the role of advocates

⁵⁹ As was seen earlier, such certainty is considered by some within and responding to the Hayekian view of justice to be the most pressing virtue to be pursued by an agency.

for the interests of their clients, rather than genuinely 'impartial' tribunals backed by violence. Ultimately, perhaps, such firms' internal adjudicatory processes might consist of certifying the validity of the client's claim after a brief review of the facts and the law, after which the agency would argue the case to the appellate court.

APPENDIX B

Proponents of a genuinely stateless society might maintain, along with Rothbard, that the central tenet of the classical libertarian view of law is that the very nature of man himself would serve as the fundamental ‘limiting rule of law’ which preempts the possibility of the paradox between preferences on the market and abstract axioms. If this is indeed an argument not uncommon among those espousing an internally consistent libertarian framework, then it undoubtedly warrants attention, even at this early stage in the historical analysis.

While considering this tangential issue, and especially while investigating the specific ethical and/or meta-ethical questions implicated by such an objection, however, it is essential that the facts and the meaning of the historical argument to which such philosophical questions pertain not be lost from sight. In other words, to ground an excursus regarding a libertarian view of certain aspects of human nature in the context of legal historiography, the student must keep in mind that Rothbard repeatedly expresses the belief that cases such as that of Roman law reflect in some essential respect the operation of genuine market law. At the same time, the indications from the factual record that those in pre-imperial Rome who were in a position to ‘make laws’ for the rapidly expanding republic made the determination, on more than one occasion, that rule by magistrate was too unpredictable to be left unchecked, and consequently, albeit through a long series of decisions, established the foundations of the Roman constitution. Thus, as a question of fact, there can be no real dispute either that a ‘legislated’ meta-rule of law was imposed in Roman society or that it resulted from a perceived need to limit the unpredictable potential of otherwise unchecked market law.

To be sure, the critic might claim here, as at every subsequent juncture in the historical analysis, that the deficiency of the given historical example under review—in this case, Roman law—proves all the more the correctness of Rothbard’s fundamental thesis. If Rome exhibited signs of overarching ‘legislation’ which constrained the thereunto free hand of the magistrates, so the retort might go, then perhaps its law was never private *enough*. Such a critique may be responded to, however, with the same answer as it merits at all other points in this analysis: Rothbard must admit (A) that pre-constitutional Rome was not private ‘enough’ to begin with, and therefore offers no solid precedent upon which his historical argument may be based, *and/or* (B) whether it was truly private or not, the *de facto* rulers of pre-constitutional Rome perceived their environment as sufficiently unstable so as to warrant drastic action. Perhaps *this* pattern of

action, which has since been repeated in many different sociological contexts in the more than two millennia since, is more indicative of the nature of man than any characteristic identified by Rothbard. In sum, the historical point must not be obscured: the question is not what man *could* do, but what overt acts of humankind *did* do. In the context of Rome, therefore, the inescapable fact is that a meta-rule was imposed, whether or not Rothbard retrospectively believes it was necessary.

Thus insulated by disclaimers, the potential objection concerning the role of human nature and its effect on selecting an appropriate legal historiography for the present project, referred to above, must be dealt with. First, of course, it is a matter of no small disagreement whether or not the ‘immutable axioms’—the self-evident, logically independent propositions upon which Rothbard’s model of private law is founded—are indeed a product or function of mankind’s nature. To be sure, this raises a philosophical and/or religious question which is not easily set aside.

However, even if it is assumed that some aspect or characteristic of mankind’s nature provides some organic yet immutable meta-rule of law, the question immediately arises of what specifically such a rule may be perceived to *limit*. In other words, it must be asked, does Rothbard expect that human nature serves as (A) an absolute constraint on the content of substantive law, thus functioning as meta-rules of law as posited in other contexts, (B) a stricture on the existing meta-rules themselves, or (C) a ceiling on the application and/or fulfillment of man’s legal obligations?

Alternatively, one might consider the question in reverse, as it were, by asking which societies have preserved best such a meta-rule grounded in human nature, and moreover what such successful societies have in common? As much research and speculation has suggested, religious faith is one, if not the, critical factor, in that it enables an imperfect humankind to sustain a structure of human relations which bears any resemblance at all to the ideal model of justice. Naturally, Rothbard’s is by no means the only formulation which must wrestle with this question, but this alone does not absolve his model from explaining how it can rely on certain universal aspects of human nature in order to operate. Both this and the prior discussion of the “rule of law” (see pp. 5ff.) as an independent juridical concept intends by the term to denote more the traditional ‘academic’ definition—i.e. a “rule of law” *qua* meta-rule—than the oft-prevailing ‘popular’ definition, which identifies the “rule of law” with the supremacy of codified,

stable law over and against crime and invasion, such that law as an impartial, impersonal adjudicator is entitled to reign, as opposed to warlords or private vigilantes.

It is worth noting that the latter definition may be held to presume that in order for such “rule” to become established, the pertinent population of a given society or culture must invest such law with some degree of credibility, and thereby tacitly bind themselves to its authority. Thus, even the application of this ‘popular’ conception of the “rule of law” ultimately hinges on the ‘academic’ definition, for the investment of credibility by the populace involves in actuality an acceptance of the content and force of a particular meta-rule of law. (The origin of such a meta-rule may, of course, include unimpaired reason, as it does in Rothbard’s model, or, alternatively, religious faith or some other dimension of a cultural worldview.) What makes this suggestion even more fascinating for interested students of juridical sociology is the realistic prospect that in a given society, no two individuals may share exactly the same view of the content or effect of the governing meta-rule—each may have his own notion of it—and yet the overlapping (or, more precisely, the ‘general intersection,’ to borrow the language of set theory) of some or all of these comprises the ‘acting’ meta-rule in any given context.

REFERENCES

- Barnett, Randy. 1978. "Toward a Theory of Legal Naturalism." *The Journal of Libertarian Studies* 2, no. 2: 97-107.
- Baumgarth, William P. 1978. "Hayek and Political Order: The Rule of Law." *The Journal of Libertarian Studies* 2, no. 1: 11-28.
- Benson, Bruce L. 1989. "Enforcement of Private Property Rights in Primitive Societies: Law without Government." *The Journal of Libertarian Studies* 9, no. 1: 1-26.
- . 1990. *The Enterprise of Law: Justice Without the State*. San Francisco, CA: Pacific Research Institute for Public Policy.
- Burgess, John W. 1915. *The Reconciliation of Government with Liberty*. New York: Charles Scribner's Sons.
- Cam, Helen. 1963. *Law-finders and Law-makers in Medieval England*. New York: Barnes & Noble, Inc.
- Cutler, Claire A. 1999. "Locating 'Authority' in the Global Political Economy." *International Studies Quarterly* 43, no. 1 (Mar. 1999): 59-82.
- Dorn, J. A. 1981. "Law and Liberty: A Comparison of Hayek and Bastiat." *The Journal of Libertarian Studies* 5, no. 4: 375-397.
- Friedman, David D. "Private Creation and Enforcement of Law: A Historical Case." *Journal of Legal Studies* 8 (Mar. 1979): 399-415.
- Hale, Robert L. 1952. *Freedom Through Law Public Control of Private Governing Power*. New York: Columbia University Press.
- Hamowy, Ronald. 1961. "Hayek's Concept of Freedom: A Critique." *New Individualist Review* 1, no. 1: pp. 28-31.
- . 1978. "Law and the Liberal Society: F. A. Hayek's Constitution of Liberty." *The Journal of Libertarian Studies* 2, no. 4: 287-297.
- Hayek, F. A. 1960. *The Constitution of Liberty*. Chicago: The University of Chicago Press.
- . 1961. "Freedom and Coercion: Some Comments and Mr. Hamowy's Criticism." *New Individualist Review* 1, no. 2: 28-30.
- Hoyt, Homer. 1918. "The Economic Function of Common Law." *The Journal of Political Economy* 26, no. 2 (Feb. 1918): 167-199.
- Kinsella, N. Stephan. 1995. "Legislation and the Discovery of Law in a Free Society." *The Journal of Libertarian Studies* 11, no. 2: 132-181.

- Knappen, M. M. 1942. *Constitutional and Legal History of England*. New York: Harcourt, Brace and Company.
- Leoni, Bruno. 1961. *Freedom and the Law*, 3rd Ed. Indianapolis, IN: Liberty Fund.
- Long, Roderick T. 1994. "The Decline and Fall of Private Law in Iceland." *Formulations* 1, no. 3 (Spring 1994).
- Nozick, Robert. 1975. *Anarchy, state, and Utopia*. Oxford: Blackwell.
- Osterfeld, David. 1989. "Anarchism and the Public Goods Issue: Law, Courts, and the Police." *The Journal of Libertarian Studies* 9, no. 1: 47-68.
- Peden, Joseph R. 1971. "Stateless Societies: Ancient Ireland." *The Libertarian Forum* (April 1971): 3-4.
- . 1977. "Property Rights in Celtic Irish Law." *The Journal of Libertarian Studies* 1, no. 2: 81-95.
- Pocock, J.G.A. 1967. *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century*. New York: W.W. Norton & Co., 1967.
- Roberts, Clayton, David Roberts, and Douglas R. Bisson. 2002. *A History of England*, 4th Ed.; Vol. I: Prehistory to 1714. Upper Saddle River, NJ: Prentice Hall.
- Rothbard, Murray N. 1962. "On Freedom and the Law." *New Individualist Review* 1 (Winter 1962): 37-40.
- . 1977. *Power and Market: Government and the Economy*. Kansas City, MO: Sheed Andrews and McMeel, Inc.
- . 1978. *For a New Liberty*. New York: Collier Books.
- . 1997a. "Law, Property Rights, and Air Pollution." *Cato Journal* 2, no. 1 (Spring 1982): 55-99. Reprinted in *The Logic of Action Two*, 121-170. Cheltenham, UK: Edward Elgar.
- . 1997b. "The Myth of Neutral Taxation." *The Cato Journal* (Fall 1981): 519-564. Reprinted in *The Logic of Action Two*, 56-108. Cheltenham, UK: Edward Elgar.
- . 1998. *The Ethics of Liberty*. New York: New York University Press.
- Sikkink, David. 2003. "From Christian Civilization to Individual Civil Liberties: Framing Religion in the Legal Field, 1880-1949." In Christian Smith, ed., *The Secular Revolution: Power, Interests, and Conflict in the Secularization of American Public Life*, Berkeley, CA: University of California Press.
- Sneed, John D. 1977. "Order Without Law: Where Will Anarchists Keep the Madmen?" *The Journal of Libertarian Studies* 1, no. 2: 117-124.

Stringham, Edward. 1999. "Market Chosen Law." *The Journal of Libertarian Studies* 14, no. 1: 53-77.

Tait, James. 1931. "Select Cases Concerning the Law Merchant, A.D. 1239-1633. Vol. ii. Central Courts [Review]." *The English Historical Review* 46, no. 184: 641-643.