XI. Criminal Justice and Dispute Resolution

Libertarian anarchists envision a system in which parties with disputes, including disputes about whether a particular person violated the rights of another and about what might be the appropriate remedy for such a violation, are resolved peacefully through the mediation of wise and fair-minded private arbitrators. But is this just wishful thinking? In the present chapter, we review several questions and objections concerning this picture of justice in the anarchist society.

1. The Integrity of Arbitrators

Individuals and security agencies in an anarchist society are moved to resolve their disputes by arbitration because this approach gives the best chance of resolving a dispute in a reasonably fair and efficient manner without the enormous costs of armed confrontation. But what mechanism will keep the arbitrators themselves honest and impartial?

We can best address this question by first considering in more detail what makes arbitration a viable dispute resolution mechanism to begin with. If two parties have a dispute that they cannot resolve by direct discussion with one another, they may nevertheless be able to agree upon a general *procedure* for resolving their dispute. This depends upon a contingent but robust fact about human beings in a wide range of cultures: that appeal to a neutral third party is widely perceived as a fair and reasonable dispute resolution mechanism. If human normative perceptions were much more idiosyncratic, so that no procedure was widely regarded as fair, then arbitration would not be a successful dispute-resolution mechanism, and peaceful social cooperation might be impossible.

But how is it that two parties who disagree about some practical matter are able to agree upon a third party to resolve the dispute? Why isn't the first-order dispute simply replaced with a second-order dispute about whom to appeal to to resolve the first dispute? Again, this depends upon a contingent but robust fact about human normative perceptions: normative perceptions tend to agree to a large extent on who constitutes an impartial judge.

But why would both parties to a dispute seek an impartial judge, rather than each insisting on a judge biased in his own favor, such as a personal friend or family member? The reason is that they are attempting to reach a peaceful resolution of the original dispute. The fundamental idea behind arbitration as a strategy for reaching such a resolution is that the parties seek something that they can agree upon that might be used to generate a solution to the original dispute. Given that goal, it makes sense for both parties to choose an arbitrator who is generally viewed in their society as fair. They should not each propose an arbitrator obviously biased in their own favor, since that would not be a viable strategy for generating the needed point of agreement. Of course, if the two parties do *not* both desire a peaceful resolution of their dispute, then they are free to fight it out; there is no need to propose a biased or corrupt arbitrator in that case.

Based on this understanding of the logic of arbitration as a solution to conflict, an arbitrator has one critical asset: his reputation for honesty, impartiality, and wisdom. That reputation is the central determinant of the perceived quality of his product, and only if he jealously guards that asset can he expect that contentious parties, frequently unable to agree upon anything else, will be able to agree upon him as the person to resolve their disputes. If an arbitrator acquires a reputation for corruption, bias, or capricious decision-making, his business will quickly disintegrate. An arbitration company, therefore, would need to be extremely careful in its choice of arbiters, knowing that a single corrupt judge could destroy the business.

In many cases, it may be that no matter how a dispute is resolved, one party or the other will regard the decision as unfair after the fact. The best that an arbitrator can do in such a case is to render a decision that will be perceived as fair by most third party observers of the case. It is the perception of such observers that will determine how well the arbitrator's reputation is maintained and thus how much business he can expect to attract in the future.

In the present system, by contrast, mechanisms for insuring the integrity of judges are weak at best. Judges' decisions are reviewed only by other judges, with the exception of supreme court members, whose decisions are reviewed by no one. If the judicial system acquires a reputation for unfairness, inefficiency, and so on, its members can nevertheless retain their positions without fear of being supplanted by the competition. Fortunately, private arbitration has not been outlawed and is presently used in many cases to avoid the high costs, long delays, and other disadvantages of government courts. The justice system could be improved by further extending private arbitration to

cover all cases.

2. Corporate Manipulation

Why won't corporations manipulate the system by requiring employees or customers to sign an agreement to have all disputes settled by an arbitrator biased in the company's favor, such as an arbitrator in the permanent employ of the corporation itself?

Here is a more fundamental question: why don't businesses make unlimited demands on employees and customers? Why not require customers to give the company all the money they have? Why not require employees to work for free? These arrangements would certainly be more favorable to them than the sort of arrangements businesses actually offer, and if businesses had unilateral control over their contracts with employees and customers, these are just the sort of contracts they would write. Employees and customers, for their part, would prefer to write equally one-sided contracts in their own favor.

To understand why businesses do not behave in these ways, it is helpful first to consider how market prices are determined. For any given business, there is some optimum level at which the business should set its prices to maximize its profit. If it sets prices below that level, the company will lower its total profits due to lower profit per unit. If it sets its prices above that level, the company will lower its total profits due to lower volume of product sold. A precise account of the optimum price level is given in standard price theory, where this price is said to lie at the intersection of supply and demand curves (see figure 6).[116] For our purposes, however, the important point is simply that market forces determine an optimal price level, such that the company does worse for itself if it exceeds that level.

[116]See D. Friedman 1990 for an accessible account of the standard theory.

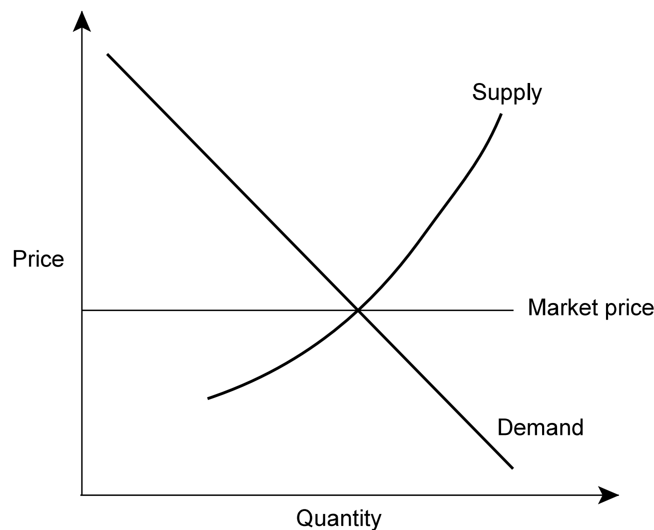

Figure 6: A standard price theory diagram shows the competitive market price of a good at the intersection of the supply curve, as determined by marginal costs of production, and the demand curve, as determined by marginal utility of consumption.

Now, the plan of making unreasonable legal demands is essentially equivalent to a plan to increase the price of one's product. Suppose that Sally's widget business requires all customers to agree that, in case of any dispute arising in connection with the sale of a Sally widget, including complaints regarding product quality or safety, the customer will accept binding arbitration by Sally's nine-year-old daughter, Susan. Sally's Widgets is then in effect adding to the price of Sally's widgets: in addition to the $150 that one must pay for a widget, the customer must also accept the risk of having a dispute with the company resolved by the owner's daughter. Clients with a normal sense of fairness would consider this undesirable. They might even take the policy as a signal that the company intends to cheat its customers, for why else would they stipulate such a condition? For this reason, if $150 was the market price for widgets, then Sally's addition of the unreasonable stipulation in regard to the resolution of disputes with her company will have the effect of placing the real price of her product above the market level and thus lowering Sally's total profit.

What if the market price for widgets is $200, and Sally charges only $150, leaving Sally some leeway to make additional demands on customers? Even in this case, insisting that all disputes should be resolved via Susan is not Sally's best option for taking advantage of that leeway. The reason is that customers are likely to place a greater negative value on Sally's dispute-resolution procedure than the positive value that Sally places on it, because customers tend to place negative value on perceived unfairness *in addition* to the potential

monetary costs of unfair procedures. Instead, Sally's best (profit-maximizing) option is simply to raise her price by $50.

The same principles apply to employer-employee relationships. There is an optimal wage for an employer to pay, such that, if the employer pays more than that, he lowers his total profits due to increased labor costs, but if he pays less, he lowers his total profits due to difficulty in attracting desirable employees. Any provision in an employment contract that employees regard as unfair or simply disadvantageous amounts to an extra cost of accepting a job with this employer, or, equivalently, a decline in the rewards of the job. A provision that would naturally be taken as signaling an intention to cheat one's employees would almost certainly lower the attractiveness of any job too much to be worth inserting. If an employer feels that he is giving too much to employees, it would make more sense for him simply to offer lower wages.

Empirically, businesses in free market economies rarely take unreasonable positions in disputes with customers. Anecdotally, the following is not an uncommon sort of consumer experience: I buy a product from the local Target, take it home, cut off the packaging, and then decide that I don't like it. I go back to the store and ask for my money back. "Is there anything wrong with it?" the cashier asks. "Nope," I say, "I just decided I don't like it. So take it back." My position in this dispute, if one can call it that, is utterly capricious. I voluntarily chose to buy the product, I know that they can't resell it after I have opened it, and I have no real complaint about the product. The product is not defective, and it was not misrepresented either by the manufacturer or by the store. I have no argument for why they should take it back. Yet in my experience, the company has never refused a return, never made a whimper of complaint, never asked for any better explanation than "I don't want it."

This evidence about the behavior of businesses is of course anecdotal, and certainly others could relate anecdotes of unsatisfactory experiences. But my Target story matches enough of my experience with enough businesses throughout my consuming years that I do not think it an unfair illustration of the overall tendency of the market: consumers are much more likely to take unreasonable positions–and prevail–than the businesses they patronize.

3. Refusing Arbitration

We have discussed the reasons for accepting arbitration as a mechanism of dispute resolution. But what if, in a particular case, you have strong reason to believe that any reputable arbitrator will find against you? This could be true for any of a number of reasons, including that you have in fact violated someone else's rights and are attempting to get away with it; that you are out of step with the values of the majority of your society, so that what you consider acceptable behavior a typical arbitrator will not; or that there is a large

amount of persuasive but misleading evidence that indicates that you are guilty of some crime of which you are in fact innocent. In any of these cases, it may seem that you would be best advised to reject arbitration.

But even in these cases, you will probably be compelled to accept arbitration. If you reject the option of having your dispute arbitrated, your security agency will probably draw the reasonable inference that you are in the wrong according to prevailing norms, since the most likely explanation for your rejection of arbitration is that you expect any reputable arbitrator to decide against you. For the same reasons that protection agencies will not defend criminals (see chapter X, section 4), they will not defend people who reject arbitration as a means of dispute resolution. Security agencies will anticipate this eventuality, writing provisions into their contracts specifying the procedures that customers must accept for resolving disputes and absolving the company of the responsibility to protect clients who violate these procedures. Thus, if you reject arbitration, you will have no defense against the other party's security agency imposing whatever solution it considers appropriate.

In some cases, this system would generate unjust or ethically objectionable results, as in the case where strong but misleading evidence points to the guilt of someone who is in fact innocent, or where the values of the majority of society are wrong. But the anarchist system nevertheless does as well as could reasonably be asked. In any functioning justice system, whether government-based or market-based, if powerful but misleading evidence points to the guilt of someone who is actually innocent, then that person will be treated as guilty. To recognize this possibility is no more than to recognize the fallibility of the system; only the unattainable standard of absolutely conclusive proof of guilt could eliminate the possibility of misleading evidence leading to punishment of the innocent.

Likewise, every social system generates unethical outcomes if the people who make decisions in that system have incorrect ethical beliefs and values. Under anarchy, unethical outcomes result if most of society have incorrect values, which will be reflected in the decisions of arbitrators seeking to cultivate a good reputation with the public. In a government-based system, unethical outcomes result if legislators, judges, or other public officials have incorrect values. This is not less likely to be true than that the majority of society have incorrect values.

4. Why Obey Arbitrators?

In the event that you have a dispute with another member of an anarchist society, why should you not agree to try arbitration to resolve the dispute, hoping that the arbitrator will side with you, and then simply ignore the

arbitrator's decision if it goes against you?

This sort of behavior, if anything, would be even less tolerated by the rest of society than a refusal to accept arbitration to begin with. For the same reasons that security agencies would not agree to defend criminals, you could expect your security agency to leave you to fend for yourself, with the result that the other party's agency could impose its resolution to the original dispute.

Beyond that, arbitration companies could publish lists of individuals who had violated an arbitration agreement. There might be criminal-record-reporting agencies, functioning analogously to credit-reporting agencies, providing reports of past criminal activity for a nominal fee. Given knowledge of your past violation of an arbitration agreement, it would not be rational for others in the future to enter into business relationships in which you might attempt to cheat them and then refuse to pay compensation. It might therefore become very difficult to find a job, get a credit card, take a bank loan, rent an apartment, and so on.

5. The Source of Law

In the status quo, the decisions of judges and juries are based largely on laws written by legislators or bureaucrats working for regulatory agencies. Since the anarcho-capitalist society has no legislature and no regulatory agencies, on what basis could arbitrators make their decisions?

There would be two sources of law in the anarchic society. First, property owners, or local associations of property owners, could specify the body of law to govern interactions occurring on their property. Provided that all who entered the property were given fair notice of the legal code in effect there, arbitrators would most likely honor the owner's choice of law. Legal scholars might develop suggested standardized legal codes, with business owners, landlords, or homeowners' associations choosing which of several widely used legal codes should hold sway on their land. Consumers with objections to a particular legal code would avoid patronizing businesses that adopted that code. In choosing a home, individuals would weigh the advantages of the legal code subscribed to by the local homeowners' association.

The other major source of law would be the arbitrators themselves. When making a decision in a particular case, a judge looks to past cases of the same kind for guidance, attempting to apply the same principles in the present case that have generally been used to decide cases of this kind in the past. If the case before him has novel features, the judge exercises his own judgment to devise a resolution that seems fair and in keeping with the generally accepted values of his society. He then writes an explanation for his decision, which is added to the body of precedent for other judges to consult in future cases. It makes sense for arbitrators to follow this tradition, since it results in decisions

that most observers regard as fair, and it preserves the sort of consistency that most observers value in a legal system.

We know that this is a viable way of developing an extremely sophisticated and subtle system of law, because this is in actual fact the source of the common law, which now holds sway (alongside statutory and regulatory law) in Great Britain and several other countries influenced by Great Britain, such as the United States, Canada, Australia, and New Zealand. In the anarchist society, common law would play an even greater role than it does in these countries today, as it would replace the bodies of law written by legislatures and bureaucrats.[117]

6. Punishment and Restitution

Existing government-based criminal justice systems center mainly on imprisonment of criminals as a response to crime. It is thought that society as a whole benefits from this practice because it keeps criminals off the streets for a time and deters would-be criminals from entering a life of crime. The victims of a particular crime, however, generally receive nothing in the way of compensation, and the rest of society is forced to pay for criminals' upkeep during their terms of imprisonment.

The anarcho-capitalist justice system would most likely focus on restitution rather than punishment. That is, criminals would be forced to pay compensation to their victims. This system would be preferred over punishment-based systems because it is better for the crime victims, and it does not require anyone to pay for the criminals' upkeep. The required compensation would most likely include compensation for the inconvenience and lost time suffered by the victim in attempting to secure justice, as well as reasonable costs incurred by the victim's protection agency in identifying, apprehending, and prosecuting the criminal. As a result, a thief, for example, would have to pay back significantly more than the value of what he stole. This extra compensation would provide a deterrent to crime.

What if the victim of a crime was dead (whether killed by the criminal or killed by other causes after the crime) and thus unable to collect compensation? In this case, the victim's family or friends might collect the owed compensation. Alternately, individuals might authorize their protection agencies to collect compensation on their behalf in the event that they are unable to receive compensation for a crime. The compensation that a crime victim is owed can be thought of as property that rightfully belongs to the victim, which he therefore has the right to give, sell, or bequeath to someone

[117] See Barnett 1998 for a more thorough account of non-governmental legal systems.

else. Granting one's protection agency the right to collect compensation in the event that one is murdered might serve to deter potential murderers.

7. Uncompensable Crimes

What would happen if a criminal lacked the funds to compensate his victims? One possibility is that the criminal would be remanded to a private prison where he would be required to work off his debt.

But what if the criminal could not work off his debt? Imagine, say, a criminal con artist who has defrauded his victims of $20 million, almost all of which has been spent. The criminal has no realistic hope of ever paying his victims back. What would be done with this criminal? One possibility is that the criminal might be housed indefinitely in a prison-labor facility, to pay as much of his debt as possible. Or the victims might settle for some partial repayment, such as the criminal could realistically make within his lifetime. It would be up to the arbitrator in the case, in consultation with the victims, to decide upon the most appropriate remedy. In any case, the information as to what the criminal had done would most likely be made publicly available, and possibly sent to criminal-record-reporting agencies, so that future landlords, employers, and so on could be on guard.

In some cases, however, a criminal's behavior is so heinous that not only is it impossible for him to compensate his victims, but the criminal can never be safely released. Imagine, for example, that a protection agency has taken Ted Bundy into custody. Bundy protests his innocence, but the arbitration company in the end finds that he is responsible for at least thirty murders. Bundy will never compensate his victims, and if he is ever released, he will kill again. There would seem to be two options: he can be imprisoned indefinitely (probably in a forced labor facility), or he can be executed. Again, it would be up to the arbitrator in the case to determine the best course of action. As in the case of the real Ted Bundy, execution appears a likely possibility.

8. Excess Restitution

The victim of a crime is justly entitled to collect full compensation for the crime, that is, sufficient compensation to return him to the welfare level he would have enjoyed if the crime had not occurred. But what if a particular court regularly awarded excess compensation–say, twice what the victim was justly entitled to, and twice what other courts generally awarded for a given crime? Wouldn't the excess compensation court be favored by victims? And since almost everyone considers himself more likely to become a crime victim than to become a criminal, almost everyone would want any future disputes of theirs to be resolved by such a court. Taking account of this, protection

agencies would agree to use courts that provide excess compensation. Soon, almost all criminal cases would be tried in courts of this kind. Criminals could protest at the injustice, but their voices would be little heeded, since protection agencies and arbitration firms would be more keen to satisfy the overwhelming majority of law-abiding customers than to satisfy the criminals.

What is problematic about this result? The obvious problem is that this situation is an injustice, albeit one over which we may find it difficult to rouse much indignation–it is an injustice to the criminals. But Paul Birch argues that the problem would go deeper than this, undermining the entire anarcho-capitalist system.[118] Once the practice of awarding excess compensation started, firms would compete to offer higher and higher awards to victims, perhaps ten times, twenty times, or even fifty times the amount to which the crime victim was justly entitled. These excessive awards would create powerful deterrents to crime, resulting in a dramatic drop in the crime rate. While this may sound like a happy result, it would put increasing financial pressure on arbitration firms, who make money from criminal cases. As the crime rate dropped, arbitration firms would continue to raise their compensation awards in the effort to collect a larger share of the dwindling market. This would only cause the market to shrink further. Eventually, either all firms would go out of business, in which case society would devolve into a state of chaos, or the last firm able to hold out would acquire a monopoly on the industry, whereupon it would evolve into a state.

There are several reasons why the foregoing scenario is unlikely to transpire:

i) The argument unrealistically assumes that actual and potential crime victims favor unlimited compensation. This assumption may be driven by a conception of human beings as *homo economicus*, pure profit-maximizers: since higher compensation equals higher profit, crime victims will favor unlimited increases in compensation. Normal human beings, however, do not think in this way–they do not see criminal victimization as an opportunity to get rich. That sort of thinking is generally reserved for scam artists, the sort of people who are more likely to be the ones owing compensation in the criminal justice system, rather than receiving it. What most normal people desire is to avoid being crime victims if possible, and to secure justice in the event that they are victimized.

   A more plausible concern is that crime victims will be motivated by anger and vengefulness, rather than profit-seeking, to push for excessive sanctions on their malefactors, and that this will lead courts to issue

[118]Birch 1998.

unjustly harsh judgments. But this concern, perhaps surprisingly, is not supported by empirical evidence: surveys of attitudes toward criminal sentencing have indicated that crime victims in fact harbor attitudes no more punitive than those of the average member of the population.[119]

ii) Birch imagines arbitration companies advertising that they award excessive compensation–announcing, for example, that they award each victim compensation equal to ten times the loss the victim has suffered. This is very close to a court's explicitly announcing that it is unjust. It is difficult to imagine this occurring. For reasons discussed earlier, arbitration companies would carefully select their judges and guard their reputation for fairness, impartiality, and wisdom. The sort of people who would wind up as judges, therefore, would be highly unlikely to explicitly and intentionally promote injustice for the sake of profit maximization.

    A more realistic concern is that arbitration companies would be *biased* in favor of victims, rather than that they would explicitly embrace injustice. They would almost certainly claim to be administering justice, but their perceptions of what justice demands might be slanted in favor of victims; for instance, they might tend to perceive most crimes as more damaging than they really are. It is plausible that arbitration companies could hire judges with such slanted perceptions without unduly tainting their reputation for integrity. I therefore think it plausible that in an anarcho-capitalist society, criminals would often suffer somewhat more than they deserved, though not ten or twenty times more.

    This is a possible problem with the system, but it is not a terrible problem. Moreover, it is plausible that overpunishment occurs also in governmental systems, and it is not obvious that governmental systems deliver more just or proportionate punishments than those that would emerge from an anarcho-capitalist system.

iii) Apart from their concern for the rights of criminals, which admittedly is limited, there is another reason for ordinary individuals to oppose absurdly excessive compensation for crimes: in any realistic criminal justice system, innocent people are sometimes convicted. Most people find this prospect troubling even in the abstract, and perhaps more so when they reflect that they themselves or someone they are close to may one day be among the wrongly convicted. The problem cannot be eliminated without entirely dispensing with the criminal justice system; however, most people would find the problem much less troubling if the penalties for crimes were reasonable than if they were absurdly excessive. This would lead most people in the anarchist system, just as in the present system, to support

[119] Walker and Hough 1988, p. 10; Hough and Moxon 1988, pp. 137, 143-6.

some degree of restraint on the part of judges in the process of assigning compensation awards.

iv) Excessive compensation awards tend to be more difficult or expensive to collect. If, for example, a shoplifter steals a videogame from a store and then is ordered by a court to return the videogame plus $100,000, it will most likely prove difficult to enforce this judgment. If criminals anticipate excessive awards in advance, this may prompt them to resist capture and prosecution much more vigorously than they otherwise would. If, for example, a shoplifter can expect to be imprisoned for life in a compulsory labor facility if caught, then it might be rational for a shoplifter to fight to the death rather than surrendering peacefully to a security agency. Knowing this, security agencies would have some motivation to avoid arbitration companies that give absurdly excessive compensation awards.

v) A criminal who is wronged by a clearly excessive compensation award would seem to have a valid complaint against the court that made the unjust award. There is no obvious reason why he could not file a lawsuit against that court in a different court.

If all the courts had the same excessive standards for compensation, then the criminal's suit would fail. But if the courts generally started out with approximately just standards, and one court decided to seek a larger market share by offering excessive compensation awards, then that court would suffer for its indiscretion, as other courts found its judgments unjust and awarded compensation to those who had been wronged by the court. Thus, if the system starts out in a generally just position, it will be stable.

vi) Even extreme increases in the penalties for crime would not eliminate all crime. This is because some criminals, unfortunately, are highly resistant to deterrence. They recklessly ignore the future or blithely assume that they won't get caught.[120] Thus, a market for private courts would continue to exist even in a regime of absurdly high compensation awards.

vii) Even if excessive compensation awards resulted in a dramatic drop in crime rates, this would not cause all or nearly all arbitration firms to go bankrupt. However much crime might drop, honest disputes among ordinary people would continue to arise, and they would still need to be adjudicated by arbitration firms. If crime suffered a sudden drop, arbitration companies would indeed experience a decline in revenues and would need to lay off workers and scale back operations to the point that the market would support. But this would not lead all of them to go bankrupt, nor would it cause the industry to be monopolized.

Consider an analogy. As automobiles became more practical in the

[120]Banfield 1977.

early twentieth century, the demand for horses suffered a drastic drop. Some horse breeders probably went bankrupt, while others exited the industry to avoid bankruptcy. But the entire industry did not collapse, nor was it monopolized–there remain more than one horse breeder in the world today. The industry simply shrank to the size that could be supported by the new levels of demand. Likewise, if we should be so blessed as to find ourselves worrying about unduly low crime levels, the arbitration industry will shrink so that it includes only the number of courts needed to satisfy however much demand remains.

9. The Quality of Law and Justice under a Central Authority

In what ways might a non-governmental justice system be preferable to a governmental system? To answer this, we must first consider some of the flaws of the present system.

9.1. Wrongful Convictions

One disturbing aspect of the present system is the rate at which the innocent are wrongly punished. Michigan law professor Samuel Gross studied cases in which convicts were exonerated in the United States between 1989 and 2003.[121] He was able to find 340 such cases, including 205 murder cases, 121 rape cases, and 14 cases involving other crimes. On average, these defendants suffered eleven years of wrongful imprisonment before finally being officially exonerated.

Why were murder and rape so overrepresented among the crimes of which defendants were exonerated? The main reason for the dramatic overrepresentation of rape cases lies in the relatively recent development of DNA testing in the late 1980's and thereafter, which led to the reexamination of a number of rape cases in which semen samples had fortunately been preserved. Application of the new techniques revealed that many convictions prior to the advent of reliable DNA testing were erroneous. The main reason for the overrepresentation of murder cases seems to lie in the much greater scrutiny that such cases receive as compared to less serious cases, especially when the death penalty is involved.[122]

Prosecutors and police often refuse to accept that they arrested and

[121]Gross et al. 2005.

[122]Gross et al. 2005, pp. 531-2, 535-6. Gross et al. (pp. 532-3) point out that there may also be more pressure to convict someone in capital cases, leading to more mistakes. However, there may also be greater care exerted by defense attorneys, judges, and juries in cases where extremely high punishments are at issue.

prosecuted an innocent person, even after proof of the person's innocence has been uncovered.[123] In some cases, not included in Gross' 340 exoneration cases, a defendant remains in prison despite conclusive proof of his innocence. For instance, in 2001, a mentally retarded woman by the name of Victoria Banks was convicted of manslaughter after she confessed to killing her newborn baby. But there is no physical evidence that this baby ever existed, and a medical examination determined that it was physically impossible for Banks to have had a baby, due to the tubal ligation she had in 1995. In light of this evidence, her husband, a co-defendant in the case, was exonerated and released. Another co-defendant, Ms. Banks' sister, received a reduced sentence and was released, while Banks herself remains convicted and imprisoned in Alabama for the murder of the non-existent child.[124]

Also omitted from Gross' statistics are cases of mass exonerations due to the exposure of large scale police corruption. One such case involved the CRASH ("Community Resources Against Street Hoodlums") program of the Los Angeles Police Department. In 1999, Officer Rafael Perez revealed that he and other officers in the program had routinely lied in arrest reports, shot unarmed suspects and innocent bystanders, planted guns on suspects after shooting them, fabricated evidence, and framed innocent defendants. In the wake of these revelations, over 100 defendants had their convictions vacated in 1999 and 2000.[125]

Leaving aside cases of that kind, why were the defendants in Gross' sample wrongly convicted? Most cases involved witness misidentification. Many involved perjury by police, forensic scientists testifying for the government, the real criminal, jailhouse snitches, or other witnesses who stood to gain by providing false testimony. In 15% of the cases, the defendants, under the stress of high-pressure police interrogations, actually confessed to crimes they had not committed. Most of those 15% were under the age of 18, mentally retarded, or mentally ill.

Since the defendants in all these cases were ultimately exonerated, may we rest easy that the system works and that justice is served? There are two reasons for rejecting such complacency: first, there are the eleven years that these defendants, on average, were forced to spend in what may be the worst conditions that any significant segment of society must live under. Second, and more importantly, there are the implications for the number of people who continue to be unjustly imprisoned.

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[123]Gross et al. 2005, pp. 525-6.

[124]Gross et al. 2005, p. 538; Sherrer n.d.

[125]Gross et al. 2005, pp. 533-4.

There are no reliable estimates of the frequency of wrongful convictions, due chiefly to the inherent elusiveness of such cases. Though it is reasonably clear that all or nearly all of Gross' 340 cases were indeed wrongful convictions, we have no way of knowing how many additional erroneous convictions went undiscovered during the same time period. The 74 death row inmates who were exonerated constituted about 2% of the death row population.[126] This suggests that if we applied the same level of scrutiny to all cases that we apply to death penalty cases, we might find a 2% false positive rate in these other cases as well.

But we have no idea how many death penalty cases there were in which erroneous convictions went undiscovered. The wrongful convictions in Gross' sample were due mainly to witness error, perjury, and false confessions. But when a witness misidentifies a suspect, or a witness lies on the stand, or the police extort a false confession out of a suspect, in how many of such cases can we assume that proof of the defendant's innocence, elusive at the time of trial, will later luckily appear and rescue him from prison? Proof of innocence is not generally very easy to come by, and the authorities, having closed the case, will not be looking for any such evidence. The defendant himself will have a strong motivation to uncover such evidence, but his efforts will be hampered by the fact that he is in prison. For these reasons, it would seem overly optimistic to assume that in the majority of wrongful convictions (even in death penalty cases), proof of innocence is later discovered. It therefore seems probable that the actual false conviction rate is much greater than the 2% exoneration rate that Gross found among death penalty cases.

Could anything be done to improve the system, or are these mistaken convictions simply the price of criminal justice? Several measures have been suggested to improve the reliability of the system: reducing the use of high-pressure interrogation techniques, particularly for underage or mentally disabled suspects; having witnesses questioned by officers who do not know the details of the investigation and therefore cannot influence the witnesses; showing people or photographs to witnesses sequentially, rather than simultaneously in a group; and instructing juries on the limitations of eyewitness evidence. Despite studies indicating that these measures would reduce the risk of wrongful convictions, American police and courts have generally not adopted them.[127]

9.2. Oversupply of Law

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[126]Gross et al. 2005, p. 532n21.

[127]Duke 2006.

Under a legal system based on a central authority with legislative powers, a great deal more law is provided than under a pure common law system. Some see that as an advantage–perhaps we need a strong network of regulations to protect us against the failures of laissez faire capitalism. Nevertheless, it is worth considering whether a governmental system might provide too much law and regulation.

As an exercise, try to imagine an ideal legal system. Before reading on, try to estimate how many pages it would require to write down all the laws that such a system would contain. There are many difficulties with making such an estimate; nevertheless, attempting at least a vague, order-of-magnitude estimate before finding out how much law actually exists may help to forestall the tendency to rationalize the status quo.

Most citizens in modern states, whether they would describe themselves as supporting a strong regulatory regime or not, have little idea of how much regulation they actually have. In the United States, the rules promulgated by regulatory agencies of the national government are recorded in the *Code of Federal Regulations* (this does not include statutes passed directly by Congress, nor does it include state or local laws). Over the last half century, the quantity of these regulations has ballooned from about 23,000 pages to about 150,000 pages (see table below).

Year	Length of CFR (pages)[128]
1960	22,877
1970	54,834
1980	102,195
1998	134,723
2010	152,456

These statistics cannot capture qualitative information about the content of these regulations, and of course there is no prospect of reviewing any significant fraction of these regulations here (or anywhere). Nevertheless, I suggest that these numbers might prompt even the strongest ideological supporter of regulation to consider whether dedicated lawmaking bodies might have a tendency to provide a greater than optimal quantity of regulation. The reader unfamiliar with regulation is invited to peruse the CFR at random to obtain a qualitative sense of the current regulatory regime. One may, for example, chance upon a paragraph describing the spacing of spark plug gaps,

[128]Figures for 1970 and 1998 are from Longley n.d. Figures for 1960 and 1980 are from Crews 2011, p. 15. The figure for 2010 is computed from the edition of the CFR available from the Government Printing Office at <http://www.gpo.gov/fdsys/>; I have omitted the "Finding Aids" at the end of each volume from the total page count for 2010.

another prescribing the use of the expression "all day protection" in antiperspirant labels, another describing the signing of documents related to excise taxes on structured settlement factoring transactions, and so on.[129]

What is objectionable about such overprovision of law? The first objection is that it represents an excessive and unjust reliance on coercion. Each of these regulations is a command backed up by a threat of force issued by the state against its citizens. While some of these threats may be justified, those that are not constitute a violation of the rights of all those who are thereby coerced.

Second, a surplus of laws can have large economic costs. Ronald Coase, Nobel laureate and former editor of the *Journal of Law and Economics*, reports that his journal published a series of empirical studies of the effects of a wide variety of regulations, in which it turned out that every regulation studied had overall negative effects on society.[130] The Small Business Administration of the U.S. government has estimated the annual cost of federal regulations to the U.S. economy at $1.75 trillion, a burden that they find falls disproportionately on small businesses.[131]

Third, an excessive quantity of law, as well as an excessively complex and technical body of law, renders it unreasonable to demand that citizens know, understand, and follow all laws. To threaten to punish citizens for violation of rules that, in the light of the extreme cognitive burdens, they could not reasonably be expected to know or understand, is a form of injustice. These cognitive burdens at some point defeat the primary purpose of establishing written laws to begin with, namely, that the law should be accessible to all who are expected to follow it.

One solution to the last problem is for citizens to hire experts to advise them in any area in which the law is complex and difficult to follow. This, however, leads us to the next problem with the currently accepted system of justice.

9.3. The Price of Justice

For most citizens of modern states, the costs of government justice in both time and money are prohibitive. The typical civil dispute requires anywhere from several months to a few years to resolve through governmental

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[129] 40 CFR, Appendix I to subpart V of part 85 (H)(1)(b); 21 CFR 350.50(b)(3); 26 CFR 157.6061.

[130] Hazlett 1997, p. 43.

[131] Crain and Crain 2010.

channels.[132] In 2009, the average American lawyer charged fees of $284 per hour, with a typical divorce costing between $15,000 and $30,000. The average American, with an annual income of $39,000, simply cannot afford to use the government's justice system unless he is forced to do so by a lawsuit or a criminal indictment.[133]

Why are legal services so expensive? One reason is the oversupply of law mentioned above. The complexity, technicality, and sheer length of the laws and legal procedures forces individuals to pay experts to handle any legal procedure, and it forces those experts to expend a great deal of labor on each case. Another reason can be found in the restrictions on the supply of legal services, which by law may only be purchased from government-approved sources (lawyers who have been admitted to the bar, generally after a lengthy and very expensive law school education).

These costs are troubling for at least three salient reasons. First, the high cost of legal services means that only the wealthy can afford justice. Middle- and low-income individuals cannot afford to seek justice, or must take justice into their own hands, when they believe they have been wronged. In criminal cases, low-income defendants may receive inadequate legal representation due to heavy case loads on public defenders.

Second, even defendants who win their cases, whether the cases be civil or criminal, may be financially ruined by the costs of their legal defense. This acts as a kind of unjust punishment imposed on all defendants, whether they are guilty of wrongdoing or not.

Third, large businesses may be able to afford the lawyer fees necessary to ensure compliance with complex bureaucratic regulations, while the same costs may prove difficult or impossible for small businesses to bear. As a result, the present legal regime tends to promote concentration of industries in the hands of large corporations, even if those corporations are in themselves less efficient than smaller firms.

9.4. The Failure of Imprisonment

Today's governments rely chiefly on imprisonment as a response to crime. Imprisonment serves two main functions: first, it protects society from convicted criminals for a limited time by separating the criminals from the rest

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[132] In the United States, delays vary from about six months to about three years, with an average of eleven months (Dakolias 1999, p. 18).

[133] On average lawyer fees, see Lawyers.com n.d., quoting a survey by by Incisive Legal Intelligence; on the price of divorce, see Hoffman 2006; on average incomes, see U.S. Census Bureau 2011b, p. 443, table 678.

of society. Second, it punishes the criminals by forcing them to live in highly undesirable conditions. The suffering on the part of the criminals may be valued intrinsically as a form of retributive justice, or it may be valued instrumentally as a means of deterring future criminal behavior.

Existing jails and prisons, however, suffer from a number of very serious problems. In the United States, these facilities are regularly extremely overcrowded, and inmates live in danger of gang violence, rape by other prisoners, beatings by guards and other prisoners, and other forms of maltreatment by abusive guards. No reliable statistics exist on the rate of such violence and abuse, but anecdotal reports are numerous.[134] In recent years, the use of solitary confinement has become increasingly common, a practice that leads to mental deterioration on the part of the prisoner and higher rates of recidivism once the convict is released.[135]

Under these conditions, incarceration could hardly be expected to rehabilitate criminals. Accordingly, two thirds of criminals are rearrested within three years of being released from prison.[136] This statistic must be assumed to underestimate the true rate of recidivism, given the low rate at which law enforcement solves crimes (see chapter X, section 7); thus, the great majority of criminals return to a life of crime shortly after their release. Some observers have argued that incarceration not only fails to rehabilitate criminals but actually renders them more dangerous when released than they were when they entered. This may be true, for example, because inmates make new criminal contacts and learn new criminal skills and ideas from other inmates while in prison, because they absorb anti-social values from the other inmates, or because inmates become more angry and resentful as a result of the abuse they suffer while in prison. Some have gone so far as to suggest that incarceration may cause more crime than it prevents.[137]

These problems are not inevitable in a criminal justice system; critics have offered numerous potential reforms that would seem likely to significantly reduce these problems. Some rehabilitation programs have been shown to reduce recidivism rates by up to 30%. Policymakers simply have not chosen

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[134]Commission on Safety and Abuse in America's Prisons 2006, pp. 11-12, 24.

[135]Commission on Safety and Abuse in America's Prisons 2006, pp. 14-15.

[136]Commission on Safety and Abuse in America's Prisons 2006, p. 106.

[137]Pritikin 2008.

to adopt these reforms.[138]

9.5. Reform or Anarchy?

The problems listed in the preceding subsections are only the most prominent of those afflicting the present government-based system of justice. A sanguine observer, however, while acknowledging the seriousness of the problems, might take them to show merely that the justice system ought to be substantially reformed, while still remaining in the hands of government.

Indeed, there are a number of reforms that would greatly mitigate the problems listed above, and there is nothing in the nature of government that inherently precludes such reforms. We cannot rule out the possibility that government officials will one day begin a serious reform of the prison and court systems to address the problems mentioned above. Nevertheless, it also is not a mere *accident* that problems of the sort we have been discussing are found to persist in government-based justice systems. Coercive monopolies have a systematic tendency to foster a variety of problems, and they tend to be slow to recognize and address their own shortcomings.

The reasons for this are familiar. Because government collects its revenues in the form of taxes which citizens have no choice but to pay, government programs can survive financially even with extreme levels of consumer dissatisfaction. More importantly, because government is monopolistic, citizens have nowhere else to turn if they find its services inefficient, of low quality, or abusive. Most of the problems with America's justice system are obvious and have been well-known for a very long time. National and state governments have done little to address these problems, not because the problems are difficult or impossible to address, but simply because the government itself fears no loss of revenues, let alone dissolution of the entire organization, as a result of the failure to address large and obvious problems.

Consider the problem of wrongful convictions. In a competitive system, a local homeowner's association could choose from among many protection agencies, arbitration firms, and bodies of law to apply to its neighborhood, and could alter its choice whenever it became dissatisfied with the security and justice arrangements. Furthermore, residents dissatisfied with their HOA's decisions could relocate at relatively little cost. Since no one wants to be wrongfully convicted, a protection agency that used unreliable methods of investigation, or an arbitration firm that used unreliable methods of assessing guilt or innocence, would have to worry about being supplanted by competitors who offered more reliable services with less risk of wrongful

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[138] Pritikin 2008, p. 1092; Commission on Safety and Abuse in America's Prisons 2006, pp. 12, 28, 108.

convictions. Similar points apply to the problem of oversupply of law and excessive costs of legal services.

What about the cluster of problems associated with incarceration of criminals? These problems would be greatly reduced by a justice system that focused on restitution rather than punishment. In such a system, the hundreds of thousands of people presently incarcerated for victimless crimes, chiefly drug-related offenses, would be free. Only individuals who had harmed another person and were otherwise unable to pay the required compensation to the victim would be held captive in prison labor facilities. These facilities' focus on productive work would diminish the risk of in-prison violence as well as recidivism.

Again, these reforms are not impossible in a governmental system. A government could eliminate victimless crime statutes and shift its focus from punitive incarceration to restitution. But in general, reforms tend to be slow and difficult to implement in a governmental system. By contrast, businesses in a competitive industry, in the effort to maintain or expand their market share, tend to move quickly to improve their products or reduce their costs whenever the opportunity presents itself.

10. Conclusion

There are two main kinds of justice system by which a society may provide for the resolution of disputes and the remedying of rights violations committed by its members against other members.

The first kind of system, used almost everywhere today and throughout recorded history, is the coercive, monopolistic system, in which a single organization assumes exclusive authority for making laws, resolving disputes, and punishing criminals. Large and well-known problems tend to occur in systems of this kind, including frequent erroneous convictions, excessive and excessively complex legal restrictions, high monetary costs, long delays, overcrowded prisons, abuse of prisoners, and high rates of recidivism. Governments on the whole have done little to address these problems, despite the identification by social scientists and other experts of numerous steps that could be taken to greatly improve the system. This neglectfulness on the part of government can be traced to the defining characteristics of this approach to justice, namely, its coercive and monopolistic character. Because the governmental system is funded through compulsory taxation, courts, prisons, and other elements of the justice system can continue to collect as much revenue as the government wishes to allocate, regardless of their performance. And because the government holds an effective monopoly on the provision of justice, these organizations will not be replaced by competitors, no matter how much they cost or how poorly they perform.

The alternative is a market-based system of justice, in which arbitration companies compete with one another in the business of resolving disputes between individuals. When one individual violated the rights of another, an arbitrator would decide upon the compensation to be paid by the criminal to the victim. In cases in which a criminal had no other means of making payment, the criminal would be housed in a private prison, where he would be required to work off his debt. Individual property owners or associations of property owners, such as homeowners associations, would choose the body of law to apply to interactions occurring on their property. Any issues not resolved by such laws would be dealt with through a form of common law articulated by the arbitrators themselves, similar to the British common law in the actual world.

Arbitrators in the free market justice system would seek to maintain a reputation for fairness, consistency, impartiality, and wisdom, in order to continue to attract customers. Security companies would most likely require their customers to resolve any disputes through reputable third-party arbitrators, and would refuse to defend customers who either rejected arbitration or violated an arbitrator's decision after submitting the dispute to arbitration.

In this system, it is plausible that arbitrators might evince a bias in favor of crime victims and against criminals, so that criminals might be forced to pay somewhat higher amounts in compensation for their crimes than justice truly demanded. However, it is far from clear that this overpunishment problem would be more severe than the overpunishment that occurs in the present government-based system, which is focused on incarceration of criminals in unpleasant and dangerous conditions. The problem of excess compensation awards would likely be a relatively modest and tolerable problem, in comparison with the problems of the status quo.