In defense of private property: The role of private property rights and ethics in the market economy

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In defense of private property: The role of private property rights and ethics in the market economy

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University of Nevada, Las Vegas, 1994
IN DEFENSE OF PRIVATE PROPERTY

THE ROLE OF PRIVATE PROPERTY RIGHTS
AND ETHICS IN THE MARKET ECONOMY

by

Iftikhar Ahmed

A thesis submitted in partial fulfillment
of the requirements for the degree of

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in

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ABSTRACT

This paper examines the role private property rights and ethics play in a market economy, and demonstrates that in order to have a free market, it is essential to have a legal system that defines private property rights. Such a legal system can only evolve on the free market itself.

Chapter I examines the nature of property rights.

Chapter II examines some historical examples of legal systems that have been based on private property rights.

Chapter III explains the relationship between such a legal system and ethics. An attempt is made to justify such a system on the basis of ethics.

Chapter IV explores the implications of the concept of private property.

Chapter V examines the characteristics of a legal system which is based on the concept of private property.

Finally, Chapter VI presents criticisms of some present ideas on property rights and legal practices. Moreover, some conclusions are presented.
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This paper is dedicated to my parents who have provided me with an immense amount of support, taught me the importance of education, and enabled me to reach this point in my life, and to Professors Rothbard and Hoppe, who have provided me with a world of knowledge and have changed my way of thinking.

I would like to express an enormous amount of gratitude towards Elizabeth Ramirez for showing me that it is not enough to merely read and write about ideas on ethics and private property rights, but it is more important to adopt them in one's life.
INTRODUCTION

Ludwig von Mises, one of the pioneers of the Austrian School of economics, was once asked how he would tell whether a nation was under a socialist regime. He replied that the presence or absence of a stock market in a country would indicate whether that country is under a socialist regime or is a market economy -- the presence of a stock market would indicate a market economy, whereas its absence would indicate a socialist regime. That is, the presence of an intense market would testify the nature of the social and political structure and the way rights to resources are allocated in an economy. Before any discussion of markets, exchange, and trade can take place, a lot needs to be said about the structure of property rights in an economy.

Property rights are the underpinnings of a free market economy. There cannot be freedom without law and markets without property rights. In order for exchange to take place, goods and services have to be owned. Buying and selling cannot occur if goods and services are not owned.

Private property rights are the form of property rights which are most essential in a market economy. For instance, if the state or government owned certain property that would still constitute a property right, but this form of property right would be useless, in fact harmful, for the economy. In the case of a monarchy, for instance, where specific individuals acquire the
status of elites, the ruling group of elites would be the personal owners of property. Similarly, under a system of collective government ownership, where the government apparatus is considered "public" property which is administered by officials who are supposed to represent the people and who do not personally own the government and thus property, the basic form of property ownership is again that of ownership by the ruling elite. This is true because masses and majorities of people cannot possibly possess natural authority (this being a personal, individual trait). Thus, such a form of government can only acquire legitimacy unnaturally. Only in activities such as war or revolution can masses act collectively and only in such activities do victory or defeat depend on collective effort and hence, the "collective" form of government can only gain legitimacy through war or revolution.¹

Even if we were to assume that a system of collective ownership could be truly "collective" -- that is, that government and property are owned by "the people" -- it would be impossible to implement and maintain such a system. Under collective ownership, where everyone owns everything, there can be no exchange as no one person can exchange something that everybody owns. As a result, such a system would be impossible and, if implemented, would have to function as a dictatorship, or some other form of an authoritarian government, where the ruler would own property and thus the means of production. This, in fact, has been the case in most socialist economies.

Under a system of authoritarian ownership of property that would arise through collective ownership, all that is owned is in the form of

government property (or rather the property of the ruler), similar to the case of a monarchy. The major differences, however, between a monarchy and this form of a dictatorship are:

(1) The dictator may be the sole owner and exploiter of property while under a monarchy there is usually a class of ruling elites with heirs, and government is handed down from generation to generation.

(2) The dictator may have a higher time preference for the property as he may not be able to own the government for life, as opposed to a monarchy where the monarchs usually gain "legitimacy" in the eyes of the people and may thus be able to pass down government to their heirs. As a result, the dictator may have less of an incentive to preserve the property and would have every incentive to consume it within the period of his rule as compared to monarchs.

Dictators have every incentive to pay a value less than the fair market value for acquiring the property, or to confiscate it altogether. Therefore, this type of property right would be harmful for the economy or the society as it would lower the welfare of the previous owner of the property for the benefit of the dictator. This form of acquisition of property would be parasitic for the economy. As the dictator has not paid a fair market value for the property, he does not have an incentive to be efficient with it. Moreover, as the dictator has a monopoly on coercion, he has every incentive to use this unfairly acquired property in such a way that he could coerce more people through unfair means. For instance, if the dictator confiscated land and decided to use it to build a mansion for himself, he would have the power to coerce more and more people to provide him with materials and labor at low or no cost to complete his mansion.
Thus, all forms of ownership of property other than private ownership, may they be monarchies, dictatorships, or collective ownership, would eventually boil down to authoritarian and coercive ownership of property. Nothing need be explained to prove why monarchies and dictatorships are authoritarian, but in the case of collective ownership, if all property is collectively owned, then every person would have his own idea of the purpose for which the property is to be used. People have different tastes, preferences, and subjective values. Therefore, there would be constant disagreements over the use of the common property. As a result, a coercive authority would have to step in to decide what has to be done with the property that theoretically everybody owns. As indicated earlier, this inherent impossibility of collective ownership is why all communist regimes throughout history have, in reality, merely been authoritarian dictatorships.
CHAPTER I
THE NATURE OF PROPERTY RIGHTS

Property rights specify the "norms of behavior" that persons must observe while interacting with one another. In doing so, they "convey the right to benefit or harm oneself or others." In other words, property rights dictate the distribution of wealth, and changes in property rights transfer wealth. In addition, the concept of property rights encompasses all law, even criminal statutes, which define or attenuate various "human rights" as well as rights over material property. Governments govern by creating and enforcing rights and by modifying and changing rights as wealth transfers are instituted.

How are property rights enforced? The responsibility of enforcing property rights obviously goes to the legal system. This implies that a legal system is essential for the smooth functioning, in fact the very existence, of a free market. The main issue, however, is in what form should a legal system exist. It has been stated earlier that private property rights are essential to


ensure a free market, and thus, the legal system should be of the type which ensures and guarantees private property rights. It should seem logical that a legal system that enforces private property rights would develop on the free market through the spontaneous order of human beings. In fact, that is how law initially evolves.

Law consists of both rules of conduct and the mechanisms or processes for applying those rules. Individuals must have incentives to recognize rules of conduct or the rules become irrelevant, so institutions for enforcement are necessary. Law can be imposed from above by some coercive authority, such as a king, a legislature, or a supreme court, or law can evolve from the bottom as customs and practice evolve. Customary law, or law which evolves through customs or the spontaneous order or evolution of society and civilization, is recognized in a society, not because it is backed by the power of some strong individual or institution, but because each individual in the society recognizes the benefits of behaving in accordance with other individuals' expectations, given that others also behave as he expects. On the other hand, when law is enforced or imposed coercively by a minority of the population from above, this law would require much more force to maintain social order, as opposed to law which develops from the bottom through mutual recognition and acceptance.

The basic source of both the recognition of the law and of its enforcement are reciprocities in a customary legal system. That is, individuals must "exchange" recognition of certain behavioral rules for their mutual benefit. Because of the fact that reciprocity is the basis for recognition

of the law in a customary legal system, private property rights and the rights of individuals are most likely to be the ingredient of prime importance in such a legal system. In fact, voluntary recognition of laws and participation in their enforcement is likely to occur only when substantial benefits from doing so can be internalized by each individual. Under a legal system which is coercively imposed from above, punishment is usually the threat that induces recognition of law. However, under a customary system of law, incentives for the recognition of the law are usually positive. "Individuals must expect to gain as much or more than the costs they bear from voluntary involvement in the legal system. Protection of personal property and individual rights is a very attractive benefit." Bruce Benson further explains the nature of a customary legal system:

"Under a customary legal system, all offenses are treated as torts (private wrongs or injuries) instead of crimes (offenses against the state or the 'society'). A potential action by one person has to affect someone else before any question of legality can arise; any action that does not, such as what a person does alone or in voluntary cooperation with someone else but in a manner that clearly harms no one, is not likely to become the subject of a rule of conduct under customary law."

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7 Ibid., p. 13.

8 Ibid., p. 13. I shall examine this aspect of a customary or a free market legal system in more detail in Chapter V of this paper.
CHAPTER II
A HISTORICAL EXAMINATION OF CUSTOMARY LEGAL SYSTEMS

The idea that customary legal systems (that evolve within human society from the bottom and upwards through the spontaneous order of human beings) enforce private property rights and are compatible with the free market, can be witnessed by examining legal systems that have evolved among different societies through human history. Here I examine just a few such examples.

THE KAPAUKU PAPUANS OF WEST NEW GUINEA

In 1954, Leopold Popisil, a researcher, investigated the Kapauku Papuans of West New Guinea. These people lived in the form of a primitive civilization living by means of horticulture. They functioned on an ingenious system of private property rights based on reciprocal arrangements.

The Kapauku had no formal coercive government authority. However, every tribe had one influential person who was usually a healthy man in the prime of life who had accumulated a certain amount of wealth. The concepts of individualism, physical freedom, and private property rights

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were deeply rooted in the Kapauku culture. Because of the fact that under such a system an individual could only achieve influence and wealth through hard work and achievement, the influential person, or "tonowi" was usually a mature and skilled person with considerable physical and intellectual abilities. The very fact that the Kapauku considered a person with such abilities influential shows the importance these people placed on individualism and private property rights. These people had absolutely no concept of common property in their culture.

Followers became debtors to a tonowi in exchange for agreeing to perform certain duties in support of the tonowi. The expectation of future favors and advantages was the strongest motivation for most of the tonowi's followers. Thus, the position of leadership was achieved through reciprocal exchange of support between the tonowi and his followers.

During a dispute, the victim and the defendant went to the tonowi and pleaded their cases. Once a verdict was given by the tonowi, if the defendant did not accept it he was considered an outlaw. In such a case, he was free to either be driven out of the area or killed. If the verdict was accepted, which it usually was, the defendant was punished according to the nature of the crime. Torture was not permitted under Kapauku law. Even when a defendant was sentenced to death, he was given the option to run and fight back while his punishers hunted him with bows and arrows. The most popular form of punishment, however, was economic sanctions.

Kapauku law changed and developed based completely on changing customs and norms. Thus, this law evolved from the bottom and upwards in a natural way. This is believed to be the main reason why resistance to the law and the verdict of the tonowi, and thus the society, was rare. The fact that
their law evolved through the spontaneous order of society, and developed on the free market with the absence of a coercive authority, makes this legal system most compatible with a free market economy.

JUSTICE IN THE OLD AMERICAN WEST

Between 1830 and 1900, miners, farmers, ranchers, and other individuals moved faster to the American West than the United States government could expand its law enforcement. This, however, did not leave the American West lawless and violent, contrary to what most people believe. In the old Western societies, law and order was provided privately, and the privately-run legal system was maintained because it functioned very efficiently. Terry Anderson and P. J. Hill concluded after considering several Western non-governmental systems that the Western frontier was not as wild as legends have led us to believe. The market provided protection and arbitration agencies that functioned very effectively either as complete replacements for or supplements to government agencies.10 Similarly, Roger D. Mc Grath concluded that "some long-cherished notions about violence, lawlessness, and justice in the Old West ... are nothing more than myths."11

According to several historians, the West was a place where a person could exist without worrying about tax-collectors, or law-makers. This lack of effective government promoted a sense of individualism and the lack of a social structure led the people of the Western frontiers to act independently and to establish social relationships without the framework of an existing


order. Due to the fact that the westward immigrant encountered no formal government structure as he moved to the frontier, most historians assume that Western society was disorderly and violent. Henry S. Drago, however, pointed out that there were cases of violent behavior in the Old West, but such cases were not very common. Most of the historical studies of the West discovered a great deal of social order in that society. William C. Holden studied the Texas frontier from 1875 to 1890 and found that many kinds of offenses were nonexistent. Citizens did not need to lock doors, and hospitality was widespread, indicating that citizens had relatively little fear of invasive violent offenses. Shootings occurred but they typically involved what the citizens considered "fair fights." Stage and train robberies occurred but these incidents were isolated from most citizens and caused them little or no concern.

Most historians who hold that the American West was a violent place, just assume that this was the case due to the absence of an effective government authority. Most of these historians do not seek to prove that this was actually the case, but merely start from the premise or assumption that it was.

W. Eugene Hollon found that the Western frontier was a far more civilized, more peaceful and safer place than American society today. A

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14 Ibid., p. 196.

westerner "probably enjoyed greater security in both person and property than did his contemporary in the urban centers of the East."\textsuperscript{16} 

In several places in the Western frontier local governments were established to replace privately-produced law, and public police, such as sheriffs, were appointed. In several instances, however, these law enforcement officials were so ineffective or corrupt that they were soon replaced by privately-established law and order. Consider the case of San Francisco. Most of San Francisco's laws during the 1840s and the early 1850s were developed through popular assemblies of citizens.\textsuperscript{17} Governmental law enforcement, which was constituted early, required that every accused person had to be arrested by a public sheriff and had to wait for a trial in the next Court of Sessions, which met every two months at the county seat. Trials were often delayed, and as jail facilities were very scarce, the defendants were discharged, in which case they had plenty of opportunity to escape.\textsuperscript{18} Witnesses were required to pay their own expenses and due to the delays, they did not wait for the trials.\textsuperscript{19} As the population of San Francisco grew during the Gold Rush, the law and order situation got out of hand.

On February 19, 1851, the owner of a San Francisco clothing store was robbed and beaten. The sheriff arrested two men and charged them. A large


\textsuperscript{19} Ibid., pp. 28-29.
number of people gathered the next day before the city offices, demanding quick action against the accused. A committee of fourteen prominent citizens was chosen to take charge of the case. The legal authorities were invited to participate, but they declined, although they raised no resistance and handed over the prisoners to the committee. The committee impaneled a jury and appointed three judges and a clerk, and two "highly regarded" lawyers were appointed to represent the prisoners. After hearing the case, the jury found the prisoners guilty and they were turned back over to the authorities.

In May 1851, a volunteer force was organized to assist city officers in apprehending criminals, with the reluctant cooperation from the sheriff. This volunteer force, together with the citizen's committee was disbanded in September 1851, but during these few months the committee made 91 arrests and crime had declined rapidly in San Francisco.20

Similar stories could be told about other communities in the American West. Henry Plummer, the sheriff of Banack, Montana, in 1863, was also the organizer of "an intricate network of bandits, agents, and hideouts in southwestern Montana."21 Plummer participated in numerous robberies and was responsible for several deaths. When the citizens finally organized their vigilante justice, they hanged Plummer and twenty-one of his gang, banished several others from the area, and frightened the rest off.

Generally, these types of vigilante movements involved law-abiding citizens enforcing the law and re-establishing order. Scholars who view these vigilante movements as lawless are victims of the false argument that law


and order can only be established by government. When the law is only what the government says it is, these vigilante movements can easily be classified as lawless.

As mentioned previously, a law has to be established through custom or reciprocity which can be maintained through kinship, contract, or legislation. When the reciprocities are not maintained, the recognition of a system of law breaks down. "A sufficient breakdown must -- if we are to judge the matter with any rationality at all -- release men from those duties that has as their only reason for being, maintaining a pattern of social interaction that has now been destroyed."22 Such a breakdown in the governmentally-backed legal system occurred in San Francisco and other places where vigilante action was taken. In such a situation, customary law prevailed and private arrangements arose to enforce the law.

**COLONIAL RELIGIOUS COMMUNITIES**

Another example of a historic legal system which was based on reciprocity and custom was that of the early communities in the American colonies. The early settlers in the United States were escaping religious oppression by the English government and thus, after arriving at the American colonies, broke all ties to their previous government. In such a case, their own religious and moral standards served as legal standards. Such a legal system, which was based on religious morals, functioned through reciprocity as each individual's actions were influenced by his "eternal salvation."

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The Puritan communities generally chose mediation when disputes arose. The church obviously had jurisdiction over religious matters, but it also "resolved a variety of commercial and property disputes. These included questions of business ethics ...; land title disagreements; and as late as the beginning of the nineteenth century, allegations of the breach of contract and fraud." These disputes were resolved in congregation, and as these congregations involved all members of the community, there was constant provision of information, opinion, and admonition, and thereby a strengthening of the social order.

The church could neither arrest an offender nor confiscate his property. All that was done was that the offender was expelled or ostracized. Just the threat of ostracism and excommunication was sufficient to ensure compliance with the law. Thus, the legal system functioned efficiently on reciprocity.

Another such example is that of the Quakers of New England. These people had a firm belief in peace and they relied heavily on peaceful means to solve disputes. When a dispute arose, the victim asked the wrongdoer, in a very brotherly and calm way, to respect his rights. If the wrongdoer did not comply, the victim requested compliance in the presence of two or three "discreet judicious friends, who were expected to act justly and expeditiously to resolve all differences." If that did not work, the wrongdoer was asked to accept arbitration from a disinterested and impartial Quaker. If compliance

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24 Ibid., p. 23.
was still not provided, the dispute was referred to a monthly meeting where arbitrators were provided. If the wrongdoer still did not comply, he was disowned from the society. This threat of disownment ensured compliance in most cases. The Quakers also arbitrated business disputes and the Quaker economic system was very much in the "capitalist" mold, based on private property and free enterprise.

ETHNIC IMMIGRANT COMMUNITIES

Chinese in urban Chinatowns, Scandinavians in Minnesota and North Dakota, as well as the Eastern Europeans and Jewish immigrants to Eastern American cities, all established their own legal orders outside the federal, state, or local government that supposedly ruled over the geographic territories encompassing their communities.

As law in China was kinship-based custom at the time of the large nineteenth century migrations, the American Chinatowns developed a similar type of legal system. Merchant elders functioned as mediators for communities of numerous clans and local associations. Each such group solved its internal disputes and a Consolidated Benevolent Association mediated disputes between the different groups. "Ostracism, mixed with the shame of public scrutiny (and no doubt an occasional threat), was a strong deterrent."26 This system of law and dispute resolution did not yield to state law enforcement until after World War II.

Similarly, the Jews of Europe treated their religious teachings as a legal structure. For them, the Talmud and the Torah were law. Throughout Europe, the Jews maintained a strong desire for religious, cultural, and

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26 Ibid., p. 75.
economic autonomy. Thus, they enforced their own laws through synagogues and the Bet Din (rabbinical courts). The Bet Din specialized in resolving any kind of legal disputes.27

In New York, the Jewish community promoted the concept of Kehillah (community) to facilitate economic and cultural interaction. The Kehillah system set up several dispute resolution systems beginning with a Bureau of Industry around 1910 which mediated to bring order to the clothing, fur, and millinery industry. The success of this bureau led to the establishment, by 1914, of "a court of arbitration and network of neighborhood arbitration boards to handle the full range of commercial and religious disputes."28 This system was dominant until after World War I. During the post-war period, the New York Jewish community developed a variety of arbitration tribunals. One such tribunal, the Jewish Arbitration Court, resolved thousands of disputes during the 1920s. This tribunal was funded and staffed through philanthropic and professional support, and faced stiff competition in the market for disputes from the Jewish Conciliation Court of America. These courts gradually transformed into public courts as the Jewish community absorbed into the rest of American society.

**MERCHANT PRODUCTION OF COMMERCIAL LAW IN THE U.S.**

Perhaps the best example of a legal system based on reciprocity is the development of commercial law. As commerce and free trade is based on

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27 Ibid., p. 76.

28 Ibid., p. 80.
voluntary exchange, the concept of reciprocity acts as the underpinning of commerce. A party which is a buyer now may be a seller in the future. As a result, commercial law was almost completely based on reciprocity.\textsuperscript{29} Commercial law reflected business practices and customs, and its imposition in America was dominated by private institutions throughout the eighteenth century.

There were several reasons for merchants establishing commercial law themselves. First, merchants wanted to be sure that legal practices reflected business practices and customs. Second, disputes in such situations involved several technical issues and merchant arbitrators had the expertise to know the technicalities of the trade. Furthermore, arbitration and resolution in merchant courts tended to be quicker and informal as opposed to public courts which were marked by bureaucratic delay. Speed was important in such disputes as it did not disrupt business functions for too long. "Not only did (public) courts, according to one New York merchant, dispense 'expensive endless law;' they were slow to develop legal doctrine that facilitated commercial development."

Around the beginning of the nineteenth century, public courts began to adopt merchant commercial law and private arbitration began to disappear, but whenever the public system failed to function efficiently, privately-run commercial law reappeared on the scene. Around the end of the nineteenth century, commercial law established by private merchants gained popularity again. "The stronger the regulatory state, the stronger the desire for spheres of voluntary activity beyond its control. The growth of the regulatory state

\textsuperscript{29} Ibid., pp. 43-44.

\textsuperscript{30} Ibid., p. 33.
unsettled advocates of commercial autonomy who turned to arbitration as a shield against government intrusion."31

MEDIEVAL ICELAND32

Similar to the case of the early settlers of the American colonies is the case of the early settlers of Iceland. After the territory that is now Norway came under the strong rule of a conqueror called Harald, about ten percent of the population moved west, in about 870 A.D., to what is now Iceland. In 930 A.D., the Icelander settlers held an assembly at which they agreed on a common legal system. These people decided that they could run a very organized legal system without a king, as it was a powerful king that they had escaped from.

The Icelandic legal system revolved around a central figure which was a chieftain. A person could become a chieftain by acquiring a bundle of rights. This bundle of rights was like private property. The rights could be transferred by buying and selling. An individual could find a chieftain who was willing to sell his rights for a price and the buyer could then become the chieftain. The chieftain was the link between the people and the legal system. Before a person was to be sued, the plaintiff inquired who his chieftain was --- just in the same way that today in order to sue someone you must find out what state the defendant is a citizen of to determine the court in which he has to be sued in. The relationship between the chieftain and his subjects was a voluntary one. The chieftain did not own the land or property of his subjects

31 Ibid., p. 101.
like a feudal lord, and the subjects were free to chose between chieftains and
to switch their chieftain to some other who is willing to have them.

The chieftain had the right to vote in the legislature and to pick out judges who decided legal cases. There were thirty-six judges on each court and they were equivalent to present day jurymen. The court system in the medieval Icelandic legal structure included several levels which went up to the quarter courts or fifth courts.

Under this legal system there was only one "government" part-time employee. This employee was the lawspeaker who was elected for a three-year term. The lawspeaker presided over the legislature, memorized the law, gave legal advice, and once during his three-year term, recited the entire code of law at an annual assembly of people from all over Iceland which lasted for two weeks. During the recitation of the law code, if the lawspeaker omitted a part of the law and nobody objected, then that part of the law was eliminated from the code.

If an offender was sued and the court found him guilty, he was considered an outlaw if he did not abide by the verdict. In such a case, the outlaw was given a few weeks to get out of Iceland, and if he did not, he was free to be killed by the plaintiff without any legal repercussions. If his friends tried to defend him, they were violating the law and could be sued as well.

A claim for damages under the Icelandic legal system was a piece of transferable property. If the victim was weaker than the offender and the offender could get away without paying damages to the victim, the victim could sell his claim to a stronger person who was willing to buy it. The new owner of the claim now had the responsibility to collect the damages from the offender, in the process establishing his reputation for use in future conflicts.
At the same time, the victim got part or all of his damages and he established his reputation to reflect that anyone who did him wrong would pay.

Unlike the present legal system where civil law is enforced privately and criminal law is enforced by the government, under the Icelandic legal system all law was civil law and was enforced privately. When a weak victim sold his claim to a stronger party for part of the damages, it was similar to the modern practice of the plaintiff agreeing to split the damages with his lawyer instead of paying him a fee. Consider the following quote from David Friedman.

"Because the Icelandic system relied entirely on private enforcement, it can be seen as a system of civil law expanded to include what we think of as criminal offenses. It is similar to our civil law in another sense as well. Under our system, the loser of a civil case typically, although not inevitably, ends up paying money damages to the winner; the loser of a criminal case typically ends up with a non-monetary payment, such as a jail term; or in extreme cases, execution. Under the Icelandic system the typical settlement was a cash payment to the victim or his heirs. The alternative, if you lost your case, was outlawry. The payment for killing someone was called 'wergeld' -- man gold."

David Friedman estimates that the payment for killing an ordinary man was between 12.5 and 50 years of an ordinary man's wages.34

This legal system made a distinction between a murderer and a killer. If a person killed someone and immediately admitted to it in front of witnesses, he was classified as a killer. If he ran away and hid from the law, he was a murderer. The "wergeld" paid by a killer corresponded to the punishment imposed today on a murderer who turns himself in

33 Ibid., p. 204.
34 Ibid., p. 205. See also David Friedman, "Private Creation and Enforcement of Law," JOURNAL OF LEGAL STUDIES, June 1984.
immediately after the deed. By committing a murder in the Icelandic system, the defendant forfeited all justifications, such as self-defense, that might have made the action legal.

This system collapsed in the thirteenth century, more than three hundred years after its establishment. The collapse was preceded by a period of about fifty years of severe violence. It is estimated that during the final period of the collapse, deaths due to violence totaled about 350. That comes up to 7 deaths a year in a population of about 70,000, i.e., one death per ten thousand per year.\(^5\) This is comparable to the highway death rate, or to the combined rates for murder and non-negligent manslaughter in the United States today. This suggests that even during what is considered to be the final period of the breakdown of the Icelandic system, their society was not substantially more violent than society today.

One possibility for the breakdown of the Icelandic legal system, according to David Friedman, is the increase in the concentration of wealth and power in the hands of the few which made the system unstable. But perhaps the most important reason is that the society of medieval Iceland started to get plagued by an outlandish ideology known as monarchy. This is evident by the fact that disputes during the final period of breakdown were no longer over who owed whom what, but over who was to rule Iceland.

Thus, when enforcement of law is entirely private, it does not depend on enforcement by an organization with special rights beyond those possessed by all individuals. Private enforcement agencies are a more

\(^5\) Ibid., p. 207.
formalized version of the arrangements by which individuals and coalitions in Iceland used force to protect their rights.\textsuperscript{36}

**THE YUROK INDIANS AND THEIR NORTHERN CALIFORNIAN NEIGHBORS**

Walter Goldsmidt, an anthropologist, studied the Yurok, Hupa, and Karok Indian tribes in 1951. In his study he discovered that the structure of these societies was remarkably like that of capitalistic Europe which was emerging about the same time that these tribes existed.\textsuperscript{37} In this primitive society, property was held by everyone in the form of private property titles. These Indians were organized in households and villages and there was no "state-like government with coercive power."\textsuperscript{38}

Private property rights were defined completely in this society on the following basis: (1) there was a separation of title to different types of products; (2) there were ownership rights within the territory of a foreign group (for example, the Hupas owned property inside Yurok territory); (3) there was a division of title between persons (for example, a fishing place could be owned by several people and its use could be divided such that one person used it one day, another the next, and so on). These ownership titles

\textsuperscript{36} Ibid., p. 208.


were totally transferable and this exchange of ownership was facilitated by a monetary system.\textsuperscript{39}

Under this legal system, if a plaintiff wanted to process a legal claim; he would hire two, three, or four "crossers;" who were nonrelatives from a community other than his own. The defendant also hired his own crossers, and this entire group of crossers would act as go-betweens, would ascertain claims and defenses, and would gather evidence.\textsuperscript{40} After hearing all of the evidence, these crossers would render a verdict. The crossers, in the process of settling disputes, on occasions also made new rules, in the same way as today judges set precedents that become part of the law.

The Yurok legal system recognized several offenses "ranging from murder, adultery, theft, and poaching to curses and minor insults."\textsuperscript{41} Due to the absence of a formalized social unit, all offenses in this legal system were against the person, and thus can be classified as torts. Just as in the medieval Icelandic legal system examined earlier, all punishment for offenses was in the form of a payment in terms of money or property. As law was in the form of torts, and there was no government, "order prevailed through the consistent effort of each person to serve his own self interest."\textsuperscript{42}

The crossers' verdicts were enforced due to the threat of ostracism, and any offender who failed to pay damages automatically became the wage slave

\begin{itemize}
\item \textsuperscript{39} Ibid., p. 8.
\item \textsuperscript{40} Ibid., p. 8.
\item \textsuperscript{41} Walter Goldsmidt, "Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge," AMERICAN ANTHROPOLOGIST, No. 53, October - December 1951, p. 512.
\end{itemize}
of the plaintiff. If the offender did not submit to this, he became an outcast or an outlaw and could be killed without any legal repercussions. This threat of violence did not imply that violence was common. Rather individuals avoided violence as much as possible. The threat of ostracism was viable because each man was a member of a "sweathouse group," which was a group of men from three or four neighboring houses who socialized and participated in rituals. These men were free to join any sweathouse group they wished with the acceptance of the other members in that group.

When an offender did not accept the verdict of a crosser on a claim of one of the members of the sweathouse group, the other members of the group backed this plaintiff's (fellow member's) efforts for physical retribution. The members did this because they believed that they could also be in such a situation in the future and would require other members' support. Bruce Benson explains this process in more detail as follows.

"The arrangements were voluntarily entered into. An individual exchanged a commitment to support others in the case of a legal dispute for the equivalent commitment from those other individuals for the same support should he find himself in such a dispute. And finally, the arrangement was symmetrical in the sense that each individual had strong incentives to support anyone in his group in the event of a dispute because he realized that he might require the same kind of backing in the future when his own property rights might be threatened. The fact that men voluntarily entered into such reciprocal arrangements implies that the accompanying duties were clearly spelled out and generally fulfilled when a dispute arose."
Thus, these Indian tribes functioned efficiently through a privately enforced system of private property rights. This system was based on reciprocal arrangements, as most customary law is, and "well-established arbitration arrangements, with established legal sanctions backed by the treat of ostracism and, ultimately, physical retribution."45

45 Ibid., p. 11.
Property rights and legal systems are deeply rooted in ethics. Respecting one's property rights forms the basis of ethical and moral philosophy. Most moral standards, including religion, are based on the respect for fellow man, and most legal systems today are based on the foundation of moral and ethical standards that have evolved due to centuries of evolution. The first law code, written by Hammurabi, an ancient Mesopotamian ruler, about four thousand years ago, claimed that killing or harming others was wrong and should be punished. Thus, over the years, human civilizations have taken these basic laws as natural (part of "natural law").

The free market and ethics go hand in hand. Just as we established earlier that in order to have a free market private property rights have to be defined, the free market functions smoothly according to its own system of rules and regulations once these private property rights are defined. Under a system which guarantees private property rights, a person has complete ownership of his own body, his own skills, and all labor that he derives from those skills. If that is the case, then a person should also have complete ownership of the product of his labor. This includes land and all natural resources.
resources that he cultivates through his own labor. This person would specialize in the skills that he is best at and would exchange the fruits of his labor with that of another person's labor. All forms of ownership boil down to the ownership of a person of his self and the land and resources that he cultivates with his skills, in a free society.46

Thus, the free market is nothing but a society of voluntary and consequently mutually beneficial exchanges of ownership titles between specialized producers. I exchange my skills and products for your skills and products that I value. Thus, contrary to the belief that the free market rests on the wicked doctrine that labor is a commodity, the free market is based on the natural fact that, as in the case of tangible property, one's own labor service can be alienated and exchanged for other goods and services. Although, however, one's labor service is alienable, his will is not. This means that a person can sell his labor service for money -- whether it be a teacher who sells his teaching services to a student or a worker who sells his labor to a capitalist for wages.

Because of the fact that a person's will is his or her's inalienable property, the labor service can be alienated but the capitalized future value of the service cannot be sold by that person. In other words, a person cannot sell himself into slavery and have this sale enforced, as this would mean that his future will over his own person was being surrendered in advance. A person can naturally expend his labor for someone else's benefit but he cannot transfer himself, even if he wished, into another person's capital good. If he

were to do so, he would not be able to rid himself of his own will which may change in future years and repudiate the current arrangement.

Thus the concept of voluntary slavery is contradictory. As long as the laborer voluntarily remains subservient to his master, he is not a slave as his submission is voluntary. If he later changed his mind and the master enforced the slave contract by violence, the slavery would not be voluntary. Therefore, the free market is based on property titles that are founded on the basic natural rights of human beings over their own persons, their own labor, and over the land resources which they transform.

A purely free market exists when ownership and property titles are not distributed but are acquired through labor and homesteading, and these property rights or titles are not molested. As a result there is specialization, exchange, and thus harmony, sociability, and greater productivity. In such a society, the freedom to steal or to aggress would not be a state of freedom at all because it would violate the freedom and the property right of the victim.

The ethic of liberty is universal. Every human being has a basic need to be free and to use his talents and resources in the most optimal way that he sees fit. Freedom not only implies freedom of will and action but also the freedom to own a title or property right to one's own body, skills, and the reward one derives from those skills. Only a purely free and libertarian society, without an authority which has a monopoly on coercion, can guarantee everyone's rights without molestation. As long as there is a coercive authority, rights of someone or the other would be violated.

A purely free market, then, is naturally based on ethics through the enforcement of property rights. Moreover, ethical behavior arises as a direct result of the functioning of the free market as noted earlier, for example,
through the reciprocal nature of transactions. In a purely free society, ethical and moral standards are enforced through firm private property rights and binding contracts. In such a society, promises would only be enforced if they are in the form of binding contracts, for instance. If person A agrees to transfer $1,000 to person B for $1,100 in a year, the contract is not enforceable because A promised to pay B, but because A transferred title to $1,000 to B on the condition that he receives $1,100 from B in a year. Therefore, although keeping a promise would be a morally right thing to do, it would not be legally enforceable until it is in the form of a binding contract.47

Similarly, if a parent promises to pay a child a certain amount of money regularly for college, it would not be an enforceable "promise" until title of present or future money has been transferred. If during the child's college education the parent stops providing the periodic allowance, maybe due to financial problems, the child would not be able to collect from the parent, unless the parent had signed a contract where the child would gain education on the condition that the parent paid for the education.

The ethics of a private property rights system is a concept that has been understood for centuries. Attempts have been made to justify a system based on private property rights through an objective set of ethical and moral standards. A major scholar who demonstrated this was John Locke. Locke, a prominent political philosopher of the seventeenth century, in his 1688 book The Second Treatise on Government, points out that land and all the nature which is associated with that land is provided by God for human beings to share. Thus, this nature is communal property and it has to be apportioned among people in some objective and just way. The most ethical way of

dividing land and nature, that is assigning property rights to it, is by, what is now called, homesteading. A person who mixes his labor and transforms natural resources into useful and consumable goods, with an "intrinsic value," should have a private property right on that part of the natural resources. Thus, he would also have a property right to all the revenue he would derive from exchanging or selling the product of his labor.\textsuperscript{48}

Thus, as much as the individual is willing to work and insofar as he works to "till the soil" and transforms goods out of natural resources, the more property rights he would have to the natural resources he works with and to the fruits of his labor. In the process, he would also increase the total wealth of society by increasing the number of goods and services produced.

Locke explains that by this logic, any person who holds the objection that a person has acquired "too much" property through homesteading and should be stopped, violates the property rights of the homesteader. Thus, such an act should be considered unethical. Locke states:

"As much as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labor does as it were enclose it from the common... God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and reason commanded him to subdue the earth, i.e., improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him... God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational

(and labour was to be his title to it), not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement as was already taken up, needed not complain, ought not to meddle with what was already improved by another's labour; if he did, 'tis plain he desired the benefit of another's pains, which he had no right to,..."\(^{49}\)

Locke explains that civilizations have historically come about due to the principle of homesteading. When human beings transform and labor with the nature around them, which is initially unowned property, property rights become more clearly defined. Locke explains this concept by relating it to religious scriptures.

"For we see in that part of the world which was first inhabited, and therefore like to be the best peopled, even as low down as Abraham's time they wandered with their flocks and their herds, which were their substance freely up and down; and this Abraham did in a country where he was a stranger: whence it is plain that at least a great part of the land lay in common; that the inhabitants valued it not, nor claimed property in any more than they made use of. But when there was not room enough in the same place for their herds to feed together, they by consent, as Abraham and Lot did (Gen. xiii. 5), separated and enlarged their pasture where it best liked them. And for the same reason Esau went from his father and his brother, and planted in Mount Seir (Gen. xxxvi. 6)."\(^{50}\)

\(^{49}\) Ibid., pp. 17-18, paras. 32-34.

\(^{50}\) Ibid., p. 21, para. 38.
CHAPTER IV

IMPLICATIONS OF THE THEORY OF JUST PROPERTY

From this Lockean idea of "first ownership to first use" (the homesteading principle), where each man owns the land that he mixes his labor with, and thus owns the products of such labor which he has complete right to exchange or give out as gifts, we can derive certain conclusions. If this method of assigning private property rights is just and ethical, then any attempt to violate such a principle, that is the right to the homesteaded property, would be considered to be wrong and unethical. The most obvious cases of aggression against one's just property -- which are stealing, forcibly invading one's property, trespassing, physical aggression against a person (as a person's body is his property), and destroying one's property -- are easily understood as immoral and unethical in most societies. Let us, however, examine the more subtle cases such as air and noise pollution.

Excessive noise can be considered to be a form of aggression against one's property right, as it hinders the enjoyment of his or her own property. Consider an example where an airport is built in a certain area around which
there is a large amount of empty land. The traffic of airplanes would create a certain amount of noise over the surrounding area. If later the surrounding land is bought by a home-developer, homes are built, and home-owners move in, can the home-owners later hold the airport liable for the noise? The answer is no, because by buying the land first the airport has earned the right to use the land for its operations, the noise being a necessary part of them. When the home-owners bought the property around the airport, they should have anticipated the noise level and thus should have been prepared to accommodate to it. Any attempt to hold the airport liable for the existing noise would be aggression against the just property right of the airport. By buying the land first, the airport has earned an "easement right" to create the noise in the surrounding area. If the airport, however, increased the noise level after the home-owners moved in, to a level higher than they anticipated initially, the airport should be held liable for noise pollution over and above the anticipated level.

Let us now consider air pollution. There is a certain amount of air pollution that continually goes on through natural sources, for instance, when volcanoes erupt or even when human beings breathe. Therefore, it can be said that air pollution is only a problem when it harms someone or reduces his enjoyment of his property. Just as every object in the world emanates low-level radiation, radio waves cross our properties all of the time. Does this mean that we should ban all radio transmission and put severe restrictions on all things that let out low levels of radiation? Absolutely not,


52 Ibid., pp. 248-249.
as this radiation is undetectable and totally harmless. Thus, the only time air pollution is a problem is when it physically harms someone or hinders his or her enjoyment of private property.

By this token, we would define invasion of private property not simply as crossing a boundary, but crossing a boundary in such a way as to interfere with the owner's enjoyment of his property. In the case of low-level radiation, then, the radio station which initially owns a piece of land would have an easement right to radio waves as far as necessary without harming anyone's property.53

Air pollution, such as noxious odors, smoke, or other visible matter that can be sensed by human senses, which does harm other people and hinders their enjoyment of their private property, should constitute invasion of a private property right, unless there is a "homesteaded" easement right to the air pollution. No one has the right to clean air, but one does have the right not to have his air invaded by pollutants.54

With the above factors in mind, how should private property rights be assigned? The just method of assigning or recognizing private property rights, in the light of the above-mentioned factors then, would be to own a "technological unit" of property. That is, if resource X is owned by A, then A must own enough of it so as to include necessary appurtenances. In the case of the radio station, "the extent of ownership should depend on the technological unit of the radio wave -- its width on the electromagnetic spectrum, so that another wave would not interfere with the signal, and its

53 Ibid., p. 252.
54 Ibid., p. 253.
length over space." The ownership is thus determined by width, length, and location. Murray Rothbard explains the concept further through the following example.

"... the homesteading provision in the federal land law of 1861 provided a unit of 160 acres, the clearing and use of which over a certain term would convey ownership to the homesteader. Unfortunately, in a few years, when the dry prairie began to be settled, 160 acres was much too low for any viable land use (generally ranching and grazing). As a result, very little western land came into private ownership for several decades. The resulting overuse of the land caused the destruction of western grass cover and much of the timberland."

In contrast to the principle of technical unit, the common law principle in such a case is that every land-owner owns the airspace above him indefinitely into the heaven and downward to the center of the earth. As can be imagined, this principle would create a lot of problems. No aircraft would be able to fly, and no space travel and exploration would take place as millions of people's property rights in airspace would be violated. Under the homesteading criterion, the common law principle does not make any sense. If one homesteads and uses the soil, in what sense is he also using the sky above him into heaven? Obviously, he is not.

So far the only property right theory that comes close to the homesteading principle is the "zone" theory, which states that a person owns the lower part of the airspace above his land. This airspace is enough to help the property-owner enjoy his property completely. The extent of the space depends on the nature of the property. These final notes brings me to the

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55 Ibid., p. 254.
56 Ibid., p. 254.
next section of the paper which explores free market legal systems in more
detail and attempts to explain what law is best suited to a free market.
CHAPTER V
FREE MARKET LAW

As explained earlier, clearly defined property rights are critical requirements for the functioning of a market system. Some system of defining, protecting and enforcing property rights is required before a free market can develop. "When property rights are assigned to the 'public' rather than to private individuals, people not only have incentives to overuse the common pool service, they do not have incentives to invest in inputs as replacements for the services they consume... Appropriate private assignments of property rights (eg., recognition that crimes are torts and the victims should have the right to restitution) would eliminate many of the underinvestment incentives."57

It is suggested that this enforcement of private property rights would require coercion, and as government is the only entity which would have such strong coercive powers, such a system would only be provided by government authority. While it is certainly true that a plausible threat is necessary to comply with laws and a court's judgment, as we have seen, this threat does not have to come from the government. It can be in the form of

ostracism, disownment, or simply reciprocity. We have seen from our examination of customary legal systems that just because the threat of violence underlies any system of laws, violence need not be the only threat which ensures compliance in a legal system.

Another justification often provided for the government provision of law is that because the establishment of laws and the mechanism for their enforcement has the external effect of allowing the market economy to develop and function, no private individual engaged in the production and enforcement of law would be able to charge for all the benefits the law would generate and thus too few laws would be developed on the free market. Yet another justification provided for the government production of the law is that no individual would want to give another individual authority to coercively enforce a system of property rights.

However, as we have seen, legal systems which guarantee and enforce private property rights have and usually do develop on the free market. We have also seen that the provision of a foundation for the free market is not an external benefit but the primary function of a legal system. If property rights are clearly defined and assigned to private individuals, then there is no question of externalities arising. Thus, law will develop according to the demand for it; that is, whenever society requires rules for its smooth functioning law will evolve in an amount exactly equal to what is required, through the spontaneous order of human beings.

Moreover, under customary or free market law, as we have seen, legal (or coercive) authority is not arbitrarily provided to an individual or a group

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but it is voluntarily provided for some reciprocal benefit or on the basis of personal achievements or accomplishments by the citizens of a community. Thus, it is completely possible to have a legal system produced and enforced on the free market. In fact, such a legal system, as we have seen, is most conducive to the free market system. "Public courts are more likely to create uncertainty and litigation than are private courts." Furthermore, the principles of free society do imply a theory of property rights, which is self-ownership and the ownership of resources discovered and transformed with one's labor (the Lockean idea). Thus, a government authority, contradictory to the market, is not required to define or to allocate property rights. Politically dictated rules are not defined to support the market process. In fact, they do just the opposite -- no free market is compatible with a law-making process centralized by authorities.

We have seen that privately developed and enforced systems of customary law have developed, throughout history, in various societies. This is evidence of the fact that throughout history, custom and tradition has been more important in determining rules of conduct than written constitutions and legislation. The evolution of customary law has been compared to the development of language. Just as language develops through the spontaneous order of human beings and their need to engage in cooperation and interaction with other human beings, customary law


evolves in the same way and for the same purpose.\textsuperscript{62} In fact, all of the economy and society develops this way and for this purpose.

The fact that different societies throughout history have had different customs and have developed different legal systems does not imply that legal systems would have been drastically different from each other if they had been allowed to develop on the free market. From our examination of customary legal systems, we have seen that the basic characteristics and principles of each system have been the same, together with other similarities; just as, in spite of minor differences in accents, people speaking the same language can understand each other easily -- an Englishmen can understand an American and a New Yorker can understand a person from Alabama.\textsuperscript{63}

The increasing centralization of the law-making process is believed to be due to the increasing transfer of property rights from private individuals to government authorities, more accurately, to interest groups.\textsuperscript{64} This uncertainty created by the governmental legal system's redistribution of private property rights, leads individuals to consume their private properties more rapidly. Moreover, they spend less time on improving their properties and use their properties less productively. Thus, the bureaucratic legal system would create negative externalities for society as resources would be overused and underproduced. "When negative externalities arise in the process of

\begin{itemize}
\item \textsuperscript{63} Ibid., p. 28.
\item \textsuperscript{64} Terry Anderson and P. J. Hill, THE BIRTH OF THE TRANSFER SOCIETY, (Stanford, California: Hoover Institute Press, 1970).
\end{itemize}
producing some good or service, too much of the good or service is being produced. This is the case with government production of laws through legislation.\textsuperscript{65}

The basic principles of private property and freedom of contract, as we have seen, characterize all customary legal systems. We have also seen that as such systems evolve, the requirement for the extension of these basic principles to cover unanticipated circumstances arises, and customary law adopts itself to these changing requirements of the society. A legal system developed on the free market or through custom or tradition would have the characteristics which I shall examine in this part of the paper.

First of all, unlike most disciplines, law cannot be a discipline free of normative principles. That is, in such a field, we cannot have a "value-free," objective, and positive set of principles which would define a set of legal rules. Reason cannot merely define legal rules. Law has to evolve, as explained earlier, through customs or traditions, or through some sort of moral or ethical standards. Consider, for example, tort and criminal law. These two types of law are merely a set of prohibitions against the invasion of, or aggression against, private property rights. However, if such laws dictate that it is "unlawful" to aggress against the private property of a person, then they automatically assume that a person's private property is a just property. Thus, these legal prohibitions are not value-free but a set of theories of justice and the just allocation of property rights.\textsuperscript{66}


\textsuperscript{66} In recent years, however, some jurists and "Chicago School" economists have tried to develop some value-free theories of allocating private property rights. I shall examine these theories in more detail in Chapter VI.
As we have examined earlier in the case of noise and air pollution, no action can be considered illegal and an aggression against an individual's private property right unless it harms him or hinders his enjoyment of his property. We can claim this as a general case for all types of invasions of property rights, and only such actions, thus, should be combated with the full powers of the law. Just as we derived our conclusions on noise and air pollution from the Lockean theory of just property (self-ownership and homesteading), we can derive similar conclusions for law in general. In fact, the concept of self-ownership and homesteading is the justification on which the entire system of property rights is based. This principle establishes the right of every man to his own person, the right of donation, the right of bequest (and concomitantly, the right to receive the bequest or inheritance), and the right of contractual exchange of property titles.67 Most of the criticisms of legal and political theory have centered around the failure of such theory to pinpoint physical invasion as the only action that should be illegal and that justifies the use of legal action to combat it.68

By this token, just as a person has the right to legally protect his property from physical invasion and to keep that property from invasion, he does not have the right to protect the value of that property, since its value is determined by what others think of that property and what they are willing to pay for it. Thus, as the law of torts deals with the physical invasion of person


or property, the prohibition of libel and slander is a strange anomaly in tort law. It may very well be morally wrong to defame someone's reputation, but this defamation cannot be enforced under free market or libertarian law because a person's reputation reflects the value other people place on that person. A person does not have the right to legally enforce the value of his property. Words or opinions of other people about a person do not constitute invasion of a person's physical property right -- they merely reflect other people's subjective valuations of that person. Thus, outlawing defamation is in itself the invasion of the property right of the person who holds such defaming opinions.69

It should be clear that a person has a right to defend himself against aggression against his property. But what if, while defending himself from aggression, a person violently retaliates and injures an innocent bystander? Under libertarian or free market law, the defender would be held responsible for aggressing against the innocent bystander, even if it was accidental, and the initial aggressor who provoked the entire attack would be held responsible for aggression against the defender's property right. The initial attacker's liability would be higher than that of the defender. Thus, the rights of every party would be upheld and defended. Murray Rothbard sums up the idea as follows.

"... Anyone has the right to defend his property against an overt act initiated against it. He may not move with force against an alleged

aggressor -- a trespasser against his land or chattels -- until the latter indicates force by an overt act."\textsuperscript{70}

Under a libertarian legal system, or a system that is strictly based on defining private property rights, punishment and defense have distinct definitions. "Punishment is an act of retribution after the crime has been committed, and the criminal apprehended, tried, and convicted."\textsuperscript{71} On the other hand, in the process of defense, while the crime is still in progress, the property not yet recovered, and the criminal not yet apprehended, the victim should be allowed to use all force necessary to prevent the aggressor from violating his property right.\textsuperscript{72}

What about a situation where it is unclear whether aggression is being committed? In such a case it is just not to take any action and to ensure that an innocent person is not being coerced -- it is better not to commit aggression ourselves.\textsuperscript{73} Thus, the law should be based on the principle "innocent until proven guilty."

From this reasoning we can deduce that an act would be an act of aggression only if it is proven in a court, or in arbitration, beyond a reasonable doubt. Thus, an act has to be an overt act of aggression. A regulation which automatically makes an act "unlawful" without basing it on the principle of non-aggression would be illegitimate itself. Such a regulation would itself be


\textsuperscript{71} Ibid., p. 241.


an aggression against the rights of non-criminals. Consider an example where a builder constructs a structure and it collapses. In such a case, the builder would be held liable for constructing an unsafe structure by victims and their heirs. However, if a government authority imposes "safety" regulations on all builders, then builders who do not intend to build unsafe structures and jeopardize people's lives would also be affected by costly legal requirements in advance. Similarly, builders who construct structures that meet the set of government requirements but which later collapse, would have "received the advanced imprimatur of the authorities."

Usually environmental regulations fall in this category of government regulations. An act is claimed to be "illegal" even before it is determined that it violates another person's property right or hinders his enjoyment of his private property, "beyond a reasonable doubt." Regulations that require acres and acres of land to remain undeveloped to "protect the environment" constitute rules which could be judged as violating the rights of non-criminals.

Under libertarian or free market law, only the victim of an act of aggression, or his heirs or assigns, have the right to press charges against an offender. Murray Rothbard explains as follows:

"District attorneys or other government officials should not be allowed to press charges against the wishes of the victim in the name of 'crimes' against such dubious or nonexistent entities as 'society' or the 'state.' If, for example, the victim of an assault or a theft is a pacifist and refuses to press charges against the criminal, no one else should have the right to do so against his wishes. For

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75 Ibid., p. 258.
just as a creditor has the right to voluntarily forgive an unpaid debt, so a victim, whether on pacifist grounds or for any other reason, has the right to 'forgive' the crime so that the crime is annulled. 76

Similarly, a rule which errs in establishing the true aggressor would also be an act of aggression in itself under a libertarian legal system. One such example could be found in the field of product liability. Presently, if a buyer is sold a defective product, he can hold the manufacturer directly liable. The proper rule under libertarian law would be the "privity rule," which states that "the buyer of a defective product can sue only the person with whom he had the contract." 77 Thus, the buyer would sue the retailer who sold him the product. The retailer would sue the wholesaler, and the wholesaler the manufacturer. 78

If free market or libertarian law is based on individual rights and private property rights, and if it negates any concept of communal property, "society," and the state, then there would be no crimes against the "society" per se. All crimes would be against individuals. As present criminal law is based on the premise of "crimes against the society," it is publicly imposed. Under libertarian law, however, there would be no criminal law. Since all crimes are against individuals, they would all be classified under tort law. Rothbard explains as follows.

"However, there is no reason why parts of the law that are now the province of criminal law cannot be grafted onto an enlarged law of

76 Ibid., p. 258.
torts. For example, restitution to the victim is now considered the province of tort law, whereas punishment is the realm of criminal law. Yet, punitive damages for intentional torts (as opposed to accidents) now generally are awarded in tort law. It is therefore conceivable that more severe punishments, such as imprisonment, forced labor to repay the victim, or transportation, could be grafted into tort law as well.\(^79\)

Most unsuccessful attempts at invasion of property are actually successful lesser invasions of person or property. Thus, they should be prosecuted under tort law. For example, "attempted murder is usually an aggravated assault and battery, attempted armed robbery is usually an assault, attempted car theft or burglary is usually a trespass."\(^8\) Even if the attempted crime created no aggression against the property of the victim per se, the fact that upon knowing the intent of the offender the victim would be subjected to fear, would be an assault prosecutable under tort law. Therefore, the only offense that would not be prosecutable under tort law would be one which no one would know anything about. But such an offense would not be prosecuted under any law.

Just as criminal law, under a libertarian legal system, would be included in tort law, some offenses classified as criminal would not be offenses at all. These are offenses which do not have any victims and cannot be proven to be acts of aggression. Examples are drug use, prostitution, and gambling. While such acts would be considered wrong according to several moral and ethical standards, they are acts which involve a person's use of his own body or property in a way which he sees best. Under a free market legal

\(^79\) Ibid., p. 259.

system, few people would be willing to pay to prosecute these "offenses" which have no victims. "People who want to control other people's lives are rarely eager to pay for the privilege. They usually expect to be paid for the service they provide for the 'victims'."81 Under a free market legal system, such acts would be illegal only if a society believes that such acts are causing harm to innocent victims by people indulging in such activities; in which case the society would be willing to pay to enforce laws against such acts.

What about a situation in which there are several offenders or aggressors? How are offenders in such a case to be held liable? The answer to these questions is that offenders could be compulsorily joined together "only when all parties acted in concert in a joint tortious enterprise."82 It has also been proposed under libertarian law that the "joint aggressors" could be held equally liable for the entire amount of the damages. Otherwise, the damages could be apportioned according to "the separate causal actions contributed by each defendant."83

Similarly, if there is more than one victim in a legal suit, it is appropriate under libertarian law to have these plaintiffs join together against the offender (or offenders) in a "class action" suit. However, in such a situation the only way the class action suit could be filed is when every plaintiff in the suit agrees to sue for damages. A class action suit cannot represent citizens who have not even heard of the case or are not interested


83 Ibid., p. 261.
in suing, as is generally done today. "Thus, it would not be permissible for 50 residents of Los Angeles to file a pollution suit on behalf of the class of 'all citizens of Los Angeles' without their knowledge or express consent." As established earlier, only the victim or his heirs or assigns should be allowed to file a suit against the offender. Thus, class action suits should not be allowed except where every plaintiff actively and voluntarily joins in the suit, and where common interests prevail over separate or individuals ones.

Under a free market legal system, offenses are punished through fines payable to the victim. We saw this in our analysis of customary legal systems where punishment was in the form of a monetary unit or a piece of transferable property. The offender would not only be required to pay the victim for his damages, but would also bear the costs of the trial.

This form of punishments is more efficient than the present form, which is imprisonment, where the cost of imprisonment is born by common citizens and the prisoner's time is wasted. Moreover, as the offender would bear the cost of trials under a libertarian legal system, he would have an incentive not to waste the court's time. It would also encourage out-of-court settlements which would put less burden on the court system. Out-of-court settlements in a libertarian legal system would not be like the plea bargaining situations today, where the offender bargains with the "public" prosecutor to get a lesser sentence if he admits to a lesser crime. The bargains would be between the victim and the offender.

84 Ibid., p. 262.
86 Ibid., p. 29.
Fines are of different degrees for different offenses under free market law. As we saw in the case of medieval Iceland, fines were high enough, according to the offense, to deter crime. Moreover, the fine for a murder was much larger than that for a killing. As noticed in most of our examples of customary legal systems, and medieval Iceland in particular, the victim's right to restitution, for violation of his property, was transferable. Thus, such a system would make sure that the victim of aggression is provided with restitution.

What would compel offenders to pay fines under a free market legal system? As we have seen in our analysis of customary law, it is usually the threat of ostracism and disownment, and the reciprocal nature of the legal system. There would always be outlaws, just as there are outlaws in our present legal structure (more in our societies than in primitive societies), but a free market legal system implemented today would pose a bigger threat against outlawry due to the presence of high technology, communications and computer linkage systems, and credit-rating agencies.87 Moreover, in today's complex societies human relationships and transactions are more important than in primitive societies, and the threat of ostracism from society would be a greater deterrent to outlawry.

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87 Ibid., p. 37.
CHAPTER VI
CRITICISMS AND CONCLUSIONS

James Buchanan asks the following questions: If government is dismantled how would rights reemerge and command respect? How would laws gain the respect for legitimacy from citizens? He believes that a social contract or constitution would arise from the collective action which is necessary in a society. This social contract would establish and define the rights of people and establish the institutions to enforce these rights.88 However, customary or libertarian law develops on the free market, through a society's customs and traditions, and it is its reciprocal nature that provides the basis for its recognition. Similarly, the institutions to enforce these property rights usually also evolve through the reciprocal benefits on the free market. "Cooperation does not require collective (governmental) action."89

A CRITIQUE OF THE CHICAGO SCHOOL'S IDEAS ON PROPERTY RIGHTS

As mentioned earlier, the field of law cannot be value-free and legal theory must have some normative basis. However, the entire idea of


property rights and ethics of the Chicago School of economics is based on the premise that it does not matter how property rights are assigned. As long as some property rights are assigned, in the case of conflicting interests of two parties, resources would be allocated as efficiently as possible. The biggest name in the Chicago School's ideas on law and economics is Ronald Coase. In his famous article "The Problem of Social Cost," Ronald Coase uses the example of a railroad locomotive blighting nearby farms and orchards. Coase called this act an "externality" which had to be "internalized" if "social efficiency" was to be achieved.\(^90\)

According to Coase, it does not matter if the farmer has a property right to the orchards and the farms and should hold the railroad responsible for the damage, or if the railroad has the right to emit the smoke and the farmer should bribe the railroad to install a smoke prevention device. Resources would be allocated such that total wealth would be maximized under either allocation of property rights. Coase's example continues as follows. The farmer's damage is, say, $100,000 and in Case 1 the farmer owns the property. Then he could hold the railroad liable to pay $100,000 to him. In Case 2, where the railroad has the property right to emit the smoke, the farmer would pay a bribe of up to $100,000 to the railroad to install a smoke prevention device (SPD).

Under the conditions of Case 1, if the SPD costs $80,000, the railroad will install it instead of paying the farmer damages of $100,000. Under the conditions of Case 2, the farmer would be willing to pay the railroad the $80,000 to install the SPD as it would thus be able to save $100,000 worth of

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crops. Therefore, the SPD would be installed and the crops would be saved no matter how the property rights are assigned. If the SPD costs, say $120,000, then under the conditions of Case 1, the railroad would keep pouring out the smoke and paying the farmer damages of $100,000 instead of installing the SPD for $120,000. Under the conditions of Case 2, the farmers would not choose to pay the railroad $120,000 to install the SPD so that $100,000 worth of property could be saved. Thus, under any kind of allocation of property rights, the SPD would not be installed. Coase states that the above conclusions would only be true in the absence of transaction costs.

Coase does not point out another condition under which the above conclusion would not be true -- if we take into account any psychic or psychological factors. Obviously, if the farmer has a personal attachment to the orchard and the farms, or if he has a large psychic income attached to them, $100,000 may not be enough to compensate for their destruction. What if the farmer requires a million dollars in compensation due to his psychic attachment to the orchards and the farms? Obviously, the railroad would not be willing to pay the amount and the Coasian argument would break down.91

Another problem with the Coasian theorem is that costs are almost impossible to measure objectively when transaction costs are included in the analysis. Coase states that when transaction costs are taken into account, property rights should be assigned in order to be minimize total ("social") cost. But costs are subjective and may not be measurable in monetary terms. Thus, there may be no way of measuring which allocation of property rights

will minimize costs. Yet another problem with the Coasian argument arises when we consider that the farmer may not be able to afford to pay the railroad anything. Demsetz, another proponent of these ideas pioneered by Coase, gives the example of a person entering the military. He states that it does not matter whether a person enlists in the army on his own and is paid for it or he is drafted and has to bribe the tax-payers to get out of the military, the same people would be recruited in the army. In such a case, the argument of the victim not having enough to pay for the bribe is even more apparent.

The arguments of Coase and Demsetz seem even more implausible when we measure their arguments on ethical and moral grounds. A person has the right to his homesteaded property and, in Demsetz's example, to his body. A second person cannot come in, invade it and expect the victim to bribe him to stop the aggression. In the case of Demsetz, a person who has the right to his body cannot be kidnapped (drafted) and then be given the option of buying himself out (pay a ransom). Any such transaction is unethical. Demsetz uses another example. He states that the success of a new product does not depend, in the absence of exchange and police costs, on whether the producers of that product are assigned the right to sell that product without compensating competitors who are hurt or whether the competitors are allowed to retain their old customers.

92 Ibid., p. 236.
95 Ibid., p. 112.
The major problem with this example is once again the same. If we take into account psychic income, the theorem will break down. Moreover, producers do not have the right to retain their customers. Producers own what they produce but do not own the value of that property. The value of the product is what consumers think of it and how much they like the product. The producer has no control over it.\textsuperscript{96} Similarly, every producer has the right to compete with other producers and no producer has the right to stop this competition.\textsuperscript{97}

In the case of high transaction costs, Demsetz holds that court decision and the allocation of property rights are essential for an "optimal" allocation of resources. Just like Coase, Demsetz holds that the objective in such a situation would be the minimization of total (social) costs. In Coase's example, if transaction costs or the costs of negotiations are $200,000, then if "the judges decide in favor of the farmer the device will be installed not because it will not pay the manufacturer to bribe the farmer into accepting the smoke -- but because it will be too expensive to negotiate the bribe."\textsuperscript{98} The courts directly influence economic activity when market transactions are so costly as to make it difficult to change the arrangement of rights established by the law.\textsuperscript{99}

Coase's basic point is that the courts should rule in favor of that party which is unable to be bribed, in the absence of transaction costs. The courts

\textsuperscript{96} Ibid., p. 112.

\textsuperscript{97} Ibid. p. 112.

\textsuperscript{98} Ibid p. 113

should give the railroad the right to emit smoke if the cost of installing the SPD is greater than the loss to the farmer. The problem is that even if the courts could determine objectively whether a mutual transaction could occur between the victim and the aggressor, the act of determining the efficient allocation would cause too much uncertainty in the legal process. This may actually hinder economic activity. Moreover, the judges who will be elected through the political process, are very likely to make mistakes in determining the maximum benefit or minimum cost allocations which would take a tremendous amount of skill.100 The uncertainty of the legal system created by following Coase’s and Demsetz’s advice would discourage out of court settlements and put more burden on the court system.101

Finally, as pointed out earlier, the solutions of the Chicago School become void if we weigh them against ethics and morals. "It is evil and vicious to violate our most cherished and precious property right in an ill conceived attempt to maximize the monetary value of production."102

SOME ADDITIONAL CRITICISMS

OF PRESENT LAW

In today's legal environment, the distinction between criminal law and civil law has led the courts to establish a more lenient and loose criterion for guilt in civil cases, and an extremely severe criterion for criminal cases. At present, the "preponderance of evidence" criterion is used to prove guilt in

101 Ibid., p.114.
102 Ibid., p. 115.
civil cases, which means that if there is merely a 51% chance of the defendant's guilt, he can be held liable. This puts a larger burden of proof on the defendant to prove innocence. For criminal cases, however, a stiffer criterion for guilt is used.103

This difference in the criteria of proving guilt is purely based on the degree of punishment. Under libertarian law this would not be the case. Criteria for determining guilt would not be based on the degree of punishment. Defendants would be provided as much protection in civil cases as they would in criminal cases. The criterion for determining guilt for all cases would be a clear, strong, and convincing proof of guilt, beyond a reasonable doubt.104 "What the plaintiff must prove, then, beyond a reasonable doubt is a strict causal connection between the defendant and his aggression against the plaintiff."105

Another practice that is very common in today's legal systems, and is totally unacceptable under libertarian law, is that of "vicarious liability." Vicarious liability holds that if A is an employee of B and if A commits a crime, then B would be held liable for it as well as long as the crime is committed by A in the course of furthering, even if only in part, B's business. This is held regardless of whether B knew of A's intent. The only exception is when A goes on a frolic of his own unconnected with B's business. Supporters of this law include such champions of free market legal theory as Richard A. Epstein. Weighing this theory against our principles of property


104 Ibid., p. 243.

105 Ibid., p. 244.
rights, the just theory of property, and ethics, the flaw in the theory can easily be seen. How can B be held responsible for A's crime if he neither knew about it or had any part in it? B would only be liable if it can be proven beyond a reasonable doubt that he was involved in the crime in the sense that he encouraged it, knew about it, or if it is done by A while performing a duty for B with B's prior knowledge.

Proponents of the theory of vicarious liability hold that if the employer benefits from the gains from his worker's activities, he should also share the losses. The problem with this statement is that it fails to appreciate that the employer is already risking a loss by hiring the employee. He may be stuck with an incompetent employee and may have already made expenditures in training the employee. In such a case the employer will lose the amount spent in the training. Moreover, the employer may not be able to fetch a price which is at least equal to the cost of producing the good produced by the employee, and may incur a loss. Furthermore, the producer or employer pays the employee before he sells the product. Thus, he pays the employee now and receives his return in the future (with a risk factor involved of whether he will receive enough return). Thus the benefits from the gains from the employee's work are not only returns for the risk associated with hiring the employee but also a payment for the time value of the return earned in the future. Therefore, the employer has already borne his fair share of risks and should not further be held liable for the employee's offense.

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CONCLUSION

The point that I have attempted to make throughout the course of this paper is that a system which defines and enforces private property rights is essential for the functioning, in fact the existence, of a free market economy. The only way we can ensure a legal system that would enforce private property rights and be compatible with the free market is if it evolved through the custom and tradition of society. Such a legal system would be voluntarily adopted as much as possible, by most people, as it would be developed by themselves. Thus, such a system would require less force to enforce and would rely more on positive reinforcements, such as reciprocity. I attempted to prove this point by studying examples of legal systems at different points in history which have developed in this way. We noticed that each one of our examples had the common characteristic of relying on positive reinforcements for the enforcement of the law, and all were deeply rooted in the enforcement of private property rights.

I have also attempted to prove, through the course of this paper, that a system of private property rights can be justified on the basis of ethics. I examined the nature of such an ethical system of private property rights and presented some criticisms of some of the prominent legal theories practiced today. I would thus conclude by making the following observation. If a system of private property rights is essential for a market economy and if the key to economic growth is a free market economy (as is widely believed today), then the only way economic growth can be achieved is by defining and enforcing private property rights.

The reason we see problems in developing nations today is because they have not grasped the notion of private property. An apparent example is
the former Soviet Union and other ex-communist Eastern European countries. The socialist bloc, and the former Soviet Union in particular, have been supposedly attempting for years to bring in "free market reforms" but they have not worked. The simple reason: the "former" socialists have not grasped the concept of private property. Ever since private property rights were abolished by the initial implementation of communism, they have not been re-established. Until they are re-established a free market cannot emerge. Thus, the key to economic development is the enforcement of private property rights and autonomy.108

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