

# MARKET CHOSEN LAW

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Central planning and state control are often cast aside as inferior replacements to far more efficient and humane voluntary market transactions. Still there is one area that most believe must be run collectively through the state. The realm of law is often the foundation of government, and the suggestion that central control be abandoned shocks most people as something impossible. Philosophers, from Hobbes to Rand, believe that for all encounters there must exist one authority to create and enforce laws. They are baffled by what would happen if two parties had a conflict without an overarching judicial system. They assume that only the public sector can prevent and resolve disputes, but they have failed to notice the many private arrangements already in existence to deal with such dilemmas.

There are numerous non-government institutions that protect individuals on both local and global levels. Examining these arrangements can give insight on how private law can function, thereby eliminating any need to speculate on how future firms might operate. The market allows consumers to choose different types and degrees of services and this could be true in the realm of law. Choice does not mean chaos and does not mean that people will be forced to deal with laws that they have not chosen. Most legal problems probably can be attributed to public law enforcement, so we do not need to assume that private law would be perplexed with the same dilemmas. A private legal system could allow individuals to agree ahead of time to follow certain rules. Judges would not need to compare individuals' utilities; they would solely make judgments in accordance with consumers' agreed-upon wants.

Government police and courts are inefficient and inhumane. There is no reason that consumers be forced to deal with a central monopoly when there are other alternatives. The legal realm is no different from any other industry; the market will allow consumers to buy services provided by entrepreneurs that are far superior than anything statisticians can imagine. Private law al-

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ready provides many solutions but is ultimately restricted by the leviathan state. If the state stopped intervening, the consumer would finally be sovereign and the market would finally be able to flourish.

### HOW WOULD THE MARKET LOOK?

If government law enforcement is to be rejected, then its alternatives must be examined. Even though we are not fortunate enough to be able to observe a fully functional modern-day private system we must realize that there are many ways of administering law other than those practices of the massive state apparatus. During the height of communism in the Soviet empire, there was no reason to assume that central planning was the only possibility. The idea of non-government law may strike many as outrageous, but others have not failed to notice that there already exists a considerable degree of private law. While they do not have the exact appearance as the governmental police and courts, many private institutions provide protective services.

When discussing whether or not government law enforcement should be abandoned, we need not look into a crystal ball to view how private judicial systems will operate. We already have existing examples that provide answers today. John Hasnas wrote, "So, what would a free market in legal services be like? As Sherlock Holmes would regularly say to the good doctor, 'You see, Watson, but you do not observe.' Examples of non-state law are all around us."<sup>1</sup> Hasnas pointed out many examples of market arrangements to provide order, which are quite common. They operate on both local and global levels and while presently the state prevents a completely private system from operating, the presence of market arrangements shows that private police and courts are possible.

The market for legal services is not different intrinsically from any other. Businesses will continually create better and more efficient products, which without competition would have seemed inconceivable.<sup>2</sup> Currently there are severe limits on incen-

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<sup>1</sup> John Hasnas, "The Myth of the Rule of Law," *Wisconsin Law Review* (1995): 227.

<sup>2</sup> Consider the case of radio and television. At one time, statisticians claimed that private broadcasts would be impossible. Despite this, private radio and television have proven themselves to be successes. Companies have discovered revenue solutions which would have been inconceivable at the outset. To solve its supposed non-excludability nature, companies found ways to finance the broadcast using advertisements, and those companies not interested in broadcasting advertisements found ways to scramble broadcasts, enabling exclusion of non-payers. It

tives for private investment in this area, but this does not mean that the realm is inherently closed. If government ceased imposing its law on everyone, most likely the nature of law enforcement would be vastly different from today's nature. How exactly would a system of competing law agencies function? Hasnas addressed the question as he wrote,

I am always tempted to give the honest and accurate response to this challenge, which is that to ask the question is to miss the point. If human beings had the wisdom and knowledge-generating capacity to be able to describe how a free market would work, that would be the strongest argument for central planning.<sup>3</sup>

He pointed out that markets allow a multitude of suppliers to attempt to solve dilemmas, which no one person or monopoly could ever be able to. Trying to predict the exact structure of the market is an impossible task to undertake, and it is foolish to think that one person can anticipate all solutions offered by entrepreneurs and businesses.

### CONTEMPORARY SOLUTIONS OFFERED ON A LOCAL LEVEL

How would it ever be possible for people to live peacefully without being controlled by the government? This question has been the subject of many discourses. Of why there must be a state authority, John Locke wrote:

First, There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the law of nature be plain and intelligible to all rational creatures; yet men, being biased by their own interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.

Secondly, In the state of Nature there wants a known and indifferent judge, with authority to determine all differences according to established law. For everyone in that state, being both judge and executioner of the law

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is unlikely that bureaucrats would have discovered these solutions, but profit-motivated businesses did. At the time television was invented, no one could have anticipated that market, but this is no grounds for banning private operation. There are strong parallels to law enforcement.

<sup>3</sup> Hasnas, "The Myth of the Rule of Law," p. 226.

of nature, men being partial to themselves, passion and revenge is very apt to carry them too far.<sup>4</sup>

Locke believed that in the absence of government, since people are biased in their own favor, they are unfit judges over themselves. Accordingly, the state must act as the arbiter; otherwise violence would ensue. While he may be correct that often times third party judges are needed, there is no reason to assume that only state officials can perform this role.

There are many cases of private law enforcement, one of the most common can be seen at institutions of higher learning. Although private security officers and dean's offices differ greatly from their bureaucratic counterparts, they nevertheless perform the job supposedly only government police and courts are capable. Many other entities also produce a safe atmosphere in a similar manner: shopping malls, amusement parks, resorts, and private housing developments are cases in point. Just because they are not as ostentatious as the state does not mean that they are not providing protection. These institutions show that not only is the notion of private security possible, but that it is widespread.

A college is a self contained community that offers a whole array of services including security. While education is its main service, to attract students it needs to provide a pleasant and safe environment. The Vice President of Business Affairs & Treasurer at the College of the Holy Cross, writes, "We employ a small police force, handle a variety of legal matters and operate small judicial and governance bodies— a small claims court and a town government rolled into one."<sup>5</sup> Along with education, the college provides other services, many of them so-called public goods. Colleges do not charge students separate fees for security, but it is included in the price of tuition. The school operates to keep students safe from each other and from outsiders, fostering a safe atmosphere where students can live peacefully, with little facilitation of government police.

Private universities are interested in providing as good a service as possible; they engage in profit-maximizing behavior.<sup>6</sup> It is in their best interest to provide as pleasant an atmosphere as possible, at the same time minimizing costs. The goal is not mere-

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<sup>4</sup> John Locke, "The Second Treatise of Civil Government," in *The Portable Enlightenment Reader*, Isaac Kramnick, ed. (New York: Penguin Books, 1995), p. 403.

<sup>5</sup> William R. Durgin, "Holy Cross as a Business," *Holy Cross Crossroads* 31, no. 5, p. 32.

<sup>6</sup> This analysis does not apply to public universities that cannot go bankrupt if they do a poor job.

ly to get tough on crime, but rather to cultivate a pleasant atmosphere to satisfy the customers and to attract even more. The system must not be too harsh, nor too lackadaisical, because in both cases it would deter students. If a school were too strict for students' tastes, applications and attendance would decline, and at the opposite extreme, if a school were too chaotic and dangerous, demand would also decline.

Private universities have also created entire "private judicial systems." Although it might seem elementary to even examine them, it is important to do so, because most people do not appreciate the parallels between universities' services and those of the government. It is fairly typical at a college for students to live in dormitories, along with Resident Advisor student employees who deal with minor problems and student concerns. These Resident Advisors operate under the supervision of non-student Complex Directors, who live in the dormitories to oversee the buildings and deal with larger problems. Problems beyond the scope of the Complex Directors are attended to by many Assistant and Associate Deans. For even larger or more difficult issues, the Dean of Students acts as the ultimate judge.

While these college employees do not have portraits painted of themselves displayed on the walls and do not wear long robes, they all perform essentially the service that government officials claim to do. While the latter system is highly complicated and bureaucratic, involving local, state, and federal judges as well as appellate and supreme courts, the university system can still be compared to it. For example, when a case is not solved by the Resident Advisor, Complex Director, Assistant, nor Associate Dean "Courts," the case is sent to the Dean of Students—the "Supreme Court." On campus, he renders the ultimate decision binding on all students, who have explicitly agreed beforehand to be adhere to this procedure when they chose to attend this college.

The entire process of resolving dilemmas at the university is done in a timely and efficient manner, because universities are competing for students. A university does not want to make the process too protracted or unpleasant, because it would ultimately lead to a lowering of quality of the total service provided by the school. Despite the alleged impossibility of a functional private judicial system, it is apparent that at the local level of a university campus, such private systems do exist. Thus, such communities internalize production of security and hardly rely on local public police at all.

### CONTEMPORARY SOLUTIONS OFFERED ON A GLOBAL LEVEL

While advocates of the state might grant that private services are possible on a local level, they still believe that on a larger scale all communities must operate under the jurisdiction of a single government. They cannot fathom anything but conflict if all parties were not forced to be under the jurisdiction of one overarching state. As seventeenth-century philosopher Thomas Hobbes wrote:

Therefore, before the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant, and to make good that propriety which by mutual contract men acquire, in recompense of the universal right they abandon; and such power there is none before the erection of the commonwealth.<sup>7</sup>

He believed that without a Leviathan that held authority over *all* people, there would be no possible way for them to interact with one another. The belief is that chaos would ensue if all individuals were not under control of a single authority.

What would happen if people were not all under the authority of a monopolist law enforcer? The most typical objection is that two parties, not under jurisdiction of the same government, would unavoidably come to an impasse. As Ayn Rand wrote:

Suppose Mr. Smith, a customer of Government A, suspects his next-door neighbor, Mr. Jones, a customer of Government B, has robbed him; a squad of Police A proceeds to Mr. Jones's house and is met at the door by a squad of Police B, who declare that they do not accept the validity of Mr. Smith's complaint and do not recognize the authority of Government A. What happens then? You take it from there.<sup>8</sup>

Although this would not pose a problem within a university campus between contractually bound students, there are many cases that parties who do not live in the same vicinity come in contact with one another. What would happen if a student of

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<sup>7</sup> Thomas Hobbes, *Leviathan: With Selected Variants From The Latin Edition of 1668*, Edwin Curly, ed. (Indianapolis, Ind.: Hackett Publishing, 1994), p. 89.

<sup>8</sup> Ayn Rand, *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), p. 335.

University A has a dispute with a student of University B? How exactly would those problems between these parties be solved? While it is tempting to try to try to solve these hypothetical dilemmas,<sup>9</sup> perhaps instead these questions should be reformulated in a different but equivalent manner, which will give insight to how these questions can be solved.

For example, what happens when a baseball team from the United States plays one in Canada? What rules would they follow and would both teams play by different rules? What would happen if there were a dispute about the rules? If the Canadian players are not under jurisdiction of the United States government and the United States players do not recognize the authority of any government but their own, who would solve the disputes? Since parties are biased in their own suits, would not the players be unable to reach a common agreement? Would these two parties be able to find a solution to their dilemmas, or would absolute chaos ensue?

Although it might seem absurd to even raise let alone answer these questions, it should be evident that they are equivalent to the arguments in favor of a monopolist law enforcer. Baseball teams, even if they are from different political jurisdictions, decide ahead of time to play by the same rules. While not all players are citizens of the same government, they allow the same baseball league officials to umpire games. The rules of the game are agreed upon by all participants, and in the case of disputes, the league officials, who have been privately contracted, resolve the issue. If, for some reason, specific league officials are not performing their tasks well, they can be replaced by the league. If the league as a whole is not performing its tasks well, players and fans are free to discontinue their business with the league and patronize another.

It should be noted that there is no compulsion in present baseball institutional arrangements. All parties have made their transactions on the market voluntarily. The league, the umpires, and the players, are all operating under the constraints of the market. If any one of them perform poorly, they will earn less revenue in the future. The league officials act in an unbiased manner, because that is what they are paid to do. If there were

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<sup>9</sup> To read speculative hypotheses about ways future private companies could solve these disputes, see Murray Rothbard, *Power and Market: Government and the Economy*, 2nd ed. (Kansas City: Sheed Andrews and McMeel, 1977), pp. 6-7; also David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2nd ed. (La Salle, Ill.: Open Court, 1989), chap. 29.

any chicanery, individual employees and the entire league would lose out. There obviously is no problem with settlement of disputes in the realm of athletics, so it is questionable why one would assume that there would be difficulties were this applied elsewhere.

Some might argue that baseball is a low-stakes matter, and that a sports contest is a completely different matter than one with potential infractions against person or property. When there are property rights at stake, sports rules would not be applicable. Even if this were true, it would still imply that there must be a monopolist enforcer.

Once again, it is helpful to reformulate the original criticisms against a market for law enforcement, this time for international business. Take the case, for example, when a producer in the United States sells goods to a purchaser in a country such as Singapore. What happens if there is a dispute?<sup>10</sup> Would they both adhere to different trade customs? Who makes and enforces the rules? If the company from Singapore is not within the jurisdiction of the United States government and the company from the United States is not under the jurisdiction of the government of Singapore, who would solve the disputes? Since parties are biased in their own suits, wouldn't they both deny allegations and be unable to reach a settlement? In the case of global trade, where there is no monopolist enforcer, would there be chaos?

These questions may seem absurd, but they are all analogous to the original criticisms against polycentric law enforcement. There is no single world government that has jurisdiction over all traders, yet somehow—astonishingly—companies are able to do business. Even though anarchy exists between nations, firms are able to engage in commerce peacefully. Since there is no coercively imposed and enforced legal system, obviously something else must provide order; else, no one would deal internationally. Many bodies of privately created law have been adopted voluntarily in order to facilitate business.

While there are potentially many different answers to these dilemmas, none of them involve a monopolist government. The common practice is for firms to contract ahead of time, agreeing to follow certain rules and to be bound by a specific arbitrator in the case of dispute. The laws of the sea were developed completely outside the jurisdiction of any government. Benson stated, "Law

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<sup>10</sup> Suppose that the purchaser does not pay the producer, or that the producers ships faulty products but denies the allegation.



Merchant effectively shatters the myth that government must define and enforce ‘the rules of the game.’”<sup>11</sup> It was not governments, but rather businesses acting in their own self interest who developed customary laws.

By agreeing to follow arbitration companies, businesses can eliminate the need to utilize government courts. These private courts exist both at international and national levels. The American Arbitration Association describes itself as itself as “dedicated to the resolution of disputes through the use of mediation, arbitration, negotiation, elections and other voluntary dispute resolution methodologies.” Parties use alternative dispute resolution for a more efficient way of resolving problems. Instead of using the bureaucratic methods, these companies can use faster and simpler procedures.

How does a system of enforcing rules work if there is no army threatening force as does the state? While most people assume that violence is the only possible way to enforce laws, this is far from the practice used in business. Firms can choose to do business only with other companies who are members of certain commerce organizations, which indicate that they are reputable and will follow appropriate business procedures. For companies that have not established connections with commerce associations, there is yet another option. Before trades take place, both companies can deposit sums of money with a specific arbitrator who has the discretion to bestow the money to a party if the arbitrator finds the other party at fault. There is no world government, and yet firms find ways to resolve disputes. Such arrangements do work, and there is no unsolvable problem due to the lack of an overarching state.

### INTEGRATION OF LOCAL AND NON-LOCAL SERVICES

It has been shown that local privately produced order is common, as is true for the global variety. Government police on both a local and international level are not necessarily needed. Could a completely private system work on a universal scale? One concern is that while it is possible for community residents to contract with one another, it is unfeasible for everyone to enter into restrictive covenants with all others on earth. When individuals do not have the resources and the wherewithal to investigate business partners as large corporations do, there would need to be some type of solution that could work for them on a large scale.

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<sup>11</sup> Bruce Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), p. 30.

Happily, once again, we do not have to speculate about how this could be accomplished. The institution of private credit cards shows that markets can offer a wide degree of differing services, linking people from all over the world in a commercial network. There is no state monopoly in the credit card market and—shockingly—it works quite well.

When a customer wishes to make a purchase with a credit card, what would happen if the store owner was affiliated with a local bank, and the customer with a bank located across the continent? Would Mr. Smith's bank not recognize the validity of Mr. Jones's bank, and would there be absolute chaos? To alleviate these dilemmas, could private banks find solutions or would there need to be a state monopoly? Merely to pose matters in this format is to reveal the ludicrousness of the question. The answer is clear: there is no coercive monopoly needed. Markets already enable many individuals and their respective banks to interact. It is common for customers to subscribe to local services, yet these banks make arrangements with non-local systems that enable customers to use their charge cards almost universally.

To return to private universities, let us look at credit cards often offered through college alumni associations. Even though the credit card is specifically designed for the college, this does not mean it is only compatible with others who have the same card. This card is designed to be able to work all across the globe. It might be difficult for each college to fully integrate a credit card into a global credit network, but a college association need not handle all of the specific credit issues itself. Associations that wish to offer credit cards can offer them through large banks (such as Citibank or MBNA), with the banks handling the details of the transactions. The university organization is able to choose the bank with which their card will be contracted.

Even though banks provide credit cards for smaller organizations, this does not solve the compatibility problem, because there could still be a dilemma if Mr. Smith uses Citibank and Mr. Jones uses MBNA. Does this situation call for a socialist monopoly, or is there a way for these companies to sort things out? Although each bank operates independently, it can choose to operate under the larger umbrellas of a Mastercard or Visa. These organizations compete with one another, as well as with others such as American Express, Discover, Diner's Club, and many others to offer wide acceptability and reliable service.

No firm or individual is forced to pay taxes for a state monopoly in this realm, and these companies have discovered a way

to make their cards acceptable in all civilized countries. If a customer wants to reap the benefits of Mastercard, he can choose to do so, but he is not forced to do so. Customers can pick Mastercard, a competitor, or they can eschew credit cards entirely. The individual who does not use credit cards does not hurt others; he simply cannot conduct business with certain firms. The market allows people to voluntarily conform to standards, but it does not compel anyone to do so.

Although it would be difficult for all businesses to investigate each individual customer's credit history, the credit card market solves this seemingly overwhelming task with ease. A business does not need to know a thing about a customer's financial situation or history, except for the single fact that the customer uses a reputable credit card.<sup>12</sup> The retailer relies on the credit card companies to deal with the customer's credit, and is guaranteed payment by the credit lender. A business can simply state that it accepts Mastercard and Visa only, and if a customer cannot supply a qualifying type of payment, then no transaction will take place. It is that simple.

How does the consumer transactions market relate to privately produced safety? It is similar because it is one possible way for businesses to make sure that their clientele meets certain qualifications. On university campuses, one often needs to present identification to security or insert identification card into electronic card readers to be able to access certain areas. For example, any college-age appearing student might be allowed on a campus, but only those who live in a certain dormitory have electronic access to enter that particular building. Similarly, each floor could have its own separate access system.<sup>13</sup> An institution can make these cautionary measures as strict or as lackadaisical as it sees fit.

It is beyond our knowledge of how entrepreneurs could create superior systems of security, but it is not difficult to envision the simple expansion of university-style security practices, coupled with credit card practices. Just as colleges may allow only resi-

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<sup>12</sup> Bryan Caplan described a situation when consumers use credit cards as collateral. He wrote, "Consider video rentals—before we can get a rental card, we must authorize the renter to use our credit card if we do not return the video or pay our fees. Our credit card company in effect guarantees our trustworthiness; and if we break our agreement, it pays the video rental firm." Bryan Caplan, "The Economics of Non-State Legal Systems," (working paper, Princeton University, (1993).

<sup>13</sup> Another similar example, although not as complex as the electronic card readers in place on college campuses, is when patrons enter a bar and are required to present identification that they are of a certain age.

dent students into the dormitories and just as businesses may choose to commercially interact only with customers who satisfy certain criteria, one could imagine people choosing to interact only with others who meet specific qualifications. Student interaction falls under the jurisdiction of the Dean of Students, debates between the Boston Red Sox and the Toronto Blue Jays are handled by the Baseball Commissioner, and business transactions with credit cards holders are administered by MasterCard or Visa. Critiques of private law have already been anticipated by higher education, baseball, and the banking industries.

It seems to be a common instinct to attempt to criticize any alternatives to government control of law, but the fact of the matter is that there already exist many solutions not involving government. The classical Randian criticism, involving the hypothetical Mr. Smith and Mr. Jones not under the jurisdiction of a monopolist governments, is really not that difficult to refute. Locally, as well as the internationally, private industries are already able to solve these dilemmas. The classic criticism is somewhat senseless, because no one on earth is now under the jurisdiction of a single world government. Unless we are to implement such an institution, we are being logically inconsistent. There are billions of cases where individuals encounter others not under the jurisdiction of the same government, and somehow there is not this chaos that statist envision. Markets can and will be able to provide security solutions without any need for government.

#### **DIFFERENT SERVICES FOR DIFFERENT PREFERENCES**

Just as consumers choose different types of credit cards, it could be possible for consumers to choose different legal arrangements. We have grown accustomed to certain structures and arrangements, but new ways of establishing and maintaining order might be discovered. Just as not all consumers choose identical services in other industries, nor would they be forced to do so in this case. Different tastes could be satisfied with specialized services. The amount of protection could be chosen, as could the very nature of the protection. It is possible that people would choose very different legal systems from one another. It is common nature to attempt to create a blueprint of how a society would look by asking the questions: What would be the nature of the laws? How strict would they be? What would the punishments be like? Would there restitution, prisons, or death penal-

ties? What standards of proof would the legal systems?<sup>14</sup> While all of these questions are grappling ones to answer if one is trying to centrally plan a monopoly, under a system with competing agencies and competing systems, these questions can be answered easily. Certain law enforcement procedures will be adopted, depending on consumer wants.

For internal disputes between contractually bound individuals, some could decide with one another to follow strict rules and others looser guidelines. It could be possible for one covenant to provide that certain crimes will warrant capital punishment. For example, a condominium association could state that any members of the private community who trespassed onto another member's property would receive the death penalty. When discussing whether or not it is humane for the government to administer such punishment, the opposing views are probably as irreconcilable as can be, but when the matter concerns parties who want to create and follow such a rule, the issue is not as problematic. Is it immoral or inefficient for individuals to voluntarily decide to abide by strict rules? This would be an issue decided only by those who would be voluntarily bound by these rules.

Another commune might state ahead of time to all joining members that there would be no private rights in that commune. The moral question concerning what degree internal aggressors would (or would not) be punished would be decided by the members of the covenant. Would it be immoral for individuals to voluntarily decide to live with few or no rules within a community? This would also be an issue for the members to decide.

Property owners could contract a legal system to define exactly what constituted an aggression within that property.<sup>15</sup>

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<sup>14</sup> Instead of solely relying on witnesses' accounts as evidence, some property owners might want to set up complex surveillance systems that electronically monitor the whereabouts of all individuals on the property. This is the case at buildings that require key cards for access, enabling management to see which people open which doors and when they do so. Now it is true that some people might not prefer to patronize such an environment, but these people would not have to do so. There are many people who choose not to work at companies with security access cards, but there are others who do. Some people might desire their everyday lives recorded so there can be no doubt whether or not they are innocent of a crime. There might be a lot of incentive to choose to have one's activities recorded. Surely, businesses motivated by profits would have a lot of incentive to find solutions.

<sup>15</sup> For a similar discussion, see Friedman *The Machinery of Freedom*, pp. 117–18. The difference between his analysis and the one contained here is that he is addressing inter-group disputes while this only addresses intra-group disputes. On pp. 196–97, Friedman brings up questions of whether flashlight rays and laser beam rays should be considered invasions of property, but he spoke about people who were not contractually bound to the same rules. It could be possible for private covenants to in-

Theoretically, the answer could easily be decided by each property owner. It is very difficult to define the limits of legal behavior for all people, but as Hasnas theorized, "In a free market, the law would not come in a one-size fits all."<sup>16</sup> People have different tastes from one another and different social norms. While certain behavior, such as murder, is almost always defined as a violation of conduct, with other behavior it is not so clear cut.

When does the aggression of an altercation begin, during the first exchange of words, during the first physical movement, or during the first moment of contact between the parties? It may seem difficult to answer that question, but with a system of market-chosen rules, the customers would be in a position to make that determination. The classic statement of parents, "While you are under my roof, you follow my rules," could be applied by each respective property owner. For example, one eating-and-drinking establishment could state to arriving customers that acting impolite would not be tolerated, and that the management would take action against anyone who used inappropriate language. In contrast, another such establishment could state that fighting was allowed inside the bar, and thus all altercations would have been voluntarily agreed to upon entrance of that bar. These different establishments could have completely different ways of dealing disputes.

While norms differ greatly between different groups of people, the government court system assigns a set of uniform guidelines for everyone to obey. This would not have to be the case with competing legal systems. People who have all agreed to abide by certain rules could handle disputes among themselves very differently from other groups. Hasnas writes:

Given the current thinking about racial and sexual identity, it seems that many disputes among members of the same minority group or among women would be brought to "niche" dispute resolution companies composed predominantly of members of the relevant group, who would use their specialized knowledge of group "culture" to devise superior rules and procedures for intra-group dispute resolution.<sup>17</sup>

In their midst, people who have agreed with each other could follow any rules type they desire. These practices would not

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ternalize most of those externalities to eliminate confusions. Certain private condominium associations could allow members to have bright lamps, while others could prohibit lamps altogether.

<sup>16</sup> Hasnas, "The Myth of the Rule of Law," p.228.

<sup>17</sup> Hasnas, "The Myth of the Rule of Law," p.229.

apply to all people, but only those who have chosen to interact in such a way.

As another example, the issue of what constitutes a violation of rights is especially controversial when it comes to defining sexual harassment. Once again this issue could be decided by the property owners of each establishment. It seems that there could be different guidelines for what constitutes acceptable behavior in a nunnery versus a singles bar. If disputes arose, instead of relying on the uniform laws set forth by the legislators, each group could deal with the problems differently. It seems likely that, if private establishments informed parties of the rules ahead of time, considerably fewer disputes would arise. The issue of harassment in the workplace is a perfect example where employers and employees are having a difficult time operating together with the laws set forth by the United States government. To avoid any such confusion to begin with, certain companies could state that relatively high degrees of sexual harassment would be allowed, while other companies could state that any non-work related comments would be intolerable. This way, the employees could decide which atmosphere was most desirable, and the market would lead to an efficient solution where all parties were satisfied.<sup>18</sup>

Certain people, who wanted more employee protection or more consumer protection, could work for companies or shop at stores that had a high degree of protection or even paternalism if desired. They would be in essence contracting legal systems that were more protective. Anyone wishing to do business in such a manner would be required by the business owners to adhere to their restrictions but no one would be forced to. Such a system would be a way for people to voluntarily choose personal regulations through the market. These regulations, unlike the bureaucratic regulations, would necessarily pass the market litmus test, with burdensome self regulations leading to a decrease in business among the concerned parties. Businesses could compete to provide the best internal atmosphere for its members, creating an atmosphere where people would tend to be satisfied. By being able to frequent businesses that had different sets of internal rules, consumers would in essence be able to have a variety of legal choice.

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<sup>18</sup> The only problem with this would be that the neo-puritans would not be able to impose their religious beliefs, through the use of law, onto all people.

### VARIETY OF LEGAL CHOICE DOES NOT MEAN CHAOS

It seems possible that there could exist many different types of legal systems, but some might wonder if it would lead to disorder if there was not one set of universal laws. When people who followed different sets of rules encountered one another, would there be confusion or an impasse? Would people operating under completely different rules constantly come in contact with one another and constantly have disagreements? Government advocates, such as Ayn Rand, with their hypothetical scenarios concerning two people who cannot come to agreement on a single arbitrator, create horrid pictures of a non-monopolistic system, but it must be reiterated that they are only hypothetical.

The major detail that is always left out of the scenario is on what property the two parties meet. The scenario assumes that strangers with no connection with each other and who have not agreed ahead of time what rules they are going to follow. If two astronauts are floating around in outer space and they come into contact with another, there could be the chance that the two do not abide by similar court systems, but in the real world, almost all encounters occur on property, which could enable the property owners to state the rules.<sup>19</sup> The property owners can lay down the law, stating that all patrons will necessarily follow their rules and procedures. This is similar to how stores operate with credit cards, with retailers stating that all customers must pay using certain credit cards, otherwise no transaction will take place. All encounters on a university campus could be under the jurisdiction of that institution, and all encounters in a shopping mall could be under its respective jurisdiction.

If each property owner were to set its own rules, would there be difficulty when people from different areas visited the property? Would it be impossible for each individual business to deal with so much "immigration" into its establishment? There could be many different ways to deal with these issues, such as joining larger trade associations, but there already is evidence that this is not a problem. Llewellyn Rockwell wrote about the entertainment park Disney World, saying, "It has even shown us how the immigration problem can be handled. Disney World attracts 30

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<sup>19</sup> Block described how private road owners could create their own traffic guidelines. "In a free market, each road owner will decide upon the rules his customers are to follow, just as nowadays rules for proper behavior in some locations are, to a great extent, determined by the owner of the property in question." Walter Block, "A Free Market in Roads," *The Libertarian Reader*, Tibor Machan, ed. (Totowa, N.J.: Rowman and Littlefield, 1982), p. 169.



million visitors per year without disruption.”<sup>20</sup> Even though visitors travel from all over the world, this private park does not experience problems with foreigners.

Profit-motivated parks create a security system that is accommodating for all of their guests. They need to act courteously to their customers, so it is no surprise that they would not follow the same procedures as government police. In a *Boston Globe* article, a patron of Disney quoted a Disney security supervisor as saying, “There is no Constitution at Disneyland. . . . We have our own laws.”<sup>21</sup> Since Disney does not follow the exact same procedures as government police, does not mean that they will operate in an unjust way. A Disney spokesman stated, “Guest service and how we treat our guest continues to be our highest priority. . . . Our security people are friendly and helpful, but they are also very serious about the job they perform.”<sup>22</sup> It is clear that even though private establishments such as Disney deal with many concerns, they do so in a manner that pleases their patrons. If visitors or employees of a private park are unhappy with the way they are being treated, they can choose to discontinue their personal business. Since many people choose to continue to do business with private firms such as Disney, it demonstrates that they are operating in a satisfying manner.

At parks such as Disney, there is no problem with unsolvable disputes between people from different parts of the globe whose governments have no connections with one another.<sup>23</sup> In the case of encounters on Disney property, the park has its own system to create order. While the thinkers of the scenario applicable to astronauts did not have outer space in mind, they probably did have in mind the common everyday encounters of strangers on the street. The fault in the logic is that they are thinking about lands that are currently owned and policed by the government.<sup>24</sup>

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<sup>20</sup> Llewellyn Rockwell, “Slouching Towards Statism,” *The Free Market* 15, no. 1: 5.

<sup>21</sup> Anne Mulkern, “Accusers say Disney Security Isn’t for Kids,” *Boston Globe* (November 7, 1996): A10.

<sup>22</sup> Mulkern, “Accusers say Disney Security Isn’t for Kids.”

<sup>23</sup> Another example is a vacation cruise where there is absolutely no government. The ship is run by business people, and there are no government police anywhere on board. It is doubtful that there is any legal recourse for any of the vacationers, yet crime and disputes between vacationers do not seem to be a problem.

<sup>24</sup> The approach given here also differs from other advocates of private law. Certain theorists attempt to map out how multiple policing agencies would operate in one geographic region. Under their scenarios, each neighbor on a street could subscribe to a different protection agency. One can question why they assume that there would be multiple policing agencies in a given geographic location. At Disney World, there is only one security agency, as is true for most privately policed areas. It is a mistake to presuppose that the

This being the case, there is the tragedy of the commons, where no one has any incentive or ability to exclude nefarious individuals from the streets.

In a sense, public roads are similar to the outer space example because nobody knows what criminal elements one will encounter on the poorly policed city streets. As soon as the issue concerns private property, the owners have incentives to make sure that their property is safe.<sup>25</sup> When discussing private police on government land, the issue can seem perplexing, but why must one assume that all land must be perpetually owned by the state? Lawless confusion is a problem that should be attributed to incapable governments, not to private establishments.

The issue of whether a plural existence of legal orders would lead to confusion, chaos, or inefficiency can once again be contrasted with the credit card industry. Different credit card firms offer different terms to their members, but this does not mean that the cards are incompatible. Each bank might have agreements with its members that are completely different from the others and still the customers are able to conduct business with one another. It is true that people often choose to conform to standards for the sake of simplicity but this is done voluntarily. The “one size fits all” solution is not required in the realm of consumer credit cards, nor is it necessarily required in the realm of law enforcement.

### INTERPERSONAL UTILITY COMPARISONS

Critics of this analysis might make the claim that if consumers are allowed to purchase the services they desire, the enforcement of their laws will necessarily fall onto people and decrease others' utility. If private law sacrifices individuals' utility for the benefit of others, then the entity which supports or enforces

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structure of private law would fit into the mainstream economists' model of perfect competition. It is equivalent to believing that the free market would consist of many different hagglers bartering in an open market place, when in fact the free market can consist of large corporations. Large regions such as North America would likely have more than one law enforcement agency, but this does not mean different neighbors in the same gated community would hire competing firms. In some places, different agencies may very well operate side by side, but this is not something that we should assume.

<sup>25</sup> Block wrote about how on public streets it is common for men to verbally harass women, while on private property, such behavior can be prevented if desired. He wrote, “In the public sector, it is in no business person's financial interest to end the harassment. . . . But in the realm of private enterprise, every entrepreneur who hopes to employ or sell to women (or to men who object to this maltreatment of women) has a strong pecuniary incentive to end it.” Walter Block, *Defending the Undefendable*, 2nd ed. (San Francisco: Fox and Wilkes, 1991), pp. 27–28.

that private law would be just as guilty as violating rights as is the government. While most people might agree that the notion of interpersonal comparisons is not ideal, they still believe that it is a necessary evil that all theorists, including judges, economists, and the government, must estimate. Critics might claim, “Is it not true that when an undoubtedly guilty criminal is required to pay reparations his utility is being lowered?” They say that when defining aggression and deciding reparations, any arbitrator, even private, must rely on interpersonal comparisons of utility. While this attempts to justify the aggregationist methodology, the argument is faulty. Not only is the idea of comparing utility unreasonable, it is also unnecessary. A system of private arbitration can attempt to solve this problem, without any need to aggregate and/or compare utility.

Self described “utilitarians” such as David Friedman say that there is no way to avoid interpersonal comparisons of utility. Friedman believes that it is necessary to at least estimate and compare individuals’ utility. He wrote:

Consider a court awarding damages. If we really know nothing at all about other people’s utility, how can a court decide how much someone owes me for breaking my arm? For all the judge knows, I enjoyed having my arm broken. Assuming that I disliked it, he has no way of knowing whether my disutility for a broken arm is measured by a penny or a billion dollars.<sup>26</sup>

Friedman and others say that one might as well base an entire legal framework around interpersonal comparisons of utility, because all proposed legal systems must necessarily make such comparisons.

Even if a court definitively finds an offender guilty, the punishment for the aggressor is not objectively clear. Regardless of whether the system is based on restitution or retribution, the judge must decide the extent of the damages owed by examining the harm suffered by the victim. Barnett wrote, “The subjectivity of punishment and reward suggests a potential problem with a restitutive theory that must be considered: Individuals attach their own value to the rights they possess, and the value of these rights cannot be measured objectively.”<sup>27</sup> If the judge finds a mugger guilty of robbing money, should the criminal be required to

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<sup>26</sup>Friedman, *The Machinery of Freedom*, p. 179.

<sup>27</sup> Randy Barnett, “Pursuing Justice in a Free Society: Part One—Power vs. Liberty,” *Criminal Justice Ethics* (Summer/Fall 1985):66.

pay back solely the money, or be required to pay additional damages to compensate for pain and suffering? It is impossible to know exactly how much pain was inflicted on the victim, so if the judge is to award reparations, without relying on interpersonal comparisons of utility, what criterion can he use?

Even some of the most severe critics of such comparisons sometimes concede that interpersonal comparisons of utility are necessary in cases such as damage awards. If the utilitarian asked, "Without interpersonal comparisons of utility, what would the exact level of damages be?" Block, an adamant critic of utilitarianism, acquiesced when he wrote:

If he [the non-utilitarian] is honest, he would have to concede that there is indeed an element of arbitrariness involved in any such juridical finding, and further, that it would be justified to make it, despite this undeniable fact. There seems to be no possible better alternative. Complex choices cannot always be made in tiny water-tight compartments, no matter how highly desirable.

However, just because reality impinges with its rough edges does not mean we have to embrace it when there are alternatives. Damage awards do indeed violate economic strictures against interpersonal comparisons of utility.<sup>28</sup>

For Block, too, there seems to be no way to avoid making such comparisons, however unscientific they may be. It might seem that the aggregationist utilitarianism must be embraced, but this is not the case.

Insofar as legal systems are chosen on the market voluntarily by all parties involved, one need never rely on invalid interpersonal comparisons of utility. Private firms operating on the market can eliminate such a problem. To see how, let us borrow a page from the Health Maintenance Organization (HMO). HMOs decide which medical procedures are worth while and which are not.<sup>29</sup> In efforts to control costs, it does not allow all patients to receive unlimited supplies of medical treatment. While individual decisions must be made by doctors and administrators, it

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<sup>28</sup> Walter Block, "O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner," *European Journal of Law and Economics* 3 (1996): 277.

<sup>29</sup> Does Mr. X value his extra examination more, or does Mr. Y value his elective procedure more? Can the HMO see into each of its patients' minds? What if Mr. X really wants the examination? Is the HMO making invalid interpersonal comparisons of utility when it does not allow Mr. X to receive his examination, but it does allow Mr. Y to receive his procedure?

is clear that all patients agreed ahead of time to follow the decisions of the organization. If patients thought the practices unreasonable, they would purchase another type of health insurance. It can be said that **all** patients' utility increases *ex ante* when they decide to join such an organization.

This analysis of health maintenance organizations applies to arbitrators; they need not rely on interpersonal comparisons of utility. It is true that individual judges must decide guilt and decide damages, but as long as all parties involved chose the arbitrator, they agreed to follow the judge's decision ahead of time. This, as before, is a case where **both** parties' utility increases *ex ante*. Any party whose utility would certainly be unjustly sacrificed by an arbitration company would choose a different type of arbitration service, just as a patient would choose something rather than the unsatisfactory HMO. As long as an arbitration service is chosen voluntarily, the judges are merely enforcing the rules that the consumers have chosen. When a judge awards damages, he is doing so in a manner that had attracted the consumers in the first place. It therefore is not a matter of judges forced to make interpersonal comparisons of utility; rather, it is a matter of judges enforcing the rules according to the chosen contracts, and awarding damages in way that was agreed upon by all parties.

There are many ways in which an arbitration system could administer such decisions. At one extreme, there could be a complex set of written rules explaining the procedures for every imaginable case. With such a code, the judges would merely attempt to find the relevant guideline among the written rules for each specific case. This system could focus on the letter of the law, but would require an inordinate amount of guidelines to be created. For example, there could be tables of exactly how much thieves would have to pay for their crimes, depending on the circumstances. While theoretically it might be possible that this could be done, it is likely unfeasible to be able to address every single concern ahead of time. This being the case, arbitrators would need to instead rely on an alternative manner of judging disputes, rather than looking up each case in a complex rule book.

At the opposite extreme, there could be absolutely no rule book whatsoever, with each case decided by the will or even the whims of a certain judge. While this might appear undesirable, this is not necessarily the case. The judge could be a wise person, chosen because all parties have a great respect for his opinion. He could rely on his own moral judgment, which could be based on any number of sources, such as religious code or libertarian code or

some other sense of justice. The judge would not need to have any set of rules to go by, but people could still trust his decisions.

While I have mentioned two extremes, consumers possibly could choose something in between the two, or possibly something that does not remotely resemble either.<sup>30</sup> An example that does fall somewhere in between these two extremes is the college Dean of Students, who has certain guidelines to follow, but also relies on personal judgment. When students decide to attend a college, they agree to abide by all of the rules and decisions of the Dean of Students. As a specific example, students today who choose a Jesuit college agree to abide by all of the decisions of the local person in charge of that order. If this Jesuit renders decisions undesirable by the students, they can transfer. The mere fact that a school has been in existence for many years, shows that the operation has been found satisfactory by the bulk of its consumers.<sup>31</sup>

The issue then is not whether in each individual case a party's utility is judged or lowered by the decisions made; the real issue is whether the parties agreed to abide by the rule of the arbiter. If the answer is affirmative, then it is evident that the total services provided by the arbitrators have *ex ante* increased the utility of all of the consumers. By electing to abide by certain rules, consumers have demonstrated the legal code they desire. This is analogous to consumers choosing the sort of health care or financial organization they wish.

This analysis applies to those with preexisting contractual legal arrangements. But what of disputes between strangers, such as a mugging on the street? Hasnas warned that one must not

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<sup>30</sup> We have grown accustomed to third parties judging affairs, but once again there is no reason to assume that all communities would desire such a structure. In some communities, there might be no need for any judges at all. For examples, most families do not rely on outside judges to work out family issues. Often, a third party cannot know enough about private business of a family to make a good decision, so in many cases it may not make sense to leave an issue to a relative stranger.

<sup>31</sup> What would happen if an arbitrator made bad decisions? This is analogous to asking what would happen if a bank showed bad judgment and decided not to repay any of its depositors. This rarely happens with banks, because they can only stay in business if they do not operate in such a manner. A bank that did not repay its creditors would not be in business for long, nor would an arbitrator who made unpredictable and undesirable decisions. Although some might think that banks do not default because of federal regulations and deposit "insurance," this is certainly not the case with overseas banks, which need to rely on established reputation or other means of insurance. It is possible that arbitrators would deal with similar constraints placed upon them by the market, which would offer consumers insurance and security. Consider again credit cards. If a consumer is charged erroneously, he does not get stuck paying for the fraud; instead, the banks often choose to assume responsibility.

simply try to speculate on how private firms would perform the same tasks performed by government today. He wrote:

Static thinking occurs when we imagine changing one feature of a dynamic system without appreciating how doing so will alter the character of all other features of the system. For example, I would be engaging in static thinking were I to ask how, if the state did not provide the law and courts, the free market could provide them in their present form. . . . Once this static thinking is rejected, it becomes apparent that if the state did not provide the law and the courts, they simply would not exist in their present form.<sup>32</sup>

Although there are many problems that need to be dealt with under public law enforcement, it is likely that private law would not be prone to the same obstacles. There are common police procedures to haul suspects into custody, but there is no reason to assume that even remotely similar practices would be used in a private system.<sup>33</sup> It is possible that private police would never need to drag anyone into court who has not made prior agreements with that specific legal institution. Addressing the issue of which court would have jurisdiction in a dispute between complete strangers, there is little reason to presuppose that this would even be a problem. Likely this is merely a public land problem, which would not occur in a private system.

Strangers do not come into conflict with one another on the golf course at a country club, because only members are only allowed to enter. On college campuses and in amusement parks such as Disney, all people on the premises have agreed to abide by the property owner's rules. Just as easily, were this legal, store and restaurant owners, as well as street and road owners,<sup>34</sup> would create private rules to govern all patrons. In the case of public roads, no one is able to exclude anyone or to arrange contractual rules, so it is unsurprising that people have become accustomed to the chaos spawned by the state. If private road owners were able to create rules only allowing those who had agreed to abide by them to set foot on the property, then they could eliminate most of the problems between strangers, and they would already have rules in place concerning how any remaining problems would be handled.

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<sup>32</sup> Hasnas, "The Myth of the Rule of Law," p. 228.

<sup>33</sup> Probably the best advice to give to private security for them to act in a just manner would be to not act anything like government police.

<sup>34</sup> See Block, "A Free Market in Roads," for the feasibility of this.

Individuals and businesses could choose to interact with only those who agree to certain rules. Whenever people agreed to certain rules, doing so would demonstrate that they have increased their utility. Not all people would be forced to conduct business in such a manner, just as not all people are forced to belong to health maintenance organizations or to use credit cards. With HMOs and credit cards, non-customers are unable to do business with certain physicians and certain firms. It could be similar with law as well. Those who do not agree to abide by certain rules would not be able to do business with certain individuals and certain firms. When there is trade, or even absence of trade, it is done out of the volition of all parties involved.

When trade takes place, such as the agreement to follow certain rules or arbitrators, the utility of all parties involved increases. While it is true that judges would have to render decisions that could even seem arbitrary, they would be doing so in a way that was contracted for by the consumers. Thus when a judge awards damages in a case,<sup>35</sup> he does not need to rely on invalid interpersonal comparisons of utility; he renders his decision in a way that passes the market litmus test. Interpersonal comparisons of utility are invalid and cannot be justified. The only way to avoid such nonscientific calculations is for the government to discontinue intervening into the market and to allow the voluntary adoption of a system of private law.

### CONCLUSION

There are numerous cases where parties choose to enter into private legal arrangements. On a local level, universities, condominium associations, and shopping malls all provide rules and security to create a safe atmosphere. On a global level, trading and arbitration companies provide guidelines and dispute settlements for businesses not under any single governing authority. If on both a local and non-local level there are numerous cases where government is not utilized, then a government monopoly in this field is hardly the necessity that is claimed by its apologists. Private companies already provide both local and non-

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<sup>35</sup> There actually is no reason to assume that aggressors need to be forced to pay for their damages. With the example of credit card companies, they do not seek damages from those who default on their loans. Instead they create incentives, such as good credit ratings and continued business, for borrowers to want repay their loans. Credit card companies cease to conduct business with bad clients, but they do not necessarily pursue damages against them. This example may be distorted by current court costs, but the model can be effective nonetheless.



local protection for their customers, arguments to the contrary notwithstanding.

Despite the existence of private law in modern society, the government nonetheless frequently intervenes. By forcibly imposing a uniform system on all people, the state prevents individual agents from purchasing the type and degree of services they desire. The unhampered market would allow people to procure a vast array of differing legal systems. This is not to say that competition would lead to chaos; quite the contrary, firms could offer a high degree of compatibility with rival legal systems, or they could offer high degrees of specialized services for their members. In all cases, customers would know what they were dealing with.

If customers agree to be bound by certain rules and procedures, this could eliminate the need for any interpersonal comparisons of utility, with the adjudication simply being made in accordance with the desires of all parties. Once we realize that a market in law would likely provide vastly different outcomes than anything we have at present, we do not need to spend time speculating on how private law enforcement agencies will solve problems that perplex today's governments. It is likely that many of the problems are only the products of the disorder caused by government law. It should be clear that government law enforcement is not perfect, not even desirable, and certainly not necessary. A market would allow private institutions to provide people with safety and security on an efficient and voluntary basis.