FRIEDMAN, D. LAW'S ORDER READER

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Other Paths

THE SUBJECT of the economic analysis of law is law—all law in all times and places. So far, however, we have applied it almost exclusively to modern Anglo-American law. In this chapter I expand the discussion to cover three very different systems of legal rules. Two are historical legal systems: saga period Iceland and eighteenth-century England. The third is a system not of law but of norms, privately enforced rules that exist a few hours from where I live and, for some categories of disputes, override the public law of the state of California.

One reason to look at such systems is to see how well our theory fits them. Another is to stretch our thinking, to bring to our attention other possible solutions to the problems our legal system deals with. A third is to provide real-world evidence of how such alternative solutions might work and what problems they might encounter, evidence that will be useful in the next chapter, where I consider possibilities for a radical redesign of our legal system.

Private Law—with a Vengeance

Standing at the beginning of the mythic history of every country is the good, strong ruler who brought it into existence: George Washington, Alfred the Great, Charlemagne. The history of Iceland starts with a strong ruler too. His name was Harald Haarfagr. He lived in the ninth century; his accomplishment was to convert a group of small kingdoms with weak kings into one large kingdom with a strong king.

The large kingdom was called Norway. The chief occupations of its inhabitants were farming, fishing, and piracy; they were what we now call Vikings. Quite a lot of them were unhappy with Harald's revision of their traditional political system, so they loaded their longships with families, friends, and as many farm animals as would fit and left for a newly discovered island out in the wastes of the North Atlantic. That is the origin of Iceland as the Icelanders told it.

When, early in the tenth century, the Icelanders got around to setting up their own legal system, they based it on traditional Norwegian law—with one major omission. They decided they could do very well without

market, one with 5 percent. If network externalities are important, the dominant program should be worth substantially more than its competitor to users, say a hundred dollars more. The rational monopolist should raise his price accordingly, to take advantage of his customers' willingness to pay. He won't raise it by the full hundred dollars, since at that price his competitor might start to expand, but raising it by somewhat less, say, fifty dollars, permits him to both maintain his monopoly and exploit it.

It follows that if externalities are important, the dominant product in each niche should cost more than its competitors. Empirically, that does not seem to be the case. Here again, the conclusion is not that network externalities do not exist but that they do not seem to matter very much, at least in this market.

I have said a good deal about the background to recent antitrust actions but very little about the case that is the current high-profile example. One reason is that by the time this book is published the Microsoft case will probably be over and something else occupying the headlines. Another reason is that I do not know enough of the detailed allegations in that case, or the evidence for and against them, to want to offer an opinion as to whether Microsoft has or has not been doing the various wicked things that its competitors accuse it of doing.

a king. The result was a polity that included a legislature and courts but no central executive and only one government employee: the law-speaker (*logsogumaðr*), whose job was presiding at the legislature, providing legal advice, and reciting the entire law code publicly once over the course of his three-year term. Putting the matter in modern American terms, they had left out an entire branch of government. Without an executive branch of government to prosecute crimes, it is hard to have a system of criminal law. They left that out too.

The Icelandic system was centered around the office of *Goði*, usually and misleadingly translated "chieftain." An ordinary landowning Icelander plugged into the legal system by being the thingman of a particular goði. The relationship was a voluntary one; the thingman was free to switch from his current goði to any other who would have him. There were thirty-nine *Goðar* (plural of *Goði*) in Iceland when the system was established, later expanded to forty. The right to be a goði, called a *goðorð*, was a piece of transferable private property, like a McDonald's franchise. You could become a goði by inheritance or by purchasing a goðorð from someone willing to give it up.

We are tenth-century Icelanders; I suspect you of cutting wood in my forest and decide to take legal action. The first step is to ask you publicly who your goði is, since the relation between our goðar will determine in what court I can sue you, just as the question of what states two modern-day American litigants are citizens of may determine what court has jurisdiction over their case.

Once the court is determined, I sue for damages as in a modern tort suit. You do or do not show up to defend your case, as you prefer; there are no police available to arrest you and hold you for trial as there would be in a modern criminal case. The court gives a verdict: You owe me a damage payment of twenty ounces of silver. The court goes home. You do or do not pay.

If you do not pay, I institute a second legal procedure to have you declared outlaw. Once you are outlawed I, or anyone else, can kill you with impunity. Anyone who helps defend you is himself in violation of the law and can in turn be sued.

Modern tort and contract law are sometimes described as private law in contrast to public (criminal) law, since the former are enforced by private prosecution by the victim, the latter by public prosecution by the state. But the Icelandic civil system was private law in a stronger sense. Not only was the prosecution of the case private, enforcement of the verdict was private too. And under the Icelandic system all law was civil. The legal procedure I have just described for your violation of my property rights to my forest could equally well have been describing the legal consequence of your killing my brother.

This description of the Icelandic legal system suggests some obvious problems. One is stability: What is to keep a good fighter with lots of tough friends from violating the law and ignoring any verdicts against him, secure in the knowledge that nobody will dare attack him? A similar problem occurs when the victim is relatively poor and friendless, with inadequate resources to prosecute a case and enforce the verdict. Further problems include offenses that are hard to detect—nine times out of ten, the thief gets away clean, one time out of ten he is sued and must give back the money—and judgment-proof defendants. Why bother to sue someone if he has no money to pay a fine?

The Icelandic legal system provided solutions, although not perfect solutions, to all of these problems. Consider first the most serious threat, the risk that powerful men would routinely ignore court verdicts, bringing down the entire system.

Powerful men in the Icelandic sagas do occasionally try to ignore court verdicts, or forcibly block the working of the legal system, but in the long run they rarely succeed. Part of the reason is that any clash between the two sides will generate injuries and a new set of cases, which the side defending the outlaw will lose, since defending an outlaw is illegal. The losing side then has the choice of either paying the resulting damage payments or ignoring them and, by doing so, pulling more and more people into the coalition against the outlaw and his supporters.

My favorite example of the inherent stability of the system is a scene in *Njalsaga*. A lawsuit is being tried, and things have gotten so badly out of hand that it looks as though violence may break out between the two sides in the middle of the (open air) courtroom. Someone on one side of the case asks a friendly neutral what he will do to help. He replies that he will draw up his supporters, armed. If his friend's side is losing, they can retreat behind his people. If his friend's side is winning, he and his people will break up the fight before the winners have killed more men than they can afford to pay for. The clear implication is that, even when things are going very badly, everyone knows that in the long run killings are going to have to be paid for—which, given how high the damage payment for a killing was, made killing your opponents an expensive proposition.

So far I have assumed that even if the defendant in a tort suit was more powerful than the plaintiff, had more friends willing to fight for him, the plaintiff at least had enough resources to prosecute the case. But what if the defendant was relatively poor and powerless—an elderly man, say, with no sons?

The solution was to make tort claims transferable. The weak tort victim sells his claim to a neighbor with sufficient force to prosecute it. How much he gets depends on how much the neighbor expects to collect and how difficult he expects the prosecution to be. If the defendant is a

sufficiently tough case, the victim may have to give the case to his neighbor for free, or even offer to help pay the costs. What he gets in exchange is deterrence—a demonstration that people who injure him will be forced to pay damages, even if he doesn't end up collecting them. His situation is the same as that of a modern tort victim whose damage judgment just covers his legal cost—or a modern crime victim. Convicted criminals pay fines, if any, to the state, not the victim.

Our legal system does not permit unresolved tort claims to be transferred. In that respect we are at least a thousand years behind the cutting edge of legal technology. But we achieve a similar effect in a clumsier and less direct way. When an attorney agrees to prosecute a case on a contingency basis, he is accepting a share in the claim as the payment for his services. If he loses, he gets nothing; if he wins, he gets a percentage of the damage judgment.

What about offenses with a low probability of being detected? The Icelandic system dealt with that problem by treating the concealment of a crime as a further offense. A law-abiding Icelander who happened to kill someone—such things can happen in a society in which going off on a Viking expedition played the same role that a college education, or a few years abroad, play in ours—was expected to promptly announce the fact of the killing and the names of both himself and the victim to someone living nearby. If he failed to do so—worse still, if he concealed the body—he was guilty not merely of killing but of the more serious offense of murder. Not only was his legal position worse if he got caught, but the action of concealing his crime was regarded as shameful.

The problem of judgment-proof defendants was solved in a variety of ways. One was through informal credit arrangements; a convicted offender might get help with his fine from friends and kin in an implicit exchange for future services. Another was through a form of temporary slavery—debt thralldom—under which the offender worked off his punishment. Finally, the fact that an offender who failed to pay would be outlawed and face the choice of leaving Iceland or being killed made it in the interest of offenders to do their best not to be judgment-proof.

The Icelandic system was set up in 930 A.D. The first serious difficulties arose just before the year 1000, in the form of violence between the majority pagan and minority Christian factions, the latter supported by the King of Norway. The two sides agreed to arbitration by the (pagan) lawspeaker. His verdict was that Christianity would become the official religion of Iceland, with pagan worship still permitted in private.

About 150 years later another serious problem arose, a feud between two powerful factions, one of which used force to prevent the other from going through the legal procedures necessary to sue them. Cooler heads prevailed, and that case too was settled by arbitration.

Finally, starting about the year 1200, there came a period of increasingly violent conflict, leading to the final breakdown of the Icelandic system. In 1262 three of the four quarters of Iceland voted to turn the country over to the king of Norway. In 1263 the north quarter agreed, and the Icelandic experiment was over. It had lasted for three hundred and thirty-three years.

The Icelandic system of fully private law appears obviously unworkable to modern American eyes. Yet it worked well enough to function for more than three hundred years and generate one of the world's great literatures. Our word "saga" comes originally from a body of histories and historical novels composed in Iceland during and just after the period I have been describing, many of which are currently in print in English paperback translations. For a population of seventy thousand people living in a far corner of the world a very long time ago, that is a considerable achievement.

Without Police or Prosecutor: Criminal Law in Eighteenth-Century England

Our next episode is closer to home in both time and law. England in the eighteenth century had, on paper, a legal system much like ours, including our distinction between criminal and tort law. But while it had criminal law, there were no police to enforce it; the first English police force was not established until the 1830s. Nor were there public prosecutors. This raises an obvious puzzle. With neither police nor prosecutors, who would catch criminals and prosecute them?

The answer is that, under English law, any Englishman could prosecute any crime. In practice the private prosecutor was usually the victim.

That raises a second puzzle. A tort plaintiff has an obvious incentive to sue; if he wins, he gets to collect damages. A private plaintiff in a criminal suit stands to collect nothing; if he wins the case, the defendant is hanged, or transported, or perhaps pardoned. So why prosecute?

One possible answer is that the reason to prosecute was the hope of settling out of court before the trial. The plaintiff might gain nothing from a conviction, but the defendant stood to lose quite a lot, possibly his life, and might therefore be willing to pay the plaintiff to drop charges. Such agreements were legal and approved of in misdemeanor prosecutions; they were illegal in felony prosecutions but seem to have happened nevertheless.

A second reason to prosecute was, just as in saga period Iceland, to buy deterrence. Suppose I am running a business particularly vulnerable to theft, say a cloth-dying establishment with lots of valuable pieces of cloth

drying in the open air. By prosecuting one thief I buy a reputation that will deter others. Precisely the same incentive, deterrence as a private good, still operates today, as witness "we prosecute shoplifters" signs in department stores. And, as that example suggests, even in our legal system criminal prosecution is in practice at least partly private, since the victim often has to go to a substantial amount of trouble in the process of helping to get the criminal convicted.

Most people do not expect to be victims of multiple offenses and so cannot reasonably expect to establish a reputation by prosecuting them. For them, Englishmen in the eighteenth century came up with an ingenious alternative: societies for the prosecution of felons.

Such societies, of which thousands were formed, typically operated in a single town. Each member contributed a small annual sum. The money was available to be spent on prosecuting anyone who committed a felony against any member. The list of members was published in the local newspaper—to be read by the local felons. Thus a prosecution society served as a commitment mechanism, a way in which a potential victim could assure potential felons that felonies against him would be prosecuted, converting deterrence from a public good into a private good. Instead of my prosecution slightly raising the general rate of conviction and so producing an infinitesimal increase in deterrence for everyone, it substantially raises the rate of conviction for people who commit felonies against members of my association, producing a substantial increase in deterrence for us.

In order for deterrence to be a private good the criminal must know who the victim is—in the eighteenth-century context, that he is a member of a particular association for the prosecution of felons. This raises a problem with anonymous-victim offenses such as highway robbery, offenses where the criminal does not know who the victim is and thus does not know whether he is precommitted to prosecute. In the middle of the century, in response to a perceived problem of inadequate incentives for prosecution, English authorities at both the national and local levels instituted a system of rewards, sometimes quite generous, for successful prosecutions. This led to some new problems, which we will return to in the next chapter.

In addition to private prosecution the English system of criminal law in the eighteenth century had another odd feature: the pattern of punishments. But first a historical digression:

In medieval England (and elsewhere) the Catholic Church claimed ultimate authority over clerics, such as priests and monks. A clergyman accused in the royal courts of a capital offense could "plead benefit of clergy" and so have his case transferred to the church courts, which did not impose capital punishment. In a society without extensive bureau-

cratic record keeping, this raised a further problem: Who counted as clergy, and how could the court know whether a particular defendant qualified? The problem was solved with a simple rule: A clergyman was defined as anyone who could read. Traditionally, the ability to read was tested by asking a defendant to read a particular verse from the Bible, which came to be known as the neck verse, since knowing it saved your neck. Criminals who were both illiterate and prudent memorized it.

Over time two developments made this system increasingly unsuited to its intended purpose. One was the spread of literacy, which meant that more and more laymen could claim benefit of clergy. The other was the Protestant Reformation. By the sixteenth century there no longer were church courts in England handling the sorts of offenses for which defendants were likely to plead benefit of clergy. The result was to convert benefit of clergy from a legal rule giving the church jurisdiction over its own officials into a get out of jail free card for felons.

The legal system responded in a variety of ways. One was to declare the more serious offenses "nonclergyable": Defendants charged with them no longer had the option of pleading benefit of clergy. By the eighteenth century virtually all serious offenses, including theft of forty shillings or more and any burglary that put the inhabitants of the burgled home in fear, had become nonclergyable felonies. According to the law the penalty for a nonclergyable felony was hanging. Eighteenth-century England thus presents, at first glance, the spectacle of a legal system in which all serious crimes were capital ones.

The appearance is misleading in several ways. A jury that thought the defendant guilty but the legally mandated punishment too severe might convict the defendant of a lesser included offense instead, a process referred to as "pious perjury." If a defendant was convicted of a capital offense, the court might offer to pardon him on condition of transportation, his agreement to be shipped off to the New World and sold into fourteen years of indentured servitude. If a war was going on, defendants might be pardoned on condition that they agreed to enlist in the army or navy. A pregnant woman could plead her belly—get off with a noncapital punishment on the grounds that even if she had committed a capital offense her unborn child had not. And a substantial number of defendants, after being convicted and sentenced to hang, were simply pardoned and sent home.

How did this system, known to later historians as the "bloody code" for its reliance on execution, work in practice? One study of records from a particular set of courts concluded that, of defendants charged with nonclergyable felonies, only about 40 percent were convicted of those charges, with some others being convicted of lesser, noncapital offenses. Of those convicted, only about 40 percent were executed. So, at least for

that sample, someone charged with a capital offense had about one chance in six of being executed—a lot higher than in our legal system, but considerably short of what the formal legal rules suggest.

Something is missing from this picture: imprisonment, which we consider the normal punishment for serious crime. In eighteenth-century England imprisonment was sometimes used as a punishment for minor offenses such as vagrancy. Other than that, jails were used to hold accused felons until trial and convicted felons until they were hanged or transported. Imprisonment as a punishment for serious crime did not exist until late in the century.

Can we make sense out of this pattern of punishments from an economic standpoint? I think the answer is yes.

Imprisoning a dangerous criminal is expensive, and England in the eighteenth century was, by our standards, a poor society. Both execution and transportation were much less expensive punishments. When a convicted felon enlisted in the army in order to save his neck, the cost of the punishment to the government imposing it was negative, since the Crown got a soldier for less than it would have had to pay to hire him on the open market.

One obvious alternative to our usual form of imprisonment—if we drop, for a moment, our late-twentieth-century sensibilities—is penal slavery, prisons whose occupants are forced to work. My conclusion, from such evidence as is available, is that penal slavery was not normally an attractive option from the standpoint of the government; the cost of housing, feeding, and guarding dangerous criminals was substantially more than the amount that could be made from their labor. That, at least, seemed to be the implication of a brief experience with penal slavery in the 1770s, when the American Revolution cut off the option of transporting convicted felons to the New World.

Further evidence comes from the history of galley slavery. Contrary to *Ben Hur* and other works of fiction, galley slavery is a Renaissance invention; the warships of the Greeks and Romans were normally rowed by free men. Sometime around the end of the fifteenth century the Mediterranean powers started using condemned criminals as rowers. The practice spread rapidly, resulting in a mass shift from execution to galley slavery as the preferred sentence for healthy male criminals.

To understand why that happened, it is worth thinking a little about the economics of slavery. In order to use slaves profitably their owner must make more money from their labor than the cost of feeding, guarding, and supervising them. How easy that is depends, to a considerable degree, on what the slaves are doing.

Supervising galley slaves is easy; since they are all rowing in unison, it is obvious if one is not doing his part. Keeping them from escaping is easy

too, since it is hard to swim with chains on. Rowing a galley was the ideal form of slave labor from the standpoint of the slaveowners. The history of criminal punishment suggests that it provided the Mediterranean powers something they had previously not had, a form of penal slavery that produced more than it cost and so was preferable, from the standpoint of the state, to execution. Galleys don't work well in the rougher waters of the Atlantic, so England used transportation instead.

This account raises another puzzle: Why did galley slavery arise when it did? I have a simple, although speculative, answer. In classical antiquity and through most of the Middle Ages, sea warfare consisted in large part of hand-to-hand combat, land battles on ships. The last thing you wanted on your warships was a crew that was unarmed, chained, and hated you. It was only when cannon became sufficiently effective to convert warships from floating armies to floating gun platforms that galley slavery became a practical military technology.

So one explanation for the observed pattern, in England and elsewhere, is that legal systems were looking for inexpensive, better yet profitable, forms of punishments. This provides an explanation not only for the existence of execution and transportation and the absence of imprisonment, but for pardoning as well. If the judge concluded that this particular defendant was merely a good boy who had yielded to temptation, not a hardened criminal, he might also conclude that telling the defendant he was going to be hanged by the neck until dead and then pardoning him would provide a sufficient fright to deter any future offenses. Much the same principle explains discretionary sentencing in modern law. It also explains the legal rule that allows (sufficiently) insane criminal defendants to get off. If someone is too crazy to be deterred, it may be worth institutionalizing him in order to prevent future problems, but there is little point to punishing him. In the one case you let the defendant off because punishing is unnecessary, in the other because it is useless.

A second explanation of selective pardoning is that it provided a way of reducing the negative externalities imposed by execution. Hanging almost always imposes a large cost on the person most directly affected; that is one of the reasons for hanging people. It may also impose substantial costs on others: friends, relatives, employers, and taxpayers potentially responsible for supporting the convicted criminal's dependents. Those costs serve little deterrent function. If many such people are willing to go to some trouble to testify in favor of the criminal at trial or sign a petition asking the Crown to pardon him, that is evidence that such costs are substantial and so a reason to avoid them by pardoning the convict.

So far I have assumed that pardons are based on information the court system receives about the prisoner. An alternative way of looking at them is as a good sold on a market. A petition from the convict's employer

might provide information about the character or productivity of the convict. A petition from a politically influential nobleman, who might never have met the convict and was unlikely to know much about him, provided no such information, at least not directly. Yet such a petition would probably have more effect on the outcome of the case than one from the convict's closest friends.

Imagine that you are an ordinary Englishman who wishes to save the life of a friend convicted of a capital felony, say sheep stealing. One way of doing so is to go to some high-status person you know, perhaps the local squire, and ask him to intervene on your friend's behalf. You are engaged in an implicit exchange of favors. Low-status people sometimes have opportunities to benefit high-status people, and you have implicitly committed yourself to do so, whether by being suitably deferential to the squire in public or by supporting the parliamentary candidate he recommends.

The local squire has more influence with the authorities than you do but not enough to save a convict from the gallows. He accordingly writes to a politically influential local peer, requesting him to intervene in behalf of one of the squire's people, a worthy young man led astray by bad companions. Here again the exchange is not primarily of information but of services. One of the things that makes local peers politically influential is the support of local squires.

The court, by considering and acting on such petitions, is implicitly offering the convicted felon a choice between a fine and execution. The fine is paid not by the felon but by his friends and takes the form not of money but of favors. It goes, possibly through intermediaries, to people who can influence the granting of pardons. To the extent that those who will end up paying such fines are in a position to prevent their friends from committing felonies, such a system gives them an incentive to do so. It thus functions as a collective punishment similar to those observed in some primitive legal systems, in which fines are paid not by the offender alone but by other members of his kinship group as well—not too far from what we observed happening in saga period Iceland.

Pardons procured in this way substitute an efficient punishment, a fine, for a less efficient punishment, execution. In doing so they provide resources to the state and those who control it. Thus the legal system, in addition to providing a mechanism to reduce crime, also increases the ability of the state to maintain its authority. Considered from the standpoint of public relations, it is an elegant way of doing so. Nobody is threatened save the guilty convict. The squire is not oppressing his tenants but doing them a favor, at their request. The knowledge that such favors may occasionally be needed gives everyone in the village an incentive to be polite to the squire. In the Middle Ages English kings openly sold par-

dons as a way of raising money. One way to interpret pardoning in the eighteenth century is as a subtler version of the same thing.

To the modern mind eighteenth-century English law enforcement, with no police or public prosecution and no imprisonment for serious crime, seems clumsy and unworkable. What is the evidence on how well it worked compared to other systems that existed at the time or compared to a modern system?

Unfortunately, there is not much good data on crime rates prior to this century. Such information as we have suggests that the very long term trend for the English murder rate over a period of many centuries is downward. For a specific comparison between the situation in the late eighteenth century, with private prosecution, and in the early twentieth, with public police and prosecutors, we have a little more than that: The figure for indictments for homicide in the former period is similar, on a per capita basis, to the figure for murders known to the police in the latter, which suggests that the eighteenth-century system and the modern system may have worked about equally well. But it is not clear how comparable the two statistics are. And even if we knew that crime rates were about the same under the two systems, we do not know how other changes over the course of the century might have affected them.

A more interesting comparison may be between England and France. France in the eighteenth century had a modern system of criminal law enforcement: paid professional police, public prosecutors, imprisonment (as well, until midcentury, as galley slavery). At the end of the century it was the French state with its modern system that collapsed, while England went on to rule much of the world. Of course, there may have been other reasons.

Finally, there is the question of why the English did not adopt a modern system earlier, as some contemporary writers argued that they should. Perhaps it was because the French did have such a system and French institutions, as every good Englishman knew, were wicked and tyrannical. A more sympathetic explanation is that England spent the seventeenth and early eighteenth centuries in a civil war followed by a military dictatorship followed by a series of successful coups: the reestablishment of the Stuart monarchy, its replacement by William and Mary in the Glorious Revolution of 1688, and finally the installation of the Hanoverian dynasty. One thing that may have become clear during those conflicts was that, if criminal prosecution was controlled by the Crown, the king's friends could get away with murder.

That problem is still with us. Consider the final outcome of three putative violations of the law committed in my lifetime by law enforcement agencies: The shooting deaths of two (sleeping) Black Panthers by Chicago police in 1969, the illegal search and seizure of Steve Jackson Games

(entertainingly recounted by Bruce Sterling in *The Hacker Crackdown*) by the Secret Service in 1990, and the killings by federal marshals and the FBI in the Ruby Ridge case in 1992. In each case perpetrators either were never prosecuted for any criminal offense, were charged with a much less serious offense than they appeared to be guilty of (obstruction of justice rather than murder), or, in one case, charged by a different level of government than the one that employed him. None of the government agents in question suffered any criminal penalty. But in each case the government or agency involved ended up paying either civil damages or a large civil settlement to the victims or their heirs. Criminal prosecution is controlled by the state, civil prosecution by the victim.

These examples suggest an important point too often forgotten in the economic analysis of law: The rationality assumption applies to enforcers as well as enforcees. In constructing legal institutions we cannot simply assume that legislators, judges, and police will go out and do good—in the economist's version, promote efficiency. We have to think about their incentives too.

Order without Law: Private Norms in a Modern Society

Our third story brings us even closer to home, to a rural California county in the late twentieth century. It starts with Ronald Coase and cattle.

Consider two neighbors. One is a farmer, the other a rancher whose cattle occasionally stray onto the farmer's land and eat his crops. Under the legal rule of *closed range*, the rancher is responsible for the resulting damage; he has a legal duty to fence in his cattle. Under the alternative rule of *open range*, it is the farmer's duty to fence the cattle out; if they get in, the rancher is not liable.

One implication of Coase's analysis of the problem of externalities, discussed in chapter 4, is that as long as transaction costs are low, which rule we have has no effect on how ranchers and farmers behave. If the efficient solution is for the farmer to fence the cattle out (typically the case if there is lots of grazing land with free-ranging cattle and a few scattered farms), that will happen, whether because the farmer is liable (open range rule) and wishes to avoid the uncompensated damage or because the rancher is liable (closed range) and pays the farmer to fence the cattle out to avoid the greater cost of fencing them in himself. Similarly, if the efficient solution is to fence the cattle in, that will happen. All the legal rule determines is who pays for it.

Shasta County California, by historical accident, is a patchwork of open and closed range; in some parts of the county owners of straying

cattle are liable for the damage their cattle do, in some parts they are not. It occurred to Robert Ellickson, a legal scholar, that this provided a perfect opportunity to test Coase's argument against the real world.

What he discovered was very odd indeed, as sometimes happens when scholars temporarily abandon theory in favor of observation. Coase's prediction was correct. Farmers, ranchers, and people who combined both functions behaved in the same way with regard to straying cattle whether in open or closed range. But Coase's explanation was wrong: There were no side payments. Farmers in open range were not paying ranchers to fence their cattle into their own fields; ranchers in closed range were not paying farmers to fence cattle out of their crops.

Further study yielded a simple and surprising explanation. When it comes to matters of trespassing cattle—and some other things—the law of the state of California does not run in Shasta County. The resolution of such disputes is determined instead by a system of informal norms of neighborly behavior, a private system of rules privately enforced.

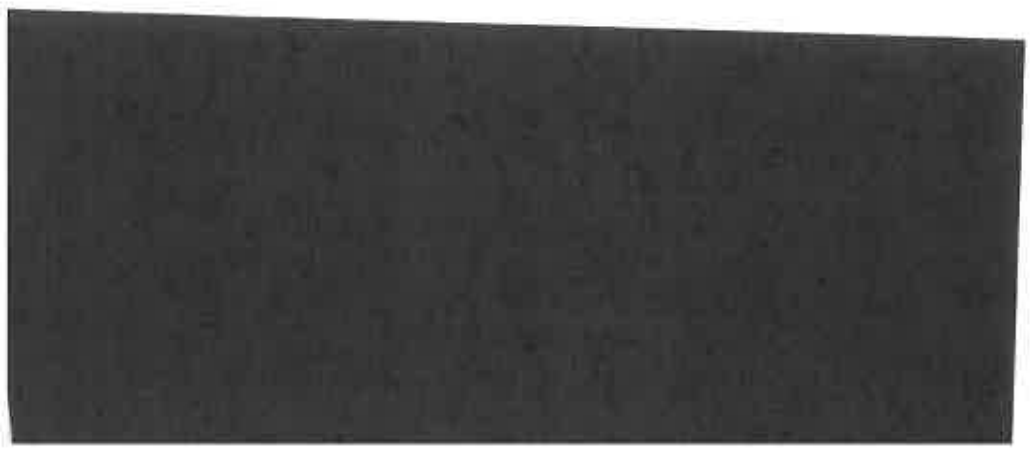
Suppose some of my cattle get into your fields and start eating your tomato plants. You call me up to complain. If I am a good neighbor, I come over promptly, remove my cattle, apologize, and, if there has been substantial damage, offer to help you repair it.

Suppose I am a bad neighbor: I show up three hours later, don't apologize, don't offer to help. Your first response is true negative gossip, telling other people in the community about my unneighborly behavior. People start showing me the cold shoulder, my wife doesn't get invited to neighborhood bridge games, my children don't get invited over to play at other children's houses.

Suppose it doesn't work; perhaps I don't have a wife and children and am an unsociable type, just as happy not to have to exchange friendly chit-chat with neighbors. After the second or third time my cattle stray into your field, you escalate the conflict. Instead of calling me up to remove my cattle, you drive them out of your field yourself and keep driving them for several miles in the direction away from my farm. Eventually I notice that my cattle are missing and have to spend considerable time and effort finding and retrieving them.

It may occur to some readers, especially after the discussion of alternative punishments in the previous part of this chapter, that there is a more efficient punishment I could impose. Eight of your cattle wander into my field. I convert one of them into hamburger in my freezer—this is, after all, a rural county—and call you up to tell you that seven of your cattle are trampling my tomatoes. After a few such incidents you count your herd and get the point.

That punishment may be more efficient, but it is forbidden by this particular system of norms. The reason, I believe, is that it is too efficient—



with the result that it is in my interest to impose it even when you are not really guilty. Not only is the system of private norms we are discussing privately enforced, it is also (unlike the Icelandic system) privately judged. When I decide what punishment to impose on you for the misdeeds of your cattle, I am acting as judge and jury in my own case, limited only by the willingness of our neighbors to accept my side of any subsequent dispute about what happened.

As long as all the punishments I can impose hurt me as well as you, my judging my own case is not too serious a problem. I don't really want to spend the next two hours driving your cattle away from your ranch. But if I have the option of imposing a punishment that makes me better off at your expense, that changes the situation. Now, when you tell our neighbors that I am really a cattle thief rather than a wronged farmer, they may believe you. By restricting the range of permitted punishments in the way it does, the system of private norms of neighborly behavior avoids that problem.

So far I have discussed the application of the norms to only one issue, trespassing cattle. They apply to some other issues as well, such as the mutual obligation of neighbors to build and maintain fences. There too the norms, in practice, trump California law.

The reason norms trump law in Shasta County is simple: One of the strongest norms is that neighbors don't sue neighbors. Anyone who goes to court to enforce his rights automatically loses his case in the court that matters most, the court of local public opinion.

Of course, the system of norms does not cover everything. California law still applies to murder, marriage, and many other things. It even applies to cattle when they are run down by cars. People driving through Shasta County are not neighbors, hence not a part of the system of self-enforced norms, so suing them is a perfectly legitimate activity and being sued by them a real risk.

Having stumbled over the norms of Shasta County, Ellickson went on to investigate a variety of other systems of private norms, including those of whalers in the nineteenth century and modern American academics. The last example was the cruelest, at least so far as his fellow law professors were concerned, since he offered evidence that professors, when photocopying each other's articles, blithely ignore the relevant copyright laws while adhering to professional norms designed to serve the interests of the academic community, in some cases at the expense of their publishers. His central thesis was a simple one: Close-knit groups tend to develop efficient norms. He concluded that while formal law is important, it is less important than generally believed. In a wide variety of situations people not only succeed in resolving their conflicts without recourse to law, they do it by mechanisms that work considerably better than the legal system.

Two important questions these stories suggest are how norms arise and why they tend to be efficient. If rules are well designed, the obvious explanation is that someone designed them. While this may explain some systems of religious norms, it tells us little about norms that apply to straying cattle and fence building in Shasta County, or, in the nineteenth century, to who owned a whale when two different ships had been involved in killing it.

An alternative to deliberate planning is evolution. Perhaps, over time, societies with better norms conquer, absorb, or are imitated by societies with worse norms, producing a world of well-designed societies. The problem with that explanation is that such a process should take centuries, if not millennia, which does not fit the facts as Ellickson reported them. Whaling norms, for example, seem to have adjusted rapidly to changes in the species being hunted.

Perhaps what is happening is a form of evolution involving smaller and more fluid groups than entire societies. Consider a norm such as honesty that can be profitably followed by small groups within a society, applicable only within the group. Groups with efficient norms prosper and grow by recruitment. Others imitate them. Groups with similar norms will tend to fuse, in order to obtain the same benefits on a larger scale. If one system of norms works better than its competitors, it will eventually spread through the entire society. When circumstances change and new problems arise the process can repeat itself, generating modified norms to deal with the new problems.

This conjecture about how norms arise and change suggests a prediction: Even if a norm is efficient, it will not arise if its benefits depend on everyone following it. It is in the interest of any pair of captains to agree in advance to an efficient rule for dealing with whales that one ship harpoons and another one brings in, just as it is in the interest of a pair of individuals to agree to be honest with each other. But a rule for holding down the total number of whales killed so as to preserve the population of whales is useful only if everyone follows it. The former type of norm existed, the latter did not, with the result that nineteenth-century whalers did an efficient job of hunting one species after another to near extinction—which was probably not the efficient outcome.

Where Are They Now?

Iceland today is a conventional Scandinavian democracy, with public prosecution, public law enforcement, and other familiar institutions. England today has a legal system very much like America today. What happened?

A possible explanation for the final collapse of the Icelandic system is external pressure. In the thirteenth century Norway emerged from a long period of civil war with a strong and wealthy monarchy. During the Sturlung period, the final fifty years of increasing violence leading to the collapse of the Icelandic system, the Norwegian Crown repeatedly meddled in Icelandic politics, supporting one faction or another in the hope of setting up a native ruler subservient to Norway. They never succeeded—their clients tended to abandon their Norwegian allegiance once it looked as though their side could win without it—but the continuing civil war eventually convinced most of the Icelanders to give up on independence.

An alternative explanation is that the Icelandic system depended on political power, in particular the ownership of goðorðs, being widely dispersed. The Sturlung period saw an increasing concentration of power, with a few factions controlling many goðorðs. That may have subverted the competitive balance of power on which the system depended.

Yet another possible explanation is that what destroyed the system was a foreign ideology: monarchy. As long as the function of feud was to resolve claims by people who thought they had been wronged, the system worked reasonably well. But when the feuds changed into a civil war over who was going to end up ruling the country when its traditional system collapsed, it was a different game with a different logic. Imagine, for a rough modern equivalent, what our legal system would look like if judges routinely got elected for the chief purpose of jailing all opponents of their political patrons, or if juries routinely acquitted murderers on the grounds that they approved of the murder. The form of the system would be the same as it now is, the substance very different.

What about the changes in the English system in the late eighteenth and early nineteenth century that converted it into something more like a modern system of public prosecution of crime? One possible explanation is that private prosecution depended on reputational incentives, on potential victims, individually or in prosecution associations, committing themselves to prosecute in order to buy a reputation that would deter crimes against them. Such incentives work better in a small town, where everyone knows everyone else, than in a big city, and the cities were getting bigger. It was in London in the 1830s that Robert Peel established England's first system of paid, professional police.

That may explain the shift from private to public prosecution, but what about the shift from execution, transportation, and pardoning to imprisonment? That may, in part, have reflected rising incomes. Imprisonment was more expensive than execution but permitted a more continuous range of punishment (and was less offensive to the views of much of the population) than a legal system that, at least sometimes, hanged people for minor crimes. So once England was rich enough to afford to

lock up violent criminals, it started doing so. In addition transportation was becoming less effective as transport became less expensive, making it easier for transportees to escape and return to England illegally.

A second factor seems to have been ideological. Eighteenth-century penal theorists had a view of criminal behavior very much like that of twentieth-century economists: Criminals were criminals because it paid. To stop them from being criminals, you imposed punishments severe enough to make some other option more attractive. The early nineteenth century saw a shift toward the idea that rehabilitation rather than punishment was the proper goal. Criminals were criminals because they didn't know any better; if properly reeducated via religion and hard work, they would become law-abiding and productive members of the community. Hence the rise of the penitentiary, where criminals would learn to repent of their moral failings and from whence they would go forth and sin no more.

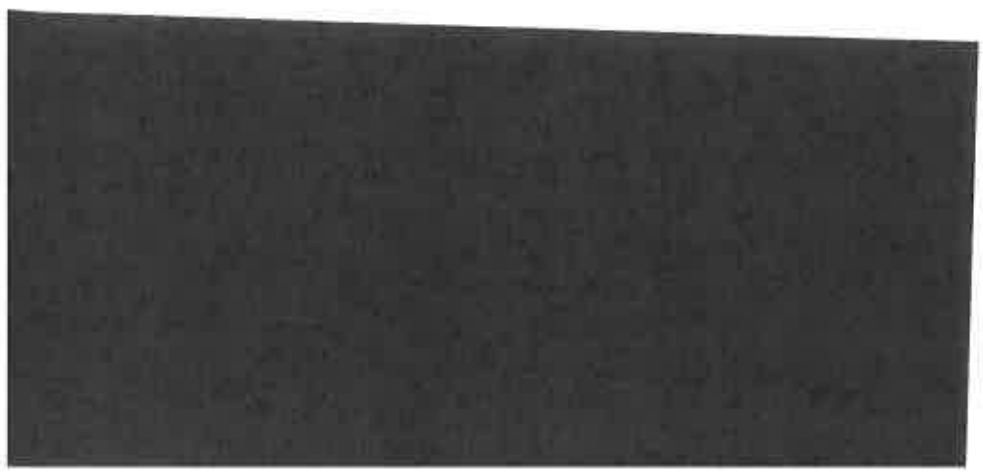
Lessons We Can Learn

I have described three different societies, each of which had or has a system of rules to deal with the same problems, or at least some of the same problems, as our legal system, and each in a different way. What can we learn from them?

The first and most general lesson is that the solutions we are used to are not the only possibilities. Crimes do not have to be prosecuted by police and public prosecutors, as we can see by both historical examples. Punishments do not even have to be enforced by the government, as we can see in both Iceland and Shasta County.

These societies not only tell us that alternatives are possible, they also tell us something about what problems they encounter and how they might be dealt with. Systems of private prosecution, including modern tort law, depend on someone having an adequate incentive to prosecute and the resources to do it. The Icelanders came up with some interesting solutions to that problem, as did the English in the eighteenth century.

Ellickson's work on norms also suggests an interesting possibility for making sense of crime rates in the United States at present. Our murder rate is not only unusually high by the standards of other developed countries, it is also very uneven—low in most places, very high in poor parts of the inner city. Perhaps the reason is that the system of legal control over crime that legal scholars, including economists, spend their time studying doesn't really matter very much on the south side of Chicago, just as it doesn't matter very much in Shasta County. The main reason not to commit crimes in most of the United States, indeed most of the world,



might be that if your neighbors suspect you are a criminal they will be reluctant to give you a job, or rent you an apartment, or let you date their daughters.

If that system of private enforcement breaks down in subgroups of our society where major sources of income are welfare and crime, where both sex and childbearing are largely divorced from marriage and parents have little control over the sex lives of their children, the criminal law may prove a weak substitute.

Further Reading

Readers interested in more information on these three societies may want to look at two articles and a book review by me, all of which can be found on my web page, and a book by Robert Ellickson:

"Making Sense of English Law Enforcement in the Eighteenth Century," *University of Chicago Law School Roundtable* (spring/summer 1995): 475–505.

"Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* (March 1979): 399–415.

"Less Law Than Meets the Eye," a review of Robert Ellickson, *Order without Law*, *Michigan Law Review* 90, no. 6 (May 1992): 1444–52.

Robert Ellickson, *Order without Law* (Cambridge, Mass.: Harvard University Press, 1994).