STRUCTURE OF PRODUCTION OF
FREE-MARKET DISPUTE RESOLUTION

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ABSTRACT

What would the market for dispute resolution look like without the interventions of compelled testimony, court records being public documents, compelled monopoly jurisdiction, and legislative supremacy? I defend a structure of production that includes the institutions of mediation firms, mediation casebooks, arbitration firms, arbitration casebooks, law firms, law schools, restatements of bodies of law, holdouts, scofflaws, deadbeats, and registries for important legal data. I make clear the means by which norms enter the bodies of law and the role of scholars and intellectuals in that process. I grapple with the difficult problems of enforcement, privacy, and the possible types of insurance in such a system.

Introduction

FREE-MARKET THEORISTS, considering the production of security and adjudication in the absence of state institutions of taxation, monopolies, and legislation have described arrangements that could meet the social needs of law and order.[1] I have written extensively on the most effective business

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[1] The most important treatments have been Gustave de Molinari, *De la production de la sécurité* Journal des Economistes 277 (Feb 1849), Murray Rothbard, Power and Market

arrangements for providing patrol and investigation, and bundling this with tort indemnity insurance.[2] Most importantly, this research has concluded that the business of dispute resolution would not be integrated with production of patrol and investigation. Therefore, I treat it separately here.

Dispute resolution is a social constant. In all times there is a market for dispute resolution regardless of aggressive interventions. In the first section of this paper, I outline both the actual (historical and present-day) institutions of free-market dispute resolution and explain the likely institutions that would evolve in the absence of aggressive interventions. After the complete picture of free-market dispute resolution is understood, I then proceed in the second section of this paper [**this draft for ASC 2011 does not contain the second section - GG**] to catalog the types of aggressive interventions into a dispute resolution market, their negative consequences, and how the negative consequences beget further aggressive interventions in a vicious dynamic.

Dispute Resolution in a Free Society

Informal Dispute Resolution

When one person violates the supposed rights of another, the complainant[3] can respond in any number of ways. How does dispute

(1970), Linda and Morris Tannehill, The Market for Liberty (1970), David Friedman, The Machinery of Freedom: Guide to a Radical Capitalism (1973), BRUCE BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990), Hans Hoppe, *The Private Production of Defense* 14 JOURNAL OF LIBERTARIAN STUDIES 27 (1999), Bruce Benson, To Serve and Protect: Privatization and Community in Criminal Justice (1998), Randy Barnett, The Structure of Liberty (1998), and Robert Murphy, Chaos Theory (2002).

[2] See Gil Guillory and Brian Drake, *On the Viability of Subscription Patrol and Restitution Services* (2006), Gil Guillory and Carrie Ann Sitren, *The Legal Landscape for Subscription Patrol and Restitution in Texas* (2007), Gil Guillory, Mike Blakeney, and Wilton Alston, *An Actuarial Analysis of Crime Data with Applications to Subscription Patrol and Restitution* (2007), Gil Guillory and Patrick Tinsley, *The Role of Subscription-Based Patrol and Restitution in the Future of Liberty* (2008), Gil Guillory, *Patrol Study for the SPR Business Model* (2008), Gil Guillory, *Marketing Subscription Patrol and Restitution* (2009). All of the works in this footnote are available on my website sites.google.com/site/gilguillory/

[3] For simplicity, I use the term *complainant* to denote the victim, the complainant, the aggrieved party, the plaintiff. I use the term for concision and simplicity. Likewise, I use the term *respondent* to denote the offender, the respondent, the defendant, the supposed aggressor. I use the term *offense* to refer to the *supposed* inadmissible act. By choosing a broad definition that includes any complaint, I draw in all disputes of whatever kind irrespective of third party notions of whether the complainant has standing, the offense under consideration could be effective (e.g., evil eye, voodoo magic), the offense is

resolution begin? It begins with the claim of a disputant. In the absence of a third party, the only choice that two parties have is to live with or settle their differences, or embark on a little war.

Without any formal dispute resolution process, a complainant has four options open to him: *doing nothing*, *seeking a concession*, *negotiating a settlement*, or *self-help*.[4]

Doing nothing is the chosen response when the complainant thinks the likely costs of doing something outweigh its likely advantages. This occurs when the violation is small, such as arriving home from the store to find an item missing from the bag, it having been left at the checkout stand. This response (doing nothing) may be driven by lethargy, but can also be driven from fear of retaliation, as in the case of the protection racket or the schoolyard bully. In the case of major power imbalances, the complainant's impotence will also drive him to do nothing, such as we see in the aphorism that "you can't fight city hall". Doing nothing presents two problems: that the respondent will get away with the crime and the complainant's situation will not be improved!

Seeking a concession is when the complainant asks for some sort of remedy directly from the offender. This is a common occurrence: returning an item to a vendor and demanding a refund, directly getting relief from a family member, friend, or co-worker; or immediately getting the insurance information from a motorist that just hit your car. If the complainant does not receive satisfaction, this can escalate to either self-help or, preferably, negotiated settlement.

Self-help is when the complainant takes direct action against the person or property of the respondent without having settled the dispute through rational discourse. This is commonly practiced with property. A neighbor "holds a ball hostage" until he can lecture the boy who keeps ruining his flowerbed. A repair shop does not release a car until the disputed bill is settled. Goods have been delivered short or damaged and the buyer refuses to pay any of the bill until the entire matter is settled.[5] Self-help

worthy of dispute, the dispute is justiciable (e.g., moot or unripe questions), the dispute is "already settled", etc. In short, we are considering *all disputes*.

[4] The categories considered here are consonant with the anthropological literature on dispute resolution and therefore apply to all societies at all times. I have specifically followed DEREK ROEBUCK, ANCIENT GREEK ARBITRATION 19 (2001) with some modifications that suit the purposes of this paper.

[5] If the buyer were to pay the uncontested part of the bill and then negotiate the contested part of the bill in good faith, this would be categorized as negotiated settlement. Here, the buyer withholds full payment in order to force the vendor into negotiation, but

against persons is not vigilantism. Vigilantism refers to both extra-legal adjudication[6] and self-help against respondents, while self-help refers to action against the person or property of the respondent and does not include an adjudicative element. Self-help, while legitimate in the eyes of all as a proper response in at least some cases,[7] is destructive of social order and is considered the worst choice or a last resort. The reason for this is that self-help specifically excludes an adjudicative element, and so a complainant's self-help can be indistinguishable from aggression from the perspective of third parties and does not usually end the dispute. Indeed, self-help often intensifies the dispute or spawns new ones. While all other dispute resolution categories (except doing nothing) require the application of reason and rhetoric to persuade others about the victim's rights, self-help lacks this ingredient. Out of frustration over his inability to press the victim's rights, a complainant may turn to self-help. Therefore, this category of dispute resolution is an ever-present threat, representing the ultimate category of escalation, and the somewhat common method of choice to force settlement in matters of property dispute. The Greeks categorized self-help as hubris.[8]

In a good society, self-help is minimized by the creation of other institutions that can assist in the resolution of disputes.

Negotiated settlement is the effort of the complainant and respondent to reach a settlement without the intercession of third parties.[9]

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the dispute must be categorized as self-help – not negotiated settlement – until the undisputed portion of the bill is paid.

[6] Vigilantism can be defined in two different ways. One definition lacks any third party adjudicative element. In this paper, we define such actions as self-help. The other possible definition (the one adopted in this paper) includes an adjudicative element and a remedy, but the adjudication lacks the proper character for wide social acceptance. The public legitimacy of the adjudicative body and any associated self-help is what separates vigilantism from other categories of dispute resolution.

[7] From Sophocles's *Antigone* to the just-released Coen brothers' film *True Grit*, self-help has been portrayed in drama for millennia, because the limits of legitimate self-help are a fascinating and important debate for every generation to grapple with. The *Dirty Harry* movies, comic book heroes such as *Batman*, and the classic movie *Taxi Driver* all exemplify self-help.

[8] DEREK ROEBUCK, ANCIENT GREEK ARBITRATION 88 (2001): "Dikē, justice, is to be preferred to hubris, the insolence of taking the law into your own hands and scorning the well-being of the community." But note that we can infer from the Greek dramatists that some forms of self-help were still legitimate. For instance, a husband catching his wife in adultery could justly kill the man. Again, some degree of self-help is always socially acceptable.

[9] However, it can be undertaken by agents of the disputants. But those agents do not intercede. They act on behalf of the disputants and so are not third parties – they are agents of parties to the dispute.

The fairer twin of self-help, negotiated settlement is all actions undertaken by the parties to settle the dispute, and so is ever-present. The agreement by parties to mediate or to arbitrate is within the category of negotiated settlement. It is not unknown for disputants, having received an arbitral award or judgment, to set it aside and substitute their own negotiated settlement. This might be done to improve long-term relations, or disputants might choose this course of action because they first wanted to establish their rights on the one hand, the status quo on the other, and then to choose a negotiated settlement with this full knowledge. If disputants are unable to negotiate a settlement, they often move to mediation, or sometimes directly to arbitration or litigation.

Mediation

Mediation is a mediated negotiated settlement. The mediator(s)[10] is (are) chosen by the disputants: sometimes a peer or friend, sometimes an authority such as a boss, teacher, parent, priest, social worker, policeman, etc., and sometimes a professional mediator or mediator-arbitrator. The functions of a mediator are to work through and defuse emotional charge, improve communication of facts and issues between the disputants, spur the disputants to focus on the future, draw out from the disputants possible and preferred terms of settlement, and sometimes to offer to the disputants his own suggested terms of settlement.[11] Due to the strained relations between the parties, sometimes the mediator acts as the conduit for communication between the disputants.

While mediation is a natural human skill, it is also an art to be learned and practiced. In primitive societies, this function is served by elders, men of wealth, and religious leaders. In a society with sufficient wealth, professional mediators emerge to sell their mediation services. As mediators rack up experience in mediation, they will experiment with techniques of mediation. A good mediator is one with a high settlement rate. As the mediators learn to improve their facilitation models,[12] they implement innovations and mediators learn from one another.

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[10] Other terms used in lieu of *mediator* include conciliator and facilitator.

[11] Some authors make a strong distinction between *mediation,* in which the mediator is truly neutral and never suggests terms of settlement, and *conciliation*, in which the conciliator is empowered by the parties to suggest terms of settlement. Sometimes the definitions of these terms are reversed. Following DEREK ROEBUCK, ANCIENT GREEK ARBITRATION (2001), I make no distinction.

12 A facilitation model is a program of "how to run" a mediation. Two state-of-the-art facilitation models are Allan H. Goodman, Basic Skills for the New Mediator (2nd ed. 2005) and Charles K. B. Barton, Restorative Justice: The Empowerment Model (2003).

State-of-the-art mediation practice follows a three-step approach. The first step of *exploration* examines the conflict from each individual perspective, consequences of the offense, and issues still on the table, such as lingering shame, fears and questions, and open questions of proper retribution, restitution, and justice. The second step of *transition* involves sharing of information and, ideally, a coming to terms by all of the parties to the concerns and issues of all other parties. The third step of *agreement* is the formation of a contract for future action to effect a compromise, render equity or justice, and settle the matter with finality. Each of these steps have nuanced sub-steps which may involve deciding when participants should be asked to speak or, in some cases, cut off; whether a sub-conference with one side of the conflict is appropriate; and how best to handle such crises as the victim being blamed.

As the best ways to conduct mediations are learned and marketed to disputants, all of society benefits by the fact that more disputes result in settlements and fewer devolve into violence and strife. Better mediations also mean less time and expense spent in adversarial modes of dispute resolution.

Mediators will begin to notice patterns among settlements. For instance, the mediator may notice that a series of disputes in which the victim has lost a thumb resulted in settlements requiring a payment of restitution of ₰5000, ₰4500, and ₰5500. In another series of cases, the mediator might notice that punishment of the offender by whipping tends to be part of the settlement if the offense was rape. These norms and their trends over time represent a direct expression of the community norms of justice, including proper forms and modes of punishment, restitution, leniency, etc.

The patterns that develop can be documented in mediation casebooks. They will have a ready market among arbiters who must impose judgments and need guidance on the specific remedies that are appropriate in their community. In many historical settings, those who mediated disputes and those who arbitrated disputes were the same people. For these reasons, the compilation of mediation casebooks was not necessary. Where the division of labor between mediation and arbitration has become more complete, the need for mediation casebooks is much stronger.[13]

Additionally, mediators will be interested in their settlements lasting, for this is also what disputants want. That is, they will follow up on settlements to see which ones were upheld by the parties, and whether the

[13] For a more exhaustive treatment of this topic, see Gil Guillory and Gregory Rome, *A Call for Mediation Casebooks* (2010), available on my website sites.google.com/site/gilguillory/

parties were happy with the outcome in the end. Such studies of victims and offenders are in the field of criminology, such as victim outcome studies and offender reintegration and recidivism studies.

However, mediation is not a panacea. Not all disputes can be mediated to settlement. When mediation fails to result in settlement, the dispute is typically elevated to arbitration or litigation. In the case of arbitration, the mediator sometimes assumes that role immediately with no loss of time or expense.

Arbitration

Arbitration is when disputants name a third party *arbiter* to resolve their dispute by imposed decision. The term encompasses the process itself. Arbitration results in an *arbitral award*. The arbiter can be plural, but is typically an odd number. Importantly, arbitration must enjoy legitimacy in the minds of the relevant public. Legitimacy means that third parties accept the arbitral award as an expression of equity or justice based solely upon the merits of the arbiter's character/social position and/or the procedures he follows, without need to learn the details of the particular case. The relevant public includes the disputants and their communities of care,[14] any people that will be called upon to exert social pressure to enforce the decision, and any people that have a diffuse interest in the social order.

Arbitration is a different line of work from mediation. While mediation requires sympathy with and understanding of the parties and their concerns, arbitration requires a greatly developed sense of practical wisdom and understanding of community norms.

There are two aspects of practical wisdom.[15] First, there is the ability to decide individual cases. Second, there is the ability to frame general rules about cases. Who has such a wealth of practical wisdom? They are the people who have demonstrated in their own lives that they have chosen well when it comes to health, wealth, friendships, and the good life in general.[16] These people, those who are most happy and productive, most secure in their affairs, most loved by friends, and most virtuous, are those whom would make the best arbiters. Historically, this is how arbiters were first chosen. They were the *first among equals*.

[14] The term community of care refers to the people most closely connected to the disputants: family, fellow churchgoers, coworkers, friends, neighbors, etc.

[15] Nicomachean Ethics, 6.11.

[16] Nicomachean Ethics, 6.5.

As cases are heard, rules are formed. A particular dispute has no "right" judgment. As with all matters of practical wisdom, such as the management of household finances or the maintenance of one's health, there are a multitude of bad choices, but there are also many good choices. It is impossible to overstate the difficulties involved in the question of "what should be done?" when faced with cases such as a young man who has killed another. Nonetheless, *something* must be done. Arbiters decide specific cases, and sometimes explain the underlying rule they use to decide the case. Explaining the underlying rule is useful, since it can persuade the disputants and third party observers that the adjudication is a good one. However, making a good judgment is easier than stating a good underlying rule, and both are easier to do than to explain why such a rule is justified. For example, it is easy to see that murder is wrong and to declare a particular case to be murder. But it is much more difficult to articulate a rule the application of which will allow one to adjudicate in all cases whether or not a given act is a murder,[17] and it is harder yet to explain why such a rule is justified.

In primitive societies, the body of cases decided and rules articulated are called *customary law*, and are transmitted orally. In different societies, different bodies of customary law evolved containing different types of offenses, different ways to obtain evidence and ascertain guilt or innocence, and different sanctions for offenders. Where writing developed, the customary laws were written down or *codified*. Such a complete set of legal rules is also called a *body of law* or a *restatement of the law*.

In the modern context, labor is further divided. Arbiters either specify their body of law or the disputants do. Arbiters do not directly add to or modify the body of law. Arbiters focus exclusively on the hearing of individual cases and applying the body of law *as given*.

As the number of modes of productive activity increase, there is a demand for specialized arbitration firms: those specializing in certain practice areas such as maritime law, family law, torts, contracts, and firms market themselves into niches such as the cheapest, the best, the fastest, the most discreet, etc. The modern arbitrator issues *arbitral awards*, the statement of *what is to be done*. Sometimes these are open to public inspection. Other times they are entirely private.

The compilation of arbitral awards or arbitral casebooks is useful to those who work on changes to the body of law, the *jurists*.

[17] As opposed to merely a negligent homicide or some other category. Such categories are necessary if we are to treat like cases alike, which is one of the requirements of justice.

Lawyers

With the increasing sophistication of arbitration also comes an increasing sophistication in the making of arguments before arbiters. In ancient Greece, the rise of the arts of rhetoric and argumentation paralleled the rise of codified bodies of law, permanent courts, and the multiplication of goods and services. The Sophists were itinerant scholars that sold their services, teaching people how to construct winning arguments. Many Sophists were also *logographers*, writers of courtroom speeches that their principals would give.

As the body of law develops, demand develops for *lawyers*, people who are intimately familiar with legal procedure and codes. The work of lawyers divides into three main areas. First, there is the making of arguments before arbiters, made by *advocates*. Second, there is the creation of legal instruments such as contracts and wills, made by *attorneys*. Third, there is the rendering of legal advice, made by *counselors*.[18] As the division of labor proceeds, some law firms only focus on one or two of these, and sometimes only in a particular practice area such as family law.

Law firms could and can take many shapes. The law firms might have any combination of mediators, arbiters, advocates, attorneys, and/or counselors. In a highly articulated division of labor, we would expect certain firms to specialize in mediations and/or arbitrations which require advocates on each side of the dispute. Such a firm, engaging in only arbitration would be peopled with the most experienced and knowledgeable arbiters who in the past were successful advocates, attorneys, and counselors, but in their present positions pose no competitive threat to other firms. Such a firm could build a good reputation in the niche of adjudication.

Jurists and Restatements of Law

As cases are decided and general rules are proposed, these are written down. We might ask the question, why not let adjudicators decide particular cases in every instance and dispense with the framing of general rules? There are five problems with this.[19] First, the framing of general rules serves the social function of justifying and legitimating particular rulings. Second, as we will show below, the act of restating the law allows it to be improved and more closely approach *natural law*, which means that the framing of general rules will, over time, improve the production of dispute resolution. Third,

[18] These definitions are prescriptive and do not accord with all historical or modern uses.

[19] Three of these are at Aquinas, Summa Theologica, I-II, q. 95, a. 1, reply 2

more adjudicative work can be performed with less effort by not having to re-perform the work of framing a general rule as each case is decided, but to learn from the work of others. Relatedly, it is easier to find a few good jurists than to find many good adjudicators. Fourth, a jurist can take his time framing a rule and think of many possible cases while an adjudicator must decide a particular case quickly. Fifth, a jurist can frame a rule in the hypothetical, so he is less likely to be biased by a particular case before him.

As mentioned above, practical wisdom is composed of two aspects: the deciding of particular cases and the framing of general rules. Part of the practical wisdom of deciding cases is when particular cases should not be governed by a pre-established rule.[20] For example, if there is a rule that captains of ships are liable for the loss of goods they are transporting, but then in an emergency the captain chooses to jettison some of the goods to save the ship, is the captain then liable to recompense the owner of the jettisoned goods? Here, the proper ruling is that the owners of the goods that were saved must share the losses of the owners of the goods that were jettisoned, and the captain is not liable. As can be seen by this example, simple rules develop into more complex and complete rules, resulting in a body of law that changes very slowly in its fundamental contours, and becoming more specific over time.

It may be the case that the arbiter can decide a case correctly, pointing out that the pre-established rule does not apply. He may even be able to craft a general rule to deal with the case. But there is still the question of defending the new rule in a larger conceptual framework and integrating it into the broader principles of law. As the division of labor proceeds, this function is performed by the dedicated *jurist*.[21] The jurist's inputs are arbitral award casebooks and sometimes more extensive information about individual cases, plus a thorough grounding in legal theory and its related fields such as ethics and economics. The jurist's outputs are *opinions*, which are written statements about judgments that have been made, and *Restatements of the Law*, which is a complete book of all the relevant laws as they are known, incorporating all of the latest rules that have been formed due to recent cases.

Ends and Means of Dispute Resolution

To the mediator or the arbitrator, the purpose of mediation or arbitration is to restore peace: to end the dispute with finality. They seek these ends to the greatest degree when they must market their abilities to resolve disputes widely and persuasively. Restoration of peace creates the

[20] Aquinas, Summa Theologica, I-II, q. 96, a. 6.

[21] Again, this term is used prescriptively.

conditions under which the disputants and third parties can return to the advantages of social cooperation.

The best way to ensure that the dispute is ended with finality is for both disputants to agree to a settlement; if the disputants agree the dispute is settled, then it is likely to be settled with finality.[22] The second best way is for the disputants to agree to abide by the decision of a mutually-appointed arbiter.[23] It is the diffuse goal of all parties that peace be restored, but the immediate ends sought by actors depend on their chosen role in the dispute resolution. For the reader familiar with Aristotle's four causes,[24] I suggest the following table along with Aquinas's competing formulation of law[25] in the final column:

Who	**Disputant**	**Advocate**	**Mediator**	**Arbiter**	**Jurist**	**Aquinas's Lawgiver**
Efficient Cause[26]	Advocate[27]	Advocate, Rhetoric	Mediator, Prudence, Med tech[28]	Arbiter, Prudence, Body of Law	Jurist, Ethics, Economics, Prudence	Human Lawgiver (Judge, Legislator)

[22] If the terms of the settlement are not honored, or new information comes to light, or carrying out the terms of settlement has unexpected negative consequences for a disputant, then the dispute may renew.

[23] This is less likely to result in finality since the terms are not agreed by both parties. The more the arbitral award is considered just by the disputants, the more likely will the dispute be at an end.

[24] Aristotle explained in his *Physics* four ways in which the Greek word αἴτιον (roughly translated as "cause") could be used, but this fourfold division has become something of a mainstay of philosophical analysis. There is no reason to read too much into this table, and the various conflicting definitions and interpretations given by philosophers of the four causes are such that the definitions I give in the subsequent footnotes are hardly definitive. At the very least it is my hope that this table and its footnotes are internally consistent, and it exposes to the reader how each function is carried out, and how they are interrelated.

[25] I am referring to ST THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, qq. 90-97. An excellent presentation of this is R. J. HENLE, S.J., THE TREATISE ON LAW (1993) which contains the original Latin, modern English translation, and commentary, paragraph by paragraph, and an indispensible 114-page introduction that should be read by any modern student wishing to understand, engage, and come to terms with the legal thought of Aquinas.

[26] The efficient cause is the means used and the causative agent – who is the agent and what are the tools the agent uses?

[27] Here we assume that the advocate is hired by the disputant.

[28] By this is meant the "technology" of mediation – how to perform a mediation.

Final Cause[29]	His due	Pay	Peace	Peace	Order[30]	The Common Good
Material Cause[31]	Issues, Arguments, Proposed Remedies	Issues, Body of Law, Rhetoric, Ethics, Economics	Proposed Remedies	Arguments, Proposed Remedies, Body of Law, Prudence	Body of Law, Judgments, Settlements, Arguments	Human Acts
Formal Cause[32]	Settlement	Arguments, Proposed Remedies	Settlement	Judgment	Opinions, Restatements (Body of Law)	Promulgated Law

Considering this table, we can trace the flow or impact of norms on the formation of the body of law. Arguments and proposed remedies are drawn from theories of ethics and economics and deployed with rhetoric. Prudence is used either to guide the parties toward (mediation) or to impose (arbitration) the best remedies. In mediation, the best remedies are those that the disputants most favor. In arbitration, the best remedies are those that the arbiter believes will result in lasting peace. But since the arbiter must contend with the arguments of just deserts on the part of each disputant, he may have to contend with conflicting theories of justice and either accept the argument of one side or the other, or provide a third theory within the time that is appropriate for adjudicative deliberation. This is a tall order for an arbiter.

Such competing theories of justice will open all aspects of the body of law to inspection: what constitutes an offense, who has standing, where presumptions and burdens lie, rules for presenting evidence and testimony, rules for determining credibility of witnesses, standards of proof, rightful remedies, etc.

To make the arbiter's job even harder, we must remember that his decisions must also enjoy some degree of social legitimacy beyond the parties to the dispute so that the parties are met with social pressure to adhere to the terms of the arbitral award and so that the arbiter can uphold his reputation as a good arbiter. For these reasons, the arbiter is also likely to be

[29] The final cause is the end sought by the agent – what's the agent's goal?

[30] The jurist's enterprise is an intellectual one. He solves legal problems – contradictions and inconsistencies. The goal he has is to form a coherent and orderly body of law. It is muddy thinking to impute to the jurist goals such as "justice", "law", or "the common good".

[31] The material cause is the stuff from which the form (aka formal cause) is made – what are the ingredients necessary?

[32] The formal cause is the form of the end of action – what do we end up with?

conservative to some degree, drawing from the existing body of law and even straining the interpretation of the existing body of law to create the appearance of following an existing rule when, in fact, the case in question is properly an exception to established law. There are many examples of arbiters creating interpolating rules to force-fit the body of law into a novel judgment.

These difficulties that the arbiter faces gives rise to a demand for the services of the jurist. While the arbiter must make arbitral decisions at the speed of business, the jurist can take time to consider multiple cases, the arguments of ethicists and economists, and how all of these fit together into a coherent body of law. The jurist, then, plays a decisive role in reshaping the law.

On a market, the jurist is chosen by disputants for an opinion on appeal. The jurist may also be asked by adjudicators to improve the body of law by producing a radically revised and streamlined version. Historically, jurists have been chosen as the best among all dispute resolvers and lawyers.[33] And the reforms undertaken have often been sweeping. Having been appointed, Solon repealed virtually every law of the odious Draconian code known for its harsh and unfair penalties.[34] Why a people would continue to suffer under a body of law they did not consent to (Draco's) for so long – nearly 25 years – is due primarily to the doctrine of forced jurisdiction which is discussed later.

Implicit in the enterprise of law[35] is the notion that the sciences of ethics and economics, rhetoric and logic, and their ancillary and supporting disciplines all support the evolution of law in a certain direction. That is, that law is something natural to be discovered, not something to be arbitrarily chosen and imposed. If this is not immediately self-evident to the reader, consider: Either one believes that what the body of law should be is open to rational deliberation, or one doesn't. If one doesn't, then such a skeptic cannot participate in the formation of a body of law – for such an enterprise is necessarily an intellectual and argumentative undertaking. If one *does*

[33] For example, in existing fragments from *The Athenian Constitution* of Aristotle we find that Solon was appointed as both *mediator* [between the factions in Athens] and *jurist* to rewrite the Athenian Constitution on the strength of a poem that Solon wrote on dispute resolution. And as explained by Plutarch, Solon had a track record of prudence and virtue, having been selected to lead the war against Megara on the strength of a poem he wrote, and also having demonstrated his rhetorical prowess as *advocate* in the dispute with the Megarians over the possession of Salamis Island arbitrated by the Spartans in which Solon, on behalf of Athens, prevailed.

[34] I concede that he did much that was unjust in altering the Constitution, as well.

[35] The enterprise of law is the work of adjudicators, jurists, and to some extent mediators and even disputants. It is the argumentative effort to discover norms.

believe that the body of law should be open to rational deliberation, then he implicitly accepts the claim that the application of reason to the human condition will result in a definite range of outcomes informed by the pursuit of truth and the application of prudence.

Beyond these scant points, there is a myriad of debate and discussion. It is enough for my purpose here to have established that in an arena of open debate between disputants and their advocates in the presence of adjudicators and jurists, with the indirect participation of philosophers, ethicists, economists, rhetoricians, and other thinkers, the adjudicators and jurists will correct and adjust the body of law over time to the dictates of reason – to natural law. As this theory predicts, laws in many societies have evolved in this common direction.[36] And the freer the market, the more the law will tend toward natural law.

But we must be careful that this point is not overdrawn. Even with the benefit of a mountain of settlements and judgments, reason cannot specify everything in a legal system. There is always room for judgment and the ambit it implies.

Private Law and Its Sufficiency

In a free market of dispute resolution, disputants demand the services of mediators and arbiters. As long as such a market is free to operate, disputants will face the following choices: if the price of mediation or arbitration is too high, they will resort to informal dispute resolution (doing nothing, seeking concessions, negotiating settlements, or self-help). But if a dispute is worth enough to the complainant and his means are great enough to buy a half-day or full day of labor from a mediator or arbiter, then formal dispute resolution is within reach. Historically, even the very poor have been able to avail themselves of formal dispute resolution as long as the market was free. Where adjudicative monopolies or oligopolies existed, or where the

[36] It has long been observed that there are many commonalities among customary law systems, such as a right of revenge killing for a murder and a corresponding price that can be paid to buy out that right. In a modern context, JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW (2006) has shown that judgments in the more prominent common law and civil law jurisdictions, primarily United Kingdom, United States, Germany, and France, have tended toward similar rulings despite having vastly different "starting points". The case of diametrically opposed underlying legal principles of water rights – the Riparian rule versus the Appropriation rule – is especially compelling (chapter 6).

payment to render a decision was outlawed,[37] the development of the adjudicative market was hindered, but not destroyed.

When such an adjudicative market exists, and the extent of division of labor allows people to engage in arbitration as a full-time or nearly full-time profession, then significant development of a body of law is possible, and an entire written body of law will emerge. In all such known cases, bodies of law with similar traits have emerged. We call such law *private law*. Private law involves relationships among individuals and associations of individuals. This is in contradistinction to *public law*, which involves relationships between individuals or associations of individuals on the one hand, and the state on the other.

Before the rise of the state as a legal person, private law was the sole category of law. As van Creveld writes, "In the absence of the state as legal persona against which offenses could be committed, our modern distinction between civil and criminal jurisdiction did not apply. It made no difference whether the matter brought before a court involved a dispute over an inheritance or murder…"[38]

Under the province of private law, we find diverse topics: contracts, marriage, inheritance, assault, battery, trespass, negligence, liability, nuisance, breach of confidence, fraud, and many more.

Some writers maintain that a society governed only by private law exhibits substantial flaws. They therefore advocate a substantial body of public law of *malum prohibitum*[39] laws, especially such provisions as: regulation of consumers; regulation of businesses; environmental laws; and the requirement to pay taxes for the maintenance of social insurance schemes, navies, standing armies, etc. It is not the purpose of this article to raise all objections to these claims, but I will raise three.[40] Firstly, it is historically

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[37] The semi-legendary accounts of the Roman law of the Twelve Tables apparently had such a prohibition, according to *Attic Nights* by Aulus Gellius, 20.1.7. This prohibition was counterbalanced by a strong cultural norm that it was a citizen's duty to act as arbiter (*bonus vir* or *judex*) without pay when asked by another to do so. Whether this norm *sufficiently* counterbalanced the prohibition of a market in arbitration is a difficult question.

[38] Martin van Creveld, The Rise and Decline of the State 29 (1999).

[39] *Malum prohibitum* is Latin for "wrong [as or because] prohibited", referring to offenses such as prostitution, gambling, drug use, or driving without a seatbelt on. It is often juxtaposed by *malum in se* which means "wrong in and of itself", referring to offenses that are universally acknowledged as wrong: murder, rape, theft, fraud, etc. Laws fit either into one category or another.

[40] For a critique of consumer regulation, see XXXX. For a critique of business regulation, see XXX. On the competency of private law to deal with pollution as a nuisance, see Murray Rothbard, *Law, Property Rights, and Air Pollution* 2 CATO JOURNAL 55

demonstrable that complex societies have flourished in the absence of public law.[41] Second, even if we grant some scope to public law, this does not necessarily destroy the case for a free market in adjudication entirely – it is possible to have a market in law even with public law overriding it in some areas.[42] Thirdly, some bodies of private law can and do have malum prohibitum laws. For instance, Jewish Law has existed continuously since at least 200 BCE competently resolving every type of dispute, and maintains a significant body of dietary restrictions and Sabbath rules. The key is that when there is no aggression, the disputants choose the body of law which they will obey, and this voluntariness severely restricts the number and extent of malum prohibitum laws that can be maintained in the body of law. This is a feature, not a bug.

Bodies of Law

Historically, bodies of law have emerged in all societies. Once the division of labor and the technology of writing have advanced far enough, the bodies become written laws. Bodies of law have been based on religion (Sharia Law), kinship and religion (Jewish Law), membership and religion (Canon Law), membership only (Rules of the London Stock Exchange), or even on loose business affiliation across a geographically dispersed group (Law Merchant). When we think of bodies of law we typically think of the non-exclusive and semi-universal codes such as Roman Law[43] or English Common Law.

As mentioned above, a body of law usually contains the following: what constitutes an offense, who has standing to bring a claim, where presumptions and burdens lie, rules for presenting evidence and testimony, rules for determining credibility of witnesses, standard defenses, standards of proof, rightful remedies, etc.

(Spring 1982). For a critique of tax-funded social insurance, see XXX. On defense goods, see HANS HOPPE, THE MYTH OF NATIONAL DEFENSE (2003).

[41] Consider ancient Celtic Law from at least the 12th century until the 17th century and ancient Icelandic Law 10th to the 13th centuries. For an account of ancient Celtic Law see XXXX. For an account of ancient Icelandic Law see XXX.

[42] Indeed, this is a feature of the system we have today in the United States and elsewhere. The common law body of law is not primarily a legislatively enacted code, though some elements of it may be legislated, such as overriding liability rules.

[43] Especially the *ius gentium* developed specifically as a system of universal law applicable to disputes involving foreigners.

Litigation

In discussing the categories of formal dispute resolution we have mentioned mediation and arbitration. However, there is an important third category that has emerged in all societies. Litigation is a special type of arbitration meeting five requirements. They are: public not private, public body of law, justice may be the required standard, advocates are specially trained and/or appointed, and the *judge*[44] is specially trained and/or appointed.

Litigation is distinguished from arbitration first by the fact that proceedings, evidence, and judgments are relatively open to inspection by interested members of the public.[45] The body of law used in litigation is that body of law most widely accepted by the public.[46] The standard of adjudication may be justice, not equity. In such cases, the judge acts more like a jurist than an arbiter – his end is more to convince third parties of the justness of the decision than it is to create a lasting peace between the disputants, although both considerations are always in play.[47] Litigation, therefore, enjoys a higher degree of social legitimacy than arbitration. That is, a judgment from a judge will be accepted *prima facie* by more people, more of the time. The uses of litigation are when the interests of third parties are strong. Why? For if third parties have interests in seeing justice done, it is in the interest of the disputants to have their dispute open to the public, conducted by a judge, under the most widely accepted body of law, etc. If such a dispute is not litigated, then the dispute may not end. The unsatisfied third parties may raise the issue anew with the offender!

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[44] I prescriptively use the term *judge* to denote the arbiter in litigation.

[45] Some would argue that litigation (sometimes called public arbitration) is characterized first and foremost by compelled jurisdiction. That is, one disputant can proceed with arbitration even though the other disputant does not consent to being judged by the nominated court. This is not a universal feature of litigation, so I exclude it as a necessary part of the definition and take up the question of compelled jurisdiction below.

[46] For instance, if there is contractual dispute between traders at the London Stock Exchange and it is arbitrated by the rules of the exchange, this is arbitration. If a petition is entered at common law, this is litigation.

[47] This difference was sharply drawn in Roman Law. In Pro Roscio Comoedo, Cicero says: "A certain sum of money was owed to you, which is claimed now before a judex [litigation], in which a promise was made of the additional one third required by legislation. Here, if you have claimed one sesterces more than is owing you, you have lost your case, because [the decision of a judex] is one thing, arbitration is another. A [litigation] is for a certain sum, arbitration for an uncertain…What is the formula before a judex [litigation]? Direct, hard, simple…What is it in an arbitration? Mild, moderate: 'As much as should be awarded that is the more fair and proper'"

We have implicitly raised an important issue – privacy. As has been shown, there is no general right to privacy. However, many of the issues of privacy are neatly solved in a free market of dispute resolution. In a free market, the individual can never be forced to share information, even in a litigation. He cannot be forced to appear at court, be a witness against himself, nor can his property be seized and placed into public evidence. Furthermore, if he submits to arbitration the extent of disclosure of information is open to up-front negotiation and agreement. Of course, information about him and opinions about him held by third parties he cannot control.

Evolution of Disputes

Having now traced all forms of informal and formal dispute resolution, we present Figure 1 (below) depicting the categories. The low road of self-help and the high road of negotiated settlement are available at all times. Moving from left to right we experience an escalation in the contentiousness of the dispute and a concomitant rise in the formality of procedure. Green coloring represents categories of complete voluntariness and therefore the best chance at finality. Blue coloring represents rendering of judgments. Red indicates the dangerous, but not always illegitimate, realm of self-help where direct action is taken without benefit of concluding rational discourse between disputants.

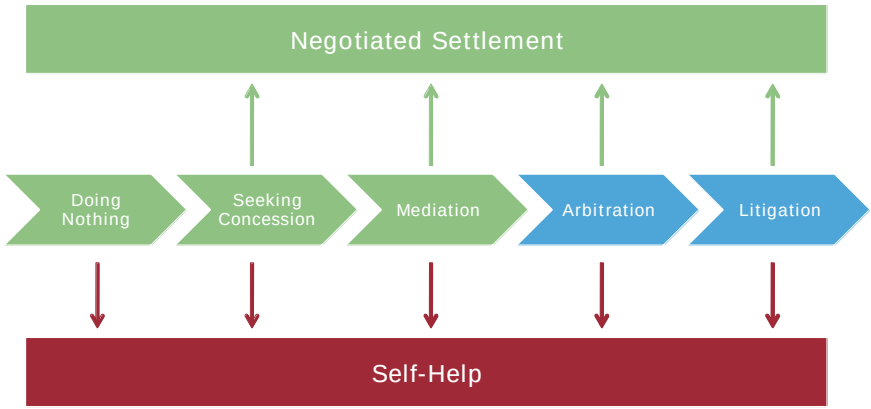

Figure 1. Dispute Resolution Category Flowchart

These dispute resolution categories sit in a larger "do loop" of action. Once a settlement or judgment has been made, the offender must undergo the punishment, render the payment, perform the required acts, etc. Sometimes this is achieved by voluntary consent. Other times, the offender does not recognize the authority of the judgment and resort is made to self-

help[48] to secure satisfaction for the complainant. We present such a schema in Figure 2 below.

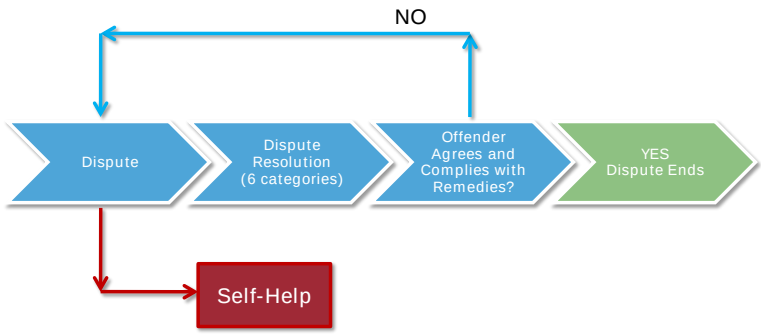

Figure 2. Dispute Cycle

To make these categories clearer, we will consider a few cases. First, a modern example. A man buys a car. After using the car a few days, it stops working. Initially, he *does nothing*. Later, he decides to take action by calling the dealer and demanding that they repair or replace it (*seeking a concession*). The dealer is particularly unhelpful, so he seeks out a third party, the manufacturer, to help (*mediation*). The manufacturer persuades the dealer to resolve the dispute with the man (this places us back into *seeking a concession* or possibly even *negotiated settlement*). The dealer makes an offer to repair by replacing a defective part with a refurbished one, and the man regards this as unfair. Not seeing this going anywhere, he decides to sue in small claims court (this ups the ante directly to *litigation*). The dealer offers to use a new replacement part. The man is happy and drops the suit once the car is repaired to his satisfaction (this lands us back in *negotiated settlement* and the dispute is over).

Consider the famous case of Bernhard Goetz, an American known for having shot four young men who tried to rob him on a New York City subway train in December of 1984. In this case, as in all cases of exigent self-defense, Goetz was *not* in the category of *self-help* as some might think. The reason for his shooting was not punishment or retribution, but to prevent his would-be attackers from taking his property and/or life.

[48] Why is enforcement here self-help? Because a meta-dispute has arisen over the recognition of the arbitral award. By stipulation, the disputants cannot or will not resolve this dispute with rational discourse.

In the 1950's Leopold Popisil observed the Kapauku Papuans of West New Guinea and personally witnessed 176 dispute resolutions involving "difficult cases". He observed a highly standardized process of law:

It typically started with a loud quarrel where the plaintiff accused the defendant of committing a harmful act while the defendant responded with denials or justification. The quarrel involved loud shouting in order to attract other people, including one or more *tonowi* ["rich ones", first among equals, generally mature, skilled men with considerable physical and intellectual abilities with which people contracted to provide help of many kinds]. Close relatives and friends of those involved in the dispute presented opinions and testimony in loud, emotional speeches. The *tonowi* generally listened until the exchange approached violence, whereupon he began his argument…The *tonowi* began by "admonishing" the disputants to have patience and then proceeded to question the accused and various witnesses. He searched the scene of the offense or the defendant's house for evidence…The *tonowi* then summed up the evidence, appealed to the relevant rules [of customary law, including stock grammatical phrases or references to specific customs or precedents, always formulating or restating a general principle of customary law], and then suggested what should be done.[49]

The formality of these procedures, the fact that the law employed is customary and therefore enjoys widespread acceptance, and that only particular men were qualified as judges means that this describes a *litigation*.

Consider this description from *The Iliad*, of the artwork adorning Achilles's replacement shield, made by Hephaestus:

> [Hephaestus] had made two beautiful cities of human folk. In the first there were weddings and parties, and they were leading brides from their women's quarters through the town under blazing torches, to the loud noise of the wedding hymn. The young people were dancing, spinning round, to the sound of flutes and lyres; and the women were standing at their front doors, watching the spectacle.
>
> Men were crowded together in an assembly. A dispute had been stirred up there, and two men were disputing about the reconciliation-payment for a man who had been killed. One was pleading all to be yielded, pointing it out to the citizens [the proposed payment – perhaps cattle], but the other refused to accept anything. Both men had put it to a knowing-one to reach an end. And men, supporters of each side, were cheering on both of them, so marshals were restraining the crowd. The elders sat on polished stones in a sacred circle and one after another took the speaking-staff of the shouting marshals in their hand and

[49] Bruce Benson, The Enterprise of Law 17 (1990).

> adjudicated. Two gold talents lay in the midst of them, to be given to the one among them who spoke the straightest judgment.[50]

Again, the judges are specially qualified and the proceedings are public – clear signs of a *litigation*. By contrast, when we consider the disputes that arise during the funerary games in book 23 of *The Iliad*, these determinations are all clearly arbitrations, undertaken self-consciously considering equity not justice, arbiters appointed ad hoc, etc.

All over Europe in the early and central Middle Ages, trial by ordeal was a last resort of dispute resolution, where no witnesses would swear an oath and where the accused could not (due to low social status) or would not swear a purgatory oath.[51] In the trial by hot iron, the accused would carry a hot iron rod a number of feet and then several days later his wound would be inspected to see whether it was healing or infected, which it was thought indicated God's judgment in the matter. The affair was blessed and overseen by a priest. Again, we see the category of *litigation* due to specially qualified roles and the social acceptance of the trial by ordeal as the ultimate "body of law".

Appeal

Having exercised our brains on the categories, let us now return to a construction of free market dispute resolution. Many authors have been at pains to ensure that a process of appeal exists to check the would-be abuses of arbiters or judges and to rectify judgments made in error. It is always possible for errors of judgment to be made, and historically free market courts have allowed for appeals. In free markets, the appeals are usually limited to matters of law, letting the rulings on facts from the referring court stand. This is the typical process for appeal for arbitrations in the US today.

This system of limited, "one-up" appeal of the application of law only works well in a free market, since the arbiters and judges are chosen by the disputants and therefore must continually exhibit fair-minded and prudent adjudication. When the arbiters are not hired by a market of disputants, for example when the state compels disputants to have their disputes heard in monopoly courts where the judges are assigned to the dispute and paid by the state, then the judges have no check upon bad behavior. History shows this intervention to invite the worst abuses, which

[50] HOMER, ILIAD at 18.497-508.

[51] See, for instance, Whitman (2008), Chapter 3, "The Decline of the Judicial Ordeal: From God as Witness to Man as Witness".

then requires the further intervention of instituting a complex and extensive system of judicial reviews and appeals.

Holdouts, Scofflaws, and Enforcement

A *holdout* is a disputant that cannot or will not agree to either refer a dispute to a mediator or submit to the judgment of an arbiter or a judge. A *scofflaw* is a disputant who will not abide by the terms of a settlement or judgment against him. Sometimes a holdout is in the right – perhaps the dispute is frivolous or the claim is lacking substance or the supposed offense is not an offense at all. Sometimes a holdout is in the wrong, hoping that by avoiding adjudication he can delay – maybe indefinitely delay – a payment of restitution to the complainant.

In free markets of dispute resolution, it is impermissible to force a person to appear before a mediator, arbiter, or judge; for, absent a judgment, the respondent is guilty of no offense. What paths are open to the complainant?

If a respondent refuses to engage in dispute resolution, the complainant can "make his case" to those socially connected to the respondent – relatives, friends, associates, neighbors, and those that trade goods and services with him. The complainant may make such a case himself, or present the complaint to an arbiter – this latter would result in a communication between the arbiter and the respondent, and in the case of the respondent refusing to appear before the arbiter,[52] the arbiter would issue a formal *notice of refusal to arbitrate*.[53] If this notice is not persuasive to the respondent, the complainant may submit a complaint to a court with what evidence he has and ask the judge to produce an *advisory opinion*. Such an advisory opinion would rule on whether the complainant has a *prima facie* case, or that one has *probable cause* to suspect the respondent is guilty of the offense. This advisory opinion, having a greater weight of social authority than if the complainant or his attorney were to draft such a document, could be used to further persuade the respondent and/or the respondent's social connections. If the respondent remains unpersuaded, then hopefully the respondent's social connections are persuaded and will apply social pressure until the respondent submits to meditation or adjudication. However, this might still not work – we have a true, intransigent *holdout*.

[52] A multitude of options for the respondent would exist and would be communicated, including another venue, another jurisdiction, mediation, litigation, etc.

[53] An example of this is the "shtar seruv" issued under Jewish Law.

Why not just force the holdout to appear on the basis of an advisory opinion? Because it would be aggression to do so. To deprive a man of his liberty, even if only for a few hours, one must have proven a case against him to an acceptable burden of proof within the relevant body of law. We will not quibble here whether it should be *reasonable doubt* or *preponderance of the evidence* or some other standard, but certainly it must be higher than *probable cause* – that is, an advisory opinion is rendered on a standard lower than that required for a judgment, otherwise it would be a judgment and not just an advisory opinion.

Not being justified in forcing the holdout to appear, the claimant can ask the judge to try the case with the holdout *in absentia*. It will be in the judge's interest to ensure that the holdout is made perfectly aware of this development and given one last chance to submit to litigation. Let us imagine the case is adjudicated and the judge produces a *judgment* against the holdout.

Now, the victim can present this judgment to the offender. If the offender does not consent to uphold the terms of the judgment, then he becomes a scofflaw. Still, the victim can present this judgment to those socially connected to the respondent (again: relatives, friends, associates, neighbors, and those that trade goods and services with him) and petition them to exert pressure upon him to submit to the terms of the judgment.

If the scofflaw still does not submit, then there is a clear method to obtain restitution. If the judgment requires the payment of restitution and the scofflaw has a job, then the victim can get a *garnishment order* from a judge that the victim can then present to the scofflaw's employer to collect a portion of the scofflaw's wages. If the scofflaw has property, he can likewise get an *attachment order* from a judge that the victim can present at the scofflaw's bank or at a real estate registry to obtain legal title to property. These orders can be enforced by special repossession agents that are trained in the repossession of property without causing any breach of peace – for instance, towing away a car while the scofflaw is otherwise engaged; or opening, emptying, and rekeying the locks on a house or apartment while the scofflaw is out; or, performing an electronic transfer of funds from the bank account of the scofflaw into that of the victim. However, these are all mechanisms of *restitution* which may not be sufficient to see through the carriage of justice. Punishment may be ordered by the judgment.

There are three sanctions of increasing severity to apply to the scofflaw as punishment. *Justifiable retribution* is the rendering of punishment to the offender by the victim or his agents based on the judgment. The problem with justifiable retribution is that it can appear to third parties to be unlawful. For this reason alone, it is unlikely that justifiable retribution would be widely

practiced in any society with free market dispute resolution. *Ostracism* is the complete severing of social relations between the scofflaw and all other members of the society. Failure to participate in the ostracism of a scofflaw is itself an offense. Moving up from ostracism, we have *outlawry*. An *outlaw* is someone for whom the protection of law has been lifted – no adjudicator will rule in his favor in any dispute. Outlawry therefore throws open the outlaw's liberty and property to any abuse or appropriation by anyone whatsover. In such a case, it may be that a victim or his agents can *then* exact retributive punishment upon the scofflaw. For this reason, outlaws often fled the societies in which they were declared outlaws. *Banishment* is the highest adjudicative sanction against a scofflaw: it declares that it is an offense for the scofflaw to be within the society. But, it is in some ways a null category, for the definition of scofflaw is that he will not submit to law: as a purely adjudicative matter, banishment is not self-enforcing; and, as a matter of enforcement, outlawry and banishment don't differ. For this reason, I will no longer discuss the category of banishment.

The main problems owing to the application of the sanctions of ostracism and outlawry are twofold: first, if the division of labor is not extensive, the scofflaw can merely retreat to his farm and live in autarky which may not be enough of a sanction to deter other would-be offenders; second, the world is a big place and people can go elsewhere to set up a new life in a new society. Indeed, as we know from The Story of Grettir the Strong, Grettir the Strong managed to live for 20 years as an outlaw in Iceland (he was outlawed in and banished from Norway).

If, in modern society, we took seriously the possible sanctions of ostracism and/or outlawry, they would be devastatingly punitive. In modern society, to live in autarky is virtually a death sentence. The ostracized or outlaw would have to resort to living "underground" as illegal immigrants do today, always fearful of being found out. However, unlike peaceful illegal immigrants, most people would be and should be fearful of an offender in a society with free market dispute resolution that chooses a life of outlawry over the much simpler choice of submitting to the authority of a judgment. A scofflaw could clean up his record at any time by appearing at a court and declaring that he would submit to the judgment against him.

To sum up the sequence by which a dispute can escalate and by which a mere respondent can become an outlaw, see the table below.

Claimant action	**Respondent response**	**Respondent is now**
Do nothing	--	--
Seek concession	Refuse	Respondent

Claimant action	**Respondent response**	**Respondent is now**
Seek mediation	Refuse	Respondent
Seek arbitration	Refuse	Respondent
Issue notice of refusal to arbitrate / seek arbitration	Refuse	Respondent
Obtain advisory opinion / seek litigation	Refuse	Holdout
Obtain judgment by litigation in absentia	Non-compliance	Scofflaw
Obtain garnishment order and/or attachment order	--	--
Obtain ostracism order	Non-compliance	Goat[54]
Obtain outlawry order	Non-compliance	Outlaw
Justifiable retribution	--	--

Deadbeats and Insurance

Deadbeats are offenders against whom there is a judgment who cannot pay ordered restitution and for whom the institutions of garnishment orders will not do – either the deadbeat has no job, or whose wages are substantially below what is required for a reasonable period of payment of the full amount of restitution. Unfortunately, there is no "solution" to this problem. It is a social fact that those who commit crimes often do more damage than they can pay for. It is simply easier to destroy value than to create value. The only solution open to the free society is for the productive members of society to share their wealth with those who face the problem of a deadbeat. There are two ways this can be done without aggression. One way is to form a mutual group where each person joining the group agrees to share his wealth with any other to the extent that a deadbeat problem emerges. The other way is for a business to be established – insurance – that performs a similar function, but with defined contributions and other terms.

Insurance against deadbeats is what modern society favors, and already exists in institutions such as homeowners' and renters' insurance which cover crime perils and "uninsured motorist insurance" which is really a type of deadbeat insurance.

[54] This is another prescriptive term of convenience. It is back-formed from scapegoat. Scapegoating was an historical practice similar to ostracizing.

It might be supposed that insurance could be much more widely used. It has been proposed that people would benefit from criminal liability insurance – that is, A would purchase insurance from B so that if A harms C, B would pay restitution to C. It is said that A and C could thereby be assured that their relationship was founded on peace and respect for life and property. I cannot agree. There is nothing stopping such an institution from being established today, and yet it exists only in special cases that have little to do with the general category of torts.[55]

This lack of demand for liability policies is probably due to a number of factors. One of the factors is the lack of control insurers have on the actions of third parties. If A is insured by B as above, C is a covered party (as all people other than A are!) and may behave in ways that marginally affect A to engage in the proscribed acts. If the act in question is the commission of fraud, then perhaps C is less careful than he otherwise would be. Since, by the nature of the insurance instrument, B and C do not have a contract, there is no way for B to control the actions of C to limit moral hazard. Perhaps most importantly, if A and C are involved in a series of exchanges (say, supplier-customer or employee-employer) this relationship must be based on the firmer bedrock of mutual trust which makes A a much lower risk to C than unknown third parties. So, if C has casualty insurance, then it can easily cover both A and unknown third parties. For instance, C can have life insurance which covers all causes of death, including murder by any party.

In a free market of *dispute resolution*, there is very little ambit for insurance – this would be limited to deadbeat insurance. Liability insurance would continue to be circumscribed into a few minor areas. In a free market of *defense services*, those providing defense would indemnify their clients against losses. This last category is where the most growth would be likely versus the status quo.

Registries

The recording, storage, retrieval, and communication of information are key elements of the dispute resolution process. Bodies of law, arbitral awards, judgments, service of process, titles to property, identification of persons, important data about persons, garnishment orders, ostracism orders,

[55] Directors & Officers liability insurance as well as most professional liability insurance have very large lists of excluded liabilities, usually all intentional torts are part of that list. In the case of automobile liability insurance, this is both a state-imposed requirement and it is also circumscribed to a subset of liabilities arising from the use of the vehicle.

outlawry orders, and other data all must be communicated with relevant parties as efficiently as possible and their authenticity must be assured.

Today, the state has created monopoly institutions that serve each of these functions. In a free market of adjudication, each of these would be produced, stored, and shared according to abilities and interests. A new category of business would arise: the registry firm. Such a firm would, in the modern world, be web-accessible to many parties for data entry and retrieval. Most of the cost for these data would be borne by arbitral firms. The most likely breakdown:

Creator	**Item**	**Seller**	**Primary Users**
Mediators	Settlements / Mediation Casebooks	Publishers	Adjudicators
Adjudicators	Judgments / Casebooks	Publishers	Jurists
Adjudicators	Summons, Notices of Refusal to Arbitrate, Advisory Opinions, Orders[56]	Registry Firm with items identified by source	Individuals, Businesses, Adjudicators
Jurists	Opinions	Registry Firm with items identified by source	Disputants, Adjudicators
Jurists	Restatements of the Law	Specialized Institutes, Publishers	Adjudicators
Adjudicators	Titles to property	Registry Firm / Insurance Companies	Insurance Firms, Adjudicators
Individuals	Identification of persons	Registry Firm	Businesses
Attorneys	Wills, contracts	Registry Firm	Individuals

The credibility of the publishers will be critical, so they may be affiliated with registry firms or disclose clearly the source of the things they publish, thereby relying upon the credibility of the source. The restatements of law pose a special problem. Individual jurists would not have sufficient authority to craft an entire body of law. There would likely continue to be non-profit organizations of jurists, such as the American Law Institute, dedicated to the common goal of rationally refining the restatement of law. Alternatively, prominent law schools or legal publishers could undertake such projects. As shown in the table, with the creation of registry firms, attorneys would likely use them as a handy place to securely store wills, contracts, and other legal instruments.

[56] Including garnishment, attachment, ostracism, and outlawry.

Standing Threats

This paper is on dispute resolution, not the production of defense, but it is worth pointing out that some judgments may state that a person poses a standing threat to all – for example, a serial killer or serial rapist. Would such a judgment indicate whether such a standing threat should be killed or imprisoned? In the case of killing, such a judgment is no different than an outlaw order, but its carrying out is not a function of the arbitration firm. The same could be said for a case of imprisonment. As a result, we expect that the free market arbitration firm will merely issue a judgment that an individual *is a standing threat*, and allow all in society to act accordingly. But what would they do?

The problem of a standing threat should be solved at minimal cost. While killing the standing threat may seem to be a relatively low-cost solution, the judgment against the standing threat may be in error, in which case the cost (a life) is quite high. There is also the question of justice. By stipulation, we are dealing with a standing threat, not a scofflaw. He has upheld the terms of all judgments against him, which may have included both punitive and restitutive elements. So, the standing threat must be dealt with by the rules of free association. No more will be said for now.

Mediation Schools

In an advanced market for mediation, mediators are trained in specialized schools. Most likely, they would be schooled in degree programs at universities in which the curriculum was adjusted to suit the demand of mediation firm requirements. Such a course of study would include the study of mediation theories and facilitation models, casebook study, and coursework in psychology and criminology. As discussed earlier, the primary market metrics of mediators are percent of cases that result in a settlement and percent of settled cases that are "seen through" and result in lasting peace for the disputants. These foci lead the mediation firm and their academic colleagues to be interested in how and why people engage in criminal behavior, what remedies result in good outcomes for victims, and what remedies minimize recidivism.

Mediators and criminologists would have much interaction with producers of defense, since they would field the fresh cases and attempt to resolve as many as possible.

Law Schools

In an advanced market for adjudication, lawyers are trained in specialized schools. As explained above, lawyers can serve in a number of capacities: attorney, advocate, counselor, arbiter, judge, and jurist. These have been listed more or less in order of increasing complexity and required intellectual capacity. As is currently practiced in many parts of the world, a free market in law would likely have an undergraduate law degree as a first step in this spectrum. The undergraduate degree would qualify one as attorney, advocate, and counselor. A lawyer would then be sufficiently qualified to practice at a law firm and from that point begin to work on obtaining his permission to be an advocate in one or more jurisdictions, which would likely include demonstrated practical experience in a subordinate role under an advocate or arbiter.

Most likely, an advanced degree in law would be required to be an arbiter, judge, or jurist. The adjudicator -- arbiter or judge -- is really one profession, with the differences mainly being the degree of privacy of the proceedings. In specialized cases, an arbiter may have familiarity with a specialized body of law that is not the most widely recognized body of law. The adjudicator would work for an arbitration firm. The jurist would either work for an arbitration firm or be a professor at a law school.

Unlike the status quo, the free market in adjudication would bring the sciences of economics and ethics into great demand. Both at the undergraduate and graduate level, the grounding of arguments in ethics and economics would be a high priority for students and faculty. Without the legislation of the state, direct appeal to reason would be the highest authority for argumentation.

Arbiters and jurists would need to be especially familiar with philosophical and economic arguments. They would have to understand the philosophical worldviews that are consistent with the body of law and which are antithetical to it, and develop rules for dealing with disputants whose philosophical worldviews are greatly at odds with the body of law. Further, jurists would be "practical philosophers" – free from the chains of legislation to write and defend entirely innovative bodies of law that would nonetheless have to withstand scrutiny from both the academy and the work-a-day world.

Normative influences on the law come from three sources: from participants during mediations, from advocates before an adjudicator, and from jurists compiling restatements. In the absence of the supremacy of legislation, it seems that all three of these will become more important. Economic, legal, and political theorists will influence legal scholars directly. Their Hayekian second-handers will influence the public. But it is the full

time job of advocates to find and advance legal theories to support their client's cases. Thus, advocates will be the most important normative force in the system, drawing their theories mainly from academics at undergraduate law schools.

Summary of Free-Market Dispute Resolution

What can be said about free-market dispute resolution? Informal dispute resolution (doing nothing, seeking a concession, negotiating a settlement, or self-help) will continue to be the most important first-line means of dispute resolution. In many ways, the entire structure of production of dispute resolution is designed to minimize the extent to which people resort to self-help. The end of the disputant is to get his due, but the end of mediators and arbiters are to achieve peace – that the dispute be ended with finality.

Mediators facilitate negotiated settlements based on facilitation models informed by the sciences of criminology and psychology. These settlements form a foundation of community norms that can be appealed to in the case of imposed decisions. Arbiters apply bodies of law to disputes, rendering arbitral awards (or, judgments). Arbitral awards are enforced by the parties or by agencies that specialize in the seizure of property without breaking the peace. Judges are those arbiters applying the most widely accepted body of law in public litigations. Casebooks of judgments are examined by jurists to refine and develop the body of law, writing such restatements of the law through the agency of non-profit organizations designed to be authoritative. Jurists acting in this capacity seek to create an orderly body of law that is consistent with the best that the sciences of ethics and economics have to offer.

Appeals processes are simple, since there is no forced jurisdiction. In the absence of aggression, it is impermissible to compel a respondent appear in a court or present evidence. However, if he refuses to arbitrate or litigate, the arbiter or judge is at liberty to issue judgments against him that can demote his social status to holdout, then to goat, then to outlaw. Along the way, the victim can get restitution via garnishment and attachment orders, and possibly even retributive punishment. To protect oneself against the possibility of a deadbeat offender, deadbeat insurance will be offered on the market.

Registry firms would store and sell access to summons, notices of refusal to arbitrate, advisory opinions, orders, opinions, titles to property, wills, contracts, etc. Registry firms would also handle the important task of documentation and procedures for the identification of persons.

In sum, a free market in dispute resolution provides suitably well the needs of society. There is a tendency for the evolution of the body of law toward natural law, no man is aggressed against, and the maximum of peaceful resolution is obtained with minimal effort.

[outline of second section – GG]

Aggressive Intervention into Natural Dispute Resolution

Forced Jurisdiction

Compelled Testimony (incl. juries)

Malum Prohibitum Legislation – deviation from nat law, law be know, Barnett's 2nd and 3rd order knowledge probs

Manipulation of standing (state claim, priority of claim, reduction in standing against the state)

Procedures and standards (reasonable doubt)

Enforcement, Punishment, and Prisons

Searches and Seizures

State Police

Enforcement Error and Enforcement Abuse

Legal Uncertainty

Injustice and the Law