10.1 A nonstate system of justice

10.1.1 Protection agencies

In any realistic human society, even an anarchist one, at least some individuals will commit aggression against others. The inhabitants of the anarchic society would most likely wish to develop systematic institutions for the provision of security, including a collection of protection agencies or security companies whose function would be to protect individuals from aggression against their persons and property and to apprehend aggressors after the fact. These agencies, in brief, would serve the function that police serve in governmental systems.

In the absence of government, protection agencies would arise for the same reason that most businesses arise in a free market; namely, that there is a need which people are willing to pay to have satisfied. The agencies would charge money for their services, just as private security companies presently charge for their services.

Who would pay the security agencies? Individuals might hire their own security company, or neighborhood homeowners’ associations might hire security for their neighborhoods, or owners of apartment buildings or businesses might hire security for their buildings, or some combination of these might occur.

Why does the anarchist not stipulate the details of nonstate security arrangements? Because the functioning of the system is determined by the individuals occupying it; therefore, the answers to questions about

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1 This proposal derives from Rothbard (1978, chapter 12) and Friedman (1989, chapter 29).
how the system would work must take the form of speculative predictions rather than stipulations (the same is true of any untried institution, though this fact is little recognized). The details of security arrangements would be determined by market forces and individual choices. If, for example, customers strongly preferred to patronize businesses that provided their own security, then most businesses would hire their own security.

What services would protection agencies provide? This, too, would depend upon customer demand. In some cases, they might provide armed patrols. In other cases, they might provide security cameras and alarm systems. After a crime was committed, they might provide detectives and armed ‘police’ to apprehend the criminals. Once apprehended, the criminals would be compelled to pay compensation for their crimes.

What would protection agencies do in the event that an accused criminal maintained his innocence? In that case, some institution serving the function of a court system would be needed.

### 10.1.2 Arbitration firms

In an anarchic society, just as in government-based societies, people would sometimes have disputes. One important kind of dispute occurs when a person is accused of a crime which he denies committing. Another type occurs when people disagree over whether a particular type of conduct ought to be tolerated; for instance, I may think my neighbor is playing his music too loud, while he thinks the volume is just fine. A third type concerns the terms of business relationships, including disputes about the interpretation of contracts. In each of these cases, the disagreeing parties need an institution functioning like a court to resolve their dispute.

In the absence of a state, this need would be supplied by private arbitration firms. Arbitration by a neutral third party is the best way to resolve most disputes, since it generally provides a good chance of delivering a reasonably fair resolution, and the costs of achieving this resolution are almost always far less for both parties than the costs of attempting a resolution through violence. For these reasons, almost all individuals would want their disputes to be resolved through arbitration.

Who would hire the arbitrators? Perhaps the parties to a dispute would agree on an arbitrator and split the cost between them. Or perhaps their security agencies would select the arbitrator. Suppose Jon accuses Sally of stealing his cat. He informs his security agency of the theft and asks them agency to retrieve the cat. But Sally notifies her
security agency that Jon is attempting to steal her cat and asks them to defend the cat. If Jon and Sally patronize the same security agency, this agency may hire an arbitration company to determine to whom the cat belongs, so that the agency may decide whose claim to enforce. If Jon and Sally patronize different agencies, the two agencies will jointly select an arbitration company, with the understanding that both will accept the verdict of the arbitrator.

These are the basic institutions of a well-ordered anarchist society. In such a society, the most fundamental functions commonly ascribed to the state are not eliminated but privatized. A great many questions naturally arise about such a system. In the remainder of this chapter, I address the most important questions about private protection agencies. Questions concerning arbitration firms will be taken up in the following chapter.

10.2 Is it anarchy?

The system just sketched is commonly referred to as ‘anarcho-capitalism’, ‘free market anarchism’, or ‘libertarian anarchism.’ One might ask, however, whether the system truly qualifies as a form of anarchy rather than, say, a system of competing governments.\(^2\)

Semantic questions about the use of ‘government’ and ‘anarchy’ are of no great importance. However, the system differs in two crucial respects from all presently existing governmental systems, and it is these differences that lead me to call the system a form of anarchy.

The first difference is one of *voluntariness* versus *coerciveness*. Governments force everyone to accept their services; as we have seen (Chapters 2 and 3), the social contract is a myth. Protection agencies, by contrast, are chosen by customers, who make actual, literal contracts with them.

The second difference is one of *competition* versus *monopoly*. Governments hold geographical monopolies on protection and dispute-resolution services,\(^3\) and changing one’s government tends to be very difficult and costly, so governments feel little competitive

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\(^2\) Rand (1964, 112–13) refers to the system as ‘competing governments’ but then argues that it is really a form of anarcho-capitalism; she appears to be under the misapprehension that the advocates of anarcho-capitalism themselves called the system ‘competing governments.’

\(^3\) Compare Weber’s well-known definition of government: ‘The state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’ (1946, 78; emphasis in original).
pressure. In the anarchist system, protection agencies and arbitration companies are in constant competition with each other. If one were dissatisfied with one’s protection agency, one could switch to another agency at little cost without moving to another country.

These two differences are the fundamental source of all the advantages claimed for anarcho-capitalism over traditional government. The voluntariness of the anarcho-capitalist scheme makes it more just than a coercive system, and both traits make the anarcho-capitalist system less abusive and more responsive to people’s needs than coercive, monopolistic systems.

10.3 Conflict between protectors

Competing security agencies might seem to have significant motives for direct physical confrontation with one another. Since they are in direct economic competition, one agency might wish to attack another in the hopes of putting the other agency out of business. Or in the event of a dispute between customers of different agencies, security agencies might go to war to defend their respective clients’ interests rather than allow the dispute to be resolved by arbitration. For these reasons, some argue that an anarchist society would be riven with interagency wars.4

10.3.1 The costs of violence

As discussed earlier (Section 9.2), violent conflict tends to be very dangerous for both parties; rational individuals therefore seek to avoid provoking such conflicts and prefer peaceful methods of dispute resolution, such as third-party arbitration, whenever available.

But in spite of the prudential and moral arguments against engaging in avoidable violent confrontations, such confrontations periodically break out among ordinary individuals. Why does this occur? In essence, the reason is that in the general population, there are a wide variety of attitudes and motivations, and among all this variety there are some individuals with unusually high degrees of physical confidence, unusually low concern for their own physical safety, and unusually low capacity for impulse control – a collection of traits often referred to as ‘recklessness.’5

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4 This objection appears in Wellman (2005, 15–16) and Rand (1964, 113). Friedman (1989, 115–16) responds.

5 The theory that violent conflict is due to aggressive personalities rather than, say, to rational self-interest is evidenced by the fact that such conflict is an almost exclusively male phenomenon.
Business managers, however, are considerably more uniform than the general population. They tend to share two traits in particular: a strong desire to generate profits for their businesses, and a reasonable awareness of the effective means of doing so. Individuals who lack these traits are unlikely to emerge at the head of a business, and if they do, the market is likely either to remove them from that position (as where a company’s board of directors replaces its CEO) or to remove the company from the marketplace (as in bankruptcy). Thus, business managers are even less likely to behave in clearly profit-destroying ways than ordinary individuals are to behave in ways that clearly endanger their own physical safety.

But war is, putting it mildly, expensive. If a pair of agencies go to war with one another, both agencies, including the one that ultimately emerges the victor, will most likely suffer enormous damage to their property and their employees. It is highly improbable that a dispute between two clients would be worth this kind of expense. If at the same time there are other agencies in the region that have not been involved in any wars, the latter agencies will have a powerful economic advantage. In a competitive marketplace, agencies that find peaceful methods of resolving disputes will outperform those that fight unnecessary battles. Because this is easily predictable, each agency should be willing to resolve any dispute peacefully, provided that the other party is likewise willing.

10.3.2 Opposition to murder

Employees of a security agency have their own individual wills, distinct from the goals of the agency. If management decided to attack another agency solely to put a competitor out of business, widespread desertion is the most probable result. There are two reasons for this. First, most human beings are opposed to undertaking very large risks to their own lives for the sake of maximizing profits for their boss. Combat with another security agency would be much more dangerous than the normal work of apprehending common criminals, since the other agency would be better armed, organized, and trained than typical criminals.

Second, most people in contemporary societies are strongly opposed to murdering other members of their society.4 This ‘problem’ has long been recognized by military experts whose concern is convincing

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soldiers to kill as many of the enemy as possible. On the basis of interviews with World War II soldiers, General S. L. A. Marshall famously concluded that no more than one-quarter of American soldiers actually fired their weapons in a typical battle.⁷ Lieutenant Colonel Dave Grossman relates numerous cases in which the casualty rate during a battle was far lower than could plausibly be reconciled with the assumption of a genuine effort by each side to kill the other. In one striking incident, a Nicaraguan Contra unit was ordered by its commander to massacre the passengers on a civilian river launch. When the time came to open fire, every bullet miraculously sailed over the heads of the civilians. As one soldier explained, 'Nicaraguan peasants are mean bastards, and tough soldiers. But they're not murderers.'⁸

This is not to deny that some human beings are murderers; it is only to say that the overwhelming majority of human beings are strongly opposed to murder. A small percentage of people are willing to murder; however, these individuals are not generally desirable employees, and thus it is unlikely that a protection agency would wish to staff itself with such people.

What about the finding of the Milgram experiment (Section 6.2), in which people proved willing to electrocute a helpless victim when so ordered by a scientist? The fear of defying authority can overcome people's resistance to murder. Though business managers have much less of an aura of authority than government officials, might a security agency manager nevertheless be able to exploit this flaw in human nature to induce employees to kill members of rival agencies?

Perhaps one could, though it is worth noting a few other features of Milgram's experiment. First, the gradual escalation of the experimenter's demands, starting from a seemingly legitimate scientific experiment, was a crucial feature of the design. If Stanley Milgram had simply handed a pistol to his subjects as they walked in the door and told them to shoot another subject, he would not have succeeded. But perhaps a clever security agency manager, versed in psychology, could similarly manipulate circumstances.

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⁷ Marshall 1978, chapter 5. Others have questioned Marshall's statistics, which are probably guesswork (Chambers 2003), but the overall picture remains unaltered (Grossman 1995, 333, n. 1). Commenting on the problem faced by military leaders, Grossman (1995, 251) remarks, 'A firing rate of 15 to 20 percent among soldiers is like having a literacy rate of 15 to 20 percent among proofreaders.'

Second, Milgram's subjects were not in any personal danger from the person they were supposedly electrocuting. If the 'learner' in the experiment had the ability to shock the teacher back, it is doubtful how far the teacher would have continued with the experiment. A warlike company manager would need to convince employees not only to murder but to risk being killed in turn.

Third, though most of Milgram's subjects obeyed, they did so with great reluctance, exhibiting signs of extreme stress. Even if a warlike agency managed to get employees to commit murder, the employees would be extremely unhappy, and the agency would probably soon lose most of its employees. During the 1960s, American war protesters displayed posters and bumper stickers with the slogan, 'What if they gave a war and nobody came?'9 In the unlikely event that a protection agency declared war against another agency, residents of the anarchist society might finally have the chance to observe the answer to this question.

10.3.3 Conflict between governments
We have just seen why war between security agencies is unlikely. If, on the other hand, we rely upon government for our protection, is there any account of why war between states would be unlikely? A statist might offer two reasons for considering interstate war a smaller threat than interagency war:

i) Since governments possess territorial monopolies, citizens of different states come into conflict less often than the customers of different protection agencies would.

ii) There is less competition among governments than there is among protection agencies. The large costs of moving from one country to another, including the barriers that governments themselves often place in the way, enable a government to extract monopoly profits from its populace with little fear of losing 'customers' to a rival government. Therefore, a government has less cause to wish to eliminate rival governments than a protection agency has to wish to eliminate rival agencies.

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9 The phrase seems to derive from Sandburg (1990, 43; originally published 1936). The original phrase is 'Sometime they'll give a war and nobody will come.'
These are valid considerations. On the other hand, there seem to be several reasons for expecting the problem of intergovernmental warfare to be more serious than that of interagency warfare:

i) Business leaders tend to be driven chiefly by the profit motive. Government leaders are more likely to be driven by ideology or the desire for power. Because of the enormous costs of armed conflict, the latter motivations are much more likely motives for armed conflict than the desire for financial gain.

ii) Due to their monopolistic positions, governments can afford to make extremely large and costly errors without fear of being supplanted. For example, the estimated combined cost of the U.S. wars in Iraq and Afghanistan is $2.4 trillion,¹⁰ and yet the U.S. government need fear no loss of market share as a result of this dubious investment. If each American could choose between a government that carried on these wars and one that did not and if each individual were guaranteed to actually get what he chose, then even the most ardent hawks might find themselves thinking twice about the price tag. Fortunately for the government, individuals have no such choice.

iii) Governments have better propagandistic tools at their disposal than private businesses. Since most people believe in political authority, the state can claim that citizens are morally obligated to go to war, whether they support the war or not. The state may portray combat under its command as ‘fighting for one’s country’, which is generally seen as noble and honorable. A private business seeking to increase profits by killing competitors would have a harder sell.

iv) Human beings are far more willing to kill those who are perceived as very different from themselves, especially foreigners, than to kill ordinary members of their own society.¹¹ Consequently, it is easier to convince people to go to war against another country than it would be to convince people to attack employees of another company.

¹⁰ Reuters 2007a, reporting a Congressional Budget Office estimate of total costs through the year 2017. The estimated cost for Iraq alone is $1.9 trillion. Stiglitz and Blimes (2008), however, put the cost for both wars at at least $3 trillion.

v) Modern military training employs techniques of intensive psychological conditioning and desensitization to overcome soldiers’ humane instincts. The U.S. military adopted techniques of this kind in response to Marshall’s findings concerning the low rate of firing by World War II soldiers. As a result, the rate of fire reportedly increased from under 25 per cent in World War II to 55 per cent in the Korean War and close to 90 per cent in the Vietnam War. Employees of a security company, however, are less likely to submit to military-style conditioning, since they would not see the need of combat with other security agencies to begin with.

vi) Due to its pervasive control over the society from which its soldiers are drawn, the state can and does apply powerful sanctions to soldiers who refuse to fight or citizens who refuse to be drafted. Under a governmental system, those who refuse to fight at their government’s command must flee the country to avoid imprisonment or execution, under an anarchist system, those who refuse to fight at their employer’s command must merely find another job.

vii) Because of their monopolistic position and their ability to collect nonvoluntary payments from the populace, governments tend to have far greater resources than nongovernmental organizations, enabling them to accumulate vast arsenals even during peacetime. For example, as of this writing, the U.S. government maintains ten Nimitz-class aircraft carriers, which cost $4.5 billion apiece plus $240 million per year for maintenance while generating zero revenue. As a result, when war breaks out between governments, it is far more destructive than any kind of conflict involving any other agents. The death toll from war in the twentieth century is estimated in the neighborhood of 140 million, and the problem may yet prove the cause of the extinction of the human species.

Taking all of these observations into account, then, it appears that warfare is a greater concern with governments than with protection agencies.

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13 The U.S. Uniform Code of Military Justice, Article 85, allows for any penalty up to and including death for desertion during wartime (www.ucmj.us).
14 U.S. Navy 2009; Birkler et al. 1998, 75.
15 Leitenberg 2006, 9. Most of these are civilian deaths; military deaths were close to 36 million (Clodfelter 2002, 6).
10.4 Protection for criminals

I have described a system of private agencies devoted to protecting individuals from crime; that is, from theft, physical aggression, and other rights violations. But why should there not be agencies devoted to protecting criminals from their victims' attempts to secure justice? What asymmetry between criminals and peaceful cooperators makes it more feasible, profitable, or otherwise attractive for an agency to protect ordinary people than to protect criminals?

10.4.1 The profitability of enforcing rights

There are at least three important asymmetries that favor the protection of noncriminal persons over criminals. First, far more people wish to be protected against crime than wish to be protected in committing crimes. Almost no one desires to be a crime victim, while only a few desire to be criminals. Second, the harms suffered by victims of crime are typically far greater than the benefits enjoyed by those who commit crimes. Ordinary people would therefore be willing to pay more to avoid being victimized than criminals would be willing to pay for the chance to victimize others. In virtue of these first two conditions, there is far more money to be made in the business of protection against criminals than in the business of protection for criminals. Given that the two 'products' exclude each other – if one product is effectively supplied in the marketplace, then the other necessarily is not – it is the less profitable one that will fail to be supplied. If a rogue protection agency decides to buck the trend by supporting criminals, it will find itself locked in perpetual and hopeless conflict with far more profitable and numerous protection agencies financed by noncriminal customers.

The third asymmetry is that criminals choose to commit crimes, whereas crime victims do not choose to be victimized. Criminals, in other words, intentionally engage in behavior guaranteed to bring them into conflict with others. From the standpoint of a protection agency, this is an unattractive feature in a client, since the more conflicts there are in which the agency is called upon to protect clients, the higher the agency's costs will be. Ordinary, noncriminal clients are aligned with the agency's goals in this respect: they do not wish to be involved in conflicts any more than the agency wishes them to be. Criminal clients are a very different story. Offering protection for criminals is analogous to offering fire insurance for arsonists.
10.4.2 Criminal protection by governments

What about the analogous problem for governments: are there forces that prevent a government from acting to protect criminals? Government commonly act to protect society against those who violate others’ rights, such as common murderers, thieves, rapists, and so on. On the other hand, during the slavery era, government protected slave owners from their slaves rather than the other way around. Before the civil rights movement in the United States, government enforced racial segregation. And today, democratic governments function as tools for special-interest groups to steal from the rest of society.¹⁶

These examples show that both patterns are possible: government can protect people’s rights, and it can also protect rights violators. The question is whether the unjust pattern of protecting rights violators would be more common for a protection agency than for a government. Governments and protection agencies are both human organizations, staffed by agents with human motivations. To assume that governments are altruistically motivated while protection agencies are selfishly motivated is to apply a double standard designed to skew the evaluation in favor of government.

If we avoid such double standards, it is hard to see why governments should be thought less prone to protect rights violators than private agencies would be. One could argue that democratic governments must respond to the desires of voters, most of whom are opposed to crime. But one could equally well argue that protection agencies must respond to the desires of consumers, most of whom are opposed to crime, and there are reasons for expecting the market mechanism to be more responsive than the democratic mechanism (see Sections 10.7 and 9.4).

10.5 Justice for sale

Some object to free market provision of protective services on the grounds that justice should not be bought and sold. On the surface, this objection skirts uncomfortably close to a bare denial of the anarcho-capitalist position. To avoid begging the question, the objector must articulate a specific reason why protection and dispute resolution services should not be bought and sold. Two initially plausible reasons might be offered.

¹⁶ For discussion, see section 9.4.3.
10.5.1 Preexisting entitlement

One argument is that people should not have to pay for justice, because everyone is entitled to justice to begin with. Just as I should not have to pay for my own car (again) once I already own it, I should not have to pay for anything else to which I am already entitled.

In one sense, this is correct – no one should have to pay for justice. But what the objection points to is, not a flaw in the anarcho-capitalist system, but a flaw in human nature, for the necessity of paying for justice is created, not by the anarcho-capitalist system, but simply by the fact that criminals exist, and that fact has its roots in the perennial infirmities of human nature. In an idealistic, utopian sense, we can say that everyone should simply voluntarily respect each other’s rights so that no one need ever pay for protection.

Given, however, that some people do not in fact respect others’ rights, the best solution is for some members of society to provide protection to others. This costs money, and there are at least two reasons why the protectors cannot be asked simply to shoulder the costs themselves. First, there is the practical argument that few people are willing to expend their time and resources, to say nothing of the physical risks undertaken by security providers, without receiving some personal benefit in return. If we decide that it is wrong to charge money for a vital service such as rights protection, whereas one can charge whatever one likes for inessential goods such as Twinkies and cell phones, then we will build a society with plenty of Twinkies, cell phones, and rights violations.

Second, those who provide protective services are justly entitled to ask for compensation for their time, their material expenses, and the physical risks they undertake, at least as much as anyone else who provides services of value to others. It would be unjust to demand that they bear all these burdens while their beneficiaries, those whom they protect, may simply proceed with their own self-serving occupations, bearing none of the costs of their own defense. If anything, the vital importance of the protection of rights entitles those who provide this service to ask for greater rewards than those who provide less essential goods and services.

10.5.2 Basing law on justice

Another reason for thinking that protection from crime should not be subject to market forces is that this is incompatible with the laws’ being determined, as they ought to be, by what is morally right and just.

Again, there is something obviously correct in this thought: human beings should respect moral principles, and they should design social
rules to promote justice and ethical behavior. But this is no objection to anarcho-capitalism. In adverting to self-interest to explain how security agencies in an anarchist society would behave, I am not advocating selfishness; I am recognizing it as an aspect of human nature which exists regardless of what social system we occupy. One can design social institutions on the assumption that people are unselfish, but this will not cause people to be unselfish; it will simply cause those institutions to fail.

This is not to say that people are entirely selfish. Insofar as human beings are moved by ideals of justice and morality, these motives would only strengthen the rights-protecting institutions of the anarchic society. The ethically proper job of a protection agency is to protect the rights of its customers, and in the case of disagreement, to enforce the decisions of an arbitrator. The proper job of an arbitrator is to find the fairest, wisest, and most just resolutions possible of the disputes placed before him. The faithful discharge of these duties is not precluded by the fact that the agencies and the arbitrators have self-interested reasons to do these things.

10.5.3 Buying justice from government

The preceding objections in any case cannot favor government over anarchy, because government is subject to the very same objections. In a government-dominated system, people must pay for justice, just as surely as in an anarchist system. It is not as though courts and police forces can somehow operate without cost if only they are monopolistic and coercive. If anything, the monopolistic and coercive aspects of government justice systems make them more expensive than a competitive, voluntaristic system. The difference is simply that in governmental systems, payments are collected coercively under the name of ‘taxation’, and provision of the service is not guaranteed even if you pay.\textsuperscript{17} Presumably, these differences do not render the system more just.

Likewise, the laws enforced by a government are no more determined by justice and morality than those enforced by private protection agencies and arbitration firms. In a representative democracy, the laws are

\textsuperscript{17} U.S. courts have repeatedly ruled that police and other government agents are not obligated to protect individual citizens. See \textit{Warren v. District of Columbia} (444 A.2d. 1, D.C. Ct. of Ap., 1981); \textit{Hartle v. City of San Jose}, 46 Cal.App. 3d 6 (1975); \textit{DeShaney v. Winnebago County Department of Social Services}, 489 U.S. 189 (1989).
determined by the decisions of elected officials and the bureaucrats they appoint. Election outcomes, in turn, are affected by such factors as charisma, physical attractiveness, campaign funding, name recognition, the skill and ruthlessness of campaign managers, and voter prejudices.

Some say that politicians and bureaucrats are supposed to serve impartial ethical values, whereas business managers are only supposed to generate profits for their business. What does this mean? Who supposes that public officials are motivated in this way, and what difference does such supposition make? One argument is that because there is a general socially accepted norm to the effect that public officials should serve justice, public officials will themselves feel more inclined to behave in that way than they would in the absence of such a norm. In contrast, since no such norm is generally accepted in the case of businesses, business managers will feel little sense of obligation to serve justice.

There are two natural replies to this argument. The first is to question the relative importance of moral motivation, emphasizing instead the practical value of aligning agents’ self-interest with the requirements of justice. Granted, the ideal system is one in which people serve justice for the right reasons. But for the reasons explained in Chapter 9, government is unlikely to be that system. If one must choose between a system in which people serve self-interest in the name of justice and one in which people serve justice in the name of self-interest, surely we must prefer the latter. To prefer a system that hands people the tools to exploit others for selfish ends while assuring them that they are supposed to serve justice to a system that makes justice profitable and allows people to pursue their course would be to repose a utopian faith in the power of supposition.

The second reply is that there is no reason why the members of an anarchy may not embrace equally idealistic norms as those of a democratic society. Just as citizens of a democratic state believe that public officials should promote justice, the members of an anarchy may hold that protection agencies and arbitration firms should promote justice. However much efficacy that kind of social norm has in policing human behavior, the anarchist may harness it just as well as the statist.

10.6 Security for the poor

Another concern is that security agencies, driven by the profit motive, will cater solely to the rich, leaving the poor defenseless against criminals.
10.6.1 Do businesses serve the poor?

Unfortunately, there are no actual societies with a free market in security. We can, however, examine societies with relatively free markets in a variety of other goods and services. In such societies, for how many of these other goods and services is it true that suppliers cater solely to the rich, providing no products suitable for middle- and lower-income customers? Is clothing manufactured solely for the wealthy, leaving the poor to wander the streets naked? Do supermarkets stock only caviar and Dom Pérignon? Which chain is larger: Walmart or Bloomingdale’s? Admittedly, there are some products, such as yachts and Learjets, that have yet to appear in affordable models for the average consumer, yet the overwhelming majority of industries are dominated by production for lower- and middle-income consumers. The main explanation is volume: for most products, there are many more consumers seeking a cheap product than consumers seeking an expensive product.

The wealthy, of course, tend to receive higher quality products than the poor, from food to clothing to automobiles (that is the point of being wealthy). Under anarchy, they would no doubt receive higher-quality protection as well. Is there an injustice in this?

In one sense, yes: as a result of imperfect protection, some poor people will become victims of crime. This is unjust, in the sense that it is unjust that anyone ever suffers from crime. The injustice inherent in crime, however, points to a flaw in human nature rather than in the anarchist system. Some people will suffer from crime under any feasible social system. The question is whether anarchy faces a greater problem or a greater injustice than governmental systems.

One might think that anarchy will suffer from a further injustice beyond simply the existence of crime; namely, the inequality in the distribution of crime, the fact that the poor are subject to greater risks of crime than the wealthy. In my view, this is not an additional injustice over and above the fact that people suffer from crime. In other words, given a fixed quantity of crime, as measured perhaps by the number and seriousness of rights violations occurring in a society, I do not believe that it matters, ethically, how the crime is distributed across economic classes. Questions in this vicinity, however, are beyond the scope of this book.  

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18 On egalitarianism, see my 2003 and forthcoming.
10.6.2 How well does government protect the poor?

Even if inequality in the distribution of crime is an independent injustice, this does not obviously favor government over anarchy, since large inequalities in the distribution of crime occur in all state-based societies as well, where the wealthy are much better protected than the poor. To take a contemporary example, Americans with incomes below $7500 per year are three and a half times more likely to suffer personal crimes than those with incomes over $75,000 (see Figure 10.1), despite that the wealthy might initially seem a more attractive target for most crimes.19 Though this is not the only possible explanation, it is plausible to hold that this inequality is at least partly due to inadequate protection offered by the state to the poor. Whether an anarchist system

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19 U.S. Department of Justice 2010a, table 14.
would have more or less inequality in the distribution of crime remains a matter for speculation.

10.7 The quality of protection

How well would private protection agencies protect their clients, in comparison with police under the status quo? This comparison is difficult to make since we cannot observe an anarchist society. The best we can do is to examine the effectiveness of government police and then make theoretical predictions about the anarchist alternative on the basis of the incentive structures.

The status quo leaves considerable room for improvement. We do not know how many people are deterred from a life of crime by the prospect of being punished by the state, but we have a fair idea of how often those who turn to a life of crime are in fact punished. According to FBI statistics, only about half of all reported violent crimes and a fifth of reported property crimes are solved by law enforcement agencies (see Figure 10.2).20 These figures actually give an overestimate of the effectiveness of government law enforcement since they do not account for unreported crimes.

On a theoretical level, it is not difficult to understand why government police might be less effective than private protection agencies. If a protection agency provides poor protection or charges excessive fees, it must fear loss of customers to rival agencies. But if the police provide poor protection at a high price, they need have no fear of losing market share or going out of business. Since they have monopolized the industry, the customers have nowhere else to turn, and since their revenue derives from taxation, the customers cannot decide to fire their protectors and fend for themselves. These enviable features of the state’s position enable it to survive indefinitely almost irrespective of its performance. Indeed, the poor performance of police is more likely to bring them financial rewards than to bring financial losses, since rising crime rates tend to cause increases in law enforcement budgets rather than

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20 U.S. Federal Bureau of Investigation 2010, table 25. The statistics in the text and figure refer to the percentage of offenses ‘cleared by arrest or extraordinary means.’ This requires law enforcement officers to have located a suspect whom they had sufficient evidence to charge and to have either arrested and turned over the suspect to the courts for prosecution or been prevented from doing so by circumstances outside their control, such as the death of the suspect or refusal of extradition.
cuts (compare Section 9.4.7). Private protection agencies, lacking these advantages, would have no recourse but to provide sufficient protection to their customers at a reasonable price.

10.8 Organized crime

Private protection agencies might be able to deal with the common criminal, but how would they deal with organized crime? Do we not need a central authority to combat this problem? Government has extensive programs for fighting organized crime; they focus almost entirely on direct enforcement efforts – that is, efforts to arrest and prosecute criminals, particularly the criminal leadership. But doubts have been raised about the effectiveness of this approach.31 Evidence of the effect of these enforcement efforts on overall crime levels is lacking, and it may well be that the roles occupied by jailed crime bosses are simply filled by other criminals, resulting in negligible benefits to society in terms of total crime.32

A plausible alternative approach would be to attempt to deny organized crime its most important sources of revenue. Criminal organizations are chiefly focused on collecting money, which they do mostly through the provision of illegal goods and services. Traditionally, organized crime has generated revenue for itself through gambling operations, prostitution, and (during the Prohibition era in the United States) the illegal sale of alcohol. By far the main source of revenue for organized crime today appears to be the illicit drug trade, which is estimated to generate between $500 billion and $900 billion in sales worldwide per year.23

Why have criminal organizations focused on these industries? Why sell gambling services, sexual services, and drugs rather than, say, shoes and chocolates? There is no controversy about the answer to this: it is because gambling (in some forms), prostitution, and narcotic drugs are illegal. Al Capone made his fortune selling alcohol, not when it was legal, but during the era of Prohibition. Today, organized criminals make their fortune selling marijuana and cocaine rather than penicillin and Prozac. The reason is that criminals have no advantages in the provision of ordinary goods and services; their only special asset is their willingness and skill in defying the law. Unlike ordinary businesspeople, criminal individuals are willing to risk imprisonment for the sake of money; they are willing to forgo all social respectability; and they are willing to engage in bribery, threats, and violence to pursue their business. These are the traits needed to supply a good that is illegal. By prohibiting certain drugs, we grant control of the recreational drug industry to people with those characteristics. If these same drugs were legalized, the criminals now making fortunes from their sale would no longer be able to do so because they would no longer have any economic advantage in that industry. This is the lesson of Capone and Prohibition.

Thus, a powerful strategy for crippling organized crime would be to legalize drugs, gambling, and prostitution. I do not claim that this would eliminate all organized crime. It would, however, strike a blow to organized crime more devastating than anything the state could hope to do by way of wiretaps, sting operations, and indictments. The vast majority of organized crime's revenue stream would dry up virtually overnight, forcing most of its members to seek other employment.

In an anarchist society, it is highly probable that drugs, gambling, and prostitution would all be legal. The essential difference between

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23 Finckenauer 2009, 308.
these ‘crimes’ and more paradigmatic crimes such as murder, robbery, and rape is that the latter crimes have victims, whereas gambling, drug use, and prostitution have no victims – or at any rate, no victims who are likely to complain. In the anarcho-capitalist society, rights are enforced by the victim of a rights violation bringing a complaint against the rights violator through his protection agency and relying upon a private arbitrator to judge the validity of the complaint. There is no effective mechanism for prohibiting victimless crimes, because there is no legislature to write the statutes and no public prosecutor to enforce them.

What if a large number of people were so strongly opposed to prostitution that they were willing to pay their protection agencies to ‘protect’ them from living in a society in which other people buy and sell sexual services? And what if arbitrators in this society agreed that anyone complaining about someone else’s trade in sexual services had in fact been wronged (perhaps through being offended) and was entitled to compensation by either the prostitute or the prostitute’s client? In theory, a society of this kind could end up with antilibertarian prohibitions on prostitution; however, this is an improbable scenario, since few people in fact think that a contract to purchase sexual services victimizes any person who merely finds out about it and doesn’t like it, and few are in fact willing to pay as much to prevent other people from engaging in prostitution as prostitutes and their clients are willing to pay to be left alone. Similar observations apply to other victimless crimes, such as gambling and recreational drug use.

This does not eliminate all possible revenue sources for organized crime; criminals could still collect money, for example, through extortion and fraud. Nevertheless, denied their largest sources of revenue, criminal organizations would be much weaker in an anarchist society than they are today and would probably play a very small role.

### 10.9 Protection or extortion?

Rather than provide protection in exchange for agreed-upon fees, it might seem that it would be more profitable for a ‘protection’ agency

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24 Some claim that illegal drug use victimizes the drug user’s family, spouse, or coworkers (Wilson 1990, 24). However, these alleged crime victims are unlikely to bring a court case against the drug user and unlikely to prevail in a complaint against either user or supplier.
simply to rob people without bothering about protecting them. Why wouldn't protection agencies evolve into mere extortion agencies?

10.9.1 The discipline of competition

Interagency competition is the main force restraining abusive practices by protection agencies. Customers would subscribe to the agency that they expected to serve them best at the lowest cost, without robbing, abusing, or enslaving them.

Imagine two protection agencies operating in the same city, Tannahelp Inc. and Murbard Ltd. Tannahelp is a legitimate agency that enters into voluntary agreements with its customers, providing protection in exchange for a fee. Murbard is a rogue agency that extorts money from people while providing little of value in return. Almost anyone would prefer Tannahelp, and therefore, if individuals could freely choose their protection agency, Murbard would quickly go out of business. If Murbard tried to force people to join it instead of Tannahelp, people would appeal to Tannahelp for protection.

We saw above the incentives that oppose violent conflict between agencies. Tannahelp might therefore attempt to resolve the dispute with Murbard through third-party arbitration. Murbard could accept the offer of arbitration, in which case any fair judge would rule against it; it could abandon its extortionist plan, or it could prepare for war.

There are four reasons why Murbard would be more likely to either back down or be destroyed than Tannahelp. First, Tannahelp would be perceived as more legitimate than Murbard by the rest of society. Tannahelp would therefore have a much better chance of convincing employees to fight on its behalf than Murbard, though it might be that neither agency would succeed and that employees on both sides would desert rather than fight.

Second, Tannahelp would have the support of all the customers over whom the agencies were fighting. The customers would therefore be likely to attempt to assist their favored agency and hinder the extortionist agency.

Third, Tannahelp would have more reason to fight than the criminal agency. If Tannahelp allows some of its would-be customers to be enslaved to a criminal agency, it establishes a precedent that will likely ultimately lead to its own demise. Murbard, on the other hand, could at any time desist from its extortionist plans and decide to run

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25 These names are taken from Friedman (1989, 116–17), apparently based on modifications of the names of prominent libertarian authors.
a legitimate business protecting people from criminals. We have seen earlier the reasons why violent conflict would be very harmful for both agencies. Since both agencies are aware of this and both also know that it is Murbard that can better afford to back down, that is what will most likely occur.  

Fourth, the rest of society, including the other protection agencies in the area, would side with Tannahelp. This is partly due to common sense ethical beliefs – almost everyone considers extortion to be unjust – and partly due to self-preservation – if Murbard triumphs against Tannahelp, Murbard will probably next move on to the customers of other agencies. Other agencies are thus likely to assist Tannahelp enough to ensure its victory, even if they allow Tannahelp to do most of the work.

The preceding scenario supposes that Murbard starts out as an extortionist agency and tries to steal customers of other agencies or to force unaffiliated customers to join Murbard. What if Murbard starts out as a legitimate agency, acquiring customers through voluntary agreements, and only later evolves into an extortionist agency that prohibits existing customers from leaving?

In this case, it seems less likely that Tannahelp would fight a war to free Murbard's existing customers. Nevertheless, there are three factors that would limit the damage potential of this type of scenario. First, any such transition is unlikely to occur suddenly and without warning. Because the sorts of people who tend to be attracted to legitimate, service-providing businesses are different from those who are attracted to mafia-like crime rings, the transition from the former to the latter would most likely involve a change of personnel, both at the management level and at the level of average workers. Perhaps a criminally minded person somehow gets into a management position, where he starts making changes, expelling existing personnel and hiring friends and family members with criminal leanings. While this transition was taking place, customers who did not like the direction in which the company was moving would leave the company in favor of competing agencies. The resulting drop in company profits would probably cause the company to stop what it was doing. If not, most of the customers would probably have left by the time the process was complete.

Second, the most credible version of the scenario would have the extortionist agency controlling one or more small geographical areas, such as individual neighborhoods whose homeowners' associations

\[ \text{26 See also David Friedman's (1994) argument that rational egoists in a state of nature avoid conflict through mutual respect for rights.} \]
had originally signed on with the agency voluntarily. If, however, the agency’s behavior was sufficiently egregious, customers would prefer to leave the neighborhood rather than continue being subject to extortion. Assuming that there were many other protection agencies in the society serving otherwise similar neighborhoods, it would be extremely difficult for Murbard to keep its victims from leaving.

A similar observation could be made about governments: if one country’s government is sufficiently tyrannical, corrupt, or otherwise objectionable, citizens may leave the country. Note, however, that the mechanism of exit is more effective on the neighborhood level than it is on the national level. Individuals who flee their native country are generally forced to leave behind their culture, their jobs, and their family and friends. In contrast, those who merely relocate to a different neighborhood within the same society can generally retain their culture, job, family, and friends. Furthermore, other nations typically impose severe barriers to immigration, whereas other neighborhoods within the same society generally do not. As a result, a national government can be much more abusive before it loses most of its citizens than can an organization limited to a single neighborhood.

Finally, even if Murbard holds onto some of its original customers, it is unlikely to acquire any new customers. As a result, Murbard’s customer base will slowly dwindle, while other agencies that better serve their customers expand. This is likely to serve as an example to companies considering making the transition to extortion rings in the future.

10.9.2 Extortion by government

Now consider the analogous problem for governmental systems: why shouldn’t the government extort money from people without protecting them? All governments in fact extort money, though the practice is usually termed ‘taxation’ rather than ‘extortion.’ Few statists even contemplate ending this practice. How, then, might government be thought superior to anarchy in this area?

Perhaps one might think that government takes less of our money than private protectors would charge or that government provides better service than private protectors would provide. But it is difficult to see why this would be so. Imagine that a private protection agency somehow acquired a monopoly in a large geographical area and began to extract payments from the population by force. Few would contend that, once this state of affairs transpired, prices would drop and service would improve. Surely the opposite would occur. But that is precisely the position of societies with government-based protection.
Perhaps it is the democratic process that is supposed to induce government to control costs and maintain high-quality service: if the government does a poor job, people will vote for different politicians. The question then becomes whether this mechanism is more or less effective than the mechanism of free market competition. One shortcoming of the democratic mechanism is that the choices tend to be very limited. In some democratic societies, elections regularly offer only two choices; for example, the Democrats and the Republicans in the United States. Even systems of proportional representation rarely give voters the range of options present in typical free markets.

But the more important shortcoming is that, in the democratic system, when one chooses one politician over another, one does not thereby get what one chooses; one gets what the majority chooses. Therefore, there is little incentive to expend effort on rational or informed voting (see Section 9.4.3).

10.10 Monopolization

Some believe that a free market anarchist system would evolve into a state, as one protection agency monopolized the industry.

In the present system, nearly all monopolies and monopoly-like conditions are created by government intervention, usually prompted by special-interest groups seeking rents.37 To endorse the objection from monopolization, therefore, we need some reason to believe that the protection industry would differ from most other industries in some way that would render it particularly prone to monopolization in the absence of state intervention.

10.10.1 The size advantage in combat

Robert Nozick contends that the protection industry would succumb to natural monopoly because the value of a company's service is determined by the relative power of that company in comparison with other companies.38 Nozick imagines agencies doing battle to resolve disputes between customers. If one agency is more powerful than another, the more powerful agency will triumph. Recognizing that it is better to be protected by the stronger agency, the customers of weaker agencies will migrate to stronger agencies, making the latter even stronger. Since this sort of process tends to amplify initial differences in power, the natural

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end result is that one agency holds all the power; that is, a monopoly of
the industry. Nozick goes on to explain how this dominant protection
agency might develop into a full-fledged government.29

If the task for which one hires a protection agency were that of fighting
other agencies, then Nozick’s analysis would be correct. But one does
not hire a protection agency to fight other agencies, nor would agen-
cies provide that service (Section 10.3). One hires a protection agency
to prevent criminals from victimizing one or to track down criminals
after the fact. In this task, one’s protection agency must have the power
to apprehend criminals, but it need not have the power to defeat other
protection agencies, given that other agencies are not in the business of
protecting criminals (Section 10.4).

Nozick considers the possibility of agencies relying on third-party
arbitration, which he assumes would occur only if two agencies were
of approximately equal strength. *Face* Nozick, the peaceful arbitration
solution does not depend upon the assumption that agencies are of
approximately equal strength nor that combat between them results in
stalemate. It depends only upon the assumption that physical combat
between agencies is *more costly* than arbitration, an assumption that is
virtually guaranteed to hold in almost any conflict.

Nozick assumes that arbitration would lead to ‘one unified federal
judicial system’ to which all would be subject.30 He then proceeds,
in his subsequent reasoning about the emergence of a state, to speak
of the activities of ‘the dominant protective association’, leaving the
reader perhaps to assume that a unified judicial system is equivalent to
a dominant protection agency. He does not explain why the arbitration
industry would be controlled by a monopoly nor why a monopoly of
arbitration would be equivalent to a monopolistic protection agency.

10.10.2 Determining efficient size of firms

Under some conditions, a monopoly can develop naturally in a free
market. If the most efficient size for a firm in a particular industry is so
large that there is room for only one such firm in the marketplace, then
the conditions are ripe for a natural monopoly.31

Large firms often benefit from economies of scale. For example,
in the automobile industry, the lowest per-unit production costs are
achieved by operating a type of factory that is capable of producing tens

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29 Nozick 1974, chapter 5.
30 Nozick 1974, 16.
31 See Friedman 1990, 264.
or hundreds of thousands of cars per year. Because there is a large fixed cost for building such a factory – a cost that must be borne to produce any cars at all but that does not increase as one builds more cars up to the maximum capacity of the factory – it is most economically efficient to use the factory to full capacity once built. Any firm trying to sell less than many thousands of cars per year is thus at a competitive disadvantage to larger firms – it will be forced to charge higher prices for its cars. Economies of scale, however, operate only up to a certain point – there is no greater efficiency involved in operating ten automobile factories than in operating one.

On the other hand, large firms also suffer from dis economies of scale. Factors that tend to make a larger firm less efficient include bureaucratic insularity, alienation on the part of employees, increased costs of communication within the organization, and increased risk of duplication of effort within the organization.32

Because economies of scale cease to apply after a certain point and diseconomies of scale begin to apply at a certain point, there is a limit to how large an efficient firm can be (see Figure 10.3). This limit varies with the industry. In the automobile industry, the most efficient firms are very large because of the nature of automobile factories, which cost hundreds of millions of dollars. In industries with lower fixed costs, the most efficient firms will be smaller.

What about the protection industry? The fixed costs for a protection agency are minimal. The business owner must have sufficient funds to hire a few employees and equip them with weapons and tools for enforcement and investigation. No expensive factory, large land area, or large reserve of capital is required. There are no obvious significant economies of scale. It therefore appears that there is no economic pressure towards the formation of large firms in this industry, and the industry will most likely contain a very large number of small and medium-sized firms. Large firms would be at a disadvantage, as they

32. See Canbäck et al. 2006 for theoretical and empirical discussion of economies of scale, diseconomies of scale, and the determination of efficient size for firms in an industry. As Canbäck et al. point out, there often are firms of a variety of sizes in an industry, suggesting that there is a significant range of sizes over which average per-unit costs of production remain approximately constant. See Carson 2008, chapters 5–9, for further discussion of the inefficiency of large firms. Carson (chapter 3) argues that government intervention has facilitated the survival of firms that are much larger than the most efficient size.
would suffer from the usual diseconomies of scale without reaping significant compensatory economies of scale.

10.10.3 Government monopoly

As in the case of the previous objections, the threat of monopoly poses a more serious objection to government than to anarchy. We need not present arguments to show that a government may develop into a monopoly, because a government, by definition, already is a monopoly. Whatever ills are to be feared from the monopolization of industries, why should we not fear precisely those ills from government? The fact that an organization is labeled a 'government' rather than a 'business' will hardly render its actions beneficent if the actual incentive structure it faces is the same as that of a monopolistic business.

What is the problem with monopolies? Economic theory teaches that a monopoly will restrict output to socially suboptimal levels while raising prices to levels that maximize its own profits but lower the total utility of society. If, for example, a company held a monopoly on shoe production, there would be too few shoes, and they would be too expensive.\(^3\)

That is the problem with a rationally self-interested monopolist. But matters are worse than this, because we cannot even assume that

a monopolist will be rational. Competition makes firms act as something approximating rational profit maximizers by eliminating those who do not behave in that way. In the absence of competitive pressures, a firm has much more leeway. Optimists may observe that an organization with a robust monopoly can survive while magnanimously sacrificing profits for the good of society, if it happens to be so inclined. But it can also survive while clinging to inefficient production methods and resisting innovation; rewarding well-connected but incompetent people; wasting money on half-baked, ideologically motivated plans; ignoring evidence of customer dissatisfaction; and so on. To assume that monopoly privilege will be used only for good would seem to be an exercise in wishful thinking. Almost everyone accepts this in the case of nongovernmental monopolies; nothing essential changes when the label 'government' is applied to a monopolistic protection agency.

10.11 Collusion and cartelization

Apart from monopoly, there is a second anticompetitive practice that may increase the profits of firms in a given industry. This is the practice of forming a cartel, an association of firms that agree among themselves to hold prices at an artificially high level or otherwise cooperate to promote their mutual interests. As Adam Smith warned, 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.'

Some critics argue that the protection industry would fall under the dominance of a consortium of this kind, leading to results similar to those of an industry monopoly.

10.11.1 The traditional problem for cartels

Most cartels have difficulty enforcing their policies. Suppose that the competitive market price for widgets is $100 per widget. The leaders in the widget industry, however, in a recent backroom meeting, have agreed that $200 is a much nicer price. One small firm, Sally's Widgets, demurs. While the cartel firms charge $200, Sally decides to charge only $150 per widget. What happens?

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34 Smith 1979, 145. Smith goes on to argue that one cannot prohibit such meetings without unduly infringing on freedom but that one should not make regulations that actually induce businesses to meet together.

35 In theory, assuming perfect information and identical widgets, Sally could maximize her profit by charging $199 per widget. But in reality, a larger
At these prices, nearly all customers prefer a Sally widget over a cartel widget. Once a struggling small firm, Sally's Widgets suddenly can't expand fast enough for all the new customers approaching it. The cartel, tired of losing business, eventually abandons its scheme and competes with Sally on price but not before Sally's Widgets has enjoyed its greatest-ever boom in sales at the expense of the industry leaders. The incident stands as a lesson to players in other industries, where the smaller firms struggling to get established dream that, one day, the leaders in their industry, too, will devise a harebrained price-fixing scheme.

10.11.2 Cartelization by threat of force

Some industries may differ materially from the famously competitive widget industry. In those industries in which a firm's success depends upon its good relations with other firms, anticompetitive collusion may be more feasible because the large firms in the industry can effectively punish those who reject cartel policies. Tyler Cowen and Daniel Sutter suggest that this may be true in the protection industry because the success of a protection agency depends upon its ability to peacefully resolve disputes with other agencies.\(^{36}\) Cowen and Sutter imagine the protection agencies in a given area forming a single multilateral agreement detailing the procedures for resolving disputes involving customers of different agencies. Having tackled that problem, the agencies might next agree to fix prices at artificially high levels and to refuse to cooperate with any new firms that may subsequently enter the market.

The agreement on procedures for arbitrating disputes would be self-enforcing, in the sense that firms choosing to violate it would be sabotaging themselves (Section 10.3). But who would enforce the anticompetitive agreements to fix prices and exclude new agencies? Cowen and Sutter imagine that the cartel excludes new entrants to the industry by refusing to accept arbitration with them; cartel members resolve any disputes with nonmembers through violence.\(^{37}\) The same mechanism is used to enforce the price-fixing agreement: if any member company is found to have set prices too low, the remaining members expel the price-cutting agency and henceforth treat it like any other

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\(^{36}\) Cowen 2007b; Cowen and Sutter 2007.

\(^{37}\) Cowen and Sutter 2007, 318.
outsider, refusing arbitration in any future disputes with the ostracized agency.\footnote{Cowen (2007b, 272–3) also suggests that nonmembers might be refused such advantages as extradition of criminals and access to databases for tracking down criminals. Because these are relatively minor sanctions, I focus on the coercive enforcement mechanism.}

Although this seems to be a possible mechanism for taking over the industry, I do not find it very plausible that the mechanism would be employed. Suppose that agency A, which is a member of the cartel, has a dispute with agency B, which is not a member. A is supposed to be prepared to go to war with B rather than resolve the dispute peacefully. We have already seen that there are powerful motives for protection agencies to avoid violent confrontations, chiefly because (a) violent conflict is extremely costly and (b) most people have antimurder values. Therefore, for A to engage in armed conflict with B, A would have to be willing to sacrifice its own interests for the sake of maintaining the cartel.\footnote{As Caplan and Stringham (2007, 299–302) put it, the cartel agencies face a prisoner’s dilemma with each other, in which it pays each to renege on the agreement to punish outsider agencies.} Since the motivation for joining the cartel to begin with was one of economic self-interest, it is not plausible that A would make such a sacrifice.

Perhaps A might be moved to fight for the cartel by a further threat made by other cartel members: if A resolves its dispute with B peacefully, then other cartel members will henceforth go to war against A whenever they have a dispute with A. And what would motivate the other cartel members to do this? Well, the fact that if they don’t, other members will go to war against them, and so on. This thinking, however, strikes me as a regress of increasing implausibility. If it was implausible that A would go to war against B for not being a member of the cartel, it is still less plausible that another agency, C, would go to war against A for not going to war against B for not being a member of the cartel. If A wishes to avoid armed conflict, its best bet would be to avoid the immediately looming conflict with B, perhaps doing its best to conceal its agreement with B from the other cartel members, and worry about possible future conflicts with other agencies later.

10.11.3 Cartelization through denial of extended protection

George Klosko proposes a different mechanism for cartelization of the protection industry.\footnote{Klosko 2005, 30–3.} He imagines a collection of gated communities,
each served by a private security agency. Customers would desire 'extended protection'; that is, one would wish to be protected not only in one's own neighborhood but also when one left the neighborhood to go to work, visit friends, shop, and so on. To satisfy this demand, protection agencies would need to work together, developing common procedures and agreeing to protect each other's customers. But once the agencies had formed a consortium to provide extended protection, the consortium could easily evolve into a cartel designed to raise prices, limit competition, and so on. The cartel would limit competition by denying extended protection to the customers of nonmember agencies. Since almost everyone desires extended protection, nonmember agencies would be effectively excluded from the market. The cartel would enforce its policies internally by threatening to expel members who violate cartel policies.

How might this result be avoided? Let us begin by imagining a competitive, noncartelized protection industry, and consider whether extended protection is likely to be provided without the development of an industry cartel. Suppose, as Klosko does, that security agencies are hired by associations of property owners to protect particular areas (whether gated or not). This may include both residential and commercial areas.

Now suppose that a homeowners' association is deciding whom to hire for neighborhood security. Agency A offers to protect residents, and only residents, from crime occurring in the neighborhood. If one of their security guards witnesses a crime, he will first try somehow to check whether the victim is a resident or a visitor. If the victim appears to be a visitor, the guard will allow the crime to proceed. Agency B, on the other hand, offers to combat all crime in the neighborhood, whoever the victim may be. There are two evident reasons why A's offer will be rejected: first, homeowners are likely to perceive the idea of verifying the identity of a victim before acting to stop a crime as both impractical and immoral; second, most people would like to be able to have visitors to their neighborhood and would like those visitors to be safe while in the neighborhood. Agency B will therefore win the contract.

A similar point applies even more clearly to owners of commercial property. It takes no great altruism for a business owner to recognize that he had better provide a safe environment not just for himself but also for his customers and employees. If people other than the owner are frequently attacked or robbed while on company premises, it may be difficult to run the business. Therefore, businesses will pay protection agencies to protect everyone on their premises.
Thus, extended protection is provided with no need for industry-wide collusion. Each protection agency, acting independently, simply provides what its customers desire. If several agencies decide to form a consortium and announce that henceforth, they will only protect customers of member agencies, every agency in the consortium will quickly lose nearly all of its contracts.  

10.12 HOA versus government

I have imagined local homeowners’ associations and associations of property owners generally hiring agencies to provide security in particular neighborhoods or business districts. Why would such associations exist in an anarchic society, and why do they not qualify as governments?

The developer of a housing complex creates a homeowners’ association, which residents are required to join as a condition of buying a unit in that complex, with the understanding that membership in the association is attached to the property so that all subsequent owners are subject to the same condition. The developer creates this institution because it increases the value of the property; most potential buyers are willing to pay more for a unit in the complex knowing that everyone in the complex will be a member of the association than they would if there were no association or if only some residents were to be members of it. This is because an association to which all belong can provide important goods, such as a set of uniform policies for residents or (particularly in an anarchist society) arrangements to prevent crime within the development. HOAs have spread rapidly in the United States since 1960 and now cover 55 million people. In an anarchist society, they would probably be even more widespread.

Since HOAs can make rules for residents, which may be enforced through the HOA’s security agency, it might be thought that an HOA amounts to a kind of government, albeit a very small, localized government, so that the system here envisioned is not anarchy after all.

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41 Klosko (2005, 31) also suggests that agencies must join together ‘to regularize their standards and procedures.’ I have not addressed this in the text because I find it unclear what Klosko has in mind or why he makes this assumption.
42 Agan and Tabarrok (2005), examining five zip codes in northern Virginia, found that HOAs increased home values by an average of about 5.4 percent, or $14,000.
43 Agan and Tabarrok 2005, 14.
44 Agan and Tabarrok (2005) refer to HOAs as ‘private governments.’
On the semantic question of whether an HOA qualifies as a small government, it is worth noting that these entities actually exist at present and some even hire their own security guards, yet they are not generally considered to be governments. It might be suggested that they would qualify as ‘governments’ but for the existence of other bodies with power over them; namely, the entities actually called ‘governments.’ This semantic question, however, is of no great import, and I am not concerned to dispute the position of one who wishes to describe my proposal as one of very small, decentralized government rather than anarchy. What is important, however, is to see how an HOA differs from the institutions traditionally called ‘governments.’ It seems to me that there are at least three important differences.

The first is that because of its small size, residents have a much greater chance of influencing the policies of their HOA than they have of influencing the policies of a national, provincial, or even a typical city government. For this reason, members are more likely to vote in a relatively rational and informed way in HOA elections, and HOAs are more likely to be responsive to their members’ needs and desires than a national government.

Second, more apropos of the central themes of this book, an HOA has the consent of its members through an actual, literal contract, in contrast to the merely hypothetical or mythological social contract offered by traditional governments. This gives them a moral legitimacy that no traditional government can claim.

Third, competition among housing developments with different HOAs is much more meaningful than competition among traditional governments. Individuals who are dissatisfied with their HOA can sell their interest and relocate to another housing development. The costs of relocation are not trivial, but nor are they enormous. By contrast, the difficulties of relocating to an entirely new country are much greater, if one is even allowed to relocate at all.

As a result of these factors, competitive pressure between governments is close to nonexistent, and governments can therefore afford to be much less responsive to their citizens than a typical HOA is to its members.

10.13 Conclusion

All social systems are imperfect. In every society, people sometimes suffer from crime and injustice. In an anarchist society, this would remain true. The test of anarchism as a political ideal is whether it can
reduce the quantity of injustice suffered relative to the best alternative system, which I take to be representative democracy. I have argued that a particular sort of anarchist system, one that employs a free market for the provision of security, holds the promise of a safer, more efficient, and more just society.

The radical nature of this proposal usually calls forth strong resistance; it is said that justice should not be for sale; that the agencies will be at constant war with one another; that they will serve criminals instead of their victims; that they will serve only the rich; that they won't be able to protect us as well as the government; that they will turn into extortion agencies; that a monopoly or cartel will evolve to exploit the customers. These objections fairly flood forth when students, professors, and educated laypeople are first introduced to the idea of nonstate protective services. But if we examine the proposal more carefully and at greater length, we see that none of these objections are well founded. Anarchists have well-reasoned accounts, grounded in economic theory and realistic premises about human psychology, of how an anarchist society would avoid each of the disasters that critics fear.

Most of the objections raised against anarchy in fact apply more clearly and forcefully to government. This fact is often overlooked because, when confronted with radical ideas, we tend to look only for objections to the new ideas rather than for objections to the status quo. For example, the most common objection to anarchism, the objection that protection agencies would go to war with one another, overlooks both the extreme costliness of combat and the strong opposition that most people feel to murdering other people. The very real threat of war between governments appears a much more serious concern than conflict between private security agencies.

Similarly, the common objection that the security industry will be monopolized lacks foundation. Once we abandon the notion of security agencies doing battle with one another, economic features of the industry, particularly the minimal fixed costs for a security company, should lead us to predict a great number of small firms rather than a single enormous firm. On the other hand, a governmental system is monopolistic by definition and should therefore be expected to suffer from the usual problems of monopolies.

The central advantages of the free market anarchist system over a governmental system are twofold: first, the anarchist system rests on voluntary cooperation and is therefore more just than a system that relies on coercion. Second, the anarchist system incorporates meaningful
competition among providers of security, leading to higher quality and lower costs. As a result of these features of the system, individuals living in a free market anarchy could expect to enjoy greater freedom and greater security at a lower cost than those subject to the traditional system of coercive monopolization of the security industry.
11
Criminal Justice and Dispute Resolution

Libertarian anarchists envision a system in which disputes between individuals are resolved peacefully through the mediation of wise and fair-minded private arbitrators. Is this wishful thinking? In the present chapter, I review several questions and objections concerning this picture of justice in the anarchist society.

11.1 The integrity of arbitrators

What mechanism will keep arbitrators honest and impartial? We can best address this question by first considering in more detail what makes arbitration a viable dispute resolution mechanism to begin with. If two parties have a dispute that they cannot resolve by direct discussion with one another, they may nevertheless be able to agree upon a general procedure for resolving their dispute. This depends upon a contingent but robust fact about human beings in a wide range of cultures: that appeal to a neutral third party is widely perceived as a fair and reasonable dispute resolution mechanism.

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

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

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

In many cases, it may be that no matter how a dispute is resolved, one party or the other will regard the decision as unfair after the fact. The best that an arbitrator can do in such a case is to render a decision that will be perceived as fair by most third party observers. It is the perception of such observers that will determine how well the arbitrator’s reputation is maintained and thus how much business he can expect to attract in the future. Admittedly, public perception is an imperfect guide to justice, as the public might misunderstand a case or have incorrect values. Nevertheless, the reputational mechanism provides incentives for arbitrators to uphold justice at least approximately in most cases.

In the present system, by contrast, mechanisms for insuring the integrity of judges are much weaker. Judges’ decisions are reviewed only by other judges, with the exception of Supreme Court members, whose decisions are reviewed by no one. If the judicial system acquires a reputation for unfairness, inefficiency, and so on, its members can nevertheless retain their positions without fear of being supplanted by the competition.

11.2 Corporate manipulation

Why won’t corporations manipulate the system by requiring employees or customers to sign an agreement to have all disputes settled by an
Figure 11.1 A standard price theory diagram shows the competitive market price of a good at the intersection of the supply curve, as determined by marginal costs of production, and the demand curve, as determined by marginal utility of consumption.

arbitrator biased in the company's favor, such as an arbitrator in the permanent employ of the corporation itself?

Here is a more fundamental question: why don't businesses make unlimited demands on employees and customers? Why not require customers to give the company all the money they have? Why not require employees to work for free? These arrangements would certainly be more favorable to the company than the sort of arrangements businesses actually offer.

To understand why businesses do not behave in these ways, we should first consider how market prices are determined. For any given business, there is some optimum level at which the business should set its prices to maximize its profit. If it sets prices below that level, the company will lower its total profits due to lower profit per unit. If it sets its prices above that level, the company will lower its total profits due to lower volume of product sold. A precise account of the optimum price level is given in standard price theory, where this price is said to lie at the intersection of supply and demand curves (see Figure 11.1).\(^1\) For our purposes, the important point is simply that market forces determine an optimal price level such that the company does worse for itself if it exceeds that level.

\(^1\) See Friedman 1990 for an accessible account of the standard theory.
Now the plan of making unreasonable legal demands is essentially equivalent to a plan to increase the price of one's product. Suppose that Sally's widget business requires all customers to agree that, in case of any dispute arising in connection with the sale of a Sally widget, including complaints regarding product quality or safety, the customer will accept binding arbitration by Sally's nine-year-old daughter, Susan. Sally's Widgets is then in effect adding to the price of Sally's widgets: in addition to the $150 that one must pay for a widget, the customer must also accept the risk of having a dispute with the company resolved by the owner's daughter. Clients might consider this undesirable. They might even take the policy as a signal that the company intends to cheat its customers. For this reason, if $150 was the market price for widgets, then Sally's addition of the unreasonable stipulation in regard to the resolution of disputes with her company will have the effect of placing the real price of her product above the market level and thus lowering Sally's total profit.

What if the market price for widgets is $200 and Sally charges only $150, leaving Sally some leeway to make additional demands on customers? Even in this case, insisting that all disputes should be resolved via Susan is not Sally's best option for taking advantage of that leeway. The reason is that customers are likely to place a greater negative value on Sally's dispute resolution procedure than the positive value that Sally places on it, because customers tend to place negative value on perceived unfairness in addition to the potential monetary costs of unfair procedures. Instead, Sally's best (profit-maximizing) option is simply to raise her price by $50.

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

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2 For a different perspective, see Caplan (2010), who suggests that most customers would be unconcerned by such a clause, since they do not expect ever to sue the company.
inserting. If an employer feels that he is giving too much to employees, it would make more sense for him simply to offer lower wages.

Empirically, businesses in free market economies rarely take unreasonable positions in disputes with customers. The following is not an uncommon sort of consumer experience: I buy a product from the local Target, take it home, cut off the packaging, and then decide that I don’t like it. I go back to the store and ask for my money back. ‘Is there anything wrong with it?’ the cashier asks. ‘Nope’, I say, ‘I just decided I don’t like it. So take it back.’ My position in this dispute, if one can call it that, is utterly capricious. I voluntarily bought the product, I know that they can’t resell it after I have opened it, and I have no real complaint about the product. The product is not defective, nor was it misrepresented either by the manufacturer or by the store. I have no argument for why they should take it back. Yet in my experience, the company has never refused a return.

This evidence about the behavior of businesses is of course anecdotal, and certainly others could relate anecdotes of unsatisfactory experiences. Nevertheless, I do not think it an unfair illustration of the overall tendency of the market: consumers are much more likely to take unreasonable positions – and prevail – than the businesses they patronize.

11.3 Refusing arbitration

We have discussed the reasons for accepting arbitration as a mechanism of dispute resolution. But what if, in a particular case, you have strong reason to believe that any reputable arbitrator will find against you? This could be true for any of a number of reasons, including that you have in fact violated someone else’s rights and are attempting to get away with it; that you are out of step with the values of the majority of your society, so that what you consider acceptable behavior a typical arbitrator will not; or that there is a large amount of misleading evidence that indicates that you are guilty of some crime of which you are in fact innocent. In any of these cases, it may seem that you would be best advised to reject arbitration.

But even in these cases, you will probably be forced to accept arbitration. If you reject the option of having your dispute arbitrated, your security agency will probably draw the reasonable inference that you are in the wrong according to prevailing norms, since the most likely explanation for your rejection of arbitration is that you expect any reputable arbitrator to decide against you. For the same reasons
that protection agencies will not defend criminals (Section 10.4), they
will not defend people who reject arbitration as a means of dispute
resolution. Security agencies will anticipate this eventuality, writing
provisions into their contracts specifying the procedures that customers
must accept for resolving disputes and absolving the company of the
responsibility to protect clients who violate these procedures.

In some cases, this system would generate unjust or ethically
objectionable results, as in the case where strong evidence points to
the guilt of someone who is in fact innocent, or where the values of the
majority of society are wrong. But the anarchist system nevertheless
does as well as could reasonably be asked. In any functioning justice
system, whether government-based or market-based, if powerful but
misleading evidence points to someone’s guilt, then that person will be
treated as guilty. Only the unattainable standard of absolutely conclu-
sive proof of guilt could eliminate the possibility of misleading evidence
leading to punishment of the innocent.

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

11.4 Why obey arbitrators?

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

This sort of behavior, if anything, would be even less tolerated by
the rest of society than a refusal to accept arbitration to begin with.
For the same reasons that security agencies would not agree to defend
criminals, you could expect your security agency to leave you to fend
for yourself if you violated an arbitration decision.

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

11.5 The source of law

In the status quo, the decisions of judges and juries are based largely on laws written by legislators or bureaucrats working for regulatory agencies. Since the anarcho-capitalist society contains neither legislators nor regulators, on what basis could arbitrators make their decisions?

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

The other major source of law would be the arbitrators themselves. When the solution to a particular dispute was not determined by any law of the kind described in the foregoing paragraph, the judge would look to similar cases for guidance, attempting to apply the same principles in the present case that had generally been used to decide cases of this kind in the past. If the case before him had novel features, the judge would exercise his own judgment to devise a resolution that seemed fair and in keeping with the generally accepted values of his society. He would then write an explanation for his decision, which would be added to the body of precedent for other judges to consult in future cases. It makes sense for arbitrators to follow this tradition, since it usually results in decisions that most observers regard as fair, and it preserves the sort of consistency that most observers value in a legal system.

This bottom-up approach to generating law has three key advantages over the top-down approach of law created by a legislature.
First, judge-made law is more closely tied to the problems that ordinary people encounter and their actual circumstances, because it is made by individuals with regular experience in resolving interpersonal disputes – the problems that give rise to the need for law in the first place – and it is made only in the context of deciding such disputes. Second, judge-made law is more flexible than statutory law. No rule of conduct that human beings devise can foresee all possible future contingencies. In a common-law system, when a court encounters a case of a kind not previously considered, it can decide that case in the manner that seems most fair rather than be forced by earlier oversights to render unjust rulings. Third, the common-law system makes far smaller cognitive demands on the individual lawmaker. A legislature faces the nearly impossible task of anticipating every issue that might occur in every area of human conduct and writing rules valid for all circumstances. A judge in a common-law system faces at any given time only the task of understanding the case now before him and deciding how that case should be resolved; at no time need a judge or anyone else attempt to anticipate every possible type of problem.

We know that this is a viable way of developing an extremely sophisticated and subtle system of law, because this is in actual fact the source of the common law that now holds sway (alongside statutory and regulatory law) in Great Britain and several other countries influenced by Great Britain, such as the United States, Canada, Australia, and New Zealand. In these countries, most of contract law and tort law is judge-made common law. Most of the criminal law was also common law prior to the twentieth century. In the anarchist society, given the absence of statutory and regulatory law, common law would play an even greater role than it does in these countries today.³

11.6 Punishment and restitution

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

³ See Barnett 1998 for a more thorough account of nongovernmental legal systems.
The anarcho-capitalist justice system would most likely focus on restitution rather than punishment. That is, criminals would be forced to pay compensation to their victims. This system would be preferred over punishment-based systems because it is better for the crime victims and it does not require anyone to pay for the criminals' upkeep. The required compensation would most likely include compensation for the inconvenience and lost time suffered by the victim in attempting to secure justice, as well as reasonable costs incurred by the victim's protection agency in identifying, apprehending, and prosecuting the criminal. As a result, a thief, for example, would have to pay back significantly more than the value of what he stole. This would provide a deterrent to crime.

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

### 11.7 Uncompensable crimes

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

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

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

11.8 Excess restitution

The victim of a crime is justly entitled to collect full compensation for the crime; that is, sufficient compensation to return him to the welfare level he would have enjoyed if the crime had not occurred. But what if a particular court regularly awarded excess compensation—say, twice what the victim was justly entitled to and twice what other courts generally awarded for a given crime? Wouldn't the excess compensation court be favored by victims? And since almost everyone considers himself more likely to become a victim than to become a criminal, almost everyone would want any future disputes of theirs to be resolved by such a court. Taking account of this, protection agencies would agree to use courts that provide excess compensation. Soon, almost all criminal cases would be tried in courts of this kind. Criminals could protest at the injustice, but their voices would be little heeded, since protection agencies and arbitration firms would be more keen to satisfy the overwhelming majority of law-abiding customers than to satisfy the criminals.

What is problematic about this result? The obvious problem is that this situation is an injustice, albeit one over which we may find it difficult to rouse much indignation—it is an injustice to the criminals. But Paul Birch argues that the problem would go deeper than this, undermining the entire anarcho-capitalist system. Once the practice of awarding excess compensation started, firms would compete to offer higher and higher awards to victims, perhaps ten times, twenty times,

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4 Birch 1998.
or even fifty times the amount to which the crime victim was justly entitled. These excessive awards would create powerful deterrents to crime, resulting in a dramatic drop in the crime rate. While this may sound like a happy result, it would put increasing financial pressure on arbitration firms. As the crime rate dropped, arbitration firms would continue to raise their compensation awards in the effort to collect a larger share of the dwindling market. This would only cause the market to shrink further. Eventually, either all firms would go out of business, in which case society would devolve into a state of chaos, or the last firm able to hold out would acquire a monopoly on the industry, whereupon it would evolve into a state.

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

i) The argument unrealistically assumes that actual and potential crime victims favor unlimited compensation. This assumption may be driven by a conception of human beings as *homo economicus*, pure profit maximizers: since higher compensation equals higher profit, crime victims will favor unlimited increases in compensation. Normal human beings, however, do not see criminal victimization as an opportunity to get rich; that sort of thinking is generally reserved for scam artists. Most normal people wish to avoid being crime victims, if possible, and to secure justice in the event that they are victimized.

A more plausible concern is that crime victims will be motivated by vengefulness, rather than profit seeking, to push for excessive sanctions on their malefactors. Surprisingly, this concern is undermined by empirical evidence: surveys of attitudes toward criminal sentencing have found that crime victims in fact harbor attitudes no more punitive than those of the average member of the population.5

ii) Birch imagines arbitration companies advertising that they award excessive compensation—announcing, for example, that they award each victim compensation equal to ten times the loss the victim has suffered. This is very close to a court’s explicitly announcing that it is unjust. It is difficult to imagine this occurring. For reasons discussed earlier, arbitration companies would carefully select their judges and guard their reputations for fairness, impartiality, and

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wisdom. The sort of people who would wind up as judges would be unlikely to explicitly and intentionally promote injustice for the sake of profit maximization.

A more realistic concern is that arbitration companies would be biased in favor of victims rather than explicitly embrace injustice. They would almost certainly claim to be administering justice, but their perceptions of what justice demands might be slanted in favor of victims; for instance, they might tend to perceive most crimes as more damaging than they really are. It is plausible that arbitration companies could hire judges with such slanted perceptions without unduly tainting their reputation for integrity. I therefore think it plausible that in an anarcho-capitalist society, criminals would often suffer somewhat more than they deserved.

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

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

iv) Excessive compensation awards tend to be more difficult or expensive to collect. If, for example, the compensation for the theft of a video-game cartridge was $100,000, this might prove difficult to enforce. If a shoplifter could expect to be imprisoned for life in a compulsory labor facility if caught, then shoplifters might be willing to kill to escape or to fight to the death rather than surrender. Knowing this, security agencies would have a reason to favor reasonable compensation awards.
v) A criminal who is wronged by a clearly excessive compensation award would seem to have a valid complaint against the court that made the unjust award. There is no obvious reason why he could not file a lawsuit against that court in a different court.

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

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

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

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

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6 Banfield 1977.
11.9 The quality of law and justice under a central authority

To better assess the merits of a nongovernmental justice system, we must first consider some of the flaws of the present system.

11.9.1 Wrongful convictions

One disturbing aspect of the present system is the rate at which the innocent are punished. Michigan law professor Samuel Gross studied cases in which convicts were exonerated in the United States between 1989 and 2003.\(^7\) He found 340 such cases, including 205 murder cases, 121 rape cases, and 14 cases involving other crimes. Prosecutors and police often refuse to accept that they arrested and prosecuted an innocent person, even after proof of the person's innocence has been uncovered.\(^8\) On average, these defendants suffered eleven years of wrongful imprisonment before finally being officially exonerated.

Why were murder and rape so overrepresented among the crimes of which defendants were exonerated? The main reason for the dramatic overrepresentation of rape cases lies in the development of DNA testing in the late 1980s and thereafter, which led to the reexamination of a number of rape cases in which semen samples had fortunately been preserved. Application of the new techniques revealed that many convictions prior to the advent of reliable DNA testing were erroneous. The main reason for the overrepresentation of murder cases seems to lie in the much greater scrutiny that such cases receive as compared to less serious cases, especially when the death penalty is involved.\(^9\)

Omitted from Gross's statistics are cases of mass exonerations due to the exposure of large-scale police corruption. One such case involved the CRASH ('Community Resources against Street Hoodlums') program of the Los Angeles Police Department. In 1999, Officer Rafael Perez revealed that he and other officers in the program had routinely lied in arrest reports, shot unarmed suspects and innocent bystanders, planted guns on suspects after shooting them, fabricated evidence, and framed innocent defendants. In the wake of these

\(^7\) Gross et al. 2005.


\(^9\) Gross et al. 2005, S31–2, S35–6. Gross et al. (S32–3) point out that there may also be more pressure to convict someone in capital cases, leading to more mistakes. However, there may also be greater care exerted by defense attorneys, judges, and juries in cases where extremely severe punishments are at issue.
revelations, over 100 defendants had their convictions vacated in 1999 and 2000.¹⁰

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

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

There are no reliable estimates of the frequency of wrongful convictions due to the inherent elusiveness of such cases. Though it is reasonably clear that all or nearly all of Gross’s 340 cases were indeed wrongful convictions, we have no way of knowing how many additional erroneous convictions went undiscovered during the same time period. The 74 death row inmates who were exonerated constituted about 2 percent of the death row population.¹¹ This suggests that if we applied the same level of scrutiny to all cases that we apply to death penalty cases, we might find a 2 percent false positive rate in these other cases as well.

But we have no idea how many death penalty cases there were in which erroneous convictions went undiscovered. The wrongful convictions in Gross’s sample were due mainly to witness error, perjury, and false confessions. But when a witness misidentifies a suspect, a witness lies on the stand, or the police extort a false confession, in how many of such cases can we assume that proof of the defendant’s innocence, elusive at the time of trial, will later luckily appear and rescue him from prison? Proof of innocence is not generally very easy to come by, and the authorities, having closed the case, will not be looking for any such evidence. The defendant himself will have difficulty uncovering such

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evidence from his position in prison. For these reasons, it would seem overly optimistic to assume that in the majority of wrongful convictions (even in death penalty cases), proof of innocence is later discovered. It therefore seems probable that the actual false conviction rate is much greater than the 2 percent exoneration rate that Gross found among death penalty cases.

Could anything be done to improve the system, or are these mistaken convictions simply the price of criminal justice? Several measures have been suggested to improve the reliability of the system: reducing the use of high-pressure interrogation techniques, particularly for underage or mentally disabled suspects; having witnesses questioned by officers who do not know the details of the investigation and therefore cannot influence the witnesses; showing witnesses one suspect at a time rather than a group of suspects all at once; and instructing juries on the limitations of eyewitness evidence. Despite studies indicating that these measures would reduce the risk of wrongful convictions, American police and courts have generally not adopted them.12

11.9.2 Oversupply of law

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

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

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

balooned from about 23,000 pages to about 150,000 pages (see table below).

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These statistics cannot capture qualitative information about the content of these regulations, and of course there is no prospect of reviewing any significant fraction of these regulations here (or anywhere). Nevertheless, I suggest that these numbers might prompt even the strongest ideological supporter of regulation to consider whether dedicated lawmaking bodies might have a tendency to provide a greater than optimal quantity of regulation. The reader unfamiliar with regulation is invited to peruse the CFR at random to obtain a qualitative sense of the regulatory regime. One may, for example, chance upon a paragraph describing the spacing of spark plug gaps, another prescribing the use of the expression ‘all day protection’ in antiperspirant labels, another describing the signing of documents related to excise taxes on structured settlement factoring transactions, and so on.

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

Second, a surplus of laws can have large economic costs. Ronald Coase, Nobel laureate and former editor of the *Journal of Law and Economics*, reports that his journal published a series of empirical studies of the

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14 40 CFR, Appendix I to subpart V of part 85 (II)(1)(b); 21 CFR 350.50(b)(3); 26 CFR 157.6061.
effects of a wide variety of regulations, in which it turned out that every regulation studied had overall negative effects on society. The Small Business Administration of the U.S. government has estimated the annual cost of federal regulations to the U.S. economy at $1.75 trillion, a burden that they find falls disproportionately on small businesses.

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

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

### 11.9.3 The price of justice

For most citizens of modern states, the costs of government justice in both time and money are prohibitive. The typical civil dispute requires anywhere from several months to a few years to resolve through governmental channels. In 2009, the average American law firm billed $284 per hour, with a typical divorce costing between $15,000 and $30,000. To the average American, with an annual income of $39,000, any use of the government’s justice system represents an overwhelming financial burden.

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

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15 Hazlett 1997, 43.
16 Crain and Crain 2010.
17 In the United States, delays vary from about six months to about three years, with an average of eleven months (Dakolias 1999, 18).
18 On average lawyer fees, see California Attorney’s Fees 2011, quoting a survey by Incisive Legal Intelligence. On the price of divorce, see Hoffman 2006. On average incomes, see U.S. Census Bureau 2011b, 443, table 678.
admitted to the bar, generally after a lengthy and very expensive law school education).¹⁹

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

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

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

11.9.4 The failure of imprisonment

Today's governments rely on imprisonment as a response to serious crimes. Imprisonment serves two main functions: first, it protects society from convicted criminals for a limited time by separating the criminals from the rest of society. Second, it punishes the criminals by forcing them to live in highly undesirable conditions. The suffering on the part of the criminals may be valued intrinsically as a form of retributive justice or it may be valued instrumentally as a means of deterring future criminal behavior.

Existing jails and prisons, however, suffer from a number of very serious problems. In the United States, these facilities are regularly extremely overcrowded, and inmates live in danger of gang violence, rape by other prisoners, beatings by guards and other prisoners, and other forms of abuse. The rate of such violence and abuse is unknown, but anecdotal reports are numerous.²⁰ In recent years, the use of solitary confinement has become increasingly common, a practice that leads

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¹⁹ The price of law school often exceeds $100,000. Only seven U.S. states allow individuals to take the bar exam without attending law school (Macdonald 2003).

²⁰ Commission on Safety and Abuse in America’s Prisons 2006, 11–12, 24. A U.S. Department of Justice survey found that 4.4 percent of prison inmates and
to mental deterioration on the part of the prisoner and higher rates of recidivism once the convict is released.\textsuperscript{21}

Under these conditions, incarceration could hardly be expected to rehabilitate criminals. Accordingly, two-thirds of criminals are rearrested within three years of being released from prison.\textsuperscript{22} This statistic must be assumed to underestimate the true rate of recidivism, given the low rate at which law enforcement solves crimes (Section 10.7); thus, the great majority of criminals return to a life of crime shortly after their release. Some observers have argued that incarceration not only fails to rehabilitate criminals but actually renders them more dangerous when released than they were when they entered. This may be true, for example, because inmates make new criminal contacts and learn new criminal skills and ideas from other inmates while in prison, because they absorb antisocial values from the other inmates, and because inmates become more angry and resentful as a result of the abuse they suffer while in prison. Some have gone so far as to suggest that incarceration may cause more crime than it prevents.\textsuperscript{23}

These problems are not inevitable in a criminal justice system; critics have offered numerous potential reforms that would seem likely to significantly reduce these problems. Some rehabilitation programs have been found to reduce recidivism rates by up to 30 percent. Policymakers simply have not chosen to adopt these reforms.\textsuperscript{24}

\subsection*{11.9.5 Reform or anarchy?}

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

Indeed, there are a number of measures that would greatly mitigate the problems listed above, and we cannot rule out the possibility that government officials will one day begin a serious reform of the

\textsuperscript{3} 1 percent of jail inmates suffered some form of sexual abuse in the preceding year (Beck et al. 2010); however, such incidents may be underreported.

\textsuperscript{21} Commission on Safety and Abuse in America’s Prisons 2006, 14–15.

\textsuperscript{22} Commission on Safety and Abuse in America’s Prisons 2006, 106.

\textsuperscript{23} Pritikin 2008.

\textsuperscript{24} Pritikin 2008, 1092; Commission on Safety and Abuse in America’s Prisons 2006, 12, 28, 108.
prison and court systems. Nevertheless, it is no mere accident that problems of the sort we have been discussing are found to persist in government-based justice systems. Coercive monopolies have a systematic tendency to foster a variety of problems, and they tend to be slow to recognize and address their own shortcomings.

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

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

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

It is theoretically possible for a government to reform itself - to eliminate all victimless crime statutes, shift its focus from punishment to restitution, and so on. But when we look around and see that no government has in fact done so and when we notice that this kind of
unresponsiveness to problems has a systemic explanation rooted in the basic incentive structure of government, conversion to an alternative system begins to seem like a more rational and less utopian solution than that of reforming the present system. There will always be room for improvement in any justice system. In governmental systems, reform will tend to be slow and difficult to implement. By contrast, businesses in a competitive industry tend to move quickly to improve their products or reduce their costs when the opportunity presents itself.

11.10 Conclusion

There are two main systems by which a society may provide for the resolution of disputes and the remedying of rights violations. The first is the coercive, monopolistic system, in which a single organization assumes exclusive authority for making laws, resolving disputes, and punishing criminals. Large and well-known problems tend to occur in systems of this kind, including frequent erroneous convictions, excessive and excessively complex legal restrictions, high monetary costs, long delays, overcrowded prisons, abuse of prisoners, and high rates of recidivism. Governments on the whole have done little to address these problems, despite the identification by social scientists and other experts of numerous steps that could be taken to greatly improve the system. This neglectfulness on the part of government can be traced to the defining characteristics of this approach to justice; namely, its coercive and monopolistic character. Because the governmental system is funded through compulsory taxation, courts, prisons, and other elements of the justice system can continue to collect as much revenue as the government wishes to allocate, regardless of consumer satisfaction. Because the government holds an effective monopoly on the provision of justice, these organizations need not fear replacement by competitors, regardless of their performance.

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

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

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