



## Private Creation and Enforcement of Law: A Historical Case

David Friedman

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# PRIVATE CREATION AND ENFORCEMENT OF LAW: A HISTORICAL CASE

DAVID FRIEDMAN\*

Iceland is known to men as a land of volcanoes, geysers and glaciers. But it ought to be no less interesting to the student of history as the birthplace of a brilliant literature in poetry and prose, and as the home of a people who have maintained for many centuries a high level of intellectual cultivation. It is an almost unique instance of a community whose culture and creative power flourished independently of any favouring material conditions, and indeed under conditions in the highest degree unfavourable. Nor ought it to be less interesting to the student of politics and laws as having produced a Constitution unlike any other whereof records remain, and a body of law so elaborate and complex, that it is hard to believe that it existed among men whose chief occupation was to kill one another.

James Bryce, *Studies in History and Jurisprudence*  
263 (1901)

## I. INTRODUCTION<sup>1</sup>

**T**HE purpose of this paper is to examine the legal and political institutions of Iceland from the tenth to the thirteenth centuries. They are of interest for two reasons. First, they are relatively well documented; the sagas were written by people who had lived under that set of institutions<sup>2</sup> and provide a detailed inside view of their workings. Legal conflicts were of great interest

\* Assistant Professor, Virginia Polytechnic Institute and State University. I would like to especially thank Professor Jere Fleck of the Germanic Languages Department at the University of Maryland for answering innumerable questions and Julius Margolis for his initial encouragement. Thanks are also due to Juergen Backhaus, for the difficult feat of translating an Icelander's German, and to Geraldine Duncan. Finally, I am grateful to the authors and translators of *Njáls Saga*, *Egils Saga*, *Haralds Saga*, *Gísla Saga*, and the *Jómsvíkinga Saga*.

<sup>1</sup> I have been hampered in this work by my unfortunate ignorance of Old Norse. In particular *Grágás*, the earliest compilation of Icelandic law, seems never to have been translated into English, save for a few fragments in *Origines Islandicae* (Gudbrand Vigfusson & F. York Powell trans. 1905) [hereinafter cited as Vigfusson & Powell]. A Norse scholar willing to correct that lack would do a considerable service to those interested in the legal institutions of this extraordinary society.

<sup>2</sup> Most of the principal sagas were written down in the second half of the thirteenth century or, at the latest, the first half of the fourteenth. Prior to 1262 the institutions seem to have been relatively close to those established in the tenth century, although their workings may have been substantially different as a result of the increased concentration of wealth and power which led to their final collapse.

to the medieval Icelanders; Njal, the eponymous hero of the most famous of the sagas,<sup>3</sup> is not a warrior but a lawyer—"so skilled in law that no one was considered his equal." In the action of the sagas, law cases play as central a role as battles.

Second, medieval Icelandic institutions have several peculiar and interesting characteristics; they might almost have been invented by a mad economist to test the lengths to which market systems could supplant government in its most fundamental functions. Killing was a civil offense resulting in a fine paid to the survivors of the victim. Laws were made by a "parliament," seats in which were a marketable commodity. Enforcement of law was entirely a private affair. And yet these extraordinary institutions survived for over three hundred years, and the society in which they survived appears to have been in many ways an attractive one. Its citizens were, by medieval standards, free; differences in status based on rank or sex were relatively small,<sup>4</sup> and its literary output in relation to its size has been compared, with some justice, to that of Athens.<sup>5</sup>

While these characteristics of the Icelandic legal system may seem peculiar, they are not unique to medieval Iceland. The wergeld—the fine for killing a man—was an essential part of the legal system of Anglo-Saxon England, and still exists in New Guinea.<sup>6</sup> The sale of legislative seats has been alleged in many societies and existed openly in some. Private enforcement existed both in the American West<sup>7</sup> and in pre-nineteenth-century Britain; a famous character of eighteenth-century fiction, Mr. Peachum in Gay's "Beggar's Opera," was based on Jonathan Wild, self-titled "Thief-Taker General," who profitably combined the professions of thief-taker,

<sup>3</sup> Magnus Magnusson & Hermann Palsson trans., *Njal's Saga* (Penguin ed. 1960) [hereinafter cited as *Njal's Saga*].

<sup>4</sup> Sveinbjorn Johnson, *Pioneers of Freedom* (1930). A partial exception is the status of thralls, although even they seem freer than one might expect; in one saga a thrall owns a famous sword, and his master must ask his permission to borrow it. Carl O. Williams, in *Thralldom in Ancient Iceland* 36 (1937), estimates that there were no more than 2000 thralls in Iceland at any one time, which would be about 3% of the population. Williams believes they were very badly treated, but this may reflect his biases; for example, he repeatedly asserts that thralls were not permitted weapons despite numerous instances to the contrary in the sagas. Stefansson estimates the average period of servitude before manumission at only five years but does not state his evidence. Vilhjalmur Stefansson, *Icelandic Independence*, *Foreign Affairs*, January 1929, at 270.

<sup>5</sup> C. A. Vansittart Conybeare, *The Place of Iceland in the History of European Institutions* 6-8 (1877).

<sup>6</sup> *New York Times*, Feb. 16, 1972, at 17, col. 6. For an extensive survey of wergeld in Anglo-Saxon and other early societies, see Frederic Seebohm, *Tribal Custom in Anglo-Saxon Law* (1911).

<sup>7</sup> Terry L. Anderson & P. J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West* (1978) (staff paper in Economics, Montana State Univ. at Bozeman, Ag. Econ. & Econ. Dept.).

recoverer of stolen property, and large-scale employer of thieves for eleven years, until he was finally hanged in 1725.<sup>8</sup> The idea that law is primarily private, that most offenses are offenses against specific individuals or families, and that punishment of the crime is primarily the business of the injured party seems to be common to many early systems of law and has been discussed at some length by Maine with special reference to the early history of Roman law.<sup>9</sup>

Medieval Iceland, however, presents institutions of private enforcement of law in a purer form than any other well-recorded society of which I am aware. Even early Roman law recognized the existence of crimes, offenses against society rather than against any individual, and dealt with them, in effect, by using the legislature as a special court.<sup>10</sup> Under Anglo-Saxon law killing was an offense against the victim's family, his lord, and the lord of the place whose peace had been broken; wergeld was paid to the family, manbote to the crown, and fightwite to the respective lords.<sup>11</sup> British thief-takers in the eighteenth century were motivated by a public reward of £40 per thief.<sup>12</sup> All of these systems involved some combination of private and public enforcement. The Icelandic system developed without any central authority comparable to the Anglo-Saxon king;<sup>13</sup> as a result, even where the Icelandic legal system recognized an essentially "public" offense, it dealt with it by giving some individual (in some cases chosen by lot from those affected) the right to pursue the case and collect the resulting fine, thus fitting it into an essentially private system.

In the structure of its legislature, Iceland again presents an almost pure form of an institution, elements of which exist elsewhere. British pocket boroughs, like Icelandic *goðorð*, represented marketable seats in the legislature, but Parliament did not consist entirely of representatives from pocket boroughs. All *goðorð* were marketable and (with the exception, after Iceland's conversion to Christianity, of the two Icelandic bishops) all seats in the *lögrétta* were held by the owners of *goðorð*, or men chosen by them.

The early history of Iceland thus gives us a well-recorded picture of the workings of particularly pure forms of private enforcement and creation of law, and of the interaction between the two. Such a picture is especially

<sup>8</sup> Marilyn E. Walsh, *The Fence* 17-23 (1977).

<sup>9</sup> H. S. Maine, *Ancient Law* 355-71 (1963).

<sup>10</sup> *Id.* at 360-61.

<sup>11</sup> Seebohm, *supra* note 6, at 330-335; and Naomi D. Hurnard, *The King's Pardon for Homicide before A.D. 1307*, at 1-5 (1969).

<sup>12</sup> Walsh, *supra* note 8, at 18-19.

<sup>13</sup> "In no part of Anglo-Saxon England and at no time in its history is any trace to be found of a system of government knowing nothing of the rule of kings." P. H. Blair, *An Introduction to Anglo-Saxon England* 194 (2nd ed. 1977).

interesting because elements of both have existed, and continue to exist, in many other societies, including our own.

There are three questions in the economics of law which I believe this history may illuminate. The first is the feasibility of private enforcement.<sup>14</sup> The second is the question of whether political institutions can and do generate "efficient" law. The third is the question of what laws are in fact efficient. All three involve formidable theoretical difficulties; in the body of this paper I limit myself to sketching the arguments, describing how the Icelandic institutions worked, and attempting to draw some tentative conclusions. Appendix A gives some numerical information on the scale of punishments in Iceland, and Appendix B suggests how the Icelandic system might be adapted to modern society.

## II. THE MODERN LITERATURE

Some years ago, Becker and Stigler pointed out that a system of private enforcement of law, in which the person who caught a criminal received the fine paid by the offender, would have certain attractive characteristics;<sup>15</sup> in particular, there would be no incentive for bribery of the enforcer by the criminal, since any bribe that it paid the criminal to offer it would pay the enforcer to refuse.<sup>16</sup> The argument was criticized by Landes and Posner; they argued that since the level of fine determined both the "price" of criminal activities to the criminal and the "price" of enforcement activities, it could not in general be set at a level which would optimize both criminal and enforcement activities.<sup>17</sup> They further argued that enforcement had a positive externality (raising the probability of catching a criminal, hence lowering total crime) which would not be internalized by the enforcer; this effect by itself would tend to lead to suboptimal enforcement.

The first argument may well be correct; since government enforcement also provides no guarantee of optimality, it leaves open the question of which system is superior, as Landes and Posner pointed out. This is an empirical question and one on which the Icelandic case may provide some evidence. Landes and Posner's second argument shows insufficient ingenuity in constructing hypothetical institutions. If "enforcers" contract in advance

<sup>14</sup> This question is discussed at some length in modern libertarian or anarcho-capitalist writings. See David Friedman, *The Machinery of Freedom* (1973); and Murray N. Rothbard, *For a New Liberty* (1973).

<sup>15</sup> Gary Becker & George Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 *J. Legal Stud.* 1 (1974).

<sup>16</sup> This is not quite true. Since the trial process might impose costs on the criminal, such as uncertainty and unreimbursed time, he might be willing to pay the enforcer more than the expected value of the fine. In this case, bribery is an efficient substitute for the court process.

<sup>17</sup> William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 *J. Legal Stud.* 1 (1975).

to pursue those who perpetrate crimes against particular people, and so notify the criminals (by a notice on the door of their customers), the deterrent effect of catching criminals is internalized; the enforcers can charge their customers for the service. Such arrangements are used by private guard firms and the American Automobile Association, among others. The AAA provides its members with decals stating that, if the car is stolen, a reward will be paid for information leading to its recovery. Such decals serve both as an offer to potential informants and as a warning to potential thieves. Under medieval Icelandic institutions, who was protected by whom was to a considerable degree known in advance.

Another difficulty with private enforcement is that some means must be found to allocate rights to catch criminals—otherwise one enforcer may expend resources gathering evidence only to have the criminal arrested at the last minute by someone else. This corresponds to the familiar “commons” problem. One solution in the literature<sup>18</sup> is to let the right to prosecute a criminal be the private property of the victim; by selling it to the highest bidder he receives some compensation for the cost of the crime. This describes precisely the Icelandic arrangements.

Posner has asserted at some length<sup>19</sup> that current common law institutions have produced economically efficient law. I will argue that while that may or may not be true of those institutions, there are reasons why the Icelandic institutions might be expected to produce such law. Two specific features of “efficient” law in the Icelandic system which I will discuss are efficient punishment and the distinction between civil and criminal offenses.

### III. HISTORY AND INSTITUTIONS

In the latter half of the ninth century, King Harald Fairhair unified Norway under his rule. A substantial part of the population left;<sup>20</sup> many went either directly to Iceland, which had been discovered a few years before, or indirectly via Norse colonies in England, Ireland, Orkney, the Hebrides, and the Shetland Islands. The political system which they developed there was based on Norwegian (or possibly Danish<sup>21</sup>) traditions but with one important innovation—the King was replaced by an assembly of local chieftains. As in Norway (before Harald) there was nothing corresponding to a strictly feudal bond. The relationship between the Icelandic *goði* and his thingmen (*þingmenn*) was contractual, as in early feudal rela-

<sup>18</sup> *Id.* at 34.

<sup>19</sup> Richard A. Posner, *Economic Analysis of Law* (2nd ed. 1977).

<sup>20</sup> Some estimates put it at about 10%.

<sup>21</sup> Barði Guthmundsson, *The Origin of the Icelanders* (Lee M. Hollander trans. 1967), argues that the settlers were in large part Danes who had colonized in Norway and thus brought Danish institutions with them to Iceland.

tionships, but it was not territorial; the *goði* had no claim to the thingman's land and the thingman was free to transfer his allegiance.

At the base of the system stood the *goði* (pl. *goðar*) and the *goðorð* (pl. *goðorð*). A *goði* was a local chief who built a (pagan) temple and served as its priest; the *goðorð* was the congregation. The *goði* received temple dues and provided in exchange both religious and political services.

Under the system of laws established in A.D. 930 and modified somewhat thereafter, these local leaders were combined into a national system. Iceland was divided into four quarters, and each quarter into nine *goðorð*.<sup>22</sup> Within each quarter the *goðorð* were clustered in groups of three called things. Only the *goðar* owning these *goðorð* had any special status within the legal system, although it seems that others might continue to call themselves *goði* (in the sense of priest) and have a *goðorð* (in the sense of congregation); to avoid confusion, I will hereafter use the terms *goði* and *goðorð* only to refer to those having a special status under the legal system.

The one permanent official of this system was the *lögsögumaðr* or law-speaker; he was elected every three years by the inhabitants of one quarter (which quarter it was being chosen by lot). His job was to memorize the laws, to recite them through once during his term in office, to provide advice on difficult legal points, and to preside over the *lögrétta*, the "legislature."

The members of the *lögrétta* were the *goðar*, plus one additional man from each thing, plus for each of these two advisors. Decisions in the *lögrétta* were made, at least after the reforms attributed to Njal, by majority vote, subject apparently to attempts to first achieve unanimity.<sup>23</sup>

The laws passed by the *lögrétta* were applied by a system of courts, also resting on the *goðar*. At the lowest level were private courts, the members being chosen after the conflict arose, half by the plaintiff and half by the defendant—essentially a system of arbitration. Above this was the thing court or "Varthing", the judges<sup>24</sup> in which were chosen twelve each by the *goðar* of the thing, making thirty-six in all. Next came the quarter-thing for

<sup>22</sup> In the northern quarter there were twelve *goðorð*; the rules for membership in the *lögrétta* and the appointment of judges were modified to compensate for this fact, so that the northern quarter had the same number of seats as each of the other three quarters. I shall ignore the resulting complications (and some other details of the system) in the remainder of the description. I shall also ignore the disputed question of which features were in the original system and which were added by modifications occurring between A.D. 930 and c. A.D. 1000.

<sup>23</sup> Conybeare, *supra* note 5, at 95 ns.; and 1 Vigfusson & Powell, *supra* note 1, bk. 2, § 3, at 343-344.

<sup>24</sup> The Icelandic judges correspond more nearly to the jurymen of our system than to the judge, since it was up to them to determine guilt or innocence. Conybeare, *supra* note 5, at 146. There was no equivalent of our judge; individual experts in the law could be consulted by the court. According to Sigurdur A. Magnusson, *Northern Sphinx* 14 (1977), "Since every breach of the law had a fixed fine, the judges merely had to decide whether the culprit was guilty or innocent." The *lögrétta* had the power to reduce sentences.

disputes between members of different things within the same quarter; these seem to have been little used and not much is known about them.<sup>25</sup> Above them were the four quarter courts of the Althing (*Alþingi*) or national assembly—an annual meeting of all the *goðar* each bringing with him at least one-ninth of his thingmen. Above them, after Njal's reforms, was the fifth court. Cases undecided at any level of the court system went to the next level; at every level (except the private courts) the judges were appointed by the *goðar*, each quarter court and the fifth court having judges appointed by the *goðar* from all over Iceland.<sup>26</sup> The fifth court reached its decision by majority vote; the other courts seem to have required that there be at most six (out of thirty-six) dissenting votes in order for a verdict to be given.<sup>27</sup>

The *goðorð* itself was in effect two different things. It was a group of men—the particular men who had agreed to follow that *goði*, to be members of that *goðorð*. Any man could be challenged to name his *goðorð* and was required to do so, but he was free to choose any *goði* within his quarter and to change to a different *goðorð* at will.<sup>28</sup> It was also a bundle of rights—the right to sit in the *lögrétta*, appoint judges for certain courts, etc. The *goðorð* in this second sense was marketable property. It could be given away, sold, held by a partnership, inherited, or whatever.<sup>29</sup> Thus seats in the law-making body were quite literally for sale.

I have described the legislative and judicial branches of “government” but have omitted the executive. So did the Icelanders. The function of the courts was to deliver verdicts on cases brought to them. That done, the court was finished. If the verdict went against the defendant, it was up to him to pay the assigned punishment—almost always a fine. If he did not, the plaintiff could go to court again and have the defendant declared an outlaw. The killer of an outlaw could not himself be prosecuted for the act; in addition, anyone who gave shelter to an outlaw could be prosecuted for doing so.

<sup>25</sup> Conybeare, *supra* note 5, at 48.

<sup>26</sup> *Id.* at 50-51. But Sveinbjorn Johnson, *supra* note 4, at 64; and James Bryce, *Studies in History and Jurisprudence* 274 (1901), state that the judges of the quarter court were appointed only by the *goðar* of that quarter.

<sup>27</sup> Magnusson *supra* note 24, at 14; and Conybeare, *supra* note 5, at 95 ns., both interpret the requirement for the lower courts as no more than six dissenting votes. If this was not achieved, the case was undecided and could be taken to a higher court. While there does not seem to have been anything strictly equivalent to our system of appeals, claims that a case had been handled illegally in one court could be resolved in a higher court. In a famous case in *Njáls saga* the defendant tricks the prosecution into prosecuting him in the wrong court (by secretly changing his *goðorð*, and hence his quarter) in order to be able to sue the prosecutors in the fifth court for doing so. *Id.* at 93-94; Njal's Saga, *supra* note 3, at 309-310. Similarly, if a private court was unable to reach a verdict, or in cases of “contempt of court, disturbance of the proceedings by violence, brawling, crowding, etc.,” or if the plaintiff was unwilling to submit the case to a private court, it went to the appropriate public court instead. Conybeare, *supra* note 5, at 77.

<sup>28</sup> *Id.* at 33-34, 47; Bryce, *supra* note 26, at 268-69.

<sup>29</sup> Conybeare, *supra* note 5, at 28.



Prosecution was up to the victim (or his survivors). If they and the offender agreed on a settlement, the matter was settled.<sup>30</sup> Many cases were settled by arbitration, including the two most serious conflicts that arose prior to the final period of breakdown in the thirteenth century. If the case went to a court, the judgment, in case of conviction, would be a fine to be paid by the defendant to the plaintiff.

In modern law the distinction between civil and criminal law depends on whether prosecution is private or public; in this sense all Icelandic law was civil. But another distinction is that civil remedies usually involve a transfer (of money, goods, or services) from the defendant to the plaintiff, whereas criminal remedies often involve some sort of "punishment." In this sense the distinction existed in Icelandic law, but its basis was different.

Killing was made up for by a fine. For murder a man could be outlawed, even if he was willing to pay a fine instead. In our system, the difference between murder and killing (manslaughter) depends on intent; for the Icelanders it depended on something more easily judged. After killing a man, one was obliged to announce the fact immediately; as one law code puts it: "The slayer shall not ride past any three houses, on the day he committed the deed, without avowing the deed, unless the kinsmen of the slain man, or enemies of the slayer lived there, who would put his life in danger."<sup>31</sup> A man who tried to hide the body, or otherwise conceal his responsibility, was guilty of murder.<sup>32</sup>

#### IV. ANALYSIS

One obvious objection to a system of private enforcement is that the poor (or weak) would be defenseless. The Icelandic system dealt with this problem by giving the victim a property right—the right to be reimbursed by the criminal—and making that right transferable. The victim could turn over his case to someone else, either gratis or in return for a consideration.<sup>33</sup> A man who did not have sufficient resources to prosecute a case or enforce a verdict could sell it to another who did and who expected to make a profit in both money and reputation by winning the case and collecting the fine. This meant that an attack on even the poorest victim could lead to eventual punishment.

A second objection is that the rich (or powerful) could commit crimes with impunity, since nobody would be able to enforce judgment against them.

<sup>30</sup> But according to Johnson, *supra* note 4, at 112, for certain serious offenses the plaintiff was liable to a fine if he compromised his suit after it had been commenced.

<sup>31</sup> Quoted by Conybeare, *supra* note 5, at 78 ns., from the *Gulaping Code*.

<sup>32</sup> For a discussion of the contrast between Icelandic and (modern) English ideas of murder, see *id.* at 78-81.

<sup>33</sup> For examples, see *Njal's Saga*, *supra* note 3, at 75, 151.

Where power is sufficiently concentrated this might be true; this was one of the problems which led to the eventual breakdown of the Icelandic legal system in the thirteenth century.<sup>34</sup> But so long as power was reasonably dispersed, as it seems to have been for the first two centuries after the system was established, this was a less serious problem. A man who refused to pay his fines was outlawed and would probably not be supported by as many of his friends as the plaintiff seeking to enforce judgment, since in case of violent conflict his defenders would find themselves legally in the wrong. If the lawbreaker defended himself by force, every injury inflicted on the partisans of the other side would result in another suit, and every refusal to pay another fine would pull more people into the coalition against him.

There is a scene in *Njal's Saga* that provides striking evidence of the stability of this system. Conflict between two groups has become so intense that open fighting threatens to break out in the middle of the court. A leader of one faction asks a benevolent neutral what he will do for them in case of a fight. He replies that if they are losing he will help them, and if they are winning he will break up the fight before they kill more men than they can afford!<sup>35</sup> Even when the system seems so near to breaking down, it is still assumed that every enemy killed must eventually be paid for. The reason is obvious enough; each man killed will have friends and relations who are still neutral—and will remain neutral if and only if the killing is made up for by an appropriate wergeld.

I suggested earlier that one solution to the externality problem raised by Landes and Posner was to identify in advance the enforcer who would deal with crimes committed against a potential victim. In Iceland this was done by a system of existing coalitions—some of them *goðorð*, some clearly defined groups of friends and relatives. If a member of such a coalition was killed, it was in the interest of the other members to collect wergeld for him even if the cost was more than the amount that would be collected; their own

<sup>34</sup> The question of why the system eventually broke down is both interesting and difficult. I believe that two of the proximate causes were increased concentration of wealth, and hence power, and the introduction into Iceland of a foreign ideology—kingship. The former meant that in many areas all or most of the *goðorð* were held by one family and the latter that by the end of the Sturlung period the chieftains were no longer fighting over the traditional quarrels of who owed what to whom, but over who should eventually rule Iceland. The ultimate reasons for those changes are beyond the scope of this paper.

<sup>35</sup> "But if you are forced to give ground, you had better retreat in this direction, for I shall have my men drawn up here in battle array ready to come to your help. If on the other hand your opponents retreat, I expect they will try to reach the natural stronghold of Almannagorge . . . I shall take it upon myself to bar their way to this vantage ground with my men, but we shall not pursue them if they retreat north or south along the river. And as soon as I estimate that you have killed off as many as you can afford to pay compensation for without exile or loss of your chieftaincies, I shall intervene with all my men to stop the fighting; and you must then obey my orders, if I do all this for you." *Njal's Saga*, *supra* note 3, at 296-97. A similar passage occurs *id.* at 162-63.

safety depended partly on their reputation for doing so. This corresponds precisely to the solution to the problem of deterrence externality described above.

How well do the Icelandic laws fit the ideas of "economically efficient" law in the modern literature?<sup>36</sup> In Appendix A, I give some quantitative calculations on the value of various fines. Here I will discuss two qualitative features of Icelandic law which seem to correspond closely to the prescriptions of modern analysis.

The first is the prevalence of fines. A fine is a costless punishment; the cost to the payer is balanced by a benefit to the recipient. It is in this respect superior to punishments such as execution, which imposes cost but no corresponding benefit, or imprisonment, which imposes costs on both the criminal and the taxpayers.<sup>37</sup>

The difficulty with using fines as punishments is that many criminals may be unable to pay a fine large enough to provide adequate deterrence. The Icelandic system dealt with this in three ways. First, the offenses for which fines were assessed were offenses for which the chance of detection was unity, as explained below; it was thus sufficient for the fine to correspond to the cost of the crime, without any additional factor to compensate for the chance of not being caught.<sup>38</sup> Second, the society provided effective credit arrangements. The same coalitions mentioned above provided their members with money to pay large fines. Third, a person unable to discharge his financial obligation could apparently be reduced to a state of temporary slavery until he had worked off his debt.<sup>39</sup>

The second feature is the distinction between what I have called civil and criminal offenses. Since civil offenses were offenses in which the criminal made no attempt to hide his guilt, a reasonably low punishment was sufficient to deter most of them. High punishments were reserved for crimes whose detection was uncertain because the criminal tried to conceal his guilt. A high punishment was therefore necessary to keep the expected punishment

<sup>36</sup> See especially Posner, *supra* note 19; and Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968). Also, Gordon Tullock, *The Logic of the Law* (1971).

<sup>37</sup> I am here comparing the direct costs and benefits of different sorts of punishment. Both execution and fine have the additional indirect "benefit" of deterrence. Execution has the further indirect benefit of preventing repetition of the crime.

<sup>38</sup> Some additional punishment might be required to compensate for the chance that a guilty person would be acquitted on a technicality, as sometimes happened. The advantage of private enforcement for acts where detection is easy is discussed by Landes & Posner, *supra* note 17, at 31-35, in the context of modern law.

<sup>39</sup> My only source for this is Williams, *supra* note 4, at 117-121. The system seems to have differed from the later English imprisonment for debt, which served as an incentive to pay debts but not as a means of doing so.

(at the time the crime was committed) from being very low.<sup>40</sup> Further, the difference between the two sorts of offenses provided a high “differential punishment” for the “offense” of concealing one’s crime, an offense which imposed serious costs—both costs of detection and the punishment costs resulting from the need to use an inefficient punishment (since no payable fine, multiplied by a low probability of being caught, would provide a sufficiently high deterrent).

## V. GENERATING EFFICIENT LAW

Is there any reason to expect the Icelandic system to generate efficient law? I believe the answer is a qualified yes. If some change in laws produced net benefits, it would in principle be possible for those who supported such a change to outbid its opponents, buy up a considerable number of *goðorð*, and legislate the change. A similar potential exists in any political system; one may think of it as the application of the Coase theorem to law. The effect is limited by transaction costs—which were probably large even in the Icelandic system but, because the *goðorð* was legally marketable, smaller than under other political arrangements.<sup>41</sup>

A second reason is that inefficient laws provided, in some cases, incentives for individual responses which could in turn make changes in the laws Pareto desirable (without side payments). Suppose, for example, that the wergeld for killing was too low—substantially below the point at which the cost of an increase to an individual (involving the possibility that he might be convicted of a killing and have to pay) balanced the advantages of increased security and higher payments if a relative were killed. The individual, functioning through the coalition of which he was a member, could then unilaterally “raise” the wergeld by announcing that if any member of the coalition were killed, the others would kill the killer (or some other member of his coalition, if he were not accessible) and let the two wergelds cancel. This is essentially what happens in the famous “killing match” in *Njal’s Saga*, where Hallgerd and Bergthora alternately arrange revenge killings while

<sup>40</sup> This may be only an approximate statement. The sagas describe many miscarriages of justice, including outlawry based on relatively minor offenses. Here as elsewhere I am trying to distinguish what the rules were from how they may sometimes have been applied, partly because I believe that misapplications probably became common only in the later years, as part of the general collapse of the system described in the Sturlung sagas. Since most of the sagas were written during or shortly after the Sturlung period, I regard their description of that period as accurate and their description of the earlier “saga” period as somewhat exaggerating the resemblance between the two periods. They portray the Sturlung period as one in which justice was less common than in the saga period, and much less common than in the period between the two.

<sup>41</sup> For a description of a very different system of private production of law (by lawyers), see Maine, *supra* note 9, at 32-41. There seems no obvious reason to expect the Roman system he describes to generate efficient law.

their husbands, Njal and Gunnar, pass the same purse of silver back and forth between them.<sup>42</sup> Once such policies became widespread, it would be in the interest of everyone, potential killers, potential victims, and potential avengers, to raise the legal wergeld. And even before the legal wergeld was raised, killers would begin offering higher payments (as part of "out-of-court" settlements) to prevent revenge killings.<sup>43</sup>

### CONCLUSION

It is difficult to draw any conclusion from the Icelandic experience concerning the viability of systems of private enforcement in the twentieth century. Even if Icelandic institutions worked well then, they might not work in a larger and more interdependent society. And whether the Icelandic institutions did work well is a matter of controversy; the sagas are perceived by many as portraying an essentially violent and unjust society, tormented by constant feuding. It is difficult to tell whether such judgments are correct. Most of the sagas were written down during or after the Sturlung period, the final violent breakdown of the Icelandic system in the thirteenth century. Their authors may have projected elements of what they saw around them on the earlier periods they described. Also, violence has always been good entertainment, and the saga writers may have selected their material accordingly. Even in a small and peaceful society novelists might be able to find, over the course of three hundred years, enough conflict for a considerable body of literature.

The quality of violence, in contrast to other medieval literature, is small in scale, intensely personal (every casualty is named), and relatively straightforward. Rape and torture are uncommon, the killing of women almost unheard of; in the very rare cases when an attacker burns the defender's home, women, children, and servants are first offered an opportunity to leave.<sup>44</sup> One indication that the total amount of violence may have been relatively small is a calculation based on the Sturlung sagas. During more than fifty years of what the Icelanders themselves perceived as intolerably violent civil war, leading to the collapse of the traditional system, the average number of people killed or executed each year appears, on a per capita basis, to be roughly equal to the current rate of murder and nonnegligent manslaughter in the United States.<sup>45</sup>

<sup>42</sup> Njal's Saga, chs. 36-45, at 98-119.

<sup>43</sup> One common procedure was for the defendant to offer the plaintiff "self-judgment"—the right to set the fine himself.

<sup>44</sup> Einar Ólafur Sveinsson, *The Age of the Sturlungs* 68, 73 (Jóhann S. Hannesson trans. 1953) (Islandica vol. 36); Njal's Saga 266.

<sup>45</sup> *Id.* at 72 gives an estimate of three hundred and fifty killed in battle or executed during a fifty-two-year period (1208-1260). The population of Iceland was about seventy thousand. For

Whatever the correct judgment on the Icelandic legal system, we do know one thing: it worked—sufficiently well to survive for over three hundred years. In order to work, it had to solve, within its own institutional structure, the problems implicit in a system of private enforcement. Those solutions may or may not be still applicable, but they are certainly still of interest.

## APPENDIX A

*Wages and Wergelds*

Two different monies were in common use in medieval Iceland. One was silver, the other wadmal (*vaðmál*), a woolen cloth. Silver was measured in ounces (*aurar*) and in marks; the mark contained eight ounces. Wadmal was of a standard width of about a meter, and was measured in Icelandic ells (*alnar*) of about 56 centimeters.<sup>46</sup> The value of an ounce (*eyrir*) of silver varied, during the twelfth and thirteenth centuries, between 6 and 7½ ells.<sup>47</sup> The “law ounce” was set at 6 ells;<sup>48</sup> this appears to have been a money of account, not an attempt at price fixing.

*Grágás*, the earliest book of Icelandic written law, contains a passage setting maximum wages—presumably an attempt to enforce a monopsonistic cartel agreement by the landowning thingmen against their employees.<sup>49</sup> The passage is unclear; Þorkell Jóhannesson estimates from it that the farm laborer’s wage, net of room and board, amounted to about one mark of silver a year and cites another writer who estimates it at about three-quarters of a mark.<sup>50</sup> Þorkell Jóhannesson also states that wages (net of room and board) seem to have been low or zero at the time of settlement but to have risen somewhat by the second half of the tenth century. He dates *Grágás* to the second half of the twelfth century, or perhaps earlier; Conybeare gives its date as 1117.

These figures give us only a very approximate idea of Icelandic wages. The existence of maximum wage legislation suggests that the equilibrium wage was higher than the legislated wage.<sup>51</sup> But wages, as Þorkell Jóhannesson points out, must have

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the U.S. figures, see Michael S. Hindelang *et. al.*, Sourcebook of Criminal Justice Statistics—1976, at 443 (1977).

<sup>46</sup> Marta Hoffman, *The Warp-Weighted Loom* 213 (1964).

<sup>47</sup> Knut Gjerset, *History of Iceland* 206 (1924).

<sup>48</sup> *Njal's Saga* 41, trans. n. Also Þorkell Jóhannesson, *Die Stellung der Freien Arbeiter in Island* 37 (1933).

<sup>49</sup> *Id.* at 207-208.

<sup>50</sup> *Id.* at 211.

<sup>51</sup> The existence of maximum wage legislation raises a problem for my thesis that the Icelandic system generated efficient law. The simplest answer is that I do not expect to see perfectly efficient law. Maximum wage legislation can most naturally be interpreted as a cartel arrangement among the landowners; such an arrangement may well be in their interest, provided that the farm workers are unable, for organizational reasons connected with the public-good problem, to combine in order to bribe the landowners to repeal the legislation or, within the Icelandic system, to buy sufficient *goðorð* to repeal it themselves.

varied considerably with good and bad years; the legislation might be an attempt to hold wages in good years to a level below equilibrium but above the average wage.

I have attempted another and independent estimate of wages, based on the fact that one of the two monetary commodities was woolen cloth, a material which is highly labor intensive. If we knew how many hours went into spinning and weaving an ell of wadmal, we could estimate the market wage rate; if it takes  $y$  hours to produce one ell, then the wage of the women making cloth (including the value of any payment in kind they receive) should be about  $1/y$ .

I have estimated  $y$  in two ways—from figures given by Hoffman for the productivity of Icelandic weavers using the same technology at later periods,<sup>52</sup> and from estimates given me by Geraldine Duncan, who has herself worked with a warp-weighted loom and a drop spindle, the tools used by medieval Icelandic weavers.<sup>53</sup> Both methods lead to imprecise results: the first because reports disagree and also because the sources are vague whether the time given is for weaving only or for both weaving and spinning, the second because Mrs. Duncan did not know the precise characteristics of wadmal, or precisely how the skill of medieval Icelandic weavers compared with her own. My conclusion is that it took about a day to spin and weave an ell of wadmal; this estimate could easily be off by a factor of two in either direction. If we assume that, in a relatively poor society such as Iceland, a considerable portion of the income of an ordinary worker went for room and board, this figure is consistent with that given in *Grágás*.

A rough check on these estimates of wages is provided by the fact that the *lög-sögumaðr* received an annual salary of 200 ells of wadmal, plus a part of the fines for certain minor offenses. While his position was not a full-time one, it involved more than just the two weeks of the Althing; he was required to give information on the law to all comers. Since the man chosen for the post was an unusually talented individual, it does not seem unreasonable that the fixed part of his salary (which, unlike the wages discussed before, did *not* include room and board) amounted to five year's wages, or an amount of wadmal which would have taken about ten months to produce. Thus, this figure is not inconsistent with my previous estimate of wages.

It is interesting to note that during the Sturlung period, when wealth had become relatively concentrated, the richest men had a net worth of about three to four hundred year's production of wadmal—or about a thousand cows. The former figure would correspond today to about six million dollars, but the latter to only a few hundred thousand—wages having risen considerably more, over the last millenium, than the price of cattle.

Table 1 gives values for a number of things in ounces, ells, years of production of wadmal, and years of wages. The ounce is assumed to be worth six ells, the year's production of wadmal to be three hundred ells (three hundred days at one ell/day) and the year's wage to be one mark of forty-eight ells.

Wergeld for a thrall, the price of a thrall, and the manumission price of a thrall were all equal, as might be expected. The price of a thrall presumably represents the capitalized value of his production net of room and board. It seems at first surprising

<sup>52</sup> Hoffman, *supra* note 46, at 215-16.

<sup>53</sup> Private communication.

TABLE 1

	Ounces	Ells	Years Production of Wadmal	Years Wages	Source
Normal price of male thrall	12	72	.24	1.5	Carl O. Williams, <i>supra</i> note 4, at 29
Manumission price of thrall	12	72	.24	1.5	Sveinbjorn Johnson, <i>supra</i> note 4, at 225
Wergeld for thrall	12	72	.24	1.5	<i>Id.</i>
Wergeld for free man	100	600	2	12.5	Njal's saga, <i>supra</i> note 3, at 108
Wergeld for free man <sup>b</sup>	400	2400	8	50	<i>Id.</i>
Wergeld for important man	200	1200	4	25	<i>Id.</i> at 255 ns.
Wergeld for important man <sup>a</sup>	800	4800	16	100	<i>Id.</i>
Law-speaker Salary		200+	.8+	5+	Vigfusson & Powell, <i>supra</i> note 1, at 348
Wealth of very rich man (Sturlung period)		120,000	400	2500	Einar Olafur Sveinsson, <i>supra</i> note 44, at 45
Wealth of very rich man (Sturlung period)		96,000	320	2000	<i>Id.</i>
Price of cow (c. A. D. 1200)		90-96	.3-.32	1.9-2	<i>Id.</i> at 56.

<sup>a</sup> Magnusson and Palsson (Njal's Saga, *supra* note 3, at 63, trans. n.) interpret the ounce by which compensations are measured as probably meaning "an ounce of unrefined silver . . . worth four legal ounces." Williams, *supra* note 4, at 31, interprets it as the legal ounce.



that this should amount to only a year and a half of wages (also net of room and board), but we must remember that wages, according to Þorkell Jóhannesson, were lower in the early period, when thralldom was common; thralldom disappeared in Iceland by the early twelfth century, about when *Grágás* was being written.

It is worth noting that the wergeld for a thrall was considerably lower than for a free man. This is to be expected. The wergeld for a thrall was paid to his master and it was his master, not the thrall, who had some part in the political bargaining process by which, I have argued, wergelds were set. The value of a thrall to his master would be the capitalized value of his net product. But the value of a free man to himself and his family includes not only his net product but also the value to him of being alive. Food and board, in other words, are expenses to the owner of a thrall but consumption to a free man. Furthermore, one would expect that the costs of the thrall to the owner would include costs of guarding and supervision that would not apply to the free man's calculation of his own value.

If we interpret the "ounce" of *Njal's Saga* as a legal ounce, the usual wergelds for free men again seem somewhat low, ranging from 12½ year's wages for an ordinary man to twice that for a man of some importance.<sup>54</sup> Here again, we must remember that there is considerable uncertainty in our wage figures. Twelve and a half years' wages might be a reasonable estimate of the value of a man to his family, assuming a market interest rate of between 5 and 10 percent, but it hardly seems to include much allowance for his value to himself. If we accept the interpretation in Magnusson and Pálsson<sup>55</sup> of the ounce in which the wergelds of *Njal's Saga* are paid as an ounce of unrefined silver, worth four legal ounces, the figures seem more reasonable.

#### APPENDIX B

The first step in applying the Icelandic system of private enforcement to a modern society would be to convert all criminal offenses into civil offenses, making the offender liable to pay an appropriate fine to the victim. In some cases, it might not be obvious who the victim was, but that could be specified by legislation. The Icelanders had the same problem and took care to specify who had the right to pursue each case, even for procedural offenses.<sup>56</sup> For some minor offenses anyone could sue; presumably, whoever submitted his case first would be entitled to the fine. It must be remembered that specifying the victim has the practical function of giving someone an incentive to pursue the case.

The second step would be to make the victim's claim marketable, so that he could sell it to someone willing to catch and convict the offender. The amount of the claim

<sup>54</sup> In comparing this figure with current sentencing levels for murder or manslaughter, one must remember that killing, in Icelandic law, was distinguished from murder by the fact that the killer "turned himself in." Thus even if the average sentence served by the convicted killers in our society were as high as 12½ years—which it surely is not—the corresponding *expected* punishment would be much higher in the Icelandic case.

<sup>55</sup> *Njal's Saga*, *supra* note 3, at 63.

<sup>56</sup> 1 Vigfusson & Powell, *supra* note 1, bk. 2, at 340, 356, 358-59.

would correspond approximately to the damage caused by the crime divided by the probability of catching the criminal.<sup>57</sup> In many cases it would be substantial.

Once these steps were taken, a body of professional "thief-takers" (as they were once called in England) would presumably develop and gradually replace our present governmental police forces.

One serious problem with such institutions is that most criminals are judgment proof: their resources are insufficient to pay any large fine. The obvious way to deal with this would be some variation on Icelandic debt-thralldom. An arrangement which protects the convicted criminal against the most obvious abuses would be for every sentence to take the form of "so many years or so many dollars." The criminal would then have the choice of serving out the sentence in years or accepting bids for his services. The employer making such a bid would offer the criminal some specified working conditions (possibly inside a private prison, possibly not) and a specified rate at which the employer would pay off the fine. In order to get custody of the criminal, the employer would have to obtain his consent and post bond with the court for the amount of the fine. In order for the private-enforcement system to work, it would be necessary for most criminals to choose to work off their sentences instead of sitting them out (since their fines provide the enforcer's incentive). This could be arranged by appropriately adjusting the ratio between the number of years and the number of dollars in the sentence.

There might be some crimes, such as murder, for which the appropriate fine would be so high that the convicted killer would be unable to work it off, however unattractive the alternative. For such cases the system would break down and would have to be supplemented by some alternative arrangement—perhaps a large bounty paid by the state for the apprehension and conviction of murderers.

It would be beyond the scope of this article to argue the advantages and disadvantages of such a system, or to compare at length its potential abuses with those of our present system of enforcement and punishment; it would be beyond my competence to discuss the legal problems, and in particular the constitutional objections, that might be raised to its introduction.

<sup>57</sup> This is only a first approximation; the optimal fine must make allowance for enforcement costs—part of the cost of a crime is the cost of catching the criminal—and for the net cost of collecting the fine. This is a complicated subject and beyond the scope of this paper.