# Ideas We Can Use

I did not write this book in the hope of finding the ideal legal system. I doubt there is one. My purpose is to understand some of the different ways in which different societies have dealt with the problems that a legal system is designed to deal with. One benefit of doing so is discovering ideas that might be worth stealing.

## Marketable Torts

In modern tort law, it is up to the victim to identify and prosecute the tortfeasor. In the Icelandic system it was also up to him, once he got a verdict from the court, to enforce it. That could be a problem for a victim with insufficient resources, defined mostly in terms of the ability to use force, himself or with the aid of allies, to prosecute the case and enforce the verdict. The solution, described in Chapter XX[Iceland], was to make claims transferable, permitting the victim to transfer his claim to someone better able to pursue it. He might or might not end up with a share of the damage payment–but then, crime victims usually collect nothing under our system. At least the offender would pay, giving potential offenders a reason not to violate the rights of even weak victims.

Consider the application of the same approach to modern tort law, where the victim needs resources to win his case even if not to enforce the verdict. A careless driver damages your car and perhaps you. You cannot afford a lawyer. You may be able to get a law firm to take the case on a contingency basis, in exchange for a share of whatever damages it collects. But you may find it hard to judge which law firm will do the best job, collect the most. Even if you can afford a lawyer, you still do not know which one will do the best job for you. If tort claims were fully marketable you could simply auction the claim off to the highest bidder.

That is not the only advantage of marketable tort claims. Consider a tort that does a small amount of damage to each of a large number of people. The current mechanism for dealing with such is a class action. An enterprising attorney persuades a few of the victims to appoint him to act for them, a judge to authorize him to pursue the case on behalf of all the other victims as well.

While the attorney has an incentive to try to win the case and collect damages, he also has an incentive to direct as much as possible of the payment to himself rather than to his supposed clients. Ideally the judge keeps him honest. If not, the attorney agrees with the defendant on a multi-million-dollar settlement consisting of a million dollars in real money to him, ten million for the tort victims in the form of an offer of discounts on future purchases.

Suppose tort claims were marketable. A firm such as an insurance company that routinely deals with a large number of customers offers a discount to anyone willing to sign over to it all tort claims he might have in the next year for less than a hundred dollars. An enterprising lawyer concludes that ten million people have gotten mildly sick due to something wrong with a brand of canned beans, giving each a legitimate claim for ten dollars in damages.

The lawyer goes to the insurance company and offers to buy all of their claims for injury from canned beans. He makes the same offer to other firms that have similarly purchased their customers’ small claims. When he is done, he owns three million claims for ten dollars each. He goes to the bean company and offers to settle for eighty cents on the dollar, twenty-four million dollars. If they turn him down he sues–not on behalf of the victims, who have sold their claims to him via middlemen, but for himself. There is no need for an attorney to pretend to represent millions of people who have never heard of him, no need for a judge to monitor the settlement to make sure it is fair to the victims. The victims have been paid in advance.

Iceland had marketable claims in the tenth century. America does not have them yet. Our legal system is more than a thousand years behind the cutting edge of legal technology.[[1]](#footnote-1)

## Feud

I do not expect the U.S. to convert to a legal system that is decentralized and privately enforced any time soon, although I did sketch what something along those lines might look like in my first book forty-some years ago.[[2]](#footnote-2) But an understanding of the logic of feud law can help us make sense of legal conflicts in the modern world.

### High-Tech Feud

Consider patent litigation among high-tech companies. Imagine that Apple is considering suing Samsung for a patent violation of which Samsung is not actually guilty–the equivalent, in the modern context, of a Romanichal gypsy or medieval Icelander wronging someone by demanding compensation for a wrong that did not occur. There are at least two reasons why Apple might do so. One is the chance that the court will mistakenly decide in Apple’s favor, patent law being a complicated subject. The other is that the litigation imposes significant costs on a rival. The public perception that Samsung might have to withdraw products from the market or modify them will cost Samsung sales, some of which will go to Apple.

One argument against suing is the risk that Samsung might retaliate. Even if neither company has actually violated the patents of the other, the countersuit may still be profitable for the same reasons as the initial suit. And even if the countersuit is not profitable as a gamble on court error or a way of reducing Apple’s sales in favor of Samsung’s, being committed to such a countersuit is one way of deterring the initial suit, just as being committed to vengeance against anyone who kills your kin is one way of keeping your kin from getting killed. The implicit feud system in modern patent litigation provides a mechanism for deterring meritless suits that might otherwise be profitable just as explicit feud systems deter other forms of otherwise profitable wrongs.

What about suits that are not meritless–what if Samsung actually has infringed Apple’s patents? The threat of countersuit is still a cost to Apple of suing. If courts reached their verdicts at random the situation would be the same as in the meritless case and the feud system would equally deter suits in both cases.

But courts do not reach their decisions at random, not even in patent law. If Samsung is guilty that raises, one hopes substantially, the chance that Apple will win, increasing the benefit to Apple of suing. If Apple has not infringed Samsung’s patents, that reduces the benefit to Samsung of countersuing. The mechanism through which right makes might in the world of high tech, as in Iceland a thousand years ago, is the court system.

As long as the plaintiff is more likely to prevail when he is in the right than when he is in the wrong, suing someone for infringing your patents produces a larger benefit to the plaintiff and a larger cost to the defendant when the defendant actually has infringed the plaintiff’s patents than when he has not. Provided that the cost imposed by the threat of countersuit is greater than the benefit of a meritless suit but less than the benefit of a legitimate suit, the result is to deter the former but not the latter.

The clearest anecdotal evidence that what I have described is how the system actually works is the practice of high-tech companies accumulating large inventories of patents, many of which they are unlikely to use. It is the modern equivalent of the medieval Icelander accumulating weapons and allies in case he ever needs them to prosecute his side of a feud. As in that case–and the higher-stakes version played by great powers under the name of Mutual Assured Destruction–if the strategy works the weapons need never be used.

There remains, however, one hole in the system.

### The Invulnerable Plaintiff

Samsung and Apple both produce cell phones, making both vulnerable to threats of retaliation. A firm that produces nothing is not. A non-practicing entity, referred to by critics as a patent troll, owns a collection of patents, practices none of them, sues practicing entities for alleged infringement but faces no risk of an infringement countersuit. It is invulnerable to retaliation, like an Icelander with armor so good that no sword can cut it.

The non-practicing entity, like Apple, has the possibility of profiting by court error, winning a case it should have lost and collecting damages. And although imposing costs on Samsung provides no direct benefit to the non-practicing entity, it does give Samsung an incentive to settle instead of letting the case go to trial.

In the case of Samsung, there is an obvious reason not to settle–paying off one plaintiff with a weak case will encourage others.[[3]](#footnote-3) That incentive is weaker in the case of a much smaller firm, unlikely to be the target of multiple extortion attempts and at risk of being destroyed by a single law suit. Hence we get what critics of non-practicing entities allege to be their usual tactic, suing small firms in order to be paid to drop the suit.

It follows that even if the feud system is adequate as a way of controlling patent suits among producing companies it is impotent to control bogus patent suits by non-practicing entities. Which suggests that we may need something else. For one possible solution, …

## The Athenian Rule: A Modest Proposal for Revising Tort Law

Under the American rule, each party to a tort suit pays its own legal expenses. Under the English rule, the losing party to a tort suit owes the prevailing party compensation for its legal costs.[[4]](#footnote-4) That provides a deterrent to a suit sufficiently meritless so that the plaintiff is virtually certain to lose. But a plaintiff who has some significant chance of winning, through court error or legal uncertainty, still has an effective threat. If the defendant wins he breaks even, if he loses he pays not only damages but the legal costs of both sides. That may be a good reason for the defendant to agree to settle for some fraction of what the plaintiff claims he owes, even if he is reasonably sure he is in the right. Defendants who are repeat players, such as a firm the size of Apple or Samsung, may be able to commit to never settling. The problem is more serious for defendants who do not expect to be repeat players and so are not in a position to commit themselves.

The fundamental problem, not limited to suits over intellectual property, is that a plaintiff who sues an innocent defendant in a system with legal error imposes a cost on him in addition to his legal costs–the risk of losing the case and being found liable for damages. We cannot compensate the defendant for that risk when he loses because if he loses we do not know he is innocent. But tort law treats a defendant who is found guilty by the preponderance of the evidence as if he were guilty with certainty, so it seems natural to treat a defendant who is found innocent by the preponderance of the evidence as if he were innocent with certainty, making the plaintiff guilty of suing an innocent defendant. We can use damages owed by the losing plaintiff to the prevailing defendant as a proxy for damages for the cost imposed by a plaintiff who sues an innocent defendant and wins. The logic is analogous to the case for punishing unsuccessful criminal attempts. Shooting at someone and missing does no harm. Punishing someone who shoots and misses serves as a proxy punishment for imposing a risk of death, collected, like damages under the tort rule I am proposing, when the risk does not eventuate.[[5]](#footnote-5)

These arguments suggest that the losing tort plaintiff should be liable to the defendant for damages, possibly based on the amount the plaintiff claimed and thus the size of the risk imposed, possibly also on some measure of how badly the plaintiff lost and thus how strong the evidence is that he was innocent. Making damages depend on how badly the plaintiff lost would correspond to the rule for private prosecution of most categories of criminal offenses in Periclean Athens; a prosecutor who failed to get at least 20% of a large jury to vote for conviction was himself fined. Making the damages depend on the amount claimed would correspond to the rule in Athens for at least some of their equivalent of our tort cases; the losing plaintiff owed the defendant one sixth of the amount claimed. It is not known whether that penalty depended on getting less than 20% of the jury to vote for conviction, like the equivalent in criminal cases, or applied to any acquittal.

By suitably adjusting the damages owed by the losing plaintiff and those owed by the losing defendant, it should be possible for the legal system to deter would-be plaintiffs from suing defendants they believe to be innocent while providing potential tortfeasors with the desired level of deterrence.

I have sketched the idea of the Athenian rule, damages owed to a prevailing tort defendant to compensate him for the risk of being wrongfully found liable, in the context of the patent troll problem, but the argument is a general one. Suing an innocent defendant in a legal system that sometimes finds innocent defendants guilty imposes costs beyond the cost of the litigation, costs for which the plaintiff should be liable. The rule is particularly important in the patent troll case only because that is a situation where deliberately suing innocent defendants and then proposing settlement is argued to be a serious problem. There may well be others.

## Another Idea From Athens

The Athenian solution to the problem of determining who were the richest Athenians in order to decide who was obliged to produce a public good might be relevant to analogous problems in a modern society. One version that has been proposed is the self-assessed property tax. Every property owner must state a value for his property. If someone offers to buy it at that price he is obliged to accept.

The property owner would like to set the value of his property as low as possible in order to hold down the tax, but high enough so that he will not be forced to sell it unwillingly. Aiming for a little above the market price may not be sufficient, since he might be underestimating the market price. And even if he gets the market price right, there is the opportunity for extortion, a buyer who recognizes its high value to the present owner, offers to buy the house, and demands a payment to drop the offer. So the price we would expect a prudent owner to set would be somewhere in the range between what he believes it is worth on the market and the lowest price he would be happy to sell it for.

The advantage of the self-assessed property tax is that it gives us a mechanism for setting the value to be taxed that does not depend on the existence of honest and competent assessors. One argument against that may occur to some is that it is unjust to tax subjective value rather than market value, to make me pay for the special emotional value to me of the house in which my children grew up, the fruit trees I planted. Another is that insecurity of my ownership of my home is too great a price to pay for the advantage of an automatically assessed value.

In my experience, it is the latter issue that makes many people regard the proposal as not merely undesirable but outrageous. One possible modification would be to have property valued for purposes of taxation in the conventional way but allow a property owner to revise the taxable value of his property if he wishes by declaring his willingness to sell at a lower price.

The usual argument for eminent domain, the legal rule that allows a government to force a property owner to sell at a price set by the government buyer, is that it is necessary to prevent the owner of a piece of property that blocks a project such as a new highway from taking advantage of the situation to charge an unreasonably high price. With a self-assessed property tax the property already has a price set by the owner, eliminating the problem and thus eliminating the argument for giving governments the power to force an owner to sell at a price set by the buyer.

A modern version of the Athenian approach is routinely used in horse racing to construct a competitive race. Entering a horse in a claiming race constitutes an offer to sell the horse at the stated price, say $20,000. Varying the price provides a simple way of creating races at a range of levels. The owner of a fast horse could get an easy win by entering him in an easy race, but only at the cost of losing the horse. An even simpler and more familiar example of the same approach is the rule for dividing something evenly: You cut, I choose.

Are there other contexts where the approach could be used and isn’t? None occur to me, but perhaps one of my readers can suggest some.

## Chinese Lessons on Contracts

Chinese contract practice provides evidence on how to manage contracts with minimal help from contract law. That is relevant even in places with much more detailed contract law than ancient China, since under most circumstances what both parties want is not to win a law case but to avoid one.

People constructing contracts can probably find solutions to the problem of how to structure a contract to make it in both parties’ interest to keep it without help from China.[[6]](#footnote-6) But the issue is also relevant to people constructing contract law, since legal rules may make some private solutions more difficult. *Caveat emptor*, “let the buyer beware,” the rule according to which a buyer takes goods as he finds them unless the seller explicitly warrants their qualities, may be useful in some contexts as a way of avoiding litigation. It also may be ruled out by some forms of modern contract law. More generally, the observation that parties may find it in their interest to structure contracts in ways designed to keep them out of court provides an argument for the doctrine of freedom of contract, under which contract terms are enforceable even if the court enforcing them considers them unwise.

## Plea Bargaining and the Law of Torture

John Langbein argued that the modern practice of plea bargaining, like the medieval law of torture, came into existence as a way around problems raised by an unworkably high standard of proof. His conclusion was that the U.S. should shift to something like the modern German system of trial, retaining juries for serious offenses but eliminating the adversarial system. Whether or not that is the right answer, his article points out the risk that if additional protections for defendants make trials longer and more expensive the result may be not fewer convictions of innocents but more.

## Plea Bargaining, Overcharging, and Athenian Law

Part of the problem with the modern system of plea bargaining is that a prosecutor can stack charges. Consider a defendant arguably guilty of an assault punished by a year in prison. The prosecutor charges him not only with that but attempted murder as well. Facing only an assault charge of which he believes himself innocent, the defendant might choose to go to trial with a reasonable hope of being acquitted. Charged with murder as well, facing a significant chance of a year in prison and a much smaller but non-zero chance of twenty years, he agrees to plead guilty to the lesser charge. Is there a way of changing the incentives of prosecutor and defendant to discourage that approach?

In Athens, a private prosecutor who failed to get 20% of the jury to vote for conviction could be fined. In modern legal systems the prosecutor is not a private citizen but an official acting for a government, which makes that approach less likely. But there might be others. One could, for instance, provide that if, in three different cases over a year, there was at least one charge on which fewer than four jurors voted for conviction, the prosecutor will be removed–a three strikes rule. That gives a prosecutor a reason not to file charges that he cannot support at trial.

If he files such charges anyway the rule provides no protection to the defendant, hence no reason for him not to give in to the threat; if he gives in the charges never get tried. Consider instead, or in addition, a rule providing that a defendant who is acquitted on any one charge must receive the lowest legal penalty on any charges he is convicted of. That reduces the power of the prosecutor’s threat, giving him an incentive to charge the defendant only with offenses the prosecutor thinks he can convict him of and bargain from that.

I doubt that either variant could get adopted in a U.S. jurisdiction at present, but there are other places and will be other times.

## To Catch Up With Eighteenth-Century England

From time to time someone commits a crime that his government approves of. Examples in my lifetime include murder (of Black Panthers Fred Hampton and Mark Clark by Chicago police in 1969) and perjury (by Director of National Intelligence James Clapper testifying to Congress in 2013). Criminal prosecution in our legal system is by the government, so crimes the government approves of are unlikely to be prosecuted, and neither of those was. But the Black Panther shooting produced a civil case that eventually settled for 1.85 million dollars, paid by Chicago, Cook County, and the federal government.

A civil suit is one way of dealing with a crime that the government chooses not to prosecute, but not all crimes produce grounds for such a suit. In eighteenth-century England, the solution was much simpler: Any Englishman could prosecute any crime.

Suppose we wanted to change our system to deal with the problem of the government refusing to prosecute crimes it approves of. We could do so by changing our law to permit a private citizen to institute a criminal prosecution against a defendant whom the state failed to prosecute. That sounds like a radical proposal, but a version of it already exists in modern American law. Some statutes provide the option of a private attorney general, prosecution by a private citizen. As in English law in the late eighteenth century, the successful prosecutor can, at the option of the judge, be awarded attorney fees to cover his costs. I am proposing a modest expansion of the existing rule–to cover all crimes.

One question remains–is the result a good one? Seen from one side, it is a precaution against governments murdering people they don’t like. Seen from the other, it reduces the ability of the legal system to ignore illegal acts that are not worth punishing.

In the U.S. at present, it is illegal for college students who are under twenty-one to buy, possess, or consume alcoholic drinks and illegal for others to provide alcoholic drinks to them. Would it be a good thing for a student with a grudge against his ex-girlfriend or her new boyfriend to be able to have one or both arrested, charged with (depending on the state and circumstances) a misdemeanor or felony and, if convicted, jailed for several months, conceivably several years?[[7]](#footnote-7)

Here again, evidence from past legal systems is relevant. Under the English game laws, some wild animals were considered property of the Crown and hunting them restricted to the king or those he had authorized. The result, by the early 19th century, was that the right to hunt such animals did not always belong to the owner of the land on which they were hunted. The restriction was widely ignored, providing opportunities for the threat to prosecute to be used to extort money from landowners guilty of the crime of hunting the king’s deer on their own land.[[8]](#footnote-8)

A possible compromise might be to permit private prosecution only against government employees. Think of it as a watered-down version of Mencken’s proposal.

1. For a more detailed description of how such a system might work, see Friedman (2000) pp. 99-100, 266, 282*.* [↑](#footnote-ref-1)
2. Friedman 1973. [↑](#footnote-ref-2)
3. A point made [in verse](http://www.poetryloverspage.com/poets/kipling/dane_geld.html), in a somewhat earlier context, by Rudyard Kipling. [↑](#footnote-ref-3)
4. In the rule as it actually exists in English law, the compensation is for what the court believes the legal costs should have been, not for what the costs actually were. And under American law the prevailing party can sometimes get its costs paid if the court views the losing party’s position as sufficiently meritless. [↑](#footnote-ref-4)
5. This explanation of punishment for attempts is worked out in more detail in Friedman (1991). [↑](#footnote-ref-5)
6. For a modern discussion of the question, see Chapter 3 of Jackson et. al. 2010*.* [↑](#footnote-ref-6)
7. In Florida, possession is a misdemeanor punishable by up to sixty days imprisonment plus suspension of driving privileges. In Illinois, providing alcohol to someone under age is a misdemeanor with a penalty up to a $2,500 fine and a year in jail or a felony with a penalty of a year or more in jail and a fine of up to $25,000. [↑](#footnote-ref-7)
8. Hay, Douglas, “Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850” in *Hay and Snyder 1989*. [↑](#footnote-ref-8)