PANEL V

# THE MARKET FOR RULES, PRIVATIZATION, AND THE CRISIS OF THE THEORY OF PUBLIC GOODS

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The theme of private and privatization in law is long standing. It is fundamental to the Anglo-American common law tradition. It is possible to view the common law as being private law in contrast to many modern legal systems. However, historians of Roman law argue that Roman law was similarly private law, but that the codification under Justinian changed Roman law into the system that is widely accepted as in contrast with common law.

These issues have begun to receive greater attention from legal philosophers. Professors Ellen and Jeff Paul at the Social Philosophy and Policy Center at Bowling Green State University have directed several conferences at which the seminal contributions of Richard A. Epstein of the University of Chicago Law School have been explored and expanded upon. Similarly, James Buchanan, who was the original inspiration for the organization of this set of papers, has encouraged parallel work by legal philosophers such as Lester Hunt, J. Charles King, and Loren Lomasky. Additionally, Buchanan has included in his programs philosophers such as David Gauthier, John Rawls, Thelma Lavine, Shirley Robin Letwin, and Robert Nozick. In this Buchanan is continuing the work of his great teacher, Frank Knight, as well as continuing the work of his Italian and Swedish sources of public choice theory.

A major influence on the theme of private and privatization is the work of F. A. Hayek. Building on the contributions of Ludwig von Mises in *Socialism*[1] and in *Human Action*,[2] Hayek, during two decades at the London School of Economics and more than a dozen years at the University of Chicago at its most productive period, formulated a number of approaches to these issues. Merely noting the movement of Ronald Coase from the London School of Economics in the 1930s to the University of Virginia in the 1950s and to the University of Chicago in the 1960s suggests some of the interplay

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1. L. von Mises, Socialism (1932).
2. L. von Mises, Human Action: A Treatise on Economics (1949).

of ideas. Aaron Director, Milton Freidman, and George Stigler at the University of Chicago and Harold Demsetz, now at the University of California at Los Angeles, provided the central analyses that solidified the scholarly bases of this research.

Hayek, Director, and Coase led us to the flowering of the jurisprudence of law and economics under the leadership of Henry Manne.[3] While Manne's contributions to law and economics are widely known, less understood has been his interest in the jurisprudential aspects of law and economics. Stemming from the jurisprudential contributions of Hayek in *The Constitution of Liberty*[4] and in his three volume *Law, Legislation and Liberty*,[5] Manne explored the sources of Hayek's thinking, especially the Italian legal scholar, Bruno Leoni.

Bruno Leoni was professor of legal theory at the University of Pavia and through lectures in Europe and America influenced Hayek and others. His work, *Freedom and the Law*,[6] was celebrated by a twenty-fifth anniversary colloquium organized by Henry Manne at Emory University. Leoni explored the creation of law as a private good and presented the conflict, elaborated upon by Hayek, between law and legislation.[7]

The ideas from Leoni's *Freedom and the Law* directly, and indirectly through Hayek, influenced the approaches developed by the Chicago School and the Virginia Property Rights School. Harold Demsetz's article, *Toward a Theory of Property Rights*,[8] was an original contribution to the economists' approach to property rights. Especially important was the demonstration of a talented economist's subtle use of historical sources.[9]

The theme of private and privatization became more focused during the 1970s, as exemplified by a symposium[10] which was edited by Roger Pilon who had been on the faculty of the Emory University School of Law. In addition to Roger Pilon,[11] the contributors included Richard A. Epstein,

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3. Dean of the George Mason University School of Law and Director of the Center for Law and Economics at George Mason University.

4. F. Hayek, The Constitution of Liberty (1960).

5. F. Hayek, Law, Legislation and Liberty (1976).

6. B. Leoni, Freedom and the Law (1961).

7. The most recent discussion of the importance of Leoni's contribution can be found in Arnason, *Bruno Leoni in Retrospect*, 11 Harv. J.L. & Pub. Pol'y 661 (1988).

8. Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

9. The most useful collections for these developments are: Pejovich & Furobotn, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. Econ. Lit. 1137 (1982); The Economics of Legal Relationships: Readings in the Theory of Property Rights (H. Manne ed. 1975).

10. *Symposium: Perspectives on Rights*, 13 Ga. L. Rev. 1117 (1979).

11. Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 Ga. L. Rev. 1171 (1979); Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 Ga. L. Rev. 1245 (1979).

George P. Fletcher, David F. Forte, and Thomas Morawetz. Epstein's *Possession as the Root of the Title*[12] contributed greatly to the foundations of legal theory concerning the theme of private and privatization.

Richard Epstein was a participant in a symposium, chaired by Leonard P. Liggio, at the University of Chicago Law School on *Change in the Common Law: Legal and Economic Perspectives.*[13] Building on an article by Richard A. Posner[14] and continued by a further symposium volume edited by Mario J. Rizzo,[15] this May 1979 symposium was a major modern foundation to the law and economics tradition that efficiency is *not* the only economic approach to law.

Ronald Dworkin confronted the pure efficiency argument of William Landes and Richard A. Posner in one of the most fruitful exchanges in the current legal debates. Richard Epstein's book, *Takings: Private Property and the Power of Eminent Domain*,[16] may be seen as an important consequence of those symposium discussions between Dworkin and Landes and Posner. Other important papers in the volume were presented by Anthony Kronman, Mario Rizzo, Charles Fried, Gerald P. O'Driscoll, and George Priest.[17]

Jeremy Waldron's article, *When Justice Replaces Affection*,[18] deepens the foundations of the discussion of private and privatization. The comment by Jules Coleman[19] is a valuable addition to the discussion.

Professor Robert Ellickson, in his essay in this symposium issue of the George Mason University Law Review, established a dichotomy between the positions which he ascribes to Ronald Coase and Robert Nozick. He notes, in Coase's crucial contributions to the conclusion that there are not any public

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12. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221 (1979).

13. *Symposium: Change in the Common Law: Legal and Economic Perspectives*, 9 J. Legal Stud. 189 (1980).

14. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 281 (1979).

15. *Symposium: Efficiency as a Legal Concern*, 8 Hofstra L. Rev. 485 (1980).

16. R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

17. Epstein's work has been basic to the legal theory of private and privatization. *Cf.* R. Smith, Liberalism and American Constitutional Law (1985). *See also Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. Miami L. Rev. 1 (1986) (featuring Bruce Ackerman, Larry Alexander, Jules Coleman, Thomas C. Grey, Mark Kelman, Eric Mack, Ellen Frankel Paul, Bernard Siegan, and Cass Sunstein). A major review essay on Epstein's "Takings" by Ellen Frankel Paul appeared in, *Moral Constraints and Eminent Domain: A Review Essay of Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 55 Geo. Wash. L. Rev. 152 (1986). Further contributions to the discussion appear in Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U.L.Q. 667 and Epstein, *Time, Property, and the Common Law: Round Table Discussion*, 64 Wash. U.L.Q. 793 (1986).

18. Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 Harv. J.L. & Pub. Pol'y 625 (1988).

19. Coleman, *Rights, Markets, and Community*, 11 Harv. J.L. & Pub. Pol'y 649 (1988).

goods, the assumption that law must be a public good, a creation of a compulsory system of imposed order. Thus, a conceptual conflict arises in Coase's work between all that he examines and his discovery that there are not any economic public goods (that is that the market does not fail, but can always provide what the consumers desire to pay for), and what Coase does not examine, but asserts: that law cannot be provided in response to the desires of the consumers but must be imposed by coercion. Ellickson has made a valuable contribution by raising this issue with reference to Coase's work, which is central to modern law and economics, as well as with reference to the rights theory of Robert Nozick.[20]

Ellickson finds that the assumptions of Coase, as well as of Nozick, as an empirical matter are completely false. Ellickson believes that the evidence demonstrates that the market in society for justice, for the settlement of disputes, has been and is satisfied by non-coercive or non-state mechanisms for making rules and settling disputes. Some ongoing work in this regard has been presented by Bruce Benson of the Florida State University at the Center for Study of Public Choice at George Mason University.[21]

A monumental contribution to understanding this subject has been presented by Harold Berman, emeritus, Harvard University, presently at Emory University.[22] Starting with the work of Robert Nisbet and F. W. Maitland, Berman describes the growth of law as unplanned and uncontrolled, as something that emerged and happened. According to Berman:

> To speak of a "tradition" of law in the West is to call attention to two major historical facts: first, that from the late eleventh and twelfth centuries on, except in certain periods of revolutionary change, legal institutions in the West developed continuously over generations and centuries, with each generation consciously building on the work of previous generations; and second, that this conscious process of continuous development is (or once was) conceived as a process not merely of change but organic growth.[23]

Like a number of contemporary legal scholars, Berman has discovered that general notions currently prevailing in the universities are inadequate explanations compared to the contributions of the leading legal scholars at the turn of the century. The current inelegant theories have been an obstacle to the understanding of legal development. Berman emphasizes:

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20. R. Nozick, Anarchy, State, and Utopia (1974).

21. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. Econ. J. 644-61 (1989); *see also* B. Benson, Liberty and Justice: Alternatives to Government Production of Law and Order (1989).

22. H. Berman, Law and Revolution: The Formulation of the Western Legal Tradition (1983).

23. *Id.* at 5.

> The conventional concept of law as a body of rules derived from statutes and court decisions — reflecting a theory of the ultimate source of law in the will of the lawmaker ("the state") — is wholly inadequate to support a study of a transnational legal culture. To speak of the Western legal tradition is to postulate a concept of law, not as a body of rules, but as a process, an enterprise, in which rules have meaning only in the context of institutions and procedures, values, and ways of thought. . . . In the formative era of the Western legal tradition there was not nearly so much legislation or so much precedent as there came to be in later centuries. The bulk of law was derived from custom, which was viewed in the light of equity (defined as reason and conscience).[24]

Berman's historical analysis parallels the contributions which F. A. Hayek and Bruno Leoni have made to legal theory. Hayek and Leoni have made a radical separation of statute law or legislation and common law or law. Law is the market creation of rules as the result of an often centuries-long process of evolution by which rules or principles which provide for a successful creation of a prosperous society continue as law while decisions which undermine the free and prosperous commonwealth are discarded. Legislation is the momentary declaration by a temporary collection of people in a legislature who happened at that particular moment to represent a majority of the chamber. The attitude of the general public regarding statutes was summarized by William F. Buckley when he said that he would much prefer that statutes be enacted by the first five hundred names in a Connecticut telephone directory.

Leoni noted the irrationality and tyranny of statutes:

> The paradoxical situation of our times is that we are governed by men, not, as the classical Aristotelian theory would contend, because we are not governed by laws, but because we are. In this situation it would be of very little use to invoke the law against such men. Machiavelli himself would not have been able to contrive a more ingenious device to dignify the will of the tyrant who pretends to be a simple official acting within the framework of a perfectly legal system. If one values individual freedom of action and decision, one cannot avoid the conclusion that there must be something wrong with the whole system.[25]

H. L. A. Hart makes a parallel criticism of positivism.[26] Hart warns that the judge should not function also as a legislator. The judge should live up to

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24. *Id.* at 11.

25 Leoni, *supra* note 6, at 102.

26. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 Ga. L. Rev. 969 (1977).

Lord Radcliffe's ideal judge: the "[o]bjective, impartial, erudite, and experienced declarer of the law."[27]

Lon Fuller, in *The Law in Quest of Itself*,[28] held that being and value were two aspects of a single reality of nature and that this dual aspect of a single nature could be discoverable in the process of human activity.[29] Fuller rejected coercion and hierarchies of command as identifying characteristics of law. Social activities and relations are both legitimate and utilitarian only in the context of personal freedom of human action and human choice. The role of command is excluded from the concept of law.

Fuller identified the process of discovery of legal principles as being expressed in custom and common law along lines parallel to those described by Robert Ellickson. For Fuller, the coordination role in society is performed by purposeful human actions in a system of voluntary choices. Similarly, Hayek has emphasized the coordination role performed by individual judgments operating free from statute law. Fuller identified with the system of legal thinking which exemplified man's purposive and aspirational nature, which emphasized the role of human reason and which opposed the arbitrariness of coercive and governing agencies.[30]

In this context, it is useful to compare two major lectures by Hayek in 1933 and 1974:

> But it is an error not very different from this anthropomorphism to assume that the existing economic system serves a definite function only in so far as its institutions have been deliberately willed by individuals. This is probably the *last* remnant of that primitive attitude which made us invest with a human mind everything that moved and changed in a way adapted to perpetuate itself or its kind. In the natural sciences, we have gradually ceased to do so and have learned that the interaction of different tendencies may produce what we call an order without any mind of our own kind regulating it. But we still refuse to recognize that the spontaneous interplay of the actions of individuals may produce something which is not the deliberate object of their actions but an organism in which every part performs a necessary function for their continuance of the whole, without any human mind having devised it.[31]

> The recognition of the insuperable limits to his knowledge ought indeed to teach the student of society a lesson in humility which should guard him

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27. *Cf.* H. Hart, Law, Liberty, and Morality (1963). Recent treatment of these issues appear in L. Weinreb, Natural Law and Justice 102-04 (1987); H. Veach, Human Rights (1985); M. Martin, The Legal Philosophy of H. L. A. Hart 49-77, 175-237 (1987).

28. L. Fuller, The Law in Quest of Itself (1940).

29. Fuller, *Human Purpose and Natural Law*, 53 J. Phil. 102 (1956).

30. L. Fuller, The Morality of Law (1964). *See also* K. Winston, The Principles of Social Order: Selected Essays of Lon L. Fuller (1981); L. Fuller, *Two Principles of Human Association*, in Voluntary Associations (J. Pennock and J. Chapman ed. 1969).

> against becoming an accomplice in men's fatal striving to control society - a striving which makes him not only a tyrant over his fellows, but which may well make him the destroyer of a civilization which no brain has designed but which has grown from the free efforts of millions of individuals.[32]

Norman P. Barry, University of Buckingham, has related this analysis by Hayek to legal theory. Like Leoni, Hayek sees the demand and supply of law as analogous to the demand and supply of other goods or services in the market. Barry describes Hayek's analysis:

> Law develops in a case by case manner during which judges fit and adapt existing law to circumstances so as to produce an overall order which, although it may not be "efficient" in a technical, rationalistic sense, any more than competitive markets are "perfect," is more stable than that created by statute. Statute law may appear to be more predictable because it is written down, whereas common law ("lawyers" law) may not actually be known until a judge has "discovered" it, statute law is in fact more capricious precisely because, in the modern world especially, statutes change frequently according to the whims of legislatures. Hayek's position is similar to Leoni's anti-statute approach in all important respects: because it is impossible to predict human (legislative) behavior, a structure of law which is not the result of will and cannot be known in its entirety, paradoxically, displays more regularities than a written code. Furthermore, because the future is unknowable and unpredictable, no code could be designed to cope with all possible cases. This is why judicial activity, as a form of "puzzle-solving," is essential to Hayek's jurisprudence.[33]

Hayek's analysis has been expanded upon by Thomas Sowell. Sowell's *Knowledge and Decisions*[34] is a magisterial contribution to the discovery and codification of information and rules. Earlier work had been done in this area by Michael Polanyi.[35]

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32. F. Hayek, The Pretence of Knowledge, Novel Memorial Lecture, (December 11, 1974). *See also* G. Fletcher, *Anarchy and Spontaneour Legality*, in Liberty and Rule of Law 182 (R. Cunningham ed. 1979); Rolf Sartorius, *The Limits of Libertarianism*, in Liberty and Rule of Law 87 (R. Cunningham ed. 1979); G. O'Driscoll, Economics as a Coordination Problem: The Contribution of Friedrich A. Hayek (1977); G. O'Driscoll and M. Rizzo, The Economics of Time and Ignorance (1983); N. Barry, *The Tradition of Spontaneous Order*, in Literature of Liberty, Vol. V, No. 2 (1982); J. Gray, *F. A. Hayek and the Rebirth of Classical Liberalism*, in Literature of Liberty, Vol. V, No. 4 (1982) (also includes comments on Norman Barry's essay by James M. Buchanan, Israel M. Kirzner, Mario J. Rizzo, and Jeremy Shearmur, among others).

33. Barry, *The Tradition of Spontaneous Order*, in Literature of Liberty, V, 2, p. 44 (1982); *cf.* Barry, *The Classical Theory of Law*, 73 Cornell L. Rev. 283 (1988); N. Barry, Hayek's Social and Economic Philosophy (1979); N. Barry, The Invisible Hand in Economics and Politics (1988); F. Hayek, Law, Legislation, and Liberty, Vol. 1, *Rules and Orders*, 18-23 (1973).

34. T. Sowell, Knowledge and Decisions (1980).

35. M. Polanyi, The Logic of Liberty (1956); M. Polanyi, Personal Knowledge (1958).

The analyses of Leoni, Hayek, Hart, and Fuller regarding the success of law when it is a discovery process responding to changing market conditions for the production of law parallel the research of the legal historian, Harold Berman. Berman's work contributes one of the major themes in contemporary historical sciences: "What were the institutions of the West (Europe and America) which made possible economic prosperity?"[36]

Berman concludes that the emergence of a Western legal tradition from the eleventh century resulted from the development of the universities, the discovery of classical texts from Arabic and Byzantine sources, and the application of the scholastic technique of reconciling contradictions. The Western legal tradition is an adaptation of the old to the new; it is a process of discovery of what rules cause success in society and what rules are unsuccessful as contracting the expressions of human nature. Success has been based on testing over time, and resisting innovations. "It is presupposed in the Western legal tradition that changes do not occur at random but proceed by reinterpretation of the past to meet present and future needs. The law is not merely ongoing; it has a history."[37]

For Berman the historical foundation of law is related to the Western legal tradition's supremacy of law over the edicts or statutes of political authorities — executives or legislatures. The law's supremacy over edicts or statutes makes law binding on the state agencies. However, it is the plurality and competition of legal jurisdictions which contribute to the success of the West's legal system. According to Berman:

> Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions an legal systems that makes the supremacy of law both necessary and possible. Legal pluralism originated in the differentiation of the ecclesiastical polity from secular politics. . . . Secular law itself was divided into various competing types, including royal law, feudal law, manorial law, urban law, and mercantile law. The same person might be subject to the ecclesiastical courts in one type of case, the king's court in another, his lord's court in a third, the manorial court in a fourth, a town court in a fifth, a merchants' court in a sixth. The very complexity of a common legal *order* containing diverse legal *systems* contributed to legal sophistication. The pluralism of Western law, which has both reflected and reinforced the pluralism of Western political and economic life, has been, or once was, a source of development, or growth — legal growth as well as political and economic growth. It also has been, or once was, a source of freedom.[38]

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36. *See* H. Rosenberg & E. Birdzell, How the West Grew Rich (1986); E. Jones, The European Miracle (1981).

37. Berman, *supra* note 22, at 9.

38. *Id.* at 10.

The parallel to Leoni and Hayek can be seen in Berman's contrast between the reality of the Western legal tradition and the imposed theoretic model which is current among some legal theorists. For example, to recall Berman's analysis:

> The conventional concept of law as a body of rules derived from the statutes and court decisions — reflecting a theory of the ultimate source of law in the will of the lawmaker ("the state") — is wholly inadequate to support a study of a transnational legal culture. To speak of the Western legal tradition is to postulate a concept of law, not as a body of rules, but as a process, an enterprise, in which rules have meaning only in the context of institutions and procedures, values, and ways of thought.[39]

It is the usages of society, tested over long periods of time, which show their success by the progress of the society, which eventually are found to be the rules of law by law-finders or judges of the society. The Western legal concept is a process, an enterprise, of discovering law from the successful usages of society. The Anglo-Saxon common law represented an archetypical form of Western law, where until recent times, statutes were statements of what the common law judges had recognized after long, sometimes centuries-long, processes of discovery.

In his lecture preceding this symposium and in an article,[40] Randy E. Barnett provided a useful background to the role of the private in law. He notes the classical legal tradition as the basis for the concept of the rule of law. Aristotle in *The Rhetoric* stated: "Now, it is of great moment that well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges."[41] Aristotle expressed his distrust of random decisions of judges where there was no tradition of following precedent. The Roman jurisconsults, as Richard Epstein has most recently emphasized, did operate in a tradition of precedents. As Barnett notes, Thomas Aquinas understood Aristotle as referring to arbitrary decisions of judges not bound by precedent as inferior to man-made laws[42]

The discussion regarding the public and private distinctions carries over into constitutional law, with special reference to unenumerated rights.[43]

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39. *Id.* at 11.

40. Barnett, *Four Senses of the Public Law-Private Law Distinction*, 9 Harv. J.L. & Pub. Pol'y 267 (1986); *cf.* Barnett, *Pursuing Justice in a Free Society: Part One–Power vs. Liberty*, 4 Crim. Just. Ethics 50 (1985) and Barnett, *Pursuing Justice in a Free Society: Part Two–Crime Prevention and the Legal Order*, 5 Crim. Just. Ethics 30 (1986).

41. Aristotle, The Rhetoric 1354a32 (Modern Library ed. 1984).

42. T. Aquinas, Summa Theologiae Ia2ae Question 95, art. 1.

43. A major contribution was made by C. Black, *On Reading and Using the Ninth Amendment*, in Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow (M. McDougal and W. N. Reisman eds. 1985). *Cf. Symposium on Interpreting the Ninth*

In the discussion among the members of the panel, Ellickson emphasized that law develops in an evolutionary manner based on success and failure. He notes the alternative to ordinary legislation represented by the Uniform Code Commission. Custom in common law doctrine is the source of authority which is merely ratified by statute. Similarly, Ellickson sees a return to federalism as crucial for the health of the legal system. He believes that the ultimate source of rules should be the flourishing, competitive legal systems across the country. The society would benefit from the successful rules which undermine growth.[44]

Another approach to understanding the natural development of legal rules is provided in the recent works of Robert Axelrod[45] and Robert Sugden.[46] This approach parallels the contribution of George Priest regarding the central importance of insurance to the development of private law in place of legislation.

George Priest's criticism of the transformation of the United States Constitution from permissive of persons (individual liberty) and restrictive of the governors to restrictive of persons and permissive of the governors is intellectually challenging. He stated that his critique went beyond the efficiency argument (which is generally accepted by knowledgeable legal theorists). Efficiency is the understood given in current legal discussion, and George Priest is seeking to build on the foundation of efficiency. He believes that his argument goes beyond the advocacy of personal liberty. He holds that there are independent moral grounds for the rejection of this realm of government activity. His statement regarding the independent moral grounds for rejection of government activity parallels the arguments of eighteenth century natural jurisprudence. The eighteenth century Enlightenment legal theorists, whether in Scotland, England, France, Italy, or Germany, held that there were independent moral principles and that they were self-evident as stated in the Declaration of Independence.

George Priest's analysis, which parallels the development of the analyses of the Scottish enlightenment and the American enlightenment as represented by Thomas Jefferson, leads him to the conclusion that there is a different way to determine services to the public. His analysis questions the structure of the concept of public goods. For George Priest, a central analytic

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*Amendment*, 64 Chi-Kent L. Rev. 37 (1988); Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, 4 Cato J. 813 (1985).

44. *See* Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623 (1986).

45. R. Axelrod, The Evolution of Cooperation (1984).

46. R. Sugden, The Economics of Rights, Co-operation and Welfare (1986); Sugden, *Labor, Property and the Morality of Markets*, in The Market in History (B.L. Anderson and A.J.H. Latham eds. 1986).

instrument for judging the validity of the concept of public goods is insurance and risk-spreading. In what ways, if at all, are insurance and risk-spreading available to consumers in the market? What are consumers willing to pay for insurance to undertake an activity since all actions entail risks? Where have the historic common law protections of property been set aside creating naked risks? George Priest has contributed strongly to challenging the folklore of legislative analysis based upon the construction of the concept of public goods. The role of insurance is central to understanding the myths behind that folklore which dominates currently.[47]

George Priest has raised an important research agenda for legal scholars. He proposes that moral systems have an important, almost studied, role in defining choices in legal frameworks. Game theory and public choice analysis provide a connection between traditionally established law and economics approaches and the advance to the moral systems research approaches. As Priest had indicated, he wished to build on the efficiency foundations of law and economics approaches to grounding an analysis on independent moral systems research. His work on insurance issues is a necessary condition for the advance to moral systems research that he proposes.

George Priest thinks that his ideas regarding an advance to moral systems research leads to a different and much more constrained theory of public goods. Priest is building on a recent but widespread recognition among legal scholars that a redefinition of the theory of public goods is in order and that the direction is toward a concept of public goods of a different nature from the older theory.

In the discussion of the papers, Kenneth Abraham, Robert Ellickson, and George Priest expressed the need for a much wider development of research in insurance applications. The direction of existing research is in the direction that drastically undermines the older theory of public goods.

A recent contribution to these issues was a symposium on privatization under the direction of Henry Manne at the George Mason University Center

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47. *Cf.* D. Schmidtz, Public Goods and the Justification of Political Authority (University of Arizona Ph.D. dissertation, 1988); D. Schmidtz, The Assurance Problem in a Laboratory Market (University of Arizona working paper 1985); R. Isaac, D. Schmidtz, and J. Walker, The Assurance Problem in a Laboratory Market (University of Arizona working paper 1988); M. Bagnoli and M. Mckee, Can the Private Provision of Public Goods be Efficient? - Some Experimental Evidence (University of Colorado working paper 1987); D. Klein, *Tie-Ins and the Market Provision of Collective Goods*, 10 Harv. J.L. & Pub. Pol'y 451 (1987); A. Buchanan, Ethics, Efficiency, and the Market (1985); A. Shand, The Capitalist Alternative: An Introduction to Neo-Austrian Economics (1984); L. Trakman, The Law Merchant and the Evolution of Commercial Law (1983); and the articles by Robert Axelrod, James M. Buchanan, Ronald Coase, Harold Demsetz, and Kenneth D. Goldin in The Theory of Market Failure: A Critical Examination (T. Cowen ed. 1988).

for Law and Economics in 1987.[48] The symposium featured a lead article by Ronald A. Cass[49] and included among the participants Robert Ellickson, Neil Komesar, John Blundell, Manuel Klausner, and Robert Poole.

In conclusion, the current discussions have indicated the large conceptual progress and the potential for progress in scholarly research during the past ten years. The foundations were established by the writings of Jules Coleman, Ronald Dworkin, Richard Posner, Richard Epstein, Mario Rizzo and others.[50] Younger legal scholars should be encouraged by the large number of new issues which have been raised in the last decade, often in a tentative manner, but hardly explored due to the domination of older theories. With the important current developments in law and economics, in games theory, insurance applications, and public choice theory, concepts have emerged parallel to the theory of public goods. Now, that theory is in the process of being replaced, and the way is opening up to a wide range of research agenda.

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48. *Symposium: Privatization: the Assumptions and Implications*, 71 Marq. L. Rev. 447 (1988).

49. *Symposium: Privatization: Politics, Law and Theory*, 71 Marq. L. Rev. 447 (1988). *Cf.* S. C. Littlechild, The Fallacy of the Mixed Economy (1978); and J. Blundell, *Privatization — by Political Process or Consumer Preference?*, Economic Affairs, Oct.-Nov. 1986.

50. *Cf. Symposium, Change and the Common Law: Legal and Economic Perspectives*, 9 J. Legal Stud. 189 (1980) *with Symposium On Efficiency As A Legal Concern*, 8 Hofstra L. Rev. 485 (1980).