

LEGISLATION AND THE DISCOVERY OF LAW IN A FREE SOCIETY

*N. Stephan Kinsella**

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* N. Stephan Kinsella, JD, LL.M., practices computer software and hardware patent law with Schnader, Harrison, Segal & Lewis, in Philadelphia, and is licensed to practice in Louisiana, Texas, and Pennsylvania, and before the U.S. Patent and Trademark Office.

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*Justice must stand quite still, or else the scales will waver
and a just verdict will become impossible.*

—Franz Kafka¹

I. Introduction

Libertarians' devotion to individual rights, and to laws in support of those rights, is unquestionable. Most of the laws favored by libertarians can be shown to be consistent with our individual rights — unlike the blatantly illegitimate laws advocated by socialists. Despite this, however, many libertarians overlook important procedural or structural requirements that must accompany any legal system in which substantively justifiable law can develop and last.

In particular, the danger and futility of making law by *legislation* is too often ignored, even by libertarians (other than anarcho-capitalists, who oppose the existence of any government on principle, including its legislature). Libertarians often, for example, advocate that the legislature enact this or that law, or they at least support many statutes that are already in force, such as statutes prohibiting murder. The concept of separation of governmental powers into the legislative, executive, and judicial branches, which many libertarians support, implies that legislation can be a valid function of a libertarian government. But as the late Italian legal theorist Bruno Leoni noted in 1961:

It is ... paradoxical that the very economists who support the free market at the present time do not seem to care to consider whether a free market could really last within a legal system centered on legislation.²

Leoni argued that legislation as such is incompatible with freedom. If this is correct, then even statutes that seem to embody libertarian principles simultaneously subvert those principles. There is another way forming law, however — in which law is “found” rather than “made” — which does not depend on legislation or

¹FRANZ KAFKA, *THE TRIAL* 146 (New York: Schocken Books, Definitive ed. 1984, Willa and Edwin Muir, trans. 1956).

²BRUNO LEONI, *FREEDOM AND THE LAW* 23 (Indianapolis: Liberty Fund, expanded 3d. ed. 1991) (1961); *see also id.* at 89.

legislators. This is the way of decentralized legal systems such as customary law, Roman law, and the common law.

In this article I will examine the two ways of forming law — centralized (i.e., legislation-based) and decentralized — and will argue that only the latter is compatible with libertarian principles. I will also examine the proper role for legal codification in light of this conclusion.

II. Centralized and Decentralized Legal Systems

A. *Civil Law and Common Law*

In modern times the two dominant legal systems are the common law and the civil law. Based on the body of English case law that developed gradually over the centuries, the common law spread to English colonies and commonwealths like America, Canada, and Australia. Modern civil law systems are based on Roman law, which, like the common law, developed many of its important legal principles in the accumulated decisions of jurists in thousands of cases.³ Virtually all of Europe and many other jurisdictions, including Louisiana, Puerto Rico, and Quebec, have a civil-law system.

In the common law and Roman law, there eventually evolved very sophisticated bodies of legal principles, concepts, methodology, and precedents. Because the classical common law and Roman law developed the large bulk of their legal principles through the decision and discussion of cases, they serve as rough examples of decentralized systems of “judge-found” law, as do largely private customary law systems like the Law Merchant.⁴

³See *infra* notes 33 and 74, and accompanying text.

⁴The expression “judge-found” will be used throughout this article, rather than the more popular and positivistic phrase “judge-made.” I will use the generic phrase “judges” often to refer to the relevant expert decision maker, whether judge, jurist, or private arbitrator, in situations where the relevant discussion applies to decentralized legal systems such as the common law, Roman law, and private law. Although Roman and common law were not based solely on the decisions of judges, for illustrative purposes I will focus on this characteristic as their primary way of finding law.

Unlike Roman law and the common law, however, modern civil law principles are embodied in a statute called a Civil Code, and the civil law enshrines legislation as the primary source of law.⁵ The modern civil law is thus a good example of an explicitly centralized legal system, even though much of the substantive provisions of civil codes are based on legal principles discovered in decentralized fashion in Rome many centuries ago. Roman law thus has more in common with the common law and customary law than with the Roman law's offspring, modern civil law, since the former were decentralized law-finding systems, while the latter are centralized, legislation-based law-making systems.⁶ Today's common law, while based on the classical and mostly decentralized Anglo-American common law, is also coming to be more and more dominated by legislation, and, to that extent, is gradually being centralized as well.

Thus, previously, law was thought of as a body of true principles ripe for discovery by judges, not as whatever the legislator decreed. Nowadays, however, legislation has become such a ubiquitous way of making law that "the very idea that the law might not be identical with legislation seems odd both to students of law and to laymen."⁷ And, one might add, to many libertarians. As discussed below, however, a legislative system is incompatible with

⁵Legislative supremacy is announced in the very first articles of the Louisiana Civil Code. Article 1 provides that "The sources of law are legislation and custom," but article 3 makes it clear that legislation is dominant and supreme: "Custom may not abrogate legislation." La. Civ. Code art. 1 (emphasis added); art. 3. See also SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* 17 (Louisiana Bar Foundation, 1993). Louisiana's civil law is derived in large part from Spanish and French and, ultimately, Roman sources. For discussion of the Louisiana Civil Code, its history, and related issues, see Herman, *supra*. Differences in terminology between Louisiana's civil-law system and common-law legal systems are discussed in N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265 (1994). A general comparison of civil and common law is found in W.W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE* (Cambridge, England: University Press, 2d ed., revised by F.H. Lawson, reprinted with corrections 1965).

⁶For more discussion of the gradual method of developing law in the Roman and common law and of these systems' relative similarity, see Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1592 (1992); Buckland & McNair, *supra* note 5, at xiv.

⁷Leoni, *supra* note 2, at 6.

libertarian principles and destroys true Law. This holds true for all legislation-based legal systems, even civil law systems, which typically embody fairly libertarian principles, much as the original body of common law does. Although the civil codes of civil law systems codify, in elegant form, principles developed in the relatively decentralized Roman legal system, civil codes are still merely statutes in a system in which legislation is the primary source of law. Thus even civil codes, the most elegant and liberal exemplars of centralized legislation, are subject to the general criticism of legislation presented in this article.

B. *Civil Law, Rationalism, and Libertarianism*

Before concluding this section and proceeding to general criticisms of legislated law, I want to briefly note the tendency of civilians to regard the civil law as a great “rationalist” system.⁸ Civilians consider modern civil law to be “rational” or even “rationalistic” for various reasons, including the views that civil law: is rationally and systematically codified,⁹ rather than

⁸*Rationalism* has been defined as

the doctrines of a group of philosophers of the 17th and 18th centuries, whose most important representatives are Descartes, Spinoza, and Leibniz. The characteristics of this kind of rationalism are: (a) the belief that it is possible to obtain by reason alone a knowledge of the nature of what exists; (b) the view that knowledge forms a single system, which (c) is deductive in character; and (d) the belief that everything is explicable, that is, that everything can in principle be brought under the single system.

ANTONY FLEW, *A DICTIONARY OF PHILOSOPHY* 298-99 (New York: St. Martin's Press, rev'd 2d ed., 1984). For an illuminating discussion of rationalism, see Hans-Hermann Hoppe, *In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's The Rhetoric of Economics*, 3 REV. AUSTRIAN ECON. 179 (1989).

⁹See, e.g., Herman, *supra* note 5, at 11-16; Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 996 *et seq.* (1980) (discussing in Part III “The Contribution of the Enlightenment: A Drive to Systematization”); Stein, *supra* note 6, at 1594-95; and Julio C. Cueto-Rua, *The Future of the Civil Law*, 37 LA. L. REV. 645, 646, 652 (1977). See also GIOVANNI SARTORI, *DEMOCRATIC THEORY* 231-37, 245-56 (Westport, Connecticut:

“unscientifically” developed in an uncoordinated fashion by decentralized judges; is “certain” and clear because the rules are written;¹⁰ and is proclaimed by the legislator. Civil law systems such as the Louisiana and French systems are also praised as being drafted “in the spirit of the Enlightenment,”¹¹ and as resting on an ideological commitment to democracy,¹² economic liberalism,¹³ private property,¹⁴ freedom of contract,¹⁵ individualism,¹⁶ natural law,¹⁷ and justice.¹⁸

Most libertarians would agree that such virtues are genuinely justifiable and thus ought to be supported by any legitimate legal system. Moreover, civilians are also correct that these liberal principles are consistent with rationalism, because libertarian principles can also be justified with rationalist arguments.¹⁹

Greenwood Press, 1962) (discussing the political rationalism of the continental legal system).

¹⁰See Part III.B, *infra*.

¹¹See, e.g., Herman, *supra* note 5, at 12.

¹²See, e.g., *id.* at 12. However, “democracy” is nothing more than majoritarianism—i.e., mob rule—which does not deserve unqualified praise and thus does not belong in the same class as the other virtues listed above. See *infra* notes 20 and 79 and accompanying text (discussing some deficiencies of democracy).

¹³See, e.g., *id.* at 12.

¹⁴See, e.g., *id.* at 15.

¹⁵See, e.g., Herman, *supra* note 5, at 15.

¹⁶See, e.g., Cueto-Rua, *supra* note 9, at 652.

¹⁷See, e.g., ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 68 (Cambridge, Massachusetts and London: Harvard University Press, 1981); Cueto-Rua, *supra* note 9, at 652.

¹⁸See, e.g., Cueto-Rua, *supra* note 9, at 677. I call these generally praiseworthy things, values, and conditions “virtues” for lack of a more generic description.

¹⁹See, e.g., HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS* ch. 7 (Boston: Kluwer Academic Publishers, 1989), and *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* 180-86 (Boston, Kluwer Academic Publishers, 1993); and N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, REASON PAPERS No. 17 (Fall 1992), p. 61. For a detailed review of Hoppe’s *Economics and Ethics*, see N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 ST. MARY’S L. J. 1419 (1994).

Under the libertarian conception of individual rights, the virtues typically cited in favor of the civil law are certainly necessary requirements of a just legal system. The virtues of economic liberalism, private property, freedom of contract, individualism, natural law, and justice, are really only secondary derivations of the basic individual rights to person and property. Natural law is nothing more than the objective truth that each individual has certain rights — i.e., to own himself and to homestead unowned property. Justice is nothing more than giving a person his due, but what a person’s “due” is depends upon what his rights are. Individualism has meaning and validity, because it is *individuals* that have rights. Economic liberalism, private property, and freedom of contract are only the playing out of the fact that individuals have a right to own, and thus trade, private property, and indeed have a right to do *anything* that is not coercive. Economic liberalism is only a consequence of the government’s lack of authority to hamper free trade and association between individuals.²⁰

Any system of law must be compatible with the rights that individual humans have, and, to that extent, law should be “certain” — that is, we should be certain that law will protect our rights and will not infringe them. The more general goal of “certainty” in the law is merely an aspect of the *rule of law*, which is necessary for any civilization to survive. Without certainty and the rule of law, individuals are not able to predict the results of their actions, and are thus unable to rationally plan for the future.

In Part III, below, I argue that centralized legal systems like the civil law are antithetical to the values of justice, natural law, individual rights, and certainty. Civilians generally support these values, yet they also support the idea of the primacy of legislation

²⁰Almost all of the virtues acclaimed by civilians — as understood here as necessarily compatible with and supportive of individual rights — are genuine, objectively valid virtues or standards that the civil law must be judged by. However, the concept of “democracy” is not in the same class as the other alleged virtues of the civil law. Although the term “democracy” is widely misused today to represent things such as self-determination, economic liberties, or civil liberties, it actually denotes a type of polity whereby certain rules are made by majority vote. Under democracy, nothing prevents a majority from voting for whatever sort of tyrant or tyrannical laws that they like. There is no guarantee, or even likelihood, that laws enacted by a majority or their elected representatives will tend to be just — in fact, it is unlikely, as argued below. See Part III.C.3, *infra*.

which will tend to destroy these values. But how can the civil law be the great system of reason and rationalism, how can it support economic liberalism and individualism, if the civil law is based on legislation, which undercuts these things? Although worshipers of legislation claim to be rationalists, only a naive sort of rationalism, the same naivety that is behind the desire of socialists to “scientifically” plan market activity, can underlie such claims.²¹

Civilians are correct that reason and even rationalism justify the tenets of individualism, individual rights, economic liberalism, private property, and natural law. Contrary to claims of civilians, however, it is a completely private, decentralized law-finding system that is compatible with and that fosters such virtues and principles. Therefore, as will be shown, it is non-legislative, decentralized law-finding systems that are imbued with the spirit of reason and true rationalism. Legislated systems are not compatible with either libertarianism or rationalism.

III. Law, Legislation, and Liberty

In this section I explain the various reasons why legislation is incompatible with individual rights and the related standards that any valid legal order must uphold. Each criticism of legislation applies equally to the civil law, because the civil law is a centralized (i.e., legislative) law-making system, and also applies to modern common law systems to the extent that legislation has supplanted case law as the primary source of law.

A. Anarcho-Capitalism

In the opinion of a minority of libertarians, a principled and consistent application of libertarian principles invalidates not only most of today’s (legislated) laws, but also government itself, since government is a coercive institution. Government, by its bare existence, rests on coercion and necessarily initiates violence against innocent individuals (e.g., taxation). Government cannot exist without coercion, and if coercion is illegitimate, then so is government.²²

²¹See Part IV, *infra*.

²²Regarding the possibility of a system of anarchy that is ordered, not chaotic, see BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE*

As most libertarians are aware, this view is known as “anarcho-capitalism,” since this form of anarchism follows from a respect for individual rights that are also a feature of laissez faire capitalism. It almost goes without saying that, if government may not exist, neither may legislation, because only a governmental legislature can enact statutes. There is simply no room for government and legislation in the moral universe. This does not mean, however, that there would be no law if there were no government. Certainly law can develop in a decentralized court system, whether a government-based common-law system or a private system. As Rothbard explains,

it is perfectly possible, in theory and historically, [23] to have efficient and courteous police, competent and learned judges, and a body of systematic and socially accepted law — and none of these things being furnished by a coercive government.²⁴

The remainder of this Part is devoted to additional critiques of legislation that do not depend on anarcho-capitalism, but only on the general rights and principles accepted by libertarians.

B. Certainty

1. Certainty, the Rule of Law, and Legislation

STATE (San Francisco, Ca.: Pacific Research Institute for Public Policy, 1990); DAVID FRIEDMAN, *THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM* (La Salle, Ill.: Open Court, 2d ed. 1989); MORRIS AND LINDA TANNEHILL, *THE MARKET FOR LIBERTY* (New York: Laissez Faire Books, Reprint ed. 1984); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (New York: Libertarian Review Foundation, reprint ed. 1985) esp. ch. 12; GEORGE H. SMITH, *Justice Entrepreneurship in a Free Market*, in *ATHEISM, AYN RAND, AND OTHER HERESIES* (Buffalo, N.Y.: Prometheus Books, 1991); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 REV. AUSTRIAN ECON. 88 (1990); and Terry Anderson & P.J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9 (1979).

²³See Rothbard, *supra* note 22, at 231-33, discussing the largely successful, anarchic system that lasted for roughly 1000 years in ancient Celtic Ireland. See also Benson, *supra* note 22, discussing historical examples and theoretical bases for privately-produced justice.

²⁴Rothbard, *supra* note 22, at 234.

Certainty, which includes clarity and stability in the law, is a necessary feature of any just legal order, as it is a crucial component of the rule of law itself. “The rule of law” is a phrase that is used with varying meanings: “(1) the absence of arbitrary power on the part of the government to punish citizens or to commit acts against life or property; (2) the subjection of every man, whatever his rank or condition, to the ordinary law of the realm and to the jurisdiction of the ordinary tribunals; and (3) a predominance of the legal spirit in English institutions”²⁵ The rule of law is necessary because a government with arbitrary power to inflict violence on its subjects is a standing threat to individual liberty. And if laws are not equally applicable to all men and women, some individual rights will not be respected, because all men and women have certain inalienable, natural rights by their very nature as humans. Clearly, then, the rule of law must be maintained by any just legal system. But the rule of law “cannot be maintained without actually securing the certainty of the law, conceived of as the possibility of long-run planning on the part of individuals in regard to their behavior in private life and business.”²⁶ Thus, a direct implication of rationalism is that the law should be certain.

Even those favoring legislation recognize the importance of certainty; indeed, certainty is one of the purported hallmarks of the civil law. In the words of Professor Vernon Palmer,

What enduring objectives underlie the relentless drive toward codification in the twentieth century? In my view, this may be explained in three words — certainty, justice, and modernity. ... An unchanging purpose of codification and recodification is to overcome an existing fragmentation of law and legal sources in order to create the conditions necessary for *legal certainty*.²⁷

²⁵Leoni, *supra* note 2, at 61.

²⁶*Id.* at 95.

²⁷Vernon Palmer, *Celebrating the Québec Codification Achievement: A Louisiana Perspective*, 38 LOY. L. REV. 311, 315 (1992) (emphasis added). See also Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 1001-02 (1980); Herman, *supra* note 5, at 11; Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century*, 8 TUL. CIV. L. FORUM 63, 65 (1993) (“Civilians presuppose as a fundamental tenet that the fountainhead of stability is their legislation.”); and Leoni, *supra* note 2, at 73, 142-43 (a desire for

Yet, as Leoni points out, there is much more certainty in a decentralized legal system, than in a centralized legislative system. When the legislature has the ability to change the law from day to day, we can never be sure what rules will apply tomorrow. In one of Leoni's most brilliant insights, he points out that, in a system of legislative supremacy,

nobody can tell whether a rule may be only one year or one month or one day old when it will be abrogated by a new rule. All these rules are precisely worded in written formulae that readers or interpreters cannot change at their will. Nevertheless, all of them may go as soon and as abruptly as they came. The result is that, if we leave out of the picture the ambiguities of the text, we are always "certain" as far as the literal content of each rule is concerned at any given moment, but we are *never certain* that tomorrow we shall still have the rules we have today.²⁸

Thus, a

legal system centered on legislation, while involving the possibility that other people (the legislators) may interfere with our actions every day, also involves the possibility that they may change their way of interfering every day. As a result, people are prevented not only from freely deciding what to do, but from foreseeing the legal effects of their daily behavior.²⁹

We may have, then, either rule by legislators, or the rule of law, but not both.³⁰ In the words of the Italian scholar Giovanni Sartori, "Mass fabrication of laws ends by jeopardizing the other fundamental requisite of law — certainty."³¹

certainty in the law, in the sense of verbal precision, was one of the chief reasons for the continental codification efforts).

²⁸Leoni, *supra* note 2, at 75.

²⁹*Id.* at 10.

³⁰GIOVANNI SARTORI, *LIBERTY AND LAW* 15 (Menlo Park, Ca.: Institute for Humane Studies, 1976). The "other" fundamental requisite of law is that law be based on rules of general application, a requisite that special statutes tend to undermine. *Id.* I am grateful to Leonard Liggio for calling Sartori's works to my attention.

³¹*Id.* at 38. See also Ridgway K. Foley, Jr., *Invasive Government and the Destruction of Certainty*, *THE FREEMAN* (Jan. 1988) p. 11; Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 *HARV. J. LAW & PUBL. POL'Y* 661, 672-73, 681-82 (1988); Leonard P. Liggio & Tom G. Palmer, *Freedom and the Law: A*

2. *Decentralized Law-Finding Systems*

a. *Limits of Courts' Decisions: Jurisdiction, Scope of Decision, and Precedent*

By contrast, judicial decisions — whether by private arbitrators in an anarcho-capitalist society or by judges in a government-established common-law system — are much less able to reduce legal certainty than is legislation. This is because, as Leoni explains, the position of common-law or decentralized judges “is fundamentally different from that of legislators, at least in three very important respects.”³² First, judges can only make decisions when asked to do so by the parties concerned. Second, the judge’s decision is less far-reaching than legislation because it primarily affects the parties to the dispute, and only occasionally affects third parties or others with no connection to the parties involved.³³

Regarding this second point, however, let me point out that this is true only for the plaintiff, however, in systems where a verdict may be enforced against a defendant regardless of his consent to the

Comment on Professor Aranson’s Article, 11 HARV. J. LAW & PUBL. POL’Y 713 (1988).

³²Leoni, *supra* note 2, at 22. See also Aranson, *supra* note 31, at 669-671 and Rothbard, *For A New Liberty*, *supra* note 22, at 229 (discussing Leoni’s views with respect to these issues).

³³As Professor Benson summarizes, without legislative interference by non-judges, the

common law would grow gradually. It would grow and develop in the same way that all customary law grows and develops, particularly as a consequence of the mutual consent of parties entering into reciprocal arrangements. For example, two parties may enter into a contract, but something then occurs that the contract did not clearly account for. The parties *agree* to call upon an arbitrator or mediator to help lead them to a solution. The solution affects only those parties in the dispute, but if it turns out to be effective and the same potential conflict arises again, it may be *voluntarily* adopted by others. In this way, the solution becomes part of customary law.

Benson, *supra* note 22, at 283 (endnote omitted).

court's jurisdiction — i.e., where courts have compulsory jurisdiction over certain individuals. But even this power is of a drastically lesser scope than the ability of legislators to enact statutes at any time, without being requested by anyone, and that affect everyone, not just plaintiffs and defendants. Further, in a totally private court system, courts do not necessarily have to have the ability to assert jurisdiction over unwilling defendants.³⁴ And even in a government court system such as the common law, it is not absolutely necessary that the courts have compulsory jurisdiction over unwilling participants. By contrast, legislation of necessity arrogates to itself jurisdiction over all the government's subjects.

Third, a judge's discretion is further limited by the necessity of referring to similar precedents.³⁵ This does not necessarily mean that a judge is automatically bound by a prior judicial decision on similar facts, but that at least such precedents are influential. When law is viewed as being *found* rather than *made*, it makes sense that one court would refer to principles already discovered and developed over the centuries by other judges. Because individuals crave certainty and predictability they will tend to prefer decisions of courts that respect the wisdom of established custom and precedent, where possible. Thus, even a government court will feel a necessity to refer to similar precedents, so that its judgments and reasoning will be respected. A private court will have even more incentive to respect relevant precedents so as to gain and retain customers.

But a court's essential job is to issue a just decision rather than automatically following precedents through blind obedience. Indeed, under the Roman law, and under the common law as it existed at the time of Blackstone, an individual decision was not absolutely binding on future courts.³⁶ Even the great common-law advocate "Blackstone was not a slavish adherent of the principle of *stare decisis* (decision according to precedent) — a prior decision

³⁴See Benson, *supra* note 22, at 33 *et passim*; Tannehills, *supra* note 22, at 66 *et seq*; Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law* 3 CONST. POLITICAL ECON. 1, 9 (1992).

³⁵See Benson, *supra* note 22, at 17 and 364.

³⁶Gordon Tullock, *Courts as Legislators*, in LIBERTY AND THE RULE OF LAW (College Station, Texas: Texas A&M University Press, Robert L. Cunningham ed. 1979), Ch. 5, p. 132 at 142.

could be overruled if ‘contrary to reason’ ”³⁷ But Blackstone did favor *stare decisis* as a means of subordinating judges to law, and for stability in the law:

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments ... ³⁸

In this sense the civilian concept of *jurisprudence constante* is more likely to be adhered to by courts than *stare decisis*. (*Stare decisis* contemplates adherence by a court to a principle of law announced and applied in a single occasion in the past. Under the doctrine of *jurisprudence constante*, the rule of law upon which repeated decisions in a long line of cases is based is entitled to great weight in subsequent decisions.³⁹) In any event, it is very likely that judges will always attempt to distinguish or at least criticize similar precedents even if they choose not to follow them.⁴⁰ As mentioned above, this will tend to limit the judge’s discretion to “make” law.

*b. Government Courts: Extra-Market Powers
and Disguised Legislation*

Thus, decentralized law-finding systems offer more certainty than centralized law-making systems. As the discussion above shows, however, in a government-backed *common-law* type of decentralized system (as opposed to a wholly private court system), the common law itself can develop legislative characteristics that tend to undermine uncertainty just as legislation does. This is because common-law courts are government courts, and thus have

³⁷Richard A. Posner, *Blackstone and Bentham*, 19 J. LAW & ECON. 569, 584 (1976) (citing 1 William Blackstone, Commentaries on the Laws of England §83, at *70).

³⁸1 Blackstone, *supra* note 146 §83, at *69, also quoted in Posner, *supra* note 37, at 582.

³⁹See *Johnson v. St. Paul Mercury Ins. Co.*, 236 So.2d 216, 218 (La. 1970).

⁴⁰See Rothbard, *For a New Liberty*, *supra* note 22, at 228.

extra-market powers, such as the power to subpoena, the power of compulsory jurisdiction over defendants, and the power of judicial review.

Supreme courts, for example, may engage in what is really disguised legislation. The United States Supreme Court does this all the time.⁴¹ However, this is not a problem of decentralized law itself, but of involving government in the court system. Under anarcho-capitalism, with a system of totally private courts and judges, these problems would be minimized as much as is possible in the real world. And, as Leoni points out,

even supreme courts are not at all in the same practical position as legislators. After all, not only the inferior courts, but also the supreme courts, may issue decisions only if asked to do so by the parties concerned; and although supreme courts are in this respect in a different position from inferior courts, they are still bound to “interpret” the law instead of promulgating it. ... [Further,] under a system of “binding” precedent, supreme courts too may be bound ... by their own precedents . . . [T]his makes for a considerable difference between judges of supreme courts and legislators as far as the unwelcome imposition of their respective wills on a possibly great number of other dissenting people is concerned.⁴²

Thus, even under a government-based decentralized legal system such as the common law, judges’ ability to “legislate” is radically different from that of legislators. The possibility of judges acting like legislators is not necessarily implied in the nature of decentralized law-finding systems, but “is rather a deviation from it and a somewhat contradictory introduction of the legislative process under the deceptive label of lawyers’ or judiciary law at its highest stage.”⁴³

* * *

⁴¹See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (New York: The Free Press, 1990); HENRY MARK HOLZER, *SWEET LAND OF LIBERTY: THE SUPREME COURT AND INDIVIDUAL RIGHTS* (Costa Mesa, Calif.: Common Sense Press, 1983); BERNARD H. SIEGEN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (Chicago: University of Chicago Press, 1980); and James A. Dorn & Henry G. Manne, eds., *ECONOMIC LIBERTIES AND THE JUDICIARY* (Fairfax, Va.: George Mason University Press, 1987).

⁴²Leoni, *supra* note 2, at 181.

⁴³*Id.* at 24.

Although law developed in a decentralized legal order is an “unplanned,” spontaneous order, it results in certainty, while a centralized legal system tends to destroy certainty. In a decentralized legal system,

[I]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, ... is more stable than that created by statute [S]tatute law is in fact much more capricious [than common law] precisely because, in the modern world especially, statutes change frequently according to the whims of legislatures *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.*⁴⁴

3. Civil Codes

a. The “Special” Status of a Civil Code

Can legislation be made more stable so that it does not engender uncertainty? Written constitutions such as the United States Constitution are, after all, difficult to explicitly amend,⁴⁵ although the Supreme Court has amended the Constitution *de facto* hundreds of times.⁴⁶ The more stable a written statute is, however, the less it resembles legislation, and vice-versa. Civilians contend that the civil law’s core is the civil code, which is not meant to change on a daily basis. Rather, a code is more like a constitution, which changes only rarely, in response to greater urgency. The code is not a normal sort of legislation, it is more stable than legislation, and therefore is not subject to the criticism that it engenders uncertainty in the same way as does a mere legislative system.

[C]odification has for its object the creation of a permanent framework and direction of the evolution of the law. It has a prospective life, and it is not limited to a short-lived or cyclical

⁴⁴Barry, *The Tradition of Spontaneous Order*, 5 LIT. OF LIBERTY 7, 44 (1982) (emphasis added), quoted in Aranson, *supra* note 31, at 723, n.40.

⁴⁵In over 200 years, the U.S. Constitution has been amended only 27 times.

⁴⁶See *supra* note 41 and references cited therein.

legislation. ... [C]odification is to be contrasted with simple legislation tailored to the circumstances.⁴⁷

A civil code is more like a constitution than mere legislation:

It is a commonplace that a civil code enjoys a more exalted status than an ordinary statute. The higher dignity accorded to a code is traditional in the civil law world. This respect is due originally to the special qualities of the legislation — its relative permanence, imposing structure, and inner coherence. Statutes may be ad hoc, scattered, and temporary, but the civil code in our tradition has attained something close to the stature enjoyed by a constitution or a Magna Carta in the common-law world.⁴⁸

However, such flattery cannot change the fact that the civil code itself provides that legislation is the primary source of law. It does not provide that *codal* legislation, which conforms to certain code-like requirements (e.g., generality, natural law, and the like), is the only source of law. It does not abolish mere statutes and does not take precedence over any subsequently-enacted conflicting statutes, as the U.S. Constitution does; and neither does it provide for a supermajority requirement for its amendment. From a legislator's point of view, the civil code and more mundane legislation are on the exact same horizontal level.

Thus the code itself is subject to continual revision and, indeed, is continually revised. It may not in practice be revised as drastically or as often as the other statutes, but the legislature retains the ability to change the code from day to day. For, “a code is a special kind of statute, but a statute nevertheless.”⁴⁹

b. Diluting Effect of Special Statutes

What is worse, even if the civil code itself were to be immutably etched in stone — and civil codes are, admittedly, amended much less frequently in some regimes than are “normal” statutes — it would tend to be swamped by subsequent special statutes. Civilians

⁴⁷Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1079 (1988).

⁴⁸Vernon Palmer, *The Death of a Code — The Birth of a Digest*, 63 TUL. L. REV. 221, 235 (1988).

⁴⁹Julio C. Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147, 158 (1989).

do not disagree with this point. Once a code has been produced and the laws codified, as Professor Palmer recognizes,

[f]ragmentation continues inexorably. Special legislation lying outside of the code piles up on all sides, as caselaw and jurisprudence create a thicker and thicker gloss upon the code texts. ... [T]his inflation of redundant and overlapping laws ... is the true enemy of a scientific codification and *the true nemesis of legal certainty*.⁵⁰

The inexorable production of specialized legislation thus dilutes any stabilizing effect of a civil code, and makes the code less relevant. Given the unwieldy hodge-podge of arcane, special-interest statutes that we are faced with today, is it any wonder that uncertainty — both in what the law is today, and in what it might be tomorrow — is engendered? Yet we would not have reached such a chaotic state if not for the legislature's ability to enact its will into law.

4. *Negative Effects of Uncertainty*

a. *Sanctity of Contract*

As discussed above,⁵¹ without certainty of the law individuals are less able to make long-range plans. The uncertainty resulting from legislative supremacy also has the negative side effect of weakening the sanctity of contract. Legislation

destroy[s] established rules and [nullifies] existing conventions and agreements that have hitherto been voluntarily accepted and kept. Even more disruptive is the fact that the very possibility of nullifying agreements and conventions through supervening legislation tends in the long run to induce people to fail to rely on any existing conventions or to keep any accepted agreements.⁵²

When legislation becomes supreme and statutes are fruitful and multiply, our very conception of what the law is changes. Unlike in

⁵⁰Palmer, *supra* note 27, at 316 (emphasis added). *See also id.* at 317 (discussing the phenomenal growth of special laws in Louisiana since 1825); Leoni, *supra* note 2, at 6 (discussing the submersion of continental civil codes in thousands of specialized statutes).

⁵¹*See supra* note 26 and accompanying text.

⁵²Leoni, *supra* note 2, at 18.

the past, “we are used to having our rights modified by the sovereign decisions of legislators. A landlord no longer feels surprised at being compelled to keep a tenant; an employer is no less used to having to raise the wages of his employees in virtue of the decrees of Power. Nowadays it is understood that our subjective rights are precarious and at the good pleasure of authority.”⁵³

When contractual reliance becomes more risky, “contractual exchanges requiring temporally separated future performance become less attractive, leading the parties to develop costly alternatives, such as contractual hostages (if that is possible at all under the statute), otherwise unwarranted vertical integration of production processes, or the foregoing of such exchanges entirely.”⁵⁴ Such alternatives impoverish us all by imposing unnecessary costs on production and exchange.

b. Time Preference and the Structure of Production

Another extremely pernicious but subtle effect of the increased uncertainty of legislative systems is the increase of man’s time preference. Individuals invariably demonstrate a preference for earlier goods over later goods, all things being equal. This is the phenomenon of time preference.⁵⁵ Time preference explains the advent of interest payments, payments made to someone who loans money. When a loan of money is made, the lender gives up (more-valued) present dollars and receives (less-valued) future dollars, and thus the loan will go forward only if the lender is compensated with interest.

Men prosper materially when time preferences are lower, since when this is the case, they are more willing to forego immediate benefits such as consumption and invest their time and capital in

⁵³BERTRAND DE JOUVENEL, *SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD* 189 (Chicago: University of Chicago Press, 1957). *See also* Leoni, *supra* note 2, at 145-46.

⁵⁴Aranson, *supra* note 31, at 681-82 (footnote omitted).

⁵⁵Hans-Hermann Hoppe, *Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy*, 5 *J. DES ECONOMISTES ET DES ETUDES HUMAINES* 319, 319-21 (1994). *See also* LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* chapters XVIII, XIX (Chicago: Contemporary Books, Inc., 3d rev’d ed., 1966); MURRAY N. ROTHBARD, *MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* (Los Angeles: Nash Publishing, 1962) (2 vols.).

more indirect (i.e., more roundabout, lengthier) production processes, which yield more and/or better goods for consumption or for further production.⁵⁶ We forego picking bananas to eat them now (consumption) and devote some of our present time to the building of fishing nets (capital), to catch more fish in the future which can feed more people for the same amount of work as it took to search for bananas.

Any artificial raising of the general time preference rate tends to impoverish society by pushing us away from production, long-term investments and roundabout production processes, and towards consumption and more short-term investments which produce fewer and/or worse quality goods. In other words, instead of foregoing picking bananas to eat them now and instead of spending time building fishing nets to produce goods in the future, we tend to eat more bananas now and live only for the moment, and reduce our investment in the future. Clearly, when the general time preference rate is artificially raised, the populace becomes materially poorer and worse off.

Yet increased uncertainty causes an increase in time preference rates. With the very possibility of legislation, the future is made more unpredictable than it would be without the possibility of legislation. Future goods are always less desirable to individuals than present goods. But if the future becomes more unpredictable, future actions and goods become less certain to occur, and thus future goods become relatively even *less* desirable, and present goods therefore become relatively more desirable. As explained by Hoppe,

[T]he mere fact of legislation — of democratic law-making — increases the degree of uncertainty. Rather than being immutable and hence predictable, law becomes increasingly flexible and unpredictable. What is right and wrong today may not be so tomorrow. The future is thus rendered more haphazard. Consequently, all around time preferences degrees will rise, consumption and short-term orientation will be stimulated, and at the same time the respect for all laws will be systematically undermined and crime promoted (for if there is no immutable standard of ‘right’, then there is also no firm definition of ‘crime’).⁵⁷

⁵⁶Hoppe, *supra* note 55, at 320-21.

⁵⁷*Id.* at 340.

Leoni anticipated a similar effect of legislation. Leoni called the illusory certainty generated by written legislation the short-run certainty of the law, as opposed to genuine, long-run legal certainty. The desire for short-run certainty over long-run certainty corresponds to an immature desire for immediate gratification. Leoni writes:

I am reminded of a conversation I had with an old man who grew plants in my country. I asked him to sell me a big tree for my private garden. He replied, “Everybody now wants big trees. People want them immediately; they do not bother about the fact that trees grow slowly and that it takes a great deal of time and trouble to grow them. Everybody today is always in a hurry,” he sadly concluded, “and I do not know why.”⁵⁸

The answer is, in part, because an increased climate of uncertainty increases the general time preference rate.

c. Time Preference and Crime

There is also a fascinating relationship, as Hoppe above alludes to, between higher time preference and increased crime. This is because earning a market income requires more patience than does the immediate gratification that criminals seek: “one must first work for a while before one gets paid. In contrast, specific criminal activities such as murder, assault, rape, robbery, theft, and burglary require no such discipline: the reward for the aggressor is tangible and immediate whereas the sacrifice — possible punishment — lies in the future and is uncertain.”⁵⁹ As a person becomes more present-oriented, immediate (criminal) gratifications become relatively more attractive, and future, uncertain punishment becomes less of a disincentive. Thus many people on the margin — those who are just deterred from committing crimes by the threat of possible future punishment under normal time-preference conditions

⁵⁸Leoni, *supra* note 2, at 80.

⁵⁹Hoppe, *supra* note 55, at 340 n.31. On the relationship between time preference and crime Hoppe cites J.Q. WILSON & R.J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 49-56, 416-22 (1985); E.C. BANFIELD, *THE UNHEAVENLY CITY REVISITED* (Boston: Little, Brown, 1974); and *idem*, *Present-Orientedness and Crime*, in RANDY E. BARNETT & J. HAGEL, EDS., *ASSESSING THE CRIMINAL, RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* (Cambridge: Ballinger, 1977).

in a free society — will not be deterred from committing crimes in a society with legislation and its concomitant increase in time preference. In other words, there are individuals today who are committing violent crimes solely because of the increased uncertainty in society caused by the existence of legislation.⁶⁰ Further, when the increased uncertainty tends to impoverish us by shortening the structure of production, more people are poor and impoverished, which also tends to increase the amount of crime in society.

When law is based on legislation, uncertainty is increased, not decreased, even in the supposedly “certain” civil law systems. This hampers the ability of individuals to engage in private calculation, i.e. in planning for the future and in knowing the legal consequences of their future actions. It makes contractual reliance more risky and thus imposes further costs on otherwise-beneficial economic transactions. And the unavoidable uncertainty caused by legislation also raises our time preference rate, which “necessarily exerts a push away from more highly capitalized, and hence more productive production processes, and into the direction of a hand-to-mouth existence,”⁶¹ and thus tends to impoverish us all.

C. Central Planning and Economic Calculation

Besides the fact that the possibility of legislation breeds uncertainty and is thus harmful for this reason alone, legislators face a problem that central economic planners also face. It is an information problem, and this unavoidable problem makes it unlikely that any body of legislation will develop substantively legitimate law — i.e., a body of law consistent with principles such as justice, individualism, and economic liberalism. For the same reason that central economic planning is impossible, centrally-

⁶⁰Regarding “the increase in criminal activity brought about by the operation of democratic republicanism in the course of the last hundred years as a consequence of steadily increased legislation and an ever expanding range of ‘social,’ as opposed to private, responsibilities,” *id.* n.31, Hoppe cites R.D. MCGRATH, GUNFIGHTERS, HIGHWAYMEN, AND VIGILANTES: VIOLENCE ON THE FRONTIER (Berkeley: University of California Press, 1984), esp. chapter 13, and *idem*, *Treat Them To a Good Dose of Lead*, CHRONICLES, January 1994, pp. 17-18.

⁶¹Hans-Hermann Hoppe, “The Economics and Sociology of Taxation,” in Hoppe, *Economics and Ethics*, *supra* note 19, at 34.

planned laws cannot hope to be truly based on the true interests or needs or situation of the populace. I first discuss the reason why central planning — i.e., socialism — is impossible, before analogizing socialism to legislation.

1. *Central Planning and the Impossibility of Socialism*

With the collapse of socialism, mainstream opinion is finally starting to realize that socialism, in addition to being incredibly immoral and wasteful of human life, simply does not work. But this comes as no revelation and no surprise to the Austrian school of economics following in the footsteps of Ludwig von Mises. As far back as 1920, Mises explained why socialism is *impossible*. Although Mises's amazingly prescient ideas were arrogantly and unfortunately ignored for decades by establishment thinkers, Mises has finally been vindicated by the universally (if belatedly) acknowledged failure of socialism,⁶² and I will not re-argue the obvious here, especially in a libertarian journal.

However, Mises's explanation of why socialist central planning is doomed to failure has, as pointed out by Leoni, important ramifications for *legislation* as well. Thus, in this subsection I briefly discuss the so-called "economic calculation debate" before exploring its implications for legislation.

In 1920 Mises published his devastating critique of socialism, "Economic Calculation in the Socialist Commonwealth."⁶³ Mises showed that, besides the incentive problem of socialism (e.g., "Who will take out the garbage?")⁶⁴ the central planner cannot know what products or how much of them to order to be produced, without the

⁶²See Gertrude E. Schroeder, *The Dismal Fate of Soviet-Type Economies: Mises Was Right*, CATO J. v.11 n.1 (Spring/Summer 1991) p. 13; Mark Skousen, "Just because socialism has lost does not mean that capitalism has won": Interview of Robert L. Heilbroner, FORBES, May 27, 1991, p. 130.

⁶³LUDWIG VON MISES, ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH (Auburn, Alabama: Ludwig von Mises Institute, 1990) (1920); LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS 95-130 (Indianapolis: Liberty Fund 3d rev'd ed., trans. J. Kahane, 1981); Mises, *Human Action*, *supra* note 55, at 200-31, 695-715; Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 REV. AUSTRIAN ECON. 51 (1991) [hereinafter, Rothbard, *The End of Socialism*].

⁶⁴Rothbard, *The End of Socialism*, *supra* note 65, at 51.

information provided by prices on a free market. In a free market, in which there is by definition private ownership of property, the free exchange of goods by individual human actors in accordance with their subjective utilities establishes relative prices, in terms of money (which historically was gold and other precious metals). These money prices are the indispensable tool of calculation for rational coordination of scarce resources, since “monetary economic calculation is the intellectual basis of the market economy.”⁶⁵ Without market prices, how can a central planning board know what or how many products to produce, with which techniques and raw materials, and in which location? These and a practically infinite number of questions are simply unanswerable without the information provided by monetary prices. As Rothbard concisely explains:

Mises demonstrated that, in any economy more complex than the Crusoe or primitive family level, the socialist planning board would simply not know what to do, or how to answer any of these vital questions. Developing the momentous concept of *calculation*, Mises pointed out that the planning board could not answer these questions because socialism would lack the indispensable tool that private entrepreneurs use to appraise and calculate: the existence of a market in the means of production, a market that brings about money prices based on genuine profit-seeking exchanges by private owners of these means of production. Since the very essence of socialism is collective ownership of the means of production, the planning board would not be able to plan, or to make any sort of rational economic decisions. Its decisions would necessarily be completely arbitrary and chaotic, and therefore the existence of a socialist planned economy is literally “impossible” (to use a term long ridiculed by Mises’s critics).⁶⁶

Defenders of socialism often countered with the bare fact of the Soviet Union’s existence and “success” as disproof of the contention that socialism is impossible. However, as Rothbard points out, Soviet GNP and other production figures relied upon as evidence of the USSR’s success were wholly inaccurate and deceitful — as the final collapse of socialism has made manifest.

⁶⁵Mises, *Human Action*, *supra* note 55, at 259.

⁶⁶Rothbard, *The End of Socialism*, *supra* note 65, at 52-53.

Further, the Soviet Union and other socialist countries have never enjoyed complete socialism, for despite their best efforts to stamp out individual initiative, free trade, and private property, the existence of black (i.e., free) markets and bribery is widespread, which prevent socialism from completely controlling and thus strangling the economy.

Also, these socialist economies existed in a world containing many (relatively) capitalist markets, such as that in the United States. Thus, the socialist planners were able to parasitically copy the prices of the West as a crude guideline for pricing and allocating their own capital resources.⁶⁷ To the extent true socialism was able to be imposed on the populace, economic calculation thereunder was impossible and the people suffered accordingly.

In the words of Mises, “Where there is no market there is no price system, and where there is no price system there can be no economic calculation.”⁶⁸ “The paradox of ‘planning’ is that it cannot plan, because of the absence of economic calculation. What is called a planned economy is no economy at all.”⁶⁹

2. *Legislation as Central Planning*

One of Bruno Leoni’s greatest achievements was to teach us that Mises’s criticism applies not only to a central planning board of a socialist economy, but also to a legislature attempting to “centrally plan” the laws of a society. Leoni notes that several economists in the early ’20s, but especially Mises, demonstrated “that a centralized economy run by a committee of directors suppressing market prices and proceeding without them does not work because the directors cannot know, without the continuous revelation of the market, what the demand or the supply would be ...”⁷⁰ Leoni recognized that

this demonstration may be deemed the most important and lasting contribution made by the economists to the cause of individual freedom in our time. *However, its conclusions may be considered only as a special case of a more general*

⁶⁷*Id.* at 73-74. See also Mises, *Human Action*, *supra* note 55, at 702 (discussing the use of western price systems by socialist governments).

⁶⁸Mises, *Socialism*, *supra* note 63, at 113 (p. 131 of the 1936 J. Kahane translation).

⁶⁹Mises, *Human Action*, *supra* note 55, at 700.

⁷⁰Leoni, *supra* note 2, at 19.

*realization that no legislator would be able to establish by himself, without some kind of continuous collaboration on the part of all the people concerned, the rules governing the actual behavior of everybody in the endless relationships that each has with everybody else. No public opinion polls, no referenda, no consultations would really put the legislators in a position to determine these rules, any more than a similar procedure could put the directors of a planned economy in a position to discover the total demand and supply of all commodities and services.*⁷¹

What does this mean? Leoni is pointing out that legislators, even if they wanted to enact rules that truly take into account the actual situation, customs, expectations, and practices of individuals, simply can never collect enough information about the near-infinite variety of human interactions. The legislator, like a communist central planner, can only grope in the dark. And unlike a blind man who literally has to grope in the dark but at least knows when he has finally run into a wall or found the door, the legislator (or central planner) have no reliable guide for knowing whether they have constructed the “right” law (or economic allocation) or not. Further, not only can legislators not know the actual situation of the individuals they intend to cast their legislative net over, but they cannot predict the often far-reaching effects of legislation. Legislation routinely has unintended consequences, a fact that cannot be gotten around since it is necessitated by the systematic ignorance that legislators face.⁷²

The ultimate reason that the legislator and central planner are both ultimately doomed to failure is that “*there is more than an analogy between the market economy and a judiciary or lawyers’ law, just as there is much more than an analogy between a planned economy and legislation.*”⁷³ There is “more” than an analogy because legislation and central planning are really the same thing:

⁷¹*Id.* at 19-20 (emphasis in original). *See also id.* at 89; Aranson, *supra* note 31, at 676.

⁷²On the unintended consequences that flow from various governmental programs and laws, see WILLIAM C. MITCHELL AND RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* (Boulder: Westview Press, 1994).

⁷³Leoni, *supra* note 2, at 23 (emphasis in original).

coercively-backed commands emanating from the government that order individuals to act in certain ways that the government prefers.

In a common-law process, law develops spontaneously, much as prices arise spontaneously on a free market. Mises showed that only when individuals remain free to trade and own private property can genuine prices be discovered. Similarly, true law is discovered in a process that “can be described as sort of a vast, continuous, and chiefly spontaneous collaboration between the judges and the judged in order to discover what the people’s will is in a series of definite instances — a collaboration that in many respects may be compared to that existing among all the participants in a free market.”⁷⁴ True Law cannot be designed or imposed top-down on society. The form of a legal system, like a price structure or like a language, must evolve naturally, from the bottom up. This is why the artificial language Esperanto failed to take hold.⁷⁵ The naive belief that Law can be discovered by means of government employees’ dictates is reminiscent of the joke about the new English public school, in which the headmaster announced to the students one day, “from now on, it will be a tradition at the School to wear hats on Fridays.” Legislation is artificial law, and is no substitute for evolved law.

A crucial reason for the systematic ignorance of central planners and legislators alike is “the decentralized, fragmentary character of knowledge.”⁷⁶ This makes central planners and central law-makers systematically unable to ever have enough knowledge to make informed decisions that affect entire economic or legal systems. Moreover, not only is a central planner “unable” to gather information only present in a dynamic price structure, but the attempt to plan actually *destroys* the price structure because the private property system at the base of a price structure is outlawed. Similarly, not only does a legislator face a severe ignorance problem — he could never hope to have a comprehensive and continually updated view of all the interactions, rules, relationships, and customs that exist among the people — he also subverts the very spontaneous legal order that would form in the absence of legislative interference. Customs change, for example, because of the

⁷⁴*Id.* at 22. See also *id.* at 104; Aranson, *supra* note 31, at 668-69; and note 33, *supra*, and accompanying text.

⁷⁵See Leoni, *supra* note 2, at 218 (discussing similarities between evolved systems like language and law).

⁷⁶Aranson, *supra* note 31, at 675.

uncertainty introduced, because people become more suspicious and rely less on contracts, and because their time preference increases, as discussed above.⁷⁷ As Professor Aranson puts it, “Legislation saps the social order of spontaneity.”⁷⁸

Just as a decentralized, free market economy is essential to the coordination of resources and the production of wealth, so a decentralized law-finding system is a prerequisite to allowing true Law to develop. This does not guarantee that the law will be just — there are no guarantees — but at least it is possible in a decentralized law-finding system, while in a legislated system it is not.

3. *Special Interests and the Unrepresentative Character of Legislation*

A problem of a legislative system that is related to the central planning problem is its unrepresentative character. Although

⁷⁷See *supra* notes 55-61 and accompanying text.

⁷⁸Aranson, *supra* note 31, at 675. See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 404 (New York: Simon & Schuster, Inc., 2d ed. 1985) (discussing James Carter’s view that legislated “[c]odes impaired the orderly development of the law; they froze the law into semipermanent form; this prevented natural evolution. ... A statute drafted by a group of so-called experts was bound to be an inferior product, compared to what centuries of evolution, of self-correcting growth, could achieve. ... [T]he social and economic legislation of the late 19th century ... were doomed to failure; they were hasty intrusions, and they contradicted the deeper genius of the law.”); and Benson, *supra* note 22, at 282 (“public production of law undermines the private property arrangements that support a free market system”). An interesting discussion of, *inter alia*, the debate on whether to legislatively codify the common law is found in Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, 1994 WIS. L. REV. 1119 (1994).

For further discussion of Leoni’s ideas in this regard and related issues, see Gottfried Dietze, *The Necessity of State Law*, in *Liberty and the Rule of Law*, *supra* note 36 (ch. 3, p. 74); Tullock, *supra* note 36; Sartori, *Liberty and Law*, *supra* note 30, and chapter 13 of *Democratic Theory*, *supra* note 9; Leonard P. Liggio, *Law and Legislation in Hayek’s Legal Philosophy*, 23 SOUTHWESTERN U. L. REV. 507 (1994); Murray N. Rothbard, *On Freedom and the Law*, NEW INDIVIDUALIST REVIEW (Winter 1962, vol. 1, no. 4) 37, reprinted in NEW INDIVIDUALIST REVIEW at 163 (1982) (reviewing Leoni, *Freedom and the Law*, *supra* note 2).

democracy is not without problems,⁷⁹ a representative democracy is better than one that is not. Because of the information problem faced by centralized law-makers, they cannot know the people's wishes with any accuracy or detail. "[A] legal system centered on legislation resembles . . . a centralized economy in which all the relevant decisions are made by a handful of directors, whose knowledge of the whole situation is fatally limited and whose respect, if any, for the people's wishes is subject to that limitation."⁸⁰

Professor Sartori puts the point forcefully:

[W]e make the inference that when a person who allegedly represents some tens of thousands contributes ... to the lawmaking process, then he is making the thousands of people whom he is representing free, because the represented thereby obey norms that they have freely chosen ... How absurd! ... In empirical terms, from the premise that I know how to swim it may follow that I can cross a river, but not that I can cross the ocean.⁸¹

Similarly, even if citizen involvement and participation in a small community can produce liberty, "we cannot draw the conclusion that the same amount of participation will produce the same result in a large community; for in the latter an equally intense participation will entail diminishing consequences."⁸² Leoni argues that "the more numerous the people are whom one tries to 'represent' through the legislative process and the more numerous the matters in which one tries to represent them, the less the word 'representation' has a meaning referable to the actual will of actual people other than that of the persons named as their 'representatives.'"⁸³

Legislators cannot discover the will of their constituents, and, as explained above,⁸⁴ cannot know very much at all about the actual interactions and circumstances of those who they seek to regulate.

⁷⁹For a discussion of some problematic tendencies of democracies, see Hoppe, *supra* note 55; and *idem*, *Free Immigration or Forced Integration?* CHRONICLES, July 1995, p. 25.

⁸⁰Leoni, *supra* note 2, at 22 (emphasis in original). See also *id.* at 89; Aranson, *supra* note 31, at 675.

⁸¹Sartori, *Liberty and Law*, *supra* note 30, at 31-32.

⁸²*Id.* at 32.

⁸³Leoni, *supra* note 2, at 19. See also Aranson, *supra* note 31, at 676-77.

⁸⁴See Part III.C.2, *supra*.

At best, then, a legislator will produce rather neutral, if bumbling, intrusive, and ineffectual, laws. But we all know about lobbyists and special interest groups, and their existence ensures that legislators will not be merely ignorant idiots. Instead, they will actively seek to enact invidious statutes that benefit a select few at the expense of others and, in the long run, at the expense of all of society.

In the political process, statutes are enacted that reflect the will of a contingent majority of legislators. This provides an opportunity for various groups to demand special treatment, such as protectionism or blatant wealth transfers. Those with a vested interest in a given piece of legislation are willing to invest much time, effort, and money (e.g. for bribes) to persuade legislators to enact the legislation. Each individual in the large group outside the special interest group feels the pain of the legislation much less than the special interest group will benefit, so that there is relatively little incentive for many people to oppose the special group's lobbying efforts, or even to educate themselves as to which lobbying efforts are taking place. Escalating efforts at forming special interest groups to lobby for specialized statutes results in "nothing less than a potential *legal war of all against all*, carried on by way of legislation and representation."⁸⁵ Any legislative system in a large, modern society is doomed to succumb, to a large extent, to special interest groups rather than representing the general will of the populace.

4. *Decentralized Law-Finding Systems*

As discussed above, legislative systems such as the civil law are centralized law-making systems, and face many of the problems faced by central planners in general. Decentralized law-finding systems like the common law, on the other hand, are analogous to free markets in that a spontaneous order arises in both.⁸⁶ Unlike a legislator imposing his will on society, when a judge decides a case

⁸⁵Leoni, *supra* note 2, at 21, 158. See also Aranson, *supra* note 31, at 677-79; Mitchell & Simmons, *supra* note 72 (discussing the large number of special interest groups that accompany big government); and FREDERIC BASTIAT, THE LAW 17-18 (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, Dean Russell trans. 1950) (1850) (discussing ever-escalating conflicts among disparate special interest groups).

⁸⁶See *supra* notes 33 and 74, and accompanying text.

he attempts “to discover and make explicit the rule that is implicit in the practices, customs, and institutions of the people. ... Law then develops through the application of the rule to new situations.”⁸⁷ But as Liggio and Palmer note,

This process reveals another analogy with the decentralized market process, for the decision of a judge in a particular case is subject to review by other participants in the legal process. One judge cannot impose his personal will or idiosyncratic interpretation of the law on the entire legal system; similarly, innovations in the market process arise through the decentralized activities of entrepreneurs and firms and are then subject to the review of consumers, investors, and other market participants. In both the market process and the common law process there is little danger of having “all your eggs in one basket,” as is the case with both socialism and legislation.⁸⁸

Judges in a decentralized law-finding system are also less likely to be influenced by special interests than are legislators. Professor Epstein argues

that structural features limit what the manipulation of common law rules can achieve. The more focused and sustained methods of legislation and regulation are apt to have more dramatic effects than does alteration of common law rules and thus will attract the primary efforts of those trying to use the law to promote their own interests.⁸⁹

To the extent a court-based legal system displays legislative characteristics, which often occurs in government-based court systems,⁹⁰ it faces the same central planning problems as does legislation.⁹¹ For example, judges that attempt in their decisions to

⁸⁷Liggio & Palmer, *supra* note 31, at 720-21.

⁸⁸*Id.* at 721, n.30.

⁸⁹Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718-19 (1982).

⁹⁰See Part III.B.2, *supra*.

⁹¹Aranson, *supra* note 31, at 697; Peter H. Aranson, *The Common Law as Central Economic Planning*, 3 CONST. POLITICAL ECON. 289, 297-99 *et passim* (1992).

“maximize society’s wealth”⁹² face the same information problems as a central economic planner.⁹³

Judges, then, especially government-employed judges, can run into the legislator’s ignorance problem when they act like legislators and pretend they are omniscient.

D. The Proliferation of Laws

A civilized society, like a functioning free market, develops spontaneously and is tremendously complex. If a legislator attempts to plug one hole in a dike, he finds that ten more spring up. If he attempts to plug these ten, a hundred more result.

Legislation is nothing more than controls, and it is evident that controls breed yet more controls. And invariably, because of government propaganda combined with public ignorance, the inevitable failures of the nostrum of legislation are blamed, not on the interventionist government, but on freedom and unregulated human conduct. Thus even more controls are imposed to solve problems caused by controls in the first place, and the process accelerates. For example, the well-known boom-bust business cycle, with its recurrent depressions and recessions (such as the Great Depression and recent recessions), is caused, not by capitalism, but by government manipulation of the money supply (which is, of course, only possible with legislatively-created institutions such as the Federal Reserve).⁹⁴ When such government-caused calamities strike, the current Roosevelt or Clinton milks the disaster as an excuse for more government intervention and power.⁹⁵ Thus, legislation has a ratcheting effect whereby statutes tend to lead to further statutes and the government sphere expands outward as these statutes cascade down from generation to generation.

⁹²Aranson, *supra* note 31, at 692.

⁹³*Id.* at 697-98 (emphasis added) (footnotes omitted). *See also* Aranson, *supra* note 31, at 314.

⁹⁴*See* MURRAY N. ROTHBARD, AMERICA’S GREAT DEPRESSION (New York: New York University Press, revised ed. 1975); *idem*, 2 Man, Economy, and State, *supra* note 55, at 854 *et seq.*; *idem*, For a New Liberty, *supra* note 22, at chapter 9; Mises, *supra* note 55, chapter XX esp. p. 561.

⁹⁵*See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (New York: Oxford University Press, 1987).

Such a continual outpouring of laws has many insidious effects. As has wisely been said, “The more corrupt the Republic, the more the laws.”⁹⁶ But the reverse is also true. As special interest groups become successful, others become necessary for self-defense, and soon a legal war of all against all begins to emerge, as already discussed.⁹⁷ The ability of legislators to change laws reduces legal certainty, which makes contractual reliance more risky and hampers useful economic transactions. Uncertainty also increases the general time preference rate, which shortens the structure of production, thereby impoverishing society. The ensuing higher time preference also increases the prevalence of criminal activity.⁹⁸

Additionally, when so many laws exist, and with such arcane, vague, complex language, it becomes almost impossible for each citizen to avoid being a law-breaker, especially when we have the perverse rule that “ignorance of the law is no excuse.” Even government officials cannot seem to obey federal tax laws regarding household help. Almost everyone has violated a tax law, securities regulation, “racketeering” law, drug law, handgun law, alcohol law, customs regulation, anti-sodomy law, or at least traffic ordinance. But when we are all law-breakers the law is discredited⁹⁹ and, what is worse, the government can selectively and arbitrarily enforce whatever law is convenient against whichever “trouble-maker” it wishes.

Furthermore, “the legislative conception of law accustoms those to whom the norms are addressed to accept any and all commands of the State, that is, to accept any *iussum* as *ius*.”¹⁰⁰ People become more accustomed to following orders, and thus become more docile, servile, and less independent. Once people become docile and lose their rebellious spirit, “[t]he road is cleared for the legal suppression of constitutional legality. Whoever has had the experience of observing, for example, how fascism established itself in power

⁹⁶TACITUS, ANNALS, III, 27, quoted in Sartori, *supra* note 30, at 3.

⁹⁷See *supra* note 85 and accompanying text.

⁹⁸See *supra* notes 55-61 and accompanying text.

⁹⁹Professor Benson notes that such a proliferation of laws “leads to selective enforcement, corruption, and open tolerance of illegal acts. Clearly a negative externality is created as respect for and fidelity to all law is harmed when large numbers of such largely unenforceable laws are openly defied.” Benson, *supra* note 22, at 286.

¹⁰⁰Sartori, *Liberty and Law*, *supra* note 30, at 38-39.

knows how easily the existing juridical order can be manipulated to serve the ends of a dictatorship without the country's being really aware of the break."¹⁰¹

Legal inflation cheapens and dilutes law, just as money inflation by the Federal Reserve dilutes dollars and causes price inflation. True Law becomes smothered by legislation.

IV. Naive Rationalism and The Primacy of Legislation

If the arguments made herein are correct, no centralized legal system can be a rationalist system, because legislation undermines the rationalist, libertarian virtues of individualism, individual liberty, and the rule of law. Why, then, is the civil law proclaimed as the great rationalist legal system, even though it sets up legislation as the primary source of law? Why are legislation and codification hailed as superior, scientific, and rational? Why, for that matter, is legislation so popular today even in common-law regimes, as well as in our federal system? It seems somewhat strange that those who support individual liberty, justice, and the rule of law would also support the very thing that opposes and erodes these things.

In Hayek's view, there are two types of rationalism: evolutionary rationalism (or, in Karl Popper's terminology, critical rationalism) and constructivist rationalism (Popper's naive rationalism).¹⁰² Each of these two variants of rationalism is

¹⁰¹*Id.* at 39. See also Benson, *supra* note 22, at 282 ("it appears that the increasing centralization of law-making has been associated with increasing transfers of property rights from private individuals to government or perhaps, more accurately, to interest groups.") (endnote omitted).

¹⁰²F. A. HAYEK, *I. LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 5-6 (Chicago: University of Chicago Press, 1973). See also *id.* at 72, 118; *idem*, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM*, Volume I of the *COLLECTED WORKS OF F.A. HAYEK* (Chicago: University of Chicago Press, W.W. Bartley, III, ed., 1989); *idem*, *THE CONSTITUTION OF LIBERTY* 38 *et seq.* (Chicago: University of Chicago Press, 1960); Eugene F. Miller, *The Cognitive Basis of Hayek's Political Thought*, in *LIBERTY AND THE RULE OF LAW*, *supra* note 36, at chapter 11, p. 242, 245 (discussing the two kinds of rationalism and their political consequences); JOHN GRAY, *HAYEK ON LIBERTY* 10 (Oxford: Basil Blackwell, 1984); Sartori, *Democratic Theory*, *supra* note 9, at Chapter XI (discussing rationalism vs. empiricism).

associated with a unique view of liberty. Critical rationalism, i.e. true rationalism, relates to a “British” theory of liberty that derives from thinkers such as Locke, Hume, Smith, Burke, Montesquieu, de Tocqueville, and Lord Acton, while the “French” version of rationalism, i.e. naive rationalism, derives from Rousseau, Condorcet, Hobbes, and Descartes.¹⁰³ Hayek believed that “all modern socialism, planning and totalitarianism derive” from the naive rationalism of the French tradition.¹⁰⁴

Like the socialists who naively believe that the delicate order of the market, coordinated by millions of individual interactions, can be replaced by the brute force of a central planning board, naive rationalists have an almost superstitious faith in the ability of reason to impose law on society.

In Hayek’s view, the decisive influence on the French Enlightenment political theory was the philosophy of Descartes, with its extravagant assumptions about the powers of human reason. Cartesian [i.e. naive] rationalism lead to the belief that everything which men achieve, including liberty, is the direct result of reason and therefore should be subject to its control. It traced all order to deliberate human design and expressed contempt for institutions that were not consciously designed or not intelligible to reason.¹⁰⁵

But naive rationalists fail to appreciate the true role of spontaneous order in human society. Because they did not understand, for example, that resources are allocated rationally only in a decentralized free market, a free market appears chaotic and unruly, as something that should be tamed and replaced with “scientific” central planning.

The belief of civilians and other proponents of centralized law-making that true Law ever could be made by a legislature stems from a naive rationalism because it assigns too broad a role to deductive reason. This is not surprising, given the French influence on the development of modern civil law. Reason is our only means of knowledge, but we would not attempt, for example, to take a sick person’s temperature by closing our eyes and deducing it. Instead, we would measure it, if we realized that a pure exercise of deductive

¹⁰³Miller, *supra* note 102, at 245.

¹⁰⁴*Id.* at 246.

¹⁰⁵*Id.* at 246-47 (footnote omitted).

thinking cannot hope to give us this information.¹⁰⁶ This would be naive.¹⁰⁷

A genuine market order can only be generated from the bottom up by the free interaction of private property owners. Given this fact, it is rational not to destroy this order by the top-down commands issued by a sovereign central planner. A detailed body of law, while based on fundamental norms established by and compatible with true rationalism, can only be discovered and established in a decentralized fashion; and it is clear that centralized legislative commands can only disrupt and distort the spontaneous and rational development of Law. The championing of legislation, not to mention central economic planning, thus irrationally ignores the reality that Law is compatible only with a decentralized law-finding system, and it ignores the inevitable negative effects of attempting to legislate (i.e. uncertainty, proliferation of the laws, special interest wars, unintended effects). The civil law worships legislation because of a desire to impose “order” on a field where there is already spontaneous order. This naive rationalism is not really rationalism at all: it is anti-rationalism or irrationalism.

The desire to plan, to impose order — whether economic or legal — on others, is dangerous because, in the name of reason and freedom, individual freedom is smothered. As Thomas Sowell writes,

¹⁰⁶See Hayek, I. *Law, Legislation and Liberty*, *supra* note 102, at 29 (“to make reason as effective as possible requires an insight into the limitations of the powers of conscious reason [O]ne of the tasks of reason is to decide how far it is to extend its control or how far it ought to rely on other forces which it cannot wholly control.”).

¹⁰⁷Hayek himself has been criticized for assigning too little role to reason, on the part of individuals within a spontaneous free market order. See Hans-Hermann Hoppe, *F.A. Hayek on Government and Social Evolution: A Critique*, 7 REV. AUSTRIAN ECON. 67 (1994). Hayek’s teacher Mises, as opposed to Hayek, viewed laws, morals, market customs, and the price system, as products of individual, rational, human action. “While these institutions were not created out of whole cloth by a single mind, political fiat or ‘social contract,’ they are indeed the products of rational and intentional planning by human beings, whose thoughts and actions continually reaffirm and reshape them in the course of history.” Joseph T. Salerno, *Ludwig von Mises as Social Rationalist*, in LUDWIG VON MISES: CONTRIBUTIONS IN ECONOMICS, SOCIOLOGY, EPISTEMOLOGY, AND POLITICAL PHILOSOPHY (Norwell, Mass.: Kluwer Academic Publishers, Jeffrey M. Herbener, ed., 1993), p. 216.

At its most extreme, [rationalism] exalts the most trivial or tendentious ‘study’ by ‘experts’ into policy, forcibly overriding the preferences and convictions of millions of people. While rationalism at the individual level is a plea for more personal autonomy from cultural norms, at the social level it is often a claim — or arrogation — of power to stifle the autonomy of others, on the basis of superior virtuosity with words.¹⁰⁸

Bentham is a good example of the dangerous arrogance of naive rationalism. Bentham longed to (legislatively) codify his utilitarian “greatest happiness principle,” and thus to use legislation as necessary to sweep aside any common law in his way. He

evinced no misgivings about the power or reason — in particular Bentham’s reason — to decide any questions of policy *de novo*, without benefit of authority, consensus, precedent, etc. ... Bentham is not a little the fanatic whose willingness to sweep aside the obstacles to implementation of his proposals draws sustenance from a boundless confidence in his own reasoning powers. ... Bentham’s blind spot about the problem of social order is of a piece with his enthusiasm for social planning. He worried about all monopolies except the most dangerous, the monopoly of political power.¹⁰⁹

Because the civil law and, indeed, all modern law, gives license to legislators, it is irrationalistic, and does not promote, but hinders, individual liberty and the true development of Law.

V. The Role of Legislation and Codification

A. *The Role of Legislation*

1. *The Secondary Role of Legislation*

¹⁰⁸THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 102-03 (New York: Basic Books, Inc., 1980).

¹⁰⁹Posner, *supra* note 37, at 594, 603-606. For a discussion of Bentham and David Dudley Field, another proponent of common-law codification, and of anti-codifiers such as James C. Carter, see Lawrence M. Friedman, *supra* note 78, at 391-92, 403-406.

Does all this mean that there is absolutely no room for legislation? If anarcho-capitalism is accepted, of course there may be no legislation because there may be no government. Relaxing this assumption, if there is a government then even if it is a minimalist one it seems that there must effectively be some legislation, if only to determine the structure and function of the government itself. In this case, the points made in this paper militate against any legislation at all other than that strictly necessary to govern the government itself (e.g., a written constitution).

Even if there is a government, the body of law in society should be fashioned by a decentralized court system. The courts should be part of a private system of courts to the extent possible, for example a competing system of arbitral tribunals, rather than government-backed common-law courts. But whether law-finding fora are government courts or private courts, the legislature should have no ability to enact “laws” that have any effect on the decisions that courts make.¹¹⁰

If we relax the anarchist/minimal state assumption once more, and admit that a legislature should in some special cases be able to enact statutes to override court decisions, clearly legislation should never be seen as even *a* primary source of law, much less *the* primary source of law, lest all the law-destroying features described herein arise.

Even Leoni was not a complete anarchist, and believed in the necessity of at least some legislation.¹¹¹ According to Leoni, the role of legislation should be kept very small, and applied only very carefully.

Substituting legislation for the spontaneous application of nonlegislated rules of behavior is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system.¹¹²

¹¹⁰This is not, however, to say that the judicial branch of a government should have the power of judicial review with respect to other branches of the government. Ideally, the legislative, judicial, and executive branches each have an equal and independent power to interpret the constitution. See William J. Quirk and R. Randall Bridwell, *Angels to Govern Us*, CHRONICLES, March 1995, p. 12 (excerpted from a forthcoming book of the same title).

¹¹¹Leoni, *supra* note 2, at 10 and 129-31.

¹¹²*Id.* at 14. See also *id.* at 178 (“Whatever is not positively proved worthy of legislation should be left to the common-law area.”).

Not much, if any, of today's legislation could survive this test. Legislation must be restricted to a strictly secondary role, for a system based on the *primacy* of legislation will inevitably subvert the spontaneous order and substitute pernicious and chaotic rules in its stead.

2. *Alleged Deficiencies of Decentralized Law-Finding Systems*

Hayek, another advocate of the spontaneous order of decentralized systems, also believed that legislation is called for in certain situations.¹¹³ Hayek maintained that the fact that a "grown" system of law has some desirable characteristics that legislation usually does not,

does not mean that in other respects such law may not develop in very undesirable directions, and that when this happens correction by deliberate legislation may not be the only practicable way out. For a variety of reasons the spontaneous process of growth may lead into an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation.¹¹⁴

Hayek also maintained that the judicial, evolutionary growth of law may be "too slow" to bring about the "desirable" rapid adaptation of the law to wholly new circumstances. Further, according to Hayek, a judge would have to upset "reasonable expectations created by his earlier decisions" to overturn an erroneous line of cases, whereas a legislator can promulgate a new rule which is to be effective only in the future.¹¹⁵

¹¹³Hayek, *I. Law, Legislation and Liberty*, *supra* note 102, at 88, subsection entitled "Why grown law requires correction by legislation."

¹¹⁴*Id.* at 88 (also citing Leoni, *Freedom and the Law*, *supra* note 2).

¹¹⁵*Id.* at 88-89.

Richard Epstein, a brilliant proponent of the common law, also feels that legislation is sometimes desirable, for example when courts cannot come up with a number, such as a statute of limitations, which might be very desirable.¹¹⁶ Without legislation, courts would likely bar lawsuits after some length of time. But it is possible that different courts would have different limitations periods, and some judges may decide each case on its own merits. According to Epstein, without a statute of limitations, no court would develop a hard and fast, arbitrary number.¹¹⁷ Rather, in a pure court system, individuals could only estimate the probability of being able to sue (or to be sued) after a given number of years. By contrast, the number is certain under a statute of limitations. Because certainty is desirable, and because people are risk-averse, “A single number stated in advance truncates the risk [by] making it clear that some actions cannot be brought.”¹¹⁸

Even Blackstone was not “an uncritical opponent of statutory law. Blackstone assigned a limited role to statutory law: its proper office was to resolve conflicts between common law precedents and otherwise to supplement and patch common law doctrine.”¹¹⁹

But is the common-law’s development “too slow,” at least on occasion, as Hayek claimed? The U.S. Supreme Court has praised the common law’s “flexibility and capacity for growth and adaptation” as “the peculiar boast and excellence of the common law.”¹²⁰ For example, as Blackstone points out, judges under the common law were able to reform the system of feudal land law without legislation.¹²¹

¹¹⁶Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 680-81 (1986).

¹¹⁷*Id.* at 680.

¹¹⁸*Id.* at 681.

¹¹⁹Posner, *supra* note 37, at 585 (citing 3 Blackstone, *supra* note 37, at *328, and 1 Blackstone §432, *365).

¹²⁰*Hurtado v. People of California*, 110 U.S. 516, 530 (1884). However, a private court system is an unadulterated decentralized system, unlike the common law, which is backed by government force. *See* Part III.B.2, *supra*. Therefore, it will adapt more efficiently and more quickly to change than a common-law system would. *See also* Benson, *supra* note 34, at 17, discussing the superior ability of the (private) Law Merchant, compared to the common law, to adapt and change in response to rapid changes in the commercial system.

¹²¹3 Blackstone *supra* note 37, at *268.

So certainly decentralized systems are able to adapt to new situations when it is called for, at least sometimes.¹²² Additionally, it is not always desirable that basic rules (such as contracts should be fulfilled) should change just because societal conditions change. Professor Epstein has explained that

Social circumstances continually change, but it is wrong to suppose that the substantive principles of the legal system should change in response to new social conditions. The law should not be a mirror of social organization. In private law matters, it can best perform its essential function only if it remains constant.¹²³

Further, one wonders how any external observer, such as Hayek or any legislature, could ever know what rate of legal change is “too slow,” or even what change is “desirable,” any more than a central planning board can know what is the “right” price to charge for a gallon of milk. Indeed, Hayek’s own insights into the virtues of spontaneous order and the problems of central economic planning demonstrate the ignorance of any central planner in this regard.

I admit that, in some circumstances, a decentralized body of law can err, and seem to need “patching”; and indeed, all things being equal, a statute of limitations might be better than none at all. Unfortunately, however, all things are *not* equal, because of the problems that inevitably accompany legislation. The choice is between a fallible system of decentralized law with no legislature and an even more fallible and dangerous legislative means of making law. To “patch” common law by legislation, you have to first empower a legislature. As Mises wisely put it,

No socialist author ever gave a thought to the possibility that the abstract entity which he wants to vest with unlimited power — whether it is called humanity, society, nation, state, or government — could act in a way of which he himself disapproves.¹²⁴

As Mises here warns, a legislature will not be content to merely fix one bad law. Rather, legislation will eventually overwhelm and suffocate the naturally-developed body of law and engender uncertainty; special interest warfare and quick fix laws will

¹²²See also Benson, *supra* note 22, at 283, n.42, and works cited therein.

¹²³Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 254 (1980).

¹²⁴Mises, *supra* note 55, at 692 (emphasis added).

proliferate; and the government will eventually abuse its sovereign position by engaging in economic and human planning.

Epstein may well be correct that not having a definite period for liberative prescription may inject uncertainty into the legal process. Unfortunately, the attempt to cure this by empowering a legislature also increases the general uncertainty in society. Which uncertainty is greater? And what about the liberty of individuals who have their right to sue artificially limited by a statute of limitations? How can we know that the benefit to them (or even to others) is greater than the harm done to them? Because values are subjective to the individual, and because of the economic calculation problem, no central governmental legislature can know whether the benefits of a statute of limitations are worth the cost of such legislation.¹²⁵ Furthermore, why is it justifiable to harm one individual to benefit another?

Another problem with urging legislation as a solution to common law gone astray, is that this assumes that the legislature can be convinced to make the correct legal reform. First, this is a very dubious assumption, especially given the special interest lobbying that legislators face, and also given the fact that legislators tend to be people who are interested in power rather than philosopher-kings who want to do the right thing.¹²⁶ Second, if a proponent of legislation assumes that reasonable and humane legislators can see the light of reason and correctly reform the law, why is it not at least as likely that judges can be persuaded as well?

Especially in an anarcho-capitalistic system — i.e., in a free society — in which all courts are private and compete for business by selling and producing “justice,” the courts at least have an incentive to continually refine the rules in a just direction. If Epstein and legislators can see the value of a fixed time limit to instituting a lawsuit, so can the public, which would create a demand for such a rule. Private court systems that offered such rules to cater to consumer demand would tend to draw more customers and lawsuits

¹²⁵On the subjective theory of value, see Mises, *Human Action*, *supra* note 55, at 94-97, 200-206, 331-33 *et passim*; Rothbard, *1 Man, Economy, and State*, *supra* note 55, at 14-17 (ch.I, §5.A); and ALEXANDER H. SHAND, *THE CAPITALIST ALTERNATIVE: AN INTRODUCTION TO NEO-AUSTRIAN ECONOMICS* ch. 4, esp. §2 (New York: New York University Press, 1984).

¹²⁶For a related discussion, see FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (Chicago: University of Chicago Press, 1944), at ch. X, “Why the Worst Get on Top.”

than relatively unjust competitor-courts. Thus there is a natural incentive for courts, at least competing courts in a free society, to search for justice and to strive to adopt it, so as to cater to a justice-seeking consumer base.

3. *Structural Safeguards to Limit Legislation*

For all these reasons, I do not believe that legislation is a legitimate or practical means of creating law, or even of patching it. If a legislature can be convinced to recognize and respect the right law, so can a decentralized court system, especially one competing with other courts for customers. Courts do not face the same pernicious and systematic incentives that legislators do to make bad laws, and many of them. And courts, if they go bad, at least have a more limited effect on society; whereas when legislatures go bad, there is no end to the evil that they can perpetrate.¹²⁷

If legislation can be considered valid at all (given a governmental system), it can only be occasional or spurious legislation that modifies the body of law which is *primarily* developed by a court-based, decentralized law-finding system. If we must have legislation, several constitutional safeguards should accompany its exercise, to attempt to restrict legislation to a purely secondary role in the formation of law. Certainly, a supermajority,¹²⁸ and maybe a referendum, should be required in order to enact any statutes whatever, except perhaps for statutes that repeal prior statutes or that limit governmental power.

In addition to a supermajority requirement, another reform that might be considered would be for all legislation to be limited to replacing the opinion of a given court decision with a new decision, which is to have purely prospective effect. Then, if a given case or line of cases were issued that had particularly egregious reasoning or results, a supermajority could form in the legislature that would rewrite the unfortunate opinion in purportedly better form, and enact this into law, as if the court had first issued the rewritten decision.

¹²⁷Government power is always subject to abuse. The greater government's role in society, the greater the chance for serious abuse. As Professor Epstein notes, "The smaller downside of a small government is perhaps its greatest virtue." RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 316 (Cambridge, Mass.: Harvard University Press, 1995).

¹²⁸See Leoni, *supra* note 2, at 178 n.5 (discussing a supermajority requirement as a way to tame legislators).

The rewritten opinion would then assume the status of a judicial precedent, at least for that court.

The benefit of this limitation is that it would prevent legislatures from enacting huge legislative schemes out of whole cloth. There would simply be no way for the legislature to enact an Americans with Disabilities Act, since any statute would really be a rewritten judicial opinion, and to the extent the legislated substitute opinion strayed from the facts of the particular case, it would be merely *dicta*. If a judge in a battery case, for example, ruled that the spotted owl or the intelligent socialist was now an endangered species, such language would be completely irrelevant, since it is beyond a judge's power to enact an Endangered Species Act in any judicial opinion. Such a mechanism for legislation would allow very bad case law developments to be overcome, but would also severely restrict the ability of legislatures to radically restructure the law, and thus would reduce the incidence of vote-buying and special interest lobbying, the amount of uncertainty, the proliferation of statutes, and the amount of social planning and other mischief that a legislature might otherwise be inclined to engage in.

Other provisions that could help to limit the dangerous effects of having a legislature include a line-item veto by the executive branch, and sunset provisions that automatically repeal legislation unless re-enacted after a given number of years. Another useful prophylactic measure would be an absolute right to jury trials in *all* cases, civil or criminal (so that government could not escape the jury requirement by calling truly criminal sanctions "civil"), in which the application of a statute is involved. This should be combined with a requirement that the jury be made aware of their right to judge the *law's* validity as well as the defendant's liability or guilt.¹²⁹

The right of law-abiding citizens to own weapons of any sort, without any registration requirement, is also essential so that an armed public can stand as a last bulwark against a tyrannical government. Even with such safeguards, the power of a

¹²⁹The latter concept is advocated by many libertarians, and is often called the Fully-Informed Jury Amendment, or FIJA. See Don Doig, "New Hope for Freedom: Fully Informed Juries," pamphlet published by the International Society for International Liberty. For discussion of the historical and natural right of jurors to judge the law's validity, see also Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L. J. 170 (1964); and LYSANDER SPOONER, *An Essay on Trial by Jury*, in THE LYSANDER SPOONER READER 122 (San Francisco: Fox & Wilkes, 1992).

government armed with the power to legislate, the power to create and rewrite “law,” is awesome, and fearsome, to behold.

B. *The Role of Commentators and Codes*

The criticisms of legislation apply even to civil codes, the most impressive component of modern civil law. Admittedly, the civil law, at least as embodied in a civil code (for example, the Louisiana Civil Code), is superior to the common law in many ways. The civilian system of property rights, not mired in feudalistic form as is the British common law, is much cleaner and conceptually more sound than is common law real property.¹³⁰ Common-law real property concepts are almost painful to the mind. As another example, the irrational common-law requirement of “consideration” to create a binding obligation¹³¹ is replaced in the civil law with the more sensible prerequisite of “cause.”¹³² However, these superior qualities of the civil law are not due to its legislated character, but to the superior legal concepts that evolved in the Roman law.

But the civil code also contains many illiberal and thus illegitimate provisions, which are a problem only because the code is legislated into law. If the civil code were a private, unlegislated codification, judges could simply ignore its illiberal provisions. A particularly egregious example of an unjust law is Louisiana’s forced heirship regime,¹³³ which limits individuals’ ability to dispose of their own property as they wish upon death. Also, in Louisiana certain sales may be annulled if “too low” a price was paid by the buyer,¹³⁴ which violates the rights of property owners to dispose of their property, and which also foolishly assumes that the

¹³⁰See also Herman, *supra* note 5, at 46-47 (discussing the civil code’s “highly stylized, streamlined system of ownership”).

¹³¹See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUMBIA L. REV. 269, 287-91 (1986) (discussing problems with the theory of consideration).

¹³²La. Civ. Code art. 1967. For a discussion of the differences between cause and consideration, see Christian Larroumet, *Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law*, 60 TUL. L. REV. 1209 (1986).

¹³³La. Civ. Code art. 1493.

¹³⁴La. Civ. Code art. 2589.

government knows better than the seller and buyer what the right price is for an item.¹³⁵

Ignoring relatively minor problems such as these, the civil code in and of itself is largely commendable, especially insofar as it embodies and systematizes a naturally grown body of law.¹³⁶ But the civil law is more than the civil code: it is legislation made paramount. Legislation is considered the primary source of law — indeed, the civil code itself is legislated — and thus all the problems of legislation discussed above apply to the civil law. When the civil code is enacted as a statute, it is no wonder that proponents of the civil code would naturally view legislation as supreme, and tend to view legislation as the primary source of law. And then even the civil code itself tends to develop legislative characteristics, such as code articles enacted at the behest of special interests; illiberal provisions such as those cited above; and specialized, detailed articles out of place in a generalized code.

The civil law would be much improved if the civil code were more like a constitution, in that its provisions would prevail over any contrary statute, and in that some sort of supermajority requirement would be needed to amend it. But we already have constitutions, both state and federal. I do believe that the basic libertarian principles specified herein — the individual rights to self-ownership and to own property, as embodied in the libertarian non-aggression axiom — should be followed by any judge, but this does not necessarily mean there must be a statute or constitution specifying these principles. It is only important that judges recognize them and, in the long run, this can only happen if a consensus in society recognizes the validity of such principles in the first place. Our task is always education. If the public were ever to become libertarian enough to adopt a libertarian constitution, one would probably not be needed, since private justice supplied on the

¹³⁵Another egregious provision in blatant contradiction to the individual right to absolute ownership of property is contained in articles 2626-27, which provide for expropriation of private property “wherever it becomes necessary for the general use.” La. Civ. Code art. 2626. Of course, the United States Constitution suffers from the same defect. U.S. Const. Vth Amendment.

¹³⁶See Thomas W. Tucker, *Sources of Louisiana’s Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 265 (1970); Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law*, 56 TUL. L. REV. 477, 585 *et seq.* (1982) (discussing Blackstone’s influence on Louisiana’s civil code).

market, or even in government-based common-law courts, would veer in a libertarian direction in response to the people's sense of justice.

But if a libertarian constitution or code were in place, it would be relatively sparse. It would specify as first principles that the initiation of force is illegitimate, and that the individual rights to own one's own body and any property one homesteads or acquires voluntarily from other owners are absolute and inviolable. As deductions therefrom, it could specify that rape, murder, theft, assault, battery, and trespass are also rights-violations. As Rothbard states:

The Law Code of a purely free society would simply enshrine the libertarian axiom: prohibition of any violence against the person or property of another (except in defense of someone's person or property), property to be defined as self-ownership plus the ownership of resources that one has found, transformed, or bought or received after such transformation. The task of the Code would be to spell out the implications of this axiom (e.g., the libertarian sections of the law merchant or common law would be co-opted, while the statist accretions would be discarded). The Code would then be applied to specific cases by the free-market judges, who would all pledge themselves to follow it.¹³⁷

(I would add that the "libertarian" sections of Roman law, e.g. as embodied in modern civil codes, could be adopted in developing Rothbard's libertarian Law Code.)

But because of the near-infinite variety of ways in which humans can interact, such a code could never be made all-comprehensive. Any codifier who attempted to do this would face the information problems discussed herein. At some point judges need to consider the particular facts of a controversy and, keeping principles of justice in mind, eke out the applicable rule. Judges will sometimes make mistakes, but, then, the fact that individuals are fallible can never be escaped, so this criticism is moot.

It is true that a decentralized, gradually-developed body of case law can become unwieldy and difficult to research. But it is not more so than the modern morass of statutes. I cannot see how either a lawyer or the average layman would have an easier time discerning what law applies to him in a given situation under today's statute-

¹³⁷Murray N. Rothbard, *Power and Market: Government and the Economy* 267 n.4 (1970); *idem*, *For A New Liberty*, *supra* note 22, at 230-31.

ridden laws, as opposed to in a decentralized legal system having a body of judge-discovered principles. Surely in both cases laymen may resort to specialists such as attorneys and explanatory treatises to tell them what the law is. At least in a decentralized system the law is less likely to change from day to day, so that when a person knows what the law is today he is more certain it will be the law tomorrow. And there are likely to be far fewer laws regulating far fewer aspects of our daily lives in a judge-based system, which should make it easier to determine what the relevant law is concerning a given situation.

There is for these reasons a significant role for codification in a free society, but only for private, not legislative, codification. To the extent such private codes are systematic and rational, they can both influence the rational development of the law and present or systematize it in concise form for lawyers and laymen alike. We already have treatises such as the *Restatements of the law*, *Texas Jurisprudence Third*, *American Jurisprudence Second*, and *Corpus Juris Secundum*. These treatises would be far more rational and systematic, and shorter, if they did not have to take an unwieldy and interfering body of legislation into account; if they could focus primarily on common-law developments. Legal scholars who currently draft civil code articles for consideration and enactment by a legislature could surely dedicate their energies to codifying and systematizing the body of case law that has been developed.¹³⁸

Even a true codification of existing case law can make mistakes. If the code is private, judges can ignore the lapses in the commentator's reasoning. Of course, this has the extra benefit of giving an incentive to private codifiers not to engage in dishonest reasoning or meddlesome social planning. If a codifier wants his work to be used and acknowledged, he will attempt to accurately describe the existing body of law when he organizes and presents it,

¹³⁸Lawrence Friedman, *supra* note 78, at 406, states that the Field "codes are the spiritual parents of the Restatements of the Law—black letter codes of the 20th century, sponsored by the American Law Institute, but meant for persuasion of judges, rather than enactment into law." See also 3 Blackstone *supra* note 37, at *267 (discussing problems that arise when a new system of law is legislatively codified rather than built upon the evolved wisdom of courts). For a fascinating discussion of the significance of both private and legislated codes for the development of law, see Alan Watson, *The Importance of "Nutshells,"* 42 Am. J. Comp. L. 1 (1994).

and will likely be explicit when recommending that judges adopt certain changes in future decisions.

Law codes should thus be strictly private. We have long seen the wisdom of keeping church and state separate. Theorists like Mises, and the collapse of socialism, teach the virtues of the separation of economy and state. Advocates of a libertarian social and legal order should favor the separation of law and state.¹³⁹

VI. Conclusion

Virtues such as individual liberty and legal certainty, understood as aspects of a just, libertarian polity, are indeed objectively valid standards that any legal system must uphold. Centralized legal systems — even those that attempt to embody libertarian virtues, such as the civil law — undercut individual rights, because in them legislation is made supreme and valid; because Law-finding is replaced with law-making.

Both the Roman law and common law have been corrupted into today's inferior legislation-dominated systems. The primacy of legislation should be abandoned, and we should return to a system of judge-made law — a private system, ideally, but in the direction of systems like the old common law and Roman law, at least. Scholars who codify naturally-evolved law have a vital function to serve, but they should not ask for the governmental imprimatur on their scholarly efforts.

Ultimately, the form of a legal system does not guarantee that just laws will be adopted. We must always be vigilant and urge that individual freedom be respected, whether by legislator or judge.

¹³⁹See Rothbard, *supra* note 22, at 228 (discussing the separation of law and state).