Committee 4
Military and Police - Public of Private? Explorations in the Theory and History of Security Production

Draft – February 1, 2000
For Conference Distribution Only

Police, Adjudication, and Arbitration: Public or Private?

N. Stephan Kinsella
Partner / Professor
Duane, Morris, and Heckscher LLP / South Texas College of Law
Houston, Texas

The Twenty-second International Conference on the Unity of the Sciences
Seoul, Korea February 9-13, 2000

POLICE, ADJUDICATION, AND ARBITRATION: PUBLIC OR PRIVATE?

N. STEPHAN KINSELLA*

TWENTY-SECOND INTERNATONAL CONFERENCE ON THE UNITY OF SCIENCES
COMMITTEE 4: MILITARY AND POLICE—PUBLIC OR PRIVATE?
EXPLORATIONS IN THE THEORY AND HISTORY OF SECURITY PRODUCTION
FEBRUARY 9–13, 2000 • SEOUL, KOREA

ABSTRACT

This paper explores the nature of law and role of law. Law is the body of principles that provide operational guides to just human conduct. Law can be a science, although not a completely empirical science like the natural sciences. It lies at the crossroads of fact and value, since law must take into account both man's nature and the nature of reality, and must also conform to justice (natural rights). A science of law is possible because political ethics—rights—can be objectively defended. Law should be that which is compatible with our natural rights.

Because rights are objective, and there can be science of ethics, legal positivism and statism are incorrect, and there can and should be private production of law. Government legislation is not the proper way to form law, to discover just legal principles, or to ensure that such just laws are enforced in society. Law can and should be generated and produced privately instead of publicly.

Some preconditions for the private production of just law include widespread consensus or agreement in society. Once anarchy has been reached, such a consensus is already widely available, meaning that there would be widespread agreement on the basic principles that would be adopted in various communities and in various law-making fora, such as private arbitration systems. In a private, anarcho-capitalist society, law would probably be generated by legal-philosophical scholars working out the contours of a just legal system and individual rights, based on fundamental, broad libertarian principles which are also widely shared in society, in combination with various systems of decentralized private courts (arbitral tribunals) applying these and accumulated principles (precedents and customs) to concrete or novel fact situations. Thus, ideally, law should be developed by application of abstract libertarian principles of justice applied to various contexts and concrete fact situations, by scholars and by private courts, instead of by centralized government-produced legislation.

Other papers in this committee and published elsewhere discuss the private provision of police and defense, and provision of payment for private production of defense, police, and law (e.g., private insurance agencies).

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[1]LL.M., University of London; J.D., M.S. E.E., B.S. E.E., Louisiana State University. The author is a partner in the intellectual property department of Duane, Morris & Heckscher LLP in Houston, and is adjunct professor of law at South Texas College of Law. He is co-author of *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (Oceana 1997). Email: nskinsella@duanemorris.com. The views expressed herein are those of the author alone, and should not be attributed to any other person or entity.

I. INTRODUCTION

Virtually no attention has been paid by mainstream theorists to the deficiencies of civil law *qua* legislation. Although its proponents usually praise the civil law as a handmaiden of reason, freedom, and individualism, most have simply not considered whether these things can survive alongside legislation. The late Italian legal theorist Bruno Leoni in 1961 made a similar point:

> 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.[1]

The work of Leoni has for too long gone unnoticed by civilian scholars; one aim of this article is to help remedy this unjust neglect.[2] Leoni's *Freedom and the Law* argues that legislation—not any specific statute, but legislation *as such*—is incompatible with freedom. If this is correct, what does this say about modern civil law? I argue in this article that a decentralized law-finding system, such as the common law, is more compatible with liberty, individualism, and reason, than is a system of legislated law such as the civil law. Although my conclusions are equally applicable to any civil law system—indeed, to any system in which legislation is a significant source of law—in this article I focus on Louisiana's civil law system.

As explained in Part II, the original common law, as well as Roman law, the predecessor of modern civil law, approximated a decentralized—i.e., non-legislative—law-finding system. In these systems, law is gradually built up in the discussion and decision of thousands of cases. In modern civil law, by contrast, legislation is the primary source of law. It is thus "centralized" because law emanates from a central source, the legislature. Court-based systems are called "decentralized" systems because law is produced in them by innumerable independent judges, and not according to the centralized decrees of a legislature. In this Part I also present the typical claims of civilians that the civil law embodies a whole host of rationalist virtues, such as individualism, rationalism, and economic liberalism. I argue in Part III that civilian rationalists are partly right: rationalism does, indeed, establish the validity of individualism, "economic liberalism" and the like, and more. Moreover, rationalism establishes the libertarian case for individual rights, and consequently for laissez-faire capitalism, individualism, and freedom, understood as consequences of these rights. Therefore, any proposed legal system must be compatible with such individual rights in order to be compatible with reason and rationalism—that is, in order to be legitimate.

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[1]Bruno Leoni, Freedom and the Law 23 (Liberty Fund expanded 3d. ed. 1991) (1961); *see also id.* at 89.

[2]Bruno Leoni, born on April 26, 1913, was Professor of Legal Theory and the Theory of the State at the University of Pavia. Arthur Kemp, *Foreword to the Third Edition*, in *Freedom and the Law*, at ix. He was a practicing attorney as well as a passionate defender of individual liberty. *Freedom and the Law* was derived from his lectures delivered at the Fifth Institute on Freedom and Competitive Enterprise in June 1958 at Claremont Men's College (now Claremont McKenna College) in Claremont California. *Id.* at x-xi. At this Institute, which turned out to be unusually productive of significant pro-freedom works, Leoni lectured along with Friedrich A. Hayek, whose lectures became a part of his classic *The Constitution of Liberty* (1960), and with Milton Friedman, whose lectures were used in his famous book *Capitalism and Freedom* (1962). *Freedom and the Law*, at xi. Leoni was murdered by a client on the night of November 21, 1967. *Id.* at x (stating the date of Leoni's death); Roy A. Childs, Jr., book review of *Freedom and the Law*, *Laissez Faire Books Catalog*, February 1992, p. 7 (mentioning the nature of Leoni's death).

In Part IV, I argue that legislation itself is completely incompatible with and hostile to individual rights. For several interconnected reasons, legislation actually undercuts the virtues that the civil law allegedly supports and embodies. Because modern civil law enshrines legislation as the supreme source of law,[3] its normative grounding must be rejected, and the civil law seen as unjustifiable and morally illegitimate.

Indeed, since it is *reason* that establishes the case for freedom and individual rights, and against legislation and the civil law, the civil law is "irrational." It is not only reason, however, that supports individual rights and laissez faire, but rationalism itself, a special type or application of reason.[4] In actuality, the alleged rationalism of the civil law is really only a "naive rationalism,"[5] a rationalism incorrectly applied. The civil law pretends to be rationalistic, yet by its nature it subverts the very principles that rationalism upholds. This is why it is, in the end, proper to speak of the *irrationalism* of the civil law.

Finally, in Part V, I discuss the proper role of legislation and codification in a free society.

II. LEGISLATION AND RATIONALISM IN THE CIVIL LAW

1. Legislative Supremacy

[3] *See* Part II.A, *infra*.

[4] *See* Part III, *infra*.

[5] *See* Part IV.E, *infra*.

The civil law and the common law differ in many ways. The difference between the common law's *stare decisis* and the civil law's *jurisprudence constante* has been said to be the fundamental difference between the two systems.[6] Others, however, "claim that the main distinction between civil law systems and common law systems is that the former are codified and the latter are not,"[7] although Professor Alan Watson feels that this view is "full of defects. . . . An historical dependence on Roman law is, in fact, the common characteristic of the civil law systems . . . ."[8]

In this article these distinctions will be largely ignored. Instead, I will examine problems that arise when law is thought of as being made by legislation, rather than found or discovered by judges or other decentralized law-finding experts (e.g., Roman jurists or private judges such as arbitrators). Thus, the crucial distinction between the common law and the civil law for purposes of this article is the centralized (i.e. legislative) character of the civil law versus the nonlegislative character of decentralized systems such as the common law. In essence, in modern civil law the will of the legislator is enshrined as the primary source of law, while in the original common law and Roman law, judges and jurists had the primary role of enunciating the law.

There can be no doubt that the civil law is based on legislation. Legislative 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,"[9] but article 3 makes it clear that legislation is dominant and supreme: "Custom may not abrogate legislation."[10] As John Dixon, Chief Justice of the Louisiana Supreme Court, has written, "Legislative supremacy in Louisiana is more than theoretical; it is

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[6] In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of *jurisprudence constante*. Unlike *stare decisis*, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past.

> . . . However, when, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of *jurisprudence constante*; and the rule of law upon which they are based is entitled to great weight in subsequent decisions.

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

Indeed, "[t]he difference between *stare decisis* and *jurisprudence constante* "is of such importance that it may be said to furnish the fundamental distinction between the English [i.e., common-law] and the Continental [i.e., civil-law] legal method."" Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 Tul.L.Rev. 1125, 1134 n.34 (quoting A.L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. Rev. 40, 42 (Jan. 1934)).

[7] Alan Watson, The Making of the Civil Law 3 (1981).

[8] *Id.*

[9] La. Civ. Code art. 1 (emphasis added).

[10] La. Civ. Code art. 3. *See also* Herman, *supra* note 2, at 17; Pascal, *supra* note 2, at 830; *idem*, *The Sources of Civil Order According to the Louisiana Civil Code*, 54 Tul. L. Rev. 917 (1980).

factual.[11] Another Justice of the Louisiana Supreme Court, Mack Barham, declared: "Common to all civil law systems is the fundamental tenet that legislative expression is the primary source of law, and common to all civil law systems now is the comprehensive written and integrated basic text of that legislative expression."[12]

Modern civil law comprises the so-called "scientific" codifications of the Roman law tradition, such as the French and Louisiana civil codes. In these systems, the will of the legislator is supreme, and his word creates law. Indeed, the very fact that we look to the articles of a legislatively enacted code to tell us what the sources of law are already presupposes the supremacy of legislation. Why would we care what the code said unless its *legislated* utterances had the force of law?

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[11] John A. Dixon, Jr., *Judicial Method in Interpretation of Law in Louisiana*, 42 La. L. Rev. 1661, 1662 (1982).

[12] Barham, *supra* note 3, at 363. The legislative character of the civil law is readily admitted by civilians. "In the French system, as in the civil law generally, legislation is regarded as the primary and ultimate source of law." John H. Crabb, *Introduction*, in The French Civil Code (as amended to July 1, 1976) 9 (John H. Crabb trans. 1977). *See also* Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 La. L. Rev. 1, 9 (1988); Julio C. Cueto-Rua, *The Future of the Civil Law*, 37 La. L. Rev. 645, 653, 654, 654 n.24 (1977); Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 Tul. L. Rev. 1591, 1600 (1992) ("No rule of private law can be recognized which is not in statutory form.").

As thousands of new statutes descend upon us each year, civil codes are being submerged in a huge morass of specialized laws. Even in common-law countries,[13] the common law is being gradually supplanted by legislation.[14] Nowadays, legislation has become so common that "the very idea that the law might not be identical with legislation seems odd both to students of law and to laymen."[15]

But legislation was not always seen as the primary source of law. In the original common law, as well as in the Roman law, legislation or statutes played a much smaller role. These systems were both more decentralized than are modern civil law systems (not to mention the thoroughly centralized legal systems of the more socialist regimes). Both the common law and Roman law

> were built up through the discussion and decision of cases, and the law was perceived as essentially law discovered through debates among experts over particular sets of facts rather than as general rules laid down by a legislature. . . . [I]n both systems the major part of the law actually emerged out of recorded discussions of cases. Therefore, both systems produced narrow rules whose limits were continually being modified by further debates. In both systems it was assumed that the relevant law existed, but was not yet articulated, and that its precise scope needed definition.[16]

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[13]The more accurate description may be, "*formerly* common-law countries."

[14]On the proliferation of laws in a legislative system, see Part IV.D, *infra*.

[15]Leoni, *supra* note 6, at 6. *See also* Giovanni Sartori, Liberty and Law 37 (1976) ("It seems to us perfectly normal to identify law with legislation.").

[16]Stein, *supra* note 17, at 1592. *See also* Peter G. Stein, *Logic and Experience in Roman and Common Law*, 59 B.U.L. Rev. 437, 439 (1970) ("Roman law, like English law, was developed by legal experts concerned with its application rather than by legislators."). *But see* Alan Watson, *Roman Law and English Law: Two Patterns of Legal Development*, 36 Loy. L. Rev. 247 (1990), arguing that there is an enormous difference between the methodology of jurists and judges. For a jurist, "[t]he issue . . . is an academic one. He is not being retained by a client whose interests he has to serve. He does not consider procedural dodges and devices to get an opponent into court or entrap him. He is not concerned with the outcome of a particular lawsuit. He has no interest in whether one party is a decent fellow, the other a rogue. He will set the particular facts within a wider context of facts that
are "slightly different," to determine where the lines should be drawn. . . . The English judge is in court, in his court, and he is faced with the issue whether his court, on this form of action for his court, should hear a suit on these particular facts." *Id.* at 262-63 (footnote omitted). *See also* Robert A. Pascal, *The Civil Law and Its Study*, in Symeonides, *supra* note 2, p. 179 at 182-82 (arguing that Roman jurisconsults were experts in legal science, as opposed to the mere magistrates charged with the applying the law). However, this difference is irrelevant for purposes of this article, since my argument for the moral superiority of a decentralized law-finding system does not depend at all on how closely Roman or common law actually approaches this ideal.

Accordingly, Peter Stein pointed out that "the Roman law of the classical period, the first two centuries A.D. when it reached its highest point of technical development, is in many respects closer in character to the common law than it is to modern civil-law systems that are derived from Roman law."[17] As Buckland and McNair noted, "It may be a paradox, but it seems to be the truth that there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor."[18]

Clearly, then, the civil law is a system in which legislation is supreme. And it is also appropriate to characterize the original common law and Roman law as (relatively) decentralized systems of "judge-found" law, since the judges (or jurisconsults, in the case of Roman law) were supposed to *find* the law that existed in nature.[19]

2. Civilian Rationalism

As Ayn Rand argued, "[r]eason is man's only means of grasping reality and of acquiring knowledge—and, therefore, the rejection of reason means that men should act regardless of and/or in contradiction to the facts of reality."[20] Reason is important to follow, because the truth about things matters to us, and reason is our only means of discovering truth.[21]

The civil law is said to be the system of reason. Moreover, as will be seen below, the civil law also claims to have rationalism as well as reason on its side. *Rationalism* has been defined as

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[17]Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 Tul. L. Rev. 1591 (1992).

[18]Buckland & McNair, *supra* note 2, at xiv. *See also* Obrad Stanojevic, *Roman Law and Common Law—A Different Point of View*, 36 Loy. L. Rev. 269, 270-71 (1990); Leoni, *supra* note 6, at 11.

[19]*See* Herman, *supra* note 2, at 24 (pointing out that judges in a case law system "actually find" the law."); Stein, *supra* note 17, at 1592.

The 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 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.

[20]Ayn Rand, *The Left: Old and New*, in The New Left: The Anti-Industrialist Revolution at 84 (1971), quoted in The Ayn Rand Lexicon: Objectivism from A to Z 407 (Harry Binswanger, ed. 1986).

[21]I will not deal here with skeptics or mystics who wish to challenge the supremacy of reason, other than to note the following. Anyone who argues that reason is somehow incomplete or invalid undercuts his own position, since he must present his reasons in an intelligible fashion as grounds for the challenge. If such a critic wishes to escape this dilemma, he may simply shut up and become like a vegetable, in Aristotle's useful analogy, or resort to non-reasoning modes of "persuasion" or communication, such as grunts or even physical violence. (Aristotle, Metaphysics 1006a12-16) In short, no one can, without self-contradiction, meaningfully deny the essential role of reason in establishing truths.

> 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.[22]

Pure deduction from a set of axioms can only yield so much knowledge; we must at some point consult the evidence of the senses.[23] Nevertheless, as argued below, rationalism properly applied can yield some significant truths that are useful even in normative inquiries that ask what is right, what is wrong, what should we do, what we have rights to, and the like. Thus, rationalism is a specific application of reason—to-wit, reasoning deductively and systematically from axioms—and, when applied correctly, can help us know things about the world.

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[22]Antony Flew, A Dictionary of Philosophy 298-99 (rev'd 2d ed'n 1984).

[23]For a discussion of the validity of the sensual perceptions and their relationship to conceptual thought, see David Kelley, The Evidence of the Senses: A Realist Theory of Perception (1986). *See also* Leonard Peikoff, Objectivism: The Philosophy of Ayn Rand chapters 2 & 3 (1991); and Ayn Rand, Introduction to Objectivist Epistemology (expanded 2d ed'n 1990). An interesting discussion of the proper role of axiomatic concepts is found in Tibor R. Machan, *Evidence of Necessary Existence*, 1 Objectivity 31 (1992).

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,[24] rather than "unscientifically" developed in an uncoordinated fashion by decentralized judges; is "certain" and clear because the rules are written;[25] and is proclaimed by the legislator.[26] Civil law systems such as the Louisiana and French systems are also praised as being drafted "in the spirit of the Enlightenment,"[27] and as resting on an ideological commitment to democracy,[28] economic liberalism,[29] private property,[30] freedom of contract,[31] individualism,[32] natural law,[33] and justice.[34]

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[24]*See, e.g.*, Herman, *supra* note 2, at 11-16, also citing René Descartes, *Discourse on Method*, Descartes' Philosophical Writings 8 (1st ed. E. Anscombe & P. Geach trans. 1971) and P. Sagnac, La Législation civile de la Revolution Française (1789-1804) 385 (1898); 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 17, at 1594-95; Cueto-Rua, *supra* note ?, at 646, 652; Jean Louis Bergel, *Principal Features and Methods of Codification*, 1073, 1076, 1084 (also citing G. Cornu, Droit Civil no. 287 (2d ed. 1985)). *See also* Giovanni Sartori, Democratic Theory 231-37, 245-56 (1962) (discussing the political rationalism of the continental legal system); and Batiza, *Origins of Modern Codification of the Civil Law*, *supra* note 4, at 485-86 (discussing the rationalism of the Enlightenment).

[25]*See* Part IV.B, *infra*.

[26]*See* Part II.A, *supra*.

[27]*See, e.g.*, Herman, *supra* note 2, at 12.

[28]*See, 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 77-80 and accompanying text (discussing some deficiencies of democracy).

[29]*See, e.g., id.* at 12.

[30]*See, e.g., id.* at 15.

[31]*See, e.g., id.*

[32]*See, e.g.*, Cueto-Rua, *supra* note ?, at 652.

[33]*See, e.g.*, Alan Watson, The Making of the Civil Law 68 (1981); Cueto-Rua, *supra* note ?, at 652.

[34]*See, e.g.*, Cueto-Rua, *supra* note ?, at 677. I call these generally praiseworthy things, values, and conditions "virtues" for lack of a more generic description.

It is evident that civilians are very fond of civil codes and civil law systems, such as those of France and Louisiana, for to call something "rational" or individualistic is certainly a compliment. By negative implication, though, civilians must believe that the common law is not as rational as the civil law, and is thus inferior to civil law, despite professions of nonjudgmental tolerance to the contrary.[35] Professor Pascal frankly and bluntly gives us his opinion of "the Common Law's failure to respect human dignity, freedom, and equality in the same degree as the Civil Law,"[36] and he also refers to "the superior philosophical orientation of the civil law and its greater technical sufficiency."[37] It seems to me that, not only do civilians, by and large, view the civil law as the "rational" system, but they also view it as therefore superior to the common law.

However, although *nonlegislative* systematic codification is, ceteris paribus, generally desirable,[38] the main, but generally unappreciated, problem with the civil law is that it sets up the *legislator* as the codifier and general law maker. When legislators are given the power to codify, they are also given the power to overwhelm the civil code with particular legislation, to enact unjust, immoral laws, and laws favoring special interests. Further, the power to legislate implies the power to change the law from day to day, which destroys certainty. Although we could urge that legislators should not do these things, it is dangerously naive to think that bureaucrats and politicians will not use the power granted to them, for reason and history show us that they will. When legislation is supreme, the other values espoused by civilians—the systematic character of the law, certainty, individualism, economic liberalism, democracy, and justice—cannot, and do not, survive.

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[35]For example, Professor Symeonedes cautions against judging one system to be superior to the other: "there is probably no such thing as a better legal system in the abstract." Symeonides, *supra* note 2, at 179 (introductory comments to "Chapter V: Civil Law and Common Law"). *See also* Herman, *supra* note 2, at 24-25, concluding that "a system of codified law is best suited for preserving the reforms made after periods of revolution or for keeping pace with drastic social change (e.g., the French and Soviet Revolutions, the emergence of Japan from isolation, and the unification of Germany); by contrast, a case system is most appropriate in societies of relatively stable evolutionary growth and change, such as England after the twelfth century and Rome in the classical period."

As this article will make clear, I disagree with Symeonides's and Herman's comments in this regard, since I do believe the common law, as an approximation of an ideal, decentralized system of judge-found law, is objectively superior to—i.e., better than—the civil law. This is contrary to my initial opinion. After entering LSU's law school in 1988 and being immersed in civil law theory, I became enamored of the civil law's ostensible devotion to reason and individualism. I began to feel the tug of the temptation to view the civil law as superior to the common law. One day, I mentioned to Professor John Devlin my growing feeling of the superiority of the civil law over the common law, of the civil law as the system of "reason." Devlin, a common-law lawyer from New York, wisely suggested that I might want to read Holmes's *The Common Law* [Oliver Wendell Holmes, Jr., *The Common Law* (1881)] and think about the issue a little more deeply. I borrowed and read Devlin's copy of that classic work, and realized there was more to the common law than I had previously known, and set aside my simplistic opinion of the civil law's superiority. My interest in the question resurfaced years later when I read Leoni's *Freedom and the Law*, *supra* note 6.

[36]Pascal, *supra* note 21, at 179.

[37]*Id.* at 182.

[38]*See* Part V.B, *infra* (discussing the proper role of commentators and codifiers in a decentralized law-finding system).

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.

III. REASON, RATIONALISM, AND INDIVIDUAL RIGHTS

Although civilians frequently praise rationalism, reason, individualism, certainty of the law, and economic liberalism, these virtues are often used vaguely and are not clearly defined or justified. Thus, a clarification of these virtues will aid in determining whether they are fostered or hindered by the civil law. As argued in this Part III, a careful application of reason and rationalism itself is useful in justifying individualism and freedom, and in clearly demarcating the nature and extent of the freedoms and rights that individuals are entitled to. The nature of our individual rights, in turn, determine what features a legitimate legal system must have, and which features it must not have.

3. Libertarianism

This clarification of the nature of our rights establishes the principled, libertarian case for individual rights. Individual rights and economic freedoms, as enshrined in a system of laissez-faire capitalism, are indeed justified and compatible with reason and even with reason's more extreme variant, rationalism. These principles, so clarified, are examined in Part IV below, along with the alleged benefits of the civil law over the common law (e.g., its systematic character, its certainty, etc.), to inquire whether the civil law actually upholds the virtues it purports to foster, or whether the civil law is actually inimical to freedom, individualism, and reason.

In libertarian political theory, there is only one basic right of an individual, the right to not have violence *initiated* against him or her. This maxim is sometimes known as the "non-aggression axiom," since any action by individuals whatsoever is permitted under libertarianism, except coercion or aggression, which is defined as the *initiation* of physical force against others. Ayn Rand states it forcefully and beautifully: "Whatever may be open to disagreement, there is one act of evil that may not, the act that no man may commit against others and no man may sanction or forgive. So long as men desire to live together, no man may *initiate*—do you hear me? no man may *start*—the use of physical force against others."[39]

As the great libertarian economist and political theorist Murray N. Rothbard has pointed out,

> the basic axiom of libertarian political theory holds that every man is a self-owner, having absolute jurisdiction over his own body. In effect, this means that no one else

[39]Ayn Rand, "Galt's Speech," in For the New Intellectual 164 (p. 133, paperback ed'n) (1961), quoted in The Ayn Rand Lexicon, *supra* note 25, at 363.

may justly invade, or aggress against, another's person. It follows then that each person justly owns whatever previously unowned resources he appropriates or 'mixes his labor with.' From these twin axioms'self-ownership and 'homesteading''stem the justification for the entire system of property rights titles in a free market society.[40]

[40]Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 Cato J. 55, 60-61 (1982). James W. Child, who apparently is not a libertarian, states that there is an 'amazing congruence of virtually all libertarian thinkers as regards first principles.' James W. Child, *Can Libertarianism Sustain a Fraud Standard?*, Ethics, vol. 104, no. 4, July 1994, p. 722, at 725. These first principles are self-ownership and private ownership of property. Child notes 'two familiar second-order rights. The first is the right to defend against forceful attack and coercion by force or threats of force. The second right is to defend one's legitimately acquired property against seizures by force or threats of force in the same way.' *Id.* at 728.

Modern libertarian arguments persuasively justifying the principles of self-ownership and homesteading—that is, the individual rights to person and property—are legion.[41] Because civilians explicitly claim (albeit without substantive justification) that the civil law is the system not only of reason, but of rationalism, I will present the two most recent and rationalistic libertarian arguments of which I am aware. Civilians claim to be rationalists, so I intend to show just what a true, rigorous rationalist argument can establish. In Part III.B, I will summarize the pathbreaking "argumentation ethic" of Hans-Hermann Hoppe, an extremely rationalistic and persuasive defense of libertarian individual rights.[42] Part III.C summarizes my own "estoppel theory" defense of individual rights.[43]

4. Argumentation Ethics

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[41]For representative works in favor of or sympathetic to strictly limited government, see Ayn Rand, Capitalism: The Unknown Ideal (Signet 1967); *idem*, The Virtue of Selfishness: A New Concept of Egoism (Signet 1964); *idem*, Philosophy: Who Needs It (Signet 1982); Leonard Peikoff, *supra* note 28, esp. chapters 10 & 11; Ludwig von Mises, Liberalism: In the Classical Tradition (trans. Ralph Raico, 3d ed'n 1985); *idem*, *Human Action*, *supra* note 1; Frederic Bastiat, The Law (Foundation for Economic Education ed'n, Dean Russell trans. 1950) (1850);
Henry Hazlitt, Economics in One Lesson; Tibor R. Machan, Individuals and Their Rights (1989); Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985); *idem*, Simple Rules for a Complex World (1995); Roger A. Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 Ga. L. Rev. 1171 (1979); *idem*, A Theory of Rights: Toward Limited Government (Ph.D. Dissertation, U. Chicago, 1979); Friedrich A. Hayek, The Road to Serfdom (1944); *idem*, The Constitution of Liberty (1960); *idem*, Law, Legislation, and Liberty (3 vols. 1973, 1976, 1979); John Hospers, Libertarianism: A Political Philosophy for Tomorrow (1971); Robert Nozick, Anarchy, State, and Utopia (1974); Loren E. Lomasky, Persons, Rights, and the Moral Community (1987); Jan Narveson, The Libertarian Idea (1988); Charles Murray, In Pursuit: Of Happiness and Good Government (1988); Douglas B. Rasmussen & Douglas J. Den Uyl, Liberty and Nature: An Aristotelian Defense of Liberal Order (1991); Isabel Paterson, The God of the Machine (1993) (1943); Rose Wilder Lane, The Discovery of Freedom: Man's Struggle Against Authority (Laissez Faire Books Reprint Ed'n 1984) (1943); Henri Lepage, Tomorrow, Capitalism: The Economics of Economic Freedom (trans. Sheilagh C. Ogilvie 1982) (1978); Milton Friedman, Capitalism and Freedom (1962); Milton & Rose Friedman, Free to Choose: A Personal Statement (1980); David Bergland, Libertarianism in One Lesson (6th ed. 1993); Anthony de Jasay, Choice, Contract, Consent: A Restatement of Liberalism (1993).

For arguments in favor not only of limited government, but in favor of anarcho-capitalism, and explaining how such a free society could function, see the works cited in note 83, *infra*.

A good deal of libertarian fiction illustrating how limited government or anarcho-capitalism might work in practice has been also written. *See, e.g.*, Ayn Rand, Atlas Shrugged (1957); Robert A. Heinlein, The Moon is a Harsh Mistress (1966); J. Neil Schulman, Alongside Night (1979); and Henry Hazlitt, Time Will Run Back (University Press of America reprint ed'n 1986; originally published as *The Great Idea* in 1951 by Appleton-Century-Crofts; revised edition 1966, Arlington House). Popular libertarian or libertarian-influenced journals and magazines include *Reason* magazine, *Liberty* magazine, *Reason Papers*, *Review of Austrian Economics*, *Journal of Libertarian Studies*, *Journal of Legal Studies*, *Cato Journal*, *Journal of Law and Economics*, *Critical Review*, and *Harvard Journal of Law and Public Policy*. Many of the books cited in this footnote and in note 83, *infra*, are available from Laissez Faire Books, 1-800-326-0996.

[42]Hoppe's theory is presented in his two books A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (1989), and The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy (1993). The discussion below is drawn mainly from *The Economics and Ethics of Private Property*, 180-86 (hereinafter "Hoppe, *Economics and Ethics*"). Hoppe's argumentation ethic is also presented in *A Theory of Socialism and Capitalism*, Chapter 7, "The Ethical Justification of Capitalism and Why Socialism is Morally Indefensible." For a detailed review of *Economics and Ethics*, see N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 St. Mary's L. J. 1419 (1994).

[43]*See* N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, Reason Papers No. 17 (Fall 1992), p. 61.

Hoppe begins his argument by noting that all truths, including ethics and normative statements, must be able to be validated through the process of argumentation. That is, any truth claim (such as a claim that socialism is valid; or a claim that capitalism is valid) is and must be raised and decided upon in the course of an argumentation. This fact has been called "the a priori of communication and argumentation" because no one can dispute this truth (for no one can communicate and argue that he cannot communicate and argue), and because "it must be assumed that everyone knows what it means to claim something to be true (one cannot deny this statement without claiming its negation to be true)".[44]

Since argumentation is always necessarily involved in any normative justification, the normative theory asserted during argumentation cannot contradict any normative view that is already implied in the very process of argumentation itself. To take a simple example of a non-normative presupposition of argumentation: One cannot argue that one cannot argue, or that argumentation is impossible. (To be explicit: one physically *can* argue it, but one cannot argue it *and be correct.* Thus one cannot *correctly* argue that argumentation is impossible.) The possibility, and fact, of argumentation is of course presupposed by any participants in argumentation or discourse.

Hoppe demonstrates that the norms of self-ownership and homesteading of unowned property are presupposed as valid by anyone engaged in argumentation, and, therefore, no norm could be argued, or, therefore, be valid, that is inconsistent with these two concepts. Hoppe first points out in Kantian fashion that the nature of argumentation requires that all norm proposals be "universalizable," that is, "that only those norms can be justified that can be formulated as general principles which without exception are valid for everyone."[45] This is so because propositions made during argumentation claim universal acceptability. "[I]t is implied in argumentation that everyone who can understand an argument must in principle be able to convinced by it simply because of its argumentative force . . . ."[46] However, the universalization principle provides only a formal criterion that asserted norms must meet. Proposed norms that arbitrarily discriminate and specify different rules for different classes of people, such as racial discrimination, clearly do not pass the test. Other rules, however, such as "anyone who drinks alcohol will be punished," are universalizable, but are incompatible with other norms implied in argumentation.

To discover the other norms (namely, self-ownership) implied in argumentation, Hoppe calls attention to

> three interrelated facts. First, that argumentation is not only a cognitive but also a practical affair. Second, that argumentation, as a form of action, implies the use of the scarce resource of one's body. And third, that argumentation is a conflict-free way of interacting. Not in the sense that there is always agreement on the things said, but rather in the sense that as long as argumentation is in progress it is always possible to agree at least on the fact that there is disagreement about the validity of what has been said. And this is to say nothing else than that a mutual recognition of each person's exclusive control over his own body must be assumed to exist as long as

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[44]Hoppe, *Economic and Ethics, supra* note 47, at 180.

[45]*Id.* at 182.

[46]*Id.*

there is argumentation (note again, that it is impossible to deny this and claim this denial to be true without implicitly having to admit its truth).

> Hence, one would have to conclude that the norm implied in argumentation is that everybody has the right to exclusively control his own body as his instrument of action and cognition. It is only as long as there is at least an implicit recognition of each individual's property right in his or her own body that argumentation can take place. . . . [A]nyone who would try to justify any norm would already have to presuppose the property right in one's body as a valid norm, simply in order to say 'this is what I claim to be true and objective.' Any person who would try to dispute the property right in one's own body would become caught up in a contradiction.[47]

The self-ownership norm that any person implicitly recognizes whenever he engages in argumentation may be restated as a property right in one's own body: 'nobody has the right to uninvitedly aggress against the body of any other person and thus delimit or restrict anyone's control over his own body.'[48] The basic reason for this rule against coercion or aggression is that justifying *means* justifying without coercion; thus, any argumentation, in attempting to justify a proposition as true, presupposes that coercion must *not* be used to force either party to accept the other's views.

At this point the right to self-ownership is established. The right to self-ownership entails the right to not be murdered, raped, assaulted, battered, and the like.

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[47] *Id.* at 182-83 (footnote omitted).

[48] Hoppe, *Economics and Ethics, supra* note 47, at 183.

Besides the right of self-ownership, Hoppe shows that argumentation also presupposes the concomitant right to homestead private property, the second fundamental libertarian political axiom. Because people, in the real world, do not live on air and love alone, . . . [t]hey need a smaller or greater number of other things as well *simply to survive*and only he who survives can sustain an argumentationlet alone live a comfortable life.[49] Therefore, because participants in argumentation indisputably need to use and control the scarce resources in the world to survive, and because their scarcity makes conflict over their use possible, norms are needed to determine the proper owner of these goods so as to avoid conflict.[50] As noted above, argumentation is a *conflict-free* way of interacting, so that anyone engaging in argument cannot deny the importance of avoiding conflict over the use of scarce resources.

> It is the function of property rights to avoid such possible clashes over the use of scarce resources by assigning rights of exclusive ownership. Property is thus a normative concept: a concept designed to make a conflict-free interaction possible by stipulating mutually binding rules of conduct (norms) regarding scarce resources.[51]

Just as the right to self-ownership avoids conflicts over human bodies by recognizing the property right of each person in his own body, similar norms are also needed with respect to *all* scarce resources. However, since the non-aggression principlei.e., the property right of self-ownershiphas been established, any other property norm must also be logically compatible with the non-aggression principle. Indeed, the specifications of the non-aggression principle, conceived as a special property norm referring to a specific kind of good, must already contain those of a general theory of property.[52] In other words, my right to self-ownership of the scarce resource of my own body is a special case of the right to own scarce resources in general. [O]nes body is indeed the *prototype* of a scarce good for the use of which property rights, i.e., rights of exclusive ownership, somehow have to be established, in order to avoid clashes.[53] Thus, property rights in external

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[49]*Id.* at 184 (emphasis added).

[50]Similar wisdom was echoed long ago by Blackstone:

> But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving to get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. *But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them,* which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have aright to inhabit the one, and to wear the other.

2 William Blackstone, Commentaries on the Laws of England *4 (last emphasis added). *See also* Murray N. Rothbard, The Ethics of Liberty 46, 50 n.1 (1982).

[51]Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 47, at 8.

[52]Hoppe, *Economics and Ethics*, *supra* note 47, at 184.

[53]Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 47, at 9.

resources must be established, in some manner. Hoppe argues that such property rights must be compatible with primarily Lockean property acquisition concepts.

Under the Lockean homesteading principle, a person gains the right of exclusive control or ownership of unowned property by visibly appropriating, or mixing one's labor with, such property (provided the scarce resource is still in its natural, unowned state, that is, has not already been appropriated by someone else). Using an *argumentum a contrario*, Hoppe shows how this Lockean concept of homesteading unowned property is the only property norm that can be justified. First, if no one had a right to acquire and control any property outside his own body, we would all cease to exist. Thus, "our existence is due to the fact that we do not, indeed cannot accept a norm outlawing property in other scarce resources next to and in addition to that of one's physical body. Hence, the right to acquire such goods must be assumed to exist."[54] But there are only two fundamental alternatives for acquiring rights in unowned property: (1) by doing something with things with which no one else had ever done anything before, i.e. the mixing of labor or homesteading; or (2) simply by verbal declaration or decree.

Only the first alternative, that of homesteading, establishes an objective, intersubjectively ascertainable link between a particular person and a particular scarce resource, which is, again, necessary in order to avoid conflicts in the use of scarce resources. To avoid conflicts in the use of property, there must be objective facts that everyone can see and verify (i.e., intersubjectively ascertainable) that establish who has acquired ownership of the property. Only homesteading or mixing one's labor with unowned property provides such an objective stamp of ownership.

By contrast, owning things by mere decree cannot serve to avoid conflicts in ownership of resources, since any number of people could verbally claim ownership of the same property, in which case there would be no objective means of deciding which person claiming ownership is "the" owner. Further, the second alternative is incompatible with the already-established right to self-ownership, because owning things by mere decree would imply that it would be possible to simply declare another person's body to be one's own.

[54]Hoppe, *Economics and Ethics, supra* note 47, at 185.

> [T]o say that property is acquired not through action but through a declaration involves an open practical contradiction, because nobody could say and declare so unless his right of exclusive control over his body as his own instrument of saying anything was in fact already presupposed, in spite of what was actually said.[55]

Thus, Hoppe's argumentation ethics establishes the right to self-ownership and the right to homestead unowned property as unchallengeable axioms, which can be used to defend individual rights and to justify a system of laissez-faire capitalism.[56]

5. Estoppel

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[55] *Id.* at 186. The property theory sketched above is essentially Lockean. However, the infamous "Lockean proviso," which states that one has a right to homestead unowned property only when "enough and as good" is left for others, is not included herein as a qualification of the right to acquire unowned property, since this limitation is simply unjustifiable. *See* Hoppe, *Economics and Ethics*, *supra* note 47, at 246; John Locke, The Second Treatise on Civil Government p. 20, § 26 (Prometheus Books ed. 1986) (1690).

[56] Professor Rothbard has aptly described the significance of Hoppe's achievement:

> In a dazzling breakthrough for political philosophy in general and for libertarianism in particular, he has managed to transcend the famous is/ought, fact/value dichotomy that has plagued philosophy since the days of the scholastics . . . . Not only that: Hans Hoppe has managed to establish the case for anarcho-capitalist-Lockean rights in an unprecedentedly hard-core manner,

one that makes my own natural law/natural rights position seem almost wimpy in comparison.

Murray N. Rothbard, *Beyond Is and Ought*, Liberty, Nov. 1988, at 44. Rothbard's article was part of a symposium, *Hans-Hermann Hoppe's Argumentation Ethics: Breakthrough or Buncombe?* in the November, 1988 issue of Liberty, at 44, which discussed an earlier presentation of Hoppe's argument in that magazine, Hans-Hermann Hoppe, *The Ultimate Justification for the Private Property Ethic*, Liberty, Sept. 1988, at 20. Rothbard's own natural law/natural rights position is presented in his books For A New Liberty: The Libertarian Manifesto (reprint ed. 1985) and *The Ethics of Liberty*, *supra* note 55. For another promising defense of individual rights that is based on Alan Gewirth's "dialectically necessary method," and which is also similar in some ways to Hoppe's approach, see Pilon, *Ordering Rights Consistently* and Pilon, A Theory of Rights, *supra* note 46. Alan Gewirth's own theories, which Gewirth believes justify welfare-statism (with which Pilon disagrees), are presented in his book Reason and Morality (1978). A concise presentation of Gewirth's theories is found in his article *The Basis and Content of Human Rights*, 13 Ga. L. Rev. 1143 (1979). Frank Van Dun, *Economics and the Limits of Value-Free Science*, Reason Papers No. 11 (Spring 1986), p. 17, is an interesting article that bears some resemblance to the "dialogical" aspects of Hoppe's arguments.

There is yet another way to justify a libertarian version of individual rights, of rights as strictly negative rights against aggression. This method is based on the legal concept of estoppel,[57] and is related to Hoppe's argumentation ethics in that it, too, focuses on discourse. This argument and Hoppe's are both dialectical or dialogical because they zero in on the inherent logic of discourse. Both these arguments are rationalistic in that each establishes certain incontestable moral or normative axioms using dialogical reasoning, and deduces further principles from these unchallengeable axioms. I will present only a brief summary of the estoppel argument here.

As discussed in Part III.B, above, Hoppe demonstrates that any person who engages in argumentation or discourse must accept certain principles that are necessarily and implicitly acknowledged by any person engaged in the activity of argumentation. Hoppe then explains why any arguer presupposes the rights of self-ownership and homesteading. In my estoppel approach, rather than considering the activity of argumentation in general, the existence of rights is demonstrated by looking at the consistency of the arguments made by a (purported) rights violator at the moment when he is about to be punished for the purported rights violation.

Anyone engaged in argumentation, such as a criminal offering reasons why he should not be punished, is attempting to find the truth of the subject under discussion. Since blatant contradictions, such as claims that A and not-A are both true at the same time (or, e.g., an argument that one cannot argue), are *false*, contradictions or inconsistencies are ruled out of bounds in an argument since they simply cannot be true, and thus cannot help to establish truth.[58] In other words, anyone engaged in argumentation is estopped, or prevented, from asserting inconsistent or contradictory positions, since contradictions cannot be true.

This philosophical version of estoppel focusses on the heart of the traditional legal concept of estoppel, which requires a certain consistency between a party's current statements or propositions and his prior actions. The estoppel principle is merely a convenient way to apply the requirement of consistency to arguers. A person is estopped from making certain claims, statements, or arguments, if the claims urged are inconsistent or contradictory with each other or with the person's actions. To say a person is estopped from making certain claims means that the claims cannot even possibly be right, because they are contradictory. Thus, the claims should be disregarded; they should not be heard. Besides consistency, another requirement for norm propositions (such as, "you should not punish me") is that the norms must be universalizable, as discussed above.[59]

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[57] *See supra* note 48.

[58] On the impossibility of denying the law of contradiction, see IV Aristotle, *Metaphysics*, 1005b19-21 ("The same thing cannot at the same time both belong and not belong to the same object and in the same respect."); Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 47, at 232 n.23.

[59] *See supra* note 50 and accompanying text.

Now what is important about rights is that they are legitimately *enforceable*. They do no good, they serve no function, otherwise.[60] Clearly, one may enforce a purported right if the alleged rights-violator does not object to such enforcement. Thus, if an alleged rights-violator is unable to meaningfully object to his punishment, then this is enough to establish the existence of the rights claimed. And it is indeed true that if *A* initiates violence against *B*, *A* is estopped from complaining or objecting if *B* retaliates or punishes *A*. For *A* has admitted the validity of aggression (by aggressing), and it would be inconsistent for him to object to his own punishment, which is, after all, merely aggression.

Further, *A* cannot attempt to remove the inconsistency by particularizing the norms asserted. For instance, *A* might wish to argue: Aggression *by me* is proper, but aggression *against me* is improper. However, such a statement clearly fails the universalizability requirement and thus is not allowed in argumentation. Any norms must be fashioned in universalizable form, such as aggression is wrong or aggression is not wrong, since universalizability is an undeniable presupposition of argumentation. Because *A* has already chosen his position that aggression is not wrong when he aggressed against *B*, it would be inconsistent of *A* to now assert that aggression is wrong. Thus, he is estopped from doing so and has no legitimate way to object to his punishment, thereby establishing that *B*s rights were, in fact, violated.[61] Clearly, then, an aggressors rights are not violated whenever he is (proportionately) punished for, or prevented from, initiating violence against other individuals. In this manner the traditional rights against murder, rape, assault, and battery can be established.

By the same token, however, laws that attempt to enforce positive rights (such as the right to food or to a job) or to prohibit nonaggressive behavior (such as speech or other forms of expression, prostitution, the use of drugs, the failure to pay taxes (i.e., the retention of ones own property), or the offer to pay someone less than minimum wage) are not legitimate. For here the state, in enforcing such laws against nonaggressors, is itself an aggressor. If the imprisoned, nonaggressive criminal asserts his right to be freed and his concomitant right to use force against the aggressor-state to escape, the state cannot deny this asserted right nor the legitimacy of the prisoners (proposed) use of force against the state, since the state, by being an aggressor, is estopped from denying the legitimacy of the use of force. Since the prisoner thus has a *right* to be freed (for the state cannot deny this), the state has no contrary right to imprison him. By this same logic, even a true criminal, who has committed aggression, has a right to not be *disproportionately* punished. For example, someone who steals an ink pen may not, in typical circumstances, be executed as punishment.[62]

The estoppel theory, like Hoppes argumentation ethics, establishes that any form of coercion or aggression, as the initiation of violence, is completely illegitimate. Once again, the validity of the

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[60]As John Locke said, For the law of Nature would, as all other laws that concern men in this world, be in vain if there were nobody that in the state of Nature had a power to execute that law, and thereby preserve the innocent and restrain offenders . . . . Locke, *supra* note 60, at 7.

[61]For further details of the estoppel argument, for instance why an aggressor is estopped from changing his mind in order to avoid inconsistencies, see Kinsella, *supra* note 48, at 65-66.

[62]*See* Kinsella, *supra* note 48, at 69 (discussing proportional punishment). I will discuss the derivation of (non-body-related) property rights in the framework of the estoppel theory in a future article.

civilians cherished individual and economic liberalism is seen to be grounded in a rationalistic argument.

6. True Rationalism and Rationalistic Virtues

Ultimately only truth matters, not rationalism. We should never care whether a given theory is rationalistic without regard to whether it is true or not; rather, we should care that it is rationalistic only because this is indicative of its truth. Luckily, though, rationalism is a good tool for discovering truth, when properly applied, since it validates several invulnerable axioms which may be used to deduce further useful normative truths.[63] As shown above, the right to self-ownership and the right to homestead unowned property may serve as unchallengeable axioms, precisely because they are undeniable. Many deductions from these axioms may be made, for example with respect to what sorts of political or legal systems are valid.

But how is the civil law rationalistic? Merely reciting words like liberty, individualism, economic liberalism, and democracy is not enough. Deduction is a valid and reasonable way of discovering truth, if one correctly deduces from true premises. Professor Herman recognizes the importance of the premises or basic axioms of any deductive system: The civilian, *unless he assumed that the code stated generally valid standards,* could not deduce a result by manipulating its provisions.[64] Precisely. But what are the bases of the civil law? The premises? Where are they defined, where are they justified? And what deductions are made therefrom? I am not aware of any serious attempt at such a thing, so I am not really clear on exactly how the civil law is supposed to be rationalistic, other than its historical link to a European period that is associated with the Enlightenment version of rationalism. But such a weak historical link can of course not hope to justify the civil law. To do this we must identify well-grounded normative principles related to law. Then, we could ask, does the civil law embody and recognize these axioms? Is it based on sound deductions from these axioms? Then, and only then, the civil law could be said to be rationalistic, and, what is more important, to be true or justified.

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[63]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); Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 47, at 1-2.

[64]Herman, *supra* note 2, at 24 (emphasis added).

So let us now ask, what are the real virtues that any legal system must support, and certainly not trample on, in order to qualify as a legitimate legal system? As discussed above,[65] the civil law is praised on the grounds that it is "certain" and clear (because the rules are written), and because it allegedly rests on an ideological commitment to democracy, economic liberalism, private property, freedom of contract, individualism, natural law, and justice. Clearly, if these things are indeed virtues, and if the civil law is in actuality antithetical to these concepts, the very foundation for the civil law's legitimacy is hollow and false.

These concepts are often thrown, haphazardly and loosely, into a gumbo of positive adjectives that describe the civil law. The terms are not rigorously defined or defended, and often contradict one another—for example, individualism and individual rights, on the one hand, and democracy, on the other, are often, if not always, incompatible, as will be discussed below.[66] Thus, it is hard to tell whether the civil law measures up to the standards ascribed to it, because these standards are very loosely defined. In this section, therefore, drawing on the conclusions established above,[67] I attempt to put some meat on the bones of the civil law's alleged virtues, so that we know which standards the civil law must live up to, which virtues it must uphold.

As argued above, individuals do indeed have an absolute, inalienable right to self-ownership, and also have the unqualified right to homestead unowned property. As can be deduced from these axioms, the only just society is one in which individual rights are respected, i.e., the libertarian conception of the minimalist, night-watchman state, the sole function of which is to protect individual rights.[68] In such a society, which is also called capitalist or laissez faire, government's scope is extremely narrow, and is limited to only a few functions, such as police, army, and courts, which are in place solely to protect individual rights. Shocking as it might seem to those with mainstream points of view[69]—although classical liberals such as Jefferson, Paine and Locke would, perhaps, not have been quite as shocked—government, according to libertarians, should not and does not have a right to enact laws: establishing a minimum wage; outlawing obscenity or pornography or sexual preference or practices; censoring speech; prohibiting "monopolies"; outlawing racial or any other sort of discrimination on one's own property, whether home or business; outlawing prostitution; taxing citizens to provide welfare payments to others; outlawing drugs; outlawing guns; and the like.[70]

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[65] *See supra* notes 29-39 and accompanying text.

[66] *See infra* notes 77-80 and accompanying text.

[67] *See* Parts III.A, III.B, and III.C, *supra*.

[68] A minority of libertarians are anarcho-capitalists, as discussed in Part IV.A, *infra*.

[69] Since most people are educated at least some portion of their lives in public or publicly-funded schools, or are taught by teachers themselves educated in such schools, it is not surprising that many people are influenced by the pro-government biases of their teachers. Nor is not surprising that teachers in public schools are biased in favor of the establishment, in favor of government, since it is only natural to not bite the hand that feeds you. This is just one reason why public education is a bad idea.

[70] *See, e.g.*, Rothbard, *For A New Liberty*, *supra* note 61; Bergland, *supra* note 46; and Walter Block, Defending the Undefendable: The Pimp, Prostitute, Scab, Slumlord, Libeler, Moneylender, and Other Scapegoats in the Rogue's Gallery of American Society (Fox & Wilkes 1991).

None of these types of laws or government actions is justifiable, because none of the individual actions banned or regulated by such laws involve aggression. Thus, since government's sole function is to protect individual rights, and since individual rights can be violated only by coercion, the government has no right to prohibit any of these activities. To the contrary, such laws are themselves blatant invasions of individual rights, because the state itself becomes an aggressor when it enforces such laws against innocent individuals. Libertarians recognize not only personal liberties such as the right to freedom of speech, but also, as Robert Nozick nicely put it, the validity of "capitalist acts between consenting adults."[71] We see no dichotomy between "civil" or "personal" rights, on the one hand, and "economic" rights, on the other. One cannot have true freedom of speech if printing presses cannot be privately owned; one cannot have freedom of assembly or religion if homes or meeting halls or churches cannot be privately owned. Conversely, a government that censors free expression will not guarantee property rights for very long, either.

Given this conception of individual rights, the virtues typically cited in favor of the civil law can be better interpreted. The virtues of economic liberalism, private property, freedom of contract, individualism, natural law, and justice, are really only secondary derivations, or corollaries, 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.

Thus it is really *individual rights* that the civil law must be compatible with in order to be justified, since its alleged virtues are merely manifestations of our natural, individual rights. Rationalism justifies individual rights; so any legal system must respect and protect individual rights if it is to be compatible with rationalism. Any just 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.

[71] Nozick, *supra* note 46, at 163.

Almost 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.[72] Because such majoritarianism is really nothing more than mob rule, the United States were established as a Republic, *not* as a □democracy,□ as the United States are so often mistakenly labelled today.[73]

In a republic, certain types of laws and government actions are prohibited, even if a majority wishes otherwise. The very purpose of the Bill of Rights itself is exactly to *oppose* majoritarianism, i.e. democracy□a fact that is often forgotten in today□s democracy-worshipping society. Although certain decisions that government must make may be decided by consulting a majority, in a constitutional republic there are simply certain areas that are not up for majority vote. Libertarians are not any more anti-democratic than is anyone who supports the existence of the Bill of Rights. We simply maintain that the sphere of activities immune from majoritarianism must be larger than the average person would maintain, and that the domain of democracy must be radically shrunk.

The potential for evil done in the name of democracy, in complete accord with its sole principle of majoritarianism, is almost unimaginable. To take a stark example:

> The Nazi party was elected to office by the freely cast ballots of millions of German voters . . . . In the national election of July 1932, the Nazis obtained 37 percent of the vote and a plurality of seats in the Reichstag. On January 30, 1933, in full accordance with the country□s legal and constitutional principles, Hitler was appointed Chancellor. Five weeks later, in the last (and semi-free) election of the pre-totalitarian period, the Nazis obtained 17 million votes, 44 percent of the total.
>
> The voters were aware of the Nazi ideology. Nazi literature, including statements of the Nazi plans for the future, papered the country during the last years of the Weimar Republic. *Mein Kampf* alone sold more than 200,000 copies between 1925 and 1932. The essence of the political system which Hitler intended to establish in Germany was clear.[74]

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[72]*See* Part IV.C.3, *infra*.

[73]Although it is becoming clearer each decade that a republic will almost necessarily deteriorate into a democracy. *See* Hans-Hermann Hoppe, *Time Preference, Government, and the Process of De-Civilization□From Monarchy to Democracy*, 5 J. des Economistes et des Etudes Humaines 319 (1994).

[74]Leonard Peikoff, The Ominous Parallels: The End of Freedom in America 5-6 (1982).

Can it be made any clearer that, like a gun, democracy is just a tool that can be used either to promote, or to destroy, human life? The ballot and the bullet are both means of using force against your neighbors.[75]

The values of justice, natural law, individual rights, and certainty are thus objectively valid standards, and they are also recognized by most civilians. I argue below that centralized legal systems like the civil law are antithetical to these virtues.

[75]This wonderful alliteration comes from Massachusetts lawyer Lysander Spooner, the 19th century anarchist and abolitionist: "the ballot . . . is a mere substitute for a bullet". Lysander Spooner, *No Treason No. VI: The Constitution of No Authority* at 15, *in* No Treason: The Constitution of No Authority and A Letter to Thomas F. Bayard (Ralph Myles Publisher ed. 1973) (1870); also reprinted in The Lysander Spooner Reader 71 (1992). A 1936 movie also has the title, "Bullets or Ballots."

IV. LAW, LEGISLATION, AND LIBERTY[76]

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. In Part IV.A I explain that the view of individual rights set forth above entails an anarcho-capitalist system, under which government may not exist. If government may not exist, the legislative support for the civil law crumbles. In subsequent sections, taking a less radical tack, I examine whether the civil law upholds the very virtues it claims to embody, especially in light of the refinements and clarifications of these principles made above.

7. Anarcho-Capitalism

In the opinion of a minority of libertarians, a principled and consistent application of the libertarian principles discussed above[77] invalidates not only most of today's (legislated) laws, but also government itself, since government is a coercive institution. Both Hoppe's argumentation ethics and the estoppel theory sketched above establish that any form of coercion or aggression is completely illegitimate since it comprises the initiation of violence. Government, by its bare existence, rests on coercion and necessarily initiates violence against innocent individuals. For example, taxation, without which no government can exist, is a form of theft in which the government forcibly expropriates individuals' property. Even if government were limited to its 'night-watchman' functions (police, army, and courts), it has a monopoly over these functions; i.e., it will not allow a competing sovereign government to operate within 'its' territory, and it forces individuals within its territory to be its subjects. But the enforcement of this monopoly necessarily involves the initiation of force against individuals. Government cannot exist without coercion, and if coercion is illegitimate, then so is government.[78]

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[76]The title of Part is drawn directly from Friedrich A. Hayek's *Law, Legislation and Liberty*, *supra* note 46.

[77]*See* Part III.D, *supra*.

[78]Anarcho-capitalists believe that order and harmony are possible without government; indeed, that true harmony is thwarted by the existence of government. This view may seem outlandish in today's government-steeped society, but the fact that a natural order arises without government assistance has long been recognized. Thomas Paine, for example, writes:

> Great part of that order which reigns among mankind is not the effect of Government. It has its origin in the principles of society and the natural constitution of man. It existed prior to Government, and would exist if the formality of Government was abolished. The mutual dependence and reciprocal interest which man has upon man, and all the parts of a civilised community upon each other, create that great chain of connection which holds it together. The landholder, the farmer, the manufacturer, the merchant, the tradesman, and every occupation, prospers by the aid which each receives from the other, and from the whole. Common interest regulates their concerns, and forms their law; and the laws which common usage ordains, have a greater influence than the laws of Government. In fine, society performs for itself almost everything which is ascribed to Government.

Thomas Paine, The Rights of Man (Part II, Chapter 1, 'Of Society and Civilisation'), in Common Sense, The Rights of Man, and Other Essential Writings of Thomas Paine 228 (Meridian 1984) (1792).

For detailed discussion of the possibility of ordered anarchy, see, e.g., Bruce L. Benson, The Enterprise of Law: Justice Without the State (1990); *idem*, *The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law, Government Law, or Evolving Self-Interest*, 6 Rev. Austrian Econ. 43 (1993); David Friedman, The Machinery of Freedom: Guide to A Radical Capitalism (2d ed. 1989); Morris and Linda Tannehill, The Market for Liberty (Laissez Faire Books Reprint ed. 1984); Rothbard, *For A New Liberty*, *supra* note 61, esp. ch. 12; *idem*, *The Ethics of Liberty*, *supra* note 55; George H. Smith, *Justice Entrepreneurship in a Free Market, in* Atheism, Ayn Rand, and Other Heresies (1991); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 Rev. Austrian Econ. 88 (1990); Spooner, *No Treason: The Constitution of No Authority*, *supra* note 80; James J. Martin, Men Against the State: The Expositors of Individualist Anarchism in America, 1827-1908 (1970); Terry Anderson & P.J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. Libertarian Stud. 9 (1979); George Woodcock, Anarchism: A History of Libertarian Ideas and Movements (1962). For arguments sympathetic to limited government generally, and for libertarian or anarcho-capitalist fiction, see the works cited in note 46, *supra*.

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. But if legislation is abolished, then so is the civil law, because legislation is the fountainhead of the civil law. There is simply no room for government and legislation, and hence no room for the civil law, in the moral universe. This does not mean, however, that there would be no law if there were no government. Certainly law can develop, and has developed, in a decentralized court system, whether in a government-based common-law system, or in a private system. As Rothbard explains,

> it is perfectly possible, in theory and historically,[79] to have efficient and courteous police, competent and learned judges, and a body of systematic and socially accepted lawand none of these things being furnished by a coercive government.[80]

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[79] *See* Rothbard, *For A New Liberty*, *supra* note 61, at 231-33, discussing the largely successful, anarchic system that lasted for roughly 1000 years in ancient Celtic Ireland. *See also* Benson, *supra* note 83, discussing historical examples and theoretical bases for privately-produced justice.

[80] *Id.* at 234.

It is interesting to note Professor Vernon Palmer's explanation for why the legislative comments to new codal provisions cannot prevail over prior code articles. "At some point, the question needs to be: How high can the comments be raised by their own bootstraps?"[81] Yet an anarcho-capitalist would ask: How high can statutes *themselves* be raised by their own bootstraps? In other words, why is legislation itself valid? Why is the verbal decree of a petty bureaucrat somehow relevant to what true Law is? True Law is there to be discovered, and the best mechanism to accomplish this is a decentralized law-finding system, not through the arbitrary whims and decrees of politicians.

Legislation, to restate, by its very existence, initiates force against innocent individuals, and is thus immoral. Since the civil law encourages and validates legislation, it, too, stands as an affront to basic human liberties each moment that it survives, each moment that the will of the codifiers and legislators is forced upon the ruled masses. I believe that this critique of the civil law is fundamentally correct, and that the civil law is immoral and unjustifiable on these grounds alone. However, because this line of argument is admittedly radical and extreme—and many people are, unfortunately, reluctant to accept "radical" conclusions, even if they are correct—I will devote the remainder of this Part to more mainstream criticisms of the civil law.

8. Certainty

1. Certainty and Legislation

As discussed above,[82] 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 . . . ."[83] 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, again 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."[84] Thus, a direct implication of rationalism is that the law should be certain.

This much should be uncontroversial, for certainty is one of the purported hallmarks of the civil law. In the words of Professor Palmer,

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[81]Palmer, *supra* note 5, at 258.

[82]*See* Part III.D, *supra*.

[83]Leoni, *supra* note 6, at 61.

[84]*Id.* at 95.

> 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*.[85]

Indeed, "the essential objective of codification[is] to render the law accessible to citizens by making it clear. . . . [T]his objective demands that the Code have certain characteristics—completeness, an optimal level of generality, a logical arrangement, and a grounding in experience."[86]

Professor Herman emphasizes the necessity for predictability, clarity, and certainty in the law:

> For a vast number of daily human affairs, a civil code proclaims general principles as fundamental guideposts. Properly understood, these guideposts should have high predictive value in both litigated and unlitigated matters. . . . Lawyers and clients who take their bearings by the legislation, if it is sound and artfully drafted, should be equipped wisely to navigate their course of conduct. Civilians presuppose as a fundamental tenet that the fountainhead of stability is their legislation.[87]

Yet, as Leoni points out, there is much more certainty in a decentralized legal system, than in a legislative system such as the civil law. 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,

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[85]Vernon Palmer, *Celebrating the Québec Codification Achievement: A Louisiana Perspective*, 38 Loy. L. Rev. 311, 315 (1992) (emphasis added). *See also* H.L.A. Hart, The Concept of Law 122, 198 (1961) (discussing the relative certainties of legislated and precedential rules).

[86]Herman & Hoskins, *supra* note 29, at 1001-02 (footnotes omitted). "What remains . . . the permanent basis for a Code, is the principle which was also, historically, its first justification: *The Law Should be Clear*, and stated in written form so that, as much as possible, every citizen would know what are his rights and duties. *Only by this clarity may litigation be decreased, injustices avoided, and freedoms preserved.*" Tunc, *The Grand Outlines of the Code Napoleon*, 29 Tul. L. Rev. 431, 434 (1955), *quoted in* Herman & Hoskins, *supra*, at 1001 n.53 (citations omitted) (emphasis added by Herman & Hoskins). "For Frenchmen at the dawn of the nineteenth century, the first goal of civil codification was to render the law accessible by making it clear." Herman, *supra* note 2, at 11.

[87]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). *See also* Leoni, *supra* note 6, at 73, 142-43 (a desire for certainty in the law, in the sense of verbal precision, was one of the chief reasons for the continental codification efforts).

> 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.[88]

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.[89]

We may have, then, either rule by legislators, or the rule of law, but not both.[90] In the words of the Italian scholar Giovanni Sartori, "Mass fabrication of laws ends by jeopardizing the other fundamental requisite of law—certainty."[91]

2. *Decentralized Law-Finding Systems*

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

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[88]Leoni, *supra* note 6, at 75.

[89]*Id.* at 10.

[90]Giovanni Sartori, Liberty and Law, *supra* note 20, at 15. 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.

[91]*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. Poll'y 661, 672-73, 681-82 (1988); Leonard P. Liggio & Tom G. Palmer, Freedom and the Law: *A Comment on Professor Aranson's Article*, 11 Harv. J. Law & Publ. Poll'y 713 (1988).

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 are legislators. 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."[92] 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.[93]

Regarding this second point, however, let me point out that this is true only for the plaintiff, in systems where a verdict may be enforced against a defendant regardless of his consent to the 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.[94] 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.[95] 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.

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[92]Leoni, *supra* note 6, at 22. *See also* Aranson, *supra* note 96, at 669-671 and Rothbard, *For A New Liberty*, *supra* note 61, at 229 (discussing Leoni's views with respect to these issues).

[93]As 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 83, at 283 (endnote omitted).

[94]*See* Benson, *supra* note 83, at 33 *et passim*; Tannehills, *supra* note 83, at 66 *et seq*; Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law*, 3 Const. Political Econ. 1, 9 (1992).

[95]*See* Benson, *supra* note 83, at 17 and 364.

But a court's essential job is to dispense justice in accord with natural law, and its primary duty is thus 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 binding on future courts.[96] 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 could be overruled if "contrary to reason" . . . ."[97] 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 . . . .[98]

In this sense the civilian concept of *jurisprudence constante* is more likely to be adhered to by courts than *stare decisis*.[99] 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.[100] As mentioned above, this will tend to limit the judge's discretion to "make" law as opposed to discovering it.

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 *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 as legislation does. This is because common-law courts are government courts, and thus have extra-market powers, such as the power to subpoena, the power of compulsory jurisdiction over defendants, and the power of judicial review. "[I]t cannot be denied that the lawyers' law or the judiciary law may tend to acquire the characteristics of legislation, including the undesirable ones, whenever jurists or judges are entitled to decide ultimately on a case."[101]

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[96]Gordon Tullock, *Courts as Legislators*, *in* Liberty and the Rule of Law (Robert L. Cunningham ed. 1979) (Ch. 5, p. 132 at 142).

[97]Richard A. Posner, *Blackstone and Bentham*, 19 J. Law & Econ. 569, 584 (1976) (citing 1 Blackstone, *supra* note 55 " 83, at *70).

[98]1 Blackstone, *supra* note 55 " 83, at *69, also quoted in Posner, *supra* note 102, at 582.

[99]*See supra* note 11 and accompanying text (discussing *stare decisis* and *jurisprudence constante*).

[100]*See* Rothbard, *For a New Liberty*, *supra* note 61, at 228.

[101]Leoni, *supra* note 6, at 24. *See also* Aranson, *supra* note 96, at 673-84; Benson, *supra* note 83, at 285; Benson,

supra note 99, at 12.

Supreme courts, for example, may engage in what is really disguised legislation. The United States Supreme Court does this all the time.[102] 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.[103]

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. Therefore, 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."[104]

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

> [l]aw 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.*[105]

3. *Civil Codes*

a. *The "Special" Status of a Civil Code*

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[102]*See, e.g.*, Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990); Henry Mark Holzer, Sweet Land of Liberty?: The Supreme Court and Individual Rights (1983); Bernard H. Siegen, Economic Liberties and the Constitution (1980); and Economic Liberties and the Judiciary (James A. Dorn & Henry G. Manne, eds. 1987).

[103]Leoni, *supra* note 6, at 181.

[104]*Id.* at 24.

[105]Barry, *The Tradition of Spontaneous Order*, 5 Lit. of Liberty 7, 44 (1982) (emphasis added), quoted in Aranson, *supra* note 96, at 723, n.40.

Civilians may counter, however, 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. Civilians frequently note the allegedly special character of a civil code, as compared to mere legislation. Bergel states that

> a codification 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 legislation. . . . [C]odification is to be contrasted with simple legislation tailored to the circumstances.[106]

Professor Crabb writes:

> While there are no inhibitions against making changes in the code as they may seem to be warranted, it is expected that the legislator should take particular care in doing so, in keeping with the seriousness of the original idea of a code and maintaining its internal consistency and cohesion and its rapport with the law and legislation generally. Thus, the distinction between codes and statutes generally is a matter of attitude which expectably accords greater prestige and stability to legislation specially invested with the dignified title of "code."[107]

Professor Palmer explains that 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.[108]

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.

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[106]Bergel, *supra* note 29, at 1079.

[107]Crabb, *supra* note 17, at 8.

[108]Palmer, *supra* note 5, at 235.

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."[109]

b. Diluting Effect of Special Statutes

What is worse, even if the civil code itself were to be immutably etched in stone, it would tend to be swamped by subsequent special statutes. Even if the articles of the civil code concerning delictual liability never change at all, no one can simply glance at the code to determine what the law is. First, he must research whether other statutes address this issue. These statutes certainly can, and do, change often.

Civilians 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.*[110]

The inexorable production of special legislation thus dilutes any stabilizing effect of a civil code and makes the code less relevant. Palmer nicely summarizes the current state of Louisiana's statutory law:

> The growth of [special] laws has been phenomenal. In 1825, the amount of special legislation lying outside of Louisiana's Civil Code was minuscule. The Code truly began as the epicenter of the legal system. By 1852, the entire Revised Statutes of the State could still be encapsulated within a single book consisting of 598 pages. By 1870, that book was still only 775 pages in length. Today, the Revised Statutes are a fifty plus volume set. The so-called Civil Code ancillaries, a set of select statutes (which by no means exhausts the special legislation connected to the Civil Code) far exceeds the length of the Civil Code itself.[111]

Given this unwieldy hodge-podge of arcane, special-interest statutes, is it any wonder that uncertainty—both in what the law is today, and in what it might be tomorrow—is engendered? Yet we

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[109]Cueto-Rua, *supra* note 5, at 158.

[110]Palmer, *supra* note 90, at 316 (emphasis added).

[111]Palmer, *supra* note 90, at 317. Along these lines, Bruno Leoni wrote as far back as 1961, "While in the Anglo-Saxon countries common law and ordinary courts of judicature are constantly losing ground to statutory law and administrative authorities, in the Continental countries civil law is undergoing a parallel process of submersion as a result of the thousands of laws that fill the statute books each year. Only sixty years after the introduction of the German Civil Code and a little more than a century and a half after the introduction of the Code Napoléon the very idea that the law might not be identical with legislation seems odd both to students of law and to laymen." Leoni, *supra* note 6, at 6. *See also* Leoni, *supra*, at 143.

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,[112] 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.[113]

When legislation becomes supreme and statutes are fruitful and multiply, our very conception of what the law is changes. Unlike in 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."[114]

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."[115] Such alternatives impoverish us all by imposing unnecessary costs on production and exchange.

b. Time Preference and the Structure of Production

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[112]*See supra* note 89 and accompanying text.

[113]Leoni, *supra* note 6, at 18.

[114]Bertrand de Jouvenel, Sovereignty: An Inquiry into the Political Good 189 (1957). *See also* Leoni, *supra* note 6, at 145-46.

[115]Aranson, *supra* note 96, at 681-82 (footnote omitted).

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.[116] 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 more indirect (i.e., more roundabout, lengthier) production processes, which yield more and/or better goods for consumption or for further production.[117] 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 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 uncertainty itself causes an increase in time preference rates. With the very possibility (and thus probability) 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,

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[116]Hoppe, *supra* note 78, at 319-21. *See also* Mises, *Human Action*, *supra* note 1, at chapters XVIII, XIX; Murray N. Rothbard, Man, Economy, and State: A Treatise on Economic Principles (1962) (2 vols.).

[117]Hoppe, *supra* note 78, at 320-21.

> [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□).[118]

Leoni seems to have 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.□[119]

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

c. Time Preference and Crime

[118] *Id.* at 340.

[119] Leoni, *supra* note 6, at 80.

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.[120] 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 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.[121] 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 of the civil law 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,[122] and thus tends to impoverish us all.

9. 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 have a proper substance—i.e., a substance consistent with the alleged virtues of the civil law, such as justice, individualism, and economic liberalism. For the same reason that central economic planning

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[120]Hoppe, *supra* note 78, 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 (1974); and *idem*, *Present-Orientedness and Crime*, in Assessing the Criminal, Restitution, Retribution, and the Legal Process (R.E. Barnett & J. Hagel, eds. 1977).

[121]Regarding 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.* at n.31, Hoppe cites R.D. McGrath, Gunfighters, Highwaymen, and Vigilantes: Violence on the Frontier (1984), esp. chapter 13, and *idem*, *Treat Them To a Good Dose of Lead*, Chronicles, January 1994, pp. 17-18.

[122]Hans-Hermann Hoppe, The Economics and Sociology of Taxation, in Hoppe, *Economics and Ethics*, *supra* note 47, at 34.

is impossible, centrally-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

In these heady days of the post-cold war world, it is becoming clearer day by day 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 the great economist, Ludwig von Mises. Mises was, without exaggeration, one of the most impressive and significant minds of the 20th century. The proof of this assessment lies in his monumental *magnum opus, Human Action: A Treatise on Economics*,[123] which contains a stunning, integrated presentation of his theories. 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,[124] and I will not re-argue the obvious here.

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 and the civil law.

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[123] *Supra* note 1.

[124] *See* Gertrude E. Schroeder, *The Dismal Fate of Soviet-Type Economies: Mises Was Right*, Cato Journal 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. *See also* Maureen Johnson (AP), *Overhaul promised for Labor*, The Philadelphia Inquirer, Thursday, Oct. 6, 1994, p. A10, which reports that the new leader of Britain's socialist Labor party, Tony Blair, plans (as of October 1994) to overhaul his Party's principles. The article reports that "Blair also signaled that he will drop the left's most cherished maxim: a party clause advocating 'common ownership of the means of production.'" *See also Blair's October revolution*, The Economist, October 8, 1994, p. 16 (reporting Blair's and other Labour Party reformers' plans to get rid of this clause).

In 1920 Mises published his devastating critique of socialism, "Economic Calculation in the Socialist Commonwealth."[125] Mises showed that, besides the incentive problem of socialism (e.g., "Who will take out the garbage?")[126] the central planner cannot know what products or how much of them to order to be produced, without the 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."[127] 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.

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[125]Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 Rev. Austrian Econ. 51 (1991) [hereinafter, Rothbard, *The End of Socialism*]. For further illuminating discussion of Mises and the economic calculation debate, see Murray N. Rothbard, 2 *Man, Economy, and State*, *supra* note 121, at 548 *et seq.*; *idem*, Ludwig von Mises: Scholar, Creator, Hero Ch. 5 (Ludwig von Mises Institute 1988); Leoni, *supra* note 6, at 19, 89; Peter H. Aranson, *The Common Law as Central Economic Planning*, 3 Constitutional Political Economy 289, 297-99 (1992); Richard M. Ebeling, *Economic Calculation under Socialism: Ludwig von Mises and His Predecessors*, in The Meaning of Ludwig von Mises: Contributions in Economics, Sociology, Epistemology, and Political Philosophy at 56 (Jeffrey M. Herbener, ed. 1993); Joseph T. Salerno, *Ludwig von Mises as Social Rationalist*, in Herbener, ed., *supra*, at pp. 223-40; Hoppe, *A Theory of Socialism and Capitalism*, *supra* note 47, at 26-28, chapters 9-10; Alexander H. Shand, The Capitalist Alternative: An Introduction to Neo-Austrian Economics 193-96 (1984); Israel M. Kirzner, *The Economic Calculation Debate: Lessons for Austrians*, 2 Rev. Austrian Econ. 1 (1988); Don Lavoie, Rivalry and Central Planning: The Socialist Calculation Debate Reconsidered (1985).

Mises's original 1920 essay, *Economic Calculation in the Socialist Commonwealth*, in Collectivist Economic Planning (F.A. von Hayek, ed. 1935), reprinted in 1990 as a monograph by the Ludwig von Mises Institute (trans. S. Adler), was originally published in German as "Die Wirtschaftsrechnung im sozialistischen Gemeinwesen." Mises published further elaborations of his arguments in his treatise Socialism: An Economic and Sociological Analysis pp. 8, 95-130 (Liberty Fund 3d rev'd ed., trans. J. Kahane 1981); and in *Human Action, supra* note 1, at 200-31, 695-715. *See also* Ludwig von Mises, *Liberalism, supra* note 46, at 70-75.

[126]Rothbard, *The End of Socialism*, *supra* note 130, at 51.

[127]Mises, *Human Action, supra* note 1, at 259.

> 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).[128]

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. 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.[129] To the extent true socialism was able to be imposed on the populace, economic calculation thereunder was impossible and the people suffered accordingly.

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[128]Rothbard, *The End of Socialism*, *supra* note 130, at 52-53.

[129]*Id.* at 73-74. *See also* Mises, *Human Action*, *supra* note 1, at 702 (discussing the use of western price systems by socialist governments).

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."[130] "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."[131]

2. *Legislation as Central Planning*

Bruno Leoni argued 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 . . . ."[132] According to Leoni,

> 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 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.[133]

What does this mean? Leone 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. Professor Herman says that

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[130]Mises, *supra* note 130, at 113 (p. 131 of the 1936 J. Kahane translation).

[131]Mises, *Human Action*, *supra* note 1, at 700. *See also* Mises, *Liberalism*, *supra* note 46, at 75, where Mises states:

> If we were to renounce monetary calculation, every economic computation would become absolutely impossible. . . . [The socialist society] must forgo the intellectual division of labor that consists in the cooperation of all entrepreneurs, landowners, and workers as producers and consumers in the formation of market prices. But without it, rationality, i.e., the possibility of economic calculation, is unthinkable.

[132]Leoni, *supra* note 6, at 19.

[133]*Id.* at 19-20 (emphasis in original). *See also id.* at 89; Aranson, *supra* note 96, at 676.

> [t]he drafter's trick is always to formulate a principle at a high enough level of abstraction to reach a wide variety of circumstances, while avoiding a formulation so abstract that we cannot tell if its terms really fit the many ordinary situations that we confront. To the civilian, the legal rule is designed to operate at an optimum level of abstraction.[134]

But a drafter is nothing more than a legislator, and a legislator simply cannot know what the "optimum level of abstraction" is. He, 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.

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.[135]

For example, a law against free testation, such as Louisiana's forced heirship regime, artificially prohibits an individual from disposing of his property as he so chooses upon his death.[136] It is easy to see that, for anyone that would prefer not to leave as much of his property to his children as the law mandates, forced heirship lowers the subjective marginal utility of the individual's property. It is worth less to him since he cannot do with it what he will. If, for example, I would prefer to leave my $1 million estate to the Ludwig von Mises Institute, as is my natural right, I have a certain natural incentive to conserve the estate so I can leave it to them. But if I am forced to leave a portion of it to my worthless son (suppose, for example, he is a socialist), whom I would prefer not to leave it to, the estate automatically becomes less valuable to me, thereby lowering my incentive to maintain it. Instead of carefully conserving it and spending frugally, I will tend to waste it on frivolous purchases. The law thus puts in place an artificial, yet obviously unintended, incentive for individuals to waste their estates. When wealth is wasted, all of society is impoverished, especially the person whose wealth is diminished.[137]

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[134]Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century*, 8 Tul. Eur. & Civ. L. Forum 63, 72 (1993).

[135]On 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 (1994).

[136]*See* La. Civ. Code arts. 1493 *et seq.*; Succession of Lauga, 624 So.2d 1156 (La. 1993) (overturning a legislative attempt at partial repeal of forced heirship).

[137]Forced heirship destroys some of my property rights and thus is a taking for purposes of the fifth amendment to the U.S. Constitution, although courts refuse to recognize such an expansive (though common-sensical and constitutionally-mandated) interpretation of the fifth amendment. *See* on this Epstein, *Takings*, *supra* note 46.

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.*"[138] There is "more" than an analogy because legislation and central planning are really the same thing: coercively-backed commands emanating from the government that order individuals to act in certain ways that the government prefers. The market and law are mutually interrelated because law, being in such high demand by people, would certainly be privately produced in a truly free market (i.e., where the function of justice was not monopolized by the state). Thus, justice is a product of the free market, while at the same time, a free market cannot exist without a widespread recognition of the principles of justice.

In a common-law process, law develops spontaneously, much like 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."[139] 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.[140] The naive belief that Law can be discovered by means of government employees' dictates reminds me 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."[141] Legislation is artificial law, and is no substitute for spontaneously-developed, grown law.

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[138]Leoni, *supra* note 6, at 23 (emphasis in original).

[139]*Id.* at 22. *See also id.* at 104; Aranson, *supra* note 96, at 668-69; and notes 21 and 98, *supra*, and accompanying text.

[140]*See* Leoni, *supra* note 6, at 218 (discussing similarities between evolved systems like language and law).

[141]A version of this story is told in Hart, *supra* note 90, at 172.

A crucial reason for the systematic ignorance of central planners and legislators alike is "the decentralized, fragmentary character of knowledge."[142] 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, 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 uncertainty introduced, because people become more suspicious and rely less on contracts, and because their time preference increases, as discussed above.[143] As Professor Aranson puts it, "Legislation saps the social order of spontaneity."[144]

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 democracy is not without problems,[145] a representative

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[142]Aranson, *supra* note 96, at 675, citing: James M. Buchanan, Cost and Choice: An Inquiry in Economic Theory (1969); F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945); and Israel Kirzner, Perception, Opportunity, and Profit: Studies in the Theory of Entrepreneurship (1979).

[143]*See supra* notes 121-126 and accompanying text.

[144]Aranson, *supra* note 96, at 675. *See also* Lawrence M. Friedman, A History of American Law 404 (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 83, 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 101 (ch. 3, p. 74); Tullock, *supra* note 101; Sartori, *Liberty and Law*, *supra* note 20, and chapter 13 of *Democratic Theory*, *supra* note 29; 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 6).

[145]*See supra* notes 77-80 and accompanying text.

democracy is better than one that is not. Certainly, a government that responds to the wishes of its subjects is better than one that does not, all other things being equal. If a legislative democracy is unjust, a legislative democracy that is unrepresentative adds insult to injury.

Because of the information problem faced by centralized law-makers, they cannot know the peopleÕs wishes with any accuracy or detail. Ó*[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 peopleÕs wishes is subject to that limitation.*Ó[146]

Professor Sartori puts the point forcefully:

[146]Leoni, *supra* note 6, at 22 (emphasis in original). *See also id.* at 89; Aranson, *supra* note 96, at 675.

> [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.[147]

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."[148] 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.""[149]

Legislators cannot discover the will of their constituents, and, as explained above,[150] cannot know very much at all about the actual interactions and circumstances of those who they seek to regulate. 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 passed 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."[151] 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

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[147] Sartori, *Liberty and Law*, *supra* note 20, at 31-32.

[148] *Id.* at 32.

[149] Leoni, *supra* note 6, at 19. *See also* Aranson, *supra* note 96, at 676-77.

[150] *See* Part IV.C.2, *supra*.

[151] Leoni, *supra* note 6, at 21, 158. *See also* Aranson, *supra* note 96, at 677-79. *See also* Mitchell & Simmons, *supra* note 140 (discussing the large number of special interest groups that accompany big government), and Bastiat, *supra* note 46, at 17-18 (discussing ever-escalating conflicts among disparate special interest groups).

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.[152] Unlike a legislator imposing his will on society, when a judge decides a case 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."[153] 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.[154]

Judges in a decentralized law-finding system are also less likely to be influenced by special interests than are legislators.[155] 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.[156]

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[152]*See supra* notes 21, 98, and 144, and accompanying text.

[153]Liggio & Palmer, *supra* note 96, at 720-21.

[154]*Id.* at 721, n.30.

[155]*See* the text accompanying note 156, *supra.*

[156]Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 Harv. L. Rev. 1717, 1718-19 (1982).

To the extent a court-based legal system displays legislative characteristics, which often occurs in government-based court systems,[157] it faces the same "central planning" problems as does legislation.[158] For example, Posnerian judges may attempt in their decisions to "maximize society's wealth"[159] rather than to decide cases "according to precedent and common law processes of legal reasoning and "discovery," with the intent of preserving the liberal freedom of the parties to the dispute."[160] "[E]fficiency theorists base their models on a simple equation: Total cost = Damage costs + Avoidance costs."[161] As Professor Aranson explains,

> "Damage costs" in a tort case, for instance, refer to the expected number of accidents that would occur under a particular rule times the expected cost of each accident; avoidance costs refer to the cost avoidance itself (added safety measures, for example), as well as to the reduction in beneficial activities that avoidance might imply. Suppose that under any particular rule each party maximizes his utility subject to the rule. An "efficient" rule, compared with its alternatives, minimizes the sum of these two costs.
>
> . . . Leoni's judge is concerned *at most* only with the *expectations* of these costs as they *should have* appeared to the instant litigants *at the penultimate moment of choice*. The "Posnerian" judge . . . must form a prediction of how these costs (or expectations of them) will appear to all subsequent parties who might possibly find themselves in the same position as did the instant litigants.
>
> These costs, however, existed only at the penultimate moment of choice and only for the instant litigants. Knowledge of such costs, then, exists only *ex hypothesis* for future parties, and that knowledge, at best, would be widely disseminated in fragmentary form throughout the economy. Hence, the judge who would pursue the explicit imposition of efficient rules *perforce* simultaneously would face the same information problems as a central economic planner.[162]

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

10. The Proliferation of Laws

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[157] *See* Part IV.B.2, *supra*.

[158] Aranson, *supra* note 96, at 697; Aranson, *supra* note 130, at 297-99 *et passim*.

[159] Aranson, *supra* note 96, at 692, citing Richard Posner, Economic Analysis of the Law (3d ed. 1986).

[160] *Id.*

[161] *Id.* at 697.

[162] *Id.* at 697-98 (emphasis added) (footnotes omitted). *See also* Aranson, *supra* note 130, at 314.

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).[163] When such government-caused calamities strike, the current Roosevelt or Clinton milks the disaster as an excuse for more government intervention and power.[164] 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.

It is clear that an explosion of laws will accompany a legislative system. There is little to restrain legislators from busily passing one law after another, as they attempt to impress their constituents that they are producing something. Plus controls breed controls, as discussed above, and as one law mucks things up legislators feel compelled to enact more to try to remedy the situation. This snowballs. And meanwhile special interest groups are seducing legislators to enact blatant protectionist or wealth-transferring laws.

Such a continual outpouring of laws has many insidious effects. As has wisely been said, The more corrupt the Republic, the more the laws.[165] 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.[166] 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.[167]

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[163]*See* Murray N. Rothbard, Americas Great Depression (revised ed. 1975); *idem*, 2 Man, Economy, and State, *supra* note 121, at 854 *et seq.*; *idem*, For a New Liberty, *supra* note 61, at chapter 9; Mises, *supra* note 1, chapter XX esp. p. 561.

[164]*See* Robert Higgs, Crisis and Leviathan: Critical Episodes in the Growth of American Government (1987).

[165]Tacitus, Annals, III, 27, quoted in Sartori, *supra* note 20, at 3.

[166]*See supra* note 156 and accompanying text.

[167]*See supra* notes 121-126 and accompanying text.

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 discredited[168] and, what is worse, the government can selectively and arbitrarily enforce whatever law is convenient against whichever "trouble-maker" it wishes.

As laws proliferate the rule of law is discredited in the ensuing uncertainty and special interest wars. But more than this, "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*."[169] People become more accustomed to following orders, and thus become more docile, servile, and less independent. Like the mythical frog who will jump if put in hot water, but who will sit still and boil alive if the water is warmed gradually, "the passage from liberty to slavery can occur quietly, with no break in continuity—almost unnoticed."[170]

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 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."[171] Where "law" used to serve as a limit on arbitrary governmental power, if law becomes equal to legislation then law *is* arbitrary power, and the government becomes freer to run wild. Writes Sartori, "When the rule of law resolves itself into the rule of legislators, the way is open, at least in principle, to an oppression "in the name of the law" that has no precedent in the history of mankind."[172]

Legal inflation cheapens and dilutes law, just as money inflation by the Federal Reserve dilutes dollars and causes price inflation (and the boom-bust business cycle). The inflation of laws caused by legislation obviously harms society.

11. Naive Rationalism

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[168]Professor 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 83, at 286.

[169]Sartori, *Liberty and Law, supra* note 20, at 38-39.

[170]*Id.* at 39.

[171]*Id. See also* notes 77-80, *supra*, and accompanying text.

[172]Sartori, *Liberty and Law*, *supra* note 20, at 40. *See also* Benson, *supra* note 83, 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).

If the arguments made herein are correct, the civil law is not a rationalist system; indeed, no centralized legal system can be. Reason and rationalism support the libertarian virtues of individualism, individual liberty, and the rule of law; while a legislative system such as the civil law undermines these things. Why, then, is the civil law proclaimed as the great rationalist legal system?

In Hayek's view, there are two types of rationalism: critical rationalism and naive rationalism.[173] Hayek also sometimes refers to critical rationalism as evolutionary rationalism; and to naive rationalism as constructivist or Cartesian rationalism, or even anti-rationalism. Each of these two variants of rationalism is associated with a unique view of liberty. Critical rationalism, i.e. true rationalism, according to Hayek, 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.[174] Hayek believed that "all modern socialism, planning and totalitarianism derive" from the naive rationalism of the French tradition.[175]

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.[176]

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

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[173]F. A. Hayek, I. Law, Legislation and Liberty: Rules and Order 5-6 (1973). *See also id.* at 72, 118; F.A. Hayek, The Fatal Conceit: The Errors of Socialism, Volume I of the Collected Works of F.A. Hayek (W.W. Bartley, III, ed., 1989); *idem*, *The Constitution of Liberty*, *supra* note 46, at 38 *et seq.*; Eugene F. Miller, *The Cognitive Basis of Hayek's Political Thought*, in Liberty and the Rule of Law, *supra* note 101, at chapter 11, p. 242, 245 (discussing the two kinds of rationalism and their political consequences); John Gray, Hayek on Liberty 10 (1984); Sartori, *Democratic Theory*, *supra* note 29, at Chapter XI (discussing rationalism vs. empiricism).

[174]Miller, *supra* note 178, at 245.

[175]*Id.* at 246, quoting F.A. Hayek, *Kinds of Rationalism*, in Studies in Philosophy, Politics and Economics, at 85 (1967).

[176]Miller, *supra* note 178, at 246-47 (footnote omitted). On the domination of the whole French Enlightenment by the Cartesian (or naive) brand of rationalism, see G. de Rugiero, History of European Liberalism 21 (trans. R.G. Collingwood, 1927), and H. J. Laski, Studies in Law and Politics 20 (1922), cited in Hayek, *I. Law, Legislation and Liberty*, *supra* note 178, at 146 n.3.

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 that true Law ever could be made by a legislature is a naive rationalism because it assigns too broad a role to deductive reason. 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 thinking cannot hope to give us this information. This is not a criticism or limitation of reason or even deduction, but rather a rational view itself that recognizes, from the nature of a given situation, what is amenable to deduction and what is not.[177]

It is true, and our reason tells us this, that 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 to not destroy this order by the top-down commands issued by a sovereign central planner. It is also true that a detailed body of law, while based on fundamental norms established by 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). Since it is rational to recognize truth and reality, the civil law can hardly be said to be "rational" or rationalistic, and its claim to rationalism can be seen as arrogant, dangerous, and naive. 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,

> 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.[178]

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[177]Hayek 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*, *supra* note 130, at 216. I am drawing in this discussion mainly on Hayek's terminology, but do not agree with Hayek's own anti-rationalism in this regard.

[178]Thomas Sowell, Knowledge and Decisions 102-03 (1980). *See also* Leoni, *supra* note 6, at 173-74 (discussing

Bentham, as an example of the dangerous arrogance of naive rationalism, desired to codify his utilitarian "greatest happiness principle," and thus to use legislation as necessary to sweep aside any common law in his way. He

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the naivety of socialists).

> 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.[179]

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

V. THE ROLE OF LEGISLATION AND CODIFICATION

12. The Role of Legislation

1. The Secondary Role of Legislation

Does all this mean that there is absolutely no room for legislation? If the anarcho-capitalist implications presented above[180] are 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.[181]

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. Indeed, this just is the main reason why the civil

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[179]Posner, *supra* note 102, 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 149, at 391-92, 403-406. *See also* Rosen, *supra* note 149.

[180]*See* Part IV.A, *supra*.

[181]This 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).

law cannot be justified and is irrationalistic: because it depends upon legislation as the primary source of law. Obviously, this criticism applies as well to modern common-law systems which are truly becoming legislative systems, in which statutes are seen as at least a primary source of law, and can and do continually and progressively chip away at the accumulated wisdom of the common law. And it should also be clear that the criticisms of legislation in this paper apply in spades to the abominable and invasive body of federal statutes in this country. But, then, at least the federal system does not pretend to be rationalist or just, and common lawyers do not as often trumpet the laws that supplant the common law.

Even Leoni was not a complete anarchist, and believed in the necessity of at least some legislation.[182] 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. This preliminary assessment is simply unthought of by contemporary legislators. On the contrary, they seem to think that legislation is always good in itself and that the burden of the proof is upon the people who do not agree. My humble suggestion is that their implication that a law (even a bad law) is better than nothing should be much more supported by evidence than it is. . . . *[W]henever any doubt arises about the advisability of the legislative process as compared with some other kind of process having for its object the determination of the rules of our behavior, the adoption of the legislative process ought to be the result of a very accurate assessment.*[183]

Not much, if any, of today's legislation could survive this test, and 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 Problems of Decentralized Law-Finding Systems*

[182] Leoni, *supra* note 6, at 10 ("I do not maintain that legislation should be entirely discarded."), and 129-31.

[183] *Id.* at 14-15 (emphasis in original). *See also id.* at 178 ("Whatever is not positively proved worthy of legislation should be left to the common-law area.").

Hayek, another advocate of the spontaneous order of decentralized systems, also believed that legislation is called for in certain situations.[184] 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.[185]

Hayek also maintains 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.[186]

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[184]Hayek, *I. Law, Legislation and Liberty*, *supra* note 178, at 88, subsection entitled Why grown law requires correction by legislation.

[185]*Id.* at 88 (also citing Leoni, *Freedom and the Law*, *supra* note 6).

[186]*Id.* at 88-89.

Before addressing Hayek's view in this regard, let me first mention a similar view of the Richard Epstein, another brilliant proponent of the common law. Legislation is sometimes desirable, he says, when, for example, courts cannot come up with a number, such as a statute of limitations, which might be very desirable.[187] Without any supervening legislation, courts would likely bar lawsuits after some length of time, because the facts are too stale, it would be unfair to sue someone after a very long time, etc. 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 (or liberative prescription,[188] to Louisiana ears), no court would develop a hard and fast, arbitrary number such as two years. "[C]ommon-law adjudication cannot generate the number needed to structure litigation."[189] 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 of [sic: by] making it clear that some actions cannot be brought."[190]

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."[191]

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."[192] And, as Blackstone points out, judges under the common law were able to reform the system of feudal land law without legislation:

> Yet they wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they

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

[188]La. Civ. Code arts. 3445, 3447.

[189]Epstein, *supra* note 192, at 680.

[190]*Id.* at 681.

[191]Posner, *supra* note 102, at 585 (citing 3 Blackstone, *supra* note 55, at *328, and 1 Blackstone ¶ 432, *365).

[192]*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 IV.B.2, *supra*. Therefore, it will adapt more efficiently and more quickly to change than a common-law system would. *See* Bruce L. Benson, *Market Failure Versus Government Failure in the Production of Adjudication*, in The Privatization of the U.S. Justice System (G. Bowman, S. Hakim, & P. Seidenstat, eds. 1992) (discussing reasons why government-made law, including common law, will produce relatively inefficient rules compared to a completely private system of law such as customary law). *See also* Benson, *supra* note 99, 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.

> were, to languish in obscurity and oblivion, and endeavored by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges, who have sate in our courts of equity to show them their error by supplying the omissions of the courts of law.[193]

So certainly decentralized systems are able to adapt to new situations when it is called for, at least sometimes.[194] 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

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[193]3 Blackstone *supra* note 55, at *268, also quoted in Posner, *supra* note 102, at 595-96.

[194]*See also* Benson, *supra* note 83, at 283, n.42, and works cited therein.

> 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. . . . The purpose of the [legal] system is to establish with reasonable certainty the boundaries in which individual decisions can take place free of public intervention and control.[195]

Or, as Kafka said, ""Justice must stand quite still, or else the scales will waver and a just verdict will become impossible.""[196]

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. All the conclusions of this article, as well as 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. But as the opening quote to this article 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 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. Furthermore, why is it justifiable to harm one individual to benefit another?

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[195]Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. Legal Stud. 253, 254-55 (1980).

[196]Franz Kafka, The Trial 146 (Schocken Kafka Library, Definitive ed"n, Willa and Edwin Muir, trans. 1956).

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.[197] 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 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 satisfy a justice-seeking consumer base.

3. *Structural Safeguards to Limit Legislation*

For all these reasons, I do not believe that legislation is a legitimate 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.

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 at least attempt to keep the genie in its bottle. Certainly, a supermajority,[198] 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, assuming the status of a judicial precedent, at least for that court. (Such a reform presumes a form of *stare decisis* or at least *jurisprudence constante* in effect so that the rewriting of the bad opinion would prevent or at least dissuade future decisions of courts from following the bad decision.)

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[197] For a related discussion, see Friedrich A. Hayek, The Road to Serfdom (1944), at ch. X, "Why the Worst Get on Top."

[198] *See* Leoni, *supra* note 6, at 178 n.5 (discussing a supermajority requirement as a way to tame legislators).

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.[199]

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

13. The Role of Commentators and Codes

I do not mean any lack of proper respect for civil codes or for civilian scholars. The Civil Code of Louisiana is a beautiful legal code that is largely consistent with libertarian virtues and the libertarian theory of individual rights set forth in this article. The substance of the civil code that is praiseworthy seems largely derived from the evolved body of Roman law and common law,[200] however. The systematizing genius of the French and Louisiana codifiers is also evident in the code.

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[199]The 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 (1992).

[200]*See* Thomas W. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 Tul. L. Rev. 265 (1970); Batiza, *Origins of Modern Codification of the Civil Law*, *supra* note 4, at 585 *et seq.* (discussing Blackstone's influence on Louisiana's civil code).

The civil law, at least as embodied in the civil code (and ignoring its enshrinement of legislation as the chief source of law), is superior to the common law in many ways. First, common lawyers use the annoying phrase "at common law," whereas you would never catch a civilian saying, "at civil law . . . ." 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.[201] Common-law real property concepts are almost painful to the mind. The irrational common-law requirement of "consideration" to create a binding obligation[202] is replaced in the civil law with the more sensible prerequisite of "cause."[203]

But the Louisiana 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,[204] 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,[205] which violates the rights of property owners to dispose of their property, and which also foolishly assumes that the government knows better than the seller and buyer what the right price is for an item.[206]

Another egregious provision in blatant contradiction to the individual right to absolute ownership of property is article 2626, which provides:

> The first law of society being that the general interest shall be preferred to that of individuals, every individual who possesses under the protection of the laws, any particular property, is tacitly subjected to the obligation of yielding it to the community, wherever it becomes necessary for the general use.

Article 2627 continues,

> If the owner of a thing necessary for the general use, refuses to yield it, or demands an exorbitant price, he may be divested of the property by the authority of law.

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[201] *See also* Herman, *supra* note 2, at 46-47 (discussing the civil code's "highly stylized, streamlined system of ownership").

[202] *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 Columbia L. Rev. 269, 287-91 (1986) (discussing problems with the theory of consideration).

[203] La. 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).

[204] La. Civ. Code art. 1493. *See also supra* notes 141-142 and accompanying text. *But see* Katherine Shaw Spaht, Kathryn Venturatos Lorio, Cynthia Picou, Cynthia Samuel, and Frederick W. Swaim, Jr., *The New Forced Heirship Legislation: A Regrettable "Revolution"*, 50 LA. L. REV. 409 (1990).

[205] La. Civ. Code art. 2589.

[206] *But see* Herman, *supra* note 2, at 42 (this doctrine is meant to embody principles of "fair dealing," and to "protect" the poor from the rich and "powerful.").

This provision is collectivist rather than individualist, and is so vague as to defy objective interpretation. (What is "necessary"? "General"? "Exorbitant"?) It places a dangerous, vaguely-limited power in government's hands. A final article that I will mention is 2652, which provides:

> He against whom a litigious right has been transferred, may get himself released by paying to the transferree the real price of the transfer, together with the interest from its date.

This article prevents a secondary discount market from developing in the sale of litigious rights, and thus lowers the economic value to an individual of litigious rights that he holds. This provision effectively establishes a price control, which is incompatible with free market principles and individual rights. Of course, illegitimate common-law statutes, as well as dubious court-developed common-law principles, may be cited as well.

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. 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.[207]

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 market, or even in government-based common-law courts, would veer in a libertarian direction in response to the people's sense of justice.[208]

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:

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[207] *See, e.g.* La. Civ. Code art. 2322.1 (concerning users of blood, organs, or tissue).

[208] *See* Rothbard, *For A New Liberty*, *supra* note 61, at 227-28 (discussing competing court systems).

> The Law Code of a purely free society [i.e., anarcho-capitalism] 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.[209]

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 may make mistakes, but, then, the fact that individuals are fallible can never be escaped, so this criticism is moot.

The civil code is an admirable achievement because it is, in large part, an integration of previously-discovered principles of law and justice.[210] But legislators cannot discover these principles. These principles are gradually discovered through the interaction of individuals and the customs that arise therefrom, and by specialists such as judges extending the law bit at a time to new applications, building upon the body of law discovered in the past. It is true that such a body of 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-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 scholarly or practical 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.

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[209]Murray N. Rothbard, Power and Market: Government and the Economy 267 n.4 (1970); *idem*, *For A New Liberty*, *supra* note 61, at 230-31. Rothbard writes: "within the framework of such a code, the particular courts would compete on the most efficient procedure, and the market would then decide whether judges, juries, etc. are the most efficient method of providing judicial services." *For A New Liberty*, at 227-28.

[210]*See* Leoni, *supra* note 6, at 141-43 (discussing the derivation of modern codes from Roman law).

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 as well as common-law developments. A brilliant legal scholar like Professor Litvinoff could surely dedicate his energies to codifying and systematizing the body of case law that has been developed, and an obligations treatise could codify and systematize the developed body of case law rather than summarizing and explaining a legislated code (itself partially based on case law).[211]

Blackstone recognized the problems with legislatively codifying a new system of law, rather than building upon the evolved wisdom of courts:

> [W]hen laws are to be framed by popular assemblies, even of the representative kind, it is too Herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counselors. A single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps an uniform, plan of justice; and evil betide that presumptuous subject who questions its wisdom or utility. But who that is acquainted with the difficulty of new-modeling any branch of our statute laws (though relating but to roads or to parish settlements) will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead?[212]

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, and will likely be explicit when recommending that judges adopt certain changes in future decisions. Further, in today's system, a scholar may devise a code, only to have it butchered by bureaucrats or by a committee; and then the code may be made virtually irrelevant anyway when it is swamped with specialized legislation.[213]

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[211] *See* Saúl Litvinoff, The Law of Obligations, in 5 Louisiana Civil Law Treatise (199_). *See also* Lawrence Friedman, *supra* note 149, at 406, stating 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. 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).

[212] 3 Blackstone *supra* note 55, at *267, also quoted in Posner, *supra* note 102, at 595.

[213] For a discussion of the different roles of academic commentators and judges in civil- and common-law systems, see Stein, *supra* note 17, at 1597.

Modern civil law requires that civil codes be stamped with approval by the legislature,[214] and also that the legislature retain the ability to change the law, including the civil code, from day to day. This dilutes any beneficial effects of a legislated civil code by making its scope uncertain, as it floats in a stormy and ever-rising sea among the flotsam and jetsam of statutes. We need civil codes, but not the civil law. Civil codes should thus be strictly private. We have long seen the wisdom of keeping church and state separate. The collapse of socialism and theorists like Mises teach the virtues of the separation of economy and state. True civilians should favor the separation of law and state.[215]

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. Although civilians admit the validity of such standards, the civil law undercuts its own self-proclaimed virtues because it makes legislation supreme and valid, because it replaces Law-finding 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. Civil codes and 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.

The form of a legal system does not guarantee that just laws will be adopted, so we must always be vigilant and urge that individual freedom be respected, whether by legislator or judge. However, it should be clear that a decentralized legal order better promotes individualism and individual rights. It should thus also be clear that claims for the superiority of the civil law are unfounded, and claims for its rationality are simply naive. I can do no better than to close with Leoni's own words:

> I do not seek to change the world, but merely to submit some modest ideas that should be, unless I am wrong, carefully and fairly considered before concluding, as do the advocates of inflated legislation, that things are unchangeable and, although not the best, are the inevitable response to our needs in contemporary society.[216]

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[214] *See* Lawrence Friedman, *supra* note 149, at 405, discussing Field's view that the legislature should take codes and simply "give them its stamp of validity."

[215] *See* Rothbard, *For A New Liberty*, *supra* note 61, at 228 (discussing the separation of law and state).

[216] Leoni, *supra* note 6, at 25.

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Other resources:

Links to individualist anarchism related sites and resources on Wendy McElroy's web site: http://www.zetetics.com/mac/ or http://www.zetetics.com/mac/subd2.htm

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