EPISTEMIC BARRIERS TO LEGISLATION

A Case for Spontaneity in Social Structures

ABSTRACT

I argue that there is no meaningful way to justify legislation. To begin, legislation is defined and explained, as are the criteria that warrant legislation. The burden of proof is laid upon the legislator, that is, coercion always must prove that it is in the right, and freedom never has such an obligation or restriction. Due to the inherent subjectivity of value, the unquantifiable extent of legislation, and the unquantifiable opportunity cost of reduced liberty (that cost being primarily innovation), it is impossible to conduct an adequate cost-benefit analysis of legislation. Because the burden of proof rests on the legislator – the one who would coerce – and proof of legislation's benefit is epistemically untenable, it cannot be said that legislation is justified. I conclude by offering examples and analyses of spontaneous orders, to demonstrate their sufficiency and preferability to coercive, rationalist orders. Spontaneous order overcomes the epistemic barriers to legislation in the same way that markets overcome the knowledge problem – prices communicate vast quantities of otherwise unknowable information, and incentivize action thereupon. By placing the rule of law under the same market feedback mechanisms, a systematized body of rules will arise that is closely aligned with individual preferences, and is constantly adjusting to meet them. The argument is axiomatic-deductive in its nature. I begin by arguing for my premises up front, and proceed to deduce a utilitarian theory of legislation based thereupon. The conclusion is simply that "legislation is unjustifiable; freedom requires no justification."

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"*For my part, as I went away, I reasoned with regard to myself: "I am wiser than this human being. For probably neither of us knows anything noble and good, but he supposes he knows something when he does not know, while I, just as I do not know, do not even suppose that I do. I am likely to be a little bit wiser than he in this very thing: that whatever I do not know, I do not even suppose I know." – Socrates (Apology, 4-5)*

Introduction

It is common, in contemporary political discourse, to proceed under the following assumptions: that law requires legislation, that legislation is necessary for the provision of specific goods, and some of these goods are normatively desirable. These claims, taken together, form the implicit basis of a case for legislation. The specific nature of the legislation will vary from proponent to proponent. However, any policy put in place by any state will be defended with the claims that it will produce a normative good ("necessity" is the term often used in political parlance), and that this good could not be provided without a state.

There is something very appealing about this way of thinking. Regardless of the precise policy that we seek to enact, defending it along these lines affirms an idea that we have much interest in affirming. If society is incapable of producing *good things* without the help of a specific politician, party, activist, voting bloc, etc., then a degree of psychic profit comes from being associated with that person or group. And it is comforting to know that, whatever misfortunes might occur, the situation can be remedied if we simply establish the right leadership or right laws.

While I do not mean to diminish the importance of having appropriate social institutions, I aim to demonstrate that there exists a massive disjunct between the belief that there are objectively superior social institutions and the belief that these institutions should – or indeed, even *can* – be established and enforced through regulation. Our fascination with legislating to improve the character of society, in whatever way we decide to go about improving, is born of pretensions to knowledge, when in fact we know far too little to warrant action. I will propose that legislation is categorically unjustifiable. Legislation of any sort faces certain burdens of proof; its proponents must answer certain questions in order to justify enforcing the policy. What we will find, when we ask these questions, is that it is entirely

impossible for the legislator to answer them. Legislation is confronted by insurmountable epistemic barriers. Whatever goods that the market produces will be produced less efficiently by legislation, if the state produces the desired goods at all.

However, it is commonly believed that there are goods the character of which is exclusively "public." These are goods that will never generate market prices, because they cannot be produced by a market, and thus the force of legislation must be used if we are to have them. On this account, a substantive body of argument will be devoted to underscoring the fact that there are no goods which can properly be classified as public. More importantly, we will see that law precedes legislation, and that even the rules which form the framework of human interaction do not require legislation to exist. On the contrary, allowing rules to arise spontaneously, as opposed to deliberately planning and imposing certain structures upon groups, will ensure outcomes that are far more in keeping with individual preferences.

Human minds are impotent when it comes to drafting law. I propose that we acknowledge our ignorance and abandon our attempts to craft our utopias. That one is wisest who knows that he does not know. We therefore ought to cease our attempts to overcome the epistemic barriers to legislation.

Section 1: Definitions

1.1 — Constructive and spontaneous orders

There exist two types of orders: the constructive, or rational, and the spontaneous. Broadly speaking, the two are easily definable. "Constructivist rationalism," writes F. A. Hayek, is "closely connected with Cartesian dualism, that is with the conception of an independently existing mind substance which stands outside the cosmos of nature and which enabled man, endowed with such a mind, to design the institutions of society and culture among which he lives" (Hayek, Law, Legislation and Liberty, 17). This is contrasted to a vision of man in which man does not possess such rational power, and social institutions arise spontaneously: "Mind is as much the product of the social environment in which it has grown up and which it has not made as something that has in turn acted upon and altered these institutions" (17).

In the first framework, institutions that exist are the product of a constructed social order. There is a teleological component to law; the prosperity of a society is corollary to the wisdom of its lawgivers. In the second case, we view social institutions as something that largely preexist an individual cognition.

The first gives us rational order. This is simply the concept of social order as a product of purposive human cognition. Examples of this might include explicitly legislated laws, clubs and groups that have certain rules of association, and professional athletic events.

The second perspective exposes to us the spontaneous order. This concept is much more difficult to describe. At it's core, it is essentially all that the rational order is not: the spontaneous order includes all social order that is not the product of purposive human cognition. Hayek writes:

> *"Most important, however, is the relation of a spontaneous order to the conception of purpose. Since such an order has not been created by an outside agency, the order as such also can have no purpose, although its existence may be very serviceable to the individuals which move within such order"* (Hayek, Law, Legislation and Liberty, 39).

The best – or at least, most obvious – example of a spontaneous order is language. Discussing the this vision of social processes, Thomas Sowell explains:

> *"Rules of language are indeed written down, but after the fact, codifying existing practices, and most people have begun obeying these rules in early childhood, before being explicitly taught them"* (Sowell, 70).

There is no question that both rational and spontaneous orders exist in society. The question that we must answer is not if, but to what degree, the framework should be spontaneous. On this issue, Hayek offers further insight.

> *"What in fact we find in all free societies is that, although groups of men will join in organizations for the achievement of some particular ends, the coordination of the activities of all these separate organizations, is brought about by the forces making for a spontaneous order"* (Hayek, Law, Legislation and Liberty, 46).

Thomas Sowell, too extends analysis of the subject. “Deliberate action,” he writes, “or planning at the individual level is by no means precluded” by those who defend the spontaneous order (Sowell, 71). Instead, they reject “individual or intentional planning of the whole system” (72). Hayek, throughout his literature, draws comparisons to the Darwinian process of evolution, but as Sowell points out, what he discusses is not “a theory of the survival of the fittest individuals but of the fittest social processes” (73).

What I will propose, then, is not that all constructive rationalism is unjustified, but that rationally planning the framework of the order – or, in a word, legislation – is unjustified. At this point, definitions become tricky. How does one distinguish the character of legislation from that of the bylaws of a club? What is the defining feature the makes legislation so problematic?

1.2 – Legislation defined

Clubs, like any of the “separate organizations” that together compose the larger, extended order, are subject to that natural selection. Market forces determine which organizations, amounting to isolated collections of rules, succeed, and which fail. A set of rules that is in demand, such as a sport or a club that is popular, will be successful. One which does not please consumers will not be capable of sustaining itself over a long period of time.

Legislation, on the other hand, is always backed with the implicit (or explicit) threat of force. As such, it is removed from the evolutionary process. It is protected from the vagaries of the market by coercion. If a particular set of legislative rules is not desired by the people who live under them, then the only possible means available of changing those rules is *violence*. Legislation is thus not *wholly* removed from the natural selection of social institutions; historically, there have clearly been successful insurrections. It is, however, a good deal further removed from the process than is a private enterprise. The set of rules is thus sustainable far beyond the point at which any of the market institutions would fail. Indeed, legislation’s viability seems to be directly proportional to the strength of the force that supports it. Tyrannical governments that would likely not exist spontaneously have perpetuated themselves through the exercise of force against their citizens (Soviet Russia, Nazi Germany, and Maoist China would be notable examples).

Thus, the argument that I will make is not an argument against constructivism categorically – indeed, all purposive action is in some sense constructive – but against the particular kind of constructivism that is removed from evaluation and evolutionary processes by coercion. Neither will it be an argument against coercion categorically. There seem to be, plausibly, occurences that legitimize the use of force (self-defense being a notable example). Rather, the case shall be against legislation – any rule or set of rules (rational order), the validity of which rests not upon general acceptance, but upon coercive force. It is in the union of coercion and constructive-rationalism that we find the problems that plague legislation.

Section 2: The Epistemic Barriers to Legislation

2.1 – Utilitarian criteria for the justification of legislation

For legislation to be rightfully adopted, it must meet two criteria: it must present a correct normative claim, and it must act upon the normative claim more efficiently than noncoercive actors. "Questions about what makes it right for public actors to compel conformity to their judgments … are inherently moral and speak to the acceptability of directing another person's activities" (Holder, 527). Legislation is normative in the sense that it is "supposed to bind a person regardless of her personal estimation of what she ought to do" (Holder, 511). Good legislation, then, will make a right normative claim.

But the fact that legislation "might do some good for somebody… seems hardly sufficient to justify its establishment" (Machan). As Nicholas Wolsterstorff noted:

> *"All human beings assume, so it seems to me, that free non-coerced action is a fundamental good, in the sense that coercion always has to be justified by some good that it achieves, or some obligation that fulfills. Coercion always bears the burden of proof; freedom from coercion never does"* (Wolsterstorff, 236).

It seems to be fairly self-evident that one does not need to justify brushing his teeth, eating meals, or going for a jog. Conversely, it is not inherently wrong for one to prevent someone from

doing these or any number of other activities. However, if someone coerces another, they must offer a sufficient reason for doing so.

It seems plausible that the reason we view coercion as so obviously requiring justification, and non-coerced action requiring none, is that we intuitively understand the mutual benefit of any voluntary exchange. So long as a person is not being forced or defrauded (i.e., coerced) into exchanging, then we recognize all parties involved as undertaking actions which they deem to benefit themselves. While many attempt to deny this idea in scholarship, and I have not the time to take seriously their arguments herein, the self-evidence of the fact that each person undertakes any voluntary action because it will benefit them might form the basis of the self-evidence of liberty's freedom from burdens of proof. "Because I want to," seems justification enough in circumstances where the action produces no adverse effects to others.

Additionally, it must be noted that laying the burden of proof on liberty is an inherently contradictory action. If one argues that anyone who engages in action must justify that action by a higher normative claim, then he, too, must first justify his act of arguing by that normative claim. His justifying of his act of arguing *then must also be justified*. In short, every action must be justified to an infinite regress. Requiring a person to perform an infinite number of justifications prior to acting naturally renders action categorically impossible. If we allow any actions to be morally justified, then the burden of proof must rest upon coercion.

Purporting to be right does not make an action in itself right. Legislation which correctly offers a normative claim must also offer a descriptive claim; legislation must be able to realize that which it supposes to be good. It must do this, moreover, better than can noncoercive action. If noncoercive institutions are capable of adequately addressing the problem, then legislation fails its burden of proof – coercion is not necessary, and as such, is unjustified.

Consider the common economic anecdote known as the "cobra effect." The British occupiers of Delhi were perturbed by the large presence of cobras in the city, so the government promised monetary reimbursement for any cobra tails brought to them, in an attempt to purge the snakes. The actual result

was antithetical to the policy's aims. Cobras, far from being removed from Delhi, more than doubled in population. The government's policy created a demand for cobra tails. A massive black market of cobra breeding erupted, and, once the cobras' tails had been removed, the breeders would release them into the streets. The British magistrates realized the deleterious effects of their policy, so they cut it short – resulting in more cobras being released onto the streets, because there was no longer any incentive to keep them for breeding. This classic example illustrates the obvious disjunct between intentions and results. The cobra legislation was unjustified, because it was not effective at realizing its aims. (Those who would object that the policy was not coercive must only remember that funds with which the government paid for cobra tails were the product of tax revenues, and that prior to taxation being diverted to the cobra tail market, no market for cobra tails had existed at all).

Suppose, then, we pass legislation to the effect of some ethnic oppression (in the manner of Nazi Germany or the Japanese internment camps in WWII America). Our legislation is very effective at accomplishing its stated goals. If we stipulate that the purpose of this policy is a moral bad, then again, it seems that the policy shouldn't be passed. It is effective at producing a normatively wrong result, and is thus unjustified.

So proving that legislation does some good is not nearly enough. It must pass a cost/benefit analysis. Legislation must be demonstrated to have a correct normative end, which is an end that warrants the costs of enacting it. But to prove that legislation does more good than harm, it is likewise not enough to point to its intentions. Legislation can be evaluated only by comparing its purported results to actual (or probable) results.

2.2 – The nonidentity of "the public"

The argument which follows makes no claim on an individual's capacity to make ethical judgments for himself. Rather, it is an argument that critiques our ability to make ethical judgments and coerce others into abiding by them.

In modern social theory, there exists a peculiar tendency to describe collective wholes as acting with a singular consciousness. It is on such premises that such ideas as a "general will" which is "always

in the right and always works for the public good" (Rousseau, 19) have been offered. While perhaps this notion is too ideological for contemporary political theorists, we still seem to be held enthralled by the idea of "the people." Rothbard noted that "such concepts as 'the public good,' 'the common good,' 'social welfare,' and so on, are endemic" to both academic and lay discourse (Rothbard, The Mantle of Science, 9). More chillingly, "not only are these terms held up as living entities; they are supposed to exist more fundamentally than mere individuals, and certainly 'their' goals take precedence over individual ones" (9).

It is perfectly admissible to describe people in terms of the groups to which they belong, and to describe groups in generalities that might apply to its members in different degrees. As such, however, the group can never be said to have any interests in a real sense; a political party "wants" to see its candidate elected into office only to the extent that each of its individual constituents desire that result. When we describe individuals by recalling the groups to which they belong and those with whom they associate, we are essentially using groups as a taxonomical tool to organize our imprecise knowledge. However, the ambiguities of language have made it easy to equivocate the statement, "Group *X* does *Y*," to literally mean that there is an ontic collective with the power of acting and deliberating. People can act collectively, but a collective can never act.

Ludwig von Mises made perhaps the most eloquent argument to this effect.

> *"A collective operates always through the intermediary of one or several individuals whose actions are related to the collective as the secondary source. It is the meaning which the acting individuals and all those who are touched by their action attribute to an action, that determines its character. It is the meaning that marks one action as the action of an individual and another action as the action of the state or of the municipality. The hangman, not the state, executes a criminal. It is the meaning of those concerned that discerns in the hangman's action an action of the state… There is no social collective conceivable which is not operative in the actions of some individuals"* (Mises, 42).

Even "collective" action is manifested in, and only to the extent of, the actions of individuals. This presents a serious problem for evaluating legislation. One cannot simply compare two, or three, or even a hundred different groups that the legislation might be affecting. Each *individual* actor will be

affected to different degrees and in different ways by legislation. What might provide a large number of people with some small satisfaction could come at the cost of inflicting extraordinary pain on a small minority of individuals.

Recall the burden of proof. For legislative action to be normatively correct, it must pass a cost/benefit analysis. The end must warrant the costs of the policy. A legislator must thus understand the exact extent, or perhaps an extremely close approximate thereof, of his plans. This includes not merely understanding which people are affected, but whether they are affected positively or negatively, and the degree to which different people are influenced by the legislation.

This, of course, assumes that the legislator himself possesses some sort of nearly indubitable knowledge of the good, to the extent that he is warranted in forcing other to adopt it. If we conceive of a legislator who is fallible and has certain prejudices, then we confront a further problem. Ayn Rand argued,

> *"Since there is no such entity as "the public," since the public is merely a number of individuals, any claimed or implied conflict of "the public interest" with private interests means that the interests of some men are to be sacrificed to the interests and wishes of others"* (Rand, 88).

The unfortunate fact is that prejudices will often cause one to conceive of harm to one person as less significant than it truly is, considered objectively. This causes the proponents of a policy to subconsciously consider the effects to one set of people, without considering the effects to others, or, more likely, to emphasize the benefits to one group and deemphasize the costs to another.

How can one ever calculate the amount of good that a legislation does and contrast it to the harm, when the legislation is drafted with a biased control group? If legislation is drafted to protect a given group of people, then we will measure its effects (if indeed, they are measurable at all) with respect to that group of people. This group, however, is nothing more or less than an arbitrarily selected sample christened with identity of the "public," which deserves *x* benefit at the expense of individuals *y* and *z*, who are certainly not the "public" and whose interests are antithetical to those of the "public."

Thus, serious epistemic problems face even the ideal lawgiver. In the hands of a flawed, human lawgiver, legislation becomes more vulnerable to those epistemic barriers, as knowledge becomes construed incorrectly.

2.3 – The indeterminacy of net good

Let us now suppose, against all reason, that we can adequately define a public, we can determine who a policy is affecting and to what degree their lives will be altered, and we want to impose on this public some policy to improve its character.

Even these stipulations are not enough to warrant legislative action. Legislation is only warranted when it produces a net benefit. The good must outweigh the costs of achieving the good. This requires that we not only be capable of determining the good that a policy achieves, but the costs that it incurs. By their very nature, however, the costs of legislation are indeterminable.

Freedom produces benefits that are largely immeasurable and unforeseeable. Innovation, operation on the fringes of existing knowledge, and the expansion of human wisdom are all, quite obviously, not predictable in any quantitative sense. While we may know, from our understanding of human nature, that men will innovate if left free to do so, we could never describe the character or the effects of their innovation until after the innovation has taken place. One cannot know a fact or use a tool before the fact is known or the tool is invented.

Discovery plays a significant role in our discussion, because it is the sole prerogative of freedom (or property rights – freedom and property both indicate exclusive authority over resources), and, as the cost of legislation is the reduction of freedom, it follows that a further cost is the reduction of discovery. As Hayek explained, “If we knew how freedom would be used, the case for it would largely disappear” (Hayek, The Constitution of Liberty, 83). Freedom’s value rests upon its capacity to produce unthinkable results. Additionally, “What is important is not what freedom I personally would like to exercise but what freedom some person may need in order to do things beneficial to society. This freedom we can assure to the unknown person only by giving it to all” (84).

The fundamental nature of legislation is telic, coercive organization. Hayek summarizes:

> *"The argument for liberty is not an argument against organization… but an argument against… monopolistic organization, against the use of coercion to prevent others from trying to do better… Organization is therefore likely to be beneficial and effective so long as it is voluntary and is imbedded in a free sphere and will either have to adjust itself to circumstances not taken into account in its conception or fail. To turn the whole of society into a single organization built and directed according to a single plan would be to extinguish the very forces that shaped the individual human minds that planned it… We might conceive of civilization coming to a standstill… because man had succeeded in so completely subjecting all his actions and his immediate surroundings to his existing state of knowledge that there would be no occasion for new knowledge to appear"* (88-89).

Other economists have argued along similar lines:

> *"The bundle of property rights is open-ended, which means that owners may discover may discover new uses of certain rights of which they were previously unaware. Indeed, the long process of mankind's economic development can be seen as a chain of millions and millions of little discoveries of what to do with property rights, including one's labor and talent. The sum of it all is called economic growth"* (Kasper, Streit, and Boettke, 187).

The case for legislation rests entirely upon the cost-benefit analysis of a given piece of legislation. What Hayek and others have shown, however, is that the cost of legislation is entirely incalculable. The value of freedom is largely contingent upon the value of the *unexpected* action that it will produce. Thus, every time a legislature passes a bill, they produce a given, plausibly quantifiable benefit – at a cost that is literally incalculable. Any utilitarian defense of legislation then fails, because it is impossible to conduct the cost-benefit analysis requisite to legislation's justification.

The problems for legislation do not end here. There still remains the classic barrier of the subjectivity of value. Given that individuals are incapable of cardinally evaluating various ends, it is impossible to conduct comparisons of values between two minds. For one person to say to another, "I value *x* more than you value *y*," is entirely meaningless. I cannot compare two individuals' levels of satisfaction like I can compare their respective heights, for "there is no such objective unit in the field of human valuation. The individual must determine subjectively for himself whether he is better or worse off as a result of any change" (Rothbard, Man, Economy, and State, 19).

This indicates to us that, even if we can determine the precise scope of legislation, and even if we can discern to a high degree of accuracy what innovations will be lost as a result of our policy, even then the legislation remains unjustified. We have at our disposal no means for actually determining how much the policy has costed, and how much benefit will be felt.

In summary, then, legislation faces three insurmountable, epistemic problems. It cannot conceivably identify the scope of its action, and thus a cost-benefit analysis on its effects cannot be conducted. It likewise will always incur costs that are, by their nature, entirely incalculable, to the same result of an impossibility of calculation. Both costs and benefits are ambiguous, as there exists no metric of satisfaction. Again, the cost-benefit analysis cannot be undertaken. Legislation cannot be justified.

2.4 – An apparent exception

Many will oppose most legislation, but still deny that there exists a categorical, epistemic limitation to good governance. Government as it exists might be bad, but there is, at least, no theoretical barrier to good government. While no cost-benefit analysis can be applied to legislation like social safety nets or drug laws, we can effectively give a legislative entity prerogative over a given, strictly defined field: the protection of private property rights.

At first blush, we do seem able to conduct a utilitarian evaluation of the legislative protection of private property rights; moreover, legislation seems to pass the evaluation. So long as we legislate the protection of all groups equally, then we need not worry ourselves with exploring the specific consequences to individual groups. Property rights do indeed come at a cost (a fact that will form an important aspect of our discussion), but that cost is not necessarily innovation. The benefit of the protection of private property is exactly that which I have been advocating all along – the freedom of each individual to conduct their own, subjective evaluations of market institutions. Put simply, protecting private property removes coercive organization, and subjects organization to the preferences of individuals. It is a normatively acceptable end precisely for the reason that it is not really a normative end at all, but rather a means of enabling the capacities of those whose rights are protected to fulfill whatever ends they deem most satisfactory.

While this is certainly the case, simply demonstrating the benefits of protecting private property is not justification for legislative action to that effect. For legislation to be justified, it must have a correct normative objective, and must accomplish this objective *more efficiently than noncoercive actors*. The protection of property fails the burden of proof as well; there are no means of demonstrating that protection of property will be better attained through coercive organization than through spontaneous. Thus, moving forward, we will turn our gaze to the spontaneous order, to demonstrate that it can and will define and protect property rights *better than government*.

2.5 – The ambiguity of property rights

Property seems a simple enough concept, particularly to the libertarian steeped in Locke's tradition.

> *"Though men as a whole own the earth and all inferior creatures, every individual man has a property in his own person; this is something that nobody else has any right to. The labour of his body and the work of his hands, we may say, are strictly his. So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property"* (Locke, 11).

Even if we stipulate that Locke correctly frames the moral foundations of property, his argument is of very little practical use when it comes to delimiting the boundaries where the rights of one end, and another's begin. Certainly, if each person owns himself, then there are actions that are obviously criminal – theft, murder, extortion, rape, etc. are entirely delegitimate. But legislation cannot extend beyond this very basic pronouncement of self-ownership.

This becomes evident when we ask ourselves some simple questions. Should mineral rights be inextricably tied to land rights (as in Britain), or separate (as in America)? Is insider trading a violation of property rights, or a legitimate exercise thereof? Is there such thing as intellectual property? Is it the cattle grazer's obligation to fence his cattle in, or the duty of the farmer to fence them out?

On some of these questions, there may indeed be moral answers. Such answers, however, are not clearly inferable from Locke's basic theory. Other answers are likely not moral issues at all; they are

simply matters of social convention that must be established. Property rights are much like speed limits: It does not particularly matter if the sign says 25 or 27, one simply should not drive at 55 miles per hour through a suburban neighborhood. Murder, theft, etc. are much like driving at 55 miles per hour. Much of property convention, however, is as morally charged as driving a few miles per hour over or under the marked speed. There is no clear, general answer to many questions of property delimitation.

When we isolate these questions to particular instances, on the other hand, normative answers reveal themselves. Consider livestock fencing law:

> *"Common Law, or case-made law, puts the burden of responsibility on livestock owners to keep their animals from trespassing on a neighbor's property. However, some states departed from Common Law, requiring crop farmers to fence their fields to keep free-ranging cattle out"* (Smith, Livestock Fence and the Law, 52).

Prior to the establishment of state of governments in Western America, cattle ranchers would let their livestock graze on the open range. Because the land was so wide and expansive, it seemed ridiculously expensive to require ranchers to fence in their grazing land. Rather, the cost-effective solution was to make the crop farmer liable for damages, against previous tradition. The absence of legislation defending the common law tradition made it possible for such changes in the rule of law to take place. Cattle grazing was common in Colorado, for instance, beginning in the 1850s. (Cooke and Redente, 204) Colorado did not have any legislature until its initiation into statehood in 1876. While eventually the fencing system became legislated into permanence, the legislation was only a codification of existing practice and custom – much like a dictionary or lexicon codifies a language only long after it is spoken. (For a lengthy discussion of this subject and the economic theory it illustrates, see Coase, The Problem of Social Cost).

This example illustrates a striking point. Clear cases where private property rights delimitations ought to be defined in a certain way do arise. Sometimes, different areas must answer the same question antithetically (as in, "Is it the cattle grazer's obligation to fence his cattle in, or the duty of the farmer to fence them out?"). In those cases where it is more beneficial to deviate from the established norm,

deviation ranges from difficult to impossible when the tradition is legislated. On the other hand, if there is no legislation in place, the spontaneous order may reach an efficient judgment on how property rights ought to be protected.

In other words, while it does seem possible to execute correct normative judgments regarding the definition of property, it also seems difficult for legislation to accomplish this. Even if the legislator simply makes redundant in writing the law that had already existed, then he entrenches the spontaneous order through legislation. This cripples much of the good of its spontaneity – they make law moveless instead of adaptable – and the legislation is even then a gross redundancy, serving to establish an order that was already established.

History is littered with examples of spontaneous systems of property. Unfortunately, however, governments rarely restrict themselves to redundancy. Too often, legislation is enacted explicitly against the spontaneous order, for the purposes of improving it. The results can be catastrophic.

The Luo tribe in Kenya had evolved a system of property antithetical to Western property law. This traditional law was a "complicated maze of swapping plots among kin and seasonal exchanges of land for labor and livestock," which, in Kenya, "was not a bad system with which to diversify risk in such an uncertain climate." (Easterly, 95) British rulers, in an attempt to develop and Westernize the Kenyan economy, passed the Native Land Tenure Rules of 1956. These replaced the traditional system of property with titled land, a seemingly necessary cornerstone of property rights. Economist William Easterly summarizes:

> *"Although land sales increased after formal registration, neither the buyers nor the sellers wanted the high fees or red tap associated with registering the sales. The system of formal titles thus gradually lost correspondence with those who the locals knew owned the land. An increasing number of formal titleholders resided in the local graveyard… What looks like opportunistic behavior could be the mingling of private property with traditional values, which place obligations to kin above those to strangers and banks. By imposing land titling on such complex social customs, 'private property rights' may actually increase the insecurity of land tenure rather than decrease it."* (Easterly, 96)

Easterly also points out that formal law in Kenya is moving toward recognizing customary property systems and abandoning the catastrophic land titling (97). Property rights are a largely ambiguous concept, but legislation *can* define them correctly. Historically, however, there has existed a disjunct between how property is legislatively defined, as opposed to how it ought to be defined. Furthermore, this disjunct is rendered null by allowing the spontaneous order to have its way. By subjecting law to market feedback mechanisms, a rule of law can arise that works for the particular instances with which it deals.

Economic theory indicates that decisions reached through bargaining between individuals will always be preferable to those decisions reached by states (see Rothbard, Man, Economy, and State, and Mises). Preferences are manifested to a precise degree through voluntary decisions and market prices, and they are manifested crudely, if at all, through a political apparatus. However, this is the only case if decisions can be reached in the marketplace at all. The question that must be answered now is thus: "Can the noncoerced and/or non-centrally-directed actions of individuals give rights to a system of well-defined and protected property rights?" If the answer is yes, then legislation to any effect is entirely delegitimized. The anecdotes above are not enough to demonstrate that the spontaneous order will always be sufficient. A much deeper analysis of spontaneous order is thus in order.

Section 3: The Sufficiency of Spontaneous Order

3.1 – The remaining questions

We've identified the good. A normatively correct set of social institutions will define and defend property, allowing individuals to overcome epistemic barriers by only acting on those impulses of which they have direct, experiential knowledge: personal preferences and price structures. It is the absence of any attempt to legislate some particular end that makes property so desirable. We've seen, however, that property rights remain an ambiguous concept, one that states can sometimes fail to recognize. Plausibly, they can arise without legislation behind them. We must analyze the concept of spontaneous order to determine whether the examples we've dealt with are exceptions or the rule.

Lastly, even if property rights would be defined by the spontaneous order, it is a leap from that conclusion to affirming that property rights will be upheld and enforced without some sort of legislative entrenchment and support. In a discussion of this point, we will briefly direct our attention to the argument of public goods, to see if there exist any goods – primarily defense – for which market prices will not arise. We will then summarize our conclusions and apply them predictively to a case study.

3.2 – A deductive argument for spontaneity

The provision of property rights will always come at a cost. This adds to the burdens facing legislation:

"…if exchange costs are positive, it is necessary to ask whether government can take the harmful effects of an action into account at less cost than can the market or, indeed, if the resulting resource realignment is worth the cost of taking the side effects into account at all" (Demsetz, The Exchange and Enforcement of Property Rights, 12).

When enforcing property rights is costly, as indeed, it always must be, then the old epistemic barriers facing the provision of any good by legislation rear their heads: how do we know that we are producing efficiently? More to the point of our current topic: where and how should we enforce property rights, and where should we leave property rights undefined? It seems fairly self-evident that there are resources which could theoretically be privatized, and yet expending the resources to privatize them would be farm more costly than beneficial. The asteroid belt is an obvious and exaggerated example of one such collection of resources. It is not justifiable to force certain people to incur incalculable costs for the sake of some benefit.

Harold Demsetz offers us a fascinating discussion of the costs of privatization with an example much closer to home. Parking lots, he asserts, are functionally public property. One can park in a large mall parking lot without doing any shopping. The cost of his using that parking lot is born by shoppers; his parking essentially operates as a negative externality. While many economists might decry this situation as "suboptimal," they would not necessarily be correct in this. Effectively reaching an "optimal" solution requires that "we… have some idea of what is the optimal number of spaces is" (14).

And how are we to know that?

> *"Those who purchase merchandise and indirectly pay for parking spaces may prefer to substitute the smaller total cost of constructing additional spaces to accommodate free-loaders rather than ration out the nonbuying parkers by paying the required exchange costs minus the savings of constructing fewer parking spaces" (14).*

Indeed, such seems to be the case for most shopping mall lots. If the mall owner constructs the "optimal" number of parking spaces, he'll face significant costs in ensuring that these spaces are only occupied by shoppers. These costs might very well exceed the profits the owner makes even with the present tragedy of the commons that parking lots create. The fact that no (or very few) malls do regulate entry to parking indicates that most proprietors do not, in fact, deem it cost effective to control parking rights. Given the third epistemic barrier (the subjectivity of value and cost), it seems evident that one cannot accurately calculate the costs and benefits of any legislated property rights. Conversely, when people act upon their preferences in the marketplace, they are of course exchanging their own, less-desired ends for preferred ends. Thus, we see that there are again incalculable costs to defending property rights, however objectively desirable such an end may be.

We have begun with a single premise: there exists a strong incentive for the protection of property. Individuals desire to be secure in their persons and effects. Whatever one's desire for another's property, he does not himself want his person violated or his belongings stolen. For most people, this desire extends to a large number of friends and family.

It has been thought by many in the tradition of the social contract that government and legislation is a response to this incentive, and, indeed, that may be. However, it is tendentious to assume that government can be the sole outcome of this incentive. We can easily conceive of a myriad collection of ways that we could attempt to define and defend our property in the absence of the state. Such was the case of the cattle ranchers in Colorado, and the Luo tribe in Kenya. Such is the case of self-defense, mercenaries, and bounty hunters. Such is the case of something like The Mayflower Compact, wherein a rational order is formed, but a rational order akin to a club, predicated on voluntary participation and

remaining unprotected by coercion. Customary law and private organizations both have long existed, often side by side, and provide a substantive body of non-legislative regulation.

In short, because the incentive to protect property exists, people will find a way to protect their property. Historically, they have done so routinely in the absence of a state. In the presence of a state that is insufficient, we still seek to defend our property rights. People hire private security officers not because the government legislates that property ought to be defended, but because people desire their property to be defended.

The question simply becomes, "Should law be a system of voluntary/customary institutions, or should it be legislated into being?" And the answer can be found in the arguments we have already discussed. The burden of proof rests upon legislation alone, and legislation fails that burden of proof, due to a number of epistemic limitations that confront the legislator. The spontaneous order is thus preferable.

3.3 – Some inductive arguments for spontaneity

It is interesting to note that the spontaneous law seems to extend far beyond the provision of property alone. Consider the example of the Entertainment Software Rating Board (ESRB). Founded in 1994, the ESRB is a private, America-based organization devoted to making audiences aware of mature content found in video games. The parental incentive to protect children from explicit or violent games is strong enough that nearly every major American retailer (Amazon, Best Buy, Target, Walmart, Redbox, and Game Stop, for instance) partners with the rating board, in addition to several large retailers in Canada (Entertainment Software Rating Board). While there is no law mandating that game developers submit their creations to the ESRB for evaluation, the fact that the most common game distributors will only carry products with an ESRB rating causes the vast majority of popular video games to be voluntarily submitted to the ESRB.

In the context of social science, voluntary arrangements like this should not be at all surprising. There is a strong incentive for people to desire particular kinds of rules. Entrepreneurs understand this demand, and so produce rules and law in the same manner another firm might produce mattresses or automobiles. The abstract character of the product presents no theoretical problem for the social scientist

– people hold all sorts of abstract ends, and face various incentives and constraints regarding them. The abstract objective's essential character (that of being an end, acquired through the application of scarce means) is identical to any sort of material good. If someone can help another more efficiently achieve that end, they will be able to market their services. And if enough people prefer that the abstract end be achieved, then the entrepreneur will make a profit. He will have created a net increase in utility for his consumers, and will be incentivized to continue to act in a way that maximizes his profit, which is of course to say that he will continue to provide rules and improve their quality and decrease the cost of their maintenance.

Of course, sometimes a rule is so mutually beneficial and easily enforceable that one does not even need a firm to provide it. This is the case with language, as witnessed in Section 1. Language may be thought of as the medium of exchange for our ideas, and just like language, no medium of exchange requires any enforcer or regulation. Dialogue is a self-enforcing construct; if one violates the rules of language to an egregious extend, his meaning will be lost and his engagement in conversation will be rendered useless. Money – the general medium of exchange for goods and services – is no different.

"In the history of mankind, a great variety of commodities – cattle, shells, nails, tobacco, cotton, copper, silver, gold, and so on – have been used as media of exchange" (Hulsmann, 22-23). Money existed long before states monopolized its production. All that is necessary for a medium of exchange to be "spontaneously adopted" is that it "must be desired for its nonmonetary services… and be marketable" (23). Goods that have these qualities to a greater degree than other goods arise as general media of exchange: monies. Much work has been done on the theory of how money arises in the market (see in particular Hulsmann, The Ethics of Money Production), but a single illustration should suffice for the purposes of this paper. Cigarettes, in POW camps during the second World War, acquired money status. (French) They became the general medium of exchange among prisoners, because they had the particular qualities that made them useful for immediate consumptive ends, and were highly marketable (this due, probably, to their widespread use, high divisibility, and durability compared to food). Whether cattle or cigarettes, money on the unhampered market is a prime example of spontaneous order; it is an observable

example of incentives (namely, “That person has something that I want”) giving rise to culturally widespread institutions.

Perhaps a more peculiar example would serve to drive home the potency of spontaneous orders:

> *“In a fishing village on the Yorkshire coast there used to be an unwritten rule about the gathering of driftwood after a storm. Whoever was first onto a stretch of the shore after high tide was allowed to take whatever he wished, without interference from later arrivals, and to gather it into piles above the high-tide line. Provided he placed two stones on the top of each pile, the wood was regarded as his property, for him to carry away when he chose. If, however, a pile had not been removed after two more high tides, this ownership right lapsed”* (Sugden, 85).

It cannot be stressed enough that there is no one agency who enforces this rule. There are strong incentives to ensure that this rule is respected and to respect the rule, and that is exactly what the village does. Customary law is effective and fruitful. It provides regularity and basis for action, while at the same time is not rigidly inflexible, allowing for adaptations, as in the case of cattle fencing law in the American West.

And indeed, it is these adaptations that are most important. What might in one case be too costly to privatize might be, in a different time or place, necessary to privatize. When people find that the costs of non-enforcement outweigh the costs of enforcement, they face a strong incentive to develop institutions that will privatize new resources. Earlier work by Demsetz illustrates the way private property rights might emerge in a spontaneous order.

For years, under Native American aboriginal government, American land was essentially public. The various tribes hunted and gathered as they pleased. There was a theoretical tragedy of the commons, but the population of Native Americans was far too low for any of the tragedy (overconsumption) to become tangibly realized by the hunters. However, upon the arrival of European traders, who were primarily interested in furs, a massive incentive for furs developed. The locals quickly began to overhunt – the negative externalities began to become realized. But the incentive to prevent this tragedy of the commons was strong enough that, as the effects of it became manifest to its perpetrators, a system of customary law developed. “An anonymous account written in 1723 states that the "principle of the

Indians is to mark off the hunting ground selected by them by blazing the trees with their crests so that they may never encroach on each other. . . . By the middle of the century these allotted territories were relatively stabilized" (Demsetz, Toward a Theory of Property, 352).

Property became demarcated, animals became domesticated for the purposes of husbandry, and tribal and individual hereditary rights to land and animals emerged entirely spontaneously. Contrast this to Native Americans in the Southwest, where no such system of property developed. Here, the negative externalities of overhunting never became problematic, primarily because the country was not inhabited by any large number of desirable animals. As a result, it would have been more costly to privatize hunting grounds than to simply allow some costs to remain external to the benefits. Thus, it seems inductively evident that "property rights arise when it becomes economic for those affected by externalities to internalize benefits and costs" (354). This is more recently observable with the phenomenon of commercial law, "overwhelmingly the product, not of state legislatures, but of private parties ordering their affairs" (Palmer, 230).

If this rule of law is constructed, then it is not protected by coercion. If it is protected by coercion, then it is not the product of some rationality, but is instead simply custom – part of the social fabric of community. In the former case, it requires no justification for existing. It is born of the free actions of individuals. Indeed, its existence might be thought of as evidence for its justification, for so long as an institution perpetuates itself in the market, without coercion, it is necessarily rendering a service to society. And if the law is customary, then again, it requires no justification. Custom was not created by anyone; no one can be held morally accountable for it. It simply is, like a law of physics. Of course, unlike the physical laws, customs can change.

An advantage of this adaptability lies in the evolutionary spread of desirable social processes. Different societies will be adapted for their particular climates and inhabitants, but, if a neighbor discovers a more effective way of doing things, there is nothing to prevent the first society from evolving, so to speak. This is precisely how technology spreads, and there seems to be no theoretical distinction between technical knowledge and knowledge of rules, save for the fact that it will be more difficult to

infer causal relationships from rules and outcomes, and so we might expect general social evolution to occur at a slower rate than technical evolution. Be that as it may, when the spontaneous order is given its way, we can expect civilization to improve at a steady rate. We can expect this progress to slow, halt, or even reverse when legislation is implemented, as social evolution becomes dependent not on the mutual benefit to a culture's participants, but upon the (sometimes arbitrary) whims of its masters, the legislators.

3.4 – Tyranny

It is, of course, the whims of the masters that are to be most feared about legislation. Thus far, I have dealt with legislation charitably. We have seen the epistemic barriers that confront legislation which might have been adopted for good purposes, and we've seen the good intentions of policies like land titling go awry. Unfortunately, however, legislation is not always well-intended. Perhaps it is not even often well-intended. While a "good" legislator can only do harm inadvertently, and will only be acting out of ignorance, there is nothing that holds him accountable. (If there is anything that holds a legislator accountable, then that too must be held accountable, or we will find ourselves in an infinite regress of accountability.) Legislation has the potential for endless damage even in the right hands; how much worse, then, is it for the wrong person to impose it?

Such an observation is fairly self-evident, and we need not spend much time discussing it. Rather than the consequences of tyrants in power, I would like to examine the incentives that the existence of legislation creates, to demonstrate that it is particularly conducive to enabling tyrants.

Legislation is inherently coercive. He who would legislate is one who would coerce the actions of other individuals. Lord Acton observed that "power corrupts" (Acton) but it is perhaps more accurate to state that power attracts the corrupt. The existence of a body that possesses the supposed moral authority to dictate the actions of others is attractive to people who would like to dictate the actions of others. Establishing a centralized monopoly on the use of force over a given geographical or cultural region creates a strong incentive for people to attempt to use that force to accomplish their particular desires. It must be noted that the threat of the tyrant also creates a strong incentive, for those who would not be coerced, to attempt to prevent the spread of force. Even if such action is successful, however, and the

tyrant is prevented from legislating, then society has lost the valuable productive efforts of individuals who were forced to divert their resources to combating coercion and protecting existing goods, services, and rules, as opposed to accumulating capital. Some economists have described the process of legislative enforcement of property rights as being at an "economy wide transaction cost [disadvantage]" compared to a "system that relies primarily on spontaneous self-enforcement" (Kasper, Streit, and Boettke, 222). They cite, as some reasons for this, the "large and sophisticated networks of arbitration experts" who are incentivized by the centralized judicial system to "foster disagreements and complicate conciliation" (222). In short, the incentives that legislation creates make legislation more than unjustifiable – legislation is always and notably a consumptive institution that squanders society's resources.

3.5 – Rights-protection as a public good

Despite the successes of the spontaneous order at identifying and enforcing property rights, there remains a common tendency to classify the protection, if not the origin, of these rules as a "public good," that is, a good which cannot generate market prices and would not naturally arise in a system of voluntary exchange. Some brief attention must be devoted to the subject, in order that there may be no doubt about the fruitlessness of legislation.

There are a number of scholars who have rejected the idea of the existence of goods that are exclusively public. In particular, I would refer the reader to Hans-Hermann Hoppe's excellent essay on the subject, an excerpt of which I quote below:

> *"… many privately produced goods seem to fit in the category of a public good. Clearly my neighbors would profit from my well-kept rose garden-they could enjoy the sight of it without ever helping me garden. The same is true of all kids of improvements that I could make on my property that would enhance the value of neighboring property as well. Even those people who do not throw money in his hat can profit from a street musician's performance. Those fellow passengers on the bus who did not help me buy it profit from my deodorant. And everyone who ever meets me would profit from my efforts, undertaken without their financial support, to turn myself into a most lovable person. Now, do all these goods-rose gardens, property improvements, street music, deodorants, personal improvements-since they clearly seem to possess the characteristics of public goods, then have to be provided by the state or with state assistance?"* (Hoppe, 29)

Inexcludability does not seem to be a problem for the production of all manner of private goods. There is nothing particular in a good that makes it "public." It might be objected to Hoppe's argument that in the instances of deodorant and rose-gardens and personality, the "free-rider problem" is superseded by the desirability of such multifarious ends to the individual producer. Such an argument would not apply to the street musician, however, because he profits and prospers *despite* the existence of free-riders. Additionally, given the apparent desirability of such mundane ends as rose gardens, the desirability of roads, defense, etc. – all those economic goods traditionally considered to be "public" – would seem to more than supersede the potential problem of free-riders.

What is perhaps the most important objection to the "public goods" argument, however, is the fact that public goods are, compared to many private goods, completely excludable. Consider the lighthouse: "… the building and operating of lighthouses by private firms was quite common." (Sechrest, 244). In Britain, by the year 1820, "34 of the 46 lighthouses then in operation had been built by private individuals. Owners of these structure gained their revenue from fees paid by shipowners, the beneficiaries of the service." (244) The lighthouse had long been regarded as a clear example of a public good; clearly, however, it is not. The reason for this:

> *"The private lighthouse owner had a credible threat to hold over the head of the boat owner who refused to pay the fee: the next time he was in need of this service, it would be turned off if there were no other ships in the area. The nonpayers could of course try to ride on the "coattails of others in the industry. But this would unduly increase the risks of collision, either with other vessels or with rocks on shore. Further, the nonpayer would have to tailor his schedule to match those of other travelers, which might be more costly than the lighthouse fee..."* (Block, 317)

Why could not such arguments apply to defense? If the free-rider problem is truly a threat to the viability of defense firms, then the defense firm faces a very strong incentive to find a way to exclude. Alternatively, if defense is valuable enough to certain individuals, then it will be provided whether there are free-riders or not, as in the case of the lighthouses.

Despite a centralized monopoly on the right to force, in contemporary American society, there still exists a vibrant market for private defense. For instance, there are *at least* twice as many private

security agents than those law enforcement officers employed by the state. (Palmer, 230) An "overwhelming majority" of fugitives are caught by private bounty hunters. (230) If the public goods theorists are correct, then this should not be the case. Obviously, private security officers are significantly subject to free-riders. A security agent standing in the doorway of one store acts as a significant deterrent on crime in the neighborhood. Yet, as predicted above, the desirability of preventing rights violations does indeed supersede the potential free-rider problem. Or, perhaps it is that the security firms themselves have found a way to exclude – the private security officer will not intervene to prevent crimes committed on neighboring property not protected by his employer. In either case, excludability does not present an issue for private defense.

We could explore further the arguments for the nonentity of public goods, but such a substantive body of literature on the subject already exists that to do so would be merely redundant. The interested reader should look to the collection of essays The Myth of National Defense, edited by the aforementioned Hans-Hermann Hoppe, for a deeper analysis. For now, the groundwork has been laid: there is no such thing as a "public good" in any theoretical sense, and a cursory look at some empirics confirms the hypothesis. Consequently, we can see that legislation remains unjustified. Basic price theory necessitates that defense of the law will be more adequately assured by private enterprise than by legislation.

Section 4: A Case Study

4.1 – A set of predictions

Legislation cannot be justified on utilitarian grounds. Attempts to manipulate the spontaneous order are epistemically illegitimate. Human interactions will give rise to specific rules of behavior and interaction, because people face a strong incentive for rules to exist. These rules will not be perfect, but will steadily improve as the market subjects rules to feedback mechanisms. Sometimes these rules will be provided by firms, like the ESRB; other times they will be conventional, like driftwood gathering practices in Yorkshire. Legislation is further dangerous because it enables coercion and attracts the

corrupt. If the peaceful are to prevail over the coercer, then they must consume capital in the (possibly violent) process, making certain that legislation is a net bad. The market system will accomplish the provision of any good, including allegedly “public goods” more efficiently than a state.

This summary of my conclusions thus far leads us to a set of predictions. Any anarchic society – a society that has no legislature – should be preferable to the same society governed by a state. Preferability will be defined as possessing a larger and faster-growing capital structure, higher material standards of living, higher levels of peaceful and cooperative interaction (and thus lower levels of violence), and a more consistent-yet-flexible, and less rigid-yet-arbitrary rule of law. Additionally, the anarchic society would in all likelihood begin to lose the benefits if even the threat of a state was introduced. The incentives for action that the threat of legislation introduces would result in competition between all manner of rival groups in an attempt by everyone to ensure that they will become the legislators, and not the legislated. Lastly, we can predict that any legislative body which takes steps to un-legislate will confer upon society benefits that are not quantitatively regular, but will in some way fall into the above notions of preferability.

These predictions cannot be made about two distinct societies. For instance, one could not compare the near-anarchy of medieval Ireland to the present-day Norway. The differences between the respective civilizations are far too numerous to infer causal relationships between political systems and social outcomes. To make a comparison and apply our social theory, we will need to examine the direct progress over time for a single, isolated culture. While one cannot conduct social science in a test tube, there are a select number of cases with relatively controlled variables to which we can apply our theories, and look to for illustration.

4.2 – Applying the predictions

One such useful case in recent memory is the country of Somalia. In 1991 the Mogadishu-based government essentially collapsed. This was followed by a period of warfare and tribal violence. This, however, was followed by a period of immense prosperity, relative to the former state of affairs under

Somalia's aggressive and despotic state. For all intents and purposes, from 1991 onward, Somalia has existed in a state of anarchy. The work of Peter T. Leeson provides much insight on the subject.

> *"The data depict a country with severe problems, but one which is clearly doing better under statelessness than it was under government. Of the 18 development indicators, 14 show unambiguous improvement under anarchy. Life expectancy is higher today than was in the last years of government's existence; infant mortality has improved 24 percent; maternal mortality has fallen over 30 percent; infants with low birth weight has fallen more than 15 percentage points; access to health facilities has increased more than 25 percentage points; access to sanitation has risen eight percentage points; extreme poverty has plummeted nearly 20 percentage points; one year olds fully immunized for TB has grown nearly 20 percentage points, and for measles has increased ten; fatalities due to measles have dropped 30 percent; and the prevalence of TVs, radios, and telephones has jumped between 3 and 25 times"* (Leeson, 696).

It should be observed that this data was gathered in 2005.

The above improvements are indicative of significant growth in the capital structure and material standards of living. Life expectancy has risen, perhaps representing a reduction in violence compared to the Somalia under government. Over a fifteen year period, Somalia has eclipsed its violent past, despite persisting imperfections. Additionally,

> *"Because of the state's collapse, private providers of law and order have been freed to step in. Somalia's stateless legal system is far from perfect. The justice system is still subject to abuse and the climate in a number of areas remained insecure even before the renewed conflict in late 2006. Nevertheless, there has been improvement compared to the situation under government" (Leeson, 705-706).*

> *"[I]n some parts of Somalia, local communities enjoy more responsive and participatory governance, and a more predictable, profitable, and safer commercial climate, than at any time in recent decades"* (Menkhaus, 1998, p. 220, qtd. in Leeson, 706).

Here we observe an increased regularity in the rule of law in the absence of a state. Private protection of rights has stepped in, and has been far superior to the predatory government. There exists a strong, established system of customary law, which was of course suppressed under the violent state regime. As an anarchy, Somalia has developed this customary law once again. As our theory would predict, rules "emerge spontaneously as people go about their daily business and try to solve the problems

that occasionally arise in it without upsetting the patterns of cooperation on which they so heavily depend" (Van Notten, 15: 2005, qtd. in Kim).

Unfortunately, violence resurged in Somalia at the end of 2005, and continued to the end of 2007. This violence is not without reason. Anarchy did not suddenly become chaotic. The rules did not reverse themselves endogenously. Rather:

> *"A democratic government has every power to exert dominion over people. To fend off the possibility of being dominated, each clan tries to capture the power of that government before it can become a threat. Those clans that didn't share in the spoils of political power would realize their chances of becoming part of the ruling alliance were nil. Therefore, they would rebel and try to secede. That would prompt the ruling clans to use every means to suppress these centrifugal forces… in the end all clans would fight with one another"* (van Notten, 136; 2005, qtd. in Kim).

The international community backed the attempts of the Transitional Federal Government (TFG) in their 2005 attempt to oust the Supreme Council of Islamic Courts from Mogadishu. (Leeson, 692) These international efforts to impose democracy resulted in local attempts to preemptively establish control over the new government, or to nullify its power. The threat of legislation, as predicted, has incentivized wasteful action. Additionally, it is perhaps evidence of the epistemic incapacity of Western legislators that the United Nations have so desperately attempted the imposition of democracy. At any rate, the resurgence of Somalian violence was by no means due to its anarchy, though much media commentary has made it out as such. (BBC) The TFG did gain control of Mogadishu in 2007, but has failed to establish anything resembling a Western state, lacking the power to collect internal revenue. (CIA World Factbook) More recent data on Somalia indicates further improvements, in such areas as transportation infrastructure and telecommunications. (CIA World Factbook)

Somalia is not proof of the argument that legislation is unjustifiable. That argument stands on its own, as an axiomatic-deductive case against government. The same goes for our defense of spontaneous orders. Rather, the absence of the Somalian state, and the improvements witnessed therein, form an illustration of the problems with legislation and the sufficiency of law in its absence, already demonstrated theoretically.

Conclusion

What has transpired above has been a case for ordered anarchy, law without states. It has been demonstrated that the constraints and incentives facing humans generally make legislation impossible. A utilitarian case for legislation must present a cost/benefit analysis, which is epistemically impossible to conduct. We have seen that laws will necessarily be better protected by the market, for there are no such things as "public goods." And furthermore, it has been shown that law can clearly exist independently of government; indeed, that it must exist, and will be preferable, as it is not subject to arbitrary whims of legislators but instead to market feedback mechanisms and the constant evaluation of its consumers.

We cannot arrange society as we would like it to be. Human beings are not mere reactors to external stimuli, to be controlled by levers and mechanisms. We must embrace a skepticism of public policy, not simply because we fear that the government might do bad things (though it certainly might), but because we know that it is incapable of doing good. We must cease our pretensions to knowledge regarding how society ought to work, and accept that we do not have the wherewithal to arrange civilizations as we please.

For too long, we have granted legitimacy to legislation, without stopping to think about what it would take for legislation to be legitimate. When we do, legislation fails the burden of proof. Legislation is unjustifiable; freedom requires no justification.

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