

Dear Stephan,

I read with interest your manuscript and find myself in sympathy with many of your conclusions. I hope my detailed remarks are useful to you in improving your work.

Of the four problems with socialism as an economy (see pg. 21), I see only one applying to your analogy: Information gathering. The other three seem to have no analog in law.

Your basic framework in this section is Hayekian, one that I am not sympathetic to. My position is Rothbardian and thus I wonder why an alternative to your dichotomy (legislation vs. Judge-discovered law) might not be reason-discovered law as Murray suggests.

If so, then no information gathering problem would necessarily exist for law development.

I would suggest that you clearly delineate between Mises (calculation) and Hayek (Information) in your discussion to further clarify your argument.

If I can be of further assistance, let me know.

Sincerely,

Jeff Gutmann

Jeff Gutmann
10/1/88

as
What is rel. betw. subj. prop. & price?
Under its arch; prices do express info?

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.”⁴² 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. 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 purportedly “certain” civil law systems. This hampers the ability of individuals to engage in private calculation, i.e. in planning for the future and in knowing the legal consequences of their future actions. It makes contractual reliance more risky and thus imposes further costs on otherwise-beneficial economic transactions. And the unavoidable uncertainty caused by legislation also raises our time preference rate, which “necessarily exerts a push away from more highly capitalized, and hence more productive production processes, and into the direction of a hand-to-mouth existence,”⁴³ and thus tends to impoverish us all.

C. Central Planning and Economic Calculation

One of the information problems with central planning is the subjective nature of some of the relevant information. The other is a practical problem of information gathering. If law is objective

Besides the fact that the possibility of legislation breeds uncertainty, legislators face a why would the former be a problem in law? what information problem could exist for developing laws of justice for example? why isn't this a problem for application of law but not development of law?

problem that central economic planners also face. It is an information problem, and this unavoidable problem makes it unlikely that any legislative system will develop substantively legitimate law—i.e., a body of law consistent with principles of justice, individualism, and

⁴²Hoppe, *supra* note 38, at 340

⁴³Hans-Hermann Hoppe, “The Economics and Sociology of Taxation,” in Hoppe, *Economics and Ethics*, *supra* note 23, at 34.

economic liberalism. For the same reason that central economic planning is impossible, centrally-planned laws cannot hope to be truly based on the true interests or needs or situation of the populace. There is thus an analogy between legislation and socialism, for both are centralized systems, and both suffer from a similar information problem. I first discuss the reason why central planning—i.e., socialism—is doomed to failure, before analogizing socialism to legislation.

1. Central Planning and the Impossibility of Socialism

With the collapse of socialism, mainstream opinion is finally beginning to realize that socialism, in addition to being incredibly immoral and wasteful of human life, simply does not work. But this comes as no revelation and no surprise to the Austrian school of economics following in the footsteps of Ludwig von Mises, arguably the most significant and profound thinker of the twentieth century. Over seven decades ago, at the dawn of Soviet socialism, Mises explained why socialism is *impossible*. Although Mises's amazingly prescient ideas have, unfortunately, been ignored for decades by establishment thinkers, Mises has finally been vindicated by the universally (if belatedly) acknowledged failure of socialism.⁴⁴ It is now obvious

⁴⁴See Gertrude E. Schroeder, *The Dismal Fate of Soviet-Type Economies: Mises Was Right*, CATO J. v.11 n.1 (Spring/Summer 1991) p. 13. Robert Heilbroner, an avowed democratic socialist, has also admitted the triumph of capitalism and Mises' prescience. See also Mark Skousen, "Just because socialism has lost does not mean that capitalism has won": Interview with Robert L. Heilbroner, FORBES, May 27, 1991, p. 130; Robert Heilbroner, *The Triumph of Capitalism*, THE NEW YORKER, Jan. 23, 1989, p. 98, 98 ("Less than seventy-five years after it officially began, the contest between capitalism and socialism is over: capitalism has won."); *idem*, *After Communism*, NEW YORKER, Sept. 10, 1990, p. 91, 92 ("It turns out, of course, that Mises was right."). Heilbroner had previously dismissed Mises's arguments, helping to spread the myth that Mises's anti-socialist claims had been "demolished" by socialist theorists responding to Mises's arguments. ROBERT HEILBRONER, BETWEEN CAPITALISM AND SOCIALISM 88-93 (1970). In this work, Heilbroner claimed that Mises was wrong, that socialist economic calculation was possible, and that the "superior performance" of socialism would "soon reveal the outmoded inadequacy of a free enterprise economy." 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.'"

to just about any honest observer that the moral basis for socialism is a sham, although its effects still linger.

The impossibility of socialism is due to inability of central-planners to calculate; this is not an information problem. Mises focused on calculation and Hayek on information.

In 1920 Mises published his devastating critique of socialism, "Economic Calculation in the Socialist Commonwealth."⁴⁵ Mises showed that, besides the well-known incentive problem of socialism (e.g., getting people to perform unpleasant, unglamorous jobs such as trash collecting)⁴⁶ 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 with 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."⁴⁷ 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:

Again, Mises's argument is not solely on "information" provided by prices but by inability of central-planners to compare different factors which are denominated in different cardinal units.

In Mises, unlike neoclassical, relative prices have nothing to do with the case. Only money prices matter.

⁴⁵LUDWIG VON MISES, ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH (Ludwig von Mises Institute 1990) (1920). See also LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS 95-130 (Liberty Fund 3d rev'd ed., trans. J. Kahane, 1981); Mises, *supra* note 1, at 200-31, 695-715; Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 REV. AUSTRIAN ECON. 51 (1991).

⁴⁶Rothbard, *supra* note 45, at 51 (discussing the incentive problem).

⁴⁷Mises, *supra* note 1, at 259. On the profoundly moral nature of money, see AYN RAND, *The Meaning of Money*, in FOR THE NEW INTELLECTUAL (Signet 1961).

Mises demonstrated that, in any economy more complex than the Crusoe or primitive family level, the socialist planning board would simply not know what to do, or how to answer any of these vital questions. Developing the momentous concept of *calculation*, Mises pointed out that the planning board could not answer these questions because socialism would lack the indispensable tool that private entrepreneurs use to appraise and calculate: the existence of a market in the means of production, a market that brings about money prices based on genuine profit-seeking exchanges by private owners of these means of production. Since the very essence of socialism is collective ownership of the means of production, the planning board would not be able to plan, or to make any sort of rational economic decisions. Its decisions would necessarily be completely arbitrary and chaotic, and therefore the existence of a socialist planned economy is literally “impossible” (to use a term long ridiculed by Mises’s critics).⁴⁸

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

⁴⁸Rothbard, *supra* note 45, at 52-53.

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.⁴⁹ To the extent true socialism was able to be imposed on the populace, economic calculation thereunder was impossible and the people suffered accordingly.⁵⁰

2. *Legislation as Central Planning*

Leoni pointed out that Mises's criticism applies not only to a central economic 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 1920s, 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"⁵¹ Leoni points out that

⁴⁹*Id.* at 73-74. See also Mises, *supra* note 1, at 702 (discussing the use of western price systems by socialist governments).

⁵⁰For further discussion of the problem of economic calculation under socialism, see vol. 9, no. 1 of *The Review of Austrian Economics* (1996); Jörg Guido Hülsmann, *Calculation and Knowledge in Human Action* (paper delivered at the Austrian Scholars Conference, Jan. 26, 1996, Auburn University, Alabama); COLLECTIVIST ECONOMIC PLANNING (F.A. Hayek ed., 1935); DON LAVOIE, RIVALRY AND CENTRAL PLANNING: THE SOCIALIST CALCULATION DEBATE RECONSIDERED (1985); DAVID RAMSAY STEELE, FROM MARX TO MISES: POST-CAPITALIST SOCIETY AND THE CHALLENGE OF ECONOMIC CALCULATION (1992); *idem*, *Posing the Problem: The Impossibility of Economic Calculation under Socialism*, 5 J. LIBERTARIAN STUD. 7 (1981); TRYGVE J.B. HOFF, ECONOMIC CALCULATION IN THE SOCIALIST SOCIETY (Liberty Press 1981) (1949).

⁵¹Leoni, *supra* note 7, at 19.

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.⁵²

The problem of calculation
is the problem of subjective
information
is not a
prob. of
lack of
collaboration.
It is the
incomparability
of the diff.
preferences
of people
and diff.
factors
of production

Leoni is pointing out here that legislators, even if they wanted to enact rules that truly take into account the actual situation, customs, expectations, and practices of individuals, simply can never collect enough information about the near-infinite variety of human interactions. The legislator, like a communist central planner, can only grope in the dark. And unlike a blind man who literally has to grope in the dark but at least knows when he has finally run into a wall or found the door, the legislator (or central planner) has no reliable guide for knowing whether he has constructed the "right" law (or economic allocation) or not.⁵³ Further, not only can legislators not know the actual situation of the individuals they intend to cast their legislative net over, but

If law
has an
objective
ground,
why
can't
one
person
discover
it?
The econ.
prob. of
socialism
or econ.
allocation
is that the
"solution" is
subjective
and ever
changing.
If law is
fixed and
obj., why
would these
problems
exist?

⁵²*Id.* at 19-20 (emphasis in original). See also *id.* at 89; Aranson, *supra* note 19, at 676.

⁵³See Mises, *Socialism*, *supra* note 45, at 100-101 (p. 117 of the 1936 J. Kahane translation) ("[Money calculation] provides a guide amid the bewildering throng of economic possibilities. It enables us to extend judgments of value which apply directly only to consumption goods—or at best to production goods of the lowest order—to all goods of higher orders. Without it, all production by lengthy and roundabout processes would be so many steps in the dark.")

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.

In a common-law process, law develops spontaneously, unplanned, much as prices arise spontaneously on a free market. Mises showed that only when individuals remain free to trade and own private property can genuine prices be discovered. Similarly, true law is discovered in a process that “can be described as sort of a vast, continuous, and chiefly spontaneous collaboration between the judges and the judged in order to discover what the people’s will is in a series of definite instances—a collaboration that in many respects may be compared to that existing among all the participants in a free market.”⁵⁴ 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.⁵⁵ The naive belief that Law can be discovered by means of government employees’ dictates is reminiscent of the joke about the new English public school, in which the headmaster announced to the students one day, “from now on, it will be a tradition at the School to wear hats

⁵⁴Leoni, *supra* note 7, at 22. See also *id.* at 104; Aranson, *supra* note 19, at 668-69. 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 9, at 283 (endnote omitted).

⁵⁵See Leoni, *supra* note 7, at 218 (discussing similarities between evolved systems like language and law).

What about the common law? Is it not circular to argue that True Law is whatever develops organically and then conclude that legislation or higher law cannot be True Law? If True Law is objective why can't it be designed or imposed? What is your definition of True Law or how do you identify it?

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on Fridays.”⁵⁶ Legislation is artificial law, and is no substitute for evolved law.

THIS IS a Hayekian view that Rothbard disagrees with Murray argued for designed law discovered by reason.

A crucial reason for the systematic ignorance of central planners and legislators alike is “the decentralized, fragmentary character of knowledge.”⁵⁷ This makes central planners and central law-makers systematically unable to ever have enough knowledge to make informed decisions that affect entire economic or legal systems. Moreover, not only is a central planner “unable” to gather information only present in a dynamic price structure, but the attempt to plan actually destroys the price structure because the private property system at the base of a price structure is outlawed. Similarly, not only does a legislator face a severe ignorance problem—he could never hope to have a comprehensive and continually updated view of all the interactions, rules, relationships, and customs that exist among the people—he also subverts the very spontaneous legal order that would form in the absence of legislative interference. Customs change, for example, because of the uncertainty introduced, because people become more suspicious and rely less on contracts, and because their time preference increases, as discussed above.⁵⁸ As Peter Aranson puts it, “Legislation saps the social order of spontaneity.”⁵⁹

THIS IS only one of the problems of socialism
1. calcul.
2. subj. Inform.
3. Inform. gathering
4. Incentive

AGAIN, I see why central-planner cannot apply law to every specific case but I don't see why he can't develop law without specific knowledge.

⁵⁶A version of this story is also told in Hart, *supra* note 31, at 172.

⁵⁷Aranson, *supra* note 19, at 675.

⁵⁸See *supra* notes 38-42 and accompanying text.

⁵⁹Aranson, *supra* note 19, 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.”); Carter, *supra* note 9, at 86 *et seq.*; and Benson, *supra* note 14, 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).

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.

I think this is question begging. What do you mean by true law? If you mean "just" or "consistent with reality or nature" then why can't such law be discovered by reason without knowledge of specific cases?

3. Special Interests Wars

Another problem of legislative systems that is related to the central planning problem is their unrepresentative character.⁶⁰ Because of the information problem faced by centralized law-makers, they cannot know the people's wishes with any accuracy or detail. For, "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.'"⁶¹

Good point, I think the correspondance between this point & public choice economics is stronger than the analogy between calculation & legislation.

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

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 23 (ch. 3, p. 74); Tullock, *supra* note 23; Sartori, *supra* note 12; 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 7).

⁶⁰However, this is not to commend the institution of democracy. For a discussion of some problematic tendencies of democracy, see Hoppe, *supra* note 38; and *idem*, *Free Immigration or Forced Integration?*, *CHRONICLES*, July 1995, p. 25.

⁶¹Leoni, *supra* note 7, at 19. See also Aranson, *supra* note 19, at 676-77.

invidious statutes that benefit a select few at the expense of others and, in the long run, at the expense of all of society.

In the political process, statutes are enacted that reflect the will of a contingent majority of legislators. This provides an opportunity for various groups to demand special treatment, such as protectionism or blatant wealth transfers. Those with a vested interest in a given piece of legislation are willing to invest much time, effort, and money (e.g. for bribes) to persuade legislators to enact the legislation. Each individual in the large group outside the special interest group feels the pain of the legislation much less than the special interest group will benefit, so that there is relatively little incentive for many people to oppose the special group's lobbying efforts, or even to educate themselves as to which lobbying efforts are taking place. Escalating efforts at forming special interest groups to lobby for specialized statutes results in "nothing less than a potential *legal war of all against all*, carried on by way of legislation and representation."⁶² Any legislative system in a large, modern society is doomed to succumb, to a large extent, to special interest groups rather than representing the general will of the populace.

4. *Decentralized Law-Finding Systems*

As discussed above, legislative systems such as the civil law are centralized law-making systems, and face many of the problems faced by central planners in general. Decentralized law-finding systems like the common law, on the other hand, are analogous to free markets in that a

⁶²Leoni, *supra* note 7, at 21, 158. See also Aranson, *supra* note 19, at 677-79; and FREDERIC BASTIAT, THE LAW 17-18 (Foundation for Economic Education, Dean Russell trans. 1950) (1850) (discussing ever-escalating conflicts among disparate special interest groups).

For the Free market to develop as a "spontaneous" order it requires defense of private property & contract, perhaps "spontaneous" law rests on some fixed principles as well.

natural, unplanned order arises in both.⁶³ 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."⁶⁴ Judges in a decentralized law-finding system are also less likely to be influenced by special interests than are legislators. As Richard Epstein explains,

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.⁶⁵

To the extent a court-based legal system displays legislative characteristics, which often occurs in government-based court systems,⁶⁶ it faces the same central planning problems as does legislation.⁶⁷ For example, judges that attempt in their decisions to "maximize society's wealth" face the same information problems as a central economic planner.⁶⁸

⁶³See *supra* notes 54 and 54, and accompanying text.

⁶⁴Liggio & Palmer, *supra* note 35, at 720-21.

⁶⁵Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718-19 (1982).

⁶⁶See Part III.B.2, *supra*.

⁶⁷Aranson, *supra* note 19, at 697; Peter H. Aranson, *The Common Law as Central Economic Planning*, 3 CONST. POLITICAL ECON. 289, 297-99 *et passim* (1992).

⁶⁸Aranson, *supra* note 19, at 697-98. See also Aranson, *The Common Law as Central Economic Planning*, *supra* note 67, at 314.

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

D. The Proliferation of Laws

A civilized society, like a functioning free market, develops spontaneously—that is, without centralized direction—and is tremendously complex.⁶⁹ 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 the imposition of 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).⁷⁰ When such

⁶⁹*But see* Hans-Hermann Hoppe, *F.A. Hayek on Government and Social Evolution: A Critique*, 7 REV. AUSTRIAN ECON. 67 (1994) (criticizing aspects of Hayek's theory of "spontaneous" social evolution).

⁷⁰*See* MURRAY N. ROTHBARD, *AMERICA'S GREAT DEPRESSION* (revised ed. 1975); *idem*, 2 *Man, Economy, and State*, *supra* note 38, at 854 *et seq.*; *idem*, *For a New Liberty*, *supra* note 14, at chapter 9; Mises, *supra* note 1, chapter XX esp. p. 561.