

Correct and Certain: Law Cannot Be Both

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ABSTRACT

Law must simultaneously satisfy two competing demands: it must be correct, meaning well-adapted to current social circumstances, and certain, meaning knowable and stable enough for citizens to form reliable expectations and long-term plans. This paper argues that these two properties are fundamentally in tension. Drawing on the work of Bruno Leoni and Friedrich Hayek, the paper examines how different conceptions of law—statutory legislation, common law, and emergent tradition—handle this tension. Leoni’s central insight, that legislation suffers from the same knowledge problem as central economic planning, is developed and extended. Just as no planner possesses sufficient local knowledge to set prices correctly, no legislature possesses sufficient information to enact laws that accurately reflect the norms and needs of a complex society. Three categories of costs attend any change in the law: switching costs, habit costs, and resistance costs. Each imposes burdens on citizens and erodes the moral authority that gives law its compliance-generating power, independent of formal enforcement. Leoni’s preferred alternative—judge-made common law rooted in tradition and the principle of Ex Eo Quod Plerumque Fit—offers greater certainty through its resistance to rapid change, while preserving a decentralized discovery process analogous to market price formation. Finally, an unresolved tension in Leoni’s framework is identified: without an external normative criterion, evolutionary legal processes offer no guarantee of just or efficient outcomes. The paper concludes that while no legal system can be perfect on all dimensions, a return to genuinely tradition-based common law adjudication would represent a meaningful improvement over modern legislative practice.

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I. INTRODUCTION

As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars. Hence, we infer that sometimes and in certain cases laws may be changed; but when we look at the matter from another point of view, great caution would seem to be required. For the habit of lightly changing the laws is an evil, and, when the advantage is small, some errors both of lawgivers and rulers had better be left; the citizen will not gain so much by making the change as he will lose by the habit of disobedience. The analogy of the arts is false; a change in a law is a very different thing from a change in an art [techne]. For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law. Even if we admit that the laws are to be changed, are they all to be changed, and in every state? And are they to be changed by anybody who likes, or only by certain persons?¹

The law should be correct, and certain.

“Correct” law is perfectly adapted to current circumstance, and conditions. “Certain” law is both *knowable* and *predictable*, allowing citizens to coordinate their expectations and behavior for long-term arrangements. The problem is clear: if society is dynamic, and circumstances and conflicts are constantly changing, then the law can only be *correct* if it adjusts accordingly through what social theorists call a *discovery process*. But the nature of the discovery process depends on one’s conception of the origins and emergence of law. Possibilities include tradition (*Ex Eo Quod Plerumque Fit*, or “From That Usually Happens”), legislation, democratic voting, or binding decision by judges.

In markets, “discovery” takes place as a result of competition, and manifests as changes in relative prices. Citizens are constantly updating their expectations and behavior in response to such price adjustments, which reflect fundamental forces of scarcity and need. It is common to lament these large changes in the economy, but as numerous economists have argued, the ability of the economy to move quickly through stages of “creative destruction” are essential. For the most part, attempts to stabilize prices introduce substantial, and expensive, distortion.

Market discovery is thus more like the “arts,” or *techne* (a practical skill or scientific discipline), as was described by Aristotle in the passage quoted at the outset. A new and superior cooking technique, or procedure for performing appendectomies,

1. ARISTOTLE, POLITICS 50–51 (B.A. Jowett, ed., 1885).

should be adopted immediately. Nostalgia for the “old ways” is simply atavistic, because the new approach yields better outcomes. If prices change, then market participants similarly update their expectations and behavior conditional on the new information about cost and scarcity.

But then what about law? The processes mentioned above—tradition, legislation, voting, or judges—all have different origins, and are likely to change in very different ways, and at different speeds. Social theorists and legal scholars have likewise argued for discovery process for the “correct” law and debated processes for updating laws in response to changes in social conditions.

Bruno Leoni, who makes one of the earliest clear arguments in this regard, highlighted this discovery process (*processo di scoperta*) in law-making.² But Leoni was firmly in the “tradition” camp, and made *Ex Eo Quod Plerumque Fit* the centerpiece of this account of the origins and legitimacy of law. In addition, and in fact for this reason, Leoni was also firmly in the Aristotelian camp, believing that certainty required constancy, which is a feature of tradition, but *not* of the other systems.

There are three differences between law and market processes that make frequent changes harmful. These differences are:

1. Laws, unlike prices, are hard to perceive or understand if they are constantly changing. Prices can be posted at the point of sale, and are easily interpreted, but laws are complex, changes are hard to communicate, and the implications of change are hard to predict.
2. Citizens have made plans, and entered into complex agreements, based on their good faith understanding of the laws that govern their relationships to other citizens. Changing the laws means that those agreements may no longer be valid or enforceable; frequent changes create circumstances of uncertainty that may prevent citizens from entering into cooperative agreements or contracts in the first place.
3. Citizens’ knowledge of the law, and the habit of obeying the law, is based on the belief that the law is morally and practically meaningful. Obeying the law because “this is the right way to do things” is an important aspect of human culture.³ Any change in the law raises doubts about the validity of law itself: “We used to punish you if you acted this way, but now you will be punished if you act *that* way.” If the justification for coercion and punishment is the moral offense of violating the law, then morality requires that the law be constant.⁴

2. Antonio Masala, *L’eredità di Bruno Leoni*, in *LIBERTAS, LIBERTATES: BRUNO LEONI NEL CENTENARIO DELLA NASCITA* 4, 6 (2014). See generally MARIO DE BENDETTI, *PER UNA TEORIA MICROPOLITICA DEL FEDERALISMO: BRUNO LEONI E LA TRADIZIONE LIBERALE TRA POLITICA, ECONOMIA, E DIRITTO* (2023).

3. See generally GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* (1985).

4. The German saying is *Die Regeln sind die Regeln!* (“The rules are the rules!”)

Finally, it is essential to recognize a difference between the decentralized discovery process used by markets, and the centralized, top-down discovery process used in “correcting” law through amending legislation. No individual, or group of experts, could possibly have enough information to reach a correct conclusion about the level, or accurate changes in prices.

Likewise, no individual, or group of experts—say, a “legislature”—could possibly know enough to make accurate judgments about whether a particular change in the law is “correct.” It is more likely that changes in legislation are responses to previous mistakes that simply introduce new and even larger distortions. There is an analogy between emergent *market* discovery—prices—and emergent *legal* discovery—traditional common law⁵—that was developed by Bruno Leoni in particular. This insight, that “corrections” are likely to be pointless, or harmful, on their merits, combined with the harms caused even if the changes are improvements, makes for a powerful indictment of top-down, centrally “planned” legislation.

In this essay I argue for the primacy of *certainty* (known and predictable) over *correctness* as the main criterion for evaluating a system of discovery and enforcement of law. I draw on work by Friedrich Hayek, and (especially) the contributions of Italian legal thinker Bruno Leoni, and scholars who have recently extended and amplified Leoni’s insights. In the following section I describe “the law,” and different conceptions of how law can be “discovered” and maintained. Importantly, three sources of cost for changes in the law are raised and discussed here as well. In the third section, a transition is made from statutory law, and Bruno Leoni’s insight about an explanatory analogy—statutes are central planning, and customary law is an emergent market process—is discussed. In the fourth section, Leoni’s preferred alternative—“grown,” or common law—is discussed, and Leoni’s distinctions between modern and classic Roman “judge-made” law are described. The fifth and final section offers some conclusions, and some directions for further inquiry on this subject.

2. LAW

When a law is changed, two things happen; both are bad. First, people who were accustomed to the old law have their expectations violated. The plans that were made under the good faith assumption that the law was constant and persistent are overturned, often in ways that are costly and require adaptation and new investment to conform with the new requirements. Second, the very idea of laws, and obedience to the law as a moral requirement, is weakened. As Aristotle notes, it would be prohibitively expensive to rely on formal enforcement of the law; we

5. This distinction will be discussed in greater detail below. But the notion that common law is based on tradition, enforced by judges, was a central conceit of much of Anglo-Saxon jurisprudence. See Charles E. Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593 (1917); James R. Stoner, *Common Law and Constitutionalism in the Abortion Case*, 55 REV. POLS. 421 (1993); A.C. Pritchard and Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 N. C. L. REV. 409 (1999); JOHN HASNAS, COMMON LAW LIBERALISM: A NEW THEORY OF THE LIBERTARIAN SOCIETY (2024).

rely on the force of habit and custom for “enforcement,” in the sense that “this is how we do things, and you should do things this way, also.” The approval and disapproval of others, and our own desire to deserve that approval, are the key to the success of the “rule of law.”⁶

A problem arises when constant changes in the law erode this sense of moral justification. Orwell famously mocked the insistence that change could simply be imposed, by pretending that the previous insistence on a moral requirement could be modified by the authorities at will:

The past was alterable. The past never had been altered. Oceania was at war with Eastasia. Oceania had always been at war with Eastasia . . . He remembered remembering contrary things, but those were false memories, products of self-deception.⁷

Saying, “You must obey the law, or be punished, because the law is correct and has moral force!” is inconsistent with saying, “That was once the law; that law was wrong. But the new law is correct, and you will be punished now for a different reason, and for different actions.”

Blackstone, at the outset of the *Commentaries*, recognizes the tension between a written code and an emergent body of “judge-made” law.

FAR be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as collection of written reason. No man is more thoroughly persuaded of the general excellence of its rules, and the usual equity of it's [sic] decisions; nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to . . . prefer the edict of the praetor, or the receipt of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whole meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

Without detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; an [sic] highly useful, I had almost said essential, part of liberal and polite education.⁸

Blackstone distinguishes the written code of the later Roman empire with the much looser, and emergent, “law” of the English system. But Bruno Leoni famously

6. Adam Smith discusses this “enforcement” mechanism at some length in Part I, Section 1, Chapter 3. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 11–13 (1759).

7. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 228 (1949).

8. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *5–6.

championed the earlier form of Roman law, before Empire and Justinian, for the same reason: discovery, or what Leoni called the “*processo di scoperta*,” of the Romans.

Partly influenced by Leoni, F.A. Hayek sought to demarcate the three domains of governance as law, legislation, and liberty.⁹ Hayek’s definition of law is both innovative and incoherent: at some points, Hayek appears to define law as “grown” (emergent), or “judge-made” (common law, based on *stare decisis*).¹⁰ As Hasnas points out, one could plausibly reconcile the contradiction by the charitable (and plausible) conjecture that Hayek was contrasting his conception with “legislation,” the formal bills that are emitted by the legislature and written down as black letter law in statute books.¹¹ More simply, accepted rules that are not legislation are laws; laws are rules that are not formally legislated.

But it matters, perhaps a lot, whether we think of “law” as meaning rules that are emergent or “discovered” by trial and error, or as meaning rules that are settled on by judges as useful and efficient means of adjudicating disputes. The process of discovery itself is quite different, and the level of certainty varies widely because emergent law can change only to reflect a prior change in “how we do things,” while judge-made law could change simply if a new precedent becomes that accepted guideline.

One of the most important discussions of this trade-off between discovery and certainty was presented by Bruno Leoni.¹² The tensions between the need for predictability—what the law *is*—and the need to foster discovery—what the law *should be*—were an important area for Bruno Leoni’s work on political theory. It is no accident that the title of Leoni’s book—*Freedom and the Law* (1962)—was so closely mimicked by Hayek’s 1973 three-part effort, *Law, Legislation, and Liberty*. A free society cannot operate without “law,” which affords a means of creating and coordinating expectations, and therefore organizing cooperative behavior. For those who view the law as “emergent,” the definition of law is simply the empirical regularities in “how we do things.”¹³

Unfortunately, as I have argued elsewhere, Leoni’s exposition of this view was cut short by his violent and untimely end.¹⁴ But it is worth describing this trade-off and considering how Leoni’s integrated conception of (1) “discovery” through

9. Peter Boettke & Rosolino Candela, *Hayek, Leoni, and Law as the Fifth Factor of Production*, 42 ATL. ECON. J. 123 (2014).

10. John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U.J. L. & LIBERTY 79 (2004).

11. *Id.* at 80.

12. Alberto Mingardi, *Bruno Leoni and the Search for Certainty in Law*, LAW & LIBERTY, Nov. 7, 2018, <https://lawliberty.org/classic/bruno-leoni-and-the-search-for-certainty-in-law/> [https://perma.cc/X24W-XSDN].

13. I have only recently noticed how frequent these exact words, or very close to them, can be found in Frances Hutcheson, Adam Smith, John R. Commons, Ronald H. Coase, F.A., Hayek, Douglass C. North, and others. But Bruno Leoni is perhaps the most faithful member of this group, in the sense that he thinks this is literally the only legitimate source of “correct” law.

14. Michael Munger, *Underappreciated Economists: Bruno Leoni*, 30 THE INDEP. REV. (forthcoming 2025).

judicial investigation, and (2) “certainty” through the preservation of a particular view of the force of precedent, reconciled the tension.

The simplest example of “how we do things” may be language: a group of people will always find it useful to be able to communicate. But effective communication requires that we all “agree” that certain concatenated sounds have particular, shared meanings. Notice that “agree” does not in any way imply *consent*. Instead, the shared meaning is simply *recognized* as being “the way we talk.” A word or idiom must be understood from the context to mean what it is usually intended to mean, in conventional conversation. Leoni’s single, central concern was certainty; it is worth considering how Leoni’s contribution on this matter was unique, and important.

Hayek had likewise been concerned about certainty, but with a crucial difference. As Hayek said: “I doubt whether the significance which the *certainty of the law* has for the smooth and efficient working of economic life can be exaggerated.”¹⁵ Leoni claimed that this was part of Hayek’s general formulation, in which Leoni claimed Hayek believed that law must be only general, equal, certain, and subject to independent judicial review.¹⁶ In Leoni’s view, Hayek advocated for “definitely written formulae,” so that “rules be general, clearly stated, and published in advance.”¹⁷ Leoni saw these not as advantages, but as flaws, at least in context of legislation. For Leoni:

The usual process of law-making . . . is by way of legislation. But the legislative process is not something that happens once and for all. It takes place every day and is continually going on. This is particularly true in our own time. In [Italy] the legislative process now means about two thousand statutes every year, and each of them may consist of several articles. Sometimes we find dozens or even hundreds of articles in the same statute . . .¹⁸

Leoni introduced a distinction between what he called “long-run uncertainty” and “short-run uncertainty” in the law. Written, legislated, or statutory laws and rules can be *seen* and understood, and their meaning interpreted, but there is little certainty that such laws are *stable*. An economic actor, an entrepreneur, or even just a citizen cannot make a reliable prediction that the law will be the same in the future. He contrasted statutes with what the English call “common law” and what Leoni called “lawyers’ and judges’ law.”¹⁹ This law can be fuzzy and unclear in some of its particulars, but it is certain in the long run because certain principles are established, and are thereafter difficult to change quickly.

15. F.A. Hayek, *The Safeguards of Individual Liberty*, in *COLLECTED WORKS* 39, 167 (Bruce Caldwell, ed. 2014).

16. BRUNO LEONI, *FREEDOM AND THE LAW* 62 (1972).

17. *Id.* at 71.

18. *Id.* at 75.

19. Peter H. Aranson, *Bruno Leoni in Retrospect*, in *LAW AND ECONOMICS* 198 (Alain Marciano ed., 2009); see generally Todd J. Zywicki, *Bruno Leoni’s Legacy and Continued Relevance*, *J. PRIV. ENTER.* 136 (2015).

Apparently, Leoni was able to persuade Hayek that being clearly written down was not sufficient to guarantee certainty, changing the direction of Hayek's research and thinking.

Of course, it is possible to change the meaning of a word or phrase, or to impose restrictions on what can or cannot be said, but the efficiency of such a change would run afoul of the problem of legitimacy: we once used *this* word, but now we must use that word, instead. If this change emerged naturally from a gradual change in convention, the effect would be smooth and not especially disruptive. But an attempt to impose a change results in turbulence and confusion: "I'm going to call it Twitter; I don't care what you say, it will never be 'X' to me!"²⁰

As these examples make clear, and as also apply to changes in the law, it seems useful to summarize the disparate strands of Leoni's goal of "certainty" as involving three quite different dimensions of cost of change.²¹

These are:

A. *Switching*: The simple transaction costs of change, reprinting notices and code books, changing procedures and training manuals, and posting notices of the changes where the information can be widely learned and acted on.²² Further, the perception that the law is changeable encourages interested parties to devote resources to the changing the law. Even if these "rent-seeking" efforts fail, the resources diverted away from productive activities can be substantial. In fact, even if there were a significant benefit to changing the law from bad to good, much of the benefit may be dissipated in subsequent efforts to change the law again, and again.²³ Having the law settled, and constant, saves enormous and largely unmeasured switching costs.

B. *Habit costs*: Habits are extremely useful as a way of economizing on decision-making and choice, provided the habits are good social ones. Alfred North

20. This imposed change in meaning, or word usage, has been endemic in the conflicts over identitarian politics. When a minority or disfavored group tries to insist on a different reference or identifier, the change—even if legitimately intended—can produce a backlash. Examples include "compelled" pronouns on gender (Murphy, *The Problem with 'Preferred Pronouns'*, FEMINIST CURRENT, (2021)), descriptors of racial or ethnic identity (*Racial and Ethnic Identity*, AMERICAN PSYCHOLOGICAL ASSOCIATION, N.D.), and required "diversity statements" on job applications (Bolstad, *Backlash against DEI spreads to more states*, STATES NEWSROOM (2024)). The point is not that these requirements are somehow wrong on the merits, but rather that they try to change convention immediately and unilaterally, from the top down, and meet resistance.

21. With thanks to John Hasnas of Georgetown, who suggested this three-part cost categorization, as a way of summarizing Leoni. If it is correct, Hasnas should be credited. But if it is mistaken, I accept the blame.

22. For a review of the consideration of switching costs see Svetozar Pejovich, *Understanding the Transaction Costs of Transition: It's the Culture, Stupid*, 16 REV. AUSTRIAN ECON. 347 (2003).

23. The rent-seeking literature began with three seminal papers. See generally Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967); Anne Krueger, *The Political Economy of Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

Whitehead famously lauded the importance of (accurate) habits over the application of reason:

It is a profoundly erroneous truism, repeated by all copy-books and by eminent people when they are making speeches, that we should cultivate the habit of thinking of what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them. Operations of thought are like cavalry charges in a battle—they are strictly limited in number, they require fresh horses, and must only be made at decisive moments.²⁴

This claim was famously extended by Friedrich A. Hayek, who said:

We make constant use of formulas, symbols and rules whose meaning we do not understand and through the use of which we avail ourselves of the assistance of knowledge which individually we do not possess. We have developed these practices and institutions by building upon habits and institutions which have proved successful in their own sphere and which have in turn become the foundation of the civilization we have built up.²⁵

It is easy to dismiss such costs as trivial and transitional. But this is to miss the problem of the Tullock's "transitional gains trap":²⁶ underestimating the costs of breaking an old habit and developing a new one fails to understand the importance of Aristotle's point made at the outset of this paper.

C. Resistance costs: People often just don't like being told what to do, especially if the "you must do this!" commands are constantly changing. This can be prosaic: people didn't want "new Coke," and they wanted to call it "Twitter," not X. The frequent changes in "politically correct" names for race, ethnic, or gender categories created a backlash even among those who were otherwise sympathetic to the cause of reducing discrimination and bias.²⁷

In this section, the importance of permanence and predictability for "certainty" has been highlighted. In the following section, Leoni's concern about a valid *processo di scoperta* is considered.

3. DISCOVERY

Leoni had two concerns, one normative and the other epistemological. As discussed in the previous section, his central normative interest was the "certainty of

24. ALFRED NORTH WHITEHEAD, AN INTRODUCTION TO MATHEMATICS 61 (1911).

25. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 528 (1945).

26. See generally Gordon Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671 (1975).

27. W. Edwards Deming founded a whole approach to management based on managing change. He called this PDCA, for Plan-Do-Check-Adjust. See W. EDWARDS DEMING, OUT OF THE CRISIS (1986). But an important implication of Deming's observation of management in Japan and the U.S. was the finding that it was resistance to change, especially constant and unexplained change, that constituted the biggest obstacle to implementing new policies.

the law.”²⁸ His central epistemological focus was the *processo di scoperta*, by which existing law might be corrected and updated.²⁹

The central organon of Leoni’s thought was the investigation of how the workings of the market, and market-like processes, could produce social order, extending even into the space of politics and the state.³⁰ According to Masala, it is important to see “two pillars” of Leoni’s mature thought.³¹ The first is the argument in *Freedom and the Law*: Leoni saw economic planning and legislation as both suffering from the same problem, because they both suffered from what we would now call “the knowledge problem.”³² Just as economic planners lack the local information about resources and their uses that would be necessary to “plan,” members of assemblies lack the local information about norms and agreements about the right to be able to choose laws that will solve social problems.

Thus, the “production” of law by an isolated and poorly informed parliament will result in distortions, and often the “overproduction” of law in settings where formal rules are not necessary and may be actively harmful.³³ Leoni argued that the errors of “centrally planned law” in Italy were quite recent, and that the interpretive tradition of law in Italy had been in place for centuries with very little centralized control.³⁴ Interestingly, Leoni used the word “discovery” (*processo di scoperta*) to describe how the law should be “made.”³⁵ Where a parliament debates and votes to “discover” the law, and where markets use exchange to generate prices to “discover” scarcity values, Leoni thought that the law could be “discovered” by judges and lawyers who were actively looking for the best solution.³⁶ The goal was not to find what the law should be, but to find the solution to problems of disputes in agreements and contracts, and to identify the principles or concepts, assign liability, and resolve problems that blocked cooperation.

Looking to Roman and English law, which worked from broad principles to generate general rules that allowed citizens to coordinate their expectations with certainty, in a way that also produced relatively efficient outcomes, Leoni argued that parliaments and legislatures should be sharply restricted in the scope of their

28. LEONI, *supra* note 16, at 70.

29. *Id.* at 65.

30. The opposite could also be true, however: the state could expand if such limits were not taken seriously. See, e.g., Luigi Marco Bassani & Carlo Lottieri, *The Rise of The Sovereign State*, MISES WIRE (November 30, 2021), <https://mises.org/mises-wire/rise-sovereign-state> [<https://perma.cc/XU8S-VBR6>].

31. See Antonio Masala, *Bruno Leoni and the Austrian Tradition*, Austrian Economics Research Conference (March 23, 2013), <https://mises.org/podcasts/aerc-2013/bruno-leoni-and-austrian-tradition> [<https://perma.cc/74TJ-H9ME>].

32. Hayek, *supra* note 25, at 524–528.

33. For a discussion of “overproduction” of law, and rules, see Mario Juarez-Garcia & David Schmidt, *The Administrative State*, 38 SOC. PHIL. & POL’Y 1, 2 (2021).

34. LEONI, *supra* note 16, at 22.

35. *Id.* at 87.

36. *Id.* at 145.

jurisdiction.³⁷ Most of the time, in most settings, there is simply no need for formal law, if common law principles can be used instead.³⁸

Another advantage of this “discovery” process, as noted above, is *precisely* that it is slow and deliberate in change, though it is fast in resolution of individual cases.³⁹ Citizens cannot be certain of parliamentary law, even if it can be read in very precise language *today*, because it may be changed or replaced tomorrow. It is worth considering Leoni’s reasoning in some depth:

While legislation is almost always certain — that is, precise and recognizable, as long as it is “in force” — people can never be certain that the legislation in force today will be in force tomorrow or even tomorrow morning. The legal system centered on legislation, while involving the possibility that other people (the legislators) may interfere with our actions every day, also involves the possibility that they may change their way of interfering every day. As a result, people are prevented not only from freely deciding what to do, but from foreseeing the legal effects of their daily behavior.⁴⁰

Leoni tried to advance an analogy, claiming that common law and market processes both share a “discovery process,” where people actively search for improvements, while legislation and centrally planned economies share the feature that they are imposed, from the top down, and that neither legislators in law nor planners in commerce possess the information they would need to carry out their tasks.⁴¹ These differences are depicted in [Table 1](#), below.

TABLE 1: ANALOGY BETWEEN COMMON LAW & MARKETS, & LEGISLATION & CENTRAL PLANNING

	Civil	Commercial
Discovery Process	Common Law	Market Processes
Imposed Top Down	Legislation	Centrally Planned Economy

The second “pillar” of Leoni’s work was a comprehensive political philosophy of law and rights. He wanted to ask how we could know if the laws are right and fair, and given a set of laws, which should be kept and which should be changed?⁴² Leoni provides several criteria that must (in his view) be met before changes in the law might be legitimate.

First, law should change only to reflect existing changes in social practices that have already evolved in society—not to impose new ones from above. As he puts

37. *Id.*
38. *Id.* at 68.
39. *Id.* at 179.
40. *Id.* at 8.
41. *Id.* at 19.
42. *Id.* at 4.

it, jurists should recognize changes “as having already happened in their environment rather than being introduced by the jurists themselves.”⁴³ Second, Leoni introduces what he calls a “golden rule” that has a censoring or gatekeeping function: law must avoid limiting or repressing the freedom of individuals.⁴⁴ That means that legislation is to be rejected whenever it is used merely to subject minorities or treat them as losers, or whenever—even without the legal change—individuals could attain their aims without collective decisions or coercing others.

Third, law should be changed by the legislature only when other alternatives have already proven inadequate.⁴⁵ Leoni warns against assuming legislation is necessary just because other methods fail to “discover” social opinion. Leoni demands that legislators rigorously prove the existence and urgency of a social problem before intervening. (It was Leoni’s belief that in practice this almost never happens!⁴⁶) He criticizes the constant legal changes that destroy voluntarily accepted conventions and agreements. Legislation, to be fair, should not undermine the stability that non-legislative rules provide.

Fourth, and finally, legislation can change existing practices and rules only when the legislative alteration is demonstrably preferable, for the entire society, to the existing common law convention.⁴⁷ If a legal problem cannot be resolved by the common-law process or other decentralized mechanisms, legislation might be justified—but only after clear, positive justification.⁴⁸ In the absence of such justification, issues should be left to private resolution and common-law processes. As Leoni puts it:

Resorting to legislation for the spontaneous application of nonlegislated rules of behavior is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system. This preliminary assessment is simply unthought of by contemporary legislators.⁴⁹

Because of his early and unexpected death, Leoni was unable to complete much work on this four-part “second pillar,” but the description above (taken from my own interpretation of claims scattered throughout the book) means that some outlines of his answer can be glimpsed.

To succeed, Leoni would have to work out an important tension, between two sources of “discovery”: reason and trial-and-error. To begin with, Leoni would dismiss political popularity as a source for “right,” because voting had no

43. *Id.* at 94.

44. *Id.* at 182.

45. *Id.* at 110.

46. *Id.* at 122.

47. *Id.* at 13.

48. *Id.* at 14.

49. *Id.* at 13.

capacity for *processo di scoperta*. What was necessary was to *look at human behavior*, human action in the Misesian sense, and determine which laws are consistent with individual liberty and prosperity.⁵⁰

Rights, for Leoni, are based on the claim of an individual, the assertion of a right (“this is mine, this is not yours,” etc.) that others are *anticipated* to respect.⁵¹ Theft is then the assertion of a right, or the exercise of a right, that others do not recognize, and cannot be expected to respect.⁵² I take when no one else recognizes my right to take. My reading of Leoni leads to the claim that for him these kinds of claims or rights have three elements:

1. A personal interest—some connection or basis for the claim, or association;
2. A forecast, a prediction about behavior—anticipating others will accept the claim;
3. The opportunity to determine the claim’s legitimacy through resolution of the dispute, in a way that others will also accept as legitimate.⁵³

There are many kinds of such claims, in Leoni’s view, far more than simply property claims. In Roman law, as discussed above, the guiding principle was *Ex Eo Quod Plerumque Fit*, or “From That Which Usually Happens.”⁵⁴

This observation seems quotidian, almost tautological, but for Leoni it was fundamental. There are three aspects behind “what usually happens”:

- A. The fact that expectations are formed out of experience with what works
- B. An element of statistical probability, in the sense that actions satisfy expectations
- C. The process of selection of principles of law, or patterns of dispute resolution, that fit particular circumstances

Taken together, this means that “what usually happens” is not the result of a random process of generating norms, but rather a process of selection of norms or principles that work, with “work” being defined as an outcome that produces mutual benefits and does not produce constant appeals and further litigation. Further, this principle is widely enough recognized and internalized that most people in the society coordinate their expectations on outcomes arising from this principle.

50. See generally LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (1949).

51. Zywicki, *supra* note 19, at 136.

52. Aranson, *supra* note 19, at 667.

53. Munger, *supra* note 14, at 11.

54. That Latin phrase always makes me think of verse 25 from the *Book of James*, Chapter 1 in the *Christian Bible*: “But whoever looks intently into the perfect law that gives freedom, and continues in it—not forgetting what they have heard, but doing it—they will be blessed in what they do.” *James* 1:25 (New International Version).

Finally, the principle is a reliable and “certain” guide to future action, because it is constant and stable over time.

As was emphasized in Table 1, there is for Leoni a kind of unity between common/lawyers’ law and market processes. Both are based on participants’ fundamental ignorance, with information emerging from a discovery process. Prices are a *social*, almost deliberative, phenomenon, and so are laws. Of course, this suggests the problem presented by natural law: there is no reason to expect that an evolutionary process will change toward better outcomes, because evolution simply emphasizes survival. There need be no *telos*.

Leoni had wrestled with this problem in his own mind, but the contradiction was cast in stark relief by the review of *Freedom and the Law* published by Murray Rothbard, soon after the book came out.⁵⁵ Rothbard admired the valid critique Leoni had leveled at Hayek on the “rule of law,” but then pointed out a problem that Leoni had not dealt with adequately, or at all.

A great defect in Leoni’s thesis is the absence of any criterion for the content of the judge-made law. It is a happy accident of history that a great deal of private law and common law is libertarian, that they elaborate the means of preserving one’s person and property against “invasion.” But a good deal of the old law was antilibertarian, and certainly custom can not always be relied on to be consistent with liberty. . . . Suppose ancient custom decrees that virgins be sacrificed to the gods by the light of the full moon, or that red-heads be slaughtered as demons? What then? May not custom be subject to a higher test—reason?⁵⁶

Leoni’s response was to begin to write about what he called the “empirical recovery” of natural law. That is, the laws that result from the evolving process of finding what works, the process of judges and lawyers looking to uncover the principles or laws of correct dispute resolution, will tend also to illuminate laws of virtue and justice.

After all, evolved law is what *is*; natural law is what *should be*. The principles of natural law await discovery, in Leoni’s view, as they are nothing more than the elaborated implications of reason.⁵⁷ And the essence of judge-made or “lawyers” law is the application of reason to disputes. Yet Leoni was unable to proceed very far, because he recognized that reason needed premises, and the path of reason that emerged from an emphasis on efficiency in dispute resolutions could be quite different from the path of reason that emerged from a foundation of virtue.

At the time of his death, Leoni was groping towards “empirical recovery” as way of reconciling the paradox. He argued that reason needs a historical experience or context. It is fair to say, as Rothbard argued, that only reason can say whether historical experience has led to good outcomes.⁵⁸ But only historical experience can say

55. See generally Murray N. Rothbard, *Review of Freedom and the Law*, 1 NEW INDIVIDUALIST REV. 187 (1961).

56. *Id.* at 188.

57. LEONI, *supra* note 16, at 87.

58. Rothbard, *supra* note 55, at 188.

whether reason leads to workable rules, and it is likely that reason alone will fail to suggest rules that “work” without considerable groping and trial-and-error.

Thus, the common law process of evolving cases will generate principles, and then the task of reason is correcting the principles that emerge, rather than the impossible task of generating workable new rules *de novo*, as was suggested by more abstract political philosophers. The common law is evolved law, and so is consistent with actions and expectations. Natural law must be derived from the systematic application of reason but can at best be used to correct common law.

The original conception of the common law contained an organic solution to this apparent tension between certainty and discovery, by linking precedent and tradition. The modern tension results “from a severing of two elements that were once united in the classic form of common law adjudication: (1) the rule of precedent, or *stare decisis*, and (2) the customary or traditional character of common law.”⁵⁹ Further, according to Stoner, at the time of the American Founding, “legislation was not taken to be the medium of all authority, since legislative bodies were established side-by-side with courts expected to follow the traditions and customs of the common law.”⁶⁰ This suggests a fifth category of law-source, tradition. Since this is the heart of the distinction between top-down and emergent features of what is now lumped together as “the common law,” it is useful to consider efficiency and emergence.

4. COMMON LAW: EFFICIENCY, EMERGENCE, EVOLUTION

4.a. Efficiency

There is a substantial literature on the “efficiency of the common law.”⁶¹ The main tenet of this work is the claim that over time judges will choose liability assignments and property rights in the ways that impose the least cost on the system, and that maximize wealth. Even if one admits that the direction of change should be in the “direction” of increased efficiency, rather than ever arriving at an “optimum” (whatever that even means), the functioning of such a system sounds attractive.

Like any “evolutionary” process, what is required is a means of generating variation, and a means of selection that favors some factor that indicates “fitness.” For biological evolution, the source of variation is genetic mutation; the source of selection is survival and differential reproduction based on the features of those genes.

For common law, the claim is that the source of variation is the myriad circumstances people find themselves in, conflicts that result in disputes. The source of selection is the expense of using the legal system, and the pressures to have

59. Stoner, *supra* note 5, at 442.

60. *Id.* at 425.

61. See, e.g., George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65–82 (1977); P. H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51–63 (1977); Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV., 1551–1596 (2003); Todd Zywicki & Edward Stringham, *Common Law and Economic Efficiency*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Francesco Parisi & Richard Posner, eds., 2010).

consistent expectation coordinated on conventions and emergent laws. If the precedents are the formal encoding of already-existing norms, conventions, and “manners” for how things are generally done, then the common law is simply “paving the muddy paths,” to use the metaphor of Munger (2019).⁶² In that case, it would be plausible to maintain, as *West’s Encyclopedia* does, that common law should be thought of as “[t]he ancient law of England based upon societal customs and recognized and enforced by the judgments and decrees of the courts.”⁶³

On that account, the conventions, in “judge-made” law, are precedents, taken from custom and given force by adoption by judges. Many judges, in many different—but similar in the important respects—fact situations, all recognize the same customary resolution, implying the same assignment of rights and liabilities. Some judges may deviate, but these “errors” will be corrected on appeal. And even if errors in individual cases go through, those decisions are not used as precedents by future judges, and so die off, much like a subspecies of animal or plant will be replaced by an alternative phenotype that exhibits more “fitness.”

This is a lovely story, but there is a problem with that account. The notion that common law was “unwritten” was challenged, most strongly by Jeremy Bentham, on the grounds that the law was very much written; it was just being written by judges. Though common law was defined as *lex non scripta* in legal dictionaries including Bouvier’s and Black’s, the law could now be found written down in case books.⁶⁴ William Blackstone piously declared that common law could only reaffirm pre-existing customs, and could never make new law. He said that the judge’s job is to determine the law “not according to his own private judgment, but according to the known laws and customs of the land;” judges are “not delegated to pronounce a new law, but to maintain and expound the old one.”⁶⁵ In fact, and contrary to Blackstone’s effort to paper over the offense, the words of the judges writing the opinion took on the force of law themselves, as if they had been legislated.

This was especially true in U.S. constitutional decisions, where phrases and multi-part “tests” proposed by the justices actually came to take on the legal force of *written* constitutional provisions.⁶⁶ This was hardly unwritten, or customary law, but was “judge-made” at level that is hard to reconcile with the traditional story of emergence and efficiency.⁶⁷

62. Michael Munger, *Pave the Muddy Paths*, THE DAILY ECON. (Jan. 22, 2019), [https://thedailyeconomy.org/article/pave-the-muddy-paths/\[https://perma.cc/8MPN-FN6N\]](https://thedailyeconomy.org/article/pave-the-muddy-paths/[https://perma.cc/8MPN-FN6N]).

63. JEFFERY LEHMAN & SHIRELLE PHELPS, 3 WEST’S ENCYCLOPEDIA OF AMERICAN LAW 30 (2d ed. 2005).

64. For background on the arguments and sources in this paragraph, see Carpenter, *supra* note 5, at 593–607. A provocative review of the wrenching change from “old” to “modern” common law can be found in HASNAS, *supra* note 5. Black’s Law Dictionary was first published in 1891, and Bouvier’s Law Dictionary was first published in 1839.

65. 2 BLACKSTONE, *supra* note 8 at *11, *69.

66. See generally HASNAS, *supra* note 5.

67. The very phrase “judge-made” was coined as a term of derision by Jeremy Bentham, arguing that judges were literally confecting laws in the guise of issuing opinions. It is interesting that this mocking description has been adopted by advocates of common law today. For a description of Bentham’s

The difference in the origins, and pressures for change, in “judge-made” law are very different from the process of changes in tradition, encoded in due course by the judiciary. The latter, the “common law” that Leoni had in mind, would change only after the expectations of actors had adapted to encompass the change. A judicial decision, replacing one body of precedent with another, is no more certain or permanent than a piece of legislation.

4.b. Emergence and Evolution

Of course, there is a grander and more fundamental level of selection, across different societies, one that uses legislation and another that uses emergent law. The question is not whether evolution, or technocracy is perfect; both are riddled with defects. The question is which might a society select? Perhaps such a selection is impossible. Still, if two otherwise similar societies happen to find themselves organized around evolutionary principles or planning principles, which society learns faster and more effectively? As Hayek put it: “The central aim of all study of society must be to construct a universal theory of all mankind, understood a scheme of the necessary development of humanity according to recognizable laws.”⁶⁸

Now, this would be an odd view of evolution by natural selection. There is nothing of the *telos* in Darwin, and in fact Darwin (and most of Darwin’s students) were very careful not to attach even ordinal conceptions of “improvement” to adaptation. All that is required for evolution is a source of variation—for biology, genetic mutation, especially in sexual reproduction—and a source of selection—for biology, either the competition for food and space, or the competition for mates in reproduction. The winners are those that can survive and reproduce, and that’s all that can be said. Still, the rules and structures of large-scale impersonal market exchange are not likely to be the product of any plan, and are likely not to be understood by the citizens who live in it and depend on it for their prosperity. As Hayek put it:

[m]any of the greatest things man has achieved are not the result of consciously directed thought, and still less the product of deliberately coordinated effort of many individuals, but of a process in which the individual plays a part which he can never fully understand. They are greater than any individual precisely because they result from the combination of knowledge more extensive than any single mind can master.⁶⁹

Further, the set of ideological and moral precepts people bring to the agora are ill-suited to market interaction, precisely because they evolved in an era where personal interactions among small groups was far more common. The biologically

critique, see Dean Alfange Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58 (1969).

68. FRIEDERICH A. HAYEK, *THE SENSORY ORDER* 196 (1952).

69. *Id.* at 149.

evolved impulses of solidarity and altruism, which were adaptive in small Stone Age communities, are maladapted to a setting where we depend on physically and psychologically distant suppliers for the things we need. In short, we have little practical understanding of market processes, and the moral precepts we bring to the consideration of managing market process do more harm than good. Hayek called the brain architecture that gives rise to these impulses “atavisms,” a vestigial behavioral disposition left over from the Stone Age.⁷⁰ And that’s the interesting thing: the process of social or cultural evolution Hayek envisions is slow to overcome—or even change—the atavistic products of biological evolution that still reside in the human brain.

It should be realized, however, that the ideals of socialism (or of ‘social justice’) which . . . prove so attractive, do not really offer a new moral but merely appeal to instincts inherited from an earlier type of society. They are an atavism, a vain attempt to impose upon the Open Society the morals of the tribal society which, if it prevails, must not only destroy the Great Society but would also greatly threaten the survival of the large numbers to which some three hundred years of a market order have enabled mankind to grow.⁷¹

And later, in the same book:

At present . . . an ever increasing part of the population of the Western World grow up as members of large organizations and thus as strangers to those rules of the market which have made the great open society possible. To them the market economy is largely incomprehensible; they have never practised the rules on which it rests, and its results seem to them irrational and immoral.

They often see in it merely an arbitrary structure maintained by some sinister power. In consequence, the long-submerged innate instincts have again surged to the top. Their demand for a just distribution in which organized power is to be used to allocate to each what he deserves, is thus strictly an atavism, based on primordial emotions. And it is these widely prevalent feelings to which prophets, moral philosophers and constructivists appeal by their plan for the deliberate creation of a new type of society.⁷²

What this means is that Hayek’s project, and Leoni’s, relies on a process of discovery, emergence, and sustainability that has fundamental tensions.⁷³ While it may be that legal systems with adaptive properties that tend toward efficiency over time are available, in the common law rather than in legislation, it is nearly

70. FRIEDERICH A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 304 (1988).

71. *Id.*

72. *Id.* at 497.

73. The problems of “discovery” in Hayekian decentralized systems are discussed at length by Stringham and Zywicki. *See generally* Edward P. Stringham & Todd J. Zywicki, *Hayekian Anarchism*, 78 J. ECON. BEHAV. & ORG. 290 (2011). *See also* Todd Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 559 IOWA L. REV. 93 (2008).

certain that citizens of these societies will have no understanding of the (tendency toward) improvement in such systems. As a result, the temptation at every stage to use legislation to improve emergent laws and institutions will be irresistible. As a pessimistic side note, such temptations can be resisted in monarchies and authoritarian regimes, but only if the monarch or ruler themselves can forebear.

5. CONCLUSION

The “rule of law,” to be functional, requires that laws must be known, constant, and optimal. *Known* means clear, and unambiguous at least on a large scale, even if some details are contestable. *Constant* means that that which is known today can be relied on as still to be true tomorrow. *Optimal* means there exists a reliable process by which inferior rules are identified, removed, and possibly replaced.

Bruno Leoni and Friedrich Hayek both believed, though in slightly different ways, that law was better than legislation. Hayek at first was more concerned with the law being known, but was converted to Leoni’s main focus that the law be certain. Both thinkers believed that the discovery process for legislation was flawed, because it relied on one, or a few, individual(s) making choice for circumstances they knew little about. The decentralized discovery process of judges doing investigations on people who “actually do things” was seen by Leoni and Hayek as superior.

What I have argued here is that there is a tension between optimality and being known that has not been solved. If the law is fixed, and nearly impossible to be changed, it is known but not likely to be optimal. Over time, the divergence between the known law and the optimal law is likely to increase. On the other hand, if the law is flexible and constantly changing, then even if I can read the law today, written clearly in black letters and with fixed words, those words may be changed substantially and without warning tomorrow.

The casuists tried to make the moral law “clear,” by spelling out every eventuality, but then no one could know all the details, so that the law is clear but unknown. No one system can be perfect on all the dimensions of being known, certain, and optimal. This raises the question of whether a system that uses legislation, provided the legislature changes the law only rarely and at need, could be better than a decentralized private system of law where change is very difficult. The author’s own inclination, that the private system would be better, is contestable. But as has been argued here, the justification often given to the common law, that it is judges enforcing traditions, has long been a fiction. A return to that system, or at a minimum an honoring of that norm as an aspiration, would be an improvement.