Part 5

Freedom and the Law

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The Ethics of Physics

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Around the mid-1980s,

* when Hans-Hermann Hoppe was delving deep into questions on the ultimate foundation of law, in Frankfurt am Main—while in Basel am Rhein, I was doing roughly the same,
* when Hans became a promising academic at Jürgen Habermas’ chair—while in my office chair, I was dealing with the worries of my clients,
* when Hans was thinking broad in philosophical spheres—while I was trying hard to understand what was going on in a lawsuit,
* and when Hans had completed his habilitation thesis—while I was still working on mine,

around that time Hans already knew that an organization like the state was contradictory in itself—while I wasn’t aware yet to be working on an approach that would ultimately lead to hard-core anarchism.

What came out some years later as my own habilitation thesis was quite close to Hans’s positions, even though we didn’t know each other yet and probably had not read each other’s writings (which was not difficult for Hans because at that time there were no notable publications from me). When some ten years or so later I realized that state and law exclude each other in a fundamental way I was more and more surprised that nobody else shared this opinion—nobody? Not so a German Professor in the United States. I came across his name in an article by Murray Rothbard. So, I sent an e-mail to that Professor Hoppe and asked whether he is still fluent in German which I later realized on the phone was the case.

And what I also realized, to my great pleasure, was that Professor Hoppe was an uncompromising anarchist: No, not a minimal state, no indispensable core functions of the state—just no state at all! And in addition, Hans told me that he knew some more people of this kind; the ones I later met in Bodrum and at other anarcho-capitalist occasions.

**Argumentation and Discursive Law**

Hans Hoppe approaches matters from the top down while my approach is rather bottom up. Hans’s “top down” approach of course doesn’t mean that he advocates some higher authority to implement what is right or wrong; what is meant is that he derives legitimacy out of a logical *a priori* which will be then applied *on* the physical reality of some conflict.[[1]](#footnote-1) My “*a priori*,” however are the facts themselves; it is out of them that legitimacy is derived. Argumentation is crucial, as well, but rather as a consequence than a starting point.

The title of my habilitation thesis (translated from German) was “Discursive Law—Theoretical Foundation of Legal Interference on Social Conflicts.”[[2]](#footnote-2) By “Discursive Law” I meant law emerging out of the discourse of the conflict itself, i.e. out of the physical collision of bodies and other things, and not out of theoretical discussions about how the world should be.

By “Social Conflicts” I meant conflicts not between individuals or other typical private law parties such as companies, families etc., but between broader and less clearly defined entities such as neighborhoods, broad interest groups or other subparts of society. My focus was on constellations that are often dealt with as “political” or “social” conflicts that go beyond individual parties. I thought of normative articulations such as protecting the environment, distributing real estate in a just way, strengthening the consumers, helping weak members of society or granting law and order.

Such articulations typically collide with contrary positions, which are no less abstract and open, such as advocacy of economic freedom, of stable property rights, of autonomy of the family or of the right to be left in peace.[[3]](#footnote-3) Nevertheless, these *are* conflicts though not between *A* and *B* or between group *X* and organization *Y*. It seemed to me that here there are not parties engaging in such conflicts but instead conflicts *creating* their parties; not preexisting holders of rights and obligations but collisions out of which something like normative subjectivity *emerges*.

Why was and is this interesting? For three reasons:

First, because it makes it plausible that mutual interdependence between conflict and subjectivity is a pattern applicable not only to those broad “political” conflicts but also to any conflict including the typical private law dispute between *A* and *B*. There is a functional connection between physical incompatibility and its subjective articulation, between conflict and argumentation, or—as Hans-Hermann Hoppe insists on a fundamental level—between reality and rationality.[[4]](#footnote-4)

The second reason for this being interesting is this: Those broad “political” positions are so open and so general in scope, that it seems impossible to subsume them under an even more general rule. One usually says that neither side is right nor wrong but that there is no higher rule at hand—such as Kelsen’s flopped “Grundnorm”[[5]](#footnote-5)—to be applied on such a broad conflict; all we have is the conflict *as such*. In political practice this means that a decision is made by democratic majority vote, authoritative order or other totalitarian means.

However, we know from the first reason just presented that the conflict itself provides answers about how to solve the conflict: it allows the emergence of mutual subjectivities that become the articulators of argumentation accompanying the conflict into the direction of its solution.[[6]](#footnote-6)

The third reason for this being interesting is that once the solution emerges out of the conflict itself, we do not need the help of an arrogant ruler such as the state.

In a short foreword of my book, I wrote that my Theory of Discursive Law seems to be quite close to the Discursive Theory of Law advocated by the Frankfurt School of Jürgen Habermas, but that still it was not the same. While Frankfurt and in its tradition Hans-Hermann Hoppe emphasize the “Diskurs” in the sense of a scheme or argumentative interaction that enables us to get answers concerning the solution of the conflict at stake, my emphasis was and is more on the incompatibilities of the colliding interests themselves, which too can give answers about how to solve the conflict. Hans solves the conflict by arguing *about* it, while I do it by interpreting the conflict’s own discourse. He is closer to metaphysics with an intrinsic relation to reality, while I am closer to physics with an intrinsic relation to rationality. His ethics lie in argumentation, mine in the laws of the physical conflict.

**Law Without the State**

Now back to rulers. They are not necessary anymore once the conflict creates its solution itself. Rulers are not necessarily arrogant. Rulers might earnestly endeavor to do a professional and useful job. For instance, they could understand their function not in the sense of creating and enforcing rules but of searching with scholarly care for regularities of social behavior and then work with these like engineers investigating the laws of reactivity, gravity, friction or inertia and using these for the construction of useful devices and machines. In case a machine gets too hot while running, the wise engineer will react by adjusting the design to better comply with those laws of nature.

If he did not react this way and his machines kept exploding or melting, he would soon be out of business. If he reacted by forbidding the machine to behave this way, he would be laughed at as a lunatic. And if, in addition, he even forbade other engineers to be wiser than him, to delve deeper into the laws of nature and to develop more sophisticated machines, then he would behave in just the way the state does with the laws of social behavior.

The history of European law reaching back to ancient Roman law, as well as to tribal Germanic law and other traditions, resembles the earnest engineering work just described: In general, they dealt with law as something not to create but to understand, not to order but to describe, not to prescribe but to write down in restatements.[[7]](#footnote-7) Even such a prominent code like the *Corpus Juris Civilis* of the byzantine emperor Justinian was mainly[[8]](#footnote-8) a compilation of court decisions—decorated with the imperial seal—which experts of the classical era had searched for and collected. As long as the content of such a collection corresponds to the reality of legal practice, the imperial seal, though being dispensable, is at least not harmful.

This pattern of searching instead of ordering fundamentally changed in 19th century Europe when the rising nation-states decided to create their own national codes such as the French Code Civil, the Prussian or the Austrian Allgemeines Bürgerliches Ge­setzbuch, later the German Bürgerliches Gesetzbuch or the Swiss Zivilgesetzbuch. The raw material of these voluminous and encompassing codes consisted mainly of field research by scholars of law and legal history and so the first editions of these codes were something like a snapshot of the reality of law at that very moment.

But then a dramatic change took place: The codes as such once issued by the state became *the source of law*.[[9]](#footnote-9) Their force was not based any longer on material criteria such as justice, God, reason, nature, naturalness, tradition etc. but on the mere fact that they were decided by the official state legislator.

This was the original sin in the evolution of law.[[10]](#footnote-10) Not because justice, God, reason, nature, naturalness, tradition etc. would grant an uncontestable foundation of law, but because *nobody* else does either. Therefore, *nobody* should have the competence to ultimately *decide* what the law is. And even less so should somebody pretend *to be the foundation of law himself*—as the state does. No wonder that it used its function less and less for its original task of legal engineering in the sense described before but abused it more and more for the purpose of its own power with all those terrible excesses of statist totalitarianism emerging in the 19th and 20th centuries.[[11]](#footnote-11)

**Chantecler and the Rule of Law**

Nevertheless, it is not easy to imagine *what* law to apply if not the one produced by the state legislator.[[12]](#footnote-12) Who shall make the law if not the state?!

At this question the animal fable of “Chantecler” by the French author Edmond Ros­tand[[13]](#footnote-13) always comes to my mind: Every morning Chantecler the proud cockerel of the hen house, loudly and solemnly shouts out his cry, and thanks to his strong will and voice the sun rises. That is why Chantecler’s authority is uncontested. All hens are convinced: Who makes the sun rise if not Chantecler?!

We as enlightened human beings know of course that the sun rises anyway with or without Chantecler, the hens do not need the cockerel to care for light instead of dark. But astonishingly, many of us think that we need the state to care for right instead of wrong, that we need state legislation to forbid murder. But: Is it forbidden to kill somebody because the state’s penal code says so? Or do all the states’ penal codes contain such paragraphs because it is forbidden anyhow? Of course, the latter is true, and not in less an obvious way as it is true that Chantecler’s cry is not the cause but the consequence of (or maybe another correlation to) the sunrise.

This corresponds to a principle we experience in everyday life and scholars articulate as one of the strongest phenomena of the world: The Rule of Law. It says that this world—does not function by independent willfulness of Gods or cockerels or others, and neither by causeless coincidence, but by rules such as e.g. the laws of gravity or of ‘action equals reaction’ or by many other regularities of nature, evolution, behavior, thinking etc.

This Rule of Law is not in force because somebody orders its enforcement but because it’s there. To take the classical Newtonian example, it’s no coincidence that an apple falls to the ground once it breaks from the branch of a tree. The next apple breaking from the branch will fall down the very same way; and again, not because some­body orders it *should* do so but because it *does* so.

Interestingly the term “Rule of Law” is used not only by natural scientists such as astro- and quantum physicists[[14]](#footnote-14) but also by those who try to attribute legitimacy to the state. These too, advocate the “Rule of Law” which allegedly means according to the same trilogy, that the state—does not function by independent and thus arbitrary will of the government, and neither by causeless coincidence, but by the legal laws that apply to everybody, to the small and the big, the poor and the rich, the citizen and even the state itself.[[15]](#footnote-15)

It is namely the first and the third of these elements which played and still play a prominent role when subordinates argue against arbitrariness of their leaders and when the latter try to put themselves in a good light. It would reach beyond this short essay to show how the state, though solemnly advocating these principles violates them in a systematic way, by definition, so to speak.[[16]](#footnote-16)

So let us return to the Rule of Law in that broader and rather “natural” sense in order to derive from it the foundation of the law, and then to show the unlawfulness of state behavior.

**Conflict and its Rules**

If a body physically collides with another body the force applied to the latter will, in a way, strike back against the former. Everybody has learned this law of Action Equals Reaction (AER) in school and has probably experienced it in his first golf lesson when smashing the club into the ground, and after his second attempt he knows for sure that AER is a reliably foreseeable regularity, i.e. a law.

This law works irrespective of whether it is subjectively perceived. It does not only apply to golf beginners but also to stones colliding with each other. Even though this does not “hurt” the stones in the sense we attribute to this notion, the law of AER produces its full effects: Both stones ricochet away in different directions, one or both break apart etc. And they do it irrespective of whether spectators like us take note of it or whether we can predict what precisely will happen, in what direction stone *A* will fly and in how many parts stone *B* will break, or what precisely will be the consequence of hard stone *A* falling on soft tree *T*, or of tree *T* falling on the head of *Homo Sapiens X*.

Even us as *Homines Sapientes* will not be able to precisely predict what *Homo Sapi­ens X* will do as a reaction to tree *T* falling on his head. It will be even more difficult than to predict what the stone’s or the tree’s reactions are; for *Homo Sapiens X* will show a much more sophisticated reaction: Apart from the simple and direct application of AER much more complex additional reactions will be triggered such as experiencing pain, then activating moves developed over millennia of phylogenetic evolution e.g. to protect by specific gestures sensitive organs like eyes,[[17]](#footnote-17) then activities probably acquired mainly in the individual ontogenetic evolution such as stemming oneself against the tree and trying to push it away etc. And it becomes even more complex if we assume that *X* keeps his cool and reasonably analyzes his unpleasant situation, then deliberately decides e.g. not to push away the heavy tree to the one side but instead to sneak out himself by the other side.

If in fact there is a Rule of Law, all these hardly predictable reactions are but applications of it. Then, even those “analyzing” decisions e.g. to sneak here instead of pushing there are neither arbitrary nor accidental but follow natural regularities. There are good reasons to follow this approach even though it increases the complexity in comparison to simply rationalistic or to simply naturalistic theories.[[18]](#footnote-18) Why not combine both these aspects, i.e. taking rationality as a reality without ignoring its biology and exploring nature without omitting its subjective elements.

In any event the collision between tree *T* and homo sapiens *X* and the pains it pro­duces to the latter provoke subjective reactions with a tendency to fight against *T*. While pushing it away *X* would probably shout “Away, you bloody tree!,” and once escaped out of his unpleasant position he would perhaps “punish” the tree by angrily kicking it. You are probably familiar with such reactions from your own experience: You inadvertently push against a table which hurts you and makes you blame and even beat the wicked table (which hurts you again, *Actio = Reactio*). In other words, the collision creates pain which in turn gives rise to subjective perception and thus articulation of blame, which again urges one to react against the colliding body, and fi­nally allows the emergence of rational classifications of “wrong” or “unjust” or “illegitimate” etc.

**Rules and Their Argumentation**

And of course, the same will happen, in reciprocal duality, when *Homo Sapiens X* does not collide with a tree but with *Homo Sapiens Y*. Then, both *Homines Sa­pientes* will suffer pain, both shout at the opponent, both blame each other and be convinced that the opponent is wrong and illegitimate. In a more cultivated context, they will develop the mutual shouting into a discussion, the pains suffered into the argument of “my property” and the blame of wrongness into the more sophisticated and abstract theory of “violation of a right.”

It seems though that corrective reactions to physical in­terferences as well as the accompanying debates and also the theories invoked during such a corrective process are but functions of the physical incompatibility of the collision—and not the other way round: There are no “rights” at the outset that must be implemented into this “wrong” world, but there are collisions in the world that lead to mutual reactions, to verbal debates and to subjective rationalizations accompanying the whole process.—To put it blasphemously: In the beginning was the *World*—the *Word* came much later.[[19]](#footnote-19)

Reality is of course much more complex. This is particularly true of rationality und its articulation in the context of argumentation. Rationality and argumentation are far from being mere byproducts decorating physical processes. They are powerful elements which not only accompany but also strongly influence the course of things. Therefore, many effects of argumentation, such as embarrassing or convincing the opponent and thus causing him to behave in a less incompatible way or alerting bystanders to support the arguer’s position etc., may show patterns of influence from an outside rationality taking influence on reality.

This in turn means that argumentation is a *normative* kind of articulation, not a *describing* one. By *arguing* one takes up a position against an opposing allegation which in turn is typically formulated in a respective counterargument. This normative aspect is particularly strong when the cause of argumentation is a physical conflict such as the one between *X* and *Y* just mentioned. Both sides not only shout in pain and anger and probably rebuff each other, but each of them *argues* that he is right, and the other is wrong. In a first instance this means nothing more than that the other’s body collides with his and that from his body’s position this is a negative impact. But “argument” means more than this. Etymologically the notion stems from *Argentum* = silver, the brightly shining metal, and insofar alludes to putting light on the object of argumentation. Arguments therefore specifically have to do with the object of conflict, they are insofar derived from the illuminated facts of the conflict at stake.

And when the parties then succeed in pursuing this specific path of argumentative illumination, and not in influencing the opponent by intimidation, fraud or coercion, then *ethics of argumentation* take place.[[20]](#footnote-20) Not however ethics in the sense of some substantive moral principles created in heaven to be applied on earth, so to speak, but ethics in a procedural sense; no ethics of *what* but of *how*; no ethics of *good* but of *correct*; no ethics implemented by some creator of morals but emerging out of the conflict.

**Arguments and Their Force**

But again: *How* can the pure facts of some conflict induce substantive answers about its solution? For incompatibility as the core of the conflict is mutual and identical for both sides (*Actio = Reactio*). At first glance, therefore, it seems that the conflict as such does not contribute very much to a solution; why should *X* and not *Y* be the one to prevail or to retreat respectively?[[21]](#footnote-21)

As an approach to find argumentative solutions out of the conflict, one might con­sider the mutually caused impairments suffered by the parties and then decide in a utilitarian way, i.e. to give preference to the party whose impairment in case of retreat is smaller than it would be for the opponent:

A diagram of a couple of people

Description automatically generated

Shall e.g. (Fig. 1) producer *P* go ahead producing up to point *Y* even though this creates unhealthy consequences for neighbor *N*? Or the other way around, shall *N* have the right to push back *P* up to the point *X* which causes high costs or losses for *P*? What is higher rated, health or wealth? What is worse, impairment of *N*’s health or reduction of *P*’s profit? It is obvious that such a confrontation will hardly bring forth any criteria acceptable to both sides: *P* will hardly be convinced by the Pro Health Ar­gument, *N* hardly by the Pro Wealth Argument. And, above all, usefulness is not part of the incompatibility.[[22]](#footnote-22)

Another approach however opens opportunities for answers: Since argumentation—as shown before—stands in a close functional relationship to the collision at stake, the extent of the mutually caused impairments proves to be a consistent criterion. And so, the more one position is pushed back the more intensive is its subjective per­ception and the “stronger”—in *this* very sense of the word—are its arguments. Applied to the conflict between Pro­ducer *P* and Neighbor *N* this means that the answer cannot be *either* for *P* or for *N*, but *more* for the one and *less* for the other. The more the constellation tends toward point *X* the higher the subjective perception of a negative effect by *P* or by its entourage or by broader parts of society, and the other way around in the opposite direction.

A diagram of a triangle

Description automatically generated

In any event there will be a tendency towards leveling off at the crossing point *Z*. Not because this is the objectively true or the morally just solution but because at point *Z* the arguments against *P* and those against *N* will be balanced. This in turn does not mean that the positions stabilized at point *Z* are valued to be equal as such, but that the mutually graded arguments reach the same intensity; at this point each of them needs more force to improve his position than his opponent to avoid an impairment of his.

There remains however still the question of how such an outcome will be enforced if one side refuses to comply.—This this question has already been answered: The de­scribed force of the arguments mirrors the force of the respective reactions against the collision. The strength or the weakness of mutual arguments corresponds to the strength and weakness of the mutual reactions. The stronger a reaction the stronger its arguments and consequentially the stronger the tendency toward *physical* influences into the “right” direction and thus towards “enforcement” of the outcome of argumentation.

Probably the strongest effect of the strength of an argument is the involvement of others by catching their attention, by provoking perception of their own pain with bystanders in view of the facts of the conflict etc. In other words, the stronger an argument for one side of the conflict, the greater the probability for additional subjective perception und hence for “collecting” additional parties supporting this side of the conflict.

**Arguing with the Mugger State**

There are constellations that do not fit into the mutual reciprocity just described. Imagine a mugger taking away 100 dollars from his victim and being now confronted with the claim to pay back the money; shall he now argue that for him to give the 100 back is the same impairment as for the victim to be deprived of 100? And that there­fore they should find a mutually balanced solution, e.g. by giving back 50 so that in the end either side has 50 and loses 50?—Certainly not, but why not?

The mistake in this mugger’s reasoning is to ignore the time element. Of relevance is not a specific situation but a change of facts, not a moment but a process, not a snap­shot but a movie. And this movie shows at the beginning of the plot a situation at point Z without any incompatibility, then an interference takes place by the mugger for reasons he values to be in his interest, such as to be enriched or to dominate another person. This in turn means that unlike in Fig. 2, the curve of the mugger *M* towards point Y runs upwards into the positive area while the victim suffers a corresponding impairment, so his curve V runs downwards into the negative area:

A diagram of a line with words

Description automatically generated with medium confidence

As shown in Fig. 2, the more the victim’s position is pushed back by the mugger, the more negative is his subjective perception, the more intensive his reaction and the “stronger”—again in this very sense of the word—its arguments. The effect of this will be to slow down the mugger’s move or rather to stop him and ultimately wind back the movie alto­gether until the outset of the plot. In short: The mugger must pay back the full amount of 100.

Unlike in Fig. 2, where *both* producer *P* and Neighbor *N mutually* react against each other and thus *reciprocally* initiate slow down effects, there is no mutuality in the mugger-victim constellation. Here is no stopping effect on the mugger’s side *against the victim*. The mugger will not be supported by reactive energies against the victim. In other words: Aggression does not produce strong arguments on its behalf while defense does.

Assuming these quite trivial thoughts make sense for the mugger-victim case, the same must be true for the state-citizen case:

* The state, like the mugger, interferes against his victims, uses, or threatens to use force and so induces them to do things against their own will, e.g. to pay money or to refrain from certain activities or to do certain activities.
* The state’s behavior, like the mugger’s, is not due to any previous activity of the victims legitimizing the state’s position. They did not cause any harm to the state which would explain the latter’s action as a re­action in turn; neither did they sign any contract with the state allowing him to enforce a contractual obligation.[[23]](#footnote-23)
* The state, like the mugger, may try to argue that to refrain from taking away the money from the victim is equally harmful for him as it is for the victims to be deprived of it. Yet we have seen, of relevance is not a specific situation but a change of facts, not a moment but a process, not a snapshot but a movie. And this movie shows the state, like the mugger, approaching his victims, ordering them to hand over their wallet or to file their tax return respectively and then collects the loot, if need be, by force.

This leads to the very same state’s curve S which starts at point Z and then runs upward toward point Y while the victim citizens’ curve runs downward and therefore creates resistance along with strong arguments against the mugging state:

A diagram of a state and state

Description automatically generated with medium confidence

And here again the natural reactive tendency “rewinds the movie back” to point Z where the curves are crossing at value zero. I.e. the mugging state must pay back all the money und refrain from mugging people in the future. And the same applies to all other interferences he commits against the citizens.

In sum we have a clear and simple case, a sort of exemplary constellation to show how the natural Rule of Law gives access to solutions derived out of the conflict itself, and namely the one between the state and its citizen victims.

**Arguing with Hans**

Back to Hans Hoppe’s ethics of argumentation and my ethics of physics: The example of the arrogant mugger state makes clear that the two ethics essentially belong together. It is the State’s unbalanced encroachment on the citizens’ positions which provoke reactions from the victims’ side to resist. These reactions include outraged exclamations, verbal articulation, and in the case of *Homo Sapiens* also rational argumentation.

Rational argumentation in turn enables the holders of colliding positions to accompany their (physical, economic, social) conflict on a more abstract meta level. This level, however, is not in another world, it is not its function to get justice from an outer sphere, but to mirror the real conflict as accurate as ever possible. The more this succeeds the higher the chance to find out who is the mugger and who the victim.

As to this, Hans and I came to the very same conclusion, he from top down, I from bottom up. It is a pleasure to celebrate this at his 75th birthday!

1. See “Hans-Hermann Hoppe, “The Ultimate Justification of the Private Property Ethic,” Liberty 2, no. 1, September 1988), p. 20, republished as “On the Ultimate Justification of the Ethics of Private Property,” in Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy* *and Philosophy* (Auburn, Ala.: Mises Institute, 2006 [1993]; www.hanshoppe.com/eepp). See also Stephan Kinsella, “Argumentation Ethics and Liberty: A Concise Guide,” StephanKinsella.com (May 27, 2011; www.StephanKinsella.com/lffs). [↑](#footnote-ref-1)
2. Diskursives Recht—zur theoretischen Grundlegung rechtlicher Einflussnahme auf überindividuelle Konflikte, Zürich 1993. [↑](#footnote-ref-2)
3. According to Roland Baader, the only true Human Right is the right to be left in peace—by everyone not invited or welcomed (translation from German), cited from Rahim Taghizadegan, at a Roland Baader-Conference in 2016. [↑](#footnote-ref-3)
4. Hoppe, *The Economics and Ethics of Private Property*, p. 347 et seq. [↑](#footnote-ref-4)
5. Hans Kelsen, *Pure Theory of Law*, 1960 and 1967, Originally in German: Reine Rechtslehre, 1st ed. 1934, later relativized by himself in *General Theories of Law and State*, 1st edition 1945. [↑](#footnote-ref-5)
6. See also the related discussion in Stephan Kinsella, *Legal Foundations of a Free Society* (Houston, Texas: Papinian Press, 2023; www.stephankinsella.com/lffs), p. 25 n.34, p. 373 n.42 & p. 636, text accompanying n.39. [↑](#footnote-ref-6)
7. The well-known Restatements of the Law edited by the American Law Institute since 1923 are thus in the line of a long tradition that goes back to Roman law compilations, then to European medieval collections sometimes called “Spiegel” and finally to broad scientific restatements of the 18th and 19th centuries. See also the discussion of such codification efforts in Stephan Kinsella, “Legislation and the Discovery of Law in a Free Society,” in Legal Foundations of a Free Society; see also Hoppe’s comments on European legal codification efforts and the relative merits of the English common law versus the Romanesque European civil law, in *ibid*., pp. 346–47. [↑](#footnote-ref-7)
8. Except the Codex iustiniani, which was a part of the Corpus that contained a collection of imperial statutes mainly in the administrative and military matters; the Corpus was collected by order of Emperor Iustinianus between 528 and 534 A.D. [↑](#footnote-ref-8)
9. See, on this, Kinsella, “Legislation and the Discovery of Law in a Free Society,” the section “Appendix: Legislative Supremacy in the Civil Code.” [↑](#footnote-ref-9)
10. The famous essay by Friedrich Carl von Savigny of 1814 (1st edition), Of the vocation of our age for legislation and jurisprudence (original in German), vividly but unsuccessfully warned against this tendency. [↑](#footnote-ref-10)
11. Such as e.g. the 1935 Nürnberg Race Legislations, that were not just ordered by the NSDAP, but carefully formulated in statutes that in turn were passed by the official legislator, i.e. the Reichstag, and then officially published in the Reichsgesetzblatt (the official gazette of laws). [↑](#footnote-ref-11)
12. This problem might be smaller for Common Law traditions, where private law issues are traditionally decided on the basis of precedents, but here too public regulatory matters are dominated by state produced legislation. [↑](#footnote-ref-12)
13. Edmond Rostand, 1868 to 1918, a French poet and dramatist, who wrote “Chantecler” in 1910. [↑](#footnote-ref-13)
14. Cf. Stephen Hawking & Leonard Mlodinow, *The Grand Design* (New York: Bantam Books, 2010). [↑](#footnote-ref-14)
15. An early example of Scottish Enlightenment is Samuel Rutherford, LEX, REX, *or the Law and the Prince; a Dispute for the Just Prerogative of King and People* (1644). [↑](#footnote-ref-15)
16. Beside many others cf. David Dürr, “The Inescapability of Law, and of Mises, Rothbard, and Hoppe,” *J. Libertarian Stud.* 23 (2019; https://mises.org/library/inescapability-law-and-mises-rothbard-and-hoppe-0): 160–70, p. 164 *et seq.* [↑](#footnote-ref-16)
17. Such as described by Michael Graziano as a very old element of human behavior influencing many of today’s signs of social communications, cf. Michael Graziano, “The First Smile,” *Aeon* (Aug. 13, 2014; https://aeon.co/essays/the-original-meaning-of-laughter-smiles-and-tears). [↑](#footnote-ref-17)
18. Cf. high interdisciplinary complexities e.g. in approaches by Edward O. Wilson, *Sociobiology*, 2nd ed. (1980); Margret Gruter, Law and the Mind: Biological Origins of Human Behavior (1991); Richard D. Alexander, *The Biology of Moral Systems* 2nd ed. (2009). [↑](#footnote-ref-18)
19. As bluntly opposed to John 1:1, In the beginning, the Word existed… (according to “International Standard Version”). [↑](#footnote-ref-19)
20. See Hoppe’s work cited in note 1, above, passim. [↑](#footnote-ref-20)
21. We will see that the main feature of state made law is that it makes such an illegitimate distinction between X and Y, i.e. that for the state itself there are fundamental privileges in relation to normal citizens, infra the section “Arguing with the Mugger State.” [↑](#footnote-ref-21)
22. This dilemma is well known in connection with the prominent “Coase Theorem” according to which the socially most effective positions will prevail in any event, R.H.Coase, The Problem of Social Cost, J L&E 1960 III, p. 1 seq.; on the other hand it leaves undecided which of the parties is better or worse off. [↑](#footnote-ref-22)
23. Nevertheless, the state usually invokes a “contrat social” allegedly approved by the citizens. However a contract can only be binding for those having voluntarily approved it, which is seldom the case. Jean-Jacques Rousseau, *Du contrat social*, book I chapter 5, emphasizes unanimity for the first contract, while in this first contract majority votes can be agreed upon for future decisions. [↑](#footnote-ref-23)