This edition may be cited as


followed by the page number
ABOUT THE TYPEFACE

The Journal Jurisprudence is typeset in Garamond 12 and the footnotes are set in Garamond 10. The typeface was named for Claude Garamond (c. 1480 - 1561) and are based on the work of Jean Jannon. By 1540, Garamond became a popular choice in the books of the French imperial court, particularly under King Francis I. Garamond was said to be based on the handwriting of Angelo Vergecio, a librarian to the King. The italics of Garamond are credited to Robert Grandjon, an assistant to Claude Garamond. The font was re-popularised in the art deco era and became a mainstay on twentieth-century publication. In the 1970s, the font was redesigned by the International Typeface Corporation, which forms the basis of the variant of Garamond used in this Journal.
# Table of Contents

Call For Papers  
Page 226

Subscription Information  
Page 228

*Technology and the Virtues, a Philosophical Guide to a Future Worth Wanting.*  
Page 229

Professor Kevin Lee  
Professor of Law  
Norman Adrian Wiggins School of Law  
Campbell University

*Hayek’s Theory of Spontaneous Order and the Normative Development of the Free Market and Common Law*  
Page 239

Professor Daniel J. Herron  
Visiting Professor of Business Law  
Western Carolina University

Mr Sean Sovacool  
Master of Accounting Student  
Miami University

Associate Professor Matthew T. Phillips  
Associate Teaching Professor of Law & Ethics and John Hendley Fellow  
Wake Forest University School of Business
CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

With the backing of our diverse and disparate community, *The Journal Jurisprudence* has now evolved into a distinct format. We will no longer be setting a question for each issue, but instead designing issues around the articles we received. Therefore, we invite scholars, lawyers, judges, philosophers and lay people to tackle any and all of the great questions of law. Knowing that ideas come in all forms, papers can be of any length, although emphasis is placed on readability by lay audiences.

Papers may engage with case studies, intellectual arguments or any other method that answers philosophical questions applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

*Jurisprudence* is published four times per year, to coincide with the four terms of the legal year, in an attractive paperback and electronic edition.
Each author who submits to this volume will be provided with a complimentary copy of the journal.

**Length:** Any length is acceptable, although readability to non-specialist is key.


**Submission:** You must submit electronically in Microsoft Word format to editor@jurisprudence.com.au. Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.
SUBSCRIPTION INFORMATION

The Journal is published four times per year in an attractive softcover book. Subscription to the Journal can be achieved by two methods:

1) Single issues can be purchased on amazon.com. Our publishers, the Elias Clark Group, set a retail price for each edition, typically AU$40. However, due to their agreement with amazon.com, the price may vary for retail customers.

2) A subscription to the Journal can be purchased for AU$150 per year, or AU$280 for two years. This price includes postage throughout the world. Payment can be made by international bank cheque, but not a personal cheque, to:

   The Journal Jurisprudence,
   C/o The Elias Clark Group
   GPO Box 5001
   Melbourne, Victoria, Australia.

Alternatively, the Journal is available online at www.jurisprudence.com.au and can be read there free of charge.
INTRODUCTION

In *Technology and the Virtues,* Shannon Vallor develops an approach to the ethics of technology rooted in a comparison of Aristotelian, Confucian, and Buddhist theories of moral virtue. She argues that “technologies invite or *afford* specific patterns of thought, behavior, and valuing; they open up new possibilities for human action and foreclose or obscure others.” Sometimes, this is done explicitly and sometimes it is implicit. Consider, for example, the practice of human-centered design thinking, which is an iterative process for product design that places high value on user experience. The resulting products and services are shaped by the designer’s understanding of what constitutes a human need or want, typically derived through an ethnographical study of human behavior. Major technology companies, including Google and Apple, use design thinking to improve customer satisfaction. Technology can also have unintended effects on human satisfaction by creating habits or traits that help or hinder human behavior and character. For example, using computer screens has displaced paper as the preferred means for delivering reading materials, with the unintended effects of decreasing the reader’s engagement with text and promoting interruption and distraction. Vallor develops the neologism, “technomoral,” to...
refer to the intended and unintended consequences of technology on the ability of humans to have fulfilled lives.

If this conception of the technomoral is correct, what virtues ought technology promote? How ought morally responsible decisions be made about technology? This is urgently needed since the NBIC (nano, bio, information, and cognitive) technologies hold the potential to unleash existential crises and radically transformative social changes? They present complex moral dilemmas that quickly exhaust the resources of standard policy debates and contribute to an increasingly “disordered geopolitics and widening fractures in the public commons.”

Vallor argues that moral assessment of the technology cannot be achieved through the deontological and utilitarian ethics, which view moral reasoning in terms of discursive calculations within a field of moral possibilities. Thus, although these forms of moral reasoning dominate in public policy today, they become overwhelmed by rapid changes in social meaning because they lack resources for imagining the state of persistent change, characteristic of technology today. The alternative developed in Technology and the Virtues is to look comparatively to broadly diverse forms of practical reasoning—Aristotelian, Confucian, and Buddhist—to determine a minimal set of core principles that define the structure of thinking about the good. These common principles she argues can be the basis for a virtue ethics (which she calls “technomoral wisdom”)

that might describe common commitments to the common practices of the emerging global information society.

---

3 Id. at 5.
4 Id. at 154.
I. DESCRIPTION OF THE BOOK

The book is divided into three parts: Part I is a metaphilosophical assessment. It advocates for a virtue ethics approach to assessing technology. Virtue (Latin), *arete* (Greek), and *de* (Chinese) refer to similar conceptualizations of assessing moral character, given excellent human function (*ergon*). These ancient approaches to moral reasoning have been the object of renewed interest in contemporary moral philosophy. This interest was furthered by the works of Elizabeth Anscombe, who called for a renewal in her classic essay “Modern Moral Philosophy.” Anscombe argued that deontological ethics rely, ultimately, on some conception of divine duty and therefore ought to be dropped in the modern discourse for a robust moral psychology. Vallor accepts that deontology ought to be dropped but establishes her claim by considering features of practical reason that exist across cultures in the Aristotelian, Confucian, and Buddhist practices of moral reasoning. Drawing from what she takes to be the acceptable aspects of these ancient traditions, she argues for a common ground. Four common commitments emerge from her analysis: (1) a belief there can be a common conception of the moral good (although the nature of the common good is contested); (2) a common understanding that virtues achieve the common good; (3) the belief that moral virtues are the habits of good character; and (4) a belief that the moral life depends on some understanding of moral anthropology (the human as a moral being). Vallor argues, following Alasdair MacIntyre, that virtues are understood and taught through particular practices and narratives of a tradition. She

---

5 Id. at 36-37.
7 VALLOR, supra note 1, at 36-42.
8 Id. at 109-110.
suggests there is an emerging global technological tradition, with its own narratives and practices, upon which a technomoral virtue ethics might be founded.\(^9\)

Part II further develops the theoretical foundations for her virtue ethics. She begins by defending comparative studies of virtue, in which she is engaged, and stressing the cultivation of the moral self through habituation. She finds similarities among the Confucians, Buddhists and Aristotelians in their understanding of this process through examination of the moral lives of exemplars and the repetition of moral practices. Common principles of moral self-cultivation involve a relational focus and a commitment to moral self-development, which involves moral attention, practical judgement, and extension of moral concern. In examining the three virtue traditions, she identifies twelve specific technomoral virtues: 1. Honesty; 2. Self-control; 3. Humility; 4. Justice; 5. Courage; 6. Empathy; 7. Care; 8. Civility; 9. Flexibility; 10. Perspective; 11. Magnanimity; 12. Technomoral Wisdom.\(^10\)

Part III applies Vallor’s conception of technomoral virtue to four types of emerging technologies: social media, surveillance, robot weapons, and human enhancement. Social media are a new context in which human relations take place.\(^11\) The nature and quality of the relations needs careful scrutiny for the challenges and opportunities to enrich human flourishing. Although she laments that social media cultivate many practices that are counter-productive to the virtues she has identified, she remains hopeful. She concludes

---

\(^9\) She believes a “family resemblance” exists among the traditions of moral reasoning that she is examining. She writes:  
This family resemblance can be articulated as a framework for the practice of moral self-cultivation, with seven core elements: moral habituation, relational understanding, reflective self-examination, intentional self-direction of moral development, moral attention, prudential judgement, and the appropriate extension of moral concern.”  
*Id.* at 118.

\(^10\) *Id.* at 120.

\(^11\) Vallor writes, “the distinctive feature of Web 2.0 is that it is users who create and share the vast majority of its content…” *Id.* at 160.
that the social media have displaced older venues for social engagement without replacing them. This has led to some degradation in social-political relation, and yet there are untapped resources in social media that could be developed.\textsuperscript{12} Next, she looks to surveillance and the ethics of privacy. She accepts that the emerging surveillance technologies will not be constrained by cultural or legal controls., privacy will be absent like it is in Bentham’s Panopticon. She hopes that the inevitable surveillance will provide opportunities for self-cultivation. Citing the Quantified Self movement, she suggests that surveillance might offer opportunities to use increased understanding of human behavior to achieve better self-awareness and non-coercive measure of social control through “nudges”.\textsuperscript{13} The third technology is robotic weapons. Here she notes that robot ethics typically takes either utilitarian or deontological forms. It rarely engages virtue ethics, which can help to articulate goods sought by the technology. In this regard, robot ethics engages the values of hope, courage, and self-care. These devices also have radically transformative possibilities for social relations and self-understanding. Vallor argues persuasively that virtue discourse will be essential to navigating them. Finally, she looks at technologies for human enhancement, which directly pose questions about imagining fulfilled human lives. What virtues would humans need to have in order to responsibly meet this challenge?\textsuperscript{14} Citing Nietzsche, she questions, if the enhancements should free us from human maladies, then what purpose are we free for?\textsuperscript{15} To know the answers to these questions will require steady commitment to cultivating the practices and habits of moral virtue.

\textsuperscript{12} She writes, “New social media and the broader Web have yet to fill the moral vacuum left by the traditional venues whose departure they hastened.” \textit{Id.} at 187.
\textsuperscript{13} \textit{Id.} at 202-204.
\textsuperscript{14} \textit{Id.} at 231.
\textsuperscript{15} \textit{Id.} at 241.
2. ANALYSIS

Vallor’s work well deserves the many accolades it has received. Her argument for a virtue ethics approach to understanding the moral issues posed by technology is persuasive and compelling. The clarity of the need for a recovery of virtue that Elizabeth Anscombe contended over fifty years ago has only grown. Anscombe contended that deontological and rational choice approaches lack the resources for dealing with the complexity of contemporary issues. Over the intervening years, the complexity of the issues has grown, driven in no small degree by the radical alterations to society brought about by developing new technologies and the scientific concepts that make them possible. Anscombe believed at the time that the recovery of virtue ethics was premature, that it waited on developing a robust science of moral psychology. But to a large degree, that development has happened. Aided by technology, moral psychology today is a well-established field that presents many difficult moral issues of its own. Vallor’s contribution to virtue ethics is therefore timely and valuable.

Despite its many insights, the project she initiates in this work might be extended in three ways. First, it might be useful to engage the ethics of information, which has been pursued through a deontic approach. Vallor, who claims that deontic ethics are inadequate for the times, should take on Floridi’s deontic ethics of information, which is the most influential ethics of technology. There appears to be much to gain from this engagement since both touch on very similar topics but perceive the issues in original ways. Second, Vallor might consider incorporating Platonic conceptions of virtue as they developed in the West. There are several advantages to this, particularly if one considers the relation between Christian Neo-Platonism and Eastern thought in contemporary understanding.\(^\text{16}\) The concept of

\(^{16}\) For a discussion of the relation between Christian Platonism and Eastern thought, see JOHN COBB, BEYOND DIALOGUE, TOWARD A MUTUAL TRANSFORMATION OF CHRISTIANITY AND BUDDHISM, (1998).
“change” which is found as a primary ontological category in Confucian and Mahayana Buddhism is also found in Heraclitus and Plato. These conceptions were taken up by Christian Neo-Platonists, such as Denys the Areopogite, Augustine of Hippo, and Bonaventure, to describe the relation between the observable world characterized by change, and the Christian commitment to an eternal, unchanging God who created all things. The similarity between Christian Neo-Platonism and Eastern thought was a well-spring for contemplative Christian thought and practices in the twentieth century with figures like Thomas Merton and D.T. Suzuki.17 Vallor’s project might benefit from exploring the significance of these important aspects of Western thought, if only to demonstrate the universality of these experiences and to blunt the artificial divisions between East and West.

Relatedly, the project might benefit from engaging more directly with the implications for politics. By more directly addressing the political, the project might better display its resources for criticizing the dominant neoliberalism. The open-ended description of virtue that Vallor develops rejects a comprehensive metaphysically teleological conception of human function (ergon) that was typical of the Aristotelian virtue ethics. In this respect, she follows modern thought. She adopts MacIntyre’s conception of virtue as a practice, which is a formal conception of virtue without a specific conception of human flourishing, but a reasonable process by which a fulfilled life might be pursued. Vallor seems to suggest this process is a political one in the sense that it involves being engaged in a public life and in a private one. Aristotle argues that humans are by nature social. They seek friendship and establish households. There are public virtues, such as courage and temperance, and there are the private virtues of the householder.


Chinese thought distinguishes between the public rituals and the private practices. But, the nature of the relation of public and private is not articulated in Vallor’s work. Does she imagine the polis as ruled by virtuous kings whose cultivation of the virtues allows them a means to wisely use technology so they might rule like the ancient Chinese Emperors, whose authority rested on the Mandate of Heaven? Or, perhaps, an Aristotelian judge who has cultivated moral perfection to such a high degree that all subordinate virtues can be seen transparently. These elitist views of politics portend dystopian authoritarian forms of government, with a technomoral intelligentsia wielding unlimited authority to protect society from the dangers of the technology they themselves have created. Or, will it be an oligopoly, with a ruling class composed of the masters of tech giants? Does the technomoral have resources that restore a robust liberal democracy? Can it resist the totalizing neoliberalism by conceiving the good?

III. CONCLUSION

Ethical analysis of technology is sorely needed. The new technologies are dramatically powerful forces shaping society and our environment. To address these developments challenge us to think seriously about issues of rights and duty, but as Vallor rightly points out, the new technologies call us to reflect on the goals and purposes that we agree to pursue together. Near the end of the book Vallor cites Ortega y Gusset to point out that the technomoral crisis comes from the “appalling restlessness’ that manifests itself in

19 For an account of the Mandate of Heaven, see generally, YONGLIN JIANG, THE MANDATE OF HEAVEN (2013).
frenzied but directionless seeking.”

This dissipating restlessness may find a distinct home in American culture, which is steeped deeply in this rugged individualism—the blind passion for more that lies like the light at the end of Daisy Buchanan’s pier in F. Scott Fitzgerald’s novel *The Great Gatsby*, and like Gatsby we believe that “if we run a little faster and stretch our arms out a little farther, then one fine day…”

Or consider the restless spirit of the American West that Wallace Stagner captures so well in his novel, *The Big Rock Candy Mountain*: Always moving on, always looking for the next gold rush. What Vallor has written is a hopeful, yet clear-eyed assessment of our ability to meet the awful challenge of facing the future with a faithful commitment to a morally meaningful and satisfying existence.

---

20 Vallor *supra* note 1, at 248.
Hayek’s Theory of Spontaneous Order and the Normative Development of the
Free Market and Common Law

Daniel J. Herron¹
Sean Sovacool²
Matthew T. Phillips³

ABSTRACT:

The work of F.A. Hayek outlining spontaneous order is a frequent element of debates about political economy, but in that context the argument is frequently ideological rather than practical and helpful. Hayek also described the role of spontaneous order in the development of common law, making both descriptive and normative observations about jurisprudence. An exploration of the role of spontaneous order in debates about both political economy and common law highlights the limitations that even Hayek placed on the application of spontaneous order: laws of conduct should develop without legislation or central design, while organizational laws need to be steered more intentionally. Similarly, organizational and structural management of commercial activity may be appropriate even as—and so that—free markets encourage economic growth and prosperity. These connections reframe an important set of debates and clarify critical detail about politics, society, policy, and the underlying theory and philosophy.

¹ Visiting Professor of Business Law, Western Carolina University, Cullowhee NC 28723; Professor Emeritus, Miami University, Oxford OH 45056.
² Master of Accounting Student, Miami University, Oxford OH 45056.
³ Associate Teaching Professor of Law & Ethics and John Hendley Fellow, Wake Forest University School of Business, Winston-Salem NC 27109. Corresponding author.
I. INTRODUCTION:

The debate over the development and proper management of the free market underlies virtually every discussion on the political landscape. It is such a hot debate that productive discussion is deeply challenging. What if a reasoned discussion of common law—a less fiery field of inquiry—would enable progress in the more burning questions of political economy?

Common law evolved out of 12th and 13th century reforms in the English legal system initiated by edicts or assizes of Plantagenet King Henry II. The questions presented with any historical development include “how?” and “why?” these developments occurred. Was there an evolutionary process at play or was it intentional design? Friedrich von Hayek advances the hypothesis that the common law is the result of spontaneous order. He advances this theory along with the twin theory that the evolution of the laissez faire market also evolved out of “spontaneous order.”

Hayek, of course, is better known for his work on spontaneous order in the markets than for his work on common law, so the appeal to Hayek connects common law with the debates over political economy that shape civic dialogue and behavior across the world at this very moment. For analysts of either law or political economy, one of the primary questions is how much the systems should be shaped positively and how much they should be allowed to develop organically. It often seems that proponents of one view of the other not only disagree with, but indeed find it impossible to conceive of, the other side of the argument. Perhaps the law, which has been developing longer than the free markets, can

---

5 A.I. Ogus, Law and Spontaneous Order: Hayek’s Contribution to Legal Theory, 16 J.L. & Soc’y 393–409, 393 (1989) in which Ogus writes “After a short account of Hayek’s approach to social science methodology, I saw how he uses an epistemological theory to develop two models of social organization: spontaneous order, which he identifies with the market and with common law, and rational constructivism, which is associated with a planned economy and regulatory law.”
be an important context: the balance of powers in the common law may contribute to a fuller understanding of one of the primary questions of political economy.

Hayek’s theory of spontaneous order is the connective tissue, and this paper explores Hayek’s theory. One hypothesis disputing Hayek’s theory would claim that left to workings of “spontaneous order,” and only “spontaneous order,” both the common law and laissez faire markets would evolve into unworkable or undesirable processes. If, according to Hayek, the common law process evolved out of “spontaneous order,” how does Hayek address, for example, that without the application of reason, logic, and analogical deduction, *stare decisis* would not have evolved and continue to evolve today as the foundation of judicial decision-making? Or, might reason, logic, and analogical deduction not be a conscious activity of human design and subsequent human intervention, but instead be imbedded in the nature of spontaneous order?

There is one aspect of Hayek’s theory that does permit the interjection of human intervention.

…Hayek is asking us consciously to design the general rules of the economic system so that spontaneous order induced by these rules can be expected to promote the general welfare…he is asking us to adopt a policy of using the spontaneous ordering forces of human behavior to bring about desirable (but, in detail, unpredictable) results. All this is very different from appealing to group selection to justify long-established rules.\(^6\)

The hypothesis of this paper is that Hayek is correct in identifying spontaneous order as an origin of various societal “institutions” such as the common law or the free market. But, to claim that rational “interference” in such spontaneous ordered institutions is a corrupting and damaging exercise is the significant question on the table.

---

Hayek may have fallen into the trap of attempting to construct one theory to explain everything. Coincidentally, it is similar to a judge adopting one legal precedent to apply to all similar situations without permitting variance by rationally cognitive human intervention. We need to explore not just the theory itself but the context of both the times and applications.

II. COMPETING TWENTIETH CENTURY THEORIES

We begin with the primary system to which Hayek was responding: a socialist-inclined managed economy.\(^7\) Almost from its inception, socialism proved to be a failed system. Ideologically pristine, socialism, as an economic system, has not been effective except in limited use in highly homogenous societies such as the Scandinavian countries. Even there, the economic system is a blend or hybrid of capitalistic and socialistic principles.\(^8\) However, on a broader scale and with a far more heterogenous national demography, the Soviet Union was one failed socialistic attempt after another.\(^9\) These continued failures awarded the default economic position of the twentieth century to capitalism – but which “flavor” of capitalism?

\(^7\) See generally James R. Otteson, THE END OF SOCIALISM 1–12 (2014) (particularly discussion of “socialist-inclined” and “capitalist-inclined”).


A. Hayek versus Keynes, both capitalists but different flavors or opponents?

Hayek and John Maynard Keynes\(^{10}\) were the combatants in the quintessential free market economic battle of the twentieth century. Both were capitalists but disagreed vehemently on the government’s role in the economy. Hayek took the “classical liberal” view of Adam Smith that the invisible hand served as the exclusive guiding force behind laissez faire economics. Keynes took the view that governmental intervention in the dual form of regulator and participant to guide the economy when it deviated from normative behavior. In the Keynesian universe, government could enter into the market with stimulus programs, such as a jobs bill or infrastructure bill, to influence economic growth. Likewise, government could regulate the economy with regulatory schemes, such as taxation, market regulation, international sanctions, or the like. Hayek opposed such schemes as a deviance from his view of normative market activities.

The intriguing aspect of Hayek’s thinking is the foundation of what he believes to be normative results. This foundation is his theory of “spontaneous order.” Succinctly, this theory postulates that, “what is, is right” in Alexander Pope’s words.\(^{11}\) If society is left unfettered by governmental, positive, or constructivist intervention, it will “spontaneously” evolve those practices, policies, and institutions which should evolve.

The doctrine of spontaneous order achieved a central place in economic and legal science when Adam Smith described the interaction of market forces coordinating processes of production, distribution, and consumption as the working of an invisible hand. Carl Menger extended the application of spontaneous order to the emergence of commodity money in a primitive barter economy and Ludwig von Mises contributed a highly sophisticated theory explaining how fiat money can evolve from commodity money. Mises’ regression theorem filled an important gap in prevailing macro monetary economics, which was unable to understand how fiat money could circulate at all. Hayek developed a theory of the evolution of democratic political and legal institutions responding to

\(^{10}\) 1883–1946.

historical influences without the intelligent design of an authoritative legislator.\textsuperscript{12}

As Mulligan connects Hayek’s spontaneous order with 19\textsuperscript{th} century laissez-faire markets, it is worth considering the failings of those markets alongside their broad successes. Wealth disparity, market manipulation, and employee oppression were, at best, side effects of 19\textsuperscript{th} century laissez-faire economics.\textsuperscript{13} With the advent of governmental regulations of market monopolies in 1890 with Sherman Act anti-trust laws\textsuperscript{14} and then regulation of consumer protection with the Federal Trade Commission Act\textsuperscript{15} in 1914, the federal government, and subsequently state governments, limited the laissez faire “spontaneous order” evolution of the market which then became affected by positive governmental influences. The paradox of the Sherman Act was that regulation was needed to protect the freedom of a laissez faire market. But does this kind of governmental intervention really contradict Hayek’s spontaneous order theory?

\textbf{B. What is Hayek’s identification of “rational constructivism”?}

Hayek contrasts his spontaneous order model of social organization with “rational constructivism,” which assumes that human institutions are capable of serving human purposes by intentional design.\textsuperscript{16} For Hayek, rational constructivism is deeply fallacious

\begin{itemize}
  \item \textsuperscript{13} As Louis Hunt notes in \textit{LOUIS HUNT \& PETER McNAMARA, LIBERALISM, CONSERVATISM, AND HAYEK’S IDEA OF SPONTANEOUS ORDER} (2007), “…Hayek conceives of the market as simply one of a number of different social and political institutions that have arisen spontaneously in response to the exigencies of human life. This may be fair enough as a description of the market in the eighteenth, or even nineteenth century, but, as many observers have noted, the market in contemporary advanced industrial societies appears to be expanding rapidly at the expense of other social and political institutions. One does not have to be a Marxist, or believe in collective planning, to share Jurgen Habermas’s concern about the tendency of the market to ‘colonize’ almost every aspect of modern society.” p. 61.
  \item \textsuperscript{14} SHERMAN ANTITRUST ACT, 15 USC §§ 1–7 (1890).
  \item \textsuperscript{15} Federal Trade Commission Act, 15 USC §§ 41–58 (1914).
  \item \textsuperscript{16} Ogus, \textit{supra} note 5 at 395.
\end{itemize}
despite its infusion in Western thought since Descartes.\textsuperscript{17} In describing the difficulties of a centrally-managed world, Hayek describes the unavailability of adequate information to manage a society, calling it a “fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order.”\textsuperscript{18} To this end, Hayek argues that the spontaneous order process is indeed normative. However, does the evidence show the contrary in both market and legal evolution?

III. \textbf{SPONTANEOUS ORDER AS A DESCRIPTIVE PROCESS IN MARKET EVOLUTION}

Robert Sugden notes that, “[h]aving recognized that such institutions as language, law, markets, and money are the product of evolution and not of reason, [Hayek argues that] we must take the final step of accepting that morality is just another institution of the same kind: “Ethics is the last fortress in which human pride must bow in recognition of its origins.”\textsuperscript{19} Let’s test this axiom with the fundamental market concept of the West: capitalism.

Hayek argues that capitalism arose as a result of spontaneous order, or an order among persons that emerges from self-motivated individual actions that combine into a larger sequence of coordinated activity, without any central direction. A spontaneous order is one that is the product of human action but not human design.\textsuperscript{20}

\textsuperscript{17} Id. at 395.
\textsuperscript{18} Id. at 395., citing F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 15 (2012).
\textsuperscript{20} Though it is beyond the scope of this paper, this conjures up notions of Noam Chomsky’s espousal of nativism. Which cognitive skills are innate, and which are acquired? Consider this paper’s first example \textit{stare decisis} in the second paragraph. Did \textit{stare decisis} evolve from an innate desire for fairness, cooperation, predictability? Did it result from conscious human decision-making or as Hayek might identify “rational
However, Hayek does not dismiss intentional human intervention. Instead, Hayek looks at human nature and concludes that humans are innately “rule followers.”\(^{21}\) As such, humans indeed do create rules. But these rules lay out general guidelines in which unintended and beneficial spontaneous orders evolve.\(^{22}\)

\section*{A. Is capitalism the “better” system?}

Capitalism has proven to be an economic system more beneficial to the human race than any other economic system in history.\(^{23}\) By process of elimination, capitalism’s chief rival, socialism, has failed, at least in large, heterogeneous societies, such as the Soviet Union. Moreover, socialism failed dramatically in the former eastern-bloc European nations. Socialist elements of policy as applied in the much more homogeneous Scandinavian countries have proven successful. But, do those failures, Scandinavian societies notwithstanding, require us to accept unregulated capitalism as the default victor?

Hayek started from an evolutionary perspective from the natural sciences. He ended his career with an evolutionary account of the development of human civilizations, where in the societies with the most materially productive rules, laws, morals, customs, and traditions will reproduce most in the end. Societal selection operates both within and among societies and is driven not by the selection of genetically influenced attributes but by the selection of societal practices to economic productivity, prosperity, and peace. Hayek saw life as a competition to extend itself most, whether in the biological or social realm.\(^{24}\)

\(21\) Sugden, supra note 6 at 395.

\(22\) Id. at 395.


Thomas Friedman in his book *The Lexus and the Olive Tree* would agree with Hayek’s conclusion. “Nearly two decades ago, Thomas Friedman came up with his ‘Golden Arches Theory of Conflict Prevention.’ No two countries that had McDonald’s restaurants would go to war. The idea suited the heady post-cold war 1990s when people thought humanity would turn to post-ideological goals, like ending hunger. It offered the prospect of ‘homo economicus’ replacing its appetite for war with a Big Mac and fries.” Perhaps Friedman’s line of thinking proves Hayek’s premise that allowing capitalism to run its course will lead to globalization and a shared economy resulting in *economic productivity, prosperity, and peace.* Further, the threats of interference of tariffs and trade wars being touted by the current American administration and implied by Brexit would further bolster Hayek’s claim that constructive rationalism interferes with the natural evolution of the free market.

**B. Is capitalism an evolutionary process?**

Supporting this claim objectively is difficult because what is viewed as beneficial to the human race varies from individual to individual. Ultimately, what is being strived for in each individual’s mind is *civilization:* “the stage of human social development and organization which is considered most advanced.” Unfortunately, clarifying this does nothing to more explicitly define the objective; some might consider the society which labors least to be the most advanced. Others might consider the society which has the highest life expectancy to be the most advanced. Others may believe that a society with the smallest wealth disparity is most advanced. Nonetheless, we tend to maintain in the West that capitalism is most beneficial to the human race in that it has elevated billions of people out of poverty who would otherwise have remained impoverished.

---

Advocates point to the structural operation by which capitalism fulfills the needs of society as a whole. It does this through necessity: if an individual player in society wishes to have his/her needs met, then the individual must fulfill needs of another in society to obtain the resources necessary to fulfill his/her need. The end result of this is that both parties are having needs met and thus a fraction of society’s total needs (the sum of all individual needs) is met. Other economic systems, such as feudalism or socialism, have inherent systemic issues that prevent benefits to multiple parties from existing, whether those issues be a lack of leverage for certain parties in negotiation (feudalism), or the lack of mutual benefit in a transaction (socialism).

The fundamental reason that capitalism serves the needs of society better is that capitalism is a spontaneously evolved—but rule-governed—system, much like common law. Spontaneously evolved systems beget more efficiency and less waste in their operations, at least according to Hayek. The reason for this is that centrally planned systems only take into account factors and variables that the planner considers when creating the model and asserting treatment to the model to achieve a desired result. The collection of all immaterial or ignored factors then results in error between expected result and actual result. Spontaneously evolved systems have a self-creating model whose result is by its very nature affected by all variables, no matter how small. Both systems have the goal of benefiting society, but centrally-planned systems are inferior because their model contains limited information.

C. Can a spontaneously-evolved system also require constructive rationalism?

All of this having been said, capitalism needs some central planning or constructive rationalism in order to uphold the integrity of the economic system itself. This is the case because the success of capitalism depends on two assumptions in a laissez faire market: 1) perfect information for all decision-making individuals in the economic system and 2) competition among producers and consumers within an economic system.
The former assumption centers around buyers and sellers having a complete understanding at the time of transaction of what they are getting or giving up. However, if left unregulated this assumption proves false, with marketers in a business creating misleading advertisements, in the extreme leaving uneducated individuals to make purchases based on outright lies. The latter assumption would be more aptly described as a principle; while models of the capitalist system include representations of noncompetitive behavior through the existence of monopolies, the existence of certain monopolies brings about such harsh realities so as to threaten the health of capitalism in the long term. Therefore, in these circumstances, and only these circumstances, central planning is necessary to uphold the integrity of the economic system.

D. What is the cost benefit analysis: risk versus reward?

Further interference in the economic system beyond those two ends will pose more possible risk than possible reward. This is the case because while interference into other aspects of the economy may pose short-term benefits when the intervention is made with good intent by a benevolent central planner, the additional delegation of power poses too great a risk for the day in the long term when a less than well-intentioned central planner takes power.

For instance, say that a central planning institution awards itself the right to redistribute income, in order to reallocate income from the wealthiest 1% and give it to the poorest 10%. Now the central planning authority has the right to redistribute income. Twenty years later another party seizes control of the central planning authority and has an agenda to reduce the power of manufacturing in the economy because of special interests. With the power to redistribute income, it targets manufacturing companies, seizing their wealth and redistributing it to the service sector of the economy. Now, an important (and socially beneficial) economic function is not being fulfilled by the capitalist system, and efficiency of the market economy is reduced. While this is a very extreme example, it holds true on
the smaller scale too. This danger is compounded by the concerns that even with the best of intentions, central planning introduces inefficiencies that sap the benefits that such planning would hope to produce.

The assertion that the market, left solely to its own devices, will always lead to a normative result in the long run cannot be squared in the context of historical, empirical data. One of many examples that provide evidence to the contrary can be seen in nature itself or, more specifically, in the market’s relationship with the environment. Classical liberal economists have repeatedly contended that consistent economic growth is sustainable because society learns more over time about how to extract greater amounts of resources at consistently decreasing cost, thus increasing firms’ throughput rates and supporting an ever-increasing GDP. While this is an appealing theory for those who are invested in stocks or have other direct incentives to see GDP values soar, the belief is based upon a fundamentally flawed central premise: that the market exists within an environment capable of providing infinite resources. This may have been an easy premise to accept a few centuries ago, when the resources at society’s disposal were immense as compared to the resources necessary to fulfill society’s most urgent needs. In the 21st century, however, reality challenges the theory. Population continues to grow, with a projected population of over 11 billion by the year 2100. Meanwhile, nonrenewable resources continue to be depleted at an alarming rate. Oil, arguably the backbone of a globalized economy, is estimated to have a remaining supply of approximately 1.7 trillion barrels: enough to

---

sustain current demand for roughly another 55 years.\textsuperscript{31} Even lithium, which is often seen as the successor to oil in the energy economy, has finite reserves.\textsuperscript{32}

\textit{E. What is the difference between allocation and scale?}

In an economic system set by its nature to attain a normative result, the scale of resource use would likely differ greatly from that used under a capitalist system. To understand this, a distinction must be made between \textit{allocation} and \textit{scale}. Allocation is simply the determination of which firms and individuals hold rights to use a resource. Economists have generally agreed that efficient resource allocation is best determined by prices, and where an inequitable or unjust distribution of such resources occurs, policies can be put in place to compensate.\textsuperscript{33}

The attainment of optimum \textit{scale} is a separate, more difficult macroeconomic goal. To define optimum scale, the goals of the economy as a whole must be ascertained. If the system is seen as anthropocentric, the optimum scale would be reached at a point where the marginal benefit to humans of manufactured capital is simply equal to the marginal cost to humans of sacrificed natural capital. On the other hand, a biocentric system would assign an intrinsic value to other species and their habitats beyond their instrumental value to humans, such that the cost to such species/habitats would be added into the marginal cost to humans. This being the case, the optimum scale for a biocentric system would be at a much lower level of resource use, since marginal cost would reach marginal benefit more quickly. We can easily accept that optimum scale must, by definition, not exceed maximum scale, with maximum scale being equal to the lesser of an ecosystem's regenerative or absorptive capacity; to say that optimum scale exceeds maximum scale is

\begin{itemize}
\item Conglin Xu & Laura Bell, \textit{Worldwide reserves, oil production post modest rise}, 111 OIL & GAS J. 30–33 (2013).
\item DALY, \textit{supra} note 27 at 50–51.
\end{itemize}
to claim that the best level of resource use would be at a point where the ecosystem’s ability to assume the damage is exceeded.\textsuperscript{34}

Determining the exact optimum scale beyond this simple understanding is difficult, but one thing has become apparent: no evidence exists to suggest that there is a price system or other ‘invisible-hand-driven’ mechanism within the confines of a laissez faire capitalist system which limits the use of natural resources to their optimum levels.\textsuperscript{35} While it is nearly impossible to prove the lack of existence of anything, empirical data suggests that no such mechanism exists at all; fossil fuels wreak havoc on the ecosystem, waste from consumer products builds even as production accelerates, and nonrenewable resources continue to be depleted in excessive fashion. Such could not be the case if Adam Smith’s invisible hand was capable of bringing a normative result to all areas of modern society, as Hayek claimed.

Is there a mechanism for addressing these “scale” questions that would not violate the supporting theory of spontaneous order? More generally, is there room in Hayek’s theory for addressing structural or organizational issues in the market while preserving the benefits of spontaneous order?

The debates in political economy continue, and the parties tend to become more entrenched rather than more competent in their understanding of opposing arguments. Political economy is not the first venue of this particular debate, though. Common law had been developing as a unique, relatively closed system for more than six hundred years when Hayek began his work. So what does common law—and particularly Hayek’s own work on common law—tell us about the opportunities and limits of spontaneous order?

\textsuperscript{34} \textit{Id.} at 50–51.

\textsuperscript{35} \textit{Id.} at 50–51.
IV. SPONTANEOUS ORDER AS A DESCRIPTIVE PROCESS IN COMMON LAW

Common law can be seen as the longest-running experiment with spontaneous order\(^\text{36}\): it predates Hayek’s own articulation of spontaneous order by at least five centuries, and so he recognized the law as an important context for exploring his theory. Hayek sees common law both as a codification of previously unarticulated rules of conduct and as providing a framework within which spontaneous orders can form.\(^\text{37}\)

In this sense, common law has both a cautionary and an illustrative role. Hayek notes that efforts to redesign law in a deliberate manner have not worked, cautioning us that broader efforts “to arrange deliberately all the particular activities of a Great Society according to a coherent plan”—a much broader project than law, which is but one feature of a complex society—could not possibly be successful.\(^\text{38}\) If law cannot be advantageously designed from whole cloth, then certainly the whole society cannot be designed, but rather must develop. What it means to design or legislate law and what it means for those efforts to be successful are among Hayek’s primary topics in his 3-volume work, *Law, Legislation and Liberty*.\(^\text{39}\)

More importantly for this project, common law is also illustrative of the finer points of Hayek’s theory about spontaneous order. Hayek recognizes that not all law will be—or should be—developed through spontaneous order. Hayek distinguishes between a “self-generating or spontaneous order,” like the legal tradition or, indeed, society, and an


\(^{37}\) Sugden, *supra* note 6 at 395.


\(^{39}\) HAYEK, *supra* note 37.
organization. Organizational principles, or the law of governing, should be developed by design and must take the form of legislation. Administrative law simply cannot develop organically in the common law model. Laws governing conduct are different: these are the “previously unarticulated” rules that properly develop and approach order spontaneously.

A. Differentiating between types of laws

The law with which Hayek is primarily concerned—that which properly develops through spontaneous order—governs the conduct of people in a society. These rules are not necessarily written, and the members of the society cannot necessarily articulate them, but they are shared in a very real cultural sense, as evidenced by the rarity of violations.

Of course, this law of unwritten and developing rules eventually requires some form of enforcement. The subpart of what Hayek calls a “Great Society” that handles this enforcement is the government:

This particular function of government is somewhat like that of a maintenance squad of a factory, its object being not to produce any particular services or products to be consumed by the citizens, but rather to see that the mechanism which regulates the production of those goods and services is kept in working order. The purposes for which the machinery is currently being used will be determined by those who operate its parts and in the last resort by those who buy its products.

---

40 Id. at 2. This may be at the heart of disagreements over Hayek’s work, because even by 1973—the time of the writing of Law, Legislation and Liberty—the most complex organizations in western society were still relatively simple and there was lingering distrust of government and institutions. As corporations and societal organizations have become more complex on every dimension, the notion that extraordinarily complex systems can be intentionally organized has become more palatable to modern ears than it would have been to Hayek because we’ve seen organizations come closer to controlling entire systems. Whether those organizations are actually successful, of course, is another question. Hayek depends on a reflexive answer that is less broadly shared in the early 21st century.

41 Id. at 86.

42 Id. at 45. This is admittedly a bit circular, because Hayek believes “it is advisable to reserve the term ‘society’ for this spontaneous overall order....”

43 Id. at 42.

44 Id. at 46.
To put a finer point on his illustration, it is not the role of government to decide who has what rights within the “factory” of society, or which things people produce, or even in what ways those things are produced.

That government is also an organization, and an increasingly complex one at that. To govern its own behavior, it needs a set of laws that cannot reasonably develop through spontaneous order. The rules within an organization—those rules that govern the organization itself rather than those rules which enforce broader standards of society and might be administered by the organization—relate to procedure. They do not assign or protect rights, but rather dictate processes. In other words, they are a kind of algorithm for determining what the governing authority would dictate in each individual situation. Since they are a way of deriving implied commands, they are subject to override by the governing authority.\footnote{Id. at 47.}

The distinction between organizational rules and rules (or laws) of conduct is that in an organization, rules are a proxy for individual commands. Therefore, in a conflict between a command from a senior officer in an organization and an organizational rule, the command wins. The rule existed to predict the command, and when that prediction fails, the rule should be disregarded (or effectively sublimated) in favor of the command.\footnote{Id. at 47.}

Hayek believed that once enough power to legislate organizational laws is vested in a given body, that body will lose track of its representative role. Those bodies will begin working to shape public sentiment rather than to represent it in the authoring of laws.\footnote{Id. at 3.} The centralization of power that is likely to result is clear enough—Hayek specifically referred
to “organized interests and their hired experts.” In other words, once legislation emerged as a method of law-making, the distinction between administrative and conduct law began to break down.

B. **Different types of development for different types of laws**

Hayek’s conviction with regard to the development of laws governing society is consistent with his approach to pricing and markets: “From the insight that the benefits of civilization rest on the use of more knowledge than can be used in any deliberately concerted effort, it follows that it is not in our power to build a desirable society by simply putting together the particular elements that by themselves appear desirable.”

The idea that it is challenging to reach larger goals through many small decisions is the same impulse that leads governing authorities to develop administrative rules so that tasks can be achieved at lower levels. Hayek is pointing out what he perceives to be the hypocrisy of a governing authority who sets guiding rules rather than dictating granular decisions, but who would attempt to design the nature of society by central administration rather than enforcing general principles that come from the governed and develop over time as the interests of the governed and the methods of achieving their goals develop over time.

For Hayek, the underlying problem when legislatures start to develop laws of conduct is that they cannot possibly be working with all the information that informs the spontaneous order.

The legislation of society does not yield positive results. Hayek doesn’t believe that this is mere theory, but rather the record of history. Legislation is frequently justified as necessary

---

48 *Id.* at 3.
49 *Id.* at 54.
50 *Id.* at 54.
to correct some errant outcome in society. First of all, Hayek attributes these errant outcomes to prior intrusion in the development of society’s law, not the product of spontaneous order.\textsuperscript{51} Second, correction of any particular ill will create additional unintended outcomes, and these are difficult to measure, even if a legislature actively attempts to measure, and they frequently do not. Correction of a perceived ill is much more salient than the negative unintended consequences: “We will rarely know what we lose through a particular restriction of freedom.”\textsuperscript{52}

The shift of legislatures from a representative role toward a manipulative role will mean that legislatures block the natural development of laws that enable prosperity and success in spontaneous orders.\textsuperscript{53}

C. The meaning of the distinctions between types of laws

Say what you will about Hayek, but he understood the challenges to his beloved spontaneous order. New legislation often offers—or even guarantees—positive benefits, but like the imagined townspeople in Bastiat’s famous allegory who dismiss the costs of a broken window because of the benefit of employment for the glazier\textsuperscript{54}—the proverbial silver lining—we have a hard time understanding the costs.\textsuperscript{55} Spontaneous order develops within a set of general rules, and the advantages—or ‘freedoms’—inherent in that system depend on those general rules or principles. Any attractive new legislative manner promises some positive results, and the argument that such promises come at the cost of valued principles is not very compelling.\textsuperscript{56}

\textsuperscript{51} Id. at 56–57.
\textsuperscript{52} Id. at 55.
\textsuperscript{53} Id. at 3.
\textsuperscript{55} HAYEK, \textit{supra} note 37 at 59.
\textsuperscript{56} Id. at 59.
Modern society is not in the habit of distinguishing between laws of conduct and laws of organization. In part, this stems from the dizzying complexity of the modern world, which is often taken to be unique in history and therefore able to justify much more administrative approaches to society’s law.\(^57\)

Using Hayek’s distinction, agricultural quotas or trade restrictions are clearly laws regulating conduct that would better be optimized through spontaneous order. And, in a less business-oriented sense, laws about violent behavior (assault, robbery, murder) would continue to form in the spontaneous, common-law manner. On the other hand, laws about how searches are performed at the airport or about how criminal charges should proceed through the justice system are organizational and should be addressed through legislation. Of course, the distinctions are not always clear. At first glance, tax law would be organizational: it is the way the government classifies income or transactions and applies a tax. But we know that when the government classifies a particular kind of economic income as taxable, there is the unintended consequence of taxpayers shifting to other kinds of income. Recalling Hayek’s factory maintenance crew example, it is as if the maintenance crew announces that it will help more quickly when fire erupts than when equipment fails, so factory workers who saw sparks as equipment began to fail are more likely to beg for help with a “fire” than with failing equipment.

V. PRELIMINARY CONCLUSIONS

Consideration of the common law points to the complexity of spontaneous order and development in the real world.

\(^{57}\) Cf. Id. at 66.
Particularly in the context of political economy, Hayek’s theory of spontaneous order has an attractiveness to it that is beguiling. A surface-level reading of Hayek would suggest that we should “just do nothing and the evolutionary forces at play will work wonders and come up with the desired, normative result.” In fact, there is a paradox at work here. Social evolutionary arcs must be directed. But, are they directed through knowing or subconscious drives? Consider that “nearly 150 years ago, Charles Darwin proposed that morality was a byproduct of evolution, a human trait that arose as natural selection shaped man into a highly social species—and the capacity for morality, he argued, lay in small, subtle differences between us and our closest animal relatives. ‘The difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind,’ he wrote in his 1871 book The Descent of Man.58

The limitations of spontaneous order are clearer in the law. Even non-lawyers are used to thinking about laws in different ways: just ask anyone who has ever condemned a murderer while regularly breaking the speed limit. More critical differences are obvious in the law as well. Organizational laws—civil procedure, for example—are vital to the successful and just operation of the broader legal system, but practical concerns mandate the rational construction of these laws rather than their graduate development through spontaneous order. A devotee of common law can, along with Hayek, admit that some constructed law is necessary for such purposes without abandoning commitment to the advantages of common law for laws of conduct.59

The clarity of the division between laws of organization and laws of conduct, not to mention the relative lack of debate among lawyers about the advantages of the

59 HAYEK, supra note 37 at 84.
development of both kinds of law, opens a window into ongoing debates in political economy. Advocates of spontaneous order cannot claim to follow in Hayek’s footsteps while eschewing any kind of rational constructivism. Just as importantly, advocates of rational constructivism should at least be prepared to answer Hayekian criticism when they advocate legislation to change developed rules of conduct. (They cannot simply offer an example of a rule or policy that has developed in unfortunate ways to say that spontaneous order never works, particularly when that rule or policy is an organizational principle.)

The goal is not to end debate, but rather to make debate more productive. This clearer framing for the debate may also make possible a range of interesting future work. Complex pieces of legislation and public policy can be broken down and analyzed by their nature as either organizational or conduct-oriented rather than taken, for the purposes of analysis and debate, as a legislative or political whole. Policies and laws that have been authored or developed outside Hayek’s model—organizational rules that developed over time or conduct rules that were legislated—can be explored as potential counterarguments to Hayek.

In addition to framing debate and offering future ideas for analysis, these arguments highlight an additional way that lawyers and legal scholars can contribute to public policy under the broad analytical umbrella of law and economics. Hayek’s maintenance example makes clear that the distinction between organizational and conduct-oriented rules is not always so clear, and lawyers have a unique ability to pick apart complex proposals to support further analysis.

The best developments for both common law and political economy will result when the two fields work together to frame and conduct sophisticated analysis rather than merely lobbing criticisms that make the critic feel good and the target feel confused. Given that the same could be said for a broad range of debates in contemporary society, this is an
approach worth perfecting over time: the most important spontaneous order we could hope for.