Chapter 5

Legislation is distinct from law

> *Legislation, the deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder. Unlike law itself, which has never been 'invented' in the same sense, the invention of legislation came relatively late in the history of mankind. It gave into the hands of men an instrument of great power which they needed to achieve some good, but which they have not yet learned so to control that it may not produce great evil.*
>
> Friedrich Hayek (1973). *Law, Legislation, and Liberty*, 1 (University of Chicago Press): 72.

The single most profound advance in our understanding of society was made in the eighteenth century by a remarkable group of Scottish philosophers, foremost of whom were David Hume and Adam Smith. These Scots explained that (to quote another Scot of that age, Adam Ferguson) "nations stumble upon establishments, which are indeed the result of human action but not the result of human design."

A good example is language. No one invented language. No person or council designed it. Each language *evolved* over the generations into the particular "shape"—vocabulary, grammar, syntax—that it has today. No genius or committee of the best and the brightest linguists invented, for example, the word "chair" to mean in English an object in which humans sit. No language designer decreed the word "merci" to convey the meaning that French speakers understand whenever they hear or say that word. Word meanings evolved

over time through repeated use and experience. Likewise for each language's grammar and syntax.

Languages are unquestionably the result of human action—in this case our and our ancestors' countless individual efforts in particular circumstances to convey meaning to others. ("Watch out for that falling rock!" "I love you." "Take that hammer to your father.") But none of the thousands of natural languages that have existed in history is the result of human *design*. None of these languages—not English, not French, not Urdu, not Chinese, not one—was invented. And yet each language is a remarkably useful tool for people who speak it to communicate in complex ways with each other.

Of course, once a language becomes established it is common for lexicographers to *codify* that language in dictionaries, thesauruses, and books of grammar. Samuel Johnson's eighteenth-century *A Dictionary of the English Language* is an example of a famous codification of the English language. Such codifications, however, do not create any language. Samuel Johnson did not *create* English; he merely recorded it as he found it in its evolved state in the mid-1700s. If Dr. Johnson had written in his dictionary that the word "chair" means "to kill in cold blood," people would not suddenly have started using "chair" as a synonym for "murder." Instead, people would have simply regarded Dr. Johnson's dictionary to be untrustworthy.

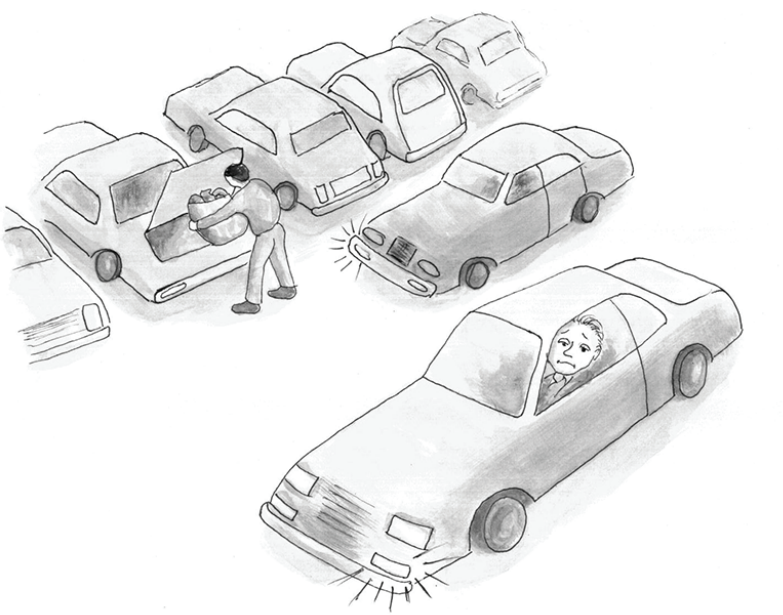
What is true of language is also true of law. The great bulk of law that governs human interactions was not invented and designed by some great Law Giver. Instead, law emerged without centralized design. Law evolved.

The law against murder, for example, is not the product of human intention or design. There was never a tribe or society in which the intentional taking of the lives of peaceful members of that tribe or society was acceptable and became unacceptable only when and because some elders, a wise leader, or a popularly elected assembly pronounced such killing to be wrong. Such killing is, to use a phrase from Anglo-American law, *malum in se*—it is wrong *in itself*. People do not tolerate murder in their midst; in some form or fashion they take steps to prevent murder and to punish—usually very harshly—those who commit it. Such steps are taken even when there is no formal government to lead such efforts. The same is true for theft, fraud, arson, and many other violent and aggressive acts initiated against the persons and property at least of the people regarded to be citizens of the group.

Some of these laws might be rooted in humans' genetic make-up. (Parents naturally will go to enormous lengths to protect the lives of their children and to ensure that their children's killers are punished appropriately. Similar, if less intense, sentiments are naturally felt for other family members and friends.) Other laws might be based more on mere social and religious conventions—such as the law that women in western societies, unlike in some African tribal societies, never appear topless in public or that women in many societies must never appear in public with their hair uncovered.

What matters here is that every day we obey a vast set of rules that are not consciously designed.

Consider how parking spaces in shopping malls are allocated on busy shopping days. Suppose that you and several other drivers are cruising around a crowded parking lot, each in search of a parking space. You eventually spot a car just beginning to pull out of a space. You will likely stop a few feet behind that parking space and turn on your car's blinker in its direction. When another driver, also looking for a parking space, sees your stopped car with its blinker on, that other driver immediately knows that you are claiming that about-to-be-abandoned space. That other driver, although disappointed that she missed out on the space, will nevertheless drive past you to continue looking for a space; that other driver leaves the space for you to occupy.



In this everyday example, both you and the other driver are governed by law. The first person to stop his car near a parking space being abandoned and to put his blinker on in the direction of that space is widely recognized as having established for himself a temporary property right to that space. It is a right that other drivers generally recognize and respect.

This law is not written in any book. It was not designed by a committee of parking geniuses. It emerged, unplanned and unintended, in the course of human interactions. And it serves the useful purpose of peacefully allocating scarce parking spaces in ways that are widely accepted as being fair.

This example of spontaneously evolved law governing the allocation of scarce parking spaces is just one instance of evolved law. A much more significant body of evolved law is the *lex mercatoria*, or "Law Merchant."

When trade in the Mediterranean region began to rapidly expand a thousand years ago, disputes between merchants naturally occurred with greater frequency. There was, though, no single sovereign power with authority over all of these merchants who traded with each other—some of whom were in Genoa, others in Venice, others in Umbria, and yet others in the several other different independent political jurisdictions that were then spread throughout the Mediterranean region. Nevertheless, a highly complex and uniform system of law emerged in this large region to settle commercial disputes. This law is today known in the English-speaking world as the Law Merchant.

Two features of the Law Merchant are worth emphasizing here.

The first is that the Law Merchant evolved spontaneously out of the actions of merchants; it wasn't designed and imposed by a king, military general, or parliament. Routine merchant practices came to be known by the merchants and these routines created expectations in all merchants about how they and their fellows would act under different circumstances. But conflicts arose when these expectations were violated—either intentionally or unintentionally—or when new occurrences happened that were out of the ordinary. Merchants themselves established and manned courts to settle these conflicts. These courts generally ruled in favour of those parties whose actions were most consistent with established merchant practices—and, hence, these courts generally ruled against those parties whose actions were deemed to have run counter to established merchant practice.

In much the same way that lexicographers look to widely accepted and established meanings of words when declaring in their dictionaries the meanings of words, Law Merchant courts looked to widely accepted mercantile practices to settle disputes and declare the law in the cases before them. Through this process, law is created and modified by ongoing human practices and interactions, and this law is further refined and spelled out in decisions by these courts. The important feature for our purposes is that no one designed this law. It is the result of human action but not of human design.

A second feature of the Law Merchant is that it was widely obeyed *even though there was no government to enforce it*. For starters, each merchant typically had powerful incentives on his own to follow the law—in the same way that you have incentives to follow the law of allocating parking spaces in crowded parking lots. By "breaking the law," you risk retaliation by others. Other drivers honk angrily at you and perhaps even confront you face-to-face to scold you for your offense. (Violating the law of allocating parking spaces usually causes only minor problems for others, so the punishments typically inflicted on violators of this law—nasty looks, repeated horn blowing, a few angry words, and the like—are correspondingly minor.)

For merchants, violating the Law Merchant risked severe damage to their professional reputations. A trader who didn't pay his debts on time, or who refused a certain shipment of supplies in situations when established commercial practice required that he accept that shipment, was a trader who lost future opportunities to borrow and trade with other merchants. Because those future opportunities were valuable, merchants had strong personal incentives to maintain their reputations for being law-abiding. And the best way to get and keep such a reputation was actually to *be* law-abiding.

It's no surprise, then, that the historical record shows that even when merchants lost cases decided by Law Merchant courts they typically obeyed the rulings. The merchants obeyed not because the government forced them to obey; again, in most cases there was no government available to enforce a Law Merchant court's ruling. Merchants obeyed the courts' rulings because to disobey those rulings would damage their own reputations.

Today's method of allocating scarce parking spaces and the Law Merchant are just two of many examples of law that is created spontaneously and isn't necessarily written in statute books. Law is not always legislated, but it *is* generally obeyed.

Of course, in addition to obeying the many laws that are not consciously designed we obey also many rules that *are* consciously designed. Rules consciously designed by government are "legislation." We obey legislation, though, only because government will fine, imprison, or execute us if we do not obey. And while we might respect the authority of government, we respect and obey legislation only because it is created and enforced by government. Unlike law, the actions declared wrong by legislation are wrong only because government prohibits them. These wrongs are *malum prohibitum*—wrong only because government says they are wrong.

Importantly, however, the mere enactment of a piece of legislation doesn't necessarily give the legislature's intention the force of law. While legal rules need not be created by a sovereign authority and written in a statute book to operate as genuine law, it is also the case that rules written in a statute book ("legislation") are not necessarily binding.

For example, according to the written criminal code of the State of Massachusetts, it is a criminal offense for two unmarried adults to have consensual sex with each other. Yet despite the fact that this prohibition against consensual pre- and extra-marital sex was duly enacted by the Massachusetts legislature and is clearly written in that state's legislative code, consensual pre- and extra-marital sex among adults in Massachusetts is in fact not unlawful. No police officer in that state would arrest violators of this legislation. No judge or jury there would convict even those who confess to committing this "crime." And if by chance some completely out-of-touch police officer or court today *would* attempt to punish a couple for this "crime," the public outrage would be so great that that attempt would fail. Indeed, in such a case the public would regard the police officer and the court—not the couple—as having broken the law.

The importance of recognizing the distinction between law and legislation goes well beyond semantics. Its importance is twofold.

First, awareness of this distinction enables us to better see that socially beneficial rules of behaviour often emerge and are enforced independently of the state. It is a myth to believe that law is necessarily a product of conscious design by holders of sovereign authority.

Second, regardless of the merits or demerits of government's expansive use of legislation, the respect that we naturally feel for law should not unquestionably be extended to legislation. A corrupt or unwise government

will legislate in many ways that are socially destructive. We should not confuse such government commands with law—or accord respect to legislation simply because it is commonly called "law."