

DO FREE MARKETS CREATE FREE SOCIETIES?

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INTRODUCTION

The notion that markets lead to law and freedom is said to have originated in Adam Smith's work and rooted in history. Both the progression and roots seem highly problematic. Neo-Smithian approaches have been refurbished by general acceptance of a contingent nature of the relation. They have also been enhanced by the failures of European Marxist economics in ways predicted with uncanny accuracy. On the other hand, neo-classical claims of democratic welfare system were only a step away from similar failures, which have been refuted.

Hopes that an international system might impose democracy from outside the nation-state are overly optimistic. Nationalism is rife, with a continuing outburst of ethnic secessions, and little yielding of power to supra-national decision-makers.

The greatest success of supra-national authority has been in creating subsidiary structures, unlikely to implement fundamental transformation, but with potential for supporting such a thrust. These include expert-based operations, and the network of NGOs.

I. THE BASICS

In a nebulous way, the relations between efficiency, law, and freedom have been explored by social scientists in a unified field theory, a social "theory of everything" analogous to Hawkins' description of "Einstein's unfulfilled legacy to physics." While attempts by physicists to link concepts are overt, attempts by social scientist have been more obscure due to many factors.

Few social scientists have identical definitions and many use terms in ways inconsistent with their own definitions. Many definitions are

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essentially contested concepts—ideological terms used by writers pre-ordaining the outcome of their inquiries. There is also an almost irresistible tendency to confuse the social and individual levels of analysis on such matters, so that a factor appears in many guises making cause and effect difficult to disentangle. No doubt there are other difficulties.

II. EARLY EFFORTS: SMITH AND NEO-CLASSIC MARKET THEORIES

The font of many such theories is Adam Smith's masterpiece, *The Wealth of Nations*.¹ While that work is esteemed more for its shrewd observations and brilliant writing than for its analytic precision or consistency, it links efficiency (*laissez faire* – the market) to the wealth of nations. The object of society, however, is not mere wealth, but “natural liberty.”² The linkage is not clear. But good laws, free trade, wealth, and natural liberty are lodestones.

In Smith's discussion law seems an independent variable, and a condition for efficiency and wealth, though that is not a clear specification. “Natural liberty” is a criterion, that as for contract theorists of his time both precedes and continues to operate as a bright line test of governmental power. Nonetheless, the traditional neo-Smithian view assumes that market efficiency generates law, and law leads to a free society. This seems to me historically anachronistic and not a good reading of Smith, but it is a possible interpretation.

The nineteenth century and most of the twentieth were not propitious years for Smithian theorists. As a practical matter most European countries accepted the logic (and political advantage) of the great society as a social insurer providing safety nets (and more) to its less well-off citizens. Indeed it can be argued that Continental Europe passed from mercantilist to welfare policies, while using *laissez faire* as a slogan to eliminate only egregious regulatory schemes.

“Efficiency” was not, as promised by devotees of “the invisible hand,” automatically available. Economists wrote of “third party costs” and “market failures.” While Smith used the term “monopoly” mainly in his era's sense of an exclusive governmental license, economists discovered “natural monopolies”—e.g. most public utilities—that drastically distorted markets or controlled them. The law had moved to allow limited liability companies and they did not act like individuals in their markets. Economic influence was not the same as “one player, one vote.” Combinations of corporations (collusions in Smith's terms) were

1. ADAM SMITH, *THE WEALTH OF NATIONS* (P. F. Collier & Son 1902) (1776).

2. JACOB VINER, *ESSAYS ON INTELLECTUAL HISTORY OF ECONOMICS* 85-113 (1991).

rendered easier to come by and to enforce.

The notion of efficiency of the market has also had redefinition among Smithian free market advocates, particularly of the Austrian-Chicago school of thinkers. That school continues to admirably combine technical proficiency with sociological and political insight in the tradition of political economy and to emphasize “natural freedom” or some equivalent as the crown jewel of that quest. Those following Frank Knight have argued for a more subtle definition of “efficiency.” They recognize the failings of the market and its inadequacies. Still it is not only usually superior to political decision-making in its ability to summarize economic processes; it also frees political processes from a burden it cannot handle. Politics overwhelms freedom when too many of the allocations of social resources are politicized. Politics also invites snowballing coercion to assure success of governmental processes. The market preserves and protects the political process by limiting its range. And so long as the market produces a reasonably efficient solution, it should be maximized as a decision-maker.³ So there is a strong presumption in favor of decentralized decision-making, enforced by monetary consequences rather than state coercion. The force of this logic has been strengthened by the failures of the Sovietized Eastern European experiments.

In recent decades Kenneth Arrow and Joseph Stiglitz have demonstrated what most have long suspected. The conditions for a pure free market seldom exist and small departures from that purity can produce large inequities.⁴ But the Knight approach inoculates against such flaws. The market is good enough when buttressed by its helping hand to the polity, and its emphasis on contract rather than legal coercion.

III. THE MARXIST SOLUTION

Marx essentially rejected any linkage of all these terms, and indeed argued against their essential validity. “The market” enshrined anti-human values and did not work. “Law” was a conceptual fetish, designed to fool the workers. Freedom was indefinable and could only emerge from the destruction of existing social restraints. It would then be complete and not dependent on either economic or legal constraints. The Marxist logical system treated all these terms as “process” notions requiring elaborate vocabularies and little concrete manifestations.

3. FRANK H. KNIGHT, *FREEDOM AND REFORM* (1947).

4. ADAM PRZEWORSKI, *The Neoliberal Fallacy*, in *CAPITALISM SOCIALISM AND DEMOCRACY REVISITED* 39-53 (Larry Diamond and Marc F. Plattner eds., 1993).

Non-Marxists found this empty verbiage. They taunted Marxists with a powerful conundrum. If the market is abolished, what replaces it? If administrators make decisions about production and distribution what do they base those decisions on?

That challenge was, in principle, answered by Oskar Lange, a Polish Marxist with a political career, and Abba Lerner, a moderate socialist economics professor. Essentially as Lange formulated it, the market can be viewed as a set of equations with needs requiring other basic goods.⁵ Planners could use an input-output matrix or similar calculations to learn how to adjust social needs to achieve a solution of these complex equations, and thus “clear the market.” Indeed much of this work was similar to a classical conceptualization of the market by Leon Walras. Socialists could build into their scheme additional corrective market prices where parts of the market were maintained.

While the intellectual theory of a socialist substitute for the market is rich and elegant, it is doubtful even today with our vast array of high-speed computers that this program is capable of even rudimentary implementation. As we shall note below the Eastern bloc countries had conferences on the intellectual theories, but in practice relied on cruder, simpler, politically driven and largely ineffectual methods to produce their failed economies.

IV. THE WELFARE STATE

A more piecemeal approach was that of the welfare economists, like Alfred Marshall and Arthur Cecil Pigou. They suggested specific policies could be evaluated in terms of auditing costs and benefits and followed when benefits outweighed costs. So environmental regulations could calculate the effects of London smog on medical bills, dry cleaning, dusting homes and streets, and loss of earnings. And these savings could be used to offset e.g. scrubbers on smoke stacks. But Lionel Robbins—not unsympathetic to the social purpose—argued persuasively that most decisions involve assigning monetary sums to other preferences are not really so calculable.⁶ A death in the family may be calculated at the basics of lifetime earnings expectations, but different heirs may regard that sum as trivial and insulting, or a good deal.

The neoclassic insistence on individual and unique utility functions are often modified by such solutions as Vilfredo Pareto optimality—

5. ERNESTO SCREPANTI AND STEFANO ZAMAGNI, AN OUTLINE OF THE HISTORY OF ECONOMIC THOUGHT 274-78 (David Field trans., 1993).

6. *Id.* at 269-71.

where everyone improves or does not suffer from the new situation—but that is a much more constrained domain for welfare economics. Furthermore, even on the question of compensation in any of these policy situations—the actual criterion is the Kaldor-Hicks solution where optimality is accepted if sufficient compensation is self-generated by the new policy.⁷

V. SOCIAL PHILOSOPHY INFLUX

In the emerging field of sociological theory a more sweeping challenge was developing. While there were important social Darwinist social philosophers like Herbert Spencer and William Graham Sumner, most emphasis was more on societal or group forms. Emile Durkheim emphasized “social solidarity” and those “moral sentiments” that Smith emphasized in his first major work but relegated to the back-benches in the *Wealth of Nations*.⁸ Weber found in social norms and bureaucratic structures, major forces for innovation and creativity, creators and not mere sideshows for economic growth.⁹ And there were other important figures, besides these giants who reconceptualized law and government as more than necessary evils. Perhaps the most significant of these was Claude-Henri de Saint-Simon who was the precursor of Marxism, technocratic and entrepreneurial approaches. In any event, economics and sociology tended to have distinctly different attitudes about social costs of the use and non-use of law as an instrument for change and social enrichment.

As important as these redefinitions of the variables of efficiency and law were, they were all dwarfed in effectiveness by a simple redefinition of the term “liberty” which accompanied a sea of change in thinking about that concept. The new “liberty” was formulated by T.H. Green, an Oxford Hegelian philosopher who argued that a new focus on “freedom” was necessary.¹⁰ To that end, he distinguished between “negative” and “positive” freedom. The old liberty was freedom from governmental infringement of “basic” rights and freed the individual to utilize the absence of restraint to assert individuality. Property (as an extension of self) was the major means to achieve this sense of expres-

7. See generally ROBERT A. DAHL AND CHARLES E. LINDBLOM, *POLITICS ECONOMICS & WELFARE* (1953); see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 91-95 (1983).

8. EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (George E.G. Catlin ed., Sarah A. Solovay and John H. Mueller trans., Chicago University Press 1938) (1895).

9. MAX WEBER, *FROM MAX WEBER ESSAYS IN SOCIOLOGY* (H.H. Gerth and C. Wright Mills trans., eds., 1953).

10. CRANE BRINTON, *Thomas H. Green*, in *THE ENCYCLOPEDIA OF THE SOCIAL SCIENCES* vol. 7, 164-65 (Edwin R.A. Seligman and Alvin Johnson eds. 1932).

sive humanity in John Locke's seminal presentation. Green argued that the modern world grated more on human potentiality and required more than just the absence of restraint. Since the state is superior to any amalgam of individuals, it must foster the best in each of them. The new, positive freedom involved freedom to be and achieve.

The "new liberty" was less formal and less constrained by historical forms, and therefore somewhat nebulous and unbounded. Indeed, the boundary between its offspring the "welfare state" and socialism is to critics of both the "new freedom" and the welfare society, not a boundary but a slippery slope.

But the new terminology has been effective and its influence persuasive, in part because of its realism. The power of the argument did not flow from the brilliance of Green's discussion—it is turgid and plodding—but from a felt erosion, a decline in personal efficacy, of the individual.

Welfare statist of the new liberal and democratic socialist variety also found themselves in a peculiar relationship with the technocrats, a social approach that was on a different plane than traditional left-right differences. These "industrial engineers" or "scientific managers" espoused a more dirigiste approach to efficiency and called for centralized control over "inefficient" competition. While ambivalent about law and democratic control of industrial policy they regarded law as a means of taming the excesses of capitalist competition. Technocrats and welfare liberals were uneasy yoke mates, for example, in Franklin Roosevelt's New Deal, with the President's first term dominated by technocrats like Rexford Tugwell and centralized programs like National Industrial Recovery Act (NIRA), while the second term saw social welfare liberals of the Brandeis school predominate. At least some technocrats viewed Western structured economics as a democratic parallel to Nazi and Russian Communist managerial control.¹¹ As World War II approached welfare statist began to view their communist and technocratic potential allies with suspicion, questioning both their ideological affinities and the political consequences of their partnerships.

VI. THE EASTERN EUROPEAN MARXIST STATES

The decade following World War II seemingly marked a high point for non-capitalist systems. The Soviet Union took over territory and installed regimes under its total control throughout Eastern Europe as far west as the East German "People's" Republic.

11. *See generally* JAMES BURNHAM, *THE MANAGERIAL REVOLUTION* (1941).

But in fact, as George Kennan noted at the time, the system was already in decay. That decay was partly a practical one—neither the economic well-being nor the liberty of people was being served. And it was also an intellectual and spiritual one. People noticed and once-fervid communists were voicing powerful critiques of the system that promised so much, only to produce Stalinism.

When all was said and done the gravamen of the analysis was that the combination of economic monopoly and political authority was not as Marx suggested of incidental importance, and especially not a step toward freedom. It was a dominant and menacing factor that was destructive of all of the key elements of social life.

The notion that concentrated powers led to synergistic evils was given pungency by the publication of Milovan Djilas's *The New Class*.¹² Tito's right-hand man in the Yugoslavian regime—a communist system that prided itself both on its fierce independence from Stalin, and on its nominally decentralized economy based on "voluntary cooperatives"—Djilas nonetheless saw it as fundamentally coercive and repressive. In a remarkable demonstration of conscience, he denounced the system and smuggled out his analysis of its flaws. He was, inevitably jailed but his logic led even the official Soviet theorists to accept the notion of "strata," and that apparatchniks controlling (though not owning) means of production were one such "stratum."

The Lange-Lerner-Arrow and Leo Hurwicz findings in theoretical terms were, in practice, not merely unworkable; they bore little if any resemblance to what was attempted by the planners. In practice, fundamental decisions by the ruling groups preceded and dominated any economic calculations at all, as Fredrich Hayek argued it would.¹³ Those policy considerations often had little or no relation to any economic reality. Mao's vision that production of steel would lead to industrial greatness, meant that the Chinese landscape was forever changed as sparse trees in semi-arid areas were cut down to melt old iron statues, producing little steel, and much ecological and cultural damage. The premise, of at least doubtful merit, was based on Mao's power, not his grasp of equations. The Soviet economic system, far from controlling waste by intricate planning to produce the right mix of raw and semi-finished products often had factories paralyzed by absence of one or more sub-products—say perhaps—screws. Since failure to produce left managers at risk not only for their jobs, but also at

12. See generally MILOVAN DJILAS, *THE NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM* (1957).

13. See generally FREDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

times for their lives, production numbers, not quality, dominated.

In short, neither short-term gain nor future-oriented investment was protected. "Production for social purposes" was the slogan and efficient productivity was not measured or valued in meaningful ways. The Eastern bloc failed miserably in the economic sphere. Its lack of productivity meant that even in those few areas where social humanism dominated distributional principles there was little to distribute.

VII. LAW AND RUSSIAN MARXISM

Marx and Engels had postulated that law was a façade, an instrument of the ruling class administered by the state, itself a mask for bourgeois power. The end of class structure doomed the capitalist state. It was, famously, not "abolished, it withered away." Further details were not provided.¹⁴

The leading Soviet legal theorist Pashukanis, drew the seemingly orthodox conclusion that as goods ceased to be burdened with ownership considerations and classes disappeared, law, would in parallel fashion, also wither away. Unfortunately for him, this logical progression was seen by Stalin as a form of criticism, and supporting Bukharin's so-called right deviations which Stalin denounced in 1929. Realizing he was in trouble, Pashukanis admitted to mistakes in his work, but this did not save him. In 1937 he was denounced as an enemy of the people "and a miserable theorist." As Stalin explained, the socialist state would become stronger, not weaker, en route to its withering. "Is this contradictory?" Yes, it is "contradictory" . . . but it completely reflects Marxist dialectics." (A less "theoretical" formulation was later added that a more formidable workers state was necessitated by "capitalist encirclement.") Pashukanis disappeared and his exact fate is unknown.¹⁵

Soviet theorists claimed—and convinced some scholars, most notably the venerable René David¹⁶—that theirs was a distinctive type of law, on a par with civil law or common law families. The distinctive features claimed were (1) the virtually complete end to property and contract litigation; (2) the emergence of separate Arbitrazh courts,

14. KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 128 (4th ed. 1963) (Ingeniously suggests the "withering away" concept might have been more a political slogan than a thought-out principle. By using it, Marx and Engels out-flanked Bakunin and the anarchists.)

15. *See generally* V.I. LENIN ET AL., *SOVIET LEGAL PHILOSOPHY* (Hugh W. Babb trans., 1951); *see also* HUGH COLLINS, *MARXISM AND LAW* 1982.

16. RENE DAVID AND JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (2nd ed. 1968).

which dealt with conflicts between large state enterprises; (3) a new humanistic approach to criminal law; (4) “comrade,” “peoples,” or “neighborhood” courts, which substituted fresh constructive guidance by co-workers or neighbors for cold-hearted formalistic bourgeois abstractions; (5) and most distinctively, the substitution of “socialist-legality” for law, a sub-situation that enabled judges to favor “social purpose” and even to negate explicit black-letter law if to follow the law as “fetish” produced an undesired result.

Today few—if any—find these claims worthy of consideration. The claims of “peoples law” and “socialist legality” were the significant ones, but were largely hoaxes.¹⁷ The “peoples law” efforts—community and factory courts—seldom were constructive, partly because political control was the obvious subtext. Additionally the system enabled the neighborhood or workplace bully to exercise power, including the initial denunciation to the authorities. “Socialist legality” was also largely a façade, for the discretion nominally given judges was in fact exercised by party leaders. Judges would notoriously adjourn proceedings when their phones rang in chambers, to get instructions, seldom socialist, that generally had little or no relation to legality.¹⁸

The failures of legal order was the other face of the absence of liberty. Stalin and Lenin’s Russia rivaled Nazi Germany in brutality and probably exceeded it in numbers killed, with the added distinction of wreaking havoc on its own people. Particularly damning was the crude smearing of comrades-in-arms who fell out of favor. Not content with taking their lives and often extending punishment to their families, the Eastern European regimes—and communist China—typically accused deposed leaders as traitors, vermin and the like. By so doing, they maximized fear and fatalism, emphasizing everyone’s liberty was ephemeral and unprotected.

VIII. THE SURVIVAL BUT SHRINKAGE OF THE WELFARE STATE

Almost parallel to the rise and fall of the “Soviet empire,” the welfare state experienced heady expansion after World War II, only to find it had over-reached its ability to deliver on its promises. Its decline, though, has seen careful pruning, rather than collapse. While some conservatives suggest that the failures of communism, democratic socialism, and liberal welfare systems are of the same cloth, the survival

17. SAMUEL KRISLOV, *The Concept of Families of Law, in* LEGAL SYSTEMS AND SOCIAL SYSTEMS 25-38 (Adam Podgorecki, Christopher J. Whelan & Dinesh Khosla eds. 1985).

18. GORDON B. SMITH, REFORMING THE RUSSIAN LEGAL SYSTEM 68, 109, 143 (1996) (gives figures on the extent of “telephone justice”).

power of truncated welfare states suggest something quite different.

The reach of democratic socialist systems has varied both in scope and time span. Sweden's preceded World War II and largely avoided nationalization. Britain's was more far-reaching in its nationalization of the economy. All of the West European systems had historic experience with some degree of a mixed economy. All proceeded in the 1940s and 1950s with slow expansion of welfare capitalism, most with an eye toward achieving something less than total governmental control of the economy. None of them had aspirations for total planning and therefore avoided the non-market price-fixing dilemmas of the Marxist states.

Those that nationalized industries followed the path of controlling the "commanding heights" of the economy; steel production, coal, energy, transportation, and a lesser degree, finance. The investments in coal and steel were historic misjudgments, as those industries' crucial role of the moment was beginning to be eclipsed in part because of new Asian competition.

British nationalization of steel and coal was a particularly disastrous step, for it also presented the Labor Party, with its heavy commitment to organized labor unions, with political as well as economic headaches. The Labor Party was whipsawed by union demands: if it agreed to them it lost middle-of-the-road voters, but denial of claims threatened its base.

Labor's strategic error in investing in wasting industries and clinging to them for political and ideological reasons helped Margaret Thatcher to gain political power and undo much of the nationalization program. Denationalization of coal and steel was spectacularly successful. Privatization of local transportation and the airlines seems to have worked, but railroad privatization touted as promoting increased investment was followed by neglect and a spectacular rise in the accident rate. By and large, the Blair years have seen no appetite to undo the significant Thatcher-Major denationalizations, a tacit concession of the inefficiencies of much of the socialist program.

In the same vein, Thatcher only nibbled at the fringes of the welfare state tacitly acknowledging its political power. The crowning jewel, the National Health Service, was already modified by co-payments and other attempts to control the realities of hypochondria and misuse of free goods. The Conservatives were keen on further limits on health and other benefits rather more as slogans than policies. Resurgent labor invested more funds with phlegmatic results but the Conservative Party's stance that it could do more with less—has not impressed the electorate.

Continental socialism had less to systematically divest—since it nationalized less systematically, and had the cover of the European Union as it evolved toward free market of Europe. The privatization of energy systems and auto manufacturing has been country-by-country rather than programmatic or European Community (EC) sponsored. Transportation, too, has slowly moved back into the private sphere.

But on the continent, too, welfare protection has been cut back, though seldom threatened in principle. Some of the more extreme theories of entitlement—for addicts, systematic subsidization of alleged art, bountiful unemployment benefits—have paralleled cuts in such benefits in the private sector including curtailment of mandated benefits. This readjustment is a minimalist recognition of the limits imposed by economic realities.

Because, as Peter Berger has noted,¹⁹ none of the Western welfare states ever attempted a total socialist economy, they experienced relatively few of the problems of measurement associated with controlled administrative pricing. Not only did some of those countries retain competitive enterprises, they also had similar products as well as imports which permitted comparisons. Of course, in socialist Western Europe state enterprises kept balance sheets—of various transparency—and posted profits and losses. The rapid disintegration of the nationalized sector represents a judgment based on these experiences. In industries such as coal and steel, the inefficiencies were inherent in the decision to acquire a wasting enterprise. But political management was also not as adept at pruning, discarding, and reformulating as private enterprise, aided by governmental pulls and shoves.

In short, government operations of newer enterprises were mostly failures, and privatization largely (though often marginally) more successful, with some clear triumphs. However, privatization also had a number of failures. Free-marketers have concluded that this record unequivocally supplements the conclusion from the Eastern Europe fiascos that private companies always do better, though the Western European record is spottier than that.

The trimming of welfare benefits also came from escalation in use and costs. The public in most countries supported curtailment of benefits (and sometimes classes of beneficiaries) but generally turned again to welfarist parties after a conservative cleansing. While the trimming of benefits is also seen by free marketers as a retreat on the way to a

19. CAPITALISM SOCIALISM AND DEMOCRACY REVISITED 3 (Larry Diamond & Marc F. Planter eds., 1993).

roul, welfarists see it as a prudent regrouping. In many instances leftist coalitions have taken the corrective steps to save the underlying system; in others they have refrained from reversing the cuts made after losing elections.

From a political standpoint this suggests that Hayek's 1944 projection of a "road to serfdom," is simply yet another "slippery slope" catastrophe theory with little behind it. Both pure welfare states and ones into nationalization have demonstrated the political will and clear freedom to reverse any process where economically required and politically desired. Hayek argued that willy-nilly welfarists would emerge as objective Bolsheviks suppressing dissent and tightening governmental control.

But welfare state countries show little signs of marching away from freedom. To the contrary: in spite of considerable controls over personal transfers of funds and other severe regulations for taxing purposes, they manage to preserve even economic liberty at a high level. Their emphasis on personal rights is even more profoundly respected throughout the world, and has not been drastically altered since Hayek wrote sixty years ago. On the whole, their feet are firmly planted in an enduring tradition of personal freedoms and they are on no road to a different end.

IX. DEVELOPMENT AND FREEDOM

Only Korea and Taiwan have followed the idealized pattern of moving from a market system to law-constrained economy to robust freedom, joining Japan and India as manifestations of Asian democracy and free expression. (India's ethos is quite deviant, reflecting its British colonial past. But many other colonies have generally repudiated their democratic legacy.) What is interesting is that these two societies are hardly the ones that would have been projected by market theorists. Their perennial favorites—Hong Kong and Singapore—remain as authoritarian as ever; indeed they probably have slipped in recent years on any democratization index.

This somewhat motely result is hardly surprising for anyone with a contingency, or even probabilistic, view of history. It certainly does not falsify the marketer's projections. But it has resulted in more modest and even guarded statements about historical outcomes. So Robert Barro has interestingly suggested that "freedom" and "personal rights" are "luxury goods" emerging as a side-product from personally "necessary" liberties of the marketplace. Instead of a monotonic progression we are offered a more contingent possibility of a type recorded history

seems to project. Richard Posner has suggested an analogous development: richer countries can afford a more elaborate and nuanced, and therefore freer, machinery for social control.

X. GLOBALIZATION AND ITS PORTENTS

The claims of globalization advocates at its apex amounted to yet another “end of history” thesis. Parochialism, local boundaries, obstacles to a seamless international economy were to be swept aside, and would be replaced by an evermore prosperous world.

The predicted efficiency would be a byproduct largely of two factors. There would be an intensification of the trend toward mobility of the factors of production and co-production of goods. Increasingly components of a product would be furnished or refurbished at the optimal place for its creation, and the various sub-products brought to its final assembly point, with transportation preplanned to be minimal. The absence of legal and minimization of physical barriers would permit the second factor to come to play. Economists had long argued that nations should produce what they could produce at the greatest comparative efficiency. Countries had evaded the import of this axiom, by tariff barriers and other measures, which were objectively to their disadvantage and that of the world, though this reality was hidden from view. Globalization would demonstrate that axioms, truth, and its implementation would be universally beneficial.

Marxist and leftist theorists have seen the classical argument about sticking to comparative advantage as a way to keep disadvantaged nations in their place. This was the explanation of the phenomenon of “imperialism” suggested by, *inter alia*, Lenin himself. Empires were seen as extractive enterprises designed to enrich the mother country. In fact, empires (including the Soviet one) have under analysis been shown to usually represent transfer of funds to the colonies. The mother country in effect buys and pays for political status by projecting itself as an international player in both the political and economic spheres. The truth of this was demonstrated by the British, French, and Dutch decisions in the aftermath of World War II to walk away from most of their empire. They decided they could not foot the bill.

The rescue approach to “imperialism” was “dependencia” theory.²⁰ It argues that modern industrialism is an ever-productive system that moves societies to further development, by requiring expanding substructure (e.g. roads, methods of transportation) and superstructure (e.g.

20. See generally JAGDISH N. BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004).

computerization, electronic tracking of goods, methods of research and retrieval). Agricultural production follows routine ruts and agricultural countries therefore fall further-and-further behind industrial societies. Dependent countries find themselves evermore depressed and backward, since they do not need or create ancillary supportive economic structures.

This interesting, even cogent, theory has the unusual fate in the social sciences of having been proved wrong. (Most social science is dismissed by e.g. physicists as “not even wrong.”) Data from supplier countries in Latin America, the source of “dependencia” theory demonstrated that infrastructure and institutions do develop around market movement of commodities, in quite comparable fashion to industrial goods. Roads, banks, futures markets, insurance, innovations, are all familiar to growers and distributors, and are comparable in their elaboration to industrial proliferation. The means for independencia are there, in these ancillary economic developments.

So the field has been left to the advocates and critics of globalization. Stiglitz summarizes the critics, claiming the advocates ignore the asymmetries and timing of global betterment, and ignores its effect on human experience. This is in part because, as Stiglitz suggests, the international system honors freedom of migration rather more in the breach than in the observance.²¹ Even in a relatively homogeneous society uprooting oneself and family is harder for individuals than moving machinery or relocating ATMs.

At the international level these issues are not merely exacerbated by distance or even oceans. Government and boundaries intervene, and “free trade” of persons remains much more a slogan than a reality. Even the European community has administered its free migration policies with noticeably less vigor than its drives against tariff and other trade barriers. In the real world, it is difficult to follow the job trail across borders unless one has specialized skill or is willing to live in the shadow of illegal immigration. Investment in humans is much more immobile under modern conditions than most other forms of capital.

The dramatic increase in the mobility of capital in recent decades is the major background for this dilemma. The internet permits communication of a sort that is difficult for governments to control. International corporations use communication in rapid fashion to “transport” assets say, by changing accounting methods. Some countries have reasonably sophisticated methods for monitoring international corporations, but

21. See generally JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

with the growing number of nation-states that subdivide year-by-year, many do not.

Another asymmetry comes from the reality that nation-states affect international pricing through their power over import (and export) taxes and their subsidies to production and export; the fiction of free trade suggests all are working to eliminate these at the same, or approximately the same rate. But of course things are much more complex. Barriers and subsidies are increased with the left hand even as the international overt autarchic policies are cut with the opened right hand.

XI. GLOBALIZATION AND LAW

It has become almost a cliché to write about an incipient international legal order. Certainly usual international law has been supplemented radically in the past half-century. But the pattern created is a peculiar patchwork that basically does not transcend the problematics of the system I studied in graduate school. To be sure almost all incipient legal systems are peculiar patchworks, but radical developments not clearly foreseeable today would have to occur to crystallize such transcendence.

Virtually all of “new legal order” conforms to the underlying reality of the nation-state. The exceptions are the regional structures which may permit individual legal action. Clearly the European community which has full-blown legal recourse is in a drastically different realm of legalism than any of the other systems in which the states are the subjects and individuals the “objects” of international law.

At the same time the number of nation-states has grown at a surprising pace. New states vastly outnumber those of pre-World War II. And the increase in such actors results in increased potential for varied behavior.

The multiplication of national units raises many questions. In most instances these represent breakaways from old entities (usually federations) which have in our time been unstable: the Soviet Union, Czechoslovakia, and Yugoslavia have splintered. Bangladesh was to emerge from Pakistan and now faces possible secession. Kurds and Basque seek autonomous regions or independence. Africa has experienced the Ethiopian-Eritrean and other breakaways. And even Puerto Rico makes occasional separatist efforts. Those who see only amalgamation may turn a blind eye to an opposite and perhaps equal dynamic.

Few of the new international institutions have the power to undertake supra-national decision making on the one hand or sub-national enforceability on the other. Those few cases where super-national decisions

are agreed to usually have grounds and machinery for opting out when national interest is deemed threatened. In most cases, there is no right of individuals to sue. In general, the U.N. machinery grinds out bureaucratic results, sometimes rule-based, but more usually ad hoc and exigency-specific.

An important, perhaps pregnant exception to the rule that global law is detoured through municipal law is the War Crimes Tribunal, an offshoot of the International Court of Justice, recently established by the U.N. Because its authority extends to alleged war criminals however seized and creates an absolute obligation of nations to turn over those accused, the U.S. has refused to participate.

Greater hopes have attached to the financial organs of internationalism but perhaps this is based on misunderstanding. The International Monetary Fund (IMF) and World Bank have almost completely operated on a non-legal exigent basis precisely because they have missions dealing with preserving funds and avoiding financial missteps for themselves and their client nations. Their austere, remote policy dominant experts sought to minimize accountability and symbolize not a desire for a legal order, but one of policy determination by those who know best. There is much and understandable discussion in the EU of “a democracy deficit,” but the Fund and Bank suffer from an autocracy-superiority-complex-surplus.

WTO succeeded to GATT, which was a proto-organization centered around periodic meetings—“rounds”—which produced agreements resulting in tariff reductions. Violations (or alleged violations) triggered jawboning between signature nations who disagreed. A skeleton staff sometimes intervened, but even the rules to judge conflicts were a secret. WTO made a great leap forward with published rules, an established organization, and panels of experts making findings.

The determination of a violation—a forbidden subsidy, or an outlawed tariff, permitted the discriminating country to get even by enacting measures that were proportional to the damage, if the offending country refused to modify its behavior. So a good deal of lag time is inherently built into the system. Bad behavior by nation A has to occur and be perceived. Nation B tells nation A to mend its ways. They interact often trading A’s grievance on matter X, for B’s complaints about Y. If they are unable to agree an official complaint may be filed and a determination made. When a complaint is upheld negotiations usually occur again. If unsuccessful, then A may announce a set of retaliatory tariffs and B has to decide to modify its behavior, accept the counter-tariffs, or challenge them as excessive given the findings of the original damage. Given this process of several years length, complaints often

dissipate with changed economic or political conditions permitting a resolution.

While WTO provisions are by the arcane methods of international law rather more law-like than the average, it is far from a juridical regime. It is analogous to a domestic order in which a tribunal decides whether the Hatfield's are entitled to go after the McCoy's, and whether they exceeded the approved quota. More importantly it does not seem to free itself from national setting of rules, or from national implementation.

The counterweight to national power throughout these systems is not in fact an internationalist perspective or world attitudes; perhaps we are at too early a point in the process for that. Rather, it is to introduce "expert," "objective," or conversely, "clearly erroneous and therefore improper" standards which limit and constrain governments from acting on perceived self-interest of the nation-state, or worse yet, of those in charge of the machinery of the nation-state.

Perhaps the purest form of claim to objectivity and expertise is expressed in the form of standards. Standards are prescriptive specifications for products, goods or service and can be promulgated by governments, associations or even individuals.²² Sometimes the products of the leading entity in a sector become the yardstick, a standard as it were by default. Penalties for not measuring up also are varied, ranging from a right to refuse delivery, a lower price or damages, all the way to confiscation or when the non-confirming product is deemed dangerous, criminal sanctions.

Standards are versatile and can be not just assurances of quality, but also of indications of appropriate use pricing and safety. While the primary beneficiaries of standardization are consumers; governments or trade associations can protect society both with respect to ultimate usage and distribution, but also as to the basics of a product's manufacture, assembly, or development.

The most important entities in this arena are the national standard setters, institutionalized by most governments in imitation of the German and British pioneering efforts mostly at the turn of the twentieth century. In the United States and most countries there are ancillary governmental, quasi-governmental and private standardizers. In the U.S. the system is largely "voluntary," but it is much more uniform than implied by that term, since failure to meet standards has severe conse-

22. See generally SAMUEL KRISLOV, *HOW NATIONS CHOOSE PRODUCT STANDARDS AND STANDARDS CHANGE NATIONS* (Pittsburgh Univ. Press 1997).

quences in obtaining insurance reimbursement, or in litigation, if something goes wrong.

Standards are especially useful in international commerce, helping bridge social differences and commercial argot and custom, by providing very specific information. But as boundaries are crossed, governments have maximum opportunity, to bring into play protectionism disguised as health and safety. Foreign beef is “prone” to hoof-and-mouth disease, local stomachs are different from (and more sensitive than) those of other countries, local housing regimes need more protection from fire, and labor conditions are different.

The move toward globalization has gone hand-in-hand with efforts to objectify standards and eliminate tax-and-non-tax barriers to trade. The European Community is premised on tackling such issues and has been far more successful in that regard than in dealing with human rights, migration, or the creation of a European political order. (A masterful example was the resolution of the European Court in dealing with different countries’ rates on wine, beer, and whiskey and favoring its homegrown products. The court decided alcoholic content was to be the measure.)

At the international level progress is much slower since it is usually worked out, step-by-step, in bilateral or multilateral agreements. But the major industrial countries and the WTO have also agreed on some modalities—standards about standards so to speak. One for example, is the insistence on performance standards over design standards—how much a crane can safely hoist, rather than created from say, an alloy, made only in the regulating country, or forbidding, say plastic parts.

The International Organization for Standardization (ISO), an international body, was not a major player in the field, until it invented the ISO 9000 services, and the process of self-certification a wildly successful program. This success of the ISO is a result of its imaginative realization that many products and services are not regulated and would benefit from an individualized validation of its consistency. It has little or nothing to do with ISO’s international status. For virtually all standard developers and users a national standard authorized by a leading organization, especially American National Standards Institute (ANSI), maximizes access to a national market and has at least equal clout, compared to ISO, in other countries.

In a sense, the continued nationally-based standards structure, the lack of true significance of any true internationalization is something of a paradigm for globalism. The world grows closer because it acknowledges American, German, European and Japanese models.

Globalization thinkers emphasize the legal intertwining of economic transactions as ultimately creating new realities. Historically they have not prevented wars between nations that are trading partners, nor the disintegration of societies with economic bounds. The most promising developments toward a new international community seem to me to lie elsewhere in political sub-institutions that have little or nothing to do with markets.

One is the EC requirement that member-states maintain a democratic structure and adhere to human rights defined in part by the Strasbourg Convention of Human Rights and legally cognizable in EC as well as member-state courts. As we know many such assurances have been made by totalitarian states and their violations have been blinked at by their supposed fellow guarantors. In the case of the EC it is clear member-states believe the requirements will be enforced and some countries—Greece and Spain come quickly to mind, as well as former Soviet satellites—were as eager to join to buttress internal democracy as well as to gain economic advantage.

The second development has been the fostering by the UN of the network of NGO's. This has the potential of being the UN's greatest contribution. Of varying influence, NGO's link representatives of many and many groups, particularly the unpowerful and otherwise poorly represented, throughout the world. They have a greater interest, a more general motive to support, the spread of law and liberty, than the more focused economic groups with quite specific expectations. NGO's may indeed provide the underpinnings of a great leap forward in internationalism.

CONCLUSIONS

The assumption that markets shape law, and in some sense are its rock-bed has also been reified into a historical rule that trade precedes law. This is at best problematic. States, tribes, and other political entities have also molded and controlled trade. Economic organizations historically do not suddenly grow political tentacles. The famous "counterexample"—that of the Hansa the merchants that created a legal order, has been shown to be extensions of the merchant's home city-states—that is agents of a polity.

Finally there is considerable fuzziness about the relationship of law and freedom. Smith's "natural liberty" included many elements of *laissez faire* which others have considered essential to a structured market legal order. The fact that many classicists consider Hong Kong and Singapore the leading exemplars of free and legal markets when they

are high on any list of constricted societies begs the question of how “liberty” emerges from markets. The current conclusion that such development is possible, but not entrained seems powerfully supported.

This probabilistic approach has renewed the neo-classical approach to democratic development, particularly with its Frank-Knight-Chicago-school recognition of market weaknesses. The imperfect market is like Churchill’s characterization of democracy, better than its rivals, and takes unbearable decision-making from the shoulders of the political system. This permits political intervention where necessary and gives breathing space to a tolerant and possibly democratic order.

The Marxist attitudes toward markets and freedom are in disarray. Marx’s contempt for efficiency and law helped deny Eastern Europe both of those qualities and thwart democratic freedom.

On the other hand, democratic socialism and the welfare state have survived a crisis of confidence with modest adjustments. After considerable privatization of industries and some trimming of benefits, continental welfare systems have proven politically and economically resilient and retained their legal traditions in full vigor.

The Sociological tradition of the nineteenth century suggested that growing involvement required increased law. This would be constrained by diverse elements of overlapping societies to be an efficient compromise of industrial methods, legal instrumentalities, and traditions of freedom. Its contemporary heir is the globalization approach, which because of its economic garb has more precision and a less Pollyannaish aura about it. The Kantian-like dreams of perpetual peace, and “the brotherhood of man,” had millenarist smugness about it, a pan-Unitarian expectation that good would triumph because it was good. While early writers on globalization suggested an increase of law and efficiency, would homogenize “freedom” in a costless way, today’s globalists see a rockier road. Still they seem to project much the same ends. But they do not accept the pattern of simple stages or simple convergence theories, stressing instead contingencies and various byways with diverse meltings of social evolution and considerable retention of diversity and traditions.