

Private Protection Agencies and Infectious Diseases

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Abstract

Emergencies critically threaten rights under constitutionally limited government, but before 2020, little scholarship considered the threat posed by a pandemic. COVID-19 has led governments to impose unprecedented restrictions on personal and economic freedom, even in developed and largely free nations. To explore how institutions might more effectively protect individual rights during a pandemic, this paper examines how private protection agencies under libertarian anarchy might deal with demands for protection from a disease in privately owned public spaces.

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I. Introduction

Life as we know it ended as governments of liberal, developed, presumptively free nations imposed policies to slow the transmission of the novel coronavirus, SARS-CoV-2, and the illness it causes, COVID-19. The policies violated the rights and expectations of millions of people. “We thought we lived under the rule of law with protections for commerce, freedom, and property,” writes Stringham (2020, p. 1) about the United States. “Suddenly we discovered otherwise. It all happened because of a virus, a subject on which most every citizen and non-medical academic[] know precious little.”

The measures implemented had precious little evidence of effectiveness (Inglesby et al. 2006). The implementation process reflected little consent of the governed and typically involved emergency orders from governors, presidents, or prime ministers. Police power has long been a part of the American constitutional system, but the extent of the actions taken in response to the COVID-19 pandemic was unprecedented and seemingly at odds with any reasonable concept of limited government.

Over the past fifty years, libertarian scholars have elaborated a system of competition in law and governance referred to as libertarian

anarchy or anarcho-capitalism; I will use the term “contractual anarchy” here.¹ Instead of trying to control and limit government, contractual anarchy allows for full competition in the promulgation and enforcement of law, with the means of coercion divided among various competing private protection agencies. Contractual anarchy would allow libertarians (and adherents of other legal-political philosophies) to seek out a protection agency catering to their preferences as opposed to convincing their fellow citizens of the virtues of limited government and market order. In short, contractual anarchy offers a radically different way of aggregating demand for police and other government services relative to representative democracy.

I consider the aggregation of demands for safety and freedom during a pandemic through protection agencies. This exercise offers several benefits: (1) exploring the operation of a system of contractual anarchy; (2) examining whether demands for quarantine can be consistent with freedom and property rights; and (3) providing insights on reforms in our world of limited government to better secure freedom during pandemics. I assume customers will make demands for safety on protection agencies based on risk preferences and subjective beliefs about a new virus about which there must be considerable uncertainty.

I also assume that contractual anarchy works largely as its proponents contend: namely, that most disputes get resolved peacefully and a diverse menu of options exists. The ownership of public spaces provides the basis for regulating personal conduct in a world without government and will be the primary locus of disputes during a pandemic. Diverse risk preferences and subjective beliefs create the potential for conflict between customers of competing protection agencies. The incentive to resolve disputes peacefully pushes agencies to work out compromises balancing safety, commerce, and freedom and to ensure that their customers believe that the compromises effectively protect their interests. The market basis of dealings creates a greater likelihood of social learning about a new virus than political interactions do. Furthermore, agencies will ensure that individuals facing quarantines receive effective representation in real time and get terms protecting their interests. Ironically, the balancing I believe protection agencies will engage in is

¹ See Nozick (1974), Rothbard (1978), Friedman (1989), Benson (1990), Cowen (1992), Caplan and Stringham (2003), and Leeson and Stringham (2005).

exactly the type of balancing called for in American court cases regarding quarantines.

This paper is organized as follows. Section 2 offers a brief background on anarcho-capitalism or libertarian anarchy and the assumptions I will make regarding its operation to ensure a common understanding of the institutional framework (including any idiosyncratic understandings on the part of this author). Section 3 discusses the role of public spaces, their ownership, and their governance in a world without government, and how access to these spaces provides the basis for restrictions on personal behavior. Section 4 considers how the collective good of personal behavior in a pandemic creates an apparently intractable conflict between agencies, while section 5 argues how this conflict might be defused. Agencies vigorously representing customers with conflicting views on access to public spaces will need a basis for avoiding conflict while retaining customers. The final section concludes with insights on protecting freedom during pandemics in a world with limited government.

II. Assumptions about the Operation of Contractual Anarchy

Proponents of libertarian anarchy (Rothbard 1978; Friedman 1989) believe that the system will operate peacefully, and I concur. The cost of conflict provides protection agencies with a sufficient incentive to avoid fighting. This is often the rule in the natural world, where biological imperatives lead animals to back down and avoid excessive fighting. The desire to avoid conflict, however, will generally admit at least two equilibria, and convention could institutionalize different patterns of backing down. The existence of multiple equilibria shifts the focus to equilibrium selection and opens the possibility that the selected equilibrium may not conform with libertarian principles; might may make right and the emergent distribution of rights or ownership may not coincide with theory (Umbeck 1981; Sutter 1995). Disputes between agencies arising from customers' actions or complaints will likely be resolved in arbitration, although an arbitration network provides a potential area for collusion between agencies in restraint of competition (Cowen 1992). I will assume that agencies genuinely compete for customers by offering different bundles of rules and enforcement mechanisms and that a wide range of rules exists for customers to choose among.

Dispute resolution will create an enduring and potentially existential threat to agencies: the threat of losing customers when failing to fully prosecute a customer's complaint (or failing to protect the

customer's interest from infringement by other agencies). Agencies must choose not to go to war over every dispute. In some cases, two of an agency's customers might make incompatible claims against each other. In other instances, customers of different agencies might present incompatible claims. In neither case can both paying customers get everything they want in the dispute.

Agencies will frequently disappoint customers and must prevent this outcome from producing a significant loss of business. Because individuals often cannot objectively assess their case, customers who subjectively perceives that their claim is not being prosecuted or defended vigorously may look to take their business elsewhere. An agency will have accepted this possible loss when choosing not to aggressively or violently pursue the claim. Peace can only prevail in contractual anarchy because agencies view the loss of a customer's business as not worth fighting over.

An existential threat could arise if the failure to prosecute or defend one customer's claim leads other customers not involved in this dispute to take their business elsewhere after concluding that the agency will not satisfactorily pursue their future claims. Agencies must prevent a decision not to prosecute a claim from setting off a cascade of exits. This requirement provides a distinct rationale for arbitrating disputes, and particularly for arbitration based on the strength of the evidence. An agency can claim that it did not pursue a customer's claim because the arbitrator judged the evidence to be weak (or to show guilt). This response may not satisfy the impacted customer, but it could persuade other customers, preventing a cascade of exit. Agencies are more likely to stay in business and earn profits when a dispute resolution process provides a rationale for not going to war over claims in addition to offering a settlement.

The subjective perceptions of customers and the managers or owners of protection agencies matter in these deliberations. As mentioned, a customer involved in a dispute personally is likely to have biased, subjective beliefs and feel wronged if her agency does not go to war over her case. Agency customers not personally involved will form subjective beliefs or inferences concerning whether a refusal to pursue the current case suggests their own cases will not be pursued. And the manager's subjective beliefs about the types of compromises that will set off a cascade of exits will constrain agencies' decisions. Agencies will likely fight when failing to pursue or defend a case will make them appear fatally ineffective. If two agencies square off in a dispute in which each fears it cannot back down and remain viable,

conflict is likely. And given the nature of subjective perceptions, a seemingly inescapable conflict can arise unexpectedly.

Comparative institutional analysis should hold other elements of the environment constant. Of course, all economic variables are endogenous in the long run; for instance, with the rules and institutions of economic freedom in place, in time we would expect technology and resource stocks—core elements of an economic environment—to be better and larger than in an economy run through government planning. The element of the economic environment needing to be controlled here would be the range of subjective beliefs about a new virus. I consider it essential to include a wide range of beliefs. A new virus should not produce a tight range of prior beliefs; with no historical record, some people will almost certainly be terrified or fearful of long-term effects, while others will be dismissive. I will use the range of beliefs observed with COVID-19 and previously with AIDS in the 1980s as guides. A wide range of subjective beliefs I hold as a robust fact for comparative institutional analysis, even if institutions vary in encouraging social learning, and consequently some institutions might generate greater convergence of subjective beliefs toward the objective truth.²

The extent of heterogeneity of risk preferences and subjective beliefs across agencies will shape the forms of potential conflict over a novel virus. If the distribution of preferences and beliefs within agencies resembles the distribution across the entire society, significant potential for disagreement and conflict will exist within agencies. With sufficient sorting of customers across agencies, there might be little divergence of opinion within agencies but exacerbated potential for conflict between agencies. With any degree of sorting, we would see a wider range of responses from agencies than we have observed among governments regarding COVID-19. The potential for sharply divergent opinions on the value of virus control and mitigation measures will be greater for illnesses like COVID-19, for which vulnerability varies substantially across subgroups of the population.³ For many young people, COVID-19 is less deadly than the seasonal

² Social learning could involve both the mean and the variance of the distribution of subjective beliefs. Learning may result in beliefs that are more accurate on average or that exhibit less divergence. Each type of learning will be beneficial.

³ Current Centers for Disease Control planning guidance offers a best estimate of the infection fatality rate at 0.00003 for persons ages 0–19 and 0.054 for persons 70 or older (CDC 2020a).

flu.⁴ An infectious disease with more uniform potential lethality across the population will produce less divergence of preferences for actions, *ceteris paribus*. For simplicity in this paper, I focus on the conflict between agencies, although the points I will make regarding resolving differences also apply to within-agency conflicts.

III. Managing Public Spaces without Government

Public spaces and their ownership will feature prominently in this discussion. In a world of private protection agencies, if quarantine, isolation, and vaccination requirements emerge, it will be through conditions for entry into public spaces. By public spaces, I mean places open for access without specific permission and treated by people as accessible if desired. Some of these will be common areas of residences, like the hallways, elevators, and grounds of an apartment complex or condominium, or the streets of a neighborhood where a resident (presumably) would have access through either common ownership or a strong contract. Many public spaces will involve transportation infrastructure, either for personal movement or for movement of goods as part of an extended economy. Public spaces will require security and should have a contract with a protection agency. If agencies do not have extensive, exclusive geographic territories, a person might easily encounter several agencies managing different public spaces during their normal daily affairs.

An economy built on specialization and a division of knowledge or labor requires public spaces. The core elements of economic freedom also require extensive public spaces. Increasing the scope of a market requires an ability to ship goods, raw materials, and intermediate products to many places. A labor market will require that workers be able to travel to their places of work (presuming their jobs cannot be totally remote) and that businesses know their workers can travel to work. Goods and employees from across the globe can only be consumed or hired with extensive mobility across public spaces. For life under contractual anarchy to be prosperous, public spaces will need to exist and be effectively managed, at least during normal times.

⁴ From the week ending February 1, 2020, through October 28, 2020, the CDC reports seventy-nine COVID-19 deaths among children age fourteen or younger out of over 200,000 total US deaths (CDC 2020b). Since 2009–10, the United States has experienced an average of 138 pediatric flu deaths per season out of seasonal fatality totals ranging from 12,000 to 61,000 (Iannelli 2020). The significantly lower proportion of pediatric deaths for COVID-19 supports the comparison. Bhattacharya, Gupta, and Kulldorf (2020) also state this claim.

Government currently owns and/or manages many public spaces, like roads and sidewalks. In contractual anarchy, these spaces will be privately or commonly owned. The owner(s) will also contract with a protection agency to police these spaces. Private property open to the public—as with shopping malls, stores, or hotels today—generally allows people to enter without specific permission. A person is not trespassing when entering a property that has been opened to the public. However, a person can be asked to leave a public store, mall, or museum, and a property need not be open to the public twenty-four hours a day, seven days a week.

Nonpharmaceutical interventions will emerge as part of the governance of privately owned spaces open to the public. The property owner will have discretion to open it to the public or not. A visitor who might normally be welcome to enter can be excluded if ill or unable to show they are not sick. The same goes for a public space. The owner(s) can impose restrictions in the event of a disease outbreak, or close a space entirely. Persons who are ill may find themselves excluded from entering all or most public spaces. Or, depending on the nature of the illness, they might need to wear personal protective equipment to enter.

Most people will have exclusive ownership of little real property themselves. And the area under the jurisdiction of one protection agency is unlikely to support a large enough market for an extensive division of labor unless scale economies create a tendency toward local monopolies in protection. Consequently, people will require access to public spaces controlled by other agencies and potentially governed by restrictions they disagree with.⁵

IV. Collective Action against Infections and Conflict

One of the great appeals of contractual anarchy is the potential to convert law into a private good, letting people choose laws based on their preferences and values. Agencies could then offer bundles of rules appealing to different preferences. By contrast, government law applies to all persons within its jurisdiction, creating a collective good (one in which all persons must consume the same quantity). Federalism allows people to choose laws coinciding with their preferences, but local governments still offer one set of laws for their citizens.

⁵ If economies of scale in the production of protection services are sufficient to support a large market within the boundaries of one agency, there will be little effective competition in the protection services market and agencies will likely resemble governments.

Collectivizing potentially private goods creates avoidable conflict, as markets promote peaceful coexistence by allowing people to choose quantities of goods or services to suit their preferences.

Privatizing law also creates a radically different path for libertarians to pursue “legal change.” Instead of convincing a majority of citizens of the value of liberty—of, say, the elimination of victimless crimes and all forms of economic regulation—libertarians need only seek out an agency catering to their tastes in law, just as they seek out clothes, music, and restaurants. If one does not exist, libertarians (and adherents of other out-of-the-mainstream political views) need only engage in market entrepreneurship, founding an agency to offer their preferred laws. As Nozick (1974) emphasizes, libertarian utopia allows a plethora of utopias to coexist.

Some rules of conflict, however, have an unavoidable and irreducible collective element where everyone must consume the same quantity. The ownership of one’s person and property provides one example. I have ownership of myself only if others who might wish to enslave me to serve their ends cannot do so. I can only use my possessions as I wish and with confidence they will remain in my possession if others accept, at least *de facto*, my ownership claims. In these cases, the outcome is either-or: either I retain possession, or someone else secures possession.

Many responses to and precautions for a communicable disease have collective good elements to them, simply because transmission will generally occur from person to person. Alternatively, actions to protect against a communicable disease have significant spillover or external effects. Therefore, people will care not just about whether they take protective action themselves but whether others take precautions as well. If each person cared only about whether they protected themselves and their family, virus protection would be a private good. In reality, residents of an apartment building will be affected by the behavior of other residents. If a neighbor frequents bars and restaurants during a pandemic and becomes ill, the ill neighbor could spread the virus into common areas of the building, both in the air and on surfaces, potentially infecting other residents.⁶ Obviously, details about transmissibility of a given virus will affect the extent of the spillover risk, but particularly with a new virus, the details will be unknown.

⁶ All residents of the apartment “consume” the same number of residents engaging in potentially risky activities and becoming infected; residents cannot tailor this number to suit their risk preferences.

For instance, epidemiologists initially feared that SARS-CoV-2 spread extensively on surfaces (and could potentially remain on surfaces capable of infecting others for days), while airborne transmission now appears to be the dominant method of transmission (Bailey 2020). The extent of transmission by the asymptomatic ill remains unclear, as does the potential for reinfection. Demands for shelter-in-place and mask mandates for COVID-19 have arisen because of the perception that people who do not know they are sick could be transmitting the virus to others.

Heterogeneity and the subjectivity of preferences and beliefs then virtually ensure conflict over virus control and access to public spaces. Self-protection and braving risks are two of the most fundamental elements of life. People differ in their willingness to face risk, and the freedom to make such fundamental life choices is a large part of personal autonomy. That humans should possess autonomy and ownership over their lives is a large part of the argument for libertarian freedom.

When fundamental elements of autonomy collide due to collective goods in a pandemic, demands placed on protection agencies will be significant. Customers' willingness to pay to have sick persons quarantined or make neighbors take protective actions, or other customers' willingness to pay not to be confined or forced to wear masks, will be relatively large. And because preferences and beliefs are subjective, they may well be inaccurate. Residents of an apartment building may fear transmission through air ducts or water pipes, or from the virus's lingering in the air in hallways or stairways. Residents might not merely wish to see a sick person confined to their unit but possibly evicted, or quarantined in another location. On matters of life and death, since people may not wish to accept much risk, they may be willing to pay—or switch agencies—to see others confined. A cascade of exit may put a protection agency into a death spiral, and, as stated in section 2, we should expect agencies, even if contractual anarchy is relatively peaceful, to not consign themselves to bankruptcy without a fight.

Some libertarians have objected to the nonpharmaceutical interventions imposed to slow the spread of COVID-19 as largely ineffective. Private protection agencies might well deliver restrictions with teeth. Suppose that some agencies do have contiguous geographic service areas. Governments often enact laws for show; passing laws grabs attention, and officials can announce they have solved a major social problem. Given limited attention spans and rational ignorance,

most people never learn that the law is rarely enforced. Enforcement requires resources, and politicians may not be willing to allocate resources to enforce a law because the marginal political benefit—given that people believe passing the law solved the problem—is not high.

As a general proposition, I believe that private protection agencies will be much less likely to take actions for show; they will need to deliver on promises to customers. Quarantines, travel bans, and other restrictions enacted by protection agencies may restrict freedom more than government-mandated nonpharmaceutical interventions. Protection agencies would likely face demands for restrictions with teeth during a pandemic. If contractual anarchy is to deliver freedom, it will likely emerge from incentives to avoid conflict.

As discussed in section 2, subjective perceptions matter significantly for potentially triggering exit by numerous customers; they also shape agency managers' perceptions of what might trigger a mass exit. Agencies will not be willing to compromise where they fear that doing so would set off a death spiral. Deadly infectious diseases threaten self-preservation, perhaps the most fundamental human motive. Failing to protect customers from a deadly threat could easily either trigger mass exit or be feared to trigger mass exit. And the more deadly the disease, the less willing we should expect agency managers will be to tolerate any compromise of customers' (or the managers' own) personal safety.

V. Voluntary Action, Respect for Others, and the Potential to Avoid Conflict

The collective nature of measures to restrict transmission of a communicable disease seemingly puts protection agencies on an unavoidable path toward conflict. I will focus on access to a public space, and conflict between customers of two agencies. If agency A represents the owners of a public space who fear contracting the virus, A's customers may seek to close access, restricting the mobility of B's customer. If A manages enough public spaces, B's customer may be de facto quarantined. B's customer wants to continue to access this public space as normal for travel and other purposes. Seemingly, either A will get its way and B's customer will be restricted, or B will get its way and A's customers will be compelled to let a potentially sick person onto their property.

The willingness to pay of the customers of A and B should be relatively high here, creating a potential for conflict between agencies.

Yet, the incentive still exists for agencies to avoid conflict if possible. A disagreement of this nature may be referred to an arbitrator, and the agencies may decide to accept the arbitrator's ruling and not fight. I am more interested in why the agencies may be able to avoid a conflict despite the contentious nature of a collective good and the life-or-death consequences.

The revenue that owners of the public space receive, such as from running a business or fees from transit, should give them a financial interest in maintaining access. To protect their interest, owners of these spaces may require travelers to take precautions to reduce virus transmission. Travelers may have to wear masks, not stop or loiter, not dispose of waste in transit, or be restricted in access time so A's customers can avoid close contact and disinfecting can occur following access. Or entrants to a public space may be required to submit to a health screening, show a recent negative test, or isolate for a period before being granted entry. The variety of precautions possible may limit the risk sufficiently to satisfy A's customers while not overburdening B's customers. Indeed, these are exactly the types of actions businesses adopted voluntarily (before governments made mandates) when politicians allowed them to operate during the COVID-19 pandemic (Tamny 2020).

Interactions between private protection agencies feature elements to further encourage resolution of this conflict via compromise. In addition to being in a position to negotiate a compromise between the parties, the agencies have a financial incentive to persuade the parties—their customers—that the compromise satisfactorily protects their interest. As discussed above, agencies will want grounds upon which to explain their actions to their customers given the potential for subjective fears about a new disease to diverge from reality. Customers may have inaccurate and possibly irrational fears that a virus poses an extremely deadly threat and can be passed on by the most casual contact. Other customers might think that the danger is tremendously exaggerated. The best way to defuse a potential conflict over, say, travel through a privately owned public space will be through the best available information and perhaps extra caution. An agency trying to ensure that a privately owned public space remains open must take the owners' fears seriously and work with the owners' protection agency to fashion safety measures that make the owners comfortable. Voluntary exchange should provide incentives for parties to credibly communicate with each other and help to bring initially divergent subjective beliefs into greater congruence. To prevent conflict,

protection agencies need to make not only their own clients feel comfortable (if not perfectly safe) but also other parties represented by other agencies.

This incentive extends beyond the disputing parties. Appearing to fail to protect a customer's interests potentially creates an existential crisis for agencies through a cascade of exit if other customers no longer trust the agency to protect their vital interests as contracted. Agencies A and B not only have an incentive to reach a mutually acceptable resolution to avoid costly conflict, but they also have an incentive to convince their customers that the compromise adequately protects their vital interests. I see this as a crucial difference between contractual anarchy and representative government. Agencies do not want to lose paying customers. They have a profit incentive to convince their customers that the proposed restrictions on public access protect their interests in personal safety or freedom of movement.

Such persuasion will require costly efforts to understand and respect subjective values, beliefs, and fears. Even should the affected customers find any compromise unacceptable, the agencies need to ensure that their other customers view the conditions as fair and reasonable. B's customer seeking access to a public space may view wearing a mask as an unacceptable imposition on his personal freedom and seek an agency willing to fight for his freedom to move around unmasked. Agency B will want to persuade its other customers that wearing a mask is a modest price to ensure access to other peoples' property.

These differential incentives stem from the difference between voluntary, market interactions and coercive, political interactions. Political markets face well-known problems from a lack of decisiveness for individuals. In a polity of any size, one person is unlikely to have a decisive influence on a collective choice, leading to problems of rational ignorance (Downs 1957) and rational irrationality (Caplan 2007). People do not face consequences closely tied to political actions, making opportunity costs difficult to recognize. And the ability to coerce participation means that subjective beliefs need not converge for political exchange as they must for market exchange (Hayek 1948).

In the COVID-19 pandemic, people have had government policies imposed on them regardless of their personal consent. The process provides little incentive for individuals to scrutinize their subjective beliefs about the transmissibility or lethality of the virus. Otteson (2019) argues that the voluntariness of market exchange requires

people (particularly entrepreneurs) to respect one another if they wish to secure their voluntary participation. This argument extends to respect for subjective beliefs.

To induce voluntary participation, an entrepreneur must respect a person's fears and provide information in a credible and persuasive way to induce a modification of these subjective beliefs. By contrast, in politics and on social media (which arguably is an extension of political dialogues), the tendency is to belittle and insult. Under a voluntary system, protection agencies would play an important role as intermediaries, not merely by supporting their customers and ensuring that arrangements are worked out to protect their vital interests, but through persuading their customers of the necessity and value of a compromise and the accuracy of the information upon which it is based.

The last piece of the argument for the superiority of contractual anarchy in addressing a new virus is that competition between protection agencies and agencies' profit motive will drive an accommodation between the agencies based on the "best science" (to use a phrase so often repeated during the COVID-19 pandemic) and emerging knowledge. This is the case because of human rational faculties. People will use their critical reasoning skills to identify false statements. Incorrect beliefs will collide with the truth in different ways, providing signs of error and making truth likely to win out in competition with falsehood (Mill 1859). Protection agencies will be more likely to persuade customers of the value of a compromise based on "truth," at least to the extent it is known.

To be sure, agreement can occur based on incorrect beliefs, and people can be fooled. If contractual anarchy works well, agreements between agencies and customers will be largely voluntary. So agencies A and B will need to come to a compromise they can accept and get their customers to accept. The space for mutually agreeable terms should be greater when anchored in truth than in fiction. Agreement should be more likely when a proposed action creates more value, *ceteris paribus*.

Protection agencies will be more likely to agree to conditions for access to public spaces when accommodations are based on the subjective values and particular circumstances of the parties in the dispute, an element totally absent in governmental COVID-19 lockdowns. This agreement could be a crucial element of credible communication of the best science. Pronouncements about medical science ignoring the immense importance of the circumstances of time

and place are ultimately not sound science; instead, such pronouncements exemplify the fatal conceit of experts and government planners (Hayek 1945, 1988). Americans may have discounted the pronouncements of public health experts during the COVID-19 pandemic not out of an anti-science worldview but because expert pronouncements have disregarded subjective value and decentralized knowledge.

VI. Conclusion

Libertarian anarchy has never truly been tried in the world, even though several places have approximated its institutional environment (Peden 1977; Friedman 1979). I have used the case of well-functioning contractual anarchy, in which protection agencies compete for customers in a reasonably peaceful manner, to conduct a thought experiment regarding how freedom might be better protected during a pandemic while still protecting health. Given the paucity of writing by scholarly proponents of freedom on this subject, I believe this thought experiment provides some useful insights. For the purposes of this exercise, I have assumed that libertarian anarchy will work as well as its proponents hope. Perhaps anarchy of any sort would descend into a Hobbesian jungle and eventually devolve into government (Holcombe 2004). Even if so, I contend that the thought experiment could provide value in sharpening focus on rules that could preserve freedom during a pandemic.

The COVID-19 pandemic can readily be viewed as an emergency powers challenge to constitutional guarantees of freedom. Higgs (1987) powerfully and influentially argues that constitutions have and likely will prove ineffective against encroachments on freedom during emergencies.⁷ My examination highlights how the indecisiveness of the individual in politics, the lack of monetary stakes closely tied to individual political action, and the power of government to coerce without persuading combine to create an environment highly unfavorable to social learning.

Political action and the extension of political dialogue to legacy and social media provide little incentive for anyone to exert resources and effort to understand and change peoples' inaccurate subjective beliefs about a new virus, as has played out with COVID-19. Businesses have had an incentive to experiment with ways to both operate safely and

⁷ Hayek (1979, chap. 17), however, offered more hope that a constitution could address the emergency powers problem.

convince their employees and customers that measures like one-way aisles, masks, plexiglass barriers, frequent cleaning, and outdoor seating at restaurants truly allow safe operation. That is, businesses have had an incentive to both find a compromise and persuade people that the compromise works. Businesses have had to take peoples' subjective fears seriously and attempt to allay them, not belittle them.

The dialogue I believe would take place between protection agencies resembles the weighing of considerations that cases on quarantine law in the United States suggests should occur (Sullum 2020). Yet, this dialogue certainly did not happen in 2020. Governments have imposed heavy-handed rules with no nuance. The thought experiment offered here provides some perspective. The nature of representative democracy leads politicians to discount the impact of policies on persons not in the coalition of voters and supporters they rely on to win elections. In 2014, Maine's then-governor Paul LePage ordered Kaci Hickox, a nurse who had treated Ebola patients in Africa, confined to her home for three weeks despite testing negative and showing no symptoms. The order was reversed by a state court (Sullum 2020). Governor LePage undoubtedly made a political calculation that ordering Hickox's confinement would demonstrate to Maine voters his decisive action to protect them from a feared virus. This calculation surely wrote off any possibility of winning Hickox's vote in a future election, and once this was decided, the governor had no need to protect her vital interests. We have seen this political calculation repeated over and over in 2020.

Under well-functioning contractual anarchy, individuals and businesses threatened with restrictions on public spaces, like stay-at-home and business closure demands, would have a protection agency with which they contract to resist these efforts and negotiate a resolution protecting their interests as an alternative to costly conflict. Under constitutionally limited government, citizens have rights claims and can try to enforce these rights claims in court. Yet, citizens must find legal representation and have the resources to pursue legal action.

Protection agencies would fill a role like that performed currently by groups like the Institute for Justice and Foundation for Individual Rights in Education, protecting the rights of citizens when government officials make a political calculation to violate their rights. As Higgs (1987) documents, legal challenge is not guaranteed to succeed; courts often essentially collude with the executive branch and tolerate rights violations during emergencies. Yet, Wisconsin Republicans successfully challenged and overturned that state's stay-at-home order

in May 2020. The comparison suggests that one concrete step to ensure more effective protection of freedom would be to ensure that citizens and businesses have access to the resources necessary to mount legal challenges. Costly litigation would be the parallel to costly conflict in anarchy that motivates a search for mutually acceptable compromises.

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