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# What Ought to Be if "There Ought to Be a Law"

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**Abstract**
Papers in economics are generally considered incomplete if they do not have policy implications; however, the policy implications often make a lot of unfounded assumptions about how the policy will be implemented and whether it will be successful. While it might not be the responsibility of an author discussing policy implications, the policy implications need to be considered with reference to the considerations laid out by Jason Brennan and Christopher Freiman and elaborated here, as Steven Horwitz explained in his scholarship and popular work "Ought Implies Can."

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*JEL Codes:* D72, H23, P16

> "Economists should cease proffering advice as if they were employed by a benevolent despot, and they should look to the structure within which political decisions are made."
> —James M. Buchanan, "The Constitution of Economic Policy"

> "'Oughts' without 'cans'—ethical pronouncements without economics—are likely to lead to disastrous public policies."
> —Steven G. Horwitz, "Ought Implies Can"

## I. Introduction

Steven G. Horwitz's most cited work is his 2000 book *Microfoundations and Macroeconomics: An Austrian Perspective*. Horwitz was more than a monetary economist, however. He was very much a comparative political economist. This is particularly clear from his second-most-cited work, his 2009 paper "Wal-Mart to the Rescue: Private

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Enterprise's Response to Hurricane Katrina." To the best of my knowledge, Horwitz never argued that markets are *perfect*, just that they work pretty well—and that, to paraphrase Deirdre McCloskey (2006), we cannot make an imagined best the enemy of an actual good.

Before a government intervenes, it should be reasonably sure it will not worsen matters. This means that the proponents of intervention should clear several epistemic bars and look for ways the institutions of civil society might be better equipped to solve the problem in question. Douglass C. North regularly reminded his students that we live in a world of ubiquitous externalities. Many choices and institutions have evolved specifically to deal with these externalities. As Carden and Horwitz (2013) argue, the mere existence of an externality is not a compelling justification for intervention. Following Brennan (2022) and Brennan and Freiman (2022) and in the spirit of Steven G. Horwitz's scholarship and public commentary, this paper summarizes and evaluates the criteria that must be met to justify a public policy—that is, an intervention by a *state*, an organization that, as North (1981) reminds us, has a comparative advantage in violence.

Behavioral economics makes much of human cognitive limitations; however, "the flaws in human cognition should make us more, not less, wary about trusting government decisionmaking" (Glaeser 2006, pp. 133–34). One virtue of a decentralized mechanism that makes it superior to a central plan is that people are more likely to enjoy tangible benefits or pay real costs due to their good or bad decisions. Policy makers far removed from the situation, in contrast, likely do not enjoy rewards as great or suffer consequences as severe based on the quality of their choices, which means they have weaker incentives to choose wisely. Cognitive biases compound the problem.

In this light, Brennan and Freiman (2022) propose several criteria that must be satisfied for government intervention to be justified. First, we must ask whether there is some way decentralized markets or civil society have already handled the problem. Second, we need sufficient warrant to believe that the governments we *actually* have, run by people who *actually* get elected, can make things better.[1] Third, they suggest that the government should do a careful cost-benefit analysis once this hurdle has been cleared. Fourth and most

[1] I have heard Michael Munger make this point on numerous occasions and in numerous contexts.

importantly, they implore people to carefully consider the downstream incentives that their proposals might create. Finally, they ask whether people have other rights that might trump a particular proposal.

In total, their criteria and analysis, like those that Steven Horwitz employed during his too short career, suggest a rethinking of the policy implications many economists and other social scientists draw from their research; as Buchanan (1987, p. 244) notes in the epigram above, we "should cease proffering advice as if they were employed by a benevolent despot." As citizens, we should echo David Hume and realize we need to be reasonably sure there *can* be a law that will improve things before we start a sentence with "There *ought* to be a law."

## II. Is This Situation the Unintended Consequence of Another Policy?

Crises bring government failure into high relief. Monetary mischief creates business cycles (Horwitz 2000). Regulatory obstacles to drug development and new delivery technologies during the early stages of the COVID-19 pandemic are conspicuous examples (Carden 2020a, 2020b, 2021). The war on drugs is another (Thornton 1991; Miron and Zweibel 1995; Meadowcroft 2008). Many reforms during the Progressive Era and under South Africa's Colour Bar were explicitly intended to exclude women, minorities, and immigrants from the labor market (Hutt 1964; Leonard 2016). Occupational licensing laws have reduced gains from trade, on net, and picked consumers' pockets for the benefit of the licensed (Kleiner 2000; Kleiner and Soltas 2019). Every introductory economics class explores the negative unintended consequences of price controls and protectionism (see Carden and Horwitz 2013).

We can assemble a long list of problems we can mitigate by rolling back government intervention (Geloso and Horwitz 2017). The housing-affordability crisis? Roll back restrictions on building new housing (Caplan and Branzei 2024). Unemployment? Roll back regulations on labor markets (Caplan 2022). Health care costs and availability? Get rid of licensing restrictions (Lindsey and Teles 2017). Income mobility? Once again, get rid of licensing restrictions (Lindsey and Teles 2017). Poor education, short life expectancy, and people failing to flourish? Roll back impediments to economic growth (McCloskey and Carden 2020). Traffic, congestion, and air pollution? Put a price on driving and parking (Caplan and Branzei

2024). Crime? End the drug war (Thornton 1991). People doing something of which you disapprove? Some government somewhere is probably subsidizing it, if only implicitly. Are people not doing enough of what you think they should be doing? Some government somewhere is probably taxing it, if only implicitly. Are you worried about the environment? Some government somewhere is probably subsidizing environmental damage and resource waste. Before intervening yet again, as Brennan and Freiman (2022) argue, governments should ensure they are not causing the problem people want them to fix.

## III. Have Private Firms and Clubs Already Fixed It?

A market failure in a model is not the same as a market failure in real life. First, "it is difficult to calculate the right tax in a world of imperfect Coasian bargains" (Nye 2008, p. 32). Measuring the marginal external cost of an activity is an insufficient guide to policy because what ultimately matters is the quantity of the offending activity. Nye argues that measuring the marginal external cost does not account for Coasean bargains that might internalize the externality in ways difficult to see. Furthermore, in cases in which people build houses next to train tracks, the nuisance's disutility is already capitalized into lower housing prices. Holding everything else constant, someone buying a house next to a railroad track is pre-compensated for the noise because the house is cheaper.

Second, history is replete with creative solutions to purported market failures. Examples include fraternal societies, civic organizations, and industrial sickness funds (Beito 2001; Murray 2007). Swedish mutual aid societies worked in such a way as to subsidize people in high-risk occupations. Andersson et al. (2022) argue that this was partly because of worker solidarity: it was argued that those with the good fortune to work in less risky occupations should subsidize those with the misfortune of working in more risky occupations.

Third, police, fire protection, and good governance provide classic examples of activities that create positive externalities and that will, in theory, be underprovided by the private sector. Stringham (2018) points to counterexamples in the markets for police services and governance, and McChesney (2002) explains how municipal fire departments were created to generate patronage jobs for political machines.

Fourth, for-profit businesses can do what we often expect governments and nonprofits to do. Horwitz (2009b) points to for-profit firms such as Walmart, Home Depot, and Lowe's. He argues that their responses to Hurricane Katrina were superior to responses from governments at various levels. Christian denominations and individual churches have disaster-relief operations. A Google search for "church disaster response team" reveals training opportunities and how-to guides for congregations interested in starting disaster-relief teams.

Fifth, mechanisms for resolving conflicts that are difficult to articulate can be embedded in beliefs, practices, and traditions that might seem irrational on the surface. Nobel laureate Elinor Ostrom's research agenda carried scholars "beyond markets and states." They uncovered the principles underlying institutions that solved collective action problems related, for example, to common pool resources on small scales (Ostrom 2010). Their insights build on Hayek's (1948); outsiders do not have the relevant knowledge of "the particular circumstances of time and place" that might be essential, tacit, and impossible to articulate. Instead of concluding that cultural mores and taboos we do not understand are irrational, we would do better to look for the problems a particular institution or practice solves—or solved at some point in the past.[2]

As Edmund Burke, Friedrich Hayek, and others with what Sowell ([1987] 2007) called "the constrained vision" might put it, there is wisdom in tradition. The institutions, norms, and conventions governing our day-to-day affairs embody tacit, unarticulated problem-solving knowledge that might not withstand the test of articulated reason but have increased the range of ways people can cooperate.

## IV. Are the Governments We Have Likely to Improve Things?

To be effective, public policy cannot make unrealistic assumptions about the resources at hand. Nor can it make unrealistic assumptions about the political process. What a technocratic economist would whisper into the ear of a benevolent, omnipotent, omniscient despot tends to look very different once it has turned into legislation and once an agency has been tasked with implementation and enforcement. In short, we cannot assume Russia or Louisiana has Swedish or Danish political and cultural institutions. On a 2022 visit

[2] I recall Joshua Hall saying at a conference once that any institution we observe exists because at some point, it solved a problem.

to Denmark, I was struck by how few people locked up their bikes. In many parts of the world, a bike without a lock will almost certainly be stolen.

The question here does not justify the status quo in a cosmic sense; rather, it suggests that policy must begin from where we are, not where we *wish* we were. "Ought implies can" (Horwitz 2009) means that we have to acknowledge the constraints we face even if we do not approve of them. As Adam Smith ([1790] 1976) puts it, "When he [the man whose public spirit is prompted altogether by humanity and benevolence] cannot establish the right, he will not disdain to ameliorate the wrong; but like Solon, when he cannot establish the best system of laws, he will endeavor to establish the best the people can bear" (p. 233).[3] Robust political institutions meet this standard: they work reasonably well even when we relax assumptions about legislators' other-interestedness (see Pennington 2011).

In his analysis of private sector responses to Hurricane Katrina, Horwitz (2009b) notes that firms such as Walmart, Home Depot, and Lowe's did not have to overcome the paralyzing effects of government inertia. Waiting for verification, validation, and permission wastes valuable time and energy at the height of a crisis. Too frequently, government controls prices, weakens the signals markets would send, and prevents crucial information about how conditions are changing in real time from getting to where it is most valuable as quickly as it is needed. Many states have specific rules making it illegal for companies to raise prices by much after a disaster has been declared. This eliminates the signal—higher prices—that would draw greater supplies into disaster-affected areas, and importantly, it does not transmit to other areas the crucial information about what is happening in those areas. Laws against price gouging are textbook examples of well-meaning policies that make problems worse.

## V. Has the Proposal Passed a Cost-Benefit Test?

Deirdre McCloskey (forthcoming) writes:

> What does not meet the test of being privately financed, further, turns out often enough to be a glorious boondoggle. The discipline of cost and benefit is set aside. The canals of Britain's Canal Age were privately financed, and proved profitable to the

[3] See Clark (2021) for commentary and analysis.

> nation. America's and Sweden's later canals were constructed or financed or guaranteed by the state as lovely "internal improvements," copying what was imagined to be the British model. Almost all of them, such as the longest canal in the US, the Wabash & Erie, were economic disasters. The Anglo-French Concorde supersonic airplane 1963–2003 never justified its expense. Nor did manned space flight. Nor Alaskan bridges to nowhere.

Public policy is littered with policies that do more harm than good and government boondoggles that waste resources. Projects like these endure not because they pass market tests but because, as Thomas Sowell ([1980] 1996, p. 38) explains, politicians are in the business of selling "a plausible belief about a complex process."

Frequently, regulations appear with little to no regard for how the regulations change people's incentives and with even less regard to what the regulations force people to give up. Interventions should be subjected to rigorous cost-benefit tests, perhaps by multiple independent agencies such as the Joint Economic Committee, the Council of Economic Advisors, and the Office of Management and Budget with a consensus among the studies determining which regulations could proceed and which could not. Many new housing and commercial developments require expensive environmental planning, impact studies, and other analyses that make them prohibitively costly. These requirements raise the prices of everything from housing to groceries. The case for applying a precautionary principle of sorts to regulation is, if anything, stronger than the case for applying it to things like new housing developments. Asking "How do the costs compare to the benefits?" is a crucial step toward better public policy.

No process would be perfect, of course, but at least requiring cost-benefit analysis would require policy makers to mind likely unintended consequences instead of merely plausible beliefs. We likely could have avoided the war on terror and the Transportation Security Administration had they been subjected to rigorous cost-benefit analysis (see, for example, Mueller and Stewart 2011).

The requirement might backfire, of course. The economic impact of stadiums and mega-events rarely covers the government subsidies they often require (Coates and Humphreys 2008; Bradbury et al. 2022). Requiring rigorous cost-benefit analyses has its risks, but studies such as Coates and Humphreys (2008) and Bradbury et al.

(2022) suggest that it is at least *plausible*—note the irony here!—to believe that the analyses could be better than the methodologically and quantitatively suspect economic-impact studies that undergird so many spending projects.

## VI. How Does the Policy Change People's Incentives?

Institutional changes do not happen in a vacuum, and every change affects people's future incentives and expectations. One cost of the bank bailouts of the Great Recession, for example, was increased rent-seeking by other people and organizations that wanted to be bailed out. Student-loan "forgiveness" in 2022 is one example. Bailing out banks encouraged rent-seeking by people who wanted their student loans "forgiven"—in reality, transferred to taxpayers who will have to replace the revenue from government-owned student loans with either higher taxes or fewer services. Practical short-run solutions create new problems later, which will in turn require their own practical short-run solutions, which will create still-more new problems later.

In *Knowledge and Persuasion in Economics*, Deirdre McCloskey (1994) explained her $A' \rightarrow C'$ theorem, which is a tongue-in-cheek way of looking at blackboard economic theory. For every set of assumptions $A$ leading to conclusions $C$, there is a set of assumptions $A'$ very close to $A$ leading to conclusions $C'$ that are very far from $C$. I once joked that there's an analog in empirical economics: for every set of regressions $R$ supporting conclusions $C$, there is a set of regressions $R'$ very close to $R$ leading to conclusions $C'$ very far from $C$. Something similar happens in the rent-seeking society: for every rent-seeking coalition $R$ demanding policies $P$, there is another coalition $R'$ within the epsilon sympathy ball of $R$ demanding policies $P'$ outside the epsilon outcome ball of $P$.

To paraphrase the character Syndrome from *The Incredibles*, if *everyone's* interest is special, no one's is. Alas, policies set precedents, and I suspect future generations of rent-seekers will appeal to the precedents set during the COVID-19 pandemic, the Ukraine-Russia conflict, and the student-loan-"forgiveness" debate to explain why their interest really is special.

## VII. Do People Have Rights That Trump What the Policy Requires?

Even after all the other questions have been answered, people might have other rights that trump the proposals. Forced-sterilization policies, for example, might conceivably pass all the other tests and yet still be impermissible because they violate people's bodily autonomy (Brennan and Freiman 2022). Carbon dioxide emissions are negative externalities. They are also the byproduct of people's breathing. I suspect there is a consensus view that the right to breathe would trump proposals for tradeable breathing permits or mandatory carbon-capture respirators—which, of course, would only be permitted if producing the respirators would produce fewer carbon emissions than the respirators would prevent.

## VIII. Conclusion

When can and should the government intervene and veto people's voluntary choices? The answer is not as clear as it might at first appear. Our faults are not in our stars but in ourselves, and they are amplified or dampened by our incentives (Glaeser 2006; Lucas and Tasic 2015; Rizzo and Whitman 2019). Economists and other scholars evaluating the policy implications of their research are presenting incomplete pictures if they assume themselves, even if only implicitly, to advise benevolent and omnipotent autocrats. An economist recommending a transfer program must be mindful of the political and social processes guiding its implementation. An epidemiologist might think all other considerations take a backseat to slowing or stopping COVID-19. If "the Science" does not account for the considerations Brennan and Freiman (2022) propose, it is incomplete.

In this respect, Brennan and Freiman (2022) contribute to a body of scholarship to which Steven Horwitz contributed regularly. Their paper, like much of Horwitz's work, is a step toward a robust, comparative-institutional political economy fit for a world of free, independent, and autonomous people. James M. Buchanan (1964) opened his classic paper "What Should Economists Do?" with a quote from Lord Acton, who wrote to Mary Gladstone that "it is not the popular movement, but the travelling of the minds of men who sit in the seat of Adam Smith that is really serious and worthy of all attention" (p. 213). Steven Horwitz sat in the seat of Adam Smith, and he exemplified Buchanan's admonition to "cease proffering advice as if they were employed by a benevolent despot, and they should look to the structure within which political decisions are made" (Buchanan 1987, p. 244). It is an example we would do well to follow.

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