Episode 557: The State's Corruption of Private Law, or We Don't Need No Legislature

Guest: Stefan Kinsella

WOODS: This is a topic I get, but I don't fully get, and I say that as somebody who's been a libertarian for a long time, and I want you to help us flesh out this topic of law and legislation as two different things — that if we say that we don't like legislation, that doesn't mean that we don't like law. What do these things mean? Can you have law without a centralized lawmaker that hands down authoritative statements that bind everybody in society? Is there another way of thinking about how law comes about? That's what we want to look at today. We're going to have a lot of links on the show notes page, so if this topic interests you, TomWoods.com/557 will have a whole bunch of stuff. Some stuff by Stefan Kinsella, some stuff by Bruno Leoni and others.

All right, let's set the stage here. Let's bear in mind that obviously as anarchocapitalists, we don't see a role for a legislature to begin with, but that's not the central claim that's being made here. I mean, F.A. Hayek was not an anarchist, and yet he still spoke very favorably about what we might call judged — not judge-made law, because that again sounds constructivist, but judge-discovered law. Give me the two-minute bird's-eye view, and then we're going to take it apart.

KINSELLA: Well, let's go back to what the term "law" means and why we use law, right, becasue the word law is used in the physical sciences, right, in physics, and it's used in the social sciences as well, in different ways. I was just listening to a great speech by a professor at Oxford about the famous scientist James Clerk Maxwell, who's a — I'm an electrical engineer background, so all "double Es," no Maxwell's equations. So Maxwell is like one of the top brilliant natural scientists of all history, really. I mean, he's up there with Einstein and Newton. What he came up with in the 1800s was incredible. He unified electromagnetism and light theory. And his father wanted him to be a lawyer, and he said, Dad, I'm going to pursue another kind of law.

So I kind of like that, because it showed that there's this unifying idea of laws that we all search for in different realms of intellectual inquiry. But the physical laws are one thing. There are physical laws we're trying to discover according to the scientific method. And then we have laws, like what people talk about normally as "it's against the law to do A, B, and C."

Nowadays, because we have a heavily, legally positivistic culture — and I can explain what that means — most people nowadays think in those terms. So they think of a law as a piece of paper with words on it that some legislature has written down what "the law" is, just like people think of contracts — and I think we talked about this recently — they think of contracts as a piece of paper with words on it that announce what the contract is. So they identify the contract with the piece of paper. They identify the word with what's written down in a statute. That's what legislation is. And sometimes you'll hear the more simple-minded types talk about "the law books," "the law books." You know, you'll hear these common law court nuts or the income tax conspiracy types who will say that it's not illegal to pay income tax, because "show me the law books," "show me the law." So they're equating in their minds law with what's written down on a piece of paper that was published by some authoritative body, the legislature or the king or maybe God or maybe the Bible, whatever. So they're thinking of law that way.

But this is not — and I think they think of that now because — and they didn't used to, Tom. And you know way a lot more on history than me, so you might be able to fill in some of my meanderings or gaps on this issue. But the approach I like to take is this: law, in terms of legal law, right, in terms of normative rules that humans come up with to help us get along with each other in society, and basically all laws are property rights that determine who can use resources that we could otherwise conflict over. So the question is what should the law be, which means who should the owner be, who should win in this dispute.

In older times, the conception of law was that there's a sort of natural justice, there's a background of what we call higher law, and we're trying to do justice. So you have a judge or a court or a tribunal or an arbitral tribunal, someone who is appealed to because of their wisdom or place in society. And the two or more contestants who have a dispute over who basically gets to own a given resource that's in dispute, who's going to get to own it. And then the job of the judge is to do justice — that is, to try to find the right answer — and they try to do this.

And over time, a body of law develops in a decentralized fashion. Now, this happened historically, Tom, and the two major periods would be in the Roman law period, roughly from 500 BC to 500 AD, like the 1,000-year period of sort of the Roman Empire. And then the second period would be the English common law, which started developing around 1000, something like that, and it borrowed partly from the Roman law, which was preserved in part because of the codifications by Emperor Justinian and preserved, I think, by the Muslims and the Arabs for quite a while, you know, during the Dark Ages.

So basically we have these two great systems in the world, of law: the Roman law and the English common law. They're both systems which developed in a piecemeal, decentralized fashion, principles of law which were reached by an attempt by the people finding the rules to do justice. It doesn't mean it's perfect; it doesn't mean it wasn't tainted by state interference from time to time, but at least it was a system that arose out of the practical necessity of trying to resolve disputes in a fair manner. So that's what we have, these two, big legal systems in the world: the common law,

which is basically in place in England and its various commonwealths and the United States, and the civil law, which is the modern version of the Roman law in the European continental system. Other systems would be Sharia law and the canon law of the Roman Catholic Church, and the Law Merchant of, say, 700 years ago. And international law's another big field. But the two big fields of private law in today's modern world are common law and Roman law.

WOODS: All right, let me ask you if this parallel works, in terms of how people understand these two models. When I think about socialism and capitalism and the extent to which people understand how they work, I can see how socialism in the classical sense of state ownership of the means of production is an easy system to understand. The state just directs production, period. Simple. It's not so easy for the average person to understand how capitalism works. The price system, the structure of production, the decentralized nature of it, the role of entrepreneurship, the role of prices. That's more complicated for the average person. They can see how order is imposed in the economy by one single entity in the form of socialism, but they don't really understand how it works with capitalism.

Well likewise, with law in society I think it's easy for people to understand how legislation works. Lawmakers, so-called, get together. They issue some legislation. They pass it into law, and it is imposed on all of us. Whereas the decentralized kind of law that you're talking about, it seems like it's a series of decisions in particular cases. How does that go from a series of decisions in particular cases to general principles that we live by?

KINSELLA: Well, there's partly a role of legal scholars here, so on the side you have the legal community, the law professors, the legal scholars, who are analyzing the actual ongoing results of all these decentralized decisions, and they try to summarize them and provide guides for them and to explain what's going on. And when they notice inconsistencies in the law, they point it out and they basically nudge and they give criticisms and things are taken into account by future judges and courts when they're making further law. So there's sort of a feedback effect.

So you'll have a respected treatise by Coke or by — nowadays we have the American law, and they will basically codify what's gone before in non-legislative fashion. It's just a book, but it attempts to codify what is basically the essence of the law that's developed, and they will suggest changes. They'll say there's a discrepancy here, there's an unfairness here, and sometimes that will get picked up in the future. And on occasion, legislation will come in, and they will adopt those changes.

The thing that's happened is that in the modern world — Hans Hermann Hoppe talks about this in his writings on democracy. He talks about how there are different institutions in society that the modern state, especially the democratic state, tries to coopt and take over. You have communication, you have defense and the courts and justice, education, and welfare, and you have law. And that means that means that when you have a democracy, you start having more and more law produced by democracy. Either the people vote or their representatives just decree things. A

nd over time, you have this body of private law, in Roman law or in the common law — and when I say Roman law, I also mean the modern civil law in Europe. The civil law basically was started around 1800 when Napoleon started codifying, he got legal experts to codify in the form of civil codes the existing principles that had been developed over centuries with Roman law and with European law in between the time of the Roman Empire and the time of the beginning of the modern codifications. It was basically an attempt to clear away the clutter, scientifically codify the law, and make it legislation too. So you had that aspect of it, which is bad. But it was at least an attempt to codify what had gone before.

So the situation now is we have a private law system which is based upon these organically bottom-up, decentralized legal decisions determined by legal experts and by neutral parties who were trying to do justice, who were trying to do the fair thing. And over time, a body of rules emerges, and with the help of legal scholars it gets cleaned up and sometimes revised.

But what's happened since the emergence of democracy is that we've begun to have a sea of legislation. Just legislation is just being issued left and right over the last 100 or more years by the modern western democracies, and they gradually encroach on the territory of the existing private law, they override it, and the law starts to take the form of just the edicts and decrees by a committee. Even the Constitution, which was a general document and which was based in part upon a lot of evolved principles from the British constitutional system is still a piece of legislation, as is the entire federal code, as is the statutes of the states. And these statutes — and in England this is happening too — there's more and more legislation that invades the territory of the common law.

And what that means is when someone goes to court to ask a judge to determine the outcome of this case, this dispute, in the older system the judge at least was oriented toward trying to do justice. So he would look at precedent; he would look at what the law had developed before, and he would try to do justice. And he might make new law when he did that, or he might just respect old law when he did that. But nowadays, the job of the judge is not to do justice. The judge is more of a functionary. He's like a civil servant whose job is to interpret words written down by another branch of the government, whether those words are just or not.

So for example, the big debate recently was over Obamacare, which is a pure creature of statute; it's just a statutory creation, just like the Social Security Act and the Immigration Act and the Americans with Disabilities Act — all these statutes that could not exist without legislation and statutes. And so the question came to be to interpret some of the words in that statute about the state exchanges, and the whole legality of this Obamacare depended upon that. The judges had to make a decision.

As John Haznas points out in his great, classic article, "The Myth of the Rule of Law," where he uses some of the reasoning of the Crits, the critical legal studies guys who claim that a lot of law is really oriented towards achieving goals that are not really stated on the surface — they're not about justice. His point is that a lot of law, there

really is no objective answer. When the judge is faced with construing a case — and this is especially so when he's interpreting legislation. If he's trying to do justice in a common law context, he can resort to justice, because that's his job, and that's the format of the common law that's arisen. It was trying to do justice. But when his job is just to interpret words, then you can't really blame the judge for just either punting or making arbitrary decision or just going with what the words say, which may be totally unjust. If the law says that the minimum sentence for the following non-crime is 35 years in prison, the judge has little discretion to do anything about that. So his job is not to do justice anymore; it's just to interpret words written down on a piece of paper that came from another committee in the state.

WOODS: All right, I want you to help me flesh this out in my mind here. I want to give you an example of — let's say we have a couple of different judges. Let's say we're not dealing with centuries and centuries ago, but we're dealing with a society that is run according to these sorts of principles today. Let's imagine a society today. And in society today, of course there are competing theories of justice, and there are competing views held by all different people. And I think most people who go through official legal training today hold views of justice that are completely removed from my own. So we've got two judges, and one of them says that a person who is working for an employer and is earning $3 an hour is, just from the point of view of equity, being mistreated, and therefore we can bring damages against the employer. Another judge says, hey, I have this case where somebody's being paid $3 an hour; this was a voluntary decision that improves the lives of both people, so I uphold this arrangement. How does a general principle binding us ever evolve out of this?

KINSELLA: Well, okay, I would say first, let's contrast it to what's going on now. In legislation, the legislature can just decree something. It doesn't have to conform to reality. It doesn't even have to be consistent with itself even. There can be inconsistencies; there can be vague terms, and often that's done as part of the political bargain. You know, the Republicans and Democrats will intentionally agree on a vague term and punt it to the courts to figure it out later, just to get the law passed. So that's the whole process. There's no reason to expect that justice would arise from that. There's no reason to expect that those acts of legislation, those statutes would embody justice. They might to the extent that they're basically an attempt to codify what had developed before.

But if we look at the free market and the decentralized system, we have to imagine that we live in somewhat of a free society and that the reason people go to judges or courts or arbitrators to resolve a dispute is because they have a preference for justice themselves. They have a dispute, but they all have their own argument for their dispute, and they don't want to have a war with each other. They want to live in some civilized fashion, so they're going to try to do the reasonable thing, which is to submit their case to someone who is a neutral third party who can make a decision and so that they can go on with their lives.

That entire process supports and basically depends upon a more libertarianish view of the world, because the only time you look for someone to resolve a dispute is when

you're opposed to disputes, and the only time you have a dispute is when you both want to use a scarce resource. So we basically have a propertarian conflict, and we have a desire on the parts of everyone — both parties, the court, and the community — that the right choice be respected. So the way these common law courts work is if you pick someone who makes crazy decisions, then over time he will be ignored and he won't get repeat business. It's almost an evolutionary thing. So that's part of it.

Also, the nature of the common law and of the Roman law before it was that the discretion or the ability of the law finder was very limited. This is why you hear terms like — well, when you're speaking out of turn in court, it's called obiter dictum. If the judge in the middle of a case, he's deciding a case between John and James over who owns a cow, if he just has a paragraph in his opinion saying, "And by the way, I believe that people should be taxed to support infirmities," or something like that, that would be obiter dictum, it would not affect parties that were not parties to the case. It could not be general legislation, and if it was totally out of character, it would just be ignored by other judges. These judges are basically trying to fit their decisions within the existing growing framework of justice that's respected by everyone, and it does just happen to grow that way.

If you look at the body of the Roman law that existed near the end of the Roman Empire or the body of the common law that it existed at its height, it's a really impressive series of practical attempts to do justice to work out ways that people can live with each other in a world of conflict. That's the only way you could expect that it could be done. It could not be done when the state gets involved or when a committee of legislators just get together and announce their will.

WOODS: All right, Stefan, I want to ask you, let's say we've got something like the Internet, which completely revolutionized society. Doesn't it seem as if it would be — and I'm just playing devil's advocate here — but doesn't it seem as if it would be more efficient to have a centralized agency saying, okay, here are the rules we're all going to abide by in using this new system. Doesn't it seem like it would be slow and cumbersome, that we'd all have to be standing around waiting for the judges to reach a consensus haphazardously as cases are brought to them before we really know what the principles that we should be observing in using this new technology are?

KINSELLA: I see no reason to think that. First of all, as libertarians, our political system, our political principles are really pretty simple if you boil them down. Whoever owns a resource has the better claim to it, unless you made a contract with regard to it, in which case you can lose ownership, or if you harm someone else and you owe them compensation. So those basic principles can help determine the ownership of resources, which is the only disputes that there can be. As technology changes, there's no reason to believe that these principles couldn't adapt and be applied to new technological developments. In fact, that is what has happened in the past, until the state stepped in and short-circuited it.

So as a couple of examples — well, let's take a recent example. In the 1980s, Bill Clinton, if I'm remembering my history right, approved a couple of laws that kind of

froze the Internet's current system into place with this DMCA system, this takedown system that we have now. Also with the safe harbor provision, which talked about ISPs, Internet Service Providers. Now it's being used by YouTube and others and blogs. No one knew about YouTube or blogs back then, but we're kind of stretching these concepts to cover that.

But the law is creaky, and it's already out of date because it's legislation, and legislation usually doesn't have an expiration date, except maybe — I guess the security laws we have now have that, luckily. But most legislation doesn't have a sunset provision, so it's going to last forever until it's updated, and they don't usually update it in time. So legislation is the problem that freezes things in place in the face of technological change. We can think of tons of examples.

At the dawn of the Internet, common law was starting to take these things into account. There's a case, I think it's called Cubby vs. CompuServe, maybe from the 1980s. And the courts were starting to use principles of common law trespass theory to analyze the right way to approach the case of a computer cyber hack. Like if I hack into your computer, what is it? And so they were just using, stretching, bending, applying, analogizing the existing common law principles, and it was working fine. I see no problem with that.

Earlier in the 20th century, when the electromagnetic spectrum was discovered and it was realized it could be used for communications, people started broadcasting television signals and radio signals, things like that. A common law was developing at that time that was figuring out common law property rights in the electromagnetic spectrum, and this is detailed, by the way, in the great book by David Kelly and Roger Donway called *Laissez Parler: Freedom on the Electromagnetic Spectrum*, or something like that. It's on of David Kelly's very nice little monographs.

But the FCC was created and came in and basically just monopolized everything and took it over, and now we have the FCC with the fairness doctrine and all their other rules, because they basically own the airwaves. They took it over, and they dole it out as tehy see fit, and they impose rules on the users — the major television networks can't have certain curse words, etc., because the government has expropriated the ownership of the airwaves themselves by legislation. So I would think that a better approach would be to let it develop according to the common law, as it was doing just fine until the government intervened.

WOODS: Well, I don't generally say to the guests, "You are just hitting my questions out of the park," but I didn't expect you to have such a good answer to that (laughing); I'll be honest with you. And I'm sorry if that comes out wrong. (laughing) *Stefan, how could you possibly have such a good answer?* But it was pretty darn good. Now, earlier on I made this comparison between socialism and capitalism, and I drew an analogy between legislator-made law and judge-discovered law, in terms of how people understand how society works. It's easier to understand the centralized version than it is to see how the decentralized version could work, but I think the analogy can be taken even farther, and in fact, in your article on this that I'm going to link to at

TomWoods.com/557, you actually run with the idea of legislation itself as being a form of central planning.

KINSELLA: Yes, now that was an argument that Bruno Leoni — so Bruno Leoni was a brilliant Italian legal theorist, unfortunately murdered by one of his clients in his prime.

WOODS: Is that what happened to him?

KINSELLA: Yep, when he was in like his mid to late 40s, one of his clients murdered him, so very sad.

WOODS: Wow, I didn't know anything about that. Okay, look at this, you're like taking over the whole show here with all your insights. All right, go ahead.

KINSELLA: He stabbed him if I remember, but I'm not sure. But anyway, it was a shame, because he was so brilliant. And what he did was he made an analogy between the Hayekian version of the argument against socialism and made an analogy between that and legislation. So basically Hayek — you know, the Misesian idea is that socialism can't work well because you need a free market and private property and trading of the capital resources to establish real free market prices, and those prices help us compare otherwise heterogeneous units, things that couldn't be otherwise easily compared. So it allows us to engage in economic calculation. It's really a mathematical argument, in a sense.

Hayek built on that and sort of emphasized the role of knowledge and said that knowledge is tacit. A lot of things we know how to do we can't explain to people, but when we act that that knowledge is embedded in sort of what we produce, and therefore it affects the prices. And so these price signals are kind of a way of conveying this tacit knowledge that otherwise couldn't be conveyed, that makes the economy work. That was Hayek's spin on it, which I have some personal problems with, but I understand where he was going.

Leoni picked up on this and said that legislation is very much like that. Legislation is similar to central planning of the economy by a committee, because it's central planning of law by a committee. You have a committee that says here's what the law should be. But because they can't have the relevant information that's tacitly spread across society, they can never make the right laws.

I wrote that actually in my article, and I think that's one of the things I would, I won't say retract, but I have backed off on it a little bit. I think I was a little bit too enthralled to the Hayekian version of the calculation argument, which I think is not as rigorous as I would like. I think there are some problems with it. There are some analogies that can be made, but we have to be careful how far we take this Hayekian knowledge problem and use it as a problem of legislation.

WOODS: Well, given how radically different the system that we live under now is from what you've been talking about today, how does what you've been talking about today help us in any way? Does it help us to see our current situation more clearly? Is it something to shoot for? If so, how would we do that? Or is it just a pure intellectual exercise?

KINSELLA: Well, I think it's good to — legal theory is always helpful in terms of classifying the existing legal structure of society, and so I do think we need to treat legislation differently than the result of more spontaneous or common law-type processes. We need to understand it, for one thing. And in terms of policy proposals, you develop a general hostility toward legislation as the way to make or to discover or to find law. It would be advocating for returning to a more decentralized or a common law system or even arbitration system and to limit the power of legislation.

So for example, you could advocate for a sunset provision, where every piece of legislation that's introduced has to automatically expire after a certain time unless it's renewed. You could have super majority requirements. You could say that only legislation that's a super majority — a more radical proposal would be something like this, like in the U.S. system.

We have a Constitution, which is a piece of legislation in a sense, but it's at least general and somewhat noble its goals, and you have a court who's interpreting that, the Supreme Court and the federal courts — which is not common law exactly, right, because they're interpreting words on a piece of paper. They blend in justice concepts when they need to, but still, they're just interpreting it. What you could do is you could say the job of Congress is to pass legislation, number one, that only affects the inner workings of the state. It's not like replacing or supplanting private law that governs the relations between people. That can be more of a common law process.

Or the legislature could be limited to passing a law that overturns a given court decision. So their job would be — let's say the Supreme Court comes up with Roe vs. Wade or some decision that everyone is outraged by. Well, you could let a majority of the state legislatures or the Congress, some kind of system like that — I think Marshall DeRosa actually proposed this in his great book when he talked about the Confederate constitution. You could say that if 3/4th of the state legislators certify that they want this decision overturned, then that Supreme Court decision will be null and void. So it's a type of nullification really, and it's a clever way. It limits the legislature to just overturning bad judicial decisions, that that would be, instead of allowing them to write the law, they would be able to guide the process, the development of this quasi common law that the federal courts engage in by just striking down the really bad or egregious decisions of the federal courts.

WOODS: So it turns out that this line of discussion really can inform our current views of what direction we should be moving in and what would be good reforms, what would be the right way to go, so it's not just an empty, speculative intellectual discussion. And by the way, I love empty, speculative intellectual discussions; nothing wrong with those, but it's interesting that this really can bear some fruit.

StefanKinsella.com is your website, and you sent me a whole bunch of links today for people who want to read more about this, and they'll all be at TomWoods.com/557. Is there anything left unsaid that, if said, would clear any remaining questions up?

KINSELLA: Maybe just two things. Number one, I would recommend — I don't have time to read it now, but I have a blog post which you can link to about James Carter, this lawyer in 1884 in New York who was opposing the legislative codification of the common law of New York. He's got a great quote, which is just great, so you've just got to read that. It's in my blog post. The other would be to be aware that, in addition to legislation, in America we have this huge thing called regulations, which are emitted by federal agencies, which are like quasi-legislation. And the length of the Code of Federal Regulations, I lost count; it's like 22,000 pages or something, or maybe it's more now, and they're coming out all the time. So legislation is a problem in its pure form and also in its bastardized form, where the legislature basically deputizes these agencies to emit quasi-legislation, which is sometimes even worse, and it sometimes has criminal implications as well. So we need to be wary of legislation and regulations, which are sort of the spin off of that.

WOODS: All right, and we will leave it off there. So TomWoods.com/557 is where you should go for all the stuff that we've been talking about and for links to Stefan, your website, StefanKinsella.com; we'll get your — are you on Twitter?

KINSELLA: I am on Twitter.

WOODS: All right, in that case, your Twitter is also there. Everything people want to know about you, within reason, will be on that page. Thanks a lot, Stefan.

KINSELLA: Thank you, Tom