Deontological Dickering

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> The Lawyers, of whose Art the Basis
> Was raising Funds and splitting Cases,
> Oppos'd all Registers, that Cheats
> Might make more Work with dipt Estates ;
> As wer't unlawful, that one's own,
> Without a Law-Suit, should be known.
> They kept off Hearings wilfully,
> To finger the refreshing Fee ;
> And to defend a wicked Cause,
> Examin'd and survey'd the Laws,
> As Burglars Shops and Houses do,
> To find out where they'd best break through.[1]

A price is an artifact but not an edict. Hayek's demonstration that buying and selling create what knowledge we have about scarcity, rather than rehashing the "given" facts,[2] is widely celebrated.[3] Knowledge is highly dispersed and perhaps incapable of articulation; a market-clearing price incorporates information by virtue of being changed in response to individuals acting independently on their own knowledge of the accuracy of previous prices. But if the purchase is mother to the price, are rights the children of infringement?

[1] Mandeville 1988, 20.

[2] Hayek 1980, 77-91.

[3] Somewhat amusingly, Hayek has recently been charged (Robin 2013) with being a sort of Nietzschean who took subjective marginalism in economics to be a premise for re-evaluating all values through market mechanisms, which might serve as a rough description of what this paper is about. The same author has accused Hayek of collaboration with Augusto Pinochet's regime (Robin 2011).

Hayek didn't seem to think so, but as we will see, his descriptive moral theory lacks the explanatory power of his economics.

A property right may be considered as a necessity of justice (or as a perpetual theft), but here we are concerned with it as an argument. Ronald Coase's famous article[4] showed that absent costs of bargaining, any initial allocation of property rights may result in an economically efficient solution due to spontaneous deal-making. Of course, Coase admits that transaction costs may actually be tremendous.[5] I propose that any regime of property rights can be considered as a more or less successful articulation of those costs.

In order to employ Hayek's theory of knowledge, we need an analog to exchange, an action by which a right comes to encode information about transaction costs, regardless of the intentions or the action's performer. The answer can't be contract, because it's precisely the costs associated with such bargaining that we're concerned with. When property rights are abandoned, ignored, destroyed, re-negotiated, or replaced, material goods are up for grabs. However, each participant has also incurred the cost of re-negotiation rather than that of bargaining within the current regime of rights to obtain those resources. There is a discovery process for moral rules.[6]

David Friedman has argued that property rights begin as self-enforcing solutions to bilateral monopoly bargaining problems.[7] That is, there is no equilibrium solution to property arguments between two parties, but once a solution is reached, it becomes a coordination point for future solutions. The only reason this would ever be the case is if re-bargaining in bilateral monopoly were expensive, if it involved transaction costs. Should two parties come to a temporary agreement that was not self-enforcing, or the agreement ceased to be attractive, it would be because the costs of re-negotiating were low or the potential payoffs to incurring them were high.

Note that the bargaining we are discussing here is not contractual exchange a la Coase, but a sort of legal wrangling[8] that defines what rights are in

[4]Coase 1960.

[5]Ibid., 15.

[6]Israel Kirzner has written a book (1989) describing the moral implications of entrepreneurship considered as a discovery procedure. Kirzner is concerned with justifying a basic right to the fruits of discoveries, not with the discovery procedure for the basic rights themselves.

[7]Friedman 1994.

[8]And indeed, physical wrangling. Friedman is describing a Hobbesean "state of warre"

the first place. The "state of nature" with no external legal enforcement is essential to our theory because where transaction costs are concerned, re-negotiation under state enforcement begs the question. As David Hume noted as a criticism of contractual accounts of rights, there's always a further question of why you ought not to break promises.[9] Or in our account of costs, implicitly accepting the monopoly right to legal enforcements of other rights ignores the efficiency of the rights of enforcement.

In fact, in order to complete the analogy with Hayek's theory of knowledge, it's necessary to confront the state is the main obstacle to the use of knowledge in transaction costs. In "The Meaning of Competition",[10] Hayek argues that the useful attributes of competition reside not in total number of competitors or perfect knowledge, but simply in freedom of entry. If a current price does not encompass all available information regarding scarcity, there's money to be made by a competitor who will offer goods at a different price. The central question to be asked when judging whether available prices reflect more or less information is the degree to which it is possible to propose new prices, or the transaction costs of competing. A single rights-enforcer that also imposes criminal punishments on those who attempt to perform similar services is prima facie evidence that the rights being enforced do not reflect the total stock of information regarding transaction costs.

Though it seems to follow straightforwardly from his theory of knowledge, Hayek did not accept this view of rights, and in fact held several contrary opinions. His strongest objection is related to his theory of group selection, under which rights are formed in early societies as arbitrary inheritances that compete for a very bare sense of efficiency: groups with lackluster traditions die out. On this view, rights as general rules are logically prior to any mechanism of incorporating knowledge into specific rights.[11] Thus, a Friedman-style bilateral monopoly in a primitive anarchy is an anachronism:

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where the threat of violence is pervasive. In *Escape From Leviathan* (2012), J. C. Lester defines observing liberty descriptively as the minimization of imposed costs, which he considers to entail the observation of property rights. On his definition, rights need not be libertarian in order to measure transaction costs, since those costs may or may not be imposed.

[9] Hume 2006, 186.

[10] Hayek 1980, 92-106

[11] For example, Hayek was fond of Bruno Leoni's account of judge-made law (1991). For an argument that judges have much arbitrary leeway in spite of the decentralized structure of their lawmaking process, see Hutchinson 2005.

> At least in primitive human society, scarcely less than in animal societies, the structure of social life is determined by rules of conduct which manifest themselves only by being in fact observed. Only when individual intellects begin to differ to a significant degree will it become necessary to express these rules in a form in which they can be communicated and explicitly taught, deviant behavior corrected, and differences in opinion about appropriate behavior decided. Although man never existed without laws that he obeyed, he did, of course, exist for hundreds of thousands of years without laws he 'knew' in the sense that he was able to articulate them.[12]

We don't have records of the jurisprudence of hundreds of thousands of years ago. We do have a wealth of anthropology concerning societies that, while they may not mirror those of the distant past in every particular, share what's important to us: a complete lack of centralized rights-enforcement. Bronisław Malinowski, the father of social anthropology, summarizes his contrast of the complex and constant give-and-take of Melanesian[13] fishing and trading rights versus the then-prevailing view of unconscious rule-obedience as follows:

> When the 'constant smoothness' in the run of obligations so often attributed to the Melanesian is studied more closely, it becomes clear that there are constant hitches in their transactions, that there is much grumbling and recrimination and seldom is a man completely satisfied with his partner. But, on the whole, every one tries to fulfil his obligations, partly out of enlightened self-interest, partly in obedience to his social ambitions and sentiments. Take the real savage, keen on evading his duties, swaggering and boastful when he has fulfilled them, and compare him with the anthropologist's dummy who slavishly follows custom and automatically obeys every regulation. There is not the remotest resemblance between the teachings of anthropology on this subject and the reality of native life.[14]

[12] Hayek 1983, 43.

[13] Here I follow Malinowski's usage, it would be more accurate to refer to the Trobriand peoples.

[14] Malinowski 1989, 30.

In other words, the rules are only as good as the benefit of violating them stands in relation to the social penalties of abandoning them, and those boundaries are constantly being tested. This isn't to deny that there are seemingly permanent features of Melanesian society, only to interpret that fact as a result of the high cost of overturning those features. Malinowski's use of the word "transactions" is different from mine; my transaction costs are what's being explored in his "constant hitches," his transactions are trading rights.[15]

H. L. Mencken once surveyed the social structures of various tribes and speculated that the discovery of biological fatherhood was the impetus toward patriarchal societies.[16] Among the Melanesians, the right of inheritance belongs to a man's sister's son, and is non-transferrable. Malinowski gives a case where a powerful man was able to favor his son and imprison his nephew until the mechanisms of tribal law were finally able to stop him.[17] Like every other member of the tribe, the father was ignorant of his biological relation to his son.[18] I maintain that this case shows the basic features of Melanesian society are tested from day to day, in spite of arising from antiquity, and the institution of patriarchal rights is lying in wait for the appropriate knowledge of costs and benefits to be acted upon.[19] On Hayek's reading of such rules, we shouldn't expect any close calls of this kind at all, much less those that seem capable of incorporating new knowledge to tip the balance.

Another, less theoretical objection Hayek might have had to this paper is that the introduction of free entry into the enforcement of rules precludes rules that are general and abstract, and opens the way for rules that take specific groups and outcomes into account, violating the rule of law[20] and therefore preventing compatibility with a large society.[21] I take Anthony

[15]As an aside on usage, there is an interesting parallel between Hayek's distinction between law and legislation (1983, 72) and Malinowski's claim that among the Melanesians there is only criminal and no civil law (1989, 56).

[16]Mencken 1930, 83.

[17]Malinowski 1989, 100.

[18]Ibid., 107n.

[19]The clever reader may suspect that a tribesman might not want to know the truth in a certain sense, or that the costs of challenging the existing rules is so high that it's not in his interest to investigate what the truth actually is. For a similar argument concerning modern democracy, see Caplan 2007.

[20]Hayek 2011, 340.

[21]It might also be objected that free entry precludes political consensus. Chantal Mouffe describes the perverse institutional effects of consensus in *On The Political* (2005). In

de Jasay's arguments against Buchanan and Congleton on this point to be irrefragable.[22] All rules must define cases and their consequences, the point being to separate states of affairs that require action. This necessarily divides one identifiable group of people from another. A fully general rule would need to illegalize the separation between plaintiff and defendant, different types of criminals (including non-criminals), and indeed every other distinction of persons in law. Generality makes a nice apophatic rhetoric for classical liberalism, but it's incoherent.

Moving to non-Hayekian criticisms, it might be objected that while my theory is correct so far as it goes, it's narrowly applicable to tribal societies. Michael Taylor makes a similar criticism (addressed against the possibility of a liberal stateless society), asserting that only face-to-face reciprocal community relations can subsist in the absence of a state.[23] We may translate this into the claim that the optimization of transaction costs I describe is only possible with a rigorous and familiar inspection of rights by well-informed neighbors.[24] Edward Stringham's recent book documents the invention of the stock exchange and related complex financial instruments, showing that the contractual rules for securities were developed not only in the absence of external enforcement from the government, but in spite of criminalization.[25] Stringham attributes the success of the new contractual forms to the provision of governance as a club good by the stock exchanges. The exchanges were able to lower the transaction costs of trading by inventing rules and enforcement

Epistemics and Economics (2009), G.L.S. Shackle lays stress on the logical necessity for disagreement within a market about the future value of goods in order for speculation to be possible. By way of analogy, disagreement about rights is a necessary mechanism of speculative projects of rights-creation.

[22]Jasay 2002, 170-185. Jeremy Shearmur attempts a justification of liberal universalism from a Hayekian perspective in Hayek and After (1996), also vulnerable to Jasay's arguments, but generally sympathetic to the idea of competing rule sets in the form of planned communities. A similar, more developed, and less Hayekian view to Shearmur's can be found in Kukathas 2003.

[23]Taylor 2000, 63. In a similar vein, Robert Axelrod, whose experiments show robust cooperation without central enforcement, emphasizes the importance of repeat interactions between individuals (1984).

[24]For a detailed description of how such face-to-face interactions generate rights, see Ellickson 1991.

[25]Stringham 2015. At one point (Ibid., 66), he quotes Adam Smith's note in *Lectures on Jurisprudence* that contemporary stock exchange contracts did not receive government enforcement. It provides a sobering constrast to the many other quotes throughout the text claiming that (theoretically speaking) such things are not possible.

mechanisms that could be provided as a service to their customers (who as a rule had no way of closely monitoring each other):

> With their multilateral reputation mechanism the cost of cheating became the souring of a relationship not only with the victim but with everyone else who found out. [...] Even if two parties have no prior experience and no expected future interactions, the reputation mechanism not only allows them to see if the other is likely to cooperate but also creates incentives for them to do so.[26]

The freedom of entry into enforcement of this kind is clearly not nil, and some of the most important features of modern society have in fact been consequences of entrepreneurial discovery of rights.[27]

A more fundamental objection to my theory might run as follows: if what's being measured by a right is the transaction cost of abandoning it, and a monopoly right of enforcement exists by imposing penalties on competing, the fact that the monopoly holds is good evidence that the transaction costs of breaking the monopoly aren't worth it. Instead of an epistemological black hole, an existing government (no matter how draconian) is proof that monopoly enforcement is a correct approximation of transaction costs.[28] It may very well be that no existing government is worth overthrowing, but that is a separate question from whether any of the rules that government enforces are achieving their nominal purposes. One might just as well consider a government-enforced monopoly industry to reflect information about scarcity, on the grounds that throwing a revolution is part of the cost of competing, and therefore competition is inefficient compared to monopoly.

Hayek left so sprawling a corpus that it's hardly surprising when various pieces of it jostle for importance like the competing enterprises of his theories.

[26]Ibid., 57.

[27]I do not claim that every feature of modern society is a result of such entrepreneurship. For an argument that intellectual property enforcement would not pay in circumstances similar to the stock exchanges' see Friedman 2015, 265-67. For a description of organizations providing the local abolition of intellectual property as a club good in patent pools, see Boldrin and Levine 2010, 63-64.

[28]If I'm correct, it might be tempting to use the suicide rate as an "ultimate exit" to measure the efficiency of rules in totalitarian regimes where emigration is impossible. Unfortunately, the case of Hegesias The Death-Persuader (Cicero 1888, 70) reminds us that people can be voluntarily convinced that death is preferable to life, and indeed we have no methodological reason to assume that this is not the case. For a discussion of the methodological difficulties in measuring the value of life, see Friedman 2000, 95-104.

I put my skin in that game alongside his theory of knowledge. If we consider rights-creation as a discovery procedure, lack of free entry is just as fundamental an impediment to the use of knowledge as in price theory. Where that deduction comes into conflict with the Hayekian program of legal theory and constitutional recommendations, the program must be suspended.

References

Axelrod, Robert. *The Evolution of Cooperation.* New York: Basic Books, 1984.

Boldrin, Michele and David Levine. *Against Intellectual Monopoly.* New York: Cambridge University Press, 2010.

Caplan, Bryan. *The Myth of the Rational Voter.* Princeton: Princeton University Press, 2007.

Cicero, Marcus Tullius. *Tusculan Disputations.* Translated by C. D. Yonge. New York: Harper and Brothers, 1888.

Coase, Ronald, "The Problem of Social Cost," The Journal of Law and Economics 3 (October 1960): 1-44.

Ellickson, Robert. *Order Without Law: How Neighbors Settle Disputes.* Cambridge, Massachusets: Harvard University Press, 1991.

Friedman, David. *Law's Order.* Chichester: Princeton University Press, 2000.

——. *The Machinery of Freedom.* CreateSpace Independent Publishing Platform, 2015.

——, "A Positive Account of Property Rights," Social Philosophy and Policy 11 no. 2 (Summer 1994): 1-16.

Coase, Ronald, "The Problem of Social Cost," The Journal of Law and Economics 3 (October 1960): 1-44.

Hayek, Friedrich. *The Constitution of Liberty.* Edited by Ronald Hamowy. Chicago: University of Chicago Press, 2011.

——. *Individualism and Economic Order.* Chicago: University of Chicago Press, 1980.

——. *Law Legislation and Liberty Volume I: Rules and Order.* Chicago: University of Chicago Press, 1983.

Hume, David. *Hume: Political Essays.* Edited by Knud Haakonssen. New York: Cambridge University Press, 2006.

Hutchinson, Allan. *Evolution and the Common Law.* New York: Cambridge University Press, 2005.

Jasay, Anthony de. *Justice and Its Surroundings.* Indianapolis: Liberty Fund, 2002.

Kirzer, Israel. *Discovery, Capitalism, and Distributive Justice.* New York: Basil Blackwell, 1989.

Kukathas, Chandran. *The Liberal Archipelago.* New York: Oxford University Press, 2003.

Leoni, Bruno. *Freedom and the Law.* Indianapolis: Liberty Fund, 1991.

Lester, J.C. *Escape From Leviathan.* Buckingham: University of Buckingham Press, 2012.

Malinowski, Bronisław. *Crime and Custom in Savage Society.* Savage, Maryland: Rowman and Littlefield, 1989.

Mandeville, Bernard. *The Fable of the Bees: or, Private Vices, Publick Benefits.* Edited by F.B. Kaye. Indianapolis: Liberty Fund, 1988.

Mencken, H.L. *Treatise on the Gods.* New York: Knopf, 1930.

Mouffe, Chantal. *On the Political.* New York: Routledge, 2005.

Robin, Corey. "Nietzsche's Marginal Children: On Friedrich Hayek," The Nation, May 7, 2013, accessed May 28, 2016, http://www.thenation.com/article/nietzsches-marginal-children-friedrich-hayek.

——. *The Reactionary Mind.* New York: Oxford University Press, 2011,

Shackle, George. *Epistemics and Economics.* Cambridge: Cambridge University Press, 2009.

Shearmur, Jeremy. *Hayek and After: Hayekian Liberalism as a Research Programme.* London: Routledge, 1996.

Stringham, Edward. *Private Governance.* New York: Oxford University Press, 2015.

Taylor, Michael. *Community, Anarchy and Liberty.* New York: Cambridge University Press, 2000.