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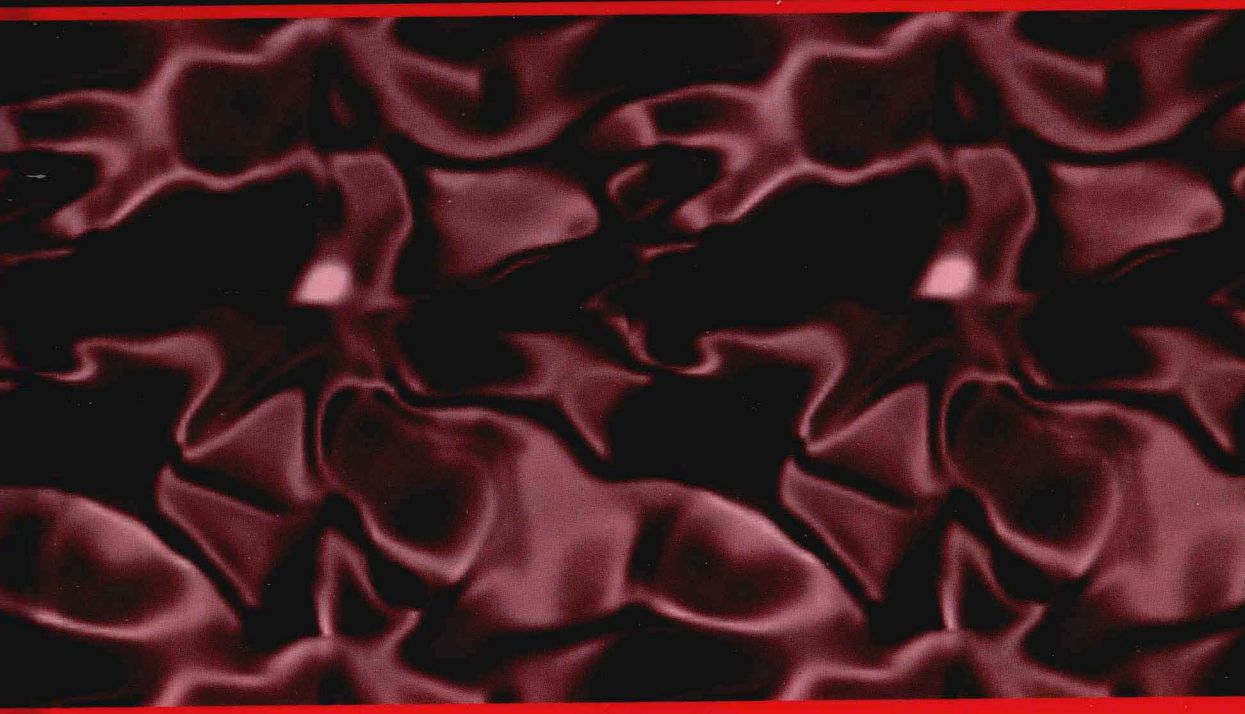
Austrian Law and Economics

VOLUME I

Edited by **Mario J. Rizzo**



ECONOMIC APPROACHES TO LAW 29

Austrian Law and Economics Volume I

Edited by

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ECONOMIC APPROACHES TO LAW

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Introduction

Mario J. Rizzo

This introductory essay is not a survey of the articles collected in these volumes. Instead, it is an attempt to identify some key themes in Austrian law and economics with a view to assisting those who wish to do research in the field.

Introduction

The distinctive feature of Austrian law and economics is its emphasis on economic, legal and political *processes*. From its earliest days in the work of Carl Menger to its revival in the early 1980s (Rizzo, 1980) and down through the present day, this approach has been focused on understanding how law or legal institutions come into being and how the law copes with a world in flux.

This essay divides the Austrian contributions into four major areas: (I) the spontaneous development of law; (II) the implications of the decentralization of knowledge; (III) the nature of legal rules; and (IV) the dynamic analysis of rules and policies. The essay also quite artificially, it may be admitted, omits much related work in the economics of institutions more generally. This is the price of today's high level of academic specialization.

The areas or themes are interrelated. The story of the spontaneous evolution of law is rooted historically in small local beginnings. Groups of people made local deals to ensure peace, order and what today we would call 'legal rights.' The rules that emerged out of these deals were often, it seems, the result of deliberate private (or, at least, local) agreements that made use of local knowledge and circumstances. From these small beginnings we see the growth of customary law. But as population expanded and the opportunities for greater gains from trade came into existence, those rules that maintained the peace and facilitated trade had to grow beyond crude beginnings.

From customary and local law grew more complex and more nearly universal legal systems. These were largely not the result of deliberate agreement or design. They were precedent-driven systems which in the attempt to deal with new circumstances, more complex forms of commercial and other interactions took on overall forms that could not be predicted or intended by the participants.

Since the rules that were generated in such a process arose out of specific concrete disputes but had to function in the future when different concrete circumstances would be present, these rules were subject to a process of abstraction. The original decision had to be generalized and some 'principle' had to be extracted in order for a rule to function as a useful precedent in new cases. This is how rules cope with the flux of the economic and social world.

The rules themselves are also subject to a process of change that is often outside the deliberate control of legislators, judges or other 'law givers.' This strain of analysis has its

roots in Ludwig von Mises's concern with the process by which one state intervention in the market leads to another, and in the jurisprudential literature on slippery slopes. It shows that law is a process based on individual decisions, to be sure, but out of those deliberate steps a complex order is built that is unintended and unforeseen. Sometimes this aggregate result is benign; other times, as in the case of market intervention and slippery slope processes, it can be malign.

I. Spontaneous Development of Law

Although Austrian law-and-economics begins with Carl Menger, the idea of the spontaneous development of law owes more to the Scottish Enlightenment thinkers than to any Austrian economist. Adam Ferguson, David Hume and Adam Smith were 'Austrian' theorists of the law.

The link between the Austrian approach to law-and-economics and the Scottish Enlightenment is the general theory of spontaneous order. This theory, developed more than a hundred years before the founding of the Austrian School, is actually a *principle* of social explanation and a tool of analysis, as well as a general substantive hypothesis about social organization. Austrians employ this principle in attempting to understand the development of complex social phenomena and institutions.

Looking around the world, we see markets, media of exchange, languages, number systems, common law, and many political institutions, of a high order of complexity, with no obvious creator or responsible deliberate decisionmaker. How did they get there? We could invent a very smart metaphysical entity – call it Society – that brings these social orders into existence. Before the reader concludes this tack would never be taken, he should think of the incessant talk, even in an advanced state of civilization such as ours, of 'Society has decided this or has done that.' This is a metaphor that needs to be deconstructed. *Who* exactly is deciding and doing? And *what* are they deciding and doing?

The Austrian approach to law and economics is firmly embedded in the Scottish research program originally posed by Adam Ferguson (1966: 122) in the eighteenth century and reiterated by Carl Menger more than a century ago. Menger (1985: 223) points to a ubiquitous phenomenon:

> An unintended product of social development which conditions and advances the welfare of society, and this perhaps to a higher degree than any social institution which is the work of human intention and calculation – the explanation of this remarkable phenomenon is the difficult problem which social science has to solve.

Much law emerged, according to Menger and later Ludwig von Mises, from the elementary insight of individuals that violence and the arbitrariness of power need to be restrained. Remarkably, the French political theorist Benjamin Constant (1988) outlined, as early as 1819, a plausible economic process, roughly the same as the Menger–Mises account, by which this takes place. In effect, people begin to see the potential advantages deriving from trade as population increases and the opportunities for higher productive specialized and divided labor emerge. In addition, most people realize that they will not always be the

beneficiaries of violence no matter how strong they are. Therefore local deals suppressing violence begin to be made. 'Law' emerges from this small beginning.

At this stage, law in the form of limited pragmatic local arrangements may indeed be the result of 'human intention and calculation.' In fact, these deliberate private orderings may have been an input into a more general unintended and emergent order. Menger (1985: 230, n.154) was careful to say that not all law comes into being organically (spontaneously) but even where it does, an organic explanation does not completely exclude 'the genesis of law as the result of human intelligence.' Just as in markets there are deliberate individual decisions that produce an unintended overall order, there can be small clusters of deliberate decisions about rules that ultimately produce an unintended legal order.

In the spirit of utilitarian philosophy, Mises sees this development of property and contract law, especially, as having only a pragmatic value (not to be confused with Menger's idea of 'pragmatic institutions' which are consciously produced). The 'very essence of the law' is 'as peacemaker – yes, peacemaker at any price' (Mises, 1981: 34). He, along with Menger, eschews any grand or metaphysical significance to the development of law. In particular, Mises is sympathetic to the Benthamite derogation of a natural law explanation or rationalization for private property and contract law. (This is possibly due to a misunderstanding of the natural law tradition.)

Mises's lack of concern with natural law rationalizations of property and contract law stems from his desire to show how law came about. It would be difficult, he believed, to give this a natural-law cast because he thought of natural law as a deductive system produced by philosophers. Such an explanation would seem to require the postulation of a supra-mind directing social processes. Instead law and private property have rather mundane and pragmatic origins.

Analytical Overview of the Principle of Spontaneous Order

Spontaneous orders are not simply any kind of emergent outcome. Emergent orders can be the outcome of a single mind's processes. There may be no substantial sociality involved. For example, an individual mind itself (that is, consciousness) is the emergent result of physical brain processes. However interesting this may be, it is not what we mean by 'spontaneous order.' Ronald Hamowy (2005: 39) gives a succinct description of the theory:

> The theory, simply put, holds that the social arrangements under which we live are of such a high order of complexity that they invariably take their form not from deliberate calculation, but as the unintended consequence of countless individual actions, many of which may be the result of instinct or habit.

Thus, spontaneous orders are patterns of human interaction generated by *many* individual actions that *unintentionally* produce these overall patterns. It is important to recognize that individual rationality (deliberation) need not be present. The actions of the individuals may be habitual or instinctual. They may not even be particularly self-interested.

The rationality in this process is primarily an 'ecological rationality' (Vernon Smith, 2003) which is not a property of the individual agent but of the system. To the extent that the order produced is a reasonably adequate adaptation to the environment it may seem as if it were the

result of rational agents striving to bring about a socially beneficial outcome. This would be an illusion.

The idea of spontaneous order must be distinguished from the related notion of the unintended or unplanned consequences of individual actions. This latter idea is narrower than the former because unintended consequences need not be of a high order of complexity. They may simply be unseen by a particular agent or group of agents.

Functions (Uses) of the Principle

1. TOOL OF EXPLANATION

If we think of the principle of spontaneous order as a tool of explanation we are essentially outlining a research program rather than making a substantive claim. We are saying that we shall try to explain complex social phenomena in a certain way. *We may not be successful.*

The method is to recompose a particular aggregate outcome – an institution – as the end of a *causal process* consisting of individually motivated actions by many people. These actions are not coordinated ex ante, but only later as the institution emerges.

Therefore, money – the generally acceptable medium of exchange – emerges, according to Carl Menger (1981), as individuals seek beneficial exchanges and try to reduce their costs in finding and executing these exchanges. This leads each individual to seek a commodity that is in great demand so as to increase his chances of finding the so-called double coincidence of wants. With that commodity he can more cheaply find and effect transactions for what he really wants.

As individuals find more highly valued commodities to use in exchange they add to the use value of those commodities an exchange value. Thus demand for these media of exchange is enhanced.

Will this process result in convergence upon one or two generally acceptable media of exchange? And, if so, what will those be?

It is altogether possible that this process may be cut short by state intervention. The state may choose a particular commodity that it finds acceptable for transactions with it or it may seek to eliminate certain media that are used by individuals with each other. In these cases, we may be unsuccessful in tracing the emergence of money to purely spontaneous processes. But since it is part of the research program to seek spontaneous processes, we frame the explanation in terms of the tendencies that such processes set in motion even if a source of conscious design (for example, the state) seeks to work against them.

As an example, the state would have to deal with the incentives among individuals to evade its regulations and with transaction efficiency losses in attempting to countermand the market process. We may even see the state restricting its own mandates about acceptable media of exchange to a subset that are at least relatively consistent with spontaneous processes.

An important aspect of the tool-of-analysis function is that no normative conclusions are implied. The emergence of money is normally considered a good thing. On the other hand, emergence of cooperative and efficient criminal enterprises may not be. (See Peter Leeson's work on pirates, in Volume II.)

2. NORMATIVE ANALYSIS

Certainly the Scottish Enlightenment philosophers thought that the consequences of a

spontaneous ordering process were generally beneficial. They pointed not only to markets but also to the evolutions of norms, law, and British political institutions. Since most of their readers would consider these good things the task was made easier. One simply had to make the analytical or positive case for the origin of the institutions.

In general, however, normative claims in the social sciences are difficult. The usual stratagem employed by economists, for example, is to use criteria that are endorsed by the agents themselves – their preferences, goals, or aims. But do agents have preferences defined over institutions that are no part of their intention? I do not think one can plausibly argue that they do.

The normative criterion must be something like what F.A. Hayek proposes in his *Law, Legislation and Liberty*: a 'good' system is one that maximizes (at least relative to alternatives) the chances that a randomly chosen individual can satisfy his preferences (Hayek, 1976: 129–32). This is a possible escape from the normative problem. So even if people do not know or understand what that system is, its value will be imputed from the value of their preference satisfaction.

3. THE UNDER-DETERMINACY OF THE PRINCIPLE IN OPERATION

Some descriptions of spontaneous ordering processes are, in a sense, too persuasive. It is quite easy to get the sense of the inevitability of the outcome. This is a pitfall of almost all ex post analyses. We know what happened and so we (re)construct the past by selecting those events that did, in fact, produce the outcome. For example, Benjamin Constant's (1988) story of the development of modern (individual) liberty gives the strong impression of inevitability.

Yet in the stories of the development of British political institutions and of the common law there is a clear understanding that random events (here good luck) played a role in these spontaneous processes. Adam Ferguson (1966: 122) made this clear in his famous statement: 'Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal *blindness to the future*; and *nations stumble upon establishments*, which are indeed the result of human action, but not the execution of any human design' (emphases added).

Hayek elaborates this story by adding a group selection process. 'Stumbling' is the rough equivalent to biological random mutation while group selection is the filter that is responsible for the survival of at least relatively efficient institutions. If, however, different accidents had taken place there would have been different and perhaps less beneficial institutional outcomes.

4. THE ROLE OF SYSTEM CONSTRAINTS

Spontaneous ordering processes can occur at many levels of social interaction subject to various constraints. For example, in markets the constraints are the rules of contract, property and tort. Within this framework, profit-seeking behavior will produce a strong tendency to coordination of plans and efficient resource allocation. Outside of the framework, however, profit-seeking behavior may not have socially beneficial results. Profit generated by fraud is not a signal of mutual gain, coordination or better resource allocation.

Quite a few spontaneous order theorists believe that some parts of the market framework – for example, contract law – can themselves emerge as a result of spontaneous processes. This analysis must take the existence of basic property rights as a constraint. Interacting merchants may, over long periods of time, work out methods of enforcing contracts,

establishing rules relating to default, and so forth. Yet their ability to do so depends on the existence of trade, which in turn depends on the existence of basic property rights.

The lesson from this is that spontaneous ordering processes do not generate all relevant social institutions simultaneously. This may seem obvious. However, it implies that the institutions we see around us developed incrementally over long periods of time. Further, there may be some order of their development that is more likely than another. It is difficult to see, for example, the emergence of contract law without the prior emergence of at least primitive property rights.

Processes in which the order of emergence is important are those in which phenomena such as path dependence (and possible lock-in) are likely. Therefore, we are unlikely to see the development of uniquely optimal institutions. This is even more likely to be the case *within* institutions. For example, most Scottish Enlightenment philosophers and Austrian economists agree that the common law developed spontaneously. A realistic attention to historical contingency and path dependence suggests that the institution itself is unlikely to be the best possible relative to constraints beyond the relevant historical accidents in its development. (The reader will note the importance of specifying the constraints in any claim of optimality.) Within the institution – that is, the complex of doctrines and procedures that comprise it – the development of any single legal doctrine is unlikely to be the best. In other words, we could conceive of another scheme of, say, tort liability for accidents that would be more efficient in minimizing the social costs of accidents. The various models produced by economists yielding liability rules 'superior' to those developed at common law are just one set of examples.

Spontaneous Order and the 'Conservative' Attitude toward Institutions

Although F.A. Hayek (1960: 399–411) is the author of an essay, 'Why I am not a Conservative,' his work on the common law clearly exhibits a reverence for evolved institutions. He, and the Scottish Enlightenment thinkers, clearly believed that the precedents established at common law embody a collective wisdom distilled from long experience. If individuals settle their disputes according to these precedents, their actions will embody wisdom greater than any of them have or can hope to have individually.

Yet as Hayek (1960: 62–3) makes clear these precedents or other evolved norms are not definitive or unquestionable carriers of knowledge. This is because the process by which these precedents emerge is a *trial and error* process. Sometimes a decision or a rule may be an error (in the sense of not adapted to the relevant circumstances). Common law rules may evolve toward dead-ends, incapable of dealing with new problems, that need to be rescued by deliberate action or legislation. In the realm of morality, circumstances change and innovation is necessary. How can we distinguish between useful moral or legal innovation and simple violation of appropriate norms? There is no easy way, especially ex ante.

Hayek believed that if these departures survive in the common law process there is a presumption in favor of them. Nevertheless, the process to which Hayek refers is not always clear. In the early development of law there was a *competitive production of precedents* (Zywicki, 2003) that weeded out precedents that did not serve the long-run interests of those regulated by them. Today, the common law process still has some competitive features (for example, competing jurisdictions) but these are greatly attenuated.

I believe that the Hayekian position in today's world must be one that is more skeptical toward the 'evolved' institutions, doctrines and norms we encounter. The Hayekian must inspect the process by which they have been produced. It would be a great mistake to pretend that we now live in the world depicted by Hayek in his description of the common law, even if we ever did. Deference to tradition should be dependent on the nature of the process that gives rise to that tradition.

Carl Menger (1985: 233), however, did not share Hayek's presumption that common law was more conducive to the general welfare than statute law. His view of common law was mixed: 'For common law has also proved harmful to the common good often enough, and on the contrary, legislation has just as often changed common law in a way benefiting the common good.'

He believed that common law *could* serve the common welfare without a single mind directing its development. When that occurred it was a puzzle in need of explanation. But it need not occur. Menger (1985: 234) was quite willing to subject the common law as it developed in specific areas to rationalistic criticism: 'But never, and this is the essential point in the matter under review, may science dispense with testing for their suitability those institutions which have come about "organically." It must, when careful investigation so requires, change and better them according to the measure of scientific insight and the practical experience at hand.'

Neither Hayek nor Menger specified the precise conditions under which spontaneous organizing forces would produce benign or malign institutions or laws. This task remains to be done. Nevertheless, the mere continued existence of a norm, a precedent or a rule has an important function in the coordination of behavior (Hazlitt, 1964: 70–74). People know what to expect.

The selection mechanism outlined above is perfectly compatible with individuals accepting or rejecting rules in a competitive process of judicial choice. It works best when the costs and benefits of rules fall mainly on the decisionmaker who decides which judicial system to patronize.

Unfortunately, the mechanism is not clearly spelled out so it is impossible to evaluate it in any detail. In the first place, we do not really know what kind of adaptability Hayek had in mind. It seems clear to me that he did not mean 'efficiency' in the sense that many economists of the law mean it (for example, rules which minimize the social costs of accidents in the case of torts). Hayek's skepticism about utilitarian balancing carries over into balancing of monetized costs and benefits. He believed that such attempts would fail because of insuperable knowledge problems. Judges do not have the requisite knowledge.

On the other hand, Hayek emphasizes the importance of expectational certainty in the law. Law should coordinate the expectations of parties with regard to certain general features of their interaction while it does not ensure the values generated by the market. This is easiest to see in contract law. Here the rules with regard to the validity of contracts, the structure of penalties for breach, and so forth are clearly set out ex ante, while the values (prices) at which parties transact are not protected by the law. Further, with regard to tort law we infer that Hayek would be sympathetic to simple rules that did not, by and large, depend on market values for the assignment of liability. Coordination of expectation and plans need not imply the exhaustion of all potential gains from trade, as Hayek (1948) showed in early work.

Spontaneous Order and Group Selection

Hayek rests much of his case for the presumption that common law doctrines embody the distilled wisdom and experience of generations in the mechanism of group selection. Those groups which stumbled into 'efficient' rules survived and prospered while those whose rules were not efficient did not survive.

This brings us to a contested point. Hayek in his economics work was known as a 'methodological individualist.' The mechanism of 'group selection' upon which Hayek relies for his evolutionary story has been thought to be incompatible with an emphasis on explanation of the origins of social phenomena in terms of the decisions of individuals (Vanberg, 1986). This has now been shown to be incorrect (Whitman, 1998). There are multiple levels and types of selection in the processes of cultural or social evolution.

Individuals filter beliefs, cultural practices, norms and related 'memes.' Some of these will enhance reproductive success of groups, be irrelevant to it, or actually be harmful to group survival. For example, societies that solve free-rider problems in providing for common defense will more likely survive and prosper than those that do not. But unless individuals can be *motivated* to moderate their selfishness or confined generosity in the service of wider cooperative behavior in producing public goods, the environmental selection mechanism will tend to weed out societies comprised of such individuals. These societies may be subject to the aggression of other, more internally cooperative, societies.

II. Implications of the Decentralization of Knowledge

The decentralization of factual knowledge in society is both one of Hayek's most important contributions and one whose implications are only recently being explored. The classic socialist calculation debate of the 1930s and '40s was the first context in which this idea was applied. Hayek implicitly applied it in his analysis of the common law and so did Bruno Leoni (1991). Later it was integrated by Israel Kirzner (1973) into a theory of entrepreneurship.

Only recently, however, has the decentralization of knowledge been explicitly, and in considerable detail, applied in a legal or jurisprudential context.

Randy Barnett (1998) analyzes three fundamental 'knowledge problems' that a system of law ought to solve. The first-order problem of knowledge has two parts. The first is to ensure that the personal and local knowledge of individuals can be incorporated into the ways they use their own resources. The second part is to facilitate the incorporation of the relevant knowledge others (non-owners) have in the use of resources. The liberal conception of *justice* that involves the right of several (that is divided or private) property, the right of first possession and the right of freedom of contract comprises the legal framework to deal with the first-order problem of knowledge. The resulting individual and market-price incentives produce a system in which, by and large, decisions to use resources are based on a coordination of the various sources of knowledge in society.

The second-order problem of knowledge consists of the need to communicate the requirements of justice in such a way that, ideally, they are known to all the participants in society. While there are a number of important legal principles that are conducive to this, Barnett emphasizes two. The first is the requirement of 'compossibility,' that is, the consistency

of legal rules with one another. Effective communication of rules is obviously hampered when agents are being sent contradictory signals. The second is the avoidance of ad hoc decisionmaking. This is related to the point raised by Whitman below that for predictability legal rules must exhibit an intermediate degree of abstraction. Collectively, the factors necessary for the communication of justice are known as the *rule of law*.

The third-order problem of knowledge consists of the need to determine specific precepts or laws that carry out the general requirements of justice in particular, and possibly complex, circumstances. The ideas of justice and the rule of law underdetermine the specific laws that carry out their mandates. In other words, while justice and the rule of law definitely rule out certain types of specific commands, they do not uniquely determine a rule for each and every case that arises. The solution of this under-determinacy problem requires a case-by-case decision procedure – like common law adjudication – to generate appropriate rules in specific circumstances. To be successful, however, the rule-making mechanism must be informed and constrained by the values and precepts of justice and the rule of law.

Paternalism

The decentralization of factual knowledge also reveals the difficulties inherent in morals legislation. One purpose of morals legislation is to make people 'better' in terms of some vision of morality. As such, it is a form of paternalism – moral paternalism.

It is obvious that moral paternalism presupposes some coherent and accepted moral framework. There are important issues here, such as by whom must the moral framework be accepted? It is clear that it must be accepted by the paternalists. Must it also be accepted by those paternalized? People can obviously accept a morality that they are too weak to follow. But must they in principle accept it? If this is the case, then we must be able to distinguish between people who do certain things despite believing they are immoral and people who do things because they do not believe they are immoral. This does not seem to be an easy task.

A more radical problem with moral paternalism is a consequence of the fact that morality or ethics is not simply about precepts or maxims, it is about practical judgments in the particular circumstances of time and place (Rizzo, 2005). To engage in behavior that is properly moral, given any general moral framework (utilitarian, Kantian or natural law) due consideration must be given to the morally relevant facts of the situation. To the extent that the moral paternalist does not have access to these facts, he is incapable of effecting his own program: to make people morally better in spite of themselves. For reasons which we cannot go into here, moral paternalists lack this particularistic knowledge in a wide range of circumstances.

This argument against moral paternalism is not a higher-level moral argument about the inappropriateness of such compulsion. It is an argument about the impossibility (or, at least, high unlikelihood) of being able to achieve it in an effective manner.

Justice as a political and legal 'virtue' suppresses many of the particular factual details about a situation or dispute in the interests of clear, objective determinations (Rizzo, 2005). As such it is not justice as a benevolent deity or philosopher king might see it. It is not even justice as individuals might perceive it with respect to people whose circumstances they know well. It is an abstract virtue. The story of King Cyrus below is a good illustration of the abstract rather than particularistic nature of justice. Cyrus's tutor wants him to be, in this role, a judge and not a philosopher king.

Justice in this Hume–Smith sense structures the framework in which individuals may (or may not) pursue their own visions of the good life. By protecting people in their property, contractual relationship and physical integrity it allows them to pursue the personal moral aims they hold dear. People may have different moral aims even where they accept essentially the same moral framework. This is because the *particular* actions they perform (or forbear) will most often depend on personal or local factual circumstances to which they have unique access. Of course, people may also have different moral aims, in a pluralistic society, when they do not all accept the same moral framework. Each of these factors combines to produce different decisions about the moral course of action in any given case.

Nevertheless, even if we were to assume – as moral paternalists tend to do – that there really is only one correct moral framework and that those in charge have it, the case for moral paternalism founders on the inability of paternalists to solve the problem of decentralized factual knowledge.

Other forms of paternalism also founder on this knowledge problem. The 'new paternalism,' usually based on the findings of behavioral economics, is particularly vulnerable to this challenge. The object of new paternalism is to maximize the satisfaction of 'true' or 'deep-seated' preferences of the agents themselves. Due to problems of insufficient willpower, limited cognitive abilities and imperfect information, people do not always do what is in their own best interests as defined by their underlying preferences.

As Rizzo and Whitman (2009a) show in an extensive fashion, the particular factual circumstances an individual faces play a decisive role in determining what is in his 'best interests.' As soon as the analysis goes beyond simple models and simple illustrative circumstances, the knowledge problem of the new paternalist becomes intractable. Thus, the central economic problem of the new paternalism is that its program cannot be implemented in a serious way.

III. The Nature of Legal Rules

There has been much discussion about Hayek's emphasis on rules as integral to his conception of the common law. Rules are that which evolve in the common law process. The set of particular rules constitute the 'rule of law.'

The predictability of the law is enhanced by rules. But what does Hayek mean by rules? Better yet, what should he have meant by rules in order to get the conclusions he wanted?

In a basic sense, any legal rule is simply a *mapping* from certain events to legal consequences. The nature of the mapping is what we must explore if we are to gain insight into Hayek's system.

An important analysis of rules, published recently by Glen Whitman (2009), sheds light on these issues. Whitman distinguishes the degree of abstraction involved in mappings and hence in the nature of rules. He argues that only rules of an intermediate degree of abstraction satisfy Hayek's criteria for the rule of law generally and for predictability in particular.

A good way of thinking about 'mappings' in this context is to conceive of them as theories. The theories will have both factual and normative components. Certain facts may imply other facts like 'carelessness' and then carelessness may imply certain kinds of normative consequences like liability.

Rules with the highest degree of abstraction from the particular circumstances of time and place are the most general. It might be better to refer to these simply as *standards*. For example, the exhortation: Do 'justice' in the individual case is an example of pure standard – as are some manifestations of the 'negligence' approach. The application of a pure standard to a case provides the relevant parties with little guidance as to what will be considered in the ultimate decision. Thus, the standard does not advance the cause of predictability.

At the other extreme, rules of the lowest degree of abstraction from particular circumstances also produce relatively unpredictable outcomes. If a legal outcome depends on processing many factual details so that each case becomes (almost) *sui generis* it will be difficult for relevant parties to predict the outcomes because they do not have access to all of the data necessary. So the location of liability appears to agents with limited information as highly variable from case to case.

The suppression of many, though not all, of the specific characteristics of a case enhances predictability. Thus, the common law traditionally enforced contracts on criteria other than the reasonableness of the price at which something was transacted. We can easily see that if such a factor were made critical to the enforceability or validity of a contract, uncertainty would be increased. (In fact, this is one objection to the doctrine of substantive unconscionability which makes such considerations relevant.)

What is relevant is the presence of duress, fraud, the competence of the transacting party and so forth. In other words, a predictable contract rule has an intermediate degree of abstraction.

Predictability to Whom?

Before we leave this general topic it makes sense to pause and consider the various angles from which predictability can be viewed. There are three relevant parties in the legal context. The first, and most obvious, perspective is that of the individuals who are subject to the law. Can they predict the circumstances in which they will be subject to legal liability? This is important both because predictability will affect ex ante incentives as well as the fairness of holding individuals liable. This has been the classic rule-of-law consideration.

A second perspective, related to the first, is that of the judges themselves. Can a subsequent judge (or a lower court judge) apply precedents consistently? If the rule itself gives little guidance then a given judge will not know how a previous judge would have applied the rule. He is bound to abide by precedent and yet it is not, in the limit, a meaningful constraint.

A third perspective is from those agents (those governed by the law) trying to predict the behavior of other agents similarly governed by the law. If a legal rule does not offer much guidance in its applicability there is little reason to assume that all agents will agree on the content of the rule. This means that they will not agree on which behavior is permitted or penalized. Thus, they each will have difficulty predicting the behavior of others. Coordination of the activities of agents is one of the classic functions of law. It fails in the absence of predictability.

An Example of a Rule of Intermediate Abstraction

We alluded above to classic common law contract rules as embodying an intermediate degree