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**INTUITION, CUSTOM, AND
PROTOCOL:
HOW TO MAKE SOUND DECISIONS
WITH LIMITED KNOWLEDGE**

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It is my very great pleasure to be asked on this occasion to deliver the first Friedrich von Hayek lecture at the New York University School of Law. One need look no further than NYU's new Journal of Law & Liberty to have some sense of the enduring influence that Hayek has had on the intellectual temper of modern times. It is no mean feat for a native Austrian to migrate to England and then to the United States, while composing along the way some of the most influential works of the twentieth century. Like so many individuals of enduring greatness, Hayek defied the usual conventions that separate one academic discipline from another. Trained as an economist, he gravitated away from technical subjects to the more ethereal realm of political theory. Moreover, his work in this area was tempered by a real appreciation for the power of legal institutions to shape human behavior. A cross between the economist, the philosopher, and the lawyer, he addressed a wide range of issues that escaped writers who were tightly bound to a single discipline. He is generally regarded as the single most

important figure in the revival of classical liberalism in the twentieth century.¹

All the more remarkable, he did his best work by writing against the grain. At a time when central planning was regarded as the solution to the ills of a chaotic and disorganized market economy, Hayek marshaled his intellectual firepower to explain that the failures of central planning were not unfortunate lapses that could be cured by a more careful application of the socialist program.² He showed that the inability of any one person or bureau to assemble all information about everyone's (indeed anyone's) needs and desires doomed any system that relied primarily on the centralized distribution of goods and services to satisfy the full range of human needs.

I think his vindication on this frontier marks the most positive portion of the Hayekian legacy, and it is surely enough for one lifetime. But the great political successes should not be allowed to conceal the other side of the story. If socialism is wrong, then how do we find out what kind of system should be put into place? How do we figure out what social norms should be, and how do we decide which of these—all, some, or none—should be converted into legal norms? In dealing with this question, Hayek showed great disdain for what he termed the “constructivist” fallacy, by which he meant the idea that scholars outside the social system are able to generate a grand theory that unifies all of social experience under a single tent.³ Hayek was deeply suspicious of anyone's effort to formulate overarching principles that explained social life.

¹ For a full collection of his works, see *The Friedrich Hayek Scholars' Page*, <http://www.hayekcenter.org/friedrichhayek/hayek.html> (last visited Oct. 23, 2005).

² F. A. Hayek, *Socialist Calculation: The Competitive 'Solution'*, 7 *ECONOMICA* 125 (1940); F. A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945). The objects of his criticism were OSKAR LANGE & FRED M. TAYLOR, *ON THE ECONOMIC THEORY OF SOCIALISM* (Benjamin E. Lippincott ed., 1938) and HENRY D. DICKINSON, *ECONOMICS OF SOCIALISM* (1939); and, somewhat later, BARBARA WOOTTON, *FREEDOM UNDER PLANNING* (1945).

³ 1 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 27 (1973).

Neither a libertarian nor utilitarian be was in one sense the guiding principle of his work.

Yet what is put in the place of the two political philosophies that, for all their failings, have done enormous amounts of good in organizing and taming social behavior? Hayek took refuge in what could be termed a theory of social evolution. He believed we come to a form of “spontaneous order” that leads us to the right social answers through the accumulation of a large number of trial and error decisions made by individuals on the ground. His major illustration was his (oversimplified) account of how the law merchant evolved over time and across cultures independent of formal legal intervention: it is for that reason that he chose the title “Reason and Evolution” for the first chapter of *Law, Legislation and Liberty*.⁴ The law merchant (which he did not fully understand) was treated as an outgrowth of this spontaneous process and strong evidence of the evolution of legal norms prior to the intervention of the state.⁵ Even on this point, he overstated the extent of decentralized development relative to judicial pronouncement, but the challenges that the law merchant poses to the usual dichotomy between positive and natural law is not the main focus of this talk. Rather my concerns travel along a different path. To what extent does this system of spontaneous order, achieved by evolutionary change, give a sensible account of legal and social institutions?

In order to attack that question, I would like to examine the three sorts of devices that could be used to set up rules and procedures under which individual and collective choices are made. My main focus is on the processes by which knowledge is acquired, which then leads to the further question of what legal rules best harness the knowledge so acquired. In answering this inquiry I do

⁴ *Id.* at 8.

⁵ For a recent symposium on this subject see Symposium, *The Empirical and Theoretical Underpinnings of the Law Merchant*, 5 CHI. J. INT’L L. 1 (2004) My contribution is Richard A. Epstein, *Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 CHI. J. INT’L L. 1 (2004).

not think that we can come up with a univocal source for all decisions, so I will then distinguish three related ways of looking at knowledge: intuition, custom, and protocol.

To set the stage, let me adopt a form of indirect utilitarianism (which Hayek was loath to do) that helps us examine these methods of knowledge. One common view of utilitarianism is that it seeks to maximize net social benefits over social costs. Often utilitarian theorists take less care than they ought on the question of *whose* benefit or *whose* cost. But since in this context we are talking about broad rules of constant application, the distributional issue tends to drop out of the equation. All gains and losses are roughly proportional for individuals that operate behind some Rawlsian veil of ignorance (which is why that metaphor offers such a powerful heuristic). But the great insight is that the rules that work best by utilitarian standards do not have to be couched in utilitarian terms; nor do they have to be motivated by a conviction that they will maximize the greatest good of the greatest number. Rather, in many cases, these desirable social ends are best achieved by responses done for independent reasons at the micro level that generate beneficial results at the macro level. But by the same token, the path of aggregation is sufficiently perilous that we have to be cautious that these multiple processes will achieve that result.

So what key insight drives this form of indirect utilitarianism? I think that much of what is at stake here is captured in flawed but instructive form by Malcolm Gladwell's recent book *Blink: The Power of Thinking Without Thinking*,⁶ whose major theme is that we are able to make accurate decisions, often in the blink of an eye, by systematically filtering out information that looks to be relevant but in fact generates more trouble than it is worth. Gladwell's basic insight is that we have limited capacities and are better off concentrating on key features that are capable of quick assessment than running on at great length, seeking to juggle lots of

⁶ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

different observations into some grand whole. Although Gladwell never draws the connection, it should be obvious that his thesis is much like the Hayekian norm in which social evolution generates a spontaneous order without central planning.

The difficulty with this thesis, I think, is that it fails to observe the differences in the three terms that I placed in series in the title of the lecture: intuition, custom, and protocol. All of these embody the basic proposition that less is more in decision theory as in architecture. But they do so in different ways. No single approach that confuses each device with the other will do the job.

Intuition

The first of these elements is ordinary human intuition, which in many instances has played a powerful role in social theory. I will pass by any detailed discussion of the theory of self-evidence as it worked its way into the Declaration of Independence and note that the first half of the twentieth century witnessed the result of a strong theory of ethical intuitionism, associated with G.E. Moore⁷ and W.D. Ross,⁸ by which individuals were said to have certain “prima facie rights,” chiefly to bodily integrity and the enforcement of promises. Modern utilitarians like to deride this low-tech theory and prefer to explain the emergence of these rules as an effective means to secure and promote social well-being. But the rational reconstruction does not explain clearly why these more primitive norms have such a powerful draw on the minds of ordinary people, most of whom find their quest for moral guidance frustrated by the more learned utilitarian reformulation. This point was brought home to me by an incident some years ago at a Liberty Fund Conference, where at lunch I waxed on about some functional explanation for a given social rule—it matters not which. My interlocutor was an English professor from Wofford College who confessed that he did not follow the fine points of the argument. But

⁷ See generally G.E. MOORE, *PRINCIPIA ETHICA* (1903).

⁸ See generally W.D. ROSS, *THE RIGHT AND THE GOOD* (1930).

he said with complete confidence that he thought that a videotape of our conversation would allow him to secure my civil commitment in any state in the union. The jargon about social optimality fell on deaf ears.

It turns out, or so my friends in psychology say, that there is some reason to believe that most people exhibit a tone-deaf response to moral arguments that rely explicitly on generalized conceptions of social welfare. In this context I rely on an instructive review article by Jonathan Haidt.⁹ Individuals have to make decisions all the time, and they could not wait for the formulation of expected utility theory to get on with the business of their lives in caves and other prehistoric conditions. They had huge numbers of interactions that they had to process, and they would not succeed in their own productive labor if they had to calculate expected utilities for each activity undertaken. So they had to develop and internalize some quick rules of thumb that would give them a leg up in the business of life. Perfection and refinement is not the goal in such a system. Passable reliability, better than random outcomes, is all that can be expected. If the psychologists are to be believed, ordinary people are hard-wired, so that they have strong predispositions that allow them not only to judge others, but also to restrain themselves. The natural lawyers took this same basic view of human behavior. Some of these thinkers clothed the natural set of dispositions in their divine origins and took the position that the utility of man's basic nature was evidence of the benevolence of divine creation. But that religious orientation was not part of the original Roman view on the subject, which was much more naturalistic in origin.¹⁰ The basic model was that cooperative human behavior could not emerge in any social regime unless individuals had some bulwark against the relentless forces of Hobbesian self-interest. Any

⁹ Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCH. REV. 814 (2001). For my take on its implications for state of nature theory, see Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J. L., ECON. & POL'Y 1 (2005).

successful barrier against aggressive impulses could not depend on conscious decisions to adopt honorable behavior. Any such decisions could not withstand the temptation to which human beings are routinely subject. Basic behaviors have to be internalized, almost as a matter of stimulus and response, driven by deep hormonal instincts.¹¹ It was of course in tension with naked self-interest, and at times it would yield to desire. But that inborn instinct also allows individuals, chiefly through gossip, to articulate the relevant norms of behavior as they evaluate disputes that arise within their circle of friends and acquaintances. The social context is strong enough that they have to be able to persuade other individuals to go along with them. The relevant norms here do not kick in with the power of autonomic reactions, such as breathing, but their responses are highly structured nonetheless. The word “visceral” is a literal term in describing reactions to certain forms of improper conduct. Do it this way and you will have a knot in your gut, a pang of conscience, or whatever.

Just what were the dominant norms in cases of this sort? Jonathan Haidt summarizes them as follows. There is a norm of reciprocity, a norm of nonaggression, and a norm against disgust. These norms are not just philosophical abstractions, but are concrete guides to behavior as well.¹² For example, individuals who adopt the norm of reciprocity have to show trust toward other individuals. Similarly they have to be able to figure out, often in the blink of an eye, whether other people are worthy of their trust. Likewise, they learn to detect, and hence to avoid, individuals who exhibit aggressive or, broadly conceived, socially destructive

¹⁰ See JUSTINIAN, INSTITUTES, bk. 1, tit. 1 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987) (533).

¹¹ For a popular summary of modern research, see Robert Lee Hotz, *Anatomy of Give and Take*, L.A. TIMES, Mar. 18, 2005, at A1, describing experiments on trust in which the participants could not bring themselves to cheat on cooperation in the final round although it was in their narrow self-interest to do so.

¹² See generally Leda Cosmides & John Tooby, *Knowing Thyself: The Evolutionary Psychology of Moral Reasoning and Moral Sentiments*, in 4 BUSINESS, SCIENCE, AND ETHICS 91 (2004).

behavior. Stated more generally, individuals are in general drawn to others who do not violate these particular norms, which helped to establish the norms in small communities that had only the weakest centralized institutions associated with the Austinian vision of law as the command of the sovereign.

And how should we interpret these norms? As the foundation of much of the common law system of basic entitlements. It does not take a legal genius to see how the nonaggression principle morphs into the law of tort; how the reciprocity principle, down even to the doctrine of consideration, morphs into the law of contract; and how the norm against disgust evolves into the system of social prohibitions against various sexual and bodily practices, which bore a close relationship to procreation, on the one hand, and sexually transmitted diseases on the other.

There is little doubt in my mind that the nineteenth century political synthesis embraced all these norms, for the police power, as it was generally termed, made it clear that the state could regulate liberty (of contract) and property in the name of morals, a position that held firm until its reversal in the twentieth century and its revival in the twenty first¹³ with the succession of states that have enacted bans of gay marriage. These norms have real clout and they fit into the system of strong intuitions. Let yourself imagine a situation in which there is a violation of one or another of these norms, and your hard-wires send off all sorts of alarms. The system of prima facie rights has a tight normative connection to the psychological underpinnings of human behavior.

And it is just here that some of the shortfalls of intuitionism assert themselves. The two most important have a close relationship

¹³ For the traditional account, see ERNST FREUND, *THE POLICE POWER* (1904). For discussion, see WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). For the modern view that gave sexual relationships the preferred position of "intimate associations," see *Griswold v. Connecticut*, 381 US 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003), *overruling Bowers v. Hardwick*, 478 U.S. 186 (1986).

with each other. The first of these asks this simple question: if we use the term “prima facie right” to account for these intuitive relationships, how then do we flesh out the rest of the picture? There are two difficulties here, each of which has been faced by every legal system from the Roman law to the present.¹⁴ The first concerns the coverage of the basic prohibitions. Here are two obvious examples: does the prohibition against killing also extend to cases where someone lays traps for his victim, or sets poison in front of him? It seems clear to anyone who *reflects* about the issue that the original prohibition will lose much of its bite if these easy circumventions work. So the holes have to be plugged. But the question is, how far can one move from the original case before the analogies looked strained?

The second difficulty is every bit as great. One reason why we call the rights protected by these prohibitions prima facie rights is that on *reflection* it is clear that they are stated too broadly. All killings are not regarded as wrongful; some could be justified or excused by insanity or self-defense. And, therefore, any system has to ask how these corrections are worked into the basic pattern without undermining the force of the original prohibition altogether. Put these two points together and you have a hermeneutical project that required centuries of arduous labor to complete. But it is not just a coincidence that the inclination to undertake that kind of close examination of both text and structure is more a characteristic of ancient legal systems than of modern ones. They have fewer structural questions—infrastructure, interoperability, taxation—to worry about than we do. The corrective justice arguments that work so well in dealing with one-on-one cases often fall short when dealing with today’s provision of public goods and organization of network industries.

¹⁴ For the Roman approach, see the discussion of the Lex Aquilia in 1 JUSTINIAN, DIGEST, bk. IX, tit. 2 (Alan Watson ed. & trans., Univ. of Penn. Press 1998) (533); for my analysis, see generally Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992).

Without question, the classical scholars did a superb job in executing their long-standing program of correcting and refining these basic moral intuitions. Anyone who teaches ancient legal subjects, as I do, is always impressed with the deft treatment of particular cases, and the slow and orderly development of the law. For example, the basic classifications in such areas as bailments or finders developed by the classical lawyers remain the accepted rules today. Modern scholars have little desire to undo the results of these earlier efforts. Yet at the same time, there is, in general, a deep suspicion that the classical lawyers did not supply a *justificatory* apparatus equal to its assigned task. At every critical juncture in the argument, we are told that natural reason or natural justice is the explanation for the decision at hand.¹⁵ There is a clear sense in which these terms are intended to evoke some connection between the basic personality and temperament that nature endows in all human beings, for the biological element is certainly prominent in much of this early thought. Yet at the same time, there is little effort to explain how the preferred legal rules discharge their appropriate social function. The modern task of reinterpreting ancient legal rules is usually meant to supply, in anti-Hayekian style, some functional reason why the individual who takes first possession of some natural object becomes its owner. The various efforts to defend this rule sound very tinny all the way through Adam Smith, who envisioned the implied consent of mankind as the glue that holds us all together.¹⁶ The effort failed because it takes categories that do have relevance—consent is a powerful source of contractual obligations—and uses them in a somewhat fictional sense to cover situations where consent is in principle needed but in practice not available.

The modern notion of social improvement, in the Paretian sense of the term, really took much longer to emerge, and was not clear until the late nineteenth or even mid-twentieth century. Once

¹⁵ See, e.g., JUSTINIAN, *supra* note 10.

¹⁶ See ADAM SMITH, *Of Occupation*, in LECTURES ON JURISPRUDENCE 14 (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1766).

developed, it then tended to reinforce the old rules in many of their key applications. At this point if we look back at our three fundamental norms, the first two have fairly clear content, but the last one is much more complex. The prohibition against aggression is meant to cut out those negative sum games; that is, those in which the gains on the one side are not large enough to compensate for the losses on the other. Stopping these cases is critical because there is no cure, no magic offset, in large numbers. The more these destructive cycles take place, the greater the cumulative losses. If A kills B, the situation is not set aright if C kills D by way of vengeance, inviting further retaliation. The utilitarian justifications for that prohibition are so strong under every conceivable variation of the theory that the legal rules and their endless refinements show little movement in the last 2,000 or so years. Even rule adaptations that are attributable to technical innovations—death by laser beam or nuclear attack—are analyzed under the traditional framework. The advantage of the utilitarian approach is that it gives some help in figuring out the various exceptions and how they should be interpreted. Self-defense, or the threat thereof, is a way to reduce the initial incidence of aggression. But it is itself subject to sufficient abuse that the terms and conditions under which it is allowed are heavily circumscribed, just as the traditional law had it.

Parallel problems of explication also arise with respect to the obligations of reciprocity. The attractiveness of that norm lies in the win/win situations that it produces. The difficulty with the norm lies in the two major adjustments needed to translate that intuition into a desirable social state. The first of these addresses the defects in the process of contract formation. If that is defective, then it undermines our confidence that the win/win condition will hold. The second relates to possible negative external effects that can dwarf the private gain to the contracting parties. This last point is worthy of at least one brief elaboration. Contracts *magnify* the ability of individuals to do what they want: after all, gains from trade just mean that the combined efforts of two individuals yield an outcome that is greater than the sum of their individual efforts. So, if the

negative effects of certain conduct (e.g. murder) are large, then the contracts in service of that end will produce mutual gains to the transacting parties that will, regrettably, generate high social losses as well. Increasing the private gain simultaneously increases the social loss. For those contracts, we have negative words: combinations, conspiracies, trafficking, aiding, abetting, and the like. But notwithstanding these difficulties, the classical synthesis, which relied on working out the implications of the early intuitions, stands us in good stead today.

The last intuition on morals and distaste is in fact the hardest to harmonize with more modern functional norms. The fear of contagion, the inability to determine parentage, and the like did pose a serious threat to social organizations. Hence, there are a powerful set of taboos that grow up around some practices. Those taboos resonate powerfully today with some people, as with red-state opposition to gay marriage. But there is a second point of view which takes a more libertarian view of matters, and insists that all cases in this third category should be decomposed into cases that fall into either of the first two categories, so that gay marriage becomes in modern times a protected win/win transaction instead of an “offense against nature,” which is the instructive early term. So intuition ends up as a guide through this moral thicket, useful but limited. And in modern thought it is more likely to be displaced as two features come together: first, as the factual patterns in particular cases move further away from those that generated our bedrock intuitions, and second, as we develop more powerful functional theories. The point here is not unfamiliar—intuitions yield to protocols in many areas of life.

Custom

Let me now move on to the second area of discussion, that of custom. There is little doubt that this particular element of the Hayekian synthesis played a very powerful role in early thought. The natural lawyers did not place all their eggs in a single basket that defended natural reason. They also placed great stock in the

idea that the rules of nature were of broad application so that they could be found in virtually any society on the face of the globe.¹⁷ The implication was that any rule that could survive in so many different circumstances had to have tapped a sensitive nerve. Survival, therefore, was a crude proxy for utility. It may not pick the best of all rules to govern any situation, but it will certainly rule out the worst. It is, moreover, for that reason that the customary norm appealed to Hayek. It did not offer the false optimism that perfect optimality is attainable in setting up social institutions. It did, however, set up the more modest and defensible claim that its decentralized tendencies, more often than not, lead toward some form of efficient solution. The point here was that individuals who did not understand the mechanisms of efficient market organization could stand aside, and in many cases watch, as the right solution unfolded before their eyes in specific contexts. That local excellence managed to persist in relative isolation even when other sectors of social life became highly dysfunctional. Custom was in effect an invisible hand that shepherded organizations through their rough spots.

There are, moreover, two particular contexts in which it played a large role. One is in setting out (customary) property rights. Here we cannot rely on ordinary two-party contracts because all property relationships take place between a given individual owner who has exclusive rights to possess, use, and dispose, and the rest of the world, which is duty-bound to forbear from interfering with these rights. Custom takes center stage because real contracts fail because it is not possible for large numbers of dispersed individuals to enter into voluntary contracts. Custom thus becomes the loose surrogate for contract in which others respect the rights of owners, and, by those nice hard-wired instincts, have a better than even chance that others will respect

¹⁷ GAIUS, *THE INSTITUTES OF GAIUS*, bk. I, ¶ 1 (Francis de Zulueta trans., 1946) (170) (“[W]hat natural reason establishes among all men and is observed by all peoples alike, is called the Law of Nations, as being the law which all nations employ.”).

their rights as well. Once one person takes possession of a thing, others tend to back off from challenging their supremacy.

Yet here too we have to be aware of the question of the just-so story about the smooth evolution of customary norms. We need to pay some attention to several difficulties with the great weight we place on custom. The first is that frequently, discontinuous changes with respect to the external environment make it impossible to rely on any incremental system to achieve collective well-being. That is in one sense the moral of Harold Demsetz's account of the switch in property rights among the Indian tribes in Quebec.¹⁸ The huge external demands required that the hunters back off the first possession rule that was long sanctioned by common practice, and adopt a system of territories in order to deal with the problem of over-consumption. It is quite correct to think that non-government groups can respond to these changes in at least some circumstances. It is wrong to assume that they respond to them by speeding up the process of incremental change. In most cases, some coercive action by tribe or by state is needed to work the shift. Whether we speak of the change in property regimes in the Demsetz setting, or the highly divisive situation of the English enclosure, it behooves us to remember that the transitions in question are often bloody, and sometimes bloody-minded. And most importantly, one byproduct of these transitions is massive wealth shifts that provoke intense political outcry, precisely because no one is able to either compute the needed side payments or secure the political will to make the transfers. The role of custom in the generation of property rights is important, but it is no panacea. At some point, collective, purposive intervention has to take place. The sharp increase in demand for beaver pelts, for example, led to a centralized response to the common pool problem that the increased demand created. The Hayekian model is displaced by more systematic and centralized means, fraught with dangers as they are.

¹⁸ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

The same drift can be seen in the law of contract, which has within it a strong customary base. In one sense, there is much to commend about customs: if there is a standard way in which traders do business, then it would be most unwise for an outsider to decree that other transactional modes are better for the welfare of the parties. The Hayekian point was that the outsider may not understand how the insiders work; yet the insider might not be able to explain his own conventions to the doubter who stands outside the system. One role of custom in contract is that it asks courts and other outsiders to defer to the explicit terms that insiders write into contracts for use for their own businesses. It is also said that custom is the preferred way to fill gaps within written contracts, which allows the participants to save time in drafting and negotiating by following these background norms. This last point is somewhat trickier than the former, because it is always an open question whether the gap-fillers that courts use are as uniform as a system of customary law presupposes. But here the argument is quite simply one of second best: there is no opposition to freedom of contract. There is only an effort to make do until some explicit written term emerges that obviates the need for the judicial inquiry. Customary practices are weak, but they are better than nothing, and certainly better than judicial efforts to construct from whole cloth a default efficient set of arrangements.

Custom therefore can be used in two senses: it can refer to the standard terms that are written into contracts or to the usual background terms that govern in the absence of explicit terms. But an appeal to custom in either of these two senses in discrete transactions overstates its power in the area of its greatest strength: commercial transactions. The most powerful evidence for this point is that the economic role of contracts is not fully understood when they are treated as dyadic arrangements that govern only the relationships of the immediate parties to them. That understanding will work for goods that are bought for consumption, but not for goods that are purchased to be resold, or for the currency that is used to purchase these goods, which is then reused by sellers when

they enter the market as buyers. The entire system of trade depends critically on the ability to string transactions in cash and goods together, and this requires a degree of standardization to make discrete transactions interoperable, to use the modern phrase. That pressure toward standardization rears its head in both ancient and modern times. The ancient law had a wide range of contracts (e.g. *mutuum*) which presupposed a definition of *fungible* goods.¹⁹ The introduction of any system of weights and measures, of cash, or the definition of a barrel or cartload requires some degree of standardization, which is exceedingly hard to obtain by the decentralized trial and error methods associated with custom. These standardized devices moreover are not collusive or anticompetitive. Rather, the ability to make efficient comparisons facilitates both monopoly and competition by making both forms of business more efficient than they would be in the absence of standardization.

More generally, we know that the cycle of standardization is much more complex than this Hayekian model presupposes. Nothing is more common in emerging industries with rapid technology change than to have individuals whose functions are to establish, first, “best practices” for certain kinds of common tasks, and, second, precise standards for communication between machines whose interoperability is essential to technical advances. The use of these institutions, which can create problems of their own, is meant to both build on and displace the customary process. The advantage of these standards organizations is that they are often funded and organized outside the earshot of the government, so the dominance of one single player is minimized.

Typically, such organizations favor a single open form of architecture, so that the new standard is best understood as a common highway to which all industry participants have equal

¹⁹ The contract of *mutuum* is a loan for consumption that obligates the buyer to return the same type of good, without interest, that he borrowed. See GAIUS, *supra* note 17, bk. III, ¶ 90 (defining “*mutuum*”).

access. There is in this context always the risk that individual participants in these industry meetings will take advantage of this collaborative process, for example, by steering the collective body toward a standard that requires people to use their own undisclosed patents.²⁰ Matters of this sort can precipitate major lawsuits. But the key point here is not to determine how to resolve the individual cases, but to note that the entire process of commerce generates, by conscious design, these second-order organizations that build the common platforms on which the primary activities take place. Hayek was right to see that nongovernmental bodies often take over and discharge standard-setting functions associated with the state. But he was wrong to think that social drift is the dominant force behind these forms of behavior. Conscious design figures much more centrally into standard-setting than his account would allow.

There is, moreover, good reason why in the end standard-setting has to take this form. Recall that the initial set of human intuitions that were hard-wired stressed the importance of reciprocity. That element remains central in understanding the role of standard-setting organizations. But the intuition at most explains why merchants, either in isolation or in firms, participate on a cooperative basis in these activities. But the intuition as to which bus, port, or wire to use in some modern computer setting does not come from nature. It comes from an intimate and detailed knowledge within the field, knowledge that is attained only after years of hands-on experience. So the older sources of information give out, and more rational methods have to be used to supplement and update what went before. Choosing the right people and the right institutional frame will have a large role to play.

Protocols

There is next the question of what kinds of standards and rules groups will adopt in particular institutional settings. And this

²⁰ See *Rambus, Inc. v. Infineon Techs. AG*, 318 F.3d 1081, 1085 (Fed. Cir. 2003).

question leads me back to a theme that I have stressed for so many years. The more complex the world, the simpler the rules needed for it to operate successfully. The increased size of an economy means people have to transact at low costs with strangers. The uniquely tailored arrangements that are suitable for family connections do not work in this context. People have to be able to come together in much the same fashion as electrical outlets. There is a standard form of connection, but the appliances that attach can differ widely. The outsider looks at the connection, and the insider adapts the functionality free from external complications.

Institutions therefore look very different on the ground from the way in which lawyers think about difficult cases that make it through the entire system for appellate resolution. The objective of sound management in all lines of business is to make sure that simple tasks are correctly discharged. These tasks are usually highly repetitive, and they must be done correctly for the business to function. Establishing the right protocols is critical for the work to go forward: unless the simple tasks are regimented, the more complex matters of design and judgment can never be addressed. There are protocols for computers, for medicine, for improvisation, credit-scoring,²¹ and countless other areas. It is important in dealing with these protocols to see how they relate to the basic intuitions and customary rules that we have spoken of before. And they do have both critical similarities and differences.

The similarity goes to the way in which information is organized and presented. The word information literally means data points of one kind or another put “in formation” so that

²¹ *Credit Scoring*, FTC Facts For Consumers: Focus on Credit (August 2005), available at <http://www.ftc.gov/bcp/online/pubs/credit/scoring.pdf> (“Credit scoring is based on real data and statistics, so it usually is more reliable than subjective or judgmental methods. It treats all applicants objectively. Judgmental methods typically rely on criteria that are not systematically tested and can vary when applied by different individuals.”). For discussion, see Wendy Edelberg, *Risk-based Pricing of Interest Rates in Household Loan Markets* (Dec. 5, 2003), available at <http://www.federalreserve.gov/pubs/feds/2003/200362/200362pap.pdf>.

patterns emerge that allow for their successful manipulation. The intuitionist program has as one of its key elements the belief that the amount of information that we have to collect from certain situations consists of a smaller set of data points than we might have thought. Protocols may be generated in a different fashion from intuition, given the hard work involved. But they rely on the same technique of paring down the information used in making particular decisions. The point of Hayek and the modern blink types is that too much information gets in the way of making sound decisions, so we strip out many bits of *relevant* information, and, by using less, we get more.

But the way in which that culling takes place differs radically by context. Thus we know for example that little or no instruction is needed to reinforce the norms of reciprocity and nonaggression. The great risk is that people will migrate away from these norms even after they have proven their value. But protocols are the antithesis of intuition in the mode of their formation and in the particular tasks that they address. They pick up where intuitions drop off, and they only work when they are followed slavishly. Protocols are the antithesis of discretion. Here are two definitions of the term protocol, one from computers and one from improvisation, which tell the same tale from the vantage points of very different disciplines. The computer-based account reads:

An agreed-upon format for transmitting data between two devices. The protocol determines the following:

- the type of error checking to be used;
- data compression method, if any;
- how the sending device will indicate that it has finished sending a message;
- how the receiving device will indicate that it has received a message.

The commentary then continues: "There are a variety of standard protocols from which programmers can choose. Each has particular advantages and disadvantages; for example, some are simpler than others, some are more reliable, and some are faster."²² Note that protocols that are machine-based can tolerate a greater level of complexity than those that are applied directly by human beings, where simplicity earns a higher premium.

Here is what is said about improvisation:

Protocols—"long-established codes" determining "precedence and precisely correct procedure"—may seem antithetical to popular notions of improvised creativity. Interdisciplinary research into improvisation shows, however, that it typically occurs either within, or in close relation to, voluntary constraints. Pressing, for example, writes: "To achieve maximal fluency and coherence, improvisers, when they are not performing free (or 'absolute') improvisation, use a referent, a set of cognitive, perceptual, or emotional structures (constraints) that guide and aid in the production of musical materials." Attali writes extensively on the "codes" found in the production of music: "rules of arrangement and laws of succession" which provide "precise operability"²³

The critical point is that protocols and intuitions are generated by wholly different processes. Malcolm Gladwell's *Blink* presents an instructive example.²⁴ Gladwell describes the heroic efforts of Brendan Reilly of Cook County Hospital to implement

²² Webopedia, *What Is a Protocol?*, <http://www.webopedia.com/TERM/P/protocol.html> (last visited Oct. 24, 2005). Note the accurate description of the trade-off between simplicity and reliability on the one hand, and sophistication and error on the other. The empirical observation is that there is no dominant solution to these questions, but that the presumption should be set in favor of simplicity and reliability.

²³ Marshall Soules, *Improvising Character Jazz, the Actor, and the Protocols of Improvisation*, <http://www.mala.bc.ca/~soules/shepard/character.htm>. (last visited Oct. 24, 2005).

²⁴ GLADWELL, *supra* note 6, at 125.

some simple protocols that Dr. Lee Goldman had developed for physicians to sort cases of potential coronary disease. The recounted story is, however, the antithesis of the *Blink* thesis that it is supposed to support. The difficulty in this particular area is that intuitions, even those that experienced physicians hone over years of practice, just do not do a very good job in sorting out the cases. The doctors involved made all sorts of leaps and relied on all sorts of hunches to make their choices. Goldblum and Reilly relied on a triage method developed only after “hundreds of cases” were fed into a computer, which led to a three-part algorithm that asked whether the pain felt by the patient counted as unstable angina, whether there was fluid in the patient’s lungs, and whether the patient’s systolic blood pressure was below 100. Ignore everything else, and just stick to the protocol, which was designed to eliminate intuitive judgments. Here was a case of not thinking, period. Empirical tests showed that Goldblum’s algorithm triumphed “hands down” over the intuitions that it displaced. It did better in reducing false positives by not holding for special treatment patients who were not having a heart attack. It also excelled in predicting those who have heart attacks with an accuracy rate of 95 percent, as opposed to 75 to 89 percent by the old methods. That improvement is impressive in its own right, but it is all the more astounding when one considers that the doctors were able to achieve their high percentages under the intuitive method by heavily over-admitting patients. It is a matter of total dominance when one decision procedure simultaneously reduces both forms of error.

The emergence of this successful protocol supports the Hayekian view that a few simple factors are dispositive in complex situations. Simultaneously, it casts doubts on the ability of intuitions to work in difficult and complicated situations. The work to get the right three steps took years to accomplish, but the number of lives saved is very large. We need simple rules for a complex world, but we have to be sure that these rules are applied in discrete settings and that we have our attention fastened onto the

right simple rules. Rules of thumb that work well at sea may not work well on land.

Legal Implications

The previous discussion of protocols did not deal with legal situations, where the usefulness of simple rules is always challenged by the need to successively *refine* the outcomes that these rules generate. It is therefore not appropriate to conclude that all legal rules, regardless of context, can be as simple as intuitions and protocols. But simplicity should often be preferred nonetheless, although practice usually runs the other way. Here the most obvious area in which to see the difficulty is the legal rules that purport to regulate the transmission of information by penalizing those who do not supply what is required. We have a broad law of misrepresentation and add to it a set of complex obligations for disclosure. These embrace a number of areas, of which it is useful to mention a few here: the duty to warn in product liability cases, duty to disclose in security cases, and duty to disclose in informed consent situations. The older law on this question was quite minimalist on required disclosures, and usually put some portion of the burden on the recipient of the information to make further inquiries if more information were required. But one tendency in modern law is to permit the compilation of long lists of material information, and then to consider presumptions that could be introduced to help the plaintiff over the hump of deciding whether the particular information that was not supplied would have made some difference in the plaintiff's choices. This view treats the information that is missing as more important than the large amounts of information that is available from all sources.

One case that merits some particular attention was the open-and-obvious rule, which held that, for example, machine tools that did not have guards may be dangerous but that disclosure

rather than redesign or extensive warnings was sufficient.²⁵ The repudiation of that rule, which imposed a hard stop on liability in many cases, was paired with an understanding (which still holds today) that stringent liability is *prima facie* proper when concealed defects result in harm. The older open-and-obvious rule strongly applied to any situation where there was asymmetrical information; that is, the seller knew of some condition but the buyer did not. But most product cases do not involve intentional concealment, so here the strong liability for latent defects was justified on the ground that the seller had better ways to prevent or correct these. Yet the general protection against liability for open and obvious conditions allowed for a greater range of goods to be sold, some of which could in turn be subject to downstream adaptations by users, or in workplace settings, by their employers. It in effect put the decision on the party best able to prevent the harm in question. And it did not create any real incentive to corrupt the original manufacturing process, because the higher risk, if any, is known and will reduce the willingness to purchase.

The next generation of criticism questioned the belief that information transmission was the sole goal and argued that design changes should be imperative when warnings did not suffice. Harper and James, in a very influential passage, wrote shortly after *Campo*:

The bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the

²⁵ See, e.g., *Campo v. Scofield*, 95 N.E.2d 802, 804 (N.Y. 1950) (“If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law’s demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out, so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous.”) (citation omitted).

product is a carrot-topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knew the condition and since it was so readily avoidable they might find the maker negligent.²⁶

This argument influenced the New York Court of Appeals twenty-five years after *Campo* to jettison the open and obvious rule²⁷ in a decision that states the now-dominant position found in the Restatement (Third) of Torts: “The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff.”²⁸

Note here the new levels of complexity introduced into the situation which allow wiggle room, albeit less under the Restatement than under John Wade’s well-known formulation that made liability turn on a long list of factors.²⁹ Now one has to ask

²⁶ 2 FOWLER HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 28.5 (1956).

²⁷ *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (1976) (“Apace with advanced technology, a relaxation of the *Campo* stringency is advisable. A casting of increased responsibility upon the manufacturer, who stands in a superior position to recognize and cure defects, for improper conduct in the placement of finished products into the channels of commerce furthers the public interest.”).

²⁸ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. d (1998).

²⁹ John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973) (“If there is agreement that the determination of whether a product is unreasonably dangerous, or is not duly safe, involves the necessary application of a standard, it will, like the determination of negligence or of strict liability for an abnormally dangerous activity, require the consideration and weighing of a number of factors. I offer here a revised list of factors which seem to me to be of significance in applying the standard:

(1) The usefulness and desirability of the product – its utility to the user and to the public as a whole.

about feasibility, which in turn requires a calculation of costs and benefits. Yet no awareness is shown that the same piece of equipment might be used in different ways for different jobs (as is common with many machine tools), so that customization at the buyer level will trade off safety and efficiency better than any one-size-fits-all solution that a manufacturer could design into the product before sale. Moreover, if the original manufacturer is the cheaper installer, then he could offer the original buyer a set of options, with downstream selection, wholly without legal intervention. Yet, once the new standard is in place, then the list of factors is essentially unbounded on either side. This is best captured by the complex formula offered in the Wade risk/utility test, which has exerted immense influence over judicial decisions, but its main consequence is to sharply limit the number of cases where a defendant can obtain summary judgment. The reliability and complexity tradeoffs that are apparent to designers of computer protocols are lost on judges, who see only one half of the problem at most. Yet in the end, the Wade position cannot be sustained because of the utter lack of guidance that it gives in any situation where there are countless permutations of the safety/effectiveness tradeoff.³⁰

(2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.") (citations omitted).

³⁰ For my criticism, see Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469 (1987).

Hence, there is in many cases a creep back towards the older position in which the question of obviousness tends to loom quite large in the decision, even in courts that think it sensible to then ask the defendant to explain why leaving the obvious choice was the best design decision.³¹ There is a huge reluctance to treat the decisions as something to be made privately, once the information transfer has been completed. The legal evolution on this question is marked by a collective failure of nerve, which hardly shows the inexorable movement of common law judges to ever more efficient liability rules. The hard open and obvious rule will make mistakes in some cases. The more fluid rules of reasonableness carry with them the illusion that all these errors can be avoided. There is, moreover, no question that if the subtler risk/utility analysis were flawlessly performed it would replicate the open and obvious test in many cases, and deviate from it in at most a few. But in real-world settings, reliability in the broad run of cases counts for far more than some hypothetical ability of a heavily nuanced rule to get all the cases right—a postulate that it is easy to state in theory but hard to generate in fact. Quite simply, we are better off with a simple rule that gets 90 percent of the cases right than with a more complex rule that aspires to get 100 percent of them right only to miss on more than 10 percent. There is no reason to favor expensive rules that yield weak results. I have no doubt that the logic of protocols works to support the traditional rule over its modern alternative.

The more general proposition that follows from this illustration is that the usual sophisticated modern rules in all areas of life tend to do badly over the broad run of cases relative to simpler and sensible rules. The literature on intuition, custom, and protocol is not meant to say that social cost/benefit calculations are illegitimate. It is only meant to say that the indirect utilitarian approach trumps the more conscious effort at multi-factor decision-making, whether by courts or administrative agencies. Hayek did

³¹ *Linegar v. Armour of America, Inc.*, 909 F.2d 1150 (8th Cir. 1990).

not coin the phrase “simple rules for a complex world,” but his own thought, suitably refined, was one of the key factors that led me in that direction. We must always be aware of the limitations of intuitions, customs, and protocols. But by the same token, we should never lose sight of the huge benefits that they provide.