Constit Polit Econ (2008) 19:3–18
DOI 10.1007/s10602-007-9030-4

ORIGINAL ARTICLE

Discussion, construction and evolution: Mill, Buchanan and Hayek on the constitutional order

Sandra J. Peart · David M. Levy

Published online: 30 January 2008

Abstract The paper examines the views of Mill, Hayek, and Buchanan on the role of discussion in the constitutional order. For Mill and Buchanan, the constitutional order itself may be subject to discussion (and change). By contrast, Hayek made the case that the constitutional order is best left unarticulated, outside the realm of public debate and discussion. The question as Hayek posed it is whether there is a role for discussion in "choice of *law*" the way there is a role for discussion in the "choice of *legislation*." For Mill and Buchanan, the answer is yes; but for Hayek, the answer is no. Supposing, with Hayek, that law evolves as a recognized pattern, we inquire about whether the pattern is unique. If multiple sets of experiences or patterns co-exist in society, then any one pattern is an incomplete description of experience and the question arises of whether there is there now a role for the recognition and then discussion of other patterns or laws? We sketch out how a norm of generosity might eventually be brought into a constitutional order as justice, through a process of discussion. We suggest that Hayek's appeal to government to remedy institutional incompleteness or "degeneration" actually takes him quite close to Mill's position that discussion can serve to beneficently direct institutional change.

Earlier versions were presented at the 2006 History of Economic Society—ASSA meetings in Boston and the 2006 History of Economics Society in Grinnell. We thank Peter Boettke and Steve Horowitz for their helpful comments. Bruce Caldwell helped us clarify the argument. The errors which survive are our responsibility.

S. J. Peart (✉)
Jepson School of Leadership Studies, University of Richmond, Richmond, VA 23173, USA
e-mail: Speart@richmond.edu

D. M. Levy
George Mason University, Fairfax, VA 22030, USA
e-mail: DavidMLevy@gmail.com

Keywords Evolution · Law · Discussion · Mill · Hayek · Buchanan · Adam Smith · Justice · Generosity · Proverb

JEL Classification H10 · P48 · B25

1 Introduction

This paper examines the views of Mill, Hayek, and Buchanan on the role of discussion in the constitutional order. We link Hayek's criticism of Mill with Buchanan's criticism of Hayek, arguing that both disagreements turn on the role for discussion within the economic and political sphere. For Mill and Buchanan, the constitutional order itself may be subjected to discussion (and change). By contrast, Hayek made the case that the constitutional order is best left unarticulated, outside the realm of public debate and discussion. The question as Hayek posed it is whether there is a role for discussion in "choice of *law*" the way there is a role for discussion in the "choice of *legislation*." For Mill and Buchanan, the answer is yes; but for Hayek, the answer is no.[1]

Having emphasized the role of discussion in the constitutional order, we then turn to the idea of law in greater detail. Supposing, with Hayek, that law evolves as a recognized pattern, we inquire about whether the pattern is unique. If multiple sets of experiences or patterns co-exist in society, then any one pattern is an incomplete description of experience and the question arises of whether there is now a role for the recognition and then discussion of other patterns or laws? We follow this thinking up in Sect. 4, where we sketch out how a norm of generosity might eventually be brought into a constitutional order as justice, through a process of discussion. We show how the analysis can be applied to the example Buchanan developed in response to Hayek, that of the messy beach. Finally, we suggest that Hayek's appeal to government to remedy institutional incompleteness (Whitman 1998) or "degeneration" actually takes him quite close to Mill's position, that discussion can serve to beneficently direct institutional change.

Throughout our analysis, we focus on Hayek's views on the evolution of institutions, while acknowledging that Darwinism is most often considered in terms of the evolution of human beings.[2] Institutional evolution was, Hayek maintained, a matter of the application of ideas that pre-dated Darwin to the realm of institutions:

[1] We should emphasize at the outset that it is *not* our intention to claim that Hayek, as a public figure and intellectual, was not open to the discussion of his arguments and ideas. Quite the contrary. Hayek of course engaged in a great deal of discourse and debate, being fully willing to discuss his own ideas at every step of his career. We are grateful to Caldwell for reminding us of this distinction.

[2] For Hayek, Darwin's evolution of *individuals* is a continuation of classical economic thinking about *institutions*. Hayek reiterated this position 3 years later (1976, p. 67) and in the final volume of *Law, Legislation and Liberty* (1979, p. 154). Hayek traces such thought to Hume; see Hayek (1963, p. 111). Hayek cites Patten's *Development* as a definitive summary of the development of English thought; see Hayek (1973, p. 153). Patten's *Development* is Hayek's authority as he concludes his British Academy lecture on Mandeville. Hayek (1967a, p. 249): "I do not intend to pitch my claim on behalf of Mandeville higher than to say that he made Hume possible." Harrod's reaction to Hayek (1946), which argues that Hayek conflates Mandeville with Smith (Harrod 1946, p. 438), will turn out to be critical to the argument below.

> A nineteenth-century social theorist who needed Darwin to teach him the idea of evolution was not worth his salt. Unfortunately, some did, and produced views which under the name of 'Social Darwinism' have since been responsible for the distrust with which the concept of evolution has been regarded by social scientists. ... The error of 'Social Darwinism' was that it concentrated on the selection of individuals rather than on institutions ... (Hayek 1973, p. 23).[3]

As noted above, a key to Hayek's disagreements with both Mill and Buchanan is the role of discussion in the context of constitution making. For Hayek, discussion may derail the evolutionary process with all the nice properties that entails. Discussion of law can do very little good and a great deal of harm. By contrast, neither Mill nor Buchanan is predisposed to find that institutions evolve optimally. Consequently, both Mill and Buchanan allow that discussion may in fact do some good and not do a great deal of harm. We suggest that Mill and Buchanan reside squarely in a Smithian framework (and they depart from Hume) in which "generosity" fills in gaps in the development of "law" or contracts. Discussion is one means by which this is accomplished.

Our reconstruction of the differences between Mill and Buchanan on the one hand, and Hayek on the other, focuses on foundations. With Buchanan, we see Hayek as a "sophisticated" rather than a naive "cultural" evolutionist (1977, p. 327). In our reading of the evidence, Mill and Buchanan allow for the possibility of systematic differences in experience, so that there is no clear-cut favored evolutionary path; while Hayek does not.[4] When experience differs systematically, proverbial wisdom—whereby the experiences of the polity are summarized in a central tendency—may provide a starting point for discussion and institution-making.[5] Starting from a summary of experience, discussion of systematically different experiences might be used to overturn, revise, or update the polity's understanding of what's "best", and institutional change may be effected.

[3] Darwin's opposition to contraception, described in his 1877 letter to Bradlaugh, concerned both the evolution of individuals and the institution of marriage (Peart and Levy 2008).

[4] The question is, perhaps, one of overall emphasis. As we shall stress at the end of our paper, Hayek did come to the conclusion late in his career that not all evolved law is optimal. Whitman (1998) defends Hayek against the reading of evolutionary uniqueness which he argues is necessary for a movement from "is" to "ought." This is regarded as definitive by Caldwell (2000). Yet, while it is true that Hayek allows for multiple equilibria, he nonetheless dismisses these as practically irrelevant. See Hayek (1973, pp. 101–102): "The judge will thus often have to solve a puzzle to which there may indeed be more than one solution, but in most instances it will be difficult enough to find even one solution which fits all the conditions it must satisfy. The judge's task will thus be an intellectual task, not one in which his emotions or personal preferences, his sympathy with the plight of one of the contestants or his opinion of the importance of the particular objective, may affect his decision. There will be given to him a definite aim,...namely the aim of improving a given order of actions by laying down a rule that would prevent the recurrence of such conflicts as have occurred." But while it will rarely be the case that one judge finds two solutions, the possibility of two judges who each find a different solution remains.

[5] We agree with Buchanan that such constructivism does not extend to widespread remaking economic man (1977, p. 327). Mill, however, allows for such re-making on an individual and freely-chosen basis. See Peart–Levy 2005c.

2 Law, patterns, and discussion

In Hayek's account, law is the result of observation and pattern recognition, something that evolves and is in some sense beyond articulation or discussion:[6]

> The first of these attributes which most rules of conduct originally possessed is that they are observed in action without being explicitly known to the acting person in articulated ('verbalized' or explicit) form. They will manifest themselves in a regularity of action which can be explicitly described, but this regularity of action is not the result of the acting persons being capable of thus stating them (1973, p. 19)

As is well known, Hayek stresses the efficiency property of rule following as agents come to treat each other impartially.[7] But he takes a step beyond this to suggest that, in fact, rules function well "especially so long as" they remain outside the realm of discussion:

> every man growing up in a given culture will find in himself rules, or may discover that he acts in accordance with the rules–and will similarly recognize that he acts in accordance with rules–and will similarly recognize the actions of others as conforming or not conforming to various rules. This is, of course, not proof that they are a permanent or unalterable part of 'human nature' or that they are innate, but proof only that they are part of a cultural heritage which is likely to be fairly constant, especially so long as they are not articulated in words and therefore also are not discussed or consciously examined. (Hayek 1973, p. 19)[8]

[6] The distinction between "law" and "legislation" is critical for the question of the "rule of law." Can we have a complete "rule of law," i.e., "law" without gaps? Hayek (1967a, b, p. 102): "Law is not only much older than legislation or even an organized state: the whole authority of the legislator and of the state derives from pre-existing conceptions of justice, and no system of articulated law can be applied except within a framework of generally recognized but often unarticulated rules of justice. There never was and there never can be a 'gap-less'...system of formulated rules." There are gaps in Hume's "just" acts that are closed, at least to some extent, by Smith with his concept of "generous" acts (Levy–Peart 2004). We return to this below.

[7] Hayek (1976, pp. 65–66):

"The moral attitude which this order demands not only of the entrepreneur but of all those, curiously called 'self-employed', who have constantly to choose the directions of their efforts, if they are to be honestly according to the rules of the game, guided only by the abstract signals of prices and giving no preference because of their sympathies or views on the merits or needs of those with whom they deal. It would mean not merely a personal loss, but a failure to their duty to the public, to employ a less efficient instead of a more efficient person, to spare an incompetent competitor, or to favour particular users of their product. The gradually spreading new liberal morals, which the Open or Great Society demanded, required above all that the same rules of conduct should apply to one's relation to all other members of society—except for natural ties to members of one's family..."

[8] Hayek (1979, p. 163):

"Man did not adopt new rules of conduct because he was intelligent. He became intelligent by submitting to new rules of conduct. The most important insight which so many rationalists still resist and are even inclined to brand as a superstition, namely that man has not only never invented his most beneficial institutions, from language to morals and law, and even today does not yet understand why he should preserve them when they satisfy neither his instincts nor his reason, still needs to be emphasized. The basic tools of civilization–language, morals, law and money – are all the result of spontaneous growth and not of design, and of the last two organized power has got hold and thoroughly corrupted them."

Indeed, Hayek goes so far as to suggest that discussion is "counter-productive". This was, he held, especially true of the discussions of "social justice" that arose following the loosening of moral obligations in the transition to a market economy.[9]

To consider our case in some detail, we need a better account of the content of what Hayek refers to as "law."[10] In a sequence of articles and books beginning with the 1945 lecture "Individualism: True and False" and stretching beyond the three volume *Law, Legislation and Liberty* of the 1970s, Hayek distinguished between liberal thinkers who gave priority to spontaneously occurring "law" and those for whom legislation enacted by majority rule was all one need worry about. He called the former, "Continental liberals", and the latter, "English liberals." Continental liberals, he argued, identified law with legislation; they are said to be "constructive rationalists". The latter believe that law is the foundation of legislation in an evolutionary sense; they are adherents of "spontaneous order." The "Continental liberal," the "rationalist" of greatest concern to Hayek, was the great British empiricist, Mill.[11]

[9] Hayek (1976, p. 66):

"It was this unavoidable attenuation of the content of our obligations, which necessarily accompanied their extension that people with strongly ingrained moral emotions resented.. Yet these are kinds of obligations which are essential to the cohesion of the small group but which are irreconcilable with the order, the productive and the peace of a great society of free men. They are all those demands which under the name of 'social justice' assert a moral claim on government that it give us what it can take by force from those who in the game of catallaxy have been more successful than we have been. Such an artificial alternation of the relative attractiveness of the different directions of productive efforts can only be counter-productive."

[10] Perhaps this will help fill the gap noted by Gordon (1999, p. 13):

"Neither de Jouvenel nor Hayek explains how the doctrine of natural law is to accomplish this task... The specific content of natural law is contained in no document, and those who invoke it are free to proclaim whatever they have a mind to. ...the concept of natural law merely serves to increase the power of any institution whose members are bold enough to explain exclusive authority of interpret it."

[11] Hayek (1979, p. 178):

"It would seem, and is confirmed by Vile, *Constitutionalism and the Separation of Powers* (Oxford, 1967), p. 217, that Mill was in this respect the main culprit, though it is difficult to find in his *Essay on Government* a precise statement to that effect. But we can trace his influence clearly in his son where, for instance, Mill argues in *On Liberty* that 'that the nation did not need to be protected against its own will' (Everyman edn., p. 67)."

Two points ought to be made. First, with respect to Mill, it was not obvious to scholars of Hayek's generation that utilitarianism of the classical period assumed a median-based metric of well-being which requires sympathetic agency to avoid problems with majority taking. As a result of the controversy over *On Government* many implicit assumptions became explicit. (Peart–Levy 2005a, c).

Also, in Hayek's reading of Mill, he reverses Mill's position in the very text from which Hayek quotes. Mill is making precisely the same point for which Hayek argued, but Mill begins with the counterargument (quoted by Hayek), in order later to disagree with it. Here is Mill's summary of philosophy unguided by fact: "What was now wanted was, that the rulers should be identified with the people; that their interest and will should be the interest and will of the nation. The nation did not need to be protected against its own will. There was no fear of its tyrannizing over itself. Let the rulers be effectually responsible to it, promptly removable by it, and it could afford to trust them with power of which it could itself dictate the use to be made. Their power was but the nation's own power, concentrated, and in a form convenient for exercise. This mode of thought, or rather perhaps of feeling, was common among the last generation of European liberalism, in the Continental section of which it still apparently predominates. ..." (1859, I.¶ 2)

Now facts enter: "But, in political and philosophical theories, as well as in persons, success discloses faults and infirmities which failure might have concealed from observation. The notion, that the people have no need to limit their power over themselves, might seem axiomatic, when popular government was

Hayek's criticism of Mill turned on his perception that Mill was responsible for much of the collectivist policy making of the 20th century, policy making that in Hayek's view had resulted from unfruitful "discussion" of the constitutional order. In his conversation with Buchanan, Hayek attributed the "delusion" that democratic politics is sufficient to limit government authority to the British utilitarians, including Mill (Hayek and Buchanan 1978). Earlier, Hayek wrote that Mill's was a "false liberalism" that "always" tended towards "socialism or collectivism": "design theories necessarily lead to the conclusion that social processes can be made to serve human ends only if they are subjected to the control of individual human reason, and thus lead directly to socialism" (1946, p. 4).

The implication is that it would be far better simply to submit to the constitutional order, to law. Indeed the efficiency properties of rule following were stressed early on by Hayek. In the 1944 *Road to Serfdom* he asserted that one needed to "submit" to prices; these were unfit for discussion.[12] Beginning in the 1960s, he sketched an account of the inarticulate institution that underlies science itself.

> Until we have definite questions to ask we cannot employ our intellect; and questions presupposed that we have formed some provisional hypothesis or theory about the agents.
> Questions will arise at first only after our senses have discerned some recurring pattern or order in the events. It is a re-cognition of some regularity (or recurring pattern, or order), of some similar feature in otherwise different circumstances, which makes us wonder and ask 'why'? ... To such curiosity we owe the beginning of science. (1967, pp. 22–23)

So, patterns of behavior underlie the law that is so critical to society. These patterns need not be articulated by those who follows the precepts of law:

> In the instances so far quoted it will probably be readily granted that the "know how" consists in the capacity to act according to rules which we may be able to discover but which we need not be able to state in order to obey

Footnote 11 continued
a thing only dreamed about, or read of as having existed at some distant period of the past. ...In time, however, a democratic republic came to occupy a large portion of the earth's surface, and made itself felt as one of the most powerful members of the community of nations; and elective and responsible government became subject to the observations and criticisms which wait upon a great existing fact. It was now perceived that such phrases as "self-government," and "the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power." (1859, I.¶ 3).

[12] Khan (2005) remarks that "Islam" translates as "submission", and then he looks into the heart of the Hayekian enterprise. In Khan's reading, Hayek is doing much more than using an unusual word to describe what economists know as "price taking" behavior. For Hayek, according to Khan, one has to "take" the entire price system.

> them. The problem is, however, of much wider significance than will perhaps be readily conceded. If what is called the *Sprachgefühl* consists in our capacity to follow yet unformulated rules, there is no reason why, for example, the sense of justice (the *Rechtsgefühl*) should not also consist in such a capacity to follow rules which we do not know in the sense that we can state them. (1967, p. 45)

From this argument, follows Hayek's distinction between law and legislation in a liberal society. The conclusion he draws from the distinction between inarticulate law and articulate legislation is that the discussion of law can do very little good and a great deal of harm. Most famously and controversially, Hayek made this case in the oft-reprinted 1949 "Intellectuals and Socialism."

Here, the difference between Mill and Hayek becomes most pronounced. One of the points Mill made in *On Liberty* was that the discussion of poorly understood norms (Hayek's inarticulate law) would make them more effective.[13] For many liberals, regardless of what might divide them, law which is not articulated violates the deepest constitutional constraint. It is the hallmark of totalitarian systems that one can be charged with and convicted of violations of secret legislation.[14] So, for instance, Mill was the greatest speaker of his era for the cause of widespread access to contraceptive information. Such "discussion" became legal in Britain only once the conviction of Mill's disciples, Besant and Bradlaugh, for the crime of publishing an "obscene" tract on birth control, was reversed on appeal because the prosecution had failed to articulate what constituted the obscenity in the case. (Peart–Levy 2005b, 2008).

The difference between Hayek and Mill may of course be a result of different historical moments from which they surveyed their worlds. Outlook and emphasis obviously changed. Mill was optimistic about the outcome of discussion—seeing room for the improvement of the existing constitutional order and fearing that, if law and institutions are left alone, beyond the pale of discussion, little improvement will occur. By the mid 20th century, however, a great deal of the sort of constitutional change favored by Mill had obviously already been implemented.

[13] Mill (1859, 2 ii § 30):

"All languages and literatures are full of general observations on life, both as to what it is, and how to conduct oneself in it; observations which everybody knows, which everybody repeats, or hears with acquiescence, which are received as truisms, yet of which most people first truly learn the meaning, when experience, generally of a painful kind, has made it a reality to them. How often, when smarting under some unforeseen misfortune or disappointment, does a person call to mind some proverb or common saying, familiar to him all his life, the meaning of which, if he had ever before felt it as he does now, would have saved him from the calamity. There are indeed reasons for this, other than the absence of discussion: there are many truths of which the full meaning cannot be realized, until personal experience has brought it home. But much more of the meaning even of these would have been understood, and what was understood would have been far more deeply impressed on the mind, if the man had been accustomed to hear it argued pro and con by people who did understand it. The fatal tendency of mankind to leave off thinking about a thing when it is no longer doubtful, is the cause of half their errors. A contemporary author has well spoken of 'the deep slumber of a decided opinion.'"

[14] An anecdote from the Stalin era:

"In Germany, if it's forbidden, you may not. In England, if it is not forbidden, you may. In France, even it is forbidden, you may. In the USSR, even those things that are permitted are forbidden." (Adams 2005, p. 45).

Perhaps, then, it is not so surprising that Hayek's outlook was less optimistic about prospects for additional improvements in the constitutional order. At any rate, he seems to have concluded that additional discussion of law (though not of legislation) now had the potential to derail the good properties of institutional evolution and he allowed a role for discussion only when evolutionary gaps and institutional "degeneration" demonstrated to his satisfaction that evolution had failed.

This "context" explanation, however, fails to explain all. For Buchanan's historical moment of survey overlapped that of Hayek and yet Buchanan's position on this is closer to that of Mill than Hayek. It was precisely the issue of law without discussion, law as it evolves, which provoked Buchanan's criticism of Hayek; and in the process of answering Hayek, Buchanan came to a solution very much like that of Mill in *On Liberty*.

3 Law as proverb

Supposing, with Hayek, that law evolves as a recognized pattern, the question that emerges from the foregoing is whether the pattern is unique? If it is, then perhaps the issue of discussion is moot: there seems little point in discussing a pattern to which we are all subject. But if multiple sets of experiences or patterns co-exist in society, then any one pattern is an incomplete description of experience. So the question arises of whether law reflects the experience of the majority and whether there is now a role for the discussion of other patterns or laws? We now turn our attention to this step in the argument.

We begin by developing a more precise means to consider what Hayek meant by "pattern" or law. In previous work (Peart–Levy 2005c) we have argued that people rely on proverbial wisdom because proverbs carry information in addition to the "theories" of scientific experts. Here, we suggest that we might consider Hayek's "pattern" or "law" as a summary of experience akin to our "proverbial wisdom".

Consider Fig. 1 in which we locate three points, a, b, c, in XY space. They do not lie on a straight line. An expert might explain the XY relationship by computing a regression line which touches no point but summarizes all points. This would be OLS in Fig. 1. How can a non-expert make a rule out of observed behavior without such devices? Suppose there are a great many ordinary people each of whom might see different and unrelated behavior. We define what Hayek calls "patterns," and we call "anecdotal evidence," as the lines containing [a,b], [b,c], [a,c]. Which one of these patterns might become law?

Here is where Hayek is a little vague; however, there are suggestions that he believes that law results from the majority of observations.[15] This ties into our formulation quite neatly, as we have argued that selecting the median slope of the anecdotal evidence [MAE] would be akin to computing a regression by voting.

[15] Hayek (1973, p. 19):

"The first of these attributes which most rules of conduct originally possessed is that they are observed in action without being known to the acting person in articulated ('verbalized' or explicit) form. They will manifest themselves in a regularity of action which can be explicitly described, but this regularity of action is not the result of the acting person being capable of thus stating them." By "regularity" we believe Hayek means to suggest that these actions occur more often than not.

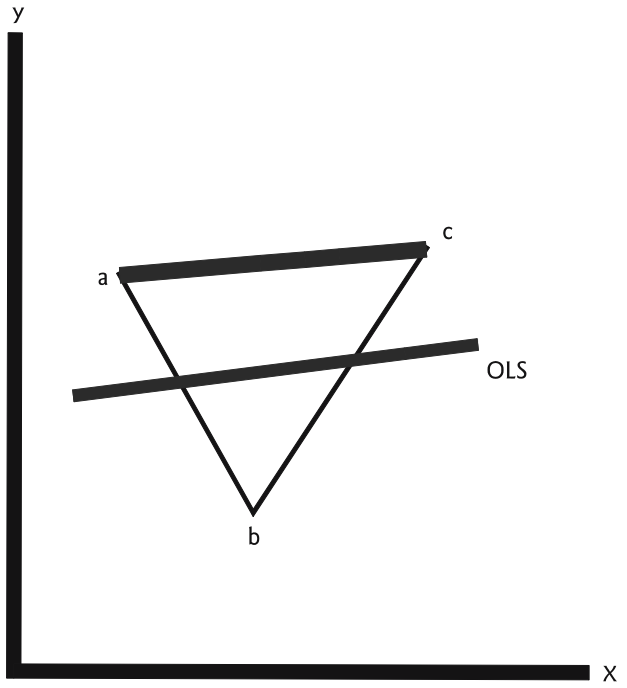

Fig. 1 Fitting a regression

Passing between majority rule and sample medians is a result which goes as far back as Galton in 1907 (Peart–Levy 2005c).

Corresponding to Hayek's concern about the vanity of the expert,[16] the assumption which keeps such devices as the MAE from being considered in the textbooks is that the expert's model has probability one status. When this is not so, and we allow for both random regime shifts and influential observations, then it is possible to construct cases where the median of anecdotal evidence provides a superior estimate to the textbook estimate of least squares or least absolute deviations regressions.

We have argued (Peart–Levy 2005c) that such technical devices as MAE are instantiated in the real world as "proverbs." This is consistent with Hayek's defense

[16] Hayek (1945, p. 521):

"It may be admitted that, as far as scientific knowledge is concerned, a body of suitably chosen experts may be in the best position to command all the best knowledge available—though this is of course merely shifting the difficulty to the problem of selecting the experts. What I wish to point out is that, even assuming that this problem can be readily solved, it is only a small part of the wider problem.

Today it is almost heresy to suggest that scientific knowledge is not the sum of all knowledge. But a little reflection will show that there is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of general rules: the knowledge of the particular circumstances of time and place. It is with respect to this that practically every individual has some advantage over all others because he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active co-operation."

of superstition found in the last appendix of *Fatal Conceit* (Hayek 1988). It is also consistent with Hayek's larger program of upholding the wisdom of regular people as opposed to experts that anecdotes were a tool of resistance in the Stalinist era.[17]

If Hayek's "law" is similar to our "MAE" then we can use this tool to work through the differences between Hayek on the one hand, and Buchanan and Mill on the other. In particular, while the MAE may have superior properties to the expert's models, there may be contenders for which line is "law," for the relevant proverbial wisdom.[18] In addition to majority experience, there may be *systematic minority* experience. Hayek's analysis suggests that law is unique in each society; he leaves little room for competing systematic experience. This is, perhaps, where Hayek diverges most radically from Smith (and from Mill and Buchanan), who all point to differences in majority and minority experience.[19] Without uniqueness of law in society, the survival of a society does not necessarily imply the law is best.

4 Just and generous acts

Supposing that laws or patterns of experiences are not unique, the next question is how to choose among them? In Sect. 2 above we emphasized the importance of discussion without disclosing what, exactly, might be achieved through discussion. Here, we explore how a norm of generosity might eventually be brought into a constitutional order as justice (as law) through a process of discussion.

Following Hume's argument, Hayek focused on one evolved convention, "justice." For Hume, justice is co-extensive with property and contract.[20] Smith also focused on justice, an exact duty that follows from the details of the contract. But what if the contract has gaps? Smith described an additional norm of generosity,

[17] "More jokes about anecdotes appeared in the 1940s when one could still be arrested for the 'anti-Soviet activity' of telling them. Most joke swapping was confined to close friends." Adams (2005, p. 48). Here is an especially grim anecdote about the infamous death canal: "'Who built the White Sea-Baltic Canal?' 'On the right bank–those who told anecdotes, on the left bank–those who heard them." (Adams 2005, p. 37).

[18] Proverbs sometimes, as is well known, offer competing wisdom: "Too many cooks spoil the broth", "Many hands make light work".

[19] The discussion in *Wealth of Nations* of the difference between liberal and austere morality would also challenge Hayek's survivalism on Smithian grounds. If Smith is correct that every great society has two codes of moral *practice*—a liberal for rich people and an austere for poor people—then from the prosperity of society one cannot tell which of the norms is superior. Levy and Peart (2008).

[20] Hume (1739, III, II, ii ¶ 21):

"Nor need we have recourse to the fictions of poets to learn this; but beside the reason of the thing, may discover the same truth by common experience and observation. 'Tis easy to remark, that a cordial affection renders all things common among friends; and that married people in particular mutually lose their property, and are unacquainted with the mine and thine, which are so necessary, and yet cause such disturbance in human society. The same effect arises from any alteration in the circumstances of mankind; as when there is such a plenty of any thing as satisfies all the desires of men: In which case the distinction of property is entirely lost, and every thing remains in common. This we may observe with regard to air and water, tho' the most valuable of all external objects; and may easily conclude, that if men were supplied with every thing in the same abundance, or if every one had the same affection and tender regard for every one as for himself; justice and injustice would be equally unknown among mankind."

which is motivationally close to justice. Where Hume had asserted that it was not irrational to save one's finger instead of sacrificing the finger in order to save the world,[21] Smith famously argued that such a trade would be so ungenerous as to be practically impossible. One does not, of course, have a well-defined contract to save the world; one acts as if one did.[22] Giving alms to the poor is not a just act for either Hume or Smith, but for Smith it is a generous one. In *Wealth of Nations* such poor people support themselves only by the beneficence of the well-disposed and generous.

If justice and thus contracts have gaps—contracts are incomplete—which are closed by generosity, then there is no reason to believe that a proposal to amend justice to include a generous act would involve "constructive rationalism." Instead, the discussion would entail the suggestion that what has evolved as a generous act be made into a just act. With incomplete contracts that follow from the gaps in justice there may well be Pareto improvements in the reformulation of justice to encompass more generous acts.

With this distinction between justice and generosity in mind, we can now show how Smith's generosity relates to Buchanan's beach example developed in response to Hayek. Buchanan's response relies on his long-standing doctrine (Buchanan 1959) that the role of the economist is to employ his knowledge to suggest Pareto-improving reforms.[23]

> Hayek properly stresses than many institutions that have emerged without conscious design are, nonetheless, efficient in the sense defined. But he fails to note that they must be subjected to the *same* tests as those which are to be classified as inefficient. There are surely many elements in the legal structure that may be provisionally classified as inefficient in the Pareto sense. For these, explicit and deliberately designed proposals for reform can be, and should be, advanced by those whose competence offers them an understanding of the principle of spontaneous coordination. Framework proposals for change can be, and should be 'constructed' and then presented for possible approval or disapproval by the members of the relevant public, the participants in the interaction. The economist can, and should, suggest the enactment of a rule, a law, that would impose fines on persons who litter the beach, a rule that is deliberately constructed for the attaining of an end result, the cleanliness of the beach. Buchanan (1977, p. 104)

Suppose we have a two sector economic model. There is a purely private household economy in which all decisions are made by parents who instruct their children about how to behave. The private households have customary rights to lunch on a beach. There are two goods. A view of the beach while lunching, and leisure. The production technology is simple. People lunch on the beach and enjoy

[21] Hume (1739, II, III, iii ¶ 6):

"'Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger. 'Tis not contrary to reason for me to chuse my total ruin, to prevent the least uneasiness of an Indian or person wholly unknown to me."

[22] For a detailed treatment of generosity in Smith, see Levy and Peart (2004).

[23] This is discussed in the larger context of Hayek's work in Gordon (1981).

the view. A canned lunch is provided by Heaven but, consistent with Hume's view of the matter, the junior Deity who creates lunches forgets to make the cans self-destruct. The view deteriorates as the cans accumulate. Picking up cans costs leisure.

With Buchanan, we start with a position of commons and we observe that many people do not pick up after themselves. Why not? All the leisure cost is borne by them, the deterioration of the view is borne by others. Unfortunately, not only did the junior Deity fail to create ecologically sensitive cans, He also failed to produce an economist who might suggest Pareto improvements.

Suppose we apply Smithian machinery to the problem. There evolves a moral judgment that children ought to pick up their own room as well as not to leave their jeans on the household commons. The spectator projects what is observed in the household to what is observed in the commons and forms a judgment about what is observed. The people who do not pick up their cans on the beach are judged to be "pigs." The generous behavior of picking up not only one's own cans but also the cans of others brings applause. This motivates a suggestion for change.

Here we jump to Mill. As Mill suggests, we cannot change the laws of production.[24] The decay of cans is fixed; the tradeoff between cans and leisure is fixed. Prayer has proven ineffective. What to do? We think about changes in distribution by changing the assignment of rights in the community.[25] Who gets to enjoy the view; who has to give up leisure to pick up the cans?

[24] Mill (1848, II.1¶ 1):

"The principles which have been set forth in the first part of this treatise, are, in certain respects, strongly distinguished from those on the consideration of which we are now about to enter. The laws and conditions of the Production of wealth partake of the character of physical truths. There is nothing optional or arbitrary in them. Whatever mankind produce, must be produced in the modes, and under the conditions, imposed by the constitution of external things, and by the inherent properties of their own bodily and mental structure. Whether they like it or not, their productions will be limited by the amount of their previous accumulation, and, that being given, it will be proportional to their energy, their skill, the perfection of their machinery, and their judicious use of the advantages of combined labour. Whether they like it or not, a double quantity of labour will not raise, on the same land, a double quantity of food, unless some improvement takes place in the processes of cultivation. Whether they like it or not, the unproductive expenditure of individuals will pro tanto tend to impoverish the community, and only their productive expenditure will enrich it. The opinions, or the wishes, which may exist on these different matters, do not control the things themselves. ..."

[25] Mill (1848, II.1¶ 2):

"It is not so with the Distribution of wealth. That is a matter of human institution solely. The things once there, mankind, individually or collectively, can do with them as they like. They can place them at the disposal of whomsoever they please, and on whatever terms. Further, in the social state, in every state except total solitude, any disposal whatever of them can only take place by the consent of society, or rather of those who dispose of its active force. Even what a person has produced by his individual toil, unaided by any one, he cannot keep, unless by the permission of society. Not only can society take it from him, but individuals could and would take it from him, if society only remained passive; if it did not either interfere en masse, or employ and pay people for the purpose of preventing him from being disturbed in the possession. The distribution of wealth, therefore, depends on the laws and customs of society. The rules by which it is determined, are what the opinions and feelings of the ruling portion of the community make them, and are very different in different ages and countries; and might be still more different, if mankind so chose."

It is not clear that Buchanan's fines would be chosen. Perhaps only an economist watching the situation from the outside would see this neat solution. If the community were divided between adherents of Mill's philosophy and those advocating the doctrine of his one-time friend and long-time debating partner, Thomas Carlyle, perhaps they might agree that the "gospel of labor" fallen into disuse with the abolition of slavery, could be brought back into service on an egalitarian basis. Householders could be randomly chosen to toil on the beach.

How this might fall out, each proposed system of rights, each possible system of justice, would have consequences, including production consequences, that need to be considered and discussed. And of course, as Mill wrote in his *Principles*, there is no reason to believe that the consequences of the change in distributional rights would be understood when it was effected.[26] The point, however, is that discussion may indeed bring about institutional change that makes the community better off.

5 "Degeneration"

Despite Hayek's position outlined above, that law lies outside the scope of discussion, debate or reform, the final volume of *Law, Legislation and Liberty* reads as if there is nothing worthy of respect in existing institutions.[27] Hayek's writing here could hardly be described as "panglossian." (Whitman 1998) "Progress" has reversed and he worried about the end of civilization itself:

> What I have been trying to sketch in these volumes (and the separate study of the role of money in a free society) has been a guide out of the process of degeneration of the existing form of government, and to construct an intellectual emergency equipment which will be available when we have no choice but to replace the tottering structure by some better edifice rather than resort in despair to some sort of dictatorial regime. (1979, p. 152)

To solve this government failure we need government, and government presupposes design.

[26] Mill (1848, II 1 ¶ 3):

"Human beings can control their own acts, but not the consequences of their acts either to themselves or to others. Society can subject the distribution of wealth to whatever rules it thinks best: but what practical results will flow from the operation of those rules, must be discovered, like any other physical or mental truths, by observation and reasoning." This conclusion to Mill's celebrated distinction between "production" and "distribution" is not quoted by Hayek in a series of attacks on Mill's competence on the basis of a purported independence of distribution and output, e.g., Hayek (1988, p. 93). Here's how Hayek reports Mill: "It is simply wrong to conclude that 'the things once there', we are free to do with them as we like, *for they will not be there* unless individuals have generated price information by securing for themselves certain shares of the total."

[27] Hayek (1979, p. xiii):

"When the present volume leads up to a proposal of basic alteration of the structure of democratic government, which at this time most people will regard as wholly impractical, this is meant to provide a sort of intellectual stand-by equipment for the time, which may not be far away, when the breakdown of the existing institutions becomes unmistakable and when I hope it may show a way out. It should enable us to preserve what is truly valuable in democracy and at the same time free us of its objectionable features which most people still accept only because the regard them as inevitable."

> Government is of necessity the product of intellectual design. If we can give it a shape in which it provides a beneficial framework for the free growth of society, without giving to any one power to control this growth in the particular, we may well hope to see the growth of civilization continue. (1979, p. 152).

The closing paragraph of *Law, Legislation and Liberty* brings us back to the "Abuse of Reason" project in which the quarrel with Mill began:

> We ought to have learnt enough to avoid destroying our civilization by smothering the spontaneous process of the interaction of the individuals by placing its direction in the hands of any authority. But to avoid this we must shed the illusion that we can deliberately 'create the future of mankind', as the characteristic hubris of a socialist sociologist has recently expressed it. This is the final conclusion of the forty years which I have now devoted to the study of these problems since I became aware of the process of the Abuse and Decline of Reason which has continued throughout that period. (1979, p. 152).

Society needs to begin discussion of a new institutional design. On what basis shall the discussion proceed? Mill's answer would be the perceived happiness of individuals. This of course is precluded by Hayek.[28] And although Hayek is an unabashed adherent of Karl Popper's "piecemeal social engineering" when one worries about dictatorship, in this case of degeneracy it is not clear that mere "tinkering" suffices.[29]

If we renounce utilitarian guidance, how might we proceed? Here is how the argument might be reconstructed using the machinery of Smith and Mill. From time $t = 1$ to $T - 1$ morals and institutions evolved together in such a way that institutions are judged to be "good." At T, something happened to the institutions to cause them to degenerate, but morals continue as before. Thus, at $T + 1$ the institutions are judged "bad." This judgment offers the imperative for a discussion of reform. To get out of evolution failures, we require social direction by discussion.

[28] Hayek (1979, p. 163):

"Although the Left is still inclined to brand all such efforts as apologetics, it may still be one of the most important tasks of our intelligence to discover the significance of rules we never deliberately made, and the obedience to which builds more complex orders than we can understand. I have already pointed out that the pleasure which man is led to strive for is of course not the end which evolution serves but merely the signal that in primitive conditions made the individual do what was usually required for the preservation of the group, but which under present conditions may no longer do so. The constructivistic theories of utilitarianism that derive the now valid rules from their serving individual pleasure are therefore completely mistaken. The rules which contemporary man has learnt to obey have indeed made possible an immense proliferation of the human race. I am not so certain that this has also increased the pleasure of the several individuals."

[29] Hayek (1979, p. 167):

"And since we owe the order of our society to a tradition of rules which we only imperfectly understand, all progress must be based on tradition. We must build on tradition and can only tinker with its products." Whitman (1998) makes the useful point that if Hayek is to be saved by appeal to multiple equilibria then there is no reason to believe that changes in the legal system will be small. Indeed, when multiple equilibria exist local methods which suppose small changes of the sort introduced in the "marginalist revolution" fail. Levy (1988). Classical methods which suppose rule-guided behavior might, however, survive, Peart–Levy (2005c).

This seems consistent with Hayek's position that "grown law requires correction by legislation."[30]

The problem of uniqueness returns. If there are multiple evolutionary norms—there is justice and generosity at each moment in time—then at each moment in time acts might be judged as "bad." Just acts could be disapproved of for being insufficiently generous or generous acts could be criticized for being unjust. We have returned once again to discussion and Mill. When Hayek argues that to fix "degeneration" or an evolutionary "impasse" we need institutional discussion and design, he has in fact come quite close to Mill. Having allowed that undirected evolution might be judged a failure, Hayek now opens the way for discussion.

6 Conclusion

From careless to careful commons, from generosity to justice, all via discussion. This is the means by which the polity evolves for Mill and Buchanan and, nearer the end of his career, for Hayek. It takes what was vague and generous and makes that precise and just. And the political reform is by means of the sort of free political discussion defended by Mill in *On Liberty*. People observe various actions, form judgments about them, and lament with others when they see the acts too rarely. What a free community might do is start somewhere, take a chance and see what happens. And then talk again. It need not wait until a dictator appears to begin the discussion.

References

Adams, B. (2005). *Tiny revolutions in Russia: Twentieth-century Soviet and Russian history in anecdotes*. New York, London: Routledge.

[30] Hayek (1973, p 88):

"*Why grown law requires correction by legislation* The fact that all law arising out of the endeavour to articulate rules of conduct will of necessity possess some desirable properties not necessarily possessed by the commands of a legislator does not mean that in other respects such law may not develop in very undesirable directions, and that when this happens correction by deliberate legislation may not be the only practicable way out. For a variety of reasons the spontaneous process of growth may lead into an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation."

"There are several other reasons for this. One is that the process of judicial development of law is of necessity gradual and may prove too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances. Perhaps the most important, however, is that it is not only difficult but also undesirable for judicial decisions to reverse a development, which has already taken place and is then seen to have undesirable consequences or to be downright wrong. The judge is not performing his function if he disappoints reasonable expectations created by earlier decisions. Although the judge can develop the law by deciding issues which are genuinely doubtful, he cannot really alter it, or can do so at most only very gradually where a rule has become firmly established; although he may clearly recognize that another rule would be better. ..." This passage is stressed by Whitman (1998, p. 48).

Buchanan, J. M. (1959). Positive economics, welfare economics, and political economy. *Journal of Law and Economics, 2*(October), 124–138.
Buchanan, J. M. (1977). Law and the invisible hand. *Moral Science and Moral Order. Volume 17 of The Collected Works of James M. Buchanan*. Indianapolis: Liberty Fund, 2001.
Caldwell, B. (2000). The emergence of Hayek's ideas on cultural evolution. *Review of Austrian Economics, 13*, 5–22.
Gordon, S. (1981). The political economy of F. A. Hayek *Canadian Journal of Economics, 14*(August), 470–487.
Gordon, S. (1999). *Controlling the state: Constitutionalism from ancient Athens to today*. Cambridge: Harvard University Press.
Harrod, R. (1946). Professor Hayek on individualism. *The Economic Journal, 56*(September), 435–442.
Hayek, F. A. (1945). The use of knowledge in society. *American Economic Review, 35*, 519–530.
Hayek, F. A. (1946). Individualism: True and false. *Individualism and Economic Order,* University of Chicago Press, 1948.
Hayek, F. A. (1949). The intellectuals and socialism. *Studies in Philosophy, Politics and Economics*. Chicago: University of Chicago Press, 1967.
Hayek, F. A. (1963). The legal and political philosophy of David Hume. *Studies in Philosophy, Politics and Economics.* Chicago: University of Chicago Press, 1967.
Hayek, F. A. (1967a). Dr. Bernard Mandeville. *New Studies in Philosophy, Politics, Economics and the History of Ideas*. Chicago: University of Chicago Press, 1978.
Hayek, F. A. (1967b). The results of human action but not of human design. *Studies in Philosophy, Politics and Economics*. Chicago: University of Chicago Press, 1967.
Hayek, F. A. (1973). *Law, legislation and liberty: Rules and order*. Chicago: University of Chicago Press.
Hayek, F. A. (1976). The atavism of social justice. *New Studies in Philosophy, Politics, Economics and the History of Ideas*. Chicago: University of Chicago Press, 1985.
Hayek, F. A. (1979). *Law, legislation and liberty: The political order of a free people*. Chicago: University of Chicago Press.
Hayek, F. A. (1988). *The fatal conceit: The errors of socialism*. In W. W. Bartley III (Ed.) Chicago: University of Chicago Press.
Hayek, F. A., & J. M. Buchanan. (1978). *A conversation between Frederick von Hayek, PhD. Economics and James Buchanan, Professor VPI*. San Jose: Chitester.
Hume, D. (1739). *A treastise of human nature*. http://www.ecn.bris.ac.uk/het/hume/treat2.htm
Khan, M. A. (2005). On Hayek's *Road to Serfdom*: 60 Years later. *European Journal of Political Economy, 21*(December), 1026–1041.
Levy, D. M. (1988). Utility-enhancing consumption constraints. *Economics and Philosophy, 4*, 69–88.
Levy, D. M., & Peart, S. J. (2004). Sympathy and approbation in Hume and Smith: A solution to the other rational species problem. *Economics and Philosophy, 20*, 331–349.
Levy, D. M., & Peart S. J. (2008). Adam Smith & his sources: The evil of independence. *Adam Smith Review, 4*.
Mill, J. S. (1848). *Principles of political economy with some of their applications to social philosophy*. In W. J. Ashley (Ed.), 1909, 7th ed. London: Longmans, Green and Co. http://www.econlib.org/library/Mill/mlP.html
Mill, J. S. (1859). *On liberty*. 1869. 4th ed. London: Longman, Roberts, & Green Co. http://www.econlib.org/library/Mill/mlLbty.html
Peart, S. J., & Levy, D. M. (2005a). A discipline without sympathy. *Canadian Journal of Economics, 38*, 937–954.
Peart, S. J., & Levy D. M. (2005b). Happiness, progress and the 'Vanity of the Philosopher': The trial of Annie Besant and Charles Bradlaugh. http://www.econlib.org/library/Columns/y2005/PeartLevymalthus2.html
Peart, S. J., & Levy, D. M. (2005c). *The 'Vanity of the Philosopher': From equality to hierarchy in post-classical economics*. Ann Arbor: University of Michigan.
Peart, S. J., & Levy, D. M. (2008). Darwin's unpublished letter at the Bradlaugh-Besant trial: A question of divided expert judgment. *European Journal of Political Economy*.
Whitman, D. G. (1998). Hayek contra pangloss on evolutionary systems. *Constitutional Political Economy, 9*, 45–66.