ABSTRACT MORALITY FOR AN ABSTRACT ORDER

Liberalism’s Difficult Problem

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Abstract

The first part of this Article outlines a conception of “the market” as an abstract and complex emergent order that is unplanned and has no specific ends. I draw on major classical liberal thinkers to elaborate this picture in order to emphasize the role that such a description plays in the liberal case for a market order. The second part describes in broad outline the kinds of rules needed to sustain the market. These rules can be reasonably described as “abstract.” The third part connects abstract moral and legal rules with a psychological framework known as construal-level theory. This framework usefully connects the degree of abstraction or level at which a problem is construed with the evaluation and judgments of agents, including judges, litigants and the general public. I argue that beneficence (generosity) is a concrete virtue and justice is an abstract one. In a concrete construal of a moral or legal problem the tendency is to evaluate and decide on the basis of the concrete virtue rather than the abstract. The fourth and last part illustrates the general issues by discussing two relevant legal examples: the police power and the contract doctrine of unconscionability. I also illustrate the interplay between special interests and the benevolent attitudes of people spurred on by low-levels of problem construal.

The possibility of men living together in peace and to their mutual advantage without having to agree on common concrete aims, and bound only by abstract rules of conduct was perhaps the greatest discovery mankind ever made.

-Friedrich A. Hayek

Two individuals are walking down Bleecker Street in New York City’s Greenwich Village. One is an economist and the other is a humanities professor. They see that a nice little gift shop has gone out of business after about a year. They economist says: “Well, it is all for the better. They sold upscale gift items mainly for tourists. There was insufficient demand for this kind of thing –

1 Unfortunately, the critically important terms “abstract,” “complex” and “emergent” do not have unique definitions in either the philosophical or economics literature. I hope to make clear what I mean by each term both through context and marking out the key characteristics as we proceed.

tourists usually want cheaper items. So it is a good thing they went of business. Now the scarce commercial real estate in a prime area will be more efficiently allocated.” The humanist is a bit taken aback: “But what about the charming family that operated the store? They all pitched in and worked long hours to make it work. I always feel bad when I see small business people fail. Maybe resources will be better allocated; but that is so abstract. I feel for the people involved.”

Notice that the humanist did not advocate commercial rent control or a small business subsidy or any other intervention in the free market. He just expressed his first caring reaction. He felt bad about the concrete individuals who ran the store. At the cost of possible misunderstanding, let me suggest that this is where the classical liberal’s problems begin.

The Plan

In the first part we outline a conception of “the market” as an abstract and complex emergent order that is unplanned and has no specific ends. We draw on some major classical liberal thinkers to draw this picture to emphasize the role that such a description plays in the liberal case for a market order. The second part describes in broad outline the kinds of rules needed to sustain the market. These rules can be reasonably described as “abstract.” In the third part, we connect abstract moral and legal rules with a psychological framework known as construal-level theory. This framework usefully connects the degree of abstraction (level) of construing a problem with the evaluation and judgments of agents, including judges, litigants and the general public. I argue that beneficence (generosity) is a concrete virtue and justice is an abstract one. In a concrete construal of a moral or legal problem the tendency (or “bias”) is to evaluate and decide on the basis of the concrete virtue rather than the abstract. In the fourth part, I illustrate the issues of the previous parts by discussing two relevant legal examples: the police power and the doctrine of unconscionability. I also illustrate with regard to the first example the interplay between special interests and the benevolent attitudes of people spurred on by low-levels of problem construal.

I. What is the Market?

The question before us is not what any particular market is – the market for chickens, the market for tourist items, and so forth. The question is: What is this thing called “the Market” or “the Market Economy”? One important strain of thought in the intellectual history of liberalism, perhaps culminating in the work of F.A. Hayek, has explored the issues involved in identifying the subject matter studied by economists or, more generally, by social theorists. The Scottish Enlightenment philosophers did not recognize any sharp division between the study of

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3 Hereinafter I use these terms without quotation marks or capitalization.
society, particularly the “great” or extended social order, and the study of a system of commercial exchanges. Society and economy were closely interwoven. Certain general principles applied to the study of each.

To identify the subject-matter of social thought intellectual effort is required. The objects of study are not immediately or intuitively known. Although all perception involves some background abstraction (we cannot point to a chair without some prior concept of a chair), some entities require the employment of a fairly high level of abstract thought simply to identify them. Not all such abstractions have counterparts in the real world but there are important abstractions in the social sciences, particularly in economics, that have. My claim is that the market is an entity of a fairly high order of abstraction that does have a counterpart in the real world. It describes the general pattern of actual exchange relations that are at the heart of a liberal social order.

In the following sections I will discuss some of the issues that have arisen in the identification of liberalism’s object of study. My intent is not to be comprehensive but to show briefly the broad intellectual evolution that has led up to the characterization of the market as an abstract order and a complex system.

1. Adam Ferguson and Adam Smith

For our purposes the recognition that society or the market is an abstract entity begins with the Scottish Enlightenment thinkers. In the work of Adam Ferguson, for example, the complexity of the societal interrelations is joined to the difficulty of comprehending them and thus of grasping the idea of society itself:

Those establishments [of society] arose from successive improvements that were made without any sense of their general effect; and they bring human affairs to a state of complication, which the greatest reach of capacity with which human nature was ever adorned, could not have been projected; nor even when the whole is carried in execution, can it be comprehended in its full extent.4

This picture was considerably elaborated by Adam Smith’s subsequent discussion of specialization and the division of labor. His analysis explained far more than the improved productivity of labor and the increase in wealth engendered by the growth of commerce. Smith’s famous dictum that “the division of labor is limited by the extent of the market” made us think of society as an extended order of interrelations. Under a regime of free trade, a

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person in one part of Scotland could benefit unknown individuals in far off countries in unknown ways. A Scotsman was in a relationship of mutual benefit with people he did not know and in ways he could not imagine. The chain of benefit grew longer and became more complex due to the indirection of international trade. A sweater made in Scotland might be sold to a Frenchman with the proceeds from the sale of the sweater being used to buy Italian wine. In turn the proceeds of that sale might used to buy tea from China. In a sense, then the Scotsman indirectly benefited a tea seller in a far off part of the world. The purpose for which the tea seller used his new wealth is not only unknown to him but irrelevant to any of the other participants in this complex web of interrelations. No one intended the full extent of all these interrelations nor could people easily comprehend their general social effect.

2. Herbert Spencer

In *The Study of Sociology* Spencer emphasizes the difficulties faced by a scientific study of society, especially including its economic relations. Some of these difficulties are a function of the ordinary limitations of the human intellect while the more important difficulties are inherent in the subject-matter or phenomena that are examined.

Spencer’s main concern in his sociological and ethical works was the evolution of human conduct especially in its social context. The framework that he used to explain this evolution implied that conduct and social institutions pass “from an indefinite incoherent homogeneity to a definite coherent heterogeneity”. However opaque this expression may seem it is essentially the modern insight that evolution usually produces greater complexity. It can also be rather simply illustrated.

In the course of social evolution, the actions of individuals have become more and more inter-related (*coherent*), especially across time, as individuals pursue their ends more indirectly. The primitive man dives in the water to catch a fish; the more advanced man may build a net or a boat. With experience and the growth of technical knowledge, actions become more precisely adapted toward their ends (*definite*) with the related effect that his relations with others become more precisely defined. “I will give you exactly this, if you give me exactly that at a certain time and in a certain place.” Contract becomes a more precise relationship rather than a primarily open-ended relationship. Lastly, preferences become more varied as knowledge,
experience and cultural interactions grow. To this we can add still further adaptive variation as the environments become more diverse due to communication and transportation advances. Actions become therefore more heterogeneous.

In parallel development with increasing complexity of individual behavior, social cooperation itself becomes more complex. Simple forms of cooperation in which people join together to hunt an animal for food become replaced by “heterogeneous cooperation.” In the former case “like efforts are joined for like ends that are simultaneously enjoyed.” Here there is little or no imputation problem – all cooperators are rewarded by equally sharing the catch. In the latter case “unlike efforts are joined for unlike ends.”9 In this kind of cooperation there is extensive division of labor and specialization. A person writing legal memos (A) is helping to provide legal services. In effect, his wages are the imputed share of the value of those legal services to person C. In turn these wages exchange for a share of the output of an agricultural worker (B) whose labor consists of a very different kind of activity. Thus unlike efforts are cooperating, but for different purposes. The memo writer wants food and the agricultural worker might conceivably want legal services but, more likely, he wants clothing for himself or his family.

This form of social cooperation cannot exist without voluntary money-based exchange. This is because there is an imputation problem when people cooperate in complex ways. The labor provided by individuals is heterogeneous (they are not all just hunting) and the products produced are heterogeneous (they are not simply hunting a given animal). The terms on which such interaction takes place cannot follow some intuitively appealing division of the catch. Instead, all sorts of heterogeneous entities must be somehow valued and the product(s) distributed. This means that voluntary agreement (contract) and money as a medium of exchange and measure of value must simultaneously develop.

3. Growing Indirection in the Pursuit of Goals

With the growth of knowledge and increasing division of labor as well as specialization of tasks, the pursuit of goals becomes more indirect. In fact, the Austrian economist Carl Menger argued that economic development was essentially the growth of knowledge. As new causal relationships between means and ends are discovered, people can more effectively satisfy their wants.10 The second generation Austrian economist and finance minister of the country of Austria, Eugen von Böhm-Bawerk, further argued that this process took the form of longer,

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9 Spencer, Principles of Ethics (cited in note 7) at 172.
more roundabout methods of production that were made possible by the accumulation of capital.\textsuperscript{11}

Roundabout methods of production are manifestation of indirection and necessarily involve more abstract goals, that is, goals that are increasingly separated (abstracted) from the individual's ultimate ends.

...[O]n observing more closely the trader’s proceedings, we find that though to the end of living comfortably he gets money, and though to the end of getting money he buys and sells at a profit...yet he is chiefly occupied with means still more remote from ultimate ends, and in relation to which even the selling at a profit becomes an end. ...[H]e busies himself mainly with... inquiries concerning markets, judgments of future prices, calculations, negotiations, correspondence... And these ends precede in time and obligation the effecting of profitable sales, just as the effecting of profitable sales precedes the end of moneymaking, and just as the end of moneymaking precedes the end of satisfactory living. His bookkeeping best exemplifies the principle at large. Entries to the debtor and creditor sides are being made all through the day; the items are classified in such a way that a moment’s notice the state of each account may be ascertained; and then, from time to time, the books are balanced... If you ask why all of this elaborate process...the answer is that keeping accounts correctly is fulfilling a condition to the end of moneymaking, and becomes itself a proximate end – a duty to be discharged, that there may be discharged a duty of getting an income, that there may be discharged a duty of maintaining self, wife, and children.\textsuperscript{12}

Money has an abstract character and, at the same time, is an extremely practical tool.\textsuperscript{13} Without it the attainment of our more remote goals would be dependent on the double coincidence of wants. With it we can obtain a product from people whom we do not know and could not reach directly. It is an intermediate means to our ends that has none of the characteristics of what we want – except exchange-value equivalence – an equivalence in terms of an abstract unit of measure. If we were to trace a simple exchange in terms of the real goods involved, even a very partial view will illustrate both the complexity and the abstract quality of the relations involved. For example, $A$ produces eggs and gets $25$ in exchange; then he takes the $25$ and buys a book from $B$. In one sense, this is quite simple. In another, we can


\textsuperscript{12} Spencer, \textit{Principles of Ethics} at 193-194 (cited in note 7).

\textsuperscript{13} See, for example, Georg Simmel, \textit{The Philosophy of Money}, 3rd edition, ed. by David Frisby, trans. by Tom Bottomore and David Frisby (Routledge 2004) at 209-211.
see the enormous complexity of what is involved. The reason $A$ can get $25 for his eggs is because $C$ is willing to buy them to feed himself so that he can continue to produce shirts. The book seller $B$ is willing and able to sell the book because he can use the proceeds to buy groceries from $D$ so that he can continue to sells books. The production of shirts and the production of groceries thus facilitate the egg producer’s obtaining of a book. The system is complex and the tool that enables its complexity is an abstract instrument.

4. Abstract Objects: Lower Levels Evolving into Higher Levels

The process of increasing complexity of social relations and increasing abstractness of social objects or instruments go hand-in-hand. This is because concrete instruments do not have as much versatility or general applicability as the abstract. For example, double-entry bookkeeping is independent of (abstracted from) the particulars of the goods in any given case. This is one of the things that make it useful, especially in the comparison of profitability across very different firms and industries. The comparison of profitability is in turn a critical aspect of the existence of stock markets which enable finance capital to be allocated across heterogeneous purposes without investors needing to know the details of the concrete products or production techniques. Thus a further level of abstraction from the basal level develops. More generally, the development of basic features of modern markets can be viewed as a process of increasing abstraction. *Spot markets* are at a relatively low level of abstraction since the properties of the goods being traded are quite important at least to traders who are buying the goods for their use value. But once arbitrageurs enter the picture these properties become less important, as the (in)consistency of prices becomes the major concern. Arbitrage transactions are not far in character from speculation on *futures markets*. People can make bets on the prices of goods not yet produced. The abstract commodity, a bushel of wheat of a certain quality at a certain place in December of next year, can itself have a price today – and inconsistencies in that can be arbitraged. Suppose that a trader is not sure that he wants a commodity or asset in the future? Then a kind of contingent market can serve his preference, that is, the *option market*. A price can be determined for the option to buy or sell a particular commodity or asset at some point in the future for a specified price. And option prices can be the object of arbitrage or speculation. At some point, it hardly matters what the original product was.

5. From Abstractness to Complexity to Emergent Outcomes

As I have said, the increasing abstractness of social objects is vital to the increasing complexity of social relations. But what is this “complexity”? If we go into detail here we will find a

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14 This is a manifestation of Say’s Law of Markets.

15 People who simply want to hedge risk can take futures positions that will offset the risks they face in the markets in which they produce. The futures position may not even be in that same market as when an exporter or importer seeks to hedge foreign exchange risk.
plethora of definitions and no apparent consensus on how the word should be used. So we shall have to make do with a rough and ready approach. In the first place, complexity needs to be distinguished from “complicatedness.” The latter is an epistemic concept – all sorts of things can be complicated for people to understand. Complexity, on the other hand, refers to the thing we are trying to understand – it is an ontological concept. Admittedly, complex systems require complicated trains of reasoning to understand which is why Enlightenment figures like Adam Ferguson, in the quotation above, did not distinguish between the increasing complexity of social relations (“bring[ing] human affairs to a state of complication”) and our inability to “[comprehend it] in its full extent.”

Complexity can be viewed as a systemic concept that is consistent with Spencer’s view of the tendency of evolutionary processes. So we can ask: What characteristics must a system have to be complex? First, it must have a definite composition with a definite structure among the components in a definite environment(s). Second, there must be interaction among many heterogeneous agents (parts) acting in local spaces. Third, the whole relation must exhibit coherence. Fourth, there must be some generative mechanism or process of formation. Some complex orders may be deliberately produced while others may be the result of processes that occur without a central command structure. These are spontaneous complex orders. And some of these may produce emergent outcomes or properties. In other words, properties that go beyond what any of the component parts of the system individually possess. In the next section we show that the “liberal” picture of the market, especially as conceived by Friedrich Hayek, is a complex, spontaneous order with emergent outcomes.

6. F.A. Hayek: The Market as a Complex Spontaneous Order

For Hayek, as is fairly well-known, the market is characterized by many heterogeneous agents. Each of these has concrete empirical knowledge (“the particular circumstances of time and place”) that is unique to his or her context in a market space. This division of knowledge is analogous to, and compatible with, the division of labor. Each agent trades, within a framework that protects especially property and contract rights, on the basis of her own preferences and local knowledge. There is no central planner to direct their activities toward any externally-decided end. The system as a whole has no end – it in that sense “ends-independent.” To put it provocatively, it is “purposeless.”

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Individual agents are both learning and adaptive. In their learning capacity some see new data emerging (like a political disturbance that reduces the availability of oil or a new demand for copper). These individuals engage in arbitrage or speculative activity that ensures that the price of oil or copper rises in line with its increased relative scarcity. Other agents in the market adapt to these changes in a way that is roughly optimal given their individual local circumstances. Therefore, all of the agents trading on the basis of the knowledge that they individually possess are able to produce a system that effectively communicates to others, through the price system, the knowledge which they do not possess. The price incentives created by this communicative system encourage the agent to use resources in a way that is responsive to demands and supplies in the broader economy. Thus the price system serves a social purpose without central direction. In other words, it tends to make the activities of agents coherent that is, as if separately acting agents were deliberately coordinating their heterogeneous plans. We have here all of the characteristics of a spontaneously created complex system at a fairly high level of abstraction. There are nameless and heterogeneous agents who act in their local spaces (perhaps geographically but certainly with respect to knowledge). They each engage in definite activities guided by their knowledge conjoined with their preferences and constraints. The interrelationship of the agents, under broad framework constraints, produces an emergent outcome. This is a system of prices that is a surrogate for explicit knowledge of social relative scarcities.

The system communicates more knowledge than any individual in the system has or possibly could have. This is the essence of an emergent property. The conception of this order as developing without central direction enables us to call it a spontaneous order. Sometimes Hayek uses this term as a short-hand for what we are more laboriously calling a “complex order with emergent outcomes arising without central direction.”

Hayek also at other times calls this an “abstract order.” It is abstract in the same way a telecommunications system is abstract. The system can handle all particulars of time and place. A congratulatory message in the middle of the night and a demand for payment in the daylight hours – each emanating from different parts of the world – can equally be transmitted. Speaking metaphorically, the content of the messages is of no concern to the system. Similarly, since the market order has no goals apart from those of individuals, it favors no one hierarchy of values over another. Whatever a person concretely plans to accomplish the market brings to that plan, in effect, knowledge that he does not possess. So his ultimate action or plan takes cognizance of knowledge is possessed by others far beyond his vision and comprehension. Thus, a second sense of the word abstract is thereby introduced into the Hayek’s conception of the
market. It is an order that we cannot feel or touch but must be built up or conceptualized by an effort of considerable intellectual difficulty. 20

II. The Nature of Rules Needed To Sustain an Abstract and Complex Order

We have constructed a picture, necessarily with broad brush strokes, of the market as conceived by the most developed strain of classical liberal thought. While the system is more than the individuals comprising it, it cannot be sustained unless the individuals allow it to function. The two major aspects of its functioning require (1) a fairly high degree of certainty about the rules of the game to facilitate voluntary exchange and (2) freedom of the parties to set the terms of exchange in order to facilitate adaptation to the particular circumstances faced by agents.

However, it is important to forestall some possible misunderstandings before I proceed further. When I say that the rules of the game in a complex emergent order must be abstract, I do not mean that these rules, in their application, abstract from all concrete facts. That, of course, would be absurd. Consider the general law of contracts. The kinds of facts that are relevant are those which shed light, as needed, on the existence of an enforceable promise or bargain, the content of the bargain, and the appropriate remedy for breaches when the parties do not explicitly adopt them. This kind of factual inquiry facilitates the parties’ agreement in cases of breakdown. On the other hand, the facts that are irrelevant (or should be) are those which must be taken into an account to produce a particular result that was no part of – or at least runs counter to – the parties’ agreement.

My concern in the rest of this paper is with a moral, and ultimately legal, conflict that threatens to undermine this system. Focus on the particular circumstances and identities of those who engage in exchange changes the framework of analysis. It redirects attention to the particular outcomes of particular cases and, if applied globally, tends to distort the aggregate functioning of the abstract order. Applied literally in a single case, very little harm will be done. Nevertheless, the framework once established will generate through precedential processes a serious deterioration in the emergent properties of the market. These include the transmission of highly dispersed knowledge, the provision of gains from trade to unknown others, and the generation of useful novelty. These social benefits rest on a set of rules that underdetermines the outcomes of the system. Anything more constraining would not have emergent properties.

1. The Level of Construal

20 “(This is what we mean when we describe such an order as abstract rather than concrete: it cannot be seen, heard, or touched but only traced by our intellect.)” Original in parentheses. Friedrich A. Hayek, A New Look at Economic Theory, in Bruce Caldwell, ed., The Market and Other Orders, 15 The Collected Works of F. A. Hayek (Chicago 2014), pp. 375-426, at 385.
David Hume understood the dangers of a too-particularistic understanding of issues regarding property rights: “When a man of merit, of beneficent disposition, returns a great fortune to a miser, or seditious bigot, he has acted justly and laudably, but the public is the real sufferer.” We see in the particular case perhaps poor person returning some lost or stolen property to a man who is rich, but unable to enjoy his own fortune (“a miser”), and is in public disrepute (“a seditious bigot”). “Why,” third parties might ask, “should the well-being of society be reduced by a returning wealth to one who will enjoy it less and who is less worthy?” Perhaps the “man of merit” should keep it. In effect, Hume agrees that when looked at in a narrow vision or in particularistic detail, there is no reason for the man to restore the fortune to the rich miser. After all, the man of merit “may impoverish himself by a single instance of integrity.”21

We could easily extend Hume’s example to a case of contract rights. A rich miser who has a large farm has contracted with relatively unskilled workers to harvest crops on his land. He pays them a competitive but low wage. Part of the way through the harvesting season, the workers stop working. They threaten to let the crops rot on the vine unless they receive a higher wage. Should the law permit this opportunistic behavior? Viewed in a narrow particularistic framework, our sympathies may be with the poor workers. Why not allow the miser farm-owner to lose profits so that the workers may have the wages they “deserve”?

On the other hand, if the above cases were characterized in an abstract way making use of the anonymous types A and B our intellect and moral emotions are directed another way. In the first case, A is the legal owner of X which has been lost or stolen. Should B who finds X be obligated to return it to A? Sure, it is a no-brainer, most of us would say: “What is the point of property rights if stolen property need not be returned to its owner?” Similarly, in the second case, if A contracts with B to do a certain job, and then when it is partly done and time is of the essence, refuses to continue unless there is renegotiation, the typical response will: “How outrageous; B should finish or pay damages or at least not prevent others from finishing.” Planning is difficult if we cannot rely on others’ contractual promises.22

There is no magic here. The role of abstraction in law and in morals is to direct our minds and emotions toward the wider or more inclusive view. Abstract morality undergirds an abstract order.

2. Concrete Virtues and Abstract Virtues

21 David Hume, A Treatise of Human Nature, ed. by David Fate Norton and Mary J. Norton (Oxford 2000 [1740]) at 319 [§ 3.2.2.22].
For Hume beneficence is a natural and concrete virtue. It is natural in the sense that it does not rest on the convention that only if others are beneficent will I be beneficent. Acts of beneficence produce an immediate positive re-enforcement irrespective of whether they are also done by others. By their nature they are responsive to the particular circumstances of each case. “A parent flies to the relief of his child, transported by that natural sympathy which actuates him, and which afford no leisure to reflect on the sentiments or conduct of the rest of mankind in like circumstances.”

Justice, on the other hand, is an artificial and abstract virtue. It rests on a social convention. Its rationale for any individual actor depends on others adhering to its rules as well. I do not steal or breach my contracts on the assumption that others also do not. Moreover, its character is also highly abstract:

All the laws of nature, which regulate property...are general and regard alone some essential variations of the case, without taking into consideration the characters, situations, and connexions of the person concerned, or any particular consequences which may result from the determination of those laws in any particular case...

Thus, corresponding to the different levels at which a given issue may be described there are different virtues (moral sentiments) activated by these descriptions. Just as we have abstract or concrete construals of problems, we have abstract or concrete moral responses to them. When we think of the behavior of the miser and the man of merit (or the poor workers) in concrete, highly particularistic terms, it seems quite natural to think in terms of beneficence. When the lifeless A and B dominate, justice more easily comes to mind. This tension between justice and beneficence figures very strongly in Hume legal and political philosophy even though he does not explicitly characterize it as such.

In his Principles of Ethics, Herbert Spencer reveals a fairly explicit understanding of the tension. He writes of generosity, rather than beneficence, but the meaning is the same:

The motive causing a generous act has reference to effects of a more concrete, special, and proximate kind, than has the motive to do justice, which beyond the proximate effects, usually themselves less concrete than those that generosity contemplates, includes a consciousness of the distant, involved, diffused effects

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24 Justice for Hume is, in this context, simply the basic common law rules pertaining to property (first possession, transference by consent) and those pertaining to contracts (competence, consideration, voluntariness – including the absence of fraud and duress). It is clearly not distributive justice.
25 Id at 171, emphasis added.
of maintaining equitable relations. And justice we hold to be a higher generosity.26

There are several things to note here. While Hume puts the emphasis on particular, concrete circumstances in the characterization of the problem, Spencer puts the emphasis on the particular, concrete effects of an act of beneficence. The two are obvious related because the act of beneficent intervention occurs in response to the evaluation of the particulars that comprise the relevant merits of the parties with the purpose of improving the status of one of the parties in a particular way. Secondly, Hume’s emphasis is on the moral sentiments activated while Spencer sees the cognitive stage as an important intermediate step. Concrete thinking induces concrete virtues, while abstract thinking induces abstract virtues.

The third important point is that Spencer considers justice a higher form of beneficence. It is more beneficent (generous) to facilitate the working of abstract social order than to help particular known individuals in cases of conflict. Recall that the market enables the individuals who compose to exceed their own isolated capacities in the sense that the market interaction is the source of beneficial emergent outcomes. Ultimately, it makes possible a greater provision of wealth and effective beneficence than any direct aid to the poor could ever accomplish. The concrete characterization of the individual interactions in a complex order does not encompass this insight.

III. Psychological Foundations for Abstract Rules

1. The Psychology of Problem Construal

We begin, following Spencer, with the cognitive issue. Any legal or moral question can be cast in relatively abstract or relatively concrete terms. Should we say: A is in possession of land for which the legal title is inadequate or that Mrs. Jones, an elderly, poor and ill woman, is in possession of land for which the title is inadequate? In one sense there is no right way to characterize the situation. But if the purpose in settling such questions is the maintenance an abstract order of interaction, then it makes sense to move to the abstract level of characterization.

In recent years there has been work by psychologists on the character, determinants and consequences of different levels of problem construal. People may construe problems at higher or lower levels. These levels are not dichotomous but hierarchical. We can ascend or descend levels of construal from the very low or concrete to relatively more and more abstract or higher levels. The higher levels will include at a greater level of generality the objects at the lower levels.

26 Spencer, Principles of Ethics at 156 (cited in note 7), emphasis added.
Higher-level construals entail constructing abstract conceptualizations of information about objects and events. ...[They], therefore, capture the superordinate, central features of an object or event, and abstracting these high-level immutable features conveys the general meaning of the event. Low-level construals, alternatively, consist of subordinate, incidental features. In low-level construals, events and objects are unique and specific. ...For example, activation of high-level construals leads to categorization in fewer, broader, and abstract units whereas activation of low levels leads to characterization in multiple, narrow and concrete units... High-level representations are also more coherent and integrative, whereas low-level representations are more specific and disparate...27

Construal levels are not always consciously chosen. They may be the result of variations in psychological distance. Psychological distance includes temporal, spatial, hypothetical and social distance. The greater this distance the more likely an event will be construed abstractly.28

It is clear that some events could be spatially distant but close on others measures of distance and vice versa. Obviously, this introduces some uncertainty in the empirical assessment of psychological distance. It is conjectured that the major reason psychological distance generates abstract construals is because the agent, generally speaking has less detailed information about distant events or objects. This, of course, is not always the case but construal level theory claims that the association is overgeneralized and occurs even in situations where the agent has equivalent information about near and distant events.29

Returning to some of the examples we have used: Is the man to whom a great fortune is to be restored a miser? Is the party who is seeking, mid-contract, a higher wage a poor worker? Is the person who has bad title to the land a poor, ill, elderly person? Or are they each the abstract A, B, C? Suppose they are physically distant from us, are strangers and the case is from long ago or even a law-school hypothetical. Then, of course, there is much psychological distance between the events and the observing party, and therefore the situations are likely to be described in an abstract way. Furthermore, when events are characterized abstractly they are separated from their contexts and thus the connection between the instant case and others of a similar kind is

29 Id at 84.
more easily made.\textsuperscript{30} The person to who property must be returned is a stand-in for all such persons who have lost or had property stolen.\textsuperscript{31}

2. Evaluation and Judgment

The construal of a problem and the evaluation of its potential or actual solutions are closely related. Abstract construals tend to generate evaluations in accordance with more abstract normative criteria.\textsuperscript{32} In this context, psychologists often distinguish between primary and secondary values. Primary values attach to the primary features of an event which have the characteristic of being those that endure through a mass of transient, inessential and concrete features. Primary values tend to be more abstract. They are more likely to be deontological rather than strictly consequential or, at least, they focus more on distant rather than immediate consequences. People are more likely to characterize a situation in terms of moral rules when a situation is imagined to be farther in temporal distance than nearer.\textsuperscript{33}

In a series of experiments found that the severity of judgments of moral transgressions was reduced when low-level (concrete) mitigating circumstances were introduced.\textsuperscript{34} For example, participants were asked to evaluate incest between siblings when the mitigating circumstances of condom use, secrecy and no intention to repeat the act were included in the description. When asked to evaluate the behavior, those who were told that the transgression (of the no-incest rule) would occur tomorrow judged the behavior less severely than those who were told it would occur next year. The same pattern of responses was found when social distance was increased.

Thus mitigating concrete circumstances will be likely to soften negative judgments in cases of rule violations when the psychological distance from the transgression is lower. This suggests, but does not directly demonstrate, that in a large population of people, mitigating circumstances can become outright exceptions to moral rules for at least some people when moral issues are construed at a lower, concrete level.

3. Generosity

In the previous section I argued that people will likely be more sympathetic to transgressions of moral rules when the act in question is construed at a relatively concrete level. Some of the

\textsuperscript{30} “...[D]econtextualization links the activity with a more general set of events, bringing in new meaning and definition that is not included in low-level representation.” Id.

\textsuperscript{31} CLT provides a psychological foundation for the view that abstract construal of legal questions focuses attention on the precedential consequences of a decision in the particular case. See below.

\textsuperscript{32} Id at 88-91.


\textsuperscript{34} Id at 1207-1208.
mitigating factors or rationalizations for exceptions to the rule may be quite reasonable within the rationale of the rule itself. Nevertheless, the lower-level construal opens the door – in some cases quite widely – to undermining the rule completely on the basis of misplaced sympathy or beneficence. Recall that Hume implicitly and Spencer explicitly juxtaposed justice and beneficence. The point is easiest to see in cases of bad title to land. Whether the possessor should remain in possession is not determined by her sympathetic nature or by whether the land would benefit her more than it would benefit the would-be possessor. Matters like adverse possession, where applicable, are relevant to the stability of expectations and not estimations of relative benefit. The existence of contractual relations is similarly not determined by whether the “promisee” is worthy person according to some moral criteria. The ascertainment of whether an enforceable promise has been made proceeds by way of showing, in some suitably objective manner, both parties intended to be bound. A promissor does not become one simply because it is beneficial to some party that she take on that role.

A person of generous disposition can easily be tempted to see such cases as warranting some adaptation of the legal rule (“justice”) to his beneficent tendencies. Create an exception to standard rules about title so that the old, ill and poor widow can have her land and her home. Imagine an enforceable agreement because someone of distracted attention thought he was being seriously promised something and relied on it. All of these tendencies are exacerbated by low-level construal of problems.

There is ample psychological support for the view that beneficence or generosity is a concrete or, in the technical sense, a low-level virtue. There is consistent evidence for the phenomenon that provision of concrete details about a potential beneficiary’s characteristics and problems increases peoples’ willingness to provide monetary assistance when compared to a more general or abstract description of the class of similar problems. Statistical victims are less likely to stir generosity in our hearts than identified and described victims. The key, once again, is psychological distance. The smaller the psychological distance the more likely beneficence will overtake justice in our evaluations and judgments when the conflict between justice and beneficence presents itself.

4. Psychological Priming and Legal Priming

It is a well-established technique among psychologists to “prime” subjects in experiments designed to show causal relationship between two variables. For example, in the field of construal level theory subjects are sometimes primed to think abstractly or concretely before being asked to complete some task or make some judgment. This priming might be

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accomplished by getting people to think about words (abstractions) or pictures (concrete representations) in a priming stage. Of course, there are many other techniques possible. In real life those who are tasked with raising money for charities will often use detailed representations of those in need to increase donations as I mentioned previously.

Priming also occurs in less recognized contexts such as legal decisionmaking. Much of this article has illustrated the issue of high and low level problem construal in hypothetical cases of property and contract relations. Let’s pause briefly to see the law primes abstract problem construal. First, is the universal legal (and moral) framework of precedent. A decision is being made in the current case, with all of its detail, which will constrain future similar cases. These future cases are unknown and unknowable in their concrete detail. So the minds of the judge and litigants are oriented or primed to a more abstract level than might otherwise be the case. Recall the story Hume tells about the Persian king Cyrus.36 in his youth Cyrus was asked by his teacher to judge to whom a big tunic and a small tunic should be given. When Cyrus thinks the solution should be that the big tunic goes to the big boy and the small tunic should go to the small boy his teacher beats Cyrus. The tunics should go to the boys who rightfully own them regardless of the appropriateness of fit. Since we do not flog judges in our society, precedent can serve as a rough substitute.37

Secondly, in the general law of contracts, the emphasis is (or should be) on whether the parties have expressed by suitably objective means their intention to be bound by a promise and what they content of the promise or bargain is. Under circumstances that might reasonably be called “freedom of contract” the content of the bargain is of no concern to the courts. Using the facts of the binding promise and its content as the standard, possible conflicts and misunderstandings will be resolved. Most of the rules developed for these purposes are essentially default provisions designed to supplement the agreement, where the parties are silent, rather than to rewrite it.

On the other hand, there is one fundamental fact of the judicial decisionmaking process that primes all parties to relatively concrete problem construal. On some dimensions of psychological distance the problem to be resolved is “here and now.” Specifically, the case in court will be actual, not hypothetical; it will be filled with particulars about the people involved (income or wealth disparities may be evident even when not “officially” allowed into consideration). Temporally it is now, and not in the more distant future. And social distance may also be small.

36 Hume, Enquiry (cited in note 23), Appendix 3 at 171.
37 In a legal environment in which freedom of contract has already been significantly eroded, strict or mechanical adherence to those precedents which focus attention on distributional concerns will increase the deviations from Humean justice. Precedent becomes, in a sense, a license for beneficent discretion. See Rizzo and Whitman, The Camel’s Nose is in the Tent: Rules, Theories, and Slippery Slopes, 51 UCLA L.R., pp. 539-592 at 568-570.
IV. Bootleggers and Baptists

The possibility of deliberately priming problem-construal opens up a possible route of cooperation between “bootleggers and Baptists” in the happy phrase of Bruce Yandle. In the case relevant to our considerations the bootleggers are those who for rent-seeking purposes wish to rewrite contracts or reduce the stability of property relations (as in the use of eminent domain to effect private purposes). The Baptists are those who are driven by their benevolent concerns to tilt the scales away from Humean justice to a distributively better outcome in the case at hand. They may also be concerned to produce aggregate social outcomes that meet their distributive preferences by permanently altering the structure of the legal rules. This bootlegger-Baptist process is not restricted to judicial decisionmaking but also has application in the legislative context and in the judicial interpretation of statutes.

Two important judicial portals for the imposition of concrete and seemingly beneficent “social” ends upon contractual relations are expansive interpretations of the police power and of the general doctrine of unconscionability. It is not possible, nor is it necessary, to go into detail here. One example from each category will serve to illustrate my points.

1. Police Power Interpretation

The police power is a loosely defined power of the state to prohibit wrongful conduct and to regulate essentially rightful conduct so as to protect the “safety, health, morals, and general welfare of the public.” The exact scope of this power has been the subject of considerable controversy. There have been expansive readings such as that of Justice William O. Douglas. There have been narrow readings such as those in the treatises of Thomas Cooley and Christopher Tiedeman. From the viewpoint of the analytical structure presented in this paper, the expansive reading is inconsistent with the maintenance of the abstract order of the market.

In a narrow “Lockean” interpretation of the state’s police power, regulation of essentially rightful conduct like the exercise of contractual freedom is legitimate to the extent that this exercise interferes “with the rightful actions of others operating within their own boundaries or spaces.” “...[P]roper police power regulations specify the manner in which persons may exercise

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40 “An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts....The definition is essentially the product of legislative determinations.” Berman v. Parker, 348 U.S. 26 at 32 (1954).
their liberties so as to prevent them from accidentally interfering with the rights of others.”

This interpretation seems consistent with an economic emphasis on external effects on the rights of others. The purpose of the police power is not to prevent individuals from making voluntary agreements that put themselves at certain health or safety risks in exchange for compensation. “Health and safety” is not a pretext for distributional gains (losses) for one party or another in the context of mutual gains from trade. It is properly an externality concern as when a contractual arrangement may spread disease or endanger safety among the public not party to the contract.

One could also look at the police power from a more positive perspective (“general welfare of the public”). Perhaps the free exercise of property rights might be regulated to provide a genuine public good like the removal of snow on the sidewalks in front of stores. In these kinds of cases the relevant conceptual test is whether the general welfare is enhanced or whether it is the welfare of a particular segment of society. A persuasive, but not always definitive, empirical application of the test is to see whether a particular limitation on property rights or freedom of contract at issue is supported by special interest groups.

The narrow interpretation of police power thus maintains a high-level of problem construal. First, liberty rights are limited by violations of rights to other parties. The limitations on free contract, for example, will be justified by equally abstract rights-guarantees to parties outside the contract. There is no diminution in the level of construal. Second, the generality of benefit test ensures that the limitations are not driven by particular distributional concerns. The benefits are to “each and all” — a class of individuals who composition may be largely unknown and should be irrelevant.

An important lesson consistent with the overall argument advanced here is in the dissenting opinion of Justice John Marshall Harlan in the famous case of *Lochner v. New York*. In this case the State of New York limited by statute the hours worked by bakers no more than sixty hours per week or ten hours per day. The question was whether under the police powers the state could restrict private contracting in such a way as to require that the terms of employment meet what the legislature believes would prevent harm to the health of the bakers. While the majority ruled against the law, Harlan upheld it. His reading of “health, safety and welfare” of the general public as, in effect, the health, safety and welfare of any group the legislature deems worthy is critical. It means that he can focus on the welfare condition of

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42 Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton 2004) at 328. I am not here concerned with whether this is a historically or doctrinally more accurate reading. My concern is with a reading that is more consistent with a market order. This is an ideal type from which one could contrast actual interpretations of the police power.


44 See note 39 at 65-74 (Justice Harlan, dissenting).
particular persons and not on rights violation or the welfare of each and all. An expansive interpretation of the police power thus lowers the level of problem construal and thus “biases” the argument against justice (freedom of contract) and toward beneficence (distributional outcomes).

It is instructive that in his dissent he quotes Ludwig Hirt, a German doctor, who wrote a book Die Krankheiten der Arbeiter (“The Diseases of the Workers”) in 1871 which has a discussion about bakers and their work-related diseases, presumably in Germany, some thirty years before: “The labor of the bakers is among the hardest and most laborious imaginable....” Harlan also quotes “another writer” who details the health difficulties attributed to “the constant inhaling of flour dust.”\(^4\) But most of the other difficulties seem to be those attributed to generalized hard work that involve standing or being in a hot environment and consuming cold drinks in consequence. In any event, the quotations amount to a long list of the possible or actual problems suffered by bakers.

From a construal-level perspective, these details about the particular problems suffered by those in a particular trade of ordinary working people which produces a product used by almost everyone is as “here and now” as things get. The psychological distance is quite small. In consequence, the way the dissent is structured it places the “abstraction” of freedom of contract against the concrete welfare of one party to the contract. Introducing consideration of the latter as relevant to the issue at hand is both the cause and consequence of low-level problem construal. The Court could not find that the contractual relations between bakers and employers violated the exercise of anyone’s rights or was conducive to the general health deterioration of third parties. In consequence, the dissent, if it were to uphold the statute, had to shift to distributional considerations and claim that these are part of the health of the general public.

Under a high-level construal of the police power and of the facts in Lochner the abstraction “freedom of contract” is the primary value. A broad interpretation, on the other hand, leads to the consideration of many concrete issues with distributional consequences. Concrete “here and now” issues reduce the level of problem construal. They act as priming factors to induce lower-level construal. Accordingly, the reduction in level encourages the individual to indulge “secondary” values at the expense of primary values. Thus I do not deny that the health of the bakers is a concern to most people of good will. The question is which values will dominate – justice or beneficence?

2. Special Interest Legislation

\(^4\) I have been unable to locate a copy of this book. I rely on what is presumably Justice Harlan’s translation.
There is a great deal of evidence to support the view that the New York statute at issue in Lochner was a piece of special interest legislation. The imposition of maximum hours (and other requirements not at issue in the case) functioned to impose differentially higher costs on the small, immigrant bakers who had difficulty, as it was, in supporting their families. Most of the large bakers already conformed to the standards of the new law so the main effect would be on marginal bakers. Furthermore, because the statute did not control wages, it would be likely that any substantial increase in costs would come out of the small bakers’ wages or profits.

Nevertheless, I think it is a mistake to argue that the law was simply an example of “bootleggers” having their way. The law itself is part of the process of lowering the level of problem construal. It focuses on the hardships of a particular segment of ordinary working people. In the final analysis, there was no reason to separate the plight of these workers to the exclusion of others, except to decrease the level of psychological distance by being very concrete – improving the lot of hot, exhausted, illness-prone people who labor to produce our daily bread. At this level of construal, beneficence wins.

The role of priming the public with cues for low-level construal of problems needs to be more thoroughly explored. Casual observation suggests that this is an important factor in political efforts to get legislation passed. Trying to “personalize” legislative issues by focusing on apparently worthy cases of mothers and children needing help – inviting them to the State of the Union speeches or to signing ceremonies or putting them in political commercials – is all quite familiar. Mobilizing benevolent feelings sometimes in conjunction with special interests is a powerful combination.

3. General Unconscionability

The doctrine of “unconscionability” stems from equity jurisprudence, but in the last few decades the doctrine has gone much beyond its origins. At the most general level, the word signifies what is contrary to good conscience. The doctrine has been use to deny the enforcement of a contract, in whole or part, and to limit the enforcement of particular unconscionable clauses. While there are many standard reasons to void a contract including

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46 See, for example, David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (Chicago 2011).

47 In the 1950s and 1960s there was a boom of sorts in the application of the doctrine of unconscionability. In the late 1970s it seemed to have leveled off and then declined in the 1980s. In the 1990s there were efforts to apply the doctrine in cases of where the parties agreed to submit contract disputes to arbitration. Ultimately, this was discouraged by various Supreme Court decisions supporting arbitration clauses. Most recently, however, there has been some resurfacing of the doctrine’s application outside in the arbitration area. See Charles L. Knapp, “Unconscionability in American Contract Law: A Twenty-First Century Survey,” in Larry A. DiMatteo, Qi Zhou, Séverine Saintier, and Keith Rowley, eds., Commercial Contract Law – Transatlantic Perspectives Cambridge 2013), pp. 309-338.
misrepresentation (fraud), duress, undue influence between people in a special relationship, and mutual mistake, the idea of unconscionability captures something more (or less) than any of these. It has been used when the plaintiff has not been able to support with adequate evidence any of the other reasons. A court which has decided to enter upon this terrain will use expandable expressions like “absence of meaningful choice,” “inequality of bargaining power,” “terms unreasonably favorable to the other party” or their equivalents.48 It is now customary to divide unconscionability into two aspects which reflect these terms. Unconscionability can be either procedural or substantive or both.49 The procedural focuses on the process of agreement and the possible unequal bargaining power of the parties. The substantive focuses on the content of the agreement – whether the terms seem unfair because they advantage one party far more than the other. In practice the two are interrelated. If there is no procedural unfairness it hard to imagine how there could be substantive unfairness; if there is no substantive unfairness, why do we care about procedural unfairness?50

A central problem with the use of unconscionability is the way it seeks to determine the distributional outcomes of contracts that are not fraudulent, do not involve duress, mutual mistake or undue influence. It strikes at the heart of general abstract contract law. It opens the door to reducing the psychological distance of disputes and thus lowering the level of theoretical construal. In so doing, all manner of particular circumstances of the parties are brought into consideration. As many courts have said explicitly: "The concept of unconscionability must necessarily be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case."51 This reduction in the level of problem construal necessarily brings with it a decrease in the level of certainty in contractual relations. The considerations of unconscionability cannot be stated as real rules; they can only be stated as a list of considerations to be balanced and given specific content at the discretion of courts. To attain specific outcomes or to prevent specific outcomes requires consideration of particular facts in ways that must vary from case to case. It is result-oriented in the worst meaning of the term.

In DJ Coleman, Inc. v. NuFarm Americas, Inc52 summary judgment for the defendant was denied in a case where an herbicide was alleged to have caused damage to a commercial farmer’s crop. The plaintiff in this case wanted to recover consequential damages (the loss of the entire crop) rather than just the cost of the herbicide or replacement of the product, as limited by the

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50 See Knapp, Unconscionability (cited in note 47).
warranty which was stated clearly and prominently on the label. The court found that the warranty limitation was both procedurally and substantively unconscionable. As expected, they argue “there is a substantial inequality of bargaining power between DJ Coleman... a commercial farming operation located in North Dakota, and Nufarm ... part of an enormous, highly diversified, and international conglomerate.” Further, “the evidence reveals that the parties had unequal bargaining power and there was no room for meaningful negotiation.” In other words, the herbicide was bought (much like paint) on a take-it-or-leave-it basis. The parties did not negotiate price, quality or warranty. The court concluded “that the limitation of remedies provision is substantively unconscionable.... It is clear that the allocation of risk for defective herbicides is better shouldered by the manufacturer of the herbicide, rather than the consumer.”

DJ Coleman was not a small family farm producing for its own consumption but a commercial enterprise which had used this herbicide without incident for ten or more years. So, for maximum effect, it must be juxtaposed with a “diversified international conglomerate.” There was no finding of negligence on the part of the manufacturer-distributer; in fact that was dismissed by the court. There was no suggestion that the herbicide was produced in a monopolistic industry or that the plaintiff did not have access to alternatives. There was no showing that the standard in the industry was for the manufacturer to assume the burden of insuring the crops. There was no evidence that the plaintiff paid a premium price that would have suggested a full consequential damages warranty (someone has to pay for that). Under the rubric of unconscionability or fairness it allows “rewriting” of the contract, ex post, to ensure that the manufacturer takes on the crop insurance function because, in the court’s opinion, it is the cheaper-cost insurer.

Trying to penetrate the fairness of a bargain outside of the abstract rules of general contract law introduces a focus on the concrete economic details of the agreement process and on the substance of the agreement, thus inviting more and more details and encouraging still further lowering of construal. Attention to the trees or plants or flowers displaces attention to the forest. The forest looks like this. First, the process of dickering and haggling is not the meaning of competition. These activities occur in deals where the seller’s supply price and the buyer’s price are unclear, where the quantities transacted constitute a very large proportion of the market, where the service or product transacted is unique, and other exceptional cases. For valid economic reasons, most transactions do not occur this way. Most of us benefit from the

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53 Id. at 1073.
54 Id. at 1073-74.
55 This is not so clear to me since the manufacturer has no control of the use of the product once sold. It has no control over what the product is mixed with or the contemporaneous natural conditions or the value of the crops at issue.
activities of marginal buyers (or sellers) who exercise pressure on prices and other product variables. These market participants are generally elsewhere. They are not in the “here and now” of concrete construal. They are unseen. Second, the outcomes of market competition are the emergent outcome of the basic abstract rules of the game. In a competitive (or even a monopolistic) environment there is no fundamental reason for a court to re-allocate the insurance aspect of any voluntary arrangement, least of all in cases where the warranty limitation is plain. But suppose it were in very small print and that the buyer had not had ten years of prior experience with the product, what can we make of the lack of negotiation on the warranty? Again, there are other larger and more knowledgeable buyers in the market who would be concerned with insurance for consequential damages (assuming the ex-ante estimate of the costs were significant). Even a monopolistic seller would want to convey more than $1 of benefit at $1 of cost if it were indeed the cheaper cost insurer. So if the buyer of the herbicide is faced with the same take-it-or-leave-it warranty as everyone else, it strains credulity to declare the arrangement as substantively unfair in any sense other than the court’s preference for the allocation of risk. Keep in mind that buyers in the future will be paying for the judge’s personal preference.

Conclusions

Modern construal-level theory sheds light on the psychological conditions that are conducive to analyzing problems in a more abstract or more concrete manner. The most beneficial aspects of the market require an effort of theoretical reconstruction to see. This requires a high-level of construal. The legal and moral rules necessary to sustain this market order are abstract. They are threatened not only by the absence of theoretical understanding about their function but, perhaps more importantly, by a tendency to construe specific cases concretely. This tendency is an unfortunate by-product of a case law system in a world where the “man of system” (Smith) predominates. The itch to fix the particular outcomes needs satisfaction. Without the presence of strong institutional constraints, the parade of particulars can easily induce concrete problem construal which, in turn, will reinforce the admissibility of particulars and still lower construal levels. At these lower construal levels, values like beneficence or generosity focused toward the outcomes of individual cases create a strong incentive first to expansively interpret police power and unconscionability doctrines, and second to use them to wiggle out of the abstract logic of that prevents courts from imposing outcomes.

The subtitle of this paper is “liberalism’s difficult problem.” It is a difficult problem in the contemporary world to sell the idea of purposeless abstract order. But the difficulty is even greater when it becomes clear that the morality appropriate to sustaining such an order is an

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abstract one. The man of system is focused on achieving concrete results, especially distributional ones, so he necessarily must focus on particular transient circumstances and processes. Courts and the political (legislative) process are unlikely to follow general rules, in an age of skepticism, just because they are or have been traditional. Absent a widespread understanding of the system and the rules that sustain it, I do not see how the order can be maintained. The concrete construal of legal and political issues gives an advantage to the virtues of beneficence, charity and generosity over justice. It is not that the former are pseudo virtues but they are not the virtues or values that are necessary for a complex emergent order. The confusion lies is not having a still higher virtue – that of knowing when to be beneficent and when to be just. Whether some form of institutional or constitutional constraint can substitute for actual understanding by most people is still an open and difficult problem.

57 “[N]othing is generous, if it is not at the same time just.” Cicero, De Officiis, with English trans. by Walter Miller, 21 Cicero in Twenty-Eight Volumes (Harvard 1975), § 43.