An Austrian approach to law and economics, with special reference to superstition[*]

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Abstract

This paper has two purposes. First, it considers what the components of an "Austrian" law and economics might consist of. I argue that Ronald Coase's conception of law and economics precludes the economic analysis of legal institutions and, in particular, the beliefs that support them. In doing so, Coase's conception precludes an Austrian law and economics. In contrast, Richard Posner's conception of law and economics makes such analysis the core of its study. In doing so, Posner's conception provides a productive foundation for an Austrian law and economics. Second, to illustrate what some aspects of an Austrian law and economics might look like in practice, I consider several examples of the economic analysis of beliefs of import for the law. I focus on objectively false beliefs, or superstitions, and argue that some such beliefs are socially productive.

JEL codes: B53, D8, K00, K49, Z12

Keywords: Austrian-Chicago synthesis, law and economics; Coase; Posner; superstition; beliefs; economic analysis of law

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1 Introduction

A hallmark of the Austrian approach to economic science is its emphasis on individuals' beliefs.[1] This emphasis derives from the importance the Austrian approach attaches to subjectivism. According to that approach, to understand observed patterns of human decision making and its results, you must understand the "meanings" humans attach to their actions and the problem situations they confront. Those meanings are beliefs.[2]

All beliefs are subjectively true: they're true for the persons who hold them. But not all beliefs are the same. Some beliefs are "mere opinions." They have no objective element to them. For example, I believe cigars are divine. This influences how I see the world, the people in it, and how I behave. But my belief is just my judgment. There's nothing more to it than that. These beliefs are *purely* subjective.[3]

Other beliefs are understandings about the way the world works that have an objective element to them. Like mere opinions, these beliefs are subjectively true. But, objectively, they may be true or false. Science supports them or it does not.[4] For example, I believe that milk curdles because microorganisms in it convert lactose into lactic acid, "clotting" the milk. Other persons, certainly historically, and perhaps in some places still today, believe milk curdles because a witch has given it the "evil eye." My belief is objectively true. The witch's-eye belief is objectively false. Organic chemistry tells us as much.

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[1] On the importance of subjectivism, "meaning," and thus individuals' beliefs in the Austrian approach to economics, see Boettke (2010).

[2] Or at least those "meanings" are determined by beliefs.

[3] Though, admittedly, I find the fact that some people hold the exact opposite view about cigars impossible to understand. Perhaps they're smoking the wrong cigars. As I write this note I smoke a 2008 San Cristobal. I can assure the reader that it's divine.

[4] I use the term "science" here broadly to also encompass purely logical propositions that have an objectively true or false element to them, such as 2 + 2 = 4. The belief that 2 + 2 = 3 lacks "scientific" support in the same way the witch's-eye belief does in the sense that I'm using the word "science."

The objectively false beliefs that individuals hold are called superstitions. Superstitions influence how the persons who hold them see the world, the people in it, and how they behave as strongly as mere opinions and objectively true beliefs do. In influencing these things, like other kinds of beliefs, superstitions may also influence institutions.[5]

To the extent that scholarship in law and economics treats individuals' beliefs at all, most of this scholarship proceeds as though individuals' beliefs were either the opinion kind or the objectively true kind. Law and economics has largely ignored superstition. One of this paper's purposes is to help remedy that.

Contrary to what I suspect is most readers' intuition, my argument is that some objectively false beliefs *improve* social cooperation and productivity. They make their holders' societies better off. This isn't true of all superstitions, of course. But it's true of many of them, including some of the superstitions that seem the most ridiculous on their surface. Critically for law and economics, many socially productive superstitions produce their desirable effects by influencing or "working through" the legal system—the law and the institutions of its enforcement.[6]

This paper's other purpose is to discuss what the components of an "Austrian" law and economics might consist of. Given the importance that the Austrian approach to economic science assigns to individuals' beliefs, such a law and economics would necessarily assign beliefs a central place in its study. Further, given that many beliefs influence the legal system, such a law and economics would also seek to analyze the

[5] As I point out below, beliefs may themselves sometimes constitute institutions as well. Thus I will at points distinguish between belief- and non-belief institutions.

[6] This paper develops thoughts connected to a closely related research project I'm currently engaged in that investigates the economics of seemingly absurd legal institutions. Superstition plays a prominent role in much of this work. See Leeson (2012a, 2012b, 2011a, 2011b, 2011c, 2010).

endogenous emergence of legal institutions in light of those beliefs, as well as the endogenous emergence of beliefs in light of legal institutions. My argument is that Ronald Coase's conception of law and economics precludes such analysis. In contrast, Richard Posner's facilitates it. An Austrian law and economics can't be built on Coasean foundations. But it can and should be built on Posnerian ones.

2 Coase, Posner, and the Austrian way

As Coase (1996: 103) points out, there are "two parts" to law and economics. These parts overlap significantly at points but, in Coase's words, remain "quite separate." The first branch of law and economics might be called the Coasean one after its founder, Ronald Coase. The second branch might be called the Posnerian one after its founder, Richard Posner.[7] These branches display "sharp differences" (Cameron 1995: 1).

The Coasean branch of law and economics is narrow. It sees the productive and legitimate scope of law-and-economic inquiry as restricted to studying "the influence of the legal system on the working of the economic system" (Coase 1996: 104). This includes, for example, studying how antitrust law affects industrial organization, how labor law affects labor markets, and so on.

The Coasean branch of law and economics' narrowness results from Coase's narrow conception of economics. Coase defines economics, and thus the productive and legitimate scope of economic inquiry, topically. For him, economics is the study of "the economy"—traditional, market decision making, such as that of consumers, independent

[7] On the differences between the Coasean and Posnerian branches of law and economics, see Harnay and Marciano (2009). See also the exchange between Coase (1993a) and Posner (1993a). Coase and Posner have both noted the differences in their respective branches elsewhere too. See, for instance, Coase (1993b) and Posner (1993c, 1987).

producers, and firms. As Coase (1998: 93) puts it, “I think economists do have a subject matter: the study of the working of the economic system, a system in which we earn and spend our incomes.” Or, as he characterizes his view elsewhere, “What economists study is the working of the social institutions which bind together the economic system: firms, markets for goods and services, labour markets, capital markets, the banking system, international trade, and so on” (Coase 1978: 206-207).

Because of the Coasean branch’s narrow conception of economics, and thus law and economics, this branch precludes institutional endogeneity. It excludes analysis of nonmarket decision making from the realm of productive and legitimate economic analysis, and thus excludes economic investigation of the decision making that gives rise to the law and legal (or other) institutions. The Coasean branch of law and economics insists on treating the law and legal institutions as exogenous and given constraints on the decision making of conventional economic actors in conventional markets.

The Coasean branch of law and economics not only precludes institutional endogeneity. It considers attempts to use economics to study nonmarket decision making that gives rise to institutions foolhardy. According to Coase, economists are fundamentally unfit to contribute the development of knowledge in “nonmarket disciplines,” such as law, where their knowledge is impoverished compared to the scholars who properly occupy them. As he puts it, “an ability to discern and understand these purposes [i.e., those of nonmarket decision makers] and the character of the institutional framework (how, for example, the political and legal systems actually operate) will require specialized knowledge not likely to be acquired by those who work in some other discipline” (Coase 1978: 208).

Coase see this fundamental unfitness as fating attempts to use rational choice theory to understand nonmarket decision making to fail. “I would not expect” persons making such attempts, Coase remarks, “to continue indefinitely their triumphal advance and it may be that they will be forced to withdraw from some of the fields which they are now so busily cultivating.” “[T]he movement by economists into the other social sciences which has as its aim, the improvement of these other social sciences . . . seems to me likely to be temporary” (Coase 1978: 209; 211). Indeed, according to Coase, economic imperialists’ attempts to use the logic of choice to understand nonmarket decision making, such as that which gives rise to legal and other institutions, may simply reflect their inability to make contributions to the study of “the economy” proper. As he puts it, these “economists are looking for fields in which they can have some success” (Coase 1978: 203).

The Posnerian branch of law and economics is very different from the Coasean one and much broader. The Posnerian branch uses economics to study the law and the legal system. It engages in an economic analysis of the law. As Posner (1975: 759) describes it, this branch concerns itself with “the application of the theories . . . of economics to the central institutions of the legal system, including the common law doctrines of negligence, contract, and property; the theory and practice of punishment; civil, criminal, and administrative procedure; the theory of legislation and of rulemaking; and law enforcement and judicial administration.”

Central to the Posnerian branch of law and economics is the idea that economics is a method of inquiry rather than the topic of one. Similar to the way that Coase’s narrow, topical conception of economics drives the Coasean branch’s narrow, topical

conception of law and economics, Posner's broad, method-based conception of economics drives the Posnerian branch's broad, method-based conception of law and economics. In the Posnerian conception, the economic method is applicable to human decision making in general. It includes narrowly "economic" decision making in the sense that the Coasean branch is concerned with. But it also encompasses human decision making outside this context—nonmarket decision making, for example in the creation of law.

In sharp contrast to the Coasean branch of law and economics, the Posnerian branch permits, and indeed demands, institutional endogeneity. Nonmarket decision making is as much decision making as that which occurs in the context of conventional, explicit markets. Thus economic analysis of the legal system is not only permissible. If one wants to understand the central phenomena underlying society—not only how social interaction responds to those phenomena but how those phenomena respond to social interaction (i.e., their sources)—economic analysis of legal (and other) institutions is indispensible. As Posner (1972: 439) put it in his statement of the *Journal of Legal Studies*' purpose in the founding year of that journal, "economic theory provides a powerful tool not only for the critique of legal institutions (normative analysis) but also for explaining such institutions (positive analysis)."

In one of his earlier articles appropriately entitled "The Economic Approach to Law" (as opposed to, say, "Studying the Law's Impact on the Economy"), Posner (1975) distinguishes between "old" (i.e., pre-1960) and "new" (i.e., post-1960) law and economics. The former, he points out, "confined its attention to laws governing explicit

economic relationships." The latter "recognizes no such limitation on the domain of economic analysis of law."

Ironically, while in one sense Coase is rightly considered the father the "new" law and economics, the Coasean branch of that law and economics is essentially what Posner describes as the "old" mode. In contrast, the Posnerian branch developed the bulk of the "new" one. Thus one might substitute "Coasean" for "old" and "Posnerian" for "new" in Posner's sentences and do little violence to the essential distinction he draws, while rendering that distinction in terms that comport more closely with the distinction between the Coasean and Posnerian branches of law and economics I've described above.

The Coasean branch of law and economics fits uncomfortably with the Austrian approach to economic science. Indeed, in important respects the Coasean branch is antithetical to it. In contrast, the Posnerian branch of law and economics connects seamlessly to that approach.

The Austrian approach to economic science is rooted in what Ludwig von Mises (1949) called praxeology: the logic of human action. In that approach, *all* purposive behavior falls under the purview of economic study, whether it's the conventionally "economic" kind in markets, or some other kind, such as decision making in the political realm, or the legal one. The praxeological perspective seeks to use economics—the logic of choice—to understand purposeful behavior whatever realm it occurs in.[8] In this perspective economics is everywhere rather than relegated to a small, confined place called "the economy."[9]

[8] On the use of the logic of choice in applied work per the Austrian approach, see Mises (1957).

[9] The Austrian approach to economic science is, in my view, the same one Becker (1976, 1993) articulates. It views economics as a method rather than a subject matter. On the importance of this approach

Because of the Austrian approach's praxeological roots, legal institutions occupy a place of particular importance in it. This is true not only because legal institutions influence the incentives and information that individuals confront in their "economic" interactions—i.e., for "Coasean reasons." Equally important, legal institutions occupy a place of prominence in the Austrian approach because they are themselves at one level or another the result of purposive behavior—i.e., for "Posnerian reasons." As a consequence, in the Austrian approach, institutions generally, and legal institutions in particular, are objects of praxeological inquiry. They're aspects of decision making properly treated by economic inquiry and thus amenable to investigation using the theory of rational choice.[10]

The praxeological roots of the Austrian approach combined with that approach's insistence on the importance of individuals' "meanings"—i.e., beliefs—for understanding human behavior and that behavior's results means that an Austrian law and economics must be, if it's to be in any sense "Austrian," centrally concerned with using the logic of choice to investigate legal institutions' emergence and how individuals' beliefs operate in that logic. In precluding such investigation, the Coasean branch of law and economics precludes the kind of law and economic analysis that could in any sense be "Austrian." It cannot serve as a foundation for an Austrian law and economics. In contrast, the Posnerian branch of law and economics can. By offering the possibility of such an analysis, and making such analysis central to economic study, the Posnerian branch

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to economics (and Becker more generally) for the development of the Posnerian branch of law and economics, see Posner (1993b).

[10] That theory is based on the unflinching application of three combined assumptions: maximizing behavior, market equilibrium, and stable preferences. See Becker (1976).

supplies a suitable framework for an Austrian law and economics. Indeed, it makes such a law and economics possible.

The discussion that follows sits squarely in the Posnerian branch of law and economics. This is what makes it "Austrian." I limit myself to using economic analysis—rational choice theory—to examine how superstition contributes to and enables the successful operation of legal institutions in four cases. Two of the cases I consider aren't original to me. They've been analyzed economically by others. But they supply useful illustrations of the law and economics of beliefs, in particular objectively false ones, and thus useful illustrations of a necessary component of an Austrian law and economics. The other two cases I will consider are my own.

My discussion takes the beliefs it considers as given and examines their implications for various aspects of legal systems. However, for reasons I describe below, many beliefs are themselves institutions. Thus they, too, should be subjected to the scrutiny of economic analysis and accordingly endogenized through the theory of rational choice. I will make some comments on this enterprise and what it implies for law and economics, and Austrian law and economics in particular, before concluding.

3 Witches and magic beans

Given Posner's approach to law and economics, it shouldn't be surprising that he supplied perhaps the first research I regard as falling within the domain of the law and economics of belief more generally and the law and economics of superstition in particular. Posner's (1980) contribution was to demonstrate that the objectively false

beliefs that permeate some primitive societies perform socially valuable functions, in particular as they relate to improving the operation of law. One such belief is in witches.

A belief in witches—persons who malevolently wield supernatural powers that derive in some way from a close relationship with "evil spirits"—is prominent in primitive societies. This belief is objectively false. No such persons exist: belief in witches is a superstition. Yet individuals in primitive societies leverage this superstition to facilitate the enforcement of primitive law.

Law here should be understood in the broad sense of rules that define acceptable interpersonal conduct, or social rules. Primitive societies typically lack anything resembling what, in the developed world, we would describe as governments, which might promulgate such law formally. Nonetheless primitive societies have laws. Without them no society would be possible. Likewise, without some mechanism of enforcing such laws in the absence of government, no society would be possible. It's in this context that the witch superstition is important.

One important law in many primitive societies dictates that individuals share resources with one another. Mother nature-induced vagaries of agricultural production, hunting, and so on render the members of societies that operate near or not dramatically above the subsistence level subject to considerable uncertainty. A sensible response to such uncertainty is social insurance.

Under such insurance primitive producers who generate more than the average produce over some period subsidize the consumption of the members of their society who were less fortunate during that period. In turn, lucky producers in period one are subsidized in future periods when they're not so fortunate but their fellow citizens are.

This simple redistribution scheme insures primitive producers against uncontrollable misfortunes. Shirking isn't a terribly difficult problem under this arrangement since the members of primitive societies tend to live and work in close physical proximity to one another. This permits them to detect whether a poor yield is the result of the probabilities of mother nature—bad luck—or instead a producer's laziness or bad decision making.

The law that prescribes the terms of such an insurance system must be enforced to function. If it's not, unfortunate producers in period one who receive consumption subsidies from fortunate producers will be tempted to refuse to provide subsidies to those persons in period two when fortunes change.

In the absence of government, social ostracism of lawbreakers is one means of accomplishing this. But this enforcement technology has limited power. Social ostracism may be costly for certain community members to execute, for example if their close relative or friend is the object of punishment. In this case a lawbreaker may be able to get away with breaking the law since he knows he can rely on familial and friend support when he falls on hard times later. Such incentives would restrict effective insurance to arrangements for redistribution within the kin group, weakening its helpful function in proportion to the reduced size of the pool of persons participating in the insurance arrangement.

To avoid this outcome, social ostracism must be made more effective. To do that, the lawbreaker must somehow be rendered more offensive and dangerous to interact with—so offensive and dangerous to interact with that even those persons close to him will be willing to shun him when he breaks the law.

Declaring the lawbreaker a witch accomplishes this. Witches are more dangerous and nefarious than persons who violate laws relating to social insurance. Their connection to evil spirits makes them so. A close relative may be unwilling to cut the lawbreaker off from his support if the lawbreaker is simply a cheater. But he's likely to be willing to do so if the lawbreaker is an agent of something like the devil and therefore threatens by his mere presence to subject his relatives and friends to all manner of dark and nefarious forces. In this way primitive societies' legal systems leverage their members' objectively false belief in witches to enforce compliance with "social insurance law."

As my second illustration of the law and economics of beliefs and, in particular, objectively false, yet socially productive, ones, I want to consider the role of beliefs in magic in supporting the enforcement of "intellectual property law." In his analysis of primitive societies, Posner (1980: 7) notes the absence of intellectual property rights in these societies—an absence that, if it really existed, would pose significant problems for their inventive members. Posner is correct to point to the extraordinarily high costs of defining and enforcing intellectual property rights in developed societies, let alone in primitive ones that lack developed societies' enforcement mechanisms. Indeed, primitive societies lack so much as written records that could facilitate this endeavor. However, Posner may be incorrect in suggesting that primitive societies have generally been unable to define and enforce intellectual property rights.

Mark Suchman's (1989) paper, "Invention and Ritual," shows how they may do so. Individuals in primitive societies define and enforce rights to ideas and practices ("trade secrets") by leveraging their societies' belief in magic: spells, potions, talismans,

and other manner of supernatural recipes and ingredients. Such belief is superstitious. "Magic," as Suchman (1989: 1272) defines it, "encompasses any activity that society *construes* as being essential to the success of a technique but that has no *objective* function in the physical mechanics of the process itself."

Unlike techniques of production, which are often difficult to protect, magic is often easy to protect. For example, many magical formulae ostensibly derive their powers from the "magician"—the magic practitioner—whose ability to practice magic successfully stems from a supposedly age-old, perhaps even quasi-familial, connection to certain helpful spirits with whom the magician has a special relationship. Similarly, unlike the idea it may ultimately protect, a magical talisman is a physical object. Thus it can be easily kept away from others in the same way the owner's other physical property is.

Though supernatural spells and incantations that invoke magical effects are "ideas" themselves, they too can be monopolized if they're long and elaborate. Certain words must be used. They must be used in the proper order. And they must be delivered in conjunction with the appropriate acts to have force. Unless an observer has an especially good memory, or has significant practice invoking the supernatural forces the magical spell entails, he's unlikely to be able to reproduce the magician's incantations exactly, rendering him unable to use the magic successfully.

By tying elements of magic to new protection techniques—to inventions—primitive producers can use their ability to enforce property rights over the former to enforce property rights over the latter. Suchman (1989: 1274-1275) supplies a nice example to illustrate this logic.

Suppose a primitive producer discovers through costly experimentation that by burying dead fish with his crops, he's able to produce a larger yield. In making this discovery the producer has "invented" a new, and very useful, production technology. Such experimentation is socially productive. But the producer's incentive to engage in such experimentation is limited if he knows that if he discovers a useful technology, others can, by observation, copy his invention and in doing so obtain it freely.

To maximize his incentive for socially productive experimentation, the producer must feel confident that he will profit significantly from his costly efforts to improve his yield. He requires intellectual property rights. Intellectual property rights permit him to sell his invention to other producers, allowing him to benefit more significantly from his experimentation. This in turn gives him the incentive he needs to discover new production techniques.

The invention of burying fish with crop seeds is, by itself, perhaps impossible to enforce a property right over. It's too easy to for others to copy. But by infusing this production process with superfluous magic, the producer can enforce property rights to his innovation. Having discovered the usefulness of burying fish with his crops, the producer invites others to observe his discovery. However, when demonstrating his invention, the producer buries some "magic beans" along with the fish. The producer tells the observers that it's the combination of the beans and fish that produce the greater yield. And, when some months later the observers see the producer's greater crop yield, the producer offers to sell or rent them his magic beans so that they might enjoy its benefits too.

The producer's property rights may not remain secure forever. Other producers may experiment with planting fish without his magic beans and in doing so discover that the fish alone are enough to generate a greater yield. Still, the magic beans give the producer a stronger intellectual property right over his new production technique than he would have without them. And, at a minimum, they're likely to allow the producer to earn rents for a longer time than if he didn't invoke them at all.

The producer might also engage in other activities that help prevent others from discovering the truth about his magic beans. For example, before burying the fish he might shred the fish, pulverize them, mix them with some other substance to disguise their odor, or engage in some other act that renders the fish unidentifiable as such to others. He may then mix the beans with the fish and tell others that it's this concoction that has magical properties, which he will sell them if they desire.

This example is hypothetical. Still, it describes in stylized form a process that Suchman (1989) contends comports with intellectual property definition and enforcement in primitive societies where belief in magic is prevalent. These primitive producers leverage their colleagues' objectively false beliefs to create intellectual property rights.

4 Boiling water and polygraph tests

Medieval European legal systems were more developed than those of primitive societies. The former legal systems had writing, formal laws, formal courts, and formal mechanisms of the law's enforcement. However, they too relied heavily on objectively false beliefs to facilitate their legal systems' operation.

Perhaps the clearest example of this is the way in which medieval legal systems' leveraged a then-popular superstition called "iudicium Dei." I've discussed this superstition and how medieval European legal systems exploited it elsewhere (see Leeson 2012a). Below I sketch how they did so.

Iudicium Dei is Latin for "judgment of God." According to the iudicium Dei superstition, if priests performed the appropriate rituals, they could call on God to assist them in finding fact in difficult criminal cases. Many criminal accusations that came before medieval courts lacked evidence that would permit justices to determine whether the accused was guilty or innocent of the crime he stood accused of. Witness testimony was usually all justices had to go on. But it wasn't difficult for parties on both sides of the issue to produce credible witnesses who would swear what they wanted.

This left justices in a quandary. They could simply release the accused. But of course he might be guilty. Such a policy would give incentive to would-be criminals to engage in more crime since they could rest assured that, in a many cases at least, they would get off scot free. Alternatively justices could convict the accused merely because he had been accused. But of course, if he were innocent, this would lead to a miscarriage of justice. Further, convicting every person who was accused of a crime could undermine otherwise law-abiding persons' incentive to remain law-abiding. Without severe restrictions on accusations, nearly anyone might be accused of a crime for any reason, including the innocent. If law-abiding persons were just as likely to be accused of crimes as guilty ones, and the legal system would condemn them whether they committed crime or not, they might as well commit crimes, or at least might be more likely to do so than if the criminal justice system was functional.

Reasonable criminal justice requires legal systems to sort accused persons by their guilt or innocence and to treat those persons differentially. Such sorting requires fact finding. But how can judges find fact without external evidence? Medieval legal systems' solution to this problem was to find fact with "internal evidence"—evidence of the accused's guilt or innocence supplied by the accused himself.

The key to doing this was tapping into medieval citizens' belief in iudicium Dei. Medieval legal systems' method of doing that was ordeals. Those legal systems used a variety of ordeals for this purpose. Here I will restrict my attention to the hot water ordeal.

In the hot water ordeal a priest threw a stone or ring into a cauldron of boiling water. The accused was then asked to plunge his arm into the cauldron to fish the object out. After doing so the priest would wrap the accused's arm in a bandage and revisit his arm several days later. If the accused's arm showed signs of having been boiled by the water, the accused was convicted of the crime. If it didn't, he was exonerated.

The belief underlying the ordeal was that of iudicium Dei. According to that belief, if the accused were innocent, God would perform a miracle, preventing the water from boiling him, and in doing so evidence the accused's innocence. If the accused were guilty, God would permit the water to boil the accused, evidencing his guilt. Through the ordeal God would reveal the accused's criminal status, making it known to the legal system which could then proceed to punish or exonerate the accused per the law.

Medieval citizens' belief in iudicium Dei was objectively false. God didn't actually intervene in worldly legal affairs at the legal system's request to find fact when the legal system was unable to do so itself. Yet precisely because medieval citizens

believed God did this, ordeals established the accused's guilt or innocence in such situations nonetheless.

Accused criminals had private information about their guilt or innocence. The "trick" of ordeals was to incentivize them to unwittingly reveal that information to the legal system. Ordeals achieved this by imposing higher costs on guilty persons who were accused of crimes than innocent ones. The reason they were able to do this was citizens' belief in iudicium Dei.

Under that belief, guilty persons expected that if they plunged their arms in the boiling water, God would let the water boil them. Thus it was better to confess, settle with their accusers, or flee than to undergo the ordeal. Confession, for example, would result in the guilty person's punishment. But that's what the guilty person expected to suffer anyway when he underwent the ordeal and God revealed his guilt. At least by confessing he could avoid being boiled on top of this.

Under the same belief, innocent persons expected the opposite if they plunged their arms in the boiling water. They expected that God would perform a miracle that prevented the water from harming them. This wouldn't only save their arms. It would prove their innocence in the process. Thus it was better to undergo the ordeal than to confess, settle with their accusers, or flee.

What I've described here is a separating equilibrium. For citizens who believe in iudicium Dei and are innocent, undergoing the ordeal is cheaper than for citizens who believe in iudicium Dei and are guilty. Guilty and innocent persons therefore behave differently when confronted with the specter of the ordeal. In behaving differently they reveal their private information about their criminal status to the legal system. In this

way, through ordeals, the legal system used medieval citizens' superstition to find fact and, in doing so, improved criminal justice.

Primitive and medieval legal systems aren't the only ones that leverage objectively false beliefs to improve their operation. As Chris Coyne and I have discussed elsewhere, modern legal systems do too (Leeson and Coyne 2012). Consider polygraph tests.

By all scientific accounts, "lie detector" tests are incapable of determining whether a person accused of a crime is in fact guilty or innocent of the crime he stands accused of. There's no way to physiologically measure if a person is telling the truth. Precisely for this reason, most (though not all) courts in the United States, for example, bar polygraph results as admissible evidence in criminal trials. But that exclusion may be too hasty. Like iudicium Dei, people's objectively false belief—their superstition—that lie detector tests can discern whether they're lying or telling the truth may permit lie detector tests to do precisely that.

Despite overwhelming evidence to the contrary, many Americans believe lie detector tests "work." Thus the same logic described above in the context of ordeals can be leveraged by law enforcement officials to improve criminal justice, and in fact is used by those officials for this purpose, even if it's not typically used by American courts.

Expecting to be "outed" by the polygraph, guilty persons are more likely to decline undergoing lie detector tests than innocent persons. The polygraph imposes different expected costs on guilty and innocent persons. Because of this, guilty and innocent persons choose differently when confronted with the specter of the polygraph. In choosing differently they reveal something about their guilt or innocence to the

polygraph's administrators. In this sense ordeals were like medieval lie detector tests. Or rather, lie detector tests are like medieval ordeals.

What I've described here and in the previous section is something like an "institutional placebo effect." The effectiveness of legal institutions depends not necessarily, or at least not exclusively, on how well they objectively work, but instead on how well people *believe* they work. People's "meanings," their beliefs—even their objectively false ones—are crucially important to the operation of legal institutions. In terms of policy, ignoring those meanings isn't just unproductive. It may be counterproductive. To the extent that legal systems that fail to take individuals' beliefs into account, for example, they may end up relying on inefficient institutions of law and order.

4 Endogenizing superstition

In the foregoing discussion I considered the connection between people's beliefs to the law—in particular their objectively false ones—taking those beliefs as exogenously given. This is unsatisfactory, or at least highly incomplete, from the Austrian perspective outlined above. To the extent that society's members share certain beliefs and these beliefs influence their expectations about other members' behavior, beliefs from part of society's institutional structure.[11] They count among the institutions that constrain and shape human behavior. Since shared beliefs are themselves institutions, like the legal institutions based on them, they must also come from somewhere. An Austrian law and

[11] See, for instance, North, Wallis, and Weingast (2006), who make this point. As these authors point out, not all beliefs have this feature. The ones this paper focuses on do.

economics must therefore endogenize persons' beliefs in the same way that it endogenizes non-belief institutions.

Here I will make some general remarks about the enterprise of doing so. These remarks parallel in some fashion the "methodological" remarks I made in section 2 regarding Coase, Posner, and the "Austrian way."

There are two broad approaches to thinking about the differences in beliefs we observe across societies. The first approach views those differences as "fundamental," i.e., as reflecting foundational differences in the cultures, preferences, and worldviews of different people. In this view cross-society differences in beliefs are irreducible and thus inscrutable by economic analysis. They're exogenously given in the same way that my feelings about cigars are.

The second approach to differences in beliefs across societies views those differences—or at least some of them—as reflecting differences in the particular problem situations that people confront in different societies and thus the relative prices of holding alternative "meanings" as a means of coping with those situations. In this view beliefs are explicable and understandable in terms of economizing behavior—in terms of the theory of rational choice. Such beliefs reflect institutional responses to the specific problem situations individuals confront in an effort to overcome those situations so as to realize otherwise unrealized gains from social cooperation. Beliefs vary across societies because the nature of particular problem situations, and thus various beliefs' prices, varies across them. But the underlying preferences, and thus goals, of persons across societies do not.[12]

[12] The Austrian approach here is, in my view, the same one articulated by Stigler and Becker (1977).

Social scientists in general, and economists in particular, have become very comfortable with the idea that non-belief institutions—systems of government, law, and so on—might reflect responses to the different obstacles that different societies confront in pursuing their common goals. However, they've been much slower or reticent to acknowledge that beliefs themselves may reflect this. This is unfortunate. Some beliefs clearly evolve to support non-belief institutions' operation. They have little or nothing to do with different fundamental, irreducible worldviews or preferences across different people in different times and places throughout the world.

An example will help illustrate this point. In several societies people hold an objectively false belief according to which lawbreakers are in some sense "spiritually contaminated" as a consequence of their lawbreaking and according to which their resulting spiritual contamination is physically contagious (see, for instance, Leeson 2010). The fundamentalist view of beliefs would maintain that this superstition is prominent in some societies and not in others because people in those societies "just" have different ideas about the way the world works than in other societies, or "just" have different underlying preferences that this superstition satisfies.

That people in such societies have different ideas about the way the world works, or different tastes, than in other societies is undoubtedly true. But this doesn't mean there's no reason—no economic logic—giving rise to those differences. The fundamentalist view ignores that we observe other systematic differences—differences in political-economic context—across societies that correlate strongly with differences in this belief across them. The "contagion superstition" isn't distributed randomly across

peoples. It's prevalent in societies with particular political-economic features, namely a lack formal government and a reliance on multilateral punishment to enforce law.

Correlation isn't causation. But at a minimum this distribution of beliefs should give belief fundamentalists some pause to consider how political-economic differences across societies may be responsible for differences in those societies' beliefs in much the same way that most would admit political-economic differences across societies are responsible for the non-belief institutional differences across them. In the case of the contagion superstition, economic logic suggests a ready reason that might account for this belief's correlation with the lack of formal government and reliance on multilateral punishment for legal enforcement.

As indicated above in my discussion of witches, multilateral punishment is most effective when that punishment is maximally multilateral—when every member of society participates in ostracizing lawbreakers. However, as I also discussed above, such ostracism is very costly for certain persons. Thus, to make the multilateral punishment institution effective, it's important to bring costs to bear on those persons who wouldn't otherwise participate in it. By rendering the lawbreaker spiritually defiled and his defilement contagious, the contagion superstition accomplishes precisely that. It reflects the emergence of an objectively false belief in response to an institutional problem as a means of overcoming it. The belief is endogenous. It's the product of rational, maximizing behavior given the common particulars of the problem situation certain societies confront.

5 Concluding remarks

An Austrian law and economics must be one that, in addition to studying how legal institutions shape individuals' behavior in the marketplace, uses rational choice theory to understand those institutions' emergence. That in turn requires such a law and economics to study the role of beliefs in the logic of choice that gives rise to legal institutions and how legal institutions give rise to beliefs. The Posnerian branch of law and economics, which supplies an economic analysis of the law, achieves this. In doing so it provides a useful foundation for an Austrian law and economics. The Coasean branch of law and economics, which insists on treating legal institutions as exogenous, and which has no role for individuals' beliefs other than perhaps as constraints on such institutions' effects on "the economy," eliminates much of the scope for an Austrian law and economics.

This paper considered some examples of how legal institutional emergence and operation is related to the "meanings" individuals assign to them—i.e., to individuals' beliefs. Hopefully these examples help illustrate the kinds of analyses an Austrian law and economics might be concerned with. In particular I examined the role that individuals' superstitions—their objectively false beliefs—play in legal institutions' emergence and operation. The examples I considered highlight the perhaps counterintuitive insight that objectively false beliefs can actually improve legal systems' operation and, with it, social cooperation.

References

Becker, G.S. (1976). *The economic approach to human behavior*. Chicago: University of Chicago Press.

Becker, G.S. (1993). The economic way of looking at life. *Journal of Political Economy, 101*, 385-409.

Boettke, P.J. (ed.) (2010). *Contemporary handbook on Austrian economics*. Cheltenham, UK: Edward Elgar.

Cameron, A. (1995). Coase on law and economics. Mimeo.

Coase, R.H. (1978). Economics and contiguous discipline. *Journal of Legal Studies, 7*, 201-211.

Coase, R.H. (1993a). Coase on Posner on Coase: Comment. *Journal of Institutional and Theoretical Economics, 149*, 96-98.

Coase, R.H. (1993b). Law and economics at Chicago. *Journal of Law and Economics, 36*, 239-254.

Coase, R.H. (1996). Law and economics and A.W. Brian Simpson. *Journal of Legal Studies, 25*, 103-119.

Coase, R.H. (1998). The new institutional economics. *American Economic Review, 88*, 72-74.

Harnay, S., & Marciano, A. (2009). Posner, economics and the law: From '*law and economics*' to *an economic analysis of law*. *Journal of the History of Economic Thought, 31*, 215-232.

Leeson, P.T. (2010). Gypsies. Mimeo

Leeson, P.T. (2011a). Animal trials. Mimeo.

Leeson, P.T. (2011b). Trial by battle. *Journal of Legal Analysis*, *3*, 341-375.

Leeson, P.T. (2011c). Oracles. Mimeo.

Leeson, P.T. (2012a). Ordeals. *Journal of Law and Economics*, forthcoming.

Leeson, P.T. (2012b). God damn: The law and economics of monastic malediction. *Journal of Law, Economics, and Organization*, forthcoming.

Leeson, P.T., & Coyne, C.J. (2012). Sassywood. *Journal of Comparative Economics*, forthcoming.

Mises, L.v. (1949). *Human action: A treatise on economics*. New Haven: Yale University Press.

Mises, L.v. (1957). *Theory and history: An interpretation of social and economic evolution*. New Haven: Yale University Press.

North, D.C., Wallis, J.J., & Weingast, B.R. (2006). A conceptual framework for interpreting recorded human history." NBER Working Paper No. 12795.

Posner, R.A. (1972). Volume one of the *Journal of Legal Studies*—An afterword. *Journal of Legal Studies*, *1*, 437-440.

Posner, R.A. (1975). The economic approach to law. *Texas Law Review*, *53*, 757-782.

Posner, R.A. (1980). A theory of primitive society, with special reference to law. *Journal of Law and Economics*, *23*, 1-53.

Posner, R.A. (1987). The law and economics movement. *American Economic Review*, *77*, 1-13.

Posner, R.A. (1993a). The new institutional economics meets law and economics. *Journal of Institutional and Theoretical Economics*, *149*, 73-87.

Posner, R.A. (1993b). Gary Becker's contributions to law and economics. *Journal of Legal Studies, 22*, 211-215.

Posner, R.A. (1993c). Nobel laureate: Ronald Coase and methodology. *Journal of Economic Perspectives*, *7*, 195-210.

Stigler, G.J., & Becker, G.S. (1977). De gustibus non est disputandum. *American Economic Review, 62*, 76-90.

Suchman, M.C. (1989). Invention and ritual: Notes on the interrelation of magic and intellectual property in preliterate societies. *Columbia Law Review*, *89*, 1264-1294.