

## Political Epistemology, Scheall and Transition Problems

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In *F. A. Hayek and the Epistemology of Politics*, Scott Scheall offers an excellent, philosophical and immanent critique of what is now known as ‘classical’ liberal political philosophy, or, Austrian, political economy, and, thereby, renews it. And while some bits involve a creative interpretation of Hayek’s works, it would be a shame if only Hayek-friendly folk read this book. The arguments are fruitful to a wider audience interested in both what we may call ‘low level public policy’ as well as more significant political transitions. This is so, even though at times the fact that it is an immanent critique means it fails to engage with already existing discussions in other parts of political philosophy and public policy/public administration.<sup>1</sup>

But rather than griping about the book that Scheall did not write, in what follows I focus primarily on the book that he did write. And before I criticize I call attention to features that make the book significant beyond a very clever self-criticism of the Austrian school. In particular, I am thrilled that Scheall puts what one may call, ‘*transition problems*’ at the heart of theorizing about political life. Prior to reading Scheall’s book, I understood *the transition problem*, as the challenge of [I] how to move from an unjust (or otherwise bad) status quo to an ideal or vastly improved polity and, in particular, with a population raised under bad institutions, that is, the status quo.

In fact, as I realized by studying Serene Khader’s (2018) work, there are (at least) three species of the transition problem: the first version [A] turns on the challenge of finding or developing the right sort of people (with the right education or dispositions, etc.) to get us from here to there and then to have the skills and temperament to make the new circumstances work out well. The second version [B] is to create mechanisms such that the incentives of policy-makers line up with the goals to be pursued and the true interests of people/constituents and how to get from here (under bad institutions) to there (the institutions with the right mechanisms). The third version is a collective action problem [C] that a population raised under bad institutions may rationally prefer a bad status quo if getting to the better state involves high costs to *them*. Of course, in practice these three versions can be blended in various ways.

To simplify a complex history of political philosophy, perfectionists, including many illiberal types (Plato, Al-Farabi, etc.) tend to focus on [A]. Inspired by Machiavelli and Spinoza, the liberal tradition, including recent work in public choice and mechanism design, is focused primarily on [B].<sup>2</sup> And progressives/feminists (including liberal feminists) tend to focus on [C].

Scheall is responding to scholars focused on [B] and ignores other versions of the transition problem. He calls this the problem of ‘policy maker incentives’ (p. 15). And given his interest in classical liberalism, Scheall rightly focuses on “Hume and his modern descendants in the public choice tradition of political economy, which make the assumed knavery of policymakers the sine qua non of their analyses,” (p. 17).

But in his argument, and I take this to be an important contribution, he is also very sensitive to the fact that [II] at each step of the way from an imperfect status quo to a better destination involves a transition problem.<sup>3</sup> So, for example, Scheall notes that the mere fact that “policymaking is less epistemically burdensome within more liberal contexts”—let’s stipulate this—“is of no use to the would-be liberalizing policymaker in a comparatively illiberal and thus more epistemically burdensome policymaking context,” (p. 99). As one of the founder of the Chicago school of economics put it, with perhaps no exaggeration, “one must plan for free-market controls just as carefully as (indeed, more so than) for socialization” (Simons 1945: 213). To put my point historically: Scheall helps recover one of the distinctive insights of the so-called neo-liberal moment in classical liberalism: that getting to spontaneous orders, and getting them to work, may be challenging work. If Scheall’s argument is right, this may be even more challenging than previously realized.

And, once one thinks about it, [III] even maintaining a status quo over time is or can be, in some respects, similar to a transition problem (in the sense of [II]). As illustration, I quote my favorite passage in the book:

Austrian economists and others sympathetic to markets must do more than merely bemoan “crony capitalism.” They have to confront head-on the criticism that cronyism is inherent in capitalism, that making profits necessarily implies the ability to garner and use political power to an individual’s or a firm’s further benefit. It is not enough to simply institute the rule of law. Once instituted, it must be perpetually maintained if the resulting liberal order is to survive and thrive. Otherwise, those citizens not in a position to take advantage of it, unable to nullify the rule in their favor, will eventually come to think the game of society rigged—and they will not be wrong. It is the responsibility of policymakers, if it belongs to anyone, to keep the system from being gamed by the wealthy and powerful. However, this bears an epistemic burden. The effectiveness of the rule of law and, therefore, the effectiveness (qua liberal) of a liberal society depends on the know-how of the policymaker to enforce the rule properly, that is, to prevent its abrogation by the powerful (p. 97).

As Scheall notes, this point generalizes to all versions of transition problems for all political traditions.<sup>4</sup> Scheall’s insight here is central to what makes the best of Ordoliberalism a distinctive tradition within classical liberalism (e.g., contrast their antitrust policy focused on effective competition to a Chicago inspired antitrust policy focused on consumer welfare). It is notable that the epistemic burden Scheall alerts us to here is not just one of figuring out when and how policy works, but also to prevent moral and political decay and corruption.<sup>5</sup> Or to put it more subtly, the political process is a constitutive feature of the epistemic burdens that policymakers (and other citizens) face. And a liberalism worth having—one that avoids enlightened despotism—better face up to this fact.<sup>6</sup>

Now, in commenting on the differences and similarities among ordo-liberalism, the Chicago school economists, and their imitators in different countries, Foucault notes in the *Birth of Biopolitics* that, unlike in the origin of the Austrian school,<sup>7</sup> there is a tendency, to take the existence and survival of liberalism as a kind of permanent background tradition for granted in American classical liberalism (including Austrians today) (Foucault 2008: (14 March, 1979), Lecture 9, pp. 217-219). So we can see that Scheall hearkens back to the spirit of the earlier Austrian tradition, which was founded in great political defeat, and thereby reinvigorated Anglophone classical liberalism.

Below I return to what I take to be some of the limits of Scheall’s approach to thinking about transition problems. But first I pause at Scheall’s core conceptual claim that the problem of policy-maker ignorance

has logical priority to aligning policy-maker incentives with her constituents or society's needs. The core argument is summarized as follows:

[O]n the assumption that some principle like *ought implies can is true* and practically useful as a guide to action, then the word “can” in such principles must mean *deliberately can*. Other candidate meanings for the word “can” render such principles practically useless. Thus, by *reductio*, “can” in *ought implies can* (and related principles) means *deliberately can*. But, by definition, deliberately can just means *knows enough to*. Therefore, *ought implies knows enough to*: nothing that we cannot know enough to deliberately realize can be an obligation. The nature and extent of our ignorance place brackets around our potential obligations. Epistemic burdens are logically prior to other normative considerations. Since this is a general fact about human decision-making in all contexts, it follows that ignorance is logically prior to incentives in specifically political contexts (p. 3; emphasizes in original).

Leaving aside concerns about the possibly plural nature of this *ought*, I offer two criticisms. First, I doubt Scheall is right to assume and argue that ‘ought implies can’ applies to *all* policy contexts. That’s required for his conclusion to follow. For, some policy decisions and ends are neither normative nor obligations, and not understood as such by decision-makers. (Pick your favorite pork-barrel spending!) So, the way feasibility enters into these decisions may be more as a constraint like other forms of instrumental reasoning (with cost-benefit analysis, opportunity costs, etc.).

In Scheall’s argument what’s happened is an unjustified slip *from* the fascinating claim that “epistemic burdens are logically prior to other normative considerations” *to* the conclusion which presupposes something like the thought that decision-making in all political contexts is normative in character. But this has not been shown to be true. Now, there are political theorists/philosophers for whom political philosophy just is ethics or applied ethics, who might endorse this claim, but it is not obviously true.<sup>8</sup>

In addition, second, Scheall ignores that it may at times make sense to pursue infeasible (but by no means utopian) ends *in virtue* of the fact that in some environments aiming too high is better than aiming at a target within reach. Nobody really believes, perhaps, that European states will manage to secure the closest possible union, or that agreeing on transnational functional legal collaboration secures prosperity. But the fact that, as the Treaty of Rome memorably put it, they have tried “to lay the foundations of an ever-closer union among the peoples of Europe,” probably has secured some non-trivial by-products (including a lasting peace between Germany and France after centuries of regular warfare).

But notice that in my two criticisms the epistemic burdens on policymakers do not disappear (although how to think about these epistemic burdens in the second kind of criticism is not trivial). So, even if one wishes to deny Scheall’s general claim, one can preserve the spirit of his project.

I now offer some criticisms of Scheall’s execution of his project in terms that I hope he can agree. It is natural to assume that throughout the book Scheall seems to assume that if policymakers lack the knowledge to pursue an end, they ought not pursue it. For, when, the “do-nothing policy is aimed at no particular end, it bears no epistemic burden,” (p. 98).<sup>9</sup> But this raises the problem that we might never discover what works.

Here’s a version of what I have in mind. Let’s say one agrees with Popper—who is no Austrian economist, but a fellow traveler—that policy should be informed by the spirit of or guided by trial-and-error.<sup>10</sup> That is to say, and one need not be Popperian to recognize this, only if errors are permitted can policymakers and policy-scientist discover empirically what works, what are unexpected side-effects, and how to make mid-way adjustments.

There are three more subtle points lurking in this Popperian point. First, Scheall tends to treat each policy-decision as a one-off: if you have the knowledge (*ceteris paribus*) you may act for an otherwise moral end, if you lack the knowledge (*ceteris paribus*) you may not. But a Popperian treats public policy as many decisions extended over time. And by doing so a public policy is conceived as learning both what the means

are *and* what the *ends* are or might be. That is to say, and this is in the spirit of Scheall, Popperian public policy treats much policy-making as instances of [II], which, recall, involves a kind of transition problem from each imperfect status quo to a better destination.

Second, Scheall's approach has relatively little space for policy-makers that learn over time. And that's in part because he tends to think of them as *elected* (p. 82) politicians (or officials and assemblies) with short time-spans and lots of epistemic burdens. But the modern state has tried to address this: it is full of bureaucracies and dedicated research agencies that are, if institutional memory is allowed to be built up, capable of learning over time.<sup>11</sup> On my reading of Lippmann, part of the point of government is to generate conditions—including access to reliable data—that reduce epistemic burdens of policy and social life more generally (Schliesser 2019). This is why some kinds of government budget cuts can be self-undermining.

And it's not just bureaucrats. As the citations in *The Open Society* reveal, Popper was a careful reader of Walter Lippmann. And as Lippmann notes one benefit of the 'revolving door' is that it would create a kind of permanent circulation of college graduates from universities into government; and technical, government bureaucrats returning regularly to train and teach at universities, etc.<sup>12</sup> This is a means of reducing epistemic burden of a policymakers.

Now, it's true that this, in turn, raises other familiar problems (rent-seeking, how to decide which experts to trust, some of which mentioned by Scheall), but this is why Scheall's work on [II-III] is so important. But the more important point is that given that Scheall understands "epistemic burdens" in terms of "the nature and extent of the ignorance that an actor in a particular context *must overcome* in order to use some means to deliberately realize some end" (p. 3; emphasis added), he should be receptive to ways that social learning, including by policymakers and their administrative systems, can reduce epistemic burdens of policy making over time.<sup>13</sup>

I would like to develop the point by dwelling on a fascinating passage in Hayek that Scheall mentions (p. 102, note 5) as an "instance for the conditions in which it might be necessary to deliberately revise the existing system of rules of conduct":

Where a real change in the law is required, the new law can properly fulfill the proper function of all law, namely that of guiding expectations, only if it becomes known before it is applied.

The necessity of such radical changes of particular rules may be due to various causes. It may be due simply to the recognition that some past development was based on error or that it produced consequences later recognized as unjust. But the most frequent cause is probably that the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice. There can be no doubt that in such fields *as the law on the relations between master and servant, 36? landlord and tenant, creditor and debtor, and in modern times between organized business and its customers, the rules have been shaped largely by the views of one of the parties and their particular interests—especially where, as used to be true in the first two of the instances given, it was one of the groups concerned which almost exclusively supplied the judges.* This, as we shall see, does not mean that, as has been asserted, 'justice is an irrational ideal' and that 'from the point of rational cognition there are only interests of human beings and hence conflicts of interests', 37? at least when by interests we do not mean only particular aims but long-term chances which different rules offer to the different members of society. It is even less true that, as would follow from those assertions, a recognized bias of some rule in favour of a particular group can be corrected only by biasing it instead in favour of another. But such occasions when it is recognized that some hereto accepted rules are unjust in the light of more general principles of justice may well require the revision not only of single rules but of whole sections of the established system of case law. This is more than can be accomplished by decisions of particular cases in the light of existing precedents (Hayek 1973, *Law, Legislation and Liberty*, pp. 88-89, emphasis added).<sup>14</sup>

I have a reductive tendency to read Hayek's political theory, especially the parts that treat the rule of law as a spontaneous order, as flirting with a variety of potentially troubling forms of status quo bias. So, it is good to be reminded of this material. Hayek explicitly notes three sources in which an evolved common law can have reached a kind of cul-de-sac such that it requires "radical change" (a term Hayek does not use frequently): (i) an erroneous application of legal principles or a judgment based on errors of fact; (ii) or that some legal principles generate unjust consequences over time; (iii) perversions of judgment—a failure to be properly impartial—due to class bias. On the previous page, Hayek also recognizes (iv) that circumstances may change faster than the law does—here he echoes Walter Lippmann's focus on how technological innovation generates a need for a spirit of legal adaptation (Schliesser 2019).<sup>15</sup>

And, in fact, (i-ii-iii) are often connected; these can endure a very long time. These facts are clear from Hayek's own footnote 36, where Hayek cites, without qualification, the nineteenth century economist, Jevons (one of the co-inventors of marginalism), as follows, "The great lesson we learn [from 650 years of legislation of English Parliaments] is that legislation with regard to labour has almost always been class-legislation. It is the effort of some dominant body to keep down a lower class, which had begun to show inconvenient aspirations' (Jevons 1882, p. 33). Not to put too fine point on it, but Hayek explicitly recognizes that in some areas the vaunted rule of law, which has generated reliable expectations, has entrenched class warfare for much of its existence. Austrians would be rhetorically more persuasive about shaping the future if they were willing to echo Hayek's point about the historical trajectory of our institutions more regularly. This requires us to distinguish between the idea of the common law as a spontaneous order, which provides Hayek with a kind of existence proof, and really existing common law.

Because of Hayek's focus on possible solutions that will not work, and the intriguing thought that a spontaneous order can require 'radical change,' it is easy to miss, and so especially worth noting that Hayek also explicitly recognizes that it is difficult for judges to become truly impartial when they are surrounded by like-minded with sympathy for their own. They become effectively what used to be known as a 'faction'. So, I read Hayek as suggesting that class bias is not noticed as class bias in homogenous population of judges and legislators. That is to say, Hayek recognizes that, at least momentarily, (even class) diversity may be constitutive, epistemically, for the discovery of more general, and more impartial principles of justice.

My view (Schliesser 2017, pp. 202-208) is that Adam Smith was inclined to support as remedy one of the measures rejected by Hayek: "a recognized bias of some rule in favour of a particular group can be corrected only by biasing it instead in favour of another." But Hayek prefers that in practice impartiality is aimed at. So, how can this be generated on his account?

It seems to me that when it comes to the selection of judges (and legislators) some kind of carefully announced and cautiously implemented temporary affirmative action or extra effort to recruit for especially salient forms of diversity can be derived from Hayek. Obviously, this is not required on Hayek's account if society has other means of discovering 'more general principles of justice' and making this discovery felt on the legislative process and case law decisions.

Undoubtedly there are Hayekian arguments against more general use of affirmative action. But if the class of legislators/judges has the character of a faction, that is, it systematically serves the group interests from which judges are appointed, then this can be a useful remedy that does not seem ruled out by Hayek.

I recognize that the previous paragraphs will be met with disbelief by some (but hopefully not Scheall). But notice that Hayek recognizes that the existing rule of law is not sacrosanct and can require quite serious remedy, including the abandonment and overturning of well-established common law. That is itself very costly. I am unfamiliar with Hayek's views on judicial appointments. But, from the perspective of preventing such radical, destabilizing change, *preventing* a homogeneous judiciary may well be welcome.

You may well wonder why I have strayed so far from Scheall's argument. But if we think of judges as experts of a certain sort, we can see that Hayek's concern generalizes. And this is a concern explicitly explored in Chapter 5 of Scheall's book. Epistemic systems can present themselves as authoritative, but can be subordinated to special interests (pp. 146-151). And, as Hayek's account of judicial authority reveals, these interests may include class or faction and be sustained for long periods. So, somewhat surprisingly if one

thinks through the implications of Scheall's argument one subtly moves from Vienna to Frankfurt.<sup>16</sup> How to protect science from the political process (broadly conceived, including other biases, including the effects of a potentially malfunctioning credit economy) is, thus, a constitutive, even reflexive feature of the epistemology of politics.

I now turn to my third Popperian inspired criticism. A further fact these two features have in common is Scheall's apparent risk aversion to policy error. There is an interesting question—familiar from debates over Rawls' original position—how much risk aversion is justifiable in foundational questions of political philosophy. But my interest here is to note something slightly different: the effect of such risk aversion is not just status quo bias in policy, but also status quo bias in policy science. The uptake of Scheall's approach in political epistemology by policymakers will create a foreseeable demand for the kind of scientific work that compares relatively focused policy interventions in restricted contexts. In fact, it is unlikely that such research will draw on Austrian insights or promote liberal goals (let alone Hayekian liberal utopia), but rather it will use data-mining of large administrative data-sets to make policy slightly more effective and efficient.<sup>17</sup> Perhaps this is a welcome effect for Scheall?

Now I have hedged my way of formulating these three criticisms because one can read Scheall as being agnostic on what ought to be done in the presence of policymaker ignorance.<sup>18</sup> And it is easy to see why; in such circumstances, doing nothing also counts as something. And in personal correspondence he acknowledges “There may be (non-epistemic) reasons to pursue a policy, even in the presence of policymaker ignorance and weak spontaneous forces.”<sup>19</sup> As Scheall puts it in the book, “*skepticism*—in the Humean sense of unbelief/agnosticism rather than positive disbelief/atheism—is the ideological implication of the problem of policymaker ignorance” (p. 77; emphasis in original). And, as is well known, Humean skepticism is directed at theory/reason not directed at action. The worry, of course, is that such skepticism may be a cover for unprincipled political decisionism.<sup>20</sup>

Scheall's acknowledgment that there may be non-epistemic reasons to pursue policy recalls my slightly different critical point above that not all given policy decisions and ends are normative in character even if taking a policy decision may have normatively valuable consequences. As Hume already noted, government's or political leaders' roles in coordinating social life may be done for the worst reasons, but *that* they have such a coordinating function may well generate important and valuable social consequences (Sabl 2015; Schliesser 2018).

Let me close with a lament that is, perhaps, more orthogonal to Scheall's own understanding. Scheall does not explore how we should think about existing examples of *effective* public policy for uncontroversial normative ends. I am thinking of, say, the eradication of highly contagious and costly diseases with high mortality and/or awful symptoms (e.g. polio, measles, etc.).<sup>21</sup> Even if one allows opportunity costs, waste and true mistakes, these policies tend to survive reasonably robust cost-benefit analyses and are worth having.<sup>22</sup> Some of these eradications have been coordinated by WHO.

Now I do not mean to suggest WHO is perfect or that its recent track-record this pandemic year does not merit criticism. But as Scheall notes, the “evaluation of epistemic mechanisms is always relative and never absolute. What matters is how well some mechanism coordinates knowledge and facilitates the making of actionable plans in a particular domain as compared to other possible mechanisms or to absence of epistemic mechanism altogether” (p. 140). Scheall here misses his own best insight. For, the comparison we must make is not to another *possible* mechanism (or the absence of an epistemic mechanism), *but also the costs and challenges of a route or path to such a possible alternative*. The WHO may be imperfect, but it exists and has done important work.

The question is now how Scheall's political epistemology understands how policy-makers should relate to such existing institutions or to possible institutions that may arise from feasible extensions from the status quo. That is to say, I hope Scheall writes a follow up book that will engage with the more messy details of our political life. What we need now, I guess, is applied political epistemology!<sup>23/24</sup>

## NOTES

- 1 So, for example, concern with ‘epistemic feasibility’ is central to the book (pp. x; 8; 85-102). But the huge literature on feasibility in political philosophy is ignored (e.g., Lawford-Smith (2013); Gilibert and Lawford-Smith (2013); Southwood (2016); and Gheaus (2013)).
- 2 For a narrative that unpacks that claim, see Schliesser (2021).
- 3 This point is not entirely original in Scheall. It has also been grasped by sometimes activist-scholars who embrace so-called prefigurative politics. See Raekstad and Gradin (2020); Rossi (2019).
- 4 Scheall does not engage with the voluminous work prompted by the theory of second best (and nth best, etc.) While that literature is not Austrian in character, it gives a sense of how to begin to think about transitions under constraints. See, for example, Lipsey and Lancaster (1956); Rodrik (2008).
- 5 This resonates, indirectly with deeper roots in the Austrian tradition. See Dekker (2016).
- 6 For more on this see, Schliesser (2019).
- 7 That’s really one of the theses of Dekker (2016).
- 8 There is a whole school of political realism that objects to the ethics first approach of political philosophy. Austrian political economists, who may embrace a normative/positive distinction, may also naturally disagree with Scheall. For discussion of the latter see Gordon (2019).
- 9 I worry this fails to adhere to his own insight [III] unless we sharply distinguish between do-nothing policy aimed at status quo and do-nothing aimed at no particular end.
- 10 This is not to deny that Popper’s stance is more receptive to a generally more activist policy stance than Hayek’s. For useful work in the vicinity of the idea presented in the body of the text, see Kerstenetzky 2007. For a more critical perspective, see Friedman (2005).
- 11 Here the problem of incentives may well be more important than Scheall allows.
- 12 For more details that draw on Lippmann’s (1922) *Public Opinion*, see Cowen and Schliesser 2020.
- 13 Scheall alerted me to this in correspondence. See also his claim on p. 1: “The problem of policymaker ignorance is the simple fact that the success of purposeful political action is necessarily limited by the nature and extent of policymakers’ ignorance and their capacities to learn.” Developing the administrative state, with associated research institutes and labs, is also a development of the policymaker’s capacity to learn over time.
- 14 The passage also figures importantly in Levy (2019), especially the discussion on p. 57.
- 15 For historical context, see Jackson (2012).
- 16 See also Foucault 1979, Lecture 5.
- 17 I have in mind the kind of work done by Raj Chetty and his collaborators, see, e.g., Card et al.
- 18 This is how Scheall understands his own position (personal correspondence, 10/21/2020).
- 19 Scheall, personal correspondence, 10/21/2020.
- 20 Cf. My praise for Smith’s claim that we need the right sort of systems to guide social life (Schliesser 2017).
- 21 If you think those ends are controversial, we may not be able to talk to each other!
- 22 For a useful framework, see Barrett (2004).
- 23 Some of the material in this paper appeared as blog posts: <https://digressionsnimpresions.typepad.com/digressionsnimpresions/2020/10/where-a-real-change-in-the-law-is-required-the-new-law-can-properly-fulfilthe-proper-function-of-all-law-namely-that-of-gu.html> and <https://digressionsnimpresions.typepad.com/digressionsnimpresions/2020/10/on-the-liberal-transition-problem-scheall-hayekian-political-epistemology-i.html>
- 24 I thank Erwin Dekker for his feedback, and William Butos for his editorial suggestions.

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