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HERCULES, OMNISCIENCE, OMNIPOTENCE, AND THE RIGHT ANSWER THESIS

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About twenty years ago when I was teaching jurisprudence I needed a filler because for some reason about half the students were going to be absent. We'd spent time on St. Thomas Aquinas' Treatise on Law,¹ and we'd spent a little time on Ronald Dworkin's arguments against positivism in *Taking Rights Seriously*.² It struck me that Dworkin's omniscient judge Hercules³ was similar to an omniscient deity, and that the question of judicial discretion in the face of Hercules was pretty much like the question of free will and an omniscient deity that so bothered Aquinas. So the *prima facie* clash and the resolutions of it should also be pretty much alike. In particular, Anthony Kenny's analysis of one of Aquinas's arguments struck me as directly applicable to Hercules and judicial discretion.⁴ If so, a central part of Dworkin's "right answer thesis" might collapse. It was this odd and somewhat unlikely juxtaposition that I put together as a lecture, not to go on the final examination, but for a bit of jurisprudential entertainment. Every now and then since I've thought I should resurrect those notes and turn them into a short article. This symposium offered just the forum for it.

THE PROBLEM

Dworkin's Hercules is a model of a unitary judge, with unlimited access to information about the world, law, and everything else, unlimited capacity to process that data, and unlimited time so that he produces the right answer.⁵ If there is a right answer, then the judge deciding does not have discretion: she either gets the right answer or

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1. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Questions 90-97 (Resnery Publishing, Inc. 1996) (1273).

2. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 110 (1977).

3. *Id.* at 105-30.

4. ANTHONY KENNY, *Divine Foreknowledge and Human Freedom*, AQUINAS, 255 (Anthony Kennedy ed., 1969).

5. DWORKIN, *supra* note 2, at 105 *et seq.*

she makes a mistake. Hercules and the right answer thesis have a seductive appeal; it is the sort of appeal that makes people say judges *find* law, not *make* law. If the judge does not find the right one then she either makes a mistake or makes it up; there has to be a law for her to find, and that means no more than that there exists a single correct decision.

I should like to try to work this out as a *de dicto-de re* modality confusion, in a manner similar to Kenny's analysis of one of Aquinas's arguments for free will given an omniscient God.⁶ If it succeeds then Dworkin's right answer thesis will fail on its own terms, but not because its terms fail (a widely accepted contention).

Aquinas's problem is variously stated as follows: God's foreknowledge is incompatible with human freedom; or, how can God know what I shall do *and* I be free to choose what I shall do? Or, if in Eternal Law, God sets up all the causal determinants of my future action, how can I freely choose otherwise?

The problem really bothered Aquinas, so much that he gave thirteen solutions to it. Here is the one that I want to follow: "Whatever is known by God must be; for whatever is known by us must be, and God's knowledge is more certain than ours. But nothing which is future and contingent *must* be. Therefore, nothing which is future and contingent is known by God."⁷

To the extent that there is an analogy between Hercules' elimination of judicial discretion and God's elimination of free will, we need to find a way out or abandon one or other, God/Hercules or free will/discretion. Now I think Hercules is a fairly useless model of judicial process for many reasons; but I think the argument that he eliminates discretion in judicial decision making should not hold, that discretion should be salvageable just as free will can be salvaged from an omniscient God even if the model were useful. To the extent it is convincing, Aquinas's argument for their compatibility ought also to work.

For a start I shall not spell out all of Aquinas's version and Kenny's downloading of it into modal logic terms. At least until the difficult

6. KENNY, *supra* note 4, at 258-60. I should like to emphasize that the arguments that follow did not originate with me: they are my rehashing of Kenny's fascinating analysis of Aquinas's arguments.

7. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part I, Question 14, art.3. Does he mean that God cannot do the causal calculus implicit in the Eternal law? Kenny says no: Aquinas uses "contingent" = "not causally determined"; but Aquinas included in contingent actions, for example, the budding of a tree. KENNY, *supra* note 4, at 258.

part, I shall just have a go at it as argument about law and judicial decisions.

FIRST ARGUMENT

(0) “whatever Hercules decides must be right” has 2 analyses: *de dicto* and *de re*.

(1) *De re*: If H’s decision is X, then X must be right.

(2) *De dicto*: It is true to say: “What H decides is right” or “If H decides X then X is right.”

(1) is false; (2) is true.

I shall use standard logical signs: Where P and Q are propositions, “ $P \supset Q$ ” is an abbreviation for “If P then Q”; “ $\square P$ ” is an abbreviation for “Necessarily P.”

In the following examples (5), the *de dicto* version, is true: it tells no more than the meaning of “If . . . then . . .”; but (6), the *de re* version, is false; it is by no means necessary that there be a law school in Manhattan, after all, for many years there was not.

(3) There is a law school in Manhattan \supset there is a law school in Manhattan. [T]

(4) NYLS is a law school in Manhattan \supset there is a law school in Manhattan. [T]

(5) \square (NYLS is a law school in Manhattan \supset there is a law school in Manhattan.) [T]

(6) NYLS is a law school in Manhattan $\supset \square$ (there is a law school in Manhattan.) [F]

Same procedure:

(7) There is a right answer \supset there is a right answer. [T]

(8) Hercules’ is the right answer \supset there is a right answer. [T]

(9) \square (Hercules’ is the right answer \supset there is a right answer.) [T]

(10) Hercules’ is the right answer $\supset \square$ (there is a right answer.) [F]

How is the content of the antecedent in (8) spelled out? Does it differ from the content of the antecedent in (7)? Not in a serious way. After all,

(8’) Sinclair’s is the right answer \supset there is a right answer.

is also true. (7) is simply less specific about which answer is right. So the argument still does not hold because (10) with the antecedent of (7) substituted is still *false*.

Go back to (0), (1), (2).

(0’) Whatever Hercules decides necessarily is right.

Again, there are two analyses. First, *de dicto*:

(2') \square (whatever H decides is right.)

But this has no tendency to show that whatever you or I decide is not at our discretion, not free —

(2'') \square (If H decides X then X is right.)

cf. de re:

(1'') If H decides X then necessarily X is right.

which is clearly false. X is possibly wrong, thus although it may be right it is not *necessarily* right. Insofar as X could be otherwise and X is a decision of mine, I have not had my discretion, my free will removed.

Thus goes Aquinas' argument, re-framed onto Hercules and the right answer thesis. In a formal way it looks O.K. and Kenny says of it: "It seems to me, therefore, that St. Thomas' answer to this particular difficulty is entirely satisfactory."⁸

But, like Kenny, I find it peculiarly unsatisfying. The reason lies in what we take to be the source of God's knowledge, and in our argument, Hercules' decision making. With God's knowledge as the subject, one now proceeds to do a standard analysis of "know" and "knowledge," that it must be justified, and about God's doing Eternal Law's causal calculus. The following is an attempted parallel, working on the requirement that decisions be justified, even Hercules' decisions.

Because we require Hercules to justify his decisions, and rightness to rest on the justification, the *de dicto* version, (2''), goes to:

(11) \square (H decides X and H is justified deciding X \supset X is right.)

But this applies to anyone, not only Hercules. It is the analogue to Aquinas' remark: "whatever is known by us must be"; whatever decision is justified must be the right one.

And the *de re* version, (1''), goes to:

(12) If H decides X and is justified in deciding X \supset \square (X is right).

What is an Herculan justification like? Because of his complete knowledge of empirical, social, and moral law and fact, it has *all* justificatory connections, including those that bring about X. So implicit in the justification is the impossibility of being otherwise — that's what it is to have infinite information, reasoning ability, and time. Any counter-example, any interfering hypothesis you'd like to name, Hercules knows about already and has accounted for in his reasoning; that's what it is to be Hercules.

8. KENNY, *supra* note 4, at 260.

And there the problem still remains. Aquinas was aware, if not of this sort of analysis, at least of this result. It is merely a re-framing of the initial problem, but ducking the easy solution of the “*first argument*” above.

SECOND ARGUMENT

The first pass argument showed that “What Hercules decides must be right” can be:

de dicto:

(2'') $\Box(H \text{ decides } X \supset X \text{ is right})$

which is true but of no consequence; or

de re:

(1'') $H \text{ decides } X \supset \Box(X \text{ is right})$

which would eliminate judicial discretion, but is false.

And this argument was unsatisfactory, at least in that it ignores the difference between Hercules and ordinary judges: it ignores Hercules' omniscience.

If you put in Hercules, with omniscience, you seem to be stuck, inescapably, with whatever Hercules decides being necessarily right. The basis on which Hercules knows things, a complete knowledge of the universe including all moral, social, and causal relations, precludes uncertainty.

When you do this argument with God's omniscience, the key to it is time. Kenny paraphrases Aquinas: “[If] it has come to God's knowledge that such and such a thing will happen, then such and such a thing will happen.”⁹ This is a convenient format because it is essentially tensed; it sets up Aquinas's ultimate answer. God is outside space and time; time is spread out for God like a spatial dimension over which he can look, widely, universally, and non-temporally. Our decisions occur in time, at points in time; the difference is the basis of our free will. But Hercules is not posited as having an a-temporal view; he does not know the future, he just knows everything else. The only lever we may have is that Aquinas was dealing with facts, or the truth of empirical propositions and God's knowledge of it; we are dealing with decisions, and Hercules' making them. Is there enough here to continue the argument? That's the problem to think one's way around or through.

Kenny begins his next analysis of Aquinas's problem as follows:

9. *Id.*

“Gp” is an abbreviation for “It has come to God’s knowledge that p.” (where ‘p’ ranges over propositions.)

(13) $\Box Gp$ (It has come to God’s knowledge that p (p is a future event) + omniscience justifies the “ \Box ”)

(14) $\Box(Gp \supset p)$ (*de dicto* truth)

(15) $\Box(\Box(r \supset s) \supset \Box(\Box r \supset \Box s))$ (theorem of logic)

(16) $\Box(\Box(Gp \supset p) \supset \Box(\Box Gp \supset \Box p))$ ((15), substituting Gp/r, p/s) therefore

(17) $\Box p$ ((13), (14), (16), *modus ponens* twice).

Premises (14) and (16) are hard to deny. So Kenny goes to work on (13), $\Box Gp$. We do this by looking at “necessity” and the meaning of “know”, in particular the requirement that the propositional object of “to know” be true. The trick here is to replicate that argument for Hercules; it turns out to be rather simple.

“Hx” is an abbreviation for “Hercules decides that x.” (where x ranges over decisions. That in itself is a pretty odd thing to say; but it precludes truth as a property of those decisions; it is *rightness* – rectitude – that we’re on about here.)

(18) $\Box(\Box(Hx \supset x) \supset \Box(\Box Hx \supset \Box x))$ ((15), Hx/r, x/s)

(19) $\Box(Hx \supset x)$ (*de dicto* truth)

(20) $\Box Hx$

therefore

(21) $\Box x$ (*modus ponens* twice)

— and that is the denial of discretion.

The premises are hard to deny: If x is “Sinclair is guilty of murdering his grandfather,” then it must be the case that I murdered my grandfather and no other decision of the case could be right; the court presiding over my trial can decide as Hercules did or make a mistake, render an injustice. The court therefore does not have discretion.

Really?

(18) is inviolate. It’s a theorem of modal logic.

(19) is inviolate. It’s a theorem of modal logic.

So we have to attack (20), $\Box Hx$. We do this by looking at “ \Box ”: “Hx” always has the background that Hercules is justified in deciding x and x is right; built into the justification and rectitude is Hercules’ omniscience; that is what justifies the “ \Box ”. But does it?

The usual interpretations of “ \Box ”, “true in all possible worlds” or “necessarily true” do not apply as we are dealing with rectitude, not truth. But simply “necessary” or “could not be otherwise” work well enough.

Is it necessary that Hercules decides x ? If x is the right decision then it is, but not otherwise. That is built into the model of Hercules. If I did not kill my grandfather, then omniscient, omnivorous Hercules will not decide $x =$ "Sinclair is guilty of murdering his grandfather."

A key step in Kenny's argument about free will and an omniscient deity goes like this. Is $\Box Gp$ true about God's knowledge *because* it is knowledge of a necessarily omniscient being? *I.e.*, if God is omniscient then Gp , "it has come to God's knowledge that p ", is true for all substitutions for p . But that is trivially false: substitute " $2 + 2 = 3$ " for p . Thus, if p is false God doesn't know that p ; if p is true then God knows p , but p is not true until its time.

So we have, acceptably, NOT (15) $\Box Gp$, but

(15') $\Box(p \supset Gp)$

which is then the correct statement of omniscience — and is not incompatible with free will.

When we see the Herculian parallel to this argument, the game simply falls apart. The compulsion we felt about Hercules and the right answer thesis is reduced to what it really is: the right answer is the right answer. " $\Box Hx$ " does not hold generally for all x . *Most* substitutions for x are *not* the right decision (because there are indefinitely many ways to go awry.) It is not necessary that Hercules choose those decisions; quite the contrary. But it would be necessary that if x is the right decision, that Hercules should choose it. And Hercules will choose x if it is the right decision:

In other words, NOT (20) $\Box Hx$, but

(22) $\Box(x \supset Hx)$

which is then the correct statement of the omniscience of Hercules — and is not incompatible with judicial discretion.

i.e. NOT

(23) $\Box(x \supset \Box Hx)$, which would deny discretion,

BUT

(24) $\Box(\Box x \supset \Box Hx)$

Hercules necessarily decides only decisions that are necessarily right (whatever that means). He makes contingently right decisions contingently, as do our human, temporally confined, and intellectually finite judges.¹⁰

10. If our human judiciary is significantly different, it is in not having Hercules' grounds for picking the difference between necessary and contingent decisions or for avoiding error. But that doesn't mean they do not have judicially adequate grounds for deciding.

All this simply shows that positing an omniscient Hercules does little for the game but surreptitiously appeal to our intuition that there must be a right answer – surely there *must*; otherwise what is the all that mental sweat and violence expended for? Sure there may be a right answer –and we know that in most cases there actually is and it's obvious – but even the omniscient Hercules can determine it only if it's right. And that is not a helpful sort of thing to say.

The point here is that even though Hercules, *ex hypothesi*, produces the right solution, we are not relieved of the problem of ascertaining its rightness, of seeing it as the right solution. Doing that is hardly different from deciding all over again. The opinion, just like an unusually high quality brief, is not conclusive of its own rectitude.

This may be something like the requirement of replicability of proofs in mathematics (problematic with some very long computer program proofs) or the replicability of experiments in laboratory science. Hercules' reasoning process itself is, *ex hypothesi*, not replicable.

One final note: Might the “right answer thesis” be put to litigation? Might the mighty Hercules be taken to court? The answer, surprisingly, is not only that it might, but that it has. It happened in 1774 before England's King's Bench and one of the greatest judges in history, Lord Mansfield: *Jones v. Randall*.¹¹ What set up such a dispute?

The action was to collect on a wager. The wager was on the outcome of plaintiff's appeal of another suit to the House of Lords. Plaintiff saw it as insurance: he bet against his prevailing.¹² At the time, contracts aleatory were not prohibited “by positive law” – by which in the jargon of that time they meant “by statute” – although some might be void in common law, for example by fraud, or, as Lord Mansfield put it, on grounds of morality or principle,¹³ or by being bets on an outcome certain to occur. The last point is the relevant one: it was only permissible to bet on contingent events.

There were two reports, one by Lofft,¹⁴ the other by Cowper.¹⁵ They are not the same.

11. *Jones v. Randall*, 1 Cowp. 37, 98 Eng. Rep. 954; Lofft. 384, 98 Eng. Rep. 706 (1774). The case is known for Lord Mansfield's remarks on the nature of precedent.

12. Mr. Mansfield for defendant Randall: “[It] was meant by the [defendant] merely as a sort of insurance upon his cause.” *Jones v. Randall*, 1 Cowp. 38, 98 Eng. Rep. at 955.

13. *Randall*, 1 Cowp. at 39, 98 Eng. Rep. at 955.

14. *Jones v. Randall*, Lofft. 384, 98 Eng. Rep. 706 (1774).

15. *Jones v. Randall*, 1 Cowp. 37, 98 Eng. Rep. 954 (1774).

Mr. Dunning, counsel for the defendant, Randall, worked on the conception of common law as merely declaratory of natural law, that judges find but do not make the law; the decision is thus predetermined. Lofft reports his argument thus: “That to make the wager fair, the laws must be supposed uncertain; and the Judges so ignorant as not to know, or, knowing, so wicked as not to decide accordingly; and though the learned gentleman abstained in words from comparing it with a lottery, yet he must in idea to justify his motion. . . . [T]o lay a wager of this sort, now before the Court, was as if a man were to lay a wager upon the truth of a mathematical proposition with which he was well acquainted. I hope your Lordships will show the determinations of law are certain; and too serious to be treated like matters of the least and most despicable regard, things of mere chance.”¹⁶ Cowper has him saying: “It is essential to the validity of a wager that the event be contingent: but the laws of this country are clear, evident, and certain: all the Judges know the laws, and, knowing them, administer justice with uprightness and integrity. The event therefore was certain, and of course the wager such, as in its nature was impossible to be lost.”¹⁷ Hercules and the right answer thesis were thus made a key point of the decision.

The reports have counsel for plaintiff, Jones, meeting Dunning’s argument in two ways. Lofft has him expressly contraverting the supposed certainty of law with a folksy story: “How few lawyers will venture to pronounce a point of law certain; and if one of the counsel, having looked in his notebook, might say, ’Tis very clear for you; another – I think, sir, the weight of authorities makes against you – and a third, I wish you success, but indeed ’tis doubtful – what should a man do, a great part of his fortune depending upon the event?”¹⁸ Cowper has him concede the ultimate, objective certainty of the law – perhaps it’s a wise strategy not to question the wisdom and integrity of the judiciary – but place the necessary contingency squarely on the parties, *ex ante*; objective certainty maybe, but subjective contingency. “This is a fair transaction between the parties, whose knowledge, or rather ignorance, respecting the event, left it equally uncertain in whose favour it would finally be decided. Therefore, as between them, it was certainly contingent.”¹⁹

16. *Randall*, Lofft. at 385, 98 Eng. Rep. at 706.

17. *Randall*, 1 Cowp. at 38, 98 Eng. Rep. at 955.

18. *Randall*, Lofft. at 384, 98 Eng. Rep. at 706.

19. *Randall*, 1 Cowp. at 37, 98 Eng. Rep. at 954 -55.

Lord Mansfield does not spend much time on this argument. Roughly, he says, that the law may be certain, but that certainty requires a final decision (how very realist!), and a final decision costs a great amount of money (even in 1774!), much to the benefit of the legal profession. Lofft: "But the law is certain – it were very unhappy, gentlemen, for you, if it were certain to every man, before the decision. But this certainty is so uncertain, that it requires a great deal of money to come at the last opinion of what is law."²⁰ Cowper: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession, if the law was so certain, that everybody knew it: the misfortune is that it is so uncertain, that it costs so much money to know what it is, even in the last resort."²¹ In other words, Lord Mansfield's answer differs only in style from Justice Jackson's famous epigram, "We are not final because we are infallible, we are infallible because we are final."²²

Plaintiff prevailed: The contract was enforced.

20. *Randall*, Lofft. at 386, 98 Eng. Rep. at 707.

21. *Randall*, 1 Cowp. at 40, 98 Eng. Rep. at 956.

22. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)