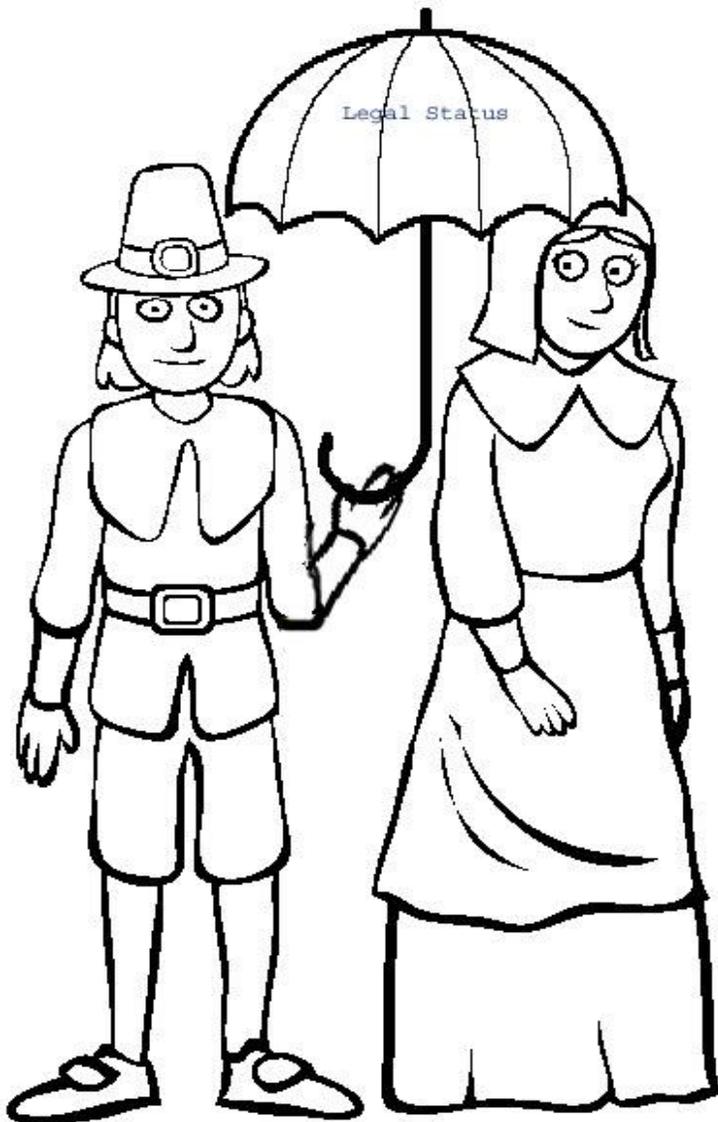


‘Rights – or Claims, Capabilities, Capacities and Competencies?’

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Feme Covert



Feme Overt

Introduction

This paper tells three parallel -- but I hope interrelated -- stories.

The first of these is illustrated by the two pictures reproduced above. This is a feminist story concerning the evolution of the legal status of women: how (married) women moved from being in effect the *possessions* of their husband to them having full legal status as property *owners* in their own right. This is a story about the general movement from possession to ownership (of

property) as central legal categories (and, as it turns out, how we might be moving back into a ‘regime of possession’ in respect to certain elements of the financial system, namely in respect to the legal status of virtual currencies like Bitcoin).

The second story is about the status of contracts as a legal category. Contracts link property to ownership in that they are the mechanisms by which legal title is conferred and regulated. The development of commercial contracts in the 1930s illustrates the issues at stake, and how these might be under threat from contemporary technological developments linked to virtual currencies and the blockchain protocol.

And the third story is about the implications of all of this for the notion of *rights* as offering a satisfactory analytical category for understanding contemporary economic property ownership—and thus contemporary capitalism. In my view Geoff Hodgson has done us a great service in opening up this area for critical reflection (Hodgson 2015).¹ As will become clear, I agree with much of what Hodgson writes but I come at this from a different angle and with a different purpose and end point – though, I hope, this is still very much in the spirit of his analysis. But broadly speaking I argue that – whilst the notion of rights is not completely redundant and still represent an important aspect of legal theory and practice (how could it be otherwise?) – more telling are the categories of *claims, capabilities, capacities and competences* (the ‘four C’s’ as I term them) in providing an analytical purchase on how the law actually works in a practical setting in this area (and others).

From *Feme Covert* to *Feme Overt*?

The conventional story in respect to the roles of women in later Medieval and early Modern Europe is that they occupied one of two legal statuses: *feme sole* and *feme covert*. *Feme sole* was a status for unmarried women, while *feme covert* was a status for married women, who existed under the practice of coverture. As *feme sole*² unmarried women were able to own and hold property in their own name – if at times under quite strict customary and restrictive quasi-legal conditions. But on their marriage, women became subject to the practice of coverture and their property passed immediately to their husbands household – they became *feme covert*, under his control and not – under normal circumstance -- able to own property in their own name³. In

¹ I proposed the title of this paper for the Symposium before reading Hodgson’s article. If I had read it before I would probably have titled it differently. As it is, I take it as a given that those interested in these matters would have read the Hodgson article (already widely circulated) so I do not summarize it further here.

² This terminology has its modern echo in the case of the *corporation sole*: the depositing of property in the name of a single person but one having an existence that transcends their own particular death so that their property passes along a line of succession intact. It is a corporate form that allows property belonging to a single ‘personae’ to be inherited by their successor. The Royal Head of State – the Monarch -- in the UK (currently Queen Elizabeth II) is a *corporation sole*, as is the head of the Church of England, The Archbishop of Canterbury (currently Justin Welby).

³ This applied to both ‘real’ property (like land) as well as ‘chattel’ property (the personal possessions of the woman). And this relationship of dependence is also clear in respect to divorce: women could not petition to divorce their husbands since they were considered part of his ‘possessions’.

effect, for all practical intents and purposes, they became the ‘*possessions*’ of their husbands where possession here refers to the *physical ability to control a resource* rather than to *own* it. And this is the important distinction I wish to emphasize: one between *possession and ownership*, which is well illustrated by the position of women in early modern Europe.

But the concept of possession I have in mind is not simply ‘control’ in an organizational sense. It is more like an effective appropriation, an act of physical seizure which secures a fusion between the resources embodied in the property and the person to whom they are attributed. It is a kind of forceful act of acquisition and a ‘physical holding’ of those resources⁴. Even in modern law the question of possession in this sense still has a place (if a largely residual one) in the context of ‘adverse possession’ (like squatting) or in the case of territory appropriated as a consequence of seizures after a conflict or war (*uti possidetis*) which remains a principle in international law.

This conventional story of women, possession and ownership is subject to all manner of reservations and caveats, though I will argue at heart it still presents a telling distinction. The caveats arise as soon as one begins to look into the detail and complexity of late medieval law(s). Here I draw on some rather neglected (UK) feminist literature dealing with issues of ‘women and law’ in this period (Churches 1998, Erickson 1993 & 2007, Todd 2010).

First, there is the fact of several different legal orders operating in this period in England (let alone in Scotland): manorial law, ecclesiastical law, borough (municipal) law as well as statute law and an emergent common law framework. All these legal orders claimed at least some jurisdictional competence over parts of property and inheritance law that established women’s legal status. And often these overlapped in terms of competences and were in conflict with one another so disputational action was possible⁵.

Second, even within England there were different traditions and emphases in different parts of the country: there was no unified legal code that operated across the country. On many occasions local customary practice was invoked to settle normal uncertainties or disputational matters in respect to female property, without this involving formal law at all.

And thirdly, of course, there were marked differences between countries within Europe. Those countries more influenced by a Roman tradition of law (which included Sweden and Denmark, for instance) cast the question of women and the law into a different context where ‘guardianship’ (by men of women) was a stronger feature than coverture as such, though this was still an aspect of married woman’s status even so.

⁴ It should be made clear that this does not involve an ‘unlimited license to plunder’ that resource. Possession here is an appropriately (rightfully!) established legal principle and practice, which also places constraints on its deployment.

⁵ This was particularly so in the case of wills. A surprisingly high proportion of the late medieval population made a will and women participated actively alongside men.

Thus we have a somewhat differentiated legal terrain operating, and this evolved over the centuries (in England, the 1620s saw a period of considerable consolidation and codification of statute law with regards to property). But this enables us to make several analytical points.

Consequences and Implications

The first is that women increasingly became ‘a problem’ for property law and ownership. With the progressive differentiation of society and the huge growth in non-land based property – particularly of movable property (chattels) -- a lot of the traditional legal distinctions began to look increasingly anachronistic. Thornhill (2014) expresses this well in terms of the role of ‘guilt’ in the formation of the modern law tradition. The law produced a ‘universal soul’ in respect to which guilt could be constructed as a uniform principle, so the double status of women no longer seemed tenable⁶. The anomalous difference between married and unmarried women, became doctrinally increasingly indefensible. A consequence was that the category of possession retreated as the category of ownership became consolidated, and the ‘problem of women and property’ was instrumental in initiating and securing this change. Ownership became the prime category for legal title and all women were eventually put on an equal legal footing with each other -- and with men -- in terms of their ability to own property: they became *feme overt* rather than *feme covert*, no longer possessions of their husbands.

The second analytical point involves the implication of this for the notion of ‘property rights’. As such the category of ‘rights’ did not play a leading role in these matters largely because this was a pre-liberal era well before the discourse of rights had fully emerged. However, I would argue that – perhaps seen retrospectively – possession and rights have been considered together in the case of property and in respect to economic property rights in particular. Fundamentally, *rights are viewed as an aspect of possession*. And this relates to the role of a constituted subject who is considered the possessor of such rights. Behind all rights discourse lurks a figure of their primary possession – a human, a worker, a corporation, a citizen, an immigrant and so on. These may be collective or individualistic subjects, they may be thickly entangled or attenuated, but there remains a constituted originating subject at the heart of any rights discourse, I would suggest. Ownership, here, occupies a secondary position: it is built on this primary consideration of possession.

There is an emergent literature that is skeptical of the centrality attributed to rights to economic and political discourse (Campbell, *et al* 2001; Geuss 2013; Webber 2009) and, earlier, in respect to feminist politics (Kingdom 1991 & 1996).

⁶ In standard accounts of the development of English law women hardly get a mention. For instance in Maitland’s *Constitutional History of England* (1911) there are only *two* references to women in the index (and one of them is a mistaken entry). In Holdsworth’s *History of English Law* (1926) -- in Volumes II, III and IV, which cover our period -- there are a single index item for women in each volume (indicating to a few paragraphs where women are mentioned in passing)..



Rights fights....?

This skepticism acts as the backdrop to further remarks on rights later in this paper. The commitment to rights discourse as in the case of ‘human rights’ is clearly of great *rhetorical value* but my objection relates more to the issues of the connection between rights and the idea of possession as just outlined. And when one examines the actual relationship between, say, women’s legal position in the period of their possession by men, their property, and the law, this is hugely differentiated and complex. It cannot simply be reduced to an issue of (the lack of) ‘rights’ to ownership or anything else. The complexity pushes us towards an examination of *alternatives* to rights, ownership and possessions in considerations of how the law actually operates and what it means in respect to property.

Instead, it is the terminology of claims, capabilities, capacities and competences that is championed here (the ‘4 Cs’). Operationalizing the law depends upon these kinds of attributes. Can an agent legitimately make a *claim* to some economic resource? Does the agent have the

capability to initiate such a claim and follow it through? Does the agent possess the *capacities* necessary to undertake such a task. And finally, to follow through on all of this requires a certain degree of *competency* on the part of the agent. All these aspects of agency speak to a differentiated and decentered role for agents in respect to the law. They cannot claim a generalized ownership relation – or, if they could it would not get them far in the actual conduct of disputational undertakings. Agents have to take a *strategic view* of their relationship to the law, and that strategic view is always *contingent* (another ‘C’?), dependent upon the previous 4-Cs. Strategy is always a dialogue between desire and possibility: a desired outcome is always tempered by operational possibilities, which is what is stressed here. We have to dispense with an already constituted subject (who has desires) as the originator of legal practice to capture the complexity of legal undertakings, as in the case of the roles of women in the Middle Ages set out above.

Contracts and Property

As mentioned above, contracts link property to ownership since they are the mechanisms by which legal title is conferred, transferred and regulated. In terms of commercial contracts involving securities, there is a huge debate over quite who ‘owns’ the firm under modern capitalism: is it the shareholders or the company itself that has title to its assets, and if so what is the role for management? Elsewhere I have argued that it is the company as ‘legal subject’ that owns its assets (not the shareholders), but where this ‘subjectivity’ is contingent and highly conditional – considered along the lines of the sentiments outlined above in respect to possession and women (Thompson 2012, Appendix to chapter 3). This is not a novel position: it is a perfectly respectable if controversial one (e.g., Ireland 1999). But disputes about these matters have been going on since at least the 1930s when Berle in particular (Berle 1933, Berle 1947) and with Means (Berle & Means 1932) in their debates with Dodd (Dodd 1932, 1935 & 1941) first drew attention to the distinction between ownership and control of corporations and the ‘enterprise entity’ approach to the analysis of the firm (Thompson 2012, pp.122-124).⁷

In regard of property rights in the case of the firm, both the shareholders and creditors of a company are similarly constituted as ‘claimants’ with only a contingent title in respect to the company’s assets (Hohfeld 1919). In addition, claimants must act in accordance with due legal process. What this means in that legal rights in respect to any company are always highly specific and contingent and what they impart to different agents are differential capacities and capabilities to undertake actions or engage in litigation. Legal rights do not exclusively or unconditionally guarantee access to ‘ownership’ or anything else but only arrange possibilities for undertaking litigation or initiating actionable endeavor in the courts.

⁷ It should be made clear that the notion of ‘control’ operating in Berle and Means is not the same as the one defended above. For Berle & Means control is an organizational category indication from where direction is centered. Above control was designated a matter of effective physical acquisition and forceful appropriation.

This point is important in several respects, particularly in the debates about ‘property rights’ in economics (and by extension for the ‘Law and Economics’ school of analysis which informs many of the hard ‘shareholder ownership’ positions that form the conventional approach to the analysis of the firm – here see also Hodgson 2015). These do not impart an exclusive, unconstrained or unconditional possession to a definite subject or agent. It is not the case, then, that any attenuation of those rights – involving a circumscription or restraint on their exercise, usually thought to be imposed by the political process or the State – necessarily represents an unwarranted challenge to those rights of possession. ‘Property rights’ attribute no more (or no less) than a capacity or capability to initiate something (like a claim on the assets of a firm). But that guarantees nothing in terms of outcomes. It only contingently and conditionally arranges a series of possibilities for legal disputation and action.

The more general importance of this formulation is to move away from a discourse of ‘rights’ to one about ‘claims’. As suggested above, rights imply a possession by a constituted subject whereas claims only imply a contingent entitlement, one dependent upon particular circumstances (in the case here as specified by a legal framework). And this aspect of the law confirming claims rather than rights is well illustrated by bankruptcy law. Although Carruthers and Halliday’s comprehensive analysis situates bankruptcy in the terminology of rights in the first instance, it is clear from the discussion that it imparts various parties with a range of claims that must be tested in law (Carruthers & Halliday 1998; Halliday & Carruthers 2009 – see also Warren & Westbrook 2005). For instance, their Table 1.1 ‘Ranking of *Claims* in Bankruptcy’, (my emphasis, 1998, p.39-40) sets out the hierarchy of claimants in the US and the UK, while ‘The Legal Constitution of Markets’ (Chapter 1, 2009) extends this approach to the potential for disputation and enforceability during bankruptcy proceedings to the Asian countries. What is clear from their extensive analysis is that there are no general ‘rights fights’, only contingent claims dependent upon the particularities of each jurisdiction, its characteristics and institutional limitations.

So with this conception there is no general public or private privileged possession of, or exclusion from, ‘ownership’. In principle the law could thus establish a set of ‘claims’ that impart capacities and capabilities to any number of stakeholders without this necessarily undermining a deeper or more fundamental ‘ownership’ relation because, as argued above, rights in law are never rendered with respect to an exclusive possession, but only in respect to a claim. Here we see the way a discussion of the nature of company law could establish the principles for the wider notion of stakeholder democracy without this necessarily compromising a ‘deeper’ set of fundamental truths about ownership.

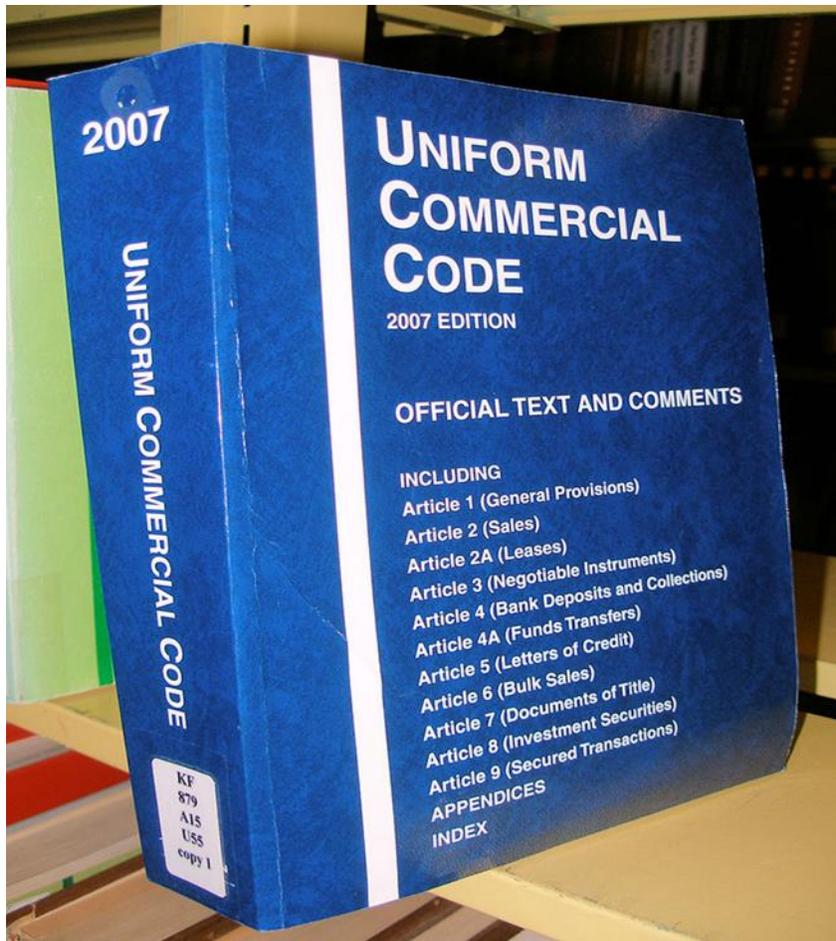
Back to Contracts.....

Returning directly to the issue of contracts for the moment, the 1930s was also a period in which important clarificatory moves were made in the development of Anglo-American commercial law. It was the period in which, in effect, US law in these matters was ‘privatized’: contracts

became a feature of the common law⁸. In effect, *contracts became the property of those who issued them*. According to Maurice Cohen private employers thereby usurped political sovereignty (Cohen 1927; see also Cohen 1935 and Kennedy 1935). *Property was taken out of the ambit of the sovereign authorities in the first instance and put in the hands of private agents who initiated contracts and established the principles by which they were to be adjudicated*. Key to this was the drafting of the Unified Commercial Code (UCC) – a joint project initiated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1942. These private organizations produced a ‘Code’ (first published in 1952) which subsequently became the basis for most US state legislation on matters of commercial contracts.

The Code, as the product of private organizations, is not itself the law, but only a recommendation of the laws that should be adopted in US states. Once enacted by a state, the UCC is codified into the state’s code of statutes. The important features of the UCC from our point of view are Articles 4, 8 and 9. Article 4 deals with financial payments and transactions, but only via banking systems (so its provisions exclude virtual currencies). Ownership of securities is governed by Article 8: it contains rules on the issuance and transfer of stocks, bonds, and other investment securities (‘moveable property’). Article 9, Secured Transactions, covers security interests in ‘real property’. A security interest is a partial or total claim to a piece of property to secure the performance of some obligation, usually the payment of a debt (but Bitcoin is not a debt instrument). The article also establishes which creditors can collect first from any defaulting debtor.

⁸ Common law is generally uncodified (in contrast to Civil Law, which is continuously codified). This means that there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on precedent, meaning the judicial decisions that have already been made in similar cases. See Llewellyn 1960 – Llewellyn was a leading figure in drafting the UCC)



Articles 8 and 9 have always proved controversial. Apart from the issues of whether these usurp political sovereignty, the initial impulse of the UCC was an anti-legislative one. The document is a Code, not a set of laws. For those on the more libertarian wing of US politics any ‘community of merchants’ obviates the need for contracts: disputes between merchants can and should be settled outside of the ambit of the law, so libertarians are hostile to the rendering of the Code into laws. In addition, the issue of moveable property of the *intangible* variety has always proved problematical: how to define this and arrange for its incorporation into contract law has required considerable ingenuity in design and enforcement (e.g. over intellectual property and copyright law). Virtual currencies – as an additional intangible – will complicate this further. According to Bollen (2013) none of the existing regulatory regimes in US, EU, UK or Australia are equipped to deal with the advent of crypto-currencies.

And it is just this latter issue that is arising acutely with recent developments in the financial system. This involves the legal status of virtual currencies like Bitcoin and the blockchain protocol that underpins it.

Blockchain, Bitcoin, Contracts and Property Rights

We are witnessing a quite dramatic increase in algorithmic trading of securities and the use of virtual currencies (Thompson 2015). A feature of this aspect of the financial system is that it celebrates the anonymity that such activity offers to its participants. This is a world of specialist encryption, secrecy and privacy, but it is also a world with significant potential ‘public’ consequences for societal security. Although the initial stimulus for an interest in this area was provided by the advent of the virtual currency Bitcoin, it is the algorithm behind this – the blockchain – that is attracting the greatest attention and which will probably prove more lasting or important than Bitcoin itself. This is a fiendishly difficult and complex world to penetrate for the amateur (which includes myself in this case) because it requires a high level of mathematical and computational ability to understand it completely (Ali, *et.al.* 2014b, Franco 2015; Lee Kuo Chuen 2015). Generalizing the scope of the blockchain beyond its initial connection to virtual currencies is where the significance of the blockchain technology is located (Ali, *et.al.* 2014a, Swan 2015, Federal Reserve System 2015, UK Government Office for Science 2015)⁹.

For the purposes of the exposition outlined here, however, I concentrate upon the algorithm in the context of its Bitcoin incarnation because it illustrates the issues involved. Here is what the UK government report just referred to says about how Bitcoin works:

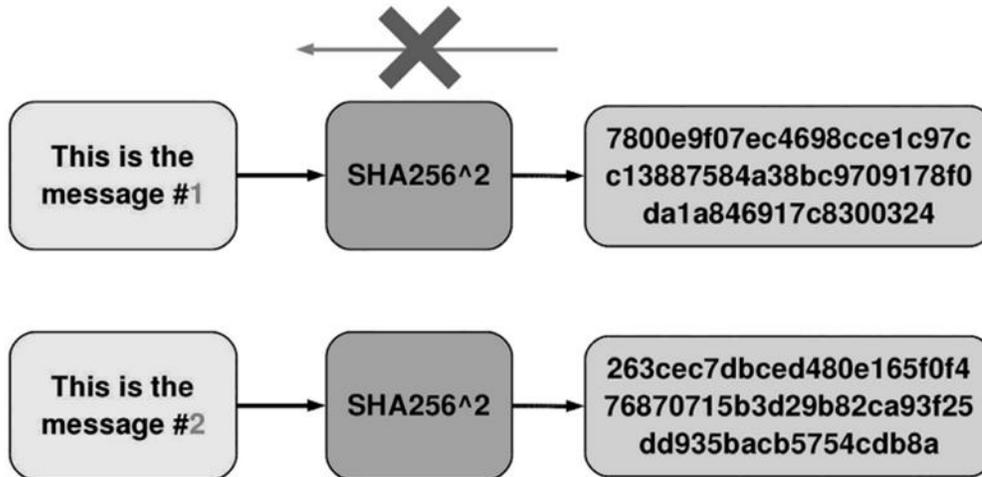
“Block chain algorithms enable Bitcoin transactions to be aggregated in ‘blocks’ and these are added to a ‘chain’ of existing blocks using a cryptographic signature. The Bitcoin ledger is constructed in a distributed and ‘permissionless’ fashion, so that anyone can add a block of transactions if they can solve a new cryptographic puzzle to add each new block. The incentive for doing this is that there is currently a reward in the form of twenty five Bitcoins awarded to the solver of the puzzle for each ‘block’. Anyone with access to the internet and the computing power to solve the cryptographic puzzles can add to the ledger and they are known as ‘Bitcoin miners’.” (p 5.)

A Bitcoin is thus nothing but an electronic ‘entry’ in a distributed ledger available to anyone in the network or who can access it, but this is encrypted and anonymous. It appears as illustrated in Figure 1.

⁹ There is a whole publishing industry emerging promoting academic and popular books about blockchain and virtual currencies. Most of these involve hype and exaggeration: about how these are going to completely transform the world we live in. Swan (2015) is this best of the popular books in my view, while the two previously cited books in the main text on Bitcoin provide the best academic coverage.

Figure 1: Example of the bitcoin protocol:

A)



B)

'000000000000000002b2d53213b1c58a82f728e2c80583f769436d6a2177c48d82'

Part A) illustrates how a transaction looks as it is undertaken (hashtag message # 1 to initiate the transaction, hashtag # 2 to recognize its completion, and **X←** indicating the impossibility of reversing the transaction once initiated – which insures against ‘double usage’). Part B is what the Bitcoin actually is: a string of numbers. It has no other ‘materiality’ than this (< <https://blockchain.info/> >).

It is the claim of anonymity that gives Bitcoin (and the blockchain) its decisive advantage for those committed to keeping this currency totally private and beyond the reach of any authorities who might like to regulate or control it. There is no need for a centralized authority (like a central bank) to authorize and regulate the currency, there is no need for social trust. So it appeals to a certain strand of ‘crypto-anarchistic’ thought, extreme neo-liberal market fundamentalists, criminals, supporters of private money, state-phobists, speculators and the like, as well as genuine enthusiasts for a cheaper and more efficient financial transaction mechanism.



Imagery for Bitcoin?

The virtual character of this form of currency raises some interesting and very important legal issues. Who actually owns Bitcoins if they are totally anonymous? Indeed, can they actually be owned in a conventional sense? (Bollen 2013, Graf 2015, Jeong 2013). The distributed ledger in which the Bitcoins are located is the site of their ‘deposits’ (in ‘electronic wallets’) but it is not owned by anyone – it exists as a dispersed network operating in the ‘anonymosphere’. There is no need for a trusted, centralized clearer. And there are no conventional contracts. The distributed ledger is precisely designed to avoid this: formally it generates self-fulfilling and self-enforcing transactions (so called ‘smart contracts’ – see below). This is its attraction. I suggest that this throws us back into a world before formal legal and commercial contracts and into a new ‘regime of possession’ rather than of ownership. Control becomes the important category, and control is a complex multi-dimensional arrangement subject to diverse conditions and prospects for its exercise (dependent upon contingent claims, capacities and competencies of participants -- there are no ‘property rights’ to be claimed or operationalize in a legal sense).

A key question for this world is whether the blockchain can actually preserve totally anonymity. This is questionable, to say the least. It is surprising how much is known about transactions by those not directly involved if they have the diligence and computing power to interrogate these (e.g. see Ron & Shamir 2013; Fleder, et al 2014). And it looks as though Bitcoin miners and exchangers can, indeed, be identified (Reid & Harrigan 2013), though – as might be expected -- there is a riposte to this with the suggestion for a revision of the blockchain to regain complete anonymity (Green 2013). But bitcoin/blockchain technology is a coded system and like all coded systems ultimately it can be undone (Lessing 2006). In addition, as Bitcoin has become institutionalized with the advent of Clearing Houses and Exchanges dealing in Bitcoins (on a

commission), strict anonymity becomes undermined. And with the advent of a wider deployment of the blockchain technology into a range of other areas of ‘transactions and record keeping’ different priorities and settings will – for good reason – require more transparent variants. In this world it could be that already existing bundles of ‘contracts’ are registered and exchanged (the trading of various securities and assets) but this would be being done in a world where those transactions themselves have no clear legal status.

Conclusion

So, will we see the eventual re-installation of commercially legal contracts? This is difficult to say and remains unclear (Bollen 2013; Swan 2015, chapter 2). The blockchain algorithm provides ‘smart contracts’: technically binding coded contracts established *within* the chain protocol. Quite how this might relate to flexible and legally binding ‘human’ contracts outside of the protocol remains obscure. At best it provides a kind of (per-legal) ‘social contract’ between those willing to participate in blockchain transactions – with all the attendant precariousnesses of such social contracts (who is going to enforce them?). I conjecture that this could more formally take us back (forwards?) into a new period of ‘*possessional contracts*’: into a new regime of possession where, whilst there is control of these virtual currencies, there is no actual contractual ownership of them. In this environment legal title and disputational action – if and when initiated after a claimed misdemeanor – will become a matter of determining who has ‘possession’ once again: who controls in the manner discussed above -- rather than who has rights to ownership (because there are none). And this will inevitably involve the operationalization of the ‘four c’s’ as discussed above. Property rights and legal ownership will be recast along these lines – indeed, are already being recast -- in any blockchain world.

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