Book Reviews

Knowing and Showing Economics and Law

An Introduction to Law and Economics. By A. Mitchell Polinsky. *Boston: Little Brown & Co.*, 1983. Pp. xv, 138. $6.95.

Judith A. Lachman†

My classmates and I, at one graduate student get-together, were remarking on the resurgence of doctor and lawyer shows on television when one of our number suggested "Why not a show about economists?" The response was enthusiastic (after all, we were economics graduate students). The possibilities were limitless. One week The Economist would gallop in a silver steed to rescue the country—or the world—from a depression. The next week The Economist would, by deft manipulation of myriad macroeconomic levers, fine-tune the economy, enhancing the quality of life for all.[1] From the settlement of international trade wars to explorations of the mystique of gold,[2] The Economist could leap tall crises in a single bound. Clearly, the day-to-day fate of Everyman as well as the wealth of nations rested in The Economist's hands.[3] The dearth of such a series came to be inexplicable.

---

† Assistant Professor of Law, University of Wisconsin. I wish to thank Ed Baker, Peter Carstensen, Carin Clauss, William Clune, Hendrik Hartog, Willard Hurst, Phillip Muehrcke, Roberta Romano, and William Whitford for their thoughtful comments. I am also indebted to Michael Morgalla of the Wisconsin Law Library for his kindness and diligence in scouting out often obscure sources, and to Karen Loebel and Lynette Zigman for research assistance.Errors remaining are my own.

1. This sequence of episodes perhaps dates this sentiment to the early 1970's. *See* L. THUROW, DANGEROUS CURRENTS: THE STATE OF ECONOMICS 30–32 (1983) (describing "age of economic imperialism").

2. *See, e.g.*, Machlup, *Speculations on Gold Speculation*, 59 AM. ECON. REV. 332 (1969) (papers and proceedings of 81st annual meeting); Samuelson, *The Mystique of Gold*, 3 VAND. J. ECON. & BUS. 1 (1977); Scitovsky, *A Reconsideration of the Theory of Tariffs*, 9 REV. ECON. STUD. 89 (1942).

3. *See* J. HICKS, VALUE AND CAPITAL (2d ed. 1946); J. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1935); A. SMITH, THE WEALTH OF NATIONS (1776); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV.

Despite the conspicuous and altogether mysterious absence of economists from the ranks of television heroes, The Economist, or at least economics, has nevertheless moved into the theatre of the legitimate, that is to say, into American law schools. There economics has attained a prominence thus far eluding it in television: Within the legal literature, as well as in hallway conversations, The Economist's roles range from Magician-Saviour to Nastiest Villain, with few instances betwixt the two.[4] Which role it is, and when, and where, seems to vary from school to school, from course to course, and indeed from one economist (or economics-y lawyer) to another.[5] There is, I think, no unified vision about what the place of economics in law should be. The divergence derives in part from the newness of the economics presence;[6] and in part from the rich diversity of the economics enterprise, with the widening play given to economists' imaginations.[7] The former is likely to decline with time; one hopes the latter will not.

A third source of the divergence, however, presents a more fundamental challenge to the long run viability (and indeed, the long run) of The Economist at its new performing home. This third source is a collection of pit-of-the-stomach-type reservations about much of economics and law, as currently played out. These reservations link to the core of the law and economics inquiry because they link to the core question of what scientific inquiry itself is all about. But more of that later when we go about constructing a screenplay.[8] First,

---

397 (1975); Zeckhauser, *Procedures of Valuing Lives*, 23 PUB. POL'Y 419 (1975).

4. For a sampling of some of the many viewpoints, see Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978); Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979); *Symposium on Efficiency As a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980).

5. *See* Hansmann, *The Current State of Law and Economics Scholarship*, J. LEGAL EDUC. 217 (1983); Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387 (1981); Klevorick, *Reflections on "The Current State of Law-and-Economics Scholarship"*, 33 J. LEGAL EDUC. 239 (1983); Markovits, *A Basic Structure for Microeconomic Policy Analysis in Our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950; Schwartz, *The Future of Economics in Legal Education: The Prospects for a New Model Curriculum*, 33 J. LEGAL EDUC. 314 (1983); Krier, Book Review, 122 U. PA. L. REV. 1664, 1665 (1974) ("Economic analysis of central legal issues seems to foment storms where otherwise only mild breezes blow.").

6. *See* THE ECONOMIC APPROACH TO LAW 1, 2-5 (P. Burrows & C. Veljanovski eds. 1981); Breyer, *Economics for Lawyers and Judges*, 33 J. LEGAL EDUC. 294 (1983); Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974) (interpreting history of law and economics within general context of legal scholarship); Posner, *supra* note 4, at 281-87.

7. *E.g.*, Akerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Chalmers & Shelton, *An Economic Analysis of Riot Participation*, 13 ECON. INQUIRY 322 (1975); Fair, *A Theory of Extramarital Affairs*, 86 J. POLIT. ECON. 45 (1978).

8. *See infra* pp. 1598-1600.

The Book

A. Mitchell Polinsky, who brings us this adventure, is no stranger to the O-K Corral. A steady and surefingered sharpshooter, he is one of the best, or even the very best, economist in the field of economics and law. In showdowns ranging from criminal sanctions[9] to contract remedies,[10] his hulking scholarly presence has sent Ignorance a-scrambling, first to the bushes, and then, by sundown, out of town.

Although he does not abstain from the hard stuff, in this episode, written for the uninitiated, the approach is decidedly different. In this book,[11] an introductory text, he strides courageously into the law and economics saloon and orders a glass of milk. Aware that to those just entering the saloon, exhaustive texts can be exhausting as well, Professor Polinsky targets for himself a different task. *An Introduction to Law and Economics* aims for a single, simple silhouette forsaking the false heroism of scattershots into the brush. A compact, concise little textbook, it offers other pluses as well: In addition to serving the first year law and undergraduate courses for which it was originally written, it easily lends itself also to spot reading by those with special subject interests in contracts, torts, criminal law, and other fields.

In my opinion, the book succeeds admirably at the tasks Professor Polinsky has set for it. Moreover, he has, in my view, set the right tasks. Instead of seeking to "comprehensively survey the many areas of law to which economic analysis has been applied,"[12] Professor Polinsky's goal is "to convey the spirit of the economic approach and the insights gained thereby."[13] In other words, he aims to help the reader learn "how to think like an economist."[14] To those that regularly recite the importance of learning to think like a lawyer, this promise of the book should be a welcome one. Polinsky pledges to treat his subject "without the technical apparatus,"[15] and he is a man of his word.[16]

---

9. Polinsky & Shavell, *The Optimal Tradeoff Between the Probablility and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979).

10. Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427 (1983).

11. A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983) [hereinafter cited by page number only].

12. P. xiii.

13. P. xiii.

14. P. xiii.

15. P. xiii.

16. This is not to say that the analysis portrayed is nontechnical. Indeed, the author often presents quite sophisticated analyses in a very readable, nontechnical form. *See, e.g.*, pp. 51–56 (discussion of concepts of risk, insurance, and moral hazard). The level of this "hidden technical apparatus" varies, however, and does so, I would guess, as a function of the sophistication of the available professional literature upon which Polinsky relies. Wisely, he limits the citations to this literature in the main body of the book, and offers the citations in a "Bibliographical Appendix," pp. 127–33.

The book pursues a spiraling course, beginning with introductory material about the role of assumptions and about the particular assumptions and definitions employed in the volume.[17] Succeeding chapters present and apply the Coase Theorem and related concepts to nuisance, breach of contract, and automobile accidents.[18] After a brief pause to present notions of risk bearing and insurance,[19] the book cycles round again past contracts and auto accidents, then on to law enforcement, pollution control, and products liability.[20] A nice little chapter midway through on "Competitive Markets"[21] highlights and explains clearly the most important concepts usually pursued in a course devoted solely to intermediate microeconomics. The book then spirals again, returning to the point from which it began, to reconsider the economic consequences and incentives associated with legal rules and institutions.[22] Each cycle of the spiral is more sophisticated than the last; by this means, the author is able to lead the newcomer to a level where the fast-becoming-classics of the field[23] will be readily accessible. It is also the spiral pattern that permits the reader with special subject interests to join in the progression, depart from it, and then rejoin at the next higher level without a great loss in continuity.

With exceptional clarity, Professor Polinsky presents an economic inquiry that is at once both a fine demonstration of how an economist might approach these subjects, and an example of why in doing so it can be difficult, for Polinsky or for anybody, to please all of the people all of the time. Let me offer his analysis of nuisance law[24] (and after that, some devil's advocacy to it) as an illustration. Having previously asserted that concepts of equity can be separated from that of efficiency,[25] Polinsky focuses for most of the book on efficiency considerations, and so the efficiency effects of nuisance law are the subject of this chapter.

In presenting an economic analysis of nuisance law issues, Polinsky of-

17. Pp. 2-5.
18. Pp. 15-24; 25-36; 37-49.
19. Pp. 51-56.
20. Pp. 57-63; 65-71; 73-84; 89-94; 95-104.
21. Pp. 85-88.
22. Pp. 105-13 (discussing relative advantages and desirability of conducting redistribution by the use of legal rules, as contrasted with taxes and transfer payments).
23. *E.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS (1970); W. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (1979); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977). For more extensive references to the literature, see Professor Polinsky's bibliographic appendix, pp. 127-33; Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 UCLA L. REV. 1260 (1982); sources cited in footnote 4.
24. Pp. 15-24.
25. Pp. xiv-xv; 7-10. The author also returns at the close of the book to reconsider the equity-efficiency relationship. Pp. 105-13. At that point, he concludes that although a tradeoff betyween equity and efficiency existys in theory,"legal rules . . . should [nevertheless] be based primarily on efficiency considerations because legal rules are generally less precise than taxes and transfers as a means of redistributing income and may be more costly." P. 113.

fers for purposes of discussion the following example.[26] A polluting factory, located next to a single resident, can obtain $10,000 in profit by producing one unit of its product, and an additional $4,000 beyond that if it produces a second. In the meantime, the neighboring resident would suffer damage of $1,000 if the factory were to produce the one unit, but his damages would soar to a total of $15,000 if the factory were to produce two. One can easily see that the factory owner and resident, were they one and the same person,[27] would between them have a $9,000 benefit if one unit were produced (the factory's profit, diminished by the resident's damage); and would experience a *negative* net benefit in expanding to two units, for the added $4,000 profit of the factory would be more than offset by the additional $14,000 losses to the resident. Clearly the best outcome from the point of view of the single resident-entrepreneur would be to produce one unit of the product: Its $9,000 profit is preferable to the zero profit of not producing at all; and it avoids the cut-off-your-nose-to-spite-your-face losses of producing more than one unit.

In a world of two people, and a world having injunctive or compensatory relief, life is understandably more complicated, and it is here that Professor Polinsky searches for the conditions under which the resident and the polluter will achieve the same one-unit output result. Here, for example, the $1,000 damage to the resident having a right to clean air[28] together with the $10,000 profit possible for the factory owner imply that agreement by the parties on any dollar value in between will be a mutu-

---

26. Pp. 16–17.

27. This preliminary device of viewing the resident and factory owner as a single individual is my own rather than Professor Polinsky's. I adopt it here for ease of exposition and because, as discussed below at pp. 1594–95, it also provides a useful reference point from which to consider the relationship between individual self-interest and socially desirable outcomes. *See infra* pp. 1594–98.

28. As does Polinsky, pp. 16–17, 22, I assume that the $1000 and $10,000 figures capture all the costs and benefits experienced by each of the parties. (Were this not so, it would be incorrect to assert that the resident is precisely as happy with the damage payment as with the obviation of damage altogether.) So, for example, the unpleasantness of smelling or breathing polluted air, even the augmented unpleasantness attributable to individual, idiosyncratic sensitivity or preferences, is included in the $1000 figure. This is an appropriate expositional simplification of the conceptual scheme employed by Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092, 1106–10 (1972), on which Professor Polinsky relies in this section. *See* p. 15 & n.8. Calabresi and Melamed use the terms "objective price" to mean the market-based valuations of damages, and "subjective price" to signify the price at which exchange occurs if a party's right to be free from injury is secured by a prohibitory injunction. Calabresi & Melamed, *supra*. Consequently, when Professor Polinsky and I use the term "damages" here, we include, in effect, both the subjective and the objective damages of the Calabresi-Melamed lexicon. However, since the idiosyncratic element of injury is usually not compensated by damages, *see* p. 22 n.15, the expositional device of including such injury in *our* calculation of damages means that we must keep the definitional artifacts in mind when carrying the conclusions from the theory back to the real world. *See infra* pp. 1598–1600; *cf.* Calabresi & Melamed, *supra*, at 1092–93, 1106–09 (entitlement of prohibitory injunction permits party to hold out for subjective price to be paid by other party, whereas liability rule requires first party to "sell" at market-based price).

ally beneficial outcome (as compared to no production at all).[29] Note that this is true for *any* agreed payment level between the wishful-thinking values of the parties: The factory owner would *like* to pay only $1,000, and the resident would *like* to collect the whole $10,000 profit his sacrifice makes possible, but these extreme cases are unlikely to occur.[30]

In this world of two people, both the damage remedy for the resident and an injunctive remedy where the parties are "cooperative"[31]—that is, where they come to some agreement on compensation—will result in production of one unit, which Polinsky characterizes as the efficient output.[32] Moreover, assuming that the costs of transacting all this are zero, the same production level would result if the entitlement, with damages or injunctive relief, belonged to the factory instead. This is the implication of the Coase Theorem,[33] discussed more extensively by the author in Chapter Three, and incorporated by reference here.[34]

But then, one asks, what if the rather restrictive assumptions adopted here are not met? For example, what if the parties *aren't* "cooperative"? Polinsky responds to this question by relaxing the assumption of "cooperativeness," and by focusing on a world in which it is not guaranteed from the outset that a negotiated agreement will be reached.[35] In addition to

---

29. Each outcome in this range is Pareto optimal, a term for which Polinsky has offered a succinct definition:

> A situation is said to be . . . Pareto optimal if there is no change from that situation that can make someone better off without making someone else worse off.

P. 7 n.4. Moreover, since each party is at least as well off at any particular point in the bargainable range as it would be with a standoff situation, a standoff is *not* Pareto optimal under the conditions assumed in our example.

30. The outcome in such cases of bilateral monopoly, *see infra* p. 1595 & n.44, will depend on the relative bargaining strength of the parties. *See* K. COHEN & R. CYERT, THEORY OF THE FIRM: RESOURCE ALLOCATION IN A MARKET ECONOMY 278–81 (1965); *see generally* J. CROSS, THE ECONOMICS OF BARGAINING 3–41 (reviewing bargaining problem and bargaining theories); J. VON NEUMANN & O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944) (alternative theoretical approaches to problems of indeterminacy involving two or more parties). Most likely, the parties will share the bargainable difference in some fashion. *See infra* note 45; J. HENDERSON & R. QUANDT, MICROECONOMIC THEORY 244–46 (2d ed. 1971) (outcome in which one party dominates and forces other to accept its price or quantity decisions is but one of several possible outcomes).

Some theorists have asserted that the course of the bargaining itself (apart from characteristics of the parties and pre-bargaining conditions) affects the bargained outcome or the failure to reach agreement. *See, e.g.*, R. WALTON & R. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 58–125 (1965). Indeed, although the complexity of such theories is beyond the range of Professor Polinsky's introductory text, their spirit is very much in keeping with that of his analysis of noncooperation.

31. P. 17.

32. Pp. 17, 19–20.

33. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (under certain restrictive conditions, choice of liability rule does not affect resource allocation by two parties to transaction, although rule may affect their wealth); *cf.* Calabresi, *Transaction Costs, Resource Alocation and Liability Rules—A Comment*, 11 J.L. & ECON 67 (1968); Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

34. Pp. 11–14 (discussion of Coase Theorem); 15 (reference to previous chapter).

35. Pp. 18–19.

showing that a damages remedy will still lead to production of one unit (and a bargain basement payment of $1000 to the resident),[36] the author considers the results of an injunctive rule.

Here, however, the production story turns out differently. Polinsky reasons that if the parties do not reach agreement—if in the framework as he's constructed it, one or both parties issue threats, engage in "stubborn bargaining," "extortion"[37] and suchlike—there would be no output at all, i.e., zilch. This, the author says, is inefficient. He therefore proposes a novel solution, namely an entitlement to the resident, enforceable by injunction, to a *one-unit* level of output.[38] This forms an interesting variant on the taxonomy proposed by Guido Calabresi and Douglas Melamed,[39] discussed in the text,[40] in which entitlements may be protected alternatively by damages or by a prohibitory injuction. The reason for such a rule, as presented by Polinsky, is not only the efficiency of the one-unit outcome, but the fact that such an outcome is a stable equilibrium. In less technical terms than I have used here, Polinsky presents an excellent explanation of this:

> Under the injunctive remedy . . . the factory could produce one unit, but no more, without having to obtain the permission of the resident. Starting at one unit of output, it would not be mutually beneficial to produce a second or third unit since the factory's gains are less than the resident's losses. Likewise, it would not be mutually beneficial to reduce output to zero since the resident's gain (in the form of reduced damages) is less than the factory's losses (in the form of reduced profits). Thus, starting at an intermediate entitlement of one unit, the parties will remain there. In essence, the reason strategic behavior cannot upset this outcome is that there are no beneficial changes that can be made and that would require negotiation.[41]

He thus concludes that where "strategic behavior"[42] is possible, a dam-

---

36. Pp. 19–20.
37. P. 19.
38. P. 18.
39. Calabresi & Melamed, *supra* note 28; *see* Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs* (Book Review), 80 YALE L.J. 647, 669–73 (1971) (extending theoretical development of G. CALABRESI, THE COSTS OF ACCIDENTS in context of nuisance law).
40. P. 15. Polinsky initially relies upon the Calabresi and Melamed concepts and language, but then builds his own analytical framework, Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980), which he explicates in simplified form in this text.
41. Pp. 18–19.
42. In Polinsky's lexicon, "strategic behavior" constitutes merely a form of transaction cost, rather than a form of interchange such as negotiation. It is a transaction cost not because it is costly in out-of-pocket terms, but because "it may prevent the parties from reaching an efficient agreement." *Id.* at 18 n.11. Now, in a Coase world, *see* Coase, *supra* note 33, the one thing that is unequivocally good is the reduction of transaction costs. Therefore, once the behavior of freely bargaining actors has been

ages remedy will lead to an "efficient" level of production, but an absolute injunctive remedy will not; as a surrogate for the latter, he recommends an injunctive remedy for production levels above one unit.[43]

Now, I want to examine in greater detail the development of the analysis of nuisance just described, and suggest why in such a context the beholder's eye may make a difference. Recall that although all the outcomes between $1000 and $10,000 are Pareto optimal, they are not equally attractive from the respective partisan points of view. Clearly, the resident prefers payments that are high to ones that are low, and the factory owner prefers just the reverse. In a world with no outside decisionmaker such as a legislature or a court, the outcome here is indeterminate. There is no obvious "right answer" as to the level of payment at which exchange should occur; this is the (in)famous problem of bilateral monopoly.[44]

At this point, one could, however, continue the development of the theory by examining bargaining behavior and suggest from that the outcome likely to result.[45] Polinsky in this book does not pursue such a bargaining theory route. Instead, construing the possibility of deadlock as a danger worth avoiding, from the point of view of Someone-or-other, he turns to the court[46] to provide a determinate solution. Someone-or-other, or the court, must therefore be a person able to take a broader view of things than does either of the parties. I have no objections to this construction as

---

defined to be a transaction cost, the obviation of such negotiation is readily seen to be good. This set of assumptions leads to one way of analyzing nuisance problems, but it simultaneously limits the theory's applicability, as do all theory-building assumptions. For example, Professor Polinsky's conclusions about the efficiency consequences of the suggested damages and injunctive remedies (accepting his definition of efficiency) will not necessarily follow in a world in which negotiation or "strategic behavior" serves any constructive purpose. Strong assumptions such as he has made in this section of the book are defensible and indeed necessary to the simplification process associated with writing an introductory text. But they simultaneously impose limitations on one's ability to draw from the model conclusions immediately applicable in the real world.

43. Pp. 18–19. This example "illustrates a general principle: Under the injunctive remedy, in order to overcome strategic behavior it is necessary to choose an entitlement corresponding to the efficient outcome," p. 19, because otherwise it would be necessary for the parties to reach agreement in order to get the efficient outcome.

44. *See* K. COHEN & R. CYERT, *supra* note 30, at 279–80, 284; *cf.* F. EDGEWORTH, MATHEMATICAL *Psychics* 20–25, 28–30, 35 (London 1881) (reprinted 1932) (in exchange between one buyer and one seller there will generally be an infinite set of Pareto optimal solutions, and within that set, yet another infinite set, the "contract curve", on which each point represents an improved position relative to particular starting points). Within the parlance of bilateral monopoly, Polinsky's suggestion that payment should not exceed the resident's damages of $1000 is equivalent to a suggestion that the indeterminacy be resolved totally in favor of the buyer of the product. *See also supra*, note 30.

45. *See, e.g.*, J. HICKS, THE THEORY OF WAGES 136–58 (2d ed. 1963) (concessions by management and resistance by labor union depend upon expected length of strike); T. SCHELLING, THE STRATEGY OF CONFLICT 21–172 (1960) (theory of bargaining, games, and strategic behavior); Ashenfelter & Johnson, *Bargaining Theory, Trade Unions, and Industrial Strike Activity*, 59 AM. ECON. REV. 35 (1969) (theory of negotiation and strike frequency and duration); J. Lachman, An Economic Model of Plea Bargaining in the Criminal Court System 84–93, 135–36 (1975) (Ph.D. dissertation, available from University Microfilms, Ann Arbor, Michigan) (theory in which parties split the bargainable difference in some proportions).

46. P. 18.

it stands. I would, however, highlight the facts that in Polinsky's world, the court and the Someone are outside the resident-factory owner nexus; and, second, that this social decisionmaker apparently has an agenda of its own—which may or may not accord with that of the reader.[47]

Consider the story both ways. Scenario 1: The parties, left to their own devices, would agree to an exchange at a price in the middle of the range—say, $5500. Preempting this negotiation event, however, Polinsky's court would order payment of only $1000 damages, or adopt an injunction guaranteeing production at one unit with *no* damages paid. It would intervene in this way in an otherwise private transaction because to do otherwise would risk the untoward consequences of deadlock.[48]

Justification for such intervention must then come from the beneficial consequences of intervention in the case where the parties would not otherwise have reached agreement; indeed, it must also be true that these

---

47. It is not clear exactly why, within the world of the self-interested economic person, the parties do not reach an agreement that (except for the extreme positions of exactly $1000 and $10,000) is in the self-interest of both of them. One possibility is that they are irrational—for example, that they act in self-destructive ways—but that possibility has been foreclosed by the initial assumption of rationality, and rationality in the form of self-interested behavior. *See* p. 10 (adopting assumption of consumer sovereignty and assumption that individuals generally know what is best for themselves). A second possibility is that the individuals are marching rationally, but to the beat of a different drummer. Polinsky suggests as much in noting that parties may be attempting to establish reputations as "tough bargainers," p. 18, rather than seeking the best solution as measured by dollars alone and in this one negotiation episode. Suppose, then, that given these *two* goals—investing in the capital that is reputation and obtaining a desirable outcome in this particular episode—the bargainers find that what is in their individual self-interest is to walk away from one another and do business elsewhere or do no business at all. By this definition, deadlock is Pareto optimal: If there *is* no overlap between the outcomes that improve well-being for one party and those that do so for the other, then each is at least as well off in deadlock. On the other hand, if one wishes to suggest that reputational investment should not be a goal, and that once it has been excised from the list of goals there *is* at least one Pareto optimal outcome to be had from doing business together, then one has in effect acknowledged the importance of goals in *determining* the efficient outcome. *Cf.* Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's* Economic Analysis of Law, 87 HARV. L. REV. 1655, 1679-80 (1974) (efficiency is not independent of equity, given that redistribution is costly; therefore, "the problem of designing the law, even within the economist's framework, is one of trading off efficiency and equity"); *but cf.* pp. 105-13 (despite costliness of redistribution and theoretical existence of tradeoff between equity and efficiency, legal rules should be based primarily on efficiency, with redistribution accomploished by taxes and transfers). How and why Professor Polinsky's views on this subject have changed since his earlier review essay are not explained in the book, except for a brief statement to the effect that they have changed, which appears in a footnote to the bibliographic appendix. P. 131 n.74. This is the only thing in the book that I found not to be crystal clear.

48. A government that would honor such freely negotiated outcomes is not necessarily less interventionist than a government that participates by overriding consumer sovereignty. *See* Calabresi & Melamed, *supra* note 28, at 1090 (presented with conflicting interests of two or more people, the state must and, in effect, does decide which side to favor; the only rule that does not require government is "might makes right"); Samuels, *Interrelations Between Legal and Economic Processes*, 14 J.L. & ECON. 435 (1971) (by enforcing property rights, even in absence of specific statutory law, government is indeed acting, and cannot be neutral as between parties having conflicting interests); *cf.* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211 (1979) ("the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it").

benefits are substantial enough to overcome the presumed negative effects of intervention in the first scenario.[49]

What then happens in the alternative case? Scenario 2: The bargainers, to whom *any* agreement in the $1000 to $10,000 range is preferable to deadlock, somehow muck things up. They stomp out of the negotiation chamber in disgust and never return. Because each loses out on the potential gain offered by the dazzling array of Pareto optimal solutions, both have plummeted to the depths, so to speak, of their joy-unit careers. In my two-person world, the curtain then closes with the two of them left on their island, sulking on their respective rocks.[50]

In Polinsky's world, however, the court dashes to the rescue to order damages of $1000, or an injunction (and no damages) so that, in either event, production occurs at the one-unit level. Now, measured in terms of individual joy levels, one or both parties are at least as well off as if they'd been sulking on the rocks for the rest of their lives: Under a damages remedy, the court's solution to this world's problem is a Pareto optimal one; the factory owner is $9000 richer and the resident is no worse off than in the sulking case. With the one-unit injunction remedy, life is $1000 rosier still for the factory owner and equivalently unrosier for the resident, but, as in the damages case, we can at least rest assured that the collectively desirable production will occur.

But wait. Who decided what is collectively desirable? Who is the collectivity, if it's not the two rock people who have already made *their* decision known? Take the easy questions first. In the damages version of Scenario 2, the one thing we know is that the parties that would have been sulking

---

49. Here I am assuming that freely-bargained outcomes are preferable from a social perspective to outcomes arrived at by governmental intervention or fiat. The assumption is useful as a starting point here (as a devil's advocate, perhaps), but it need not hold generally. "[A] case . . . for interference with consumer sovereignty . . . may derive from the role of leadership in a democratic society," R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 14 (1959), for example, in areas such as regulation of drug sales and of health facilities, and compulsory education. *See also* Steiner, *The Public Sector and the Public Interest*, in PUBLIC EXPENDITURES AND POLICY ANALYSIS 21, 23 (R. Haveman & J. Margolis eds. 1970) (public goods include those for which the publicly provided version is qualitatively different from that of private market, as well as goods for which the only difference is in distribution of benefits and costs).

50. Sad as this ending sounds, things could be worse: The two of them could, in ignorance be daydreaming on their separate rocks, not even knowing enough to grieve about their lost opportunity for bliss. Were this the case—which it is for Polinsky's third variant on the model, in which imperfect information impedes the attainment of beneficial exchange, pp. 20–23—governmental intervention would be relatively easier to justify. Government may intervene by changing the parties' starting points, *cf.* Calabresi & Melamed, *supra* nopte 28, at 1092, as Polinsky suggests, or by doing something else, such as providing or fostering the provision of better information. *See, e.g.*, FEDERAL MEDIATION AND CONCILIATION SERVICE, TWENTY-FOURTH ANNUAL REPORT FISCAL YEAR 1971 5–6 (making realistic reports to both labor and management constitutencies is important in order to avoid work stoppages). This might not, however, be a panacea. *See e.g.*, Lachman, *supra* note 45, at 14–16 (increased information available to one or both parties to bargaining may under some circumstances widen bargaining interval, and poor information may under certain conditions lead to settlement where perfect information would have led to conflict).

on the rocks are doing at least as well, thanks to Polinsky's judge, as they would have done in their alternative rocky existence. More specifically, the resident is precisely as well off and the factory owner is $9000 better off. Leaving aside the issues of distributive justice,[51] we are still left with several knotty issues. One: Even if government intervention can result in one party being better off by $9000 and another holding constant in its same old crummy position—even if this is possible—why do it? To restate the question, if Polinsky's court can coerce the parties into a "better" outcome, why is it so much better than the one *they* would have chosen, or lapsed into, themselves? On what basis does the opinion of Polinsky's court claim first dibs on the use of the term "better"?[52] And, assuming one can answer that question, is the court's solution so much better than the free non-exchange one of the parties that its brownie-point glow will carry over to justify court intervention even when the parties would otherwise have worked out their own deal (Scenario 1)?

Why is it so important that one unit of production occur anyway? Polinsky's judge would answer that it is the "efficient" outcome,[53] one that "maximize[s] the size of the pie."[54] Is the pie bigger when the factory owner produces one unit of the product? That depends on what you think of the product, or, alternatively, what you think about the fact that other folks are willing to pay big bucks for it. Suppose for the sake of argument, you think that what others are willing to pay $10,000 for is indeed worth that; and, moreover, that after these folks have thrown their money around this way, it is the case that society as a whole is $10,000 better off.[55] (Just think about it: All this joy for a mere $10,000.) Now, ask whether, for this joy, it is worth it—*socially* worth it—to have taken from those bargainers the freedom to make their own decisions. Moreover, was the resident's freedom to enjoy the clean air or to accept some payment instead—now replaced by a governmental decision that he will breathe muck and receive no compensation at all—was *that* earlier freedom worth $10,000? And who ought to decide such questions: the resident, the fac-

51. This is no small matter to leave aside. *See* Polinsky, *supra* note 47, at 1679 (determination of legal rules involves tradeoffs between equity and efficiency); Thurow, *Equity Versus Efficiency in Law Enforcement*, 18 PUB. POL'Y 451 (1970); *see also* Baker, *Starting Points in the Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980) (wealth maximization criterion dependent on difficult to measure willingness-to-pay variable); Calabresi & Melamed, *supra* note 28, at 1098 (preferences about wealth distribution play crucial role in the setting of entitlements).

52. Would it matter, for example, if the gain to the factory owner were only fifty cents?

53. P. 18.

54. P. 7. *But see* Bebchuk, *The Pursuit of A Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671, 671–72, 694–709 (1980) (under Posner's wealth-maximization criterion, poor may well get smaller slice, but this need not be true for other wealth-maximizing rules).

55. Approximating the public value of a good or activity by the price at which it is privately exchanged is a common simplifying assumption of economics. At times, however, such an assumption is inappropriate—for example, when the "good" exchanged is a murder for hire.

tory owner, Polinsky's court, or Someone else?[56] If one can answer yes in litany to the questions posed above about worth, and if one can declare the court or Someone else to be the best decisionmaker of all—only then need the one unit solution be the efficient one.[57]

The answers to these questions are things on which reasonable people, including economists, can disagree. No easy answers, indeed, no answers at all can I offer. And that's the point. In this context, any rule of decision, whether it be a laissez-faire strategy that accepts the prospect of sulking on the rocks, or a more activist role for a court or Someone else—any such rule of decision is a statement about social values and goals. The existence and authority of Polinsky's court, as well as any intimations about what is "desirable,"[58] constitute statements about values, namely, that given the hypothesized circumstances of production and residing, the exercise of governmental authority to override private choice is OK. My devil's advocacy presents the same conclusion in reflected form: The decision *not* to intervene, the decision that the market, even when there's a monopoly seller or buyer, is always right, is also a statement about values. There is, to my thinking, no value-free way to define efficiency[59] (a position at times espoused by Polinsky as well[60]). The conundrum is unavoidable. How, then, to make the best of a distressing situation?

A Word From A Sponsor: Abstractions and Their Assumptions

Fortunately for us—and despite Professor Polinsky's humble caveats to the contrary[61]—his book comes equipped with everything. In particular, it

---

56. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 91-101 (1982).

57. This assumes Polinsky's definition of efficiency. *See supra* p. 1597.

58. *E.g*, p. 119 ("it is desirable to reduce the risk borne by a risk-averse party"). The desirability to risk-averse persons of reducing risks has been explained and illustrated well in the chapter on risk bearing and insurance. Pp. 51-56. The social desirability of seeking such benefits for individuals—where this goal must be traded off against others in society—is a more complex issue.

59. To illustrate the relationship between efficiency and goals, suppose that you have determined to take a vacation in London, and order airline tickets from a travel agent in accordance with this plan. You have informed the agent of your preferences about dates, your willingness to tolerate layovers for connecting flights, desire for flexibility to change schedules while en route, price of the ticket, and so forth. Yet when you go to pick up the ticket, you find that it's a ticket to Miami instead. The agent explains that Miami tickets are on special, and so it's the most efficient ticket you could buy. The agent is right, *if* efficiency is independent of goals like going to London versus Miami, and if the measure of achievement is pure dollar-cost minimization, rather than some combination of factors that takes into account the aspects other than dollar cost, such as flexibility in travel plans while on the trip. To say that one must first attend to expanding the size of the pie by pursuing the cost-minimization course and *then* attend to goals is to suggest that you go to Miami and then go to London, probably one of the less efficient ways to manage things. And so on. For an explication of similar equity-efficiency tradeoffs in another context, that of law enforcement, see Thurow, *supra* note 51.

60. *See* Polinsky, *supra* note 47, at 1679-80.

61. P. xiii.

comes equipped with an early chapter about the role of assumptions, and about the uses of abstraction in the process of economic inquiry.[62] There Polinsky points out that "[e]conomists make assumptions for the obvious reason that the world, viewed economically, is too complicated to understand without some abstraction."[63] He therefore suggests isolating one or two issues at a time "by making simplifying assumptions that eliminate the others,"[64] and later expanding the inquiry by adding various complications to the framework.[65] In other words, the challenge of economic thinking is the proper use of abstraction; in determining how properly to use abstraction, one needs to take into account concerns about tractability, the realism of assumptions, the particular questions to be pursued, and the relationship of the assumptions to the goals of the inquiry. To use Polinsky's phrasing, "[t]he art of economics is picking assumptions that simplify a problem enough to better understand certain features of it, without inevitably causing those features to be unimportant ones."[66]

Because the process of economic abstraction is, by assumption, unfamiliar to the book's readers, I approach it by analogy to a more familiar concept, specifically, to abstraction in the form of maps. A map is an abstraction of the world, and its use requires a theory by which one can link the abstraction with the world.[67] Before this linkage is established, however, one needs to know the questions the map should answer. Humbug. A map is a map is a map, you say? Then, by all means, help yourself to a soundscape map of Boston: "A composite view of the variety of city sounds as perceived along a sequence of streets . . . [in which s]ymbols represent qualities of sounds . . ., for example, soft, intense, roaring, muffled, sharp, echoing, expansive."[68] Or if that's not quite what you had in mind, how about an Eskimo Coastline Relief Carving (yes, you read that correctly), convenient for carrying on and around your ship?[69] Or a

62. Pp. 1–5.
63. P. 2.
64. P. 3.
65. P. 4.
66. P. 4.
67. *See, e.g.*, A. ROBINSON, R. SALE & J. MORRISON, ELEMENTS OF CARTOGRAPHY 50–75 (4th ed. 1978) (theory and systems of transformation for map projections); *id.* at 149– 80 (theories of cartographic generalization); Board, *Maps as Models*, in MODELS IN GEOGRAPHY 671 (R. Chorley & P. Haggett, eds. 1967); Lam, *Spatial Interpolation Methods: A Review*, 10 AM. CARTOGRAPHER 129 (1983).
68. M. SOUTHWORTH & S. SOUTHWORTH, MAPS 190 (1982).
69. L. BAGROW & R. SKELTON, MEISTER DER KARTOGRAPHIE (1973), *reprinted in* M. SOUTHWORTH & S. SOUTHWORTH, *supra* note 68, at 51. For examples of map abstractions of a different sort, see M. KIDRON & R. SEGAL, THE STATE OF THE WORLD ATLAS, map no. 29 (1981) (entitled "Bullets and Blackboards," map depicts ratios of soldiers to teachers, by country, in 1974); G. Bula, Gospel Temperance Railroad Map (1908), *reprinted in* AN ATLAS OF FANTASY 33–35 (J. Post ed. 1973) (Railroad of Life can go past Mount Terror into State of Darkness or take more northerly route toward Celestial City).

color-coded map showing "The Percent of [the U.S] Popu.ation Unchurched . . . 1971"?[70] And so on.

Somehow, these maps offer little help in getting from Madison to Chicago. Instead I want a road map, and a certain kind at that: I need to be given the details of the street plan for the cities at each end, but *not* such details for everywhere in between. I need to know about the roads, and seasonal temperature and precipitation indicators would be nice. What about cloud movements, wind direction and color-keyed info on vegetation? National and local parks, population centers, and Howard Johnson restaurants? The map darkens progressively with colors and symbols, and darkens still some more until . . . until I notice that even as I gave free rein to my desire to know more, I consigned myself to a map from which I could only know less.

This is the paradox of abstraction to which Polinsky succinctly referred:[71] The skillful use of abstraction requires one to forego including some considerations that would indeed add information, so that the resulting abstraction will, in the end, tell us more. In other words, even as one chooses *which* details or assumptions to include, she necessarily chooses an overall level of complexity appropriate to the task.[72] This choice then constitutes a fund, a budget of complexity, from which any particular penny, once spent, cannot be spent again.

Now, within this budget, as in any other, there are allocative choices to be made. If I spend most of the available complexity showing parks and schools, there will not be much left for depicting the alternative street routes that can take me to my destination. So among the details of which the world is so rich, one must discern those details most important for the purpose at hand,[73] and in the austerity that is the elegance of abstraction, select only the highest in priority from among these.[74] The best abstraction, or even the better one, cannot be determined without reference to the goals: Both the level of complexity and the allocation of it to detail depend upon the abstraction's purpose . In order to judge the better map from the

---

70. Glenmary Research Center, Percent of Population Unchurched, By Counties of the United States: 1971 (1974).

71. *See supra* p. 1599; pp. 3-4.

72. *See, e.g.*, A. ROBINSON, R. SALE & J. MORRISON, *supra* note 67, at 201-16 (theories of representation by point symbols in cartography); *cf.* M. BLAUG, THE METHODOLOGY OF ECONOMICS, OR HOW ECONOMISTS EXPLAIN 254-55 (1980) (simplifying assumptions made in conjunction with development of growth theory result in this having "extremely limited practical implications").

73. *See* Klevorick, *supra*, note 5, at 244-45 (more formal models can "give insights about more complicated settings in which the results of the more 'stripped down' models are relevant"); *cf.* Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics,"* 33 J. LEGAL EDUC. 274, 274-75 (in its attempt to organize reaity, legal economics appears also relentless in its attempt to "filter the complexity of both social life and individual identity").

74. This choice is not irreversible, but a rerun of the selection requires reconstructing the framework.

worse, a critic must know these goals—must even, for purposes of judging, accept them—and carry on the criticism from there.

But then, to where? To the investigation of two sets of things: the choice about the allocation of complexity, and the technical integrity with which the abstracting process is carried out. The former I will turn to in a moment; the latter I discuss briefly here. Good mapmaking means certain things, and two mapmakers pursuing the same objectives with the same information can nevertheless produce maps of differing quality. Similarly, a single task in economic abstracting can be done better or more poorly as a function of the economist's efforts, imagination, and skill. The integrity of the abstraction is, I think, in part a matter of casting the problem in such a way that the research can bring to bear the intellectual metaphors of the field.

Differing senses of "like" are what distinguish one discipline from another, one form of answer from another.[75] To my amazement in the first few days of law school, I learned that water can be like cows. When is water like cows? Answer: When it's escaping from land.[76] A lawyer might be equally surprised to find that hay-bailing wire can be like San Francisco housing. When is this so? When both are in short supply due to price controls.[77] Within a discipline, the sense of like goes yet deeper: Does the demand for potatoes fall when prices rise, as demand does for many other products, or could its relationship to price be otherwise?[78] Do jobs for minority group members rise in a simple stairstep fashion as neighborhoods come to be more integrated?[79] Or do these jobs rise in

---

75. *See* Hansmann, *The Current State of the Law-and-Economics Scholarship*, 33 J. LEGAL EDUC. 217, 221 n.12 (1983) (characterizing lawyerly thinking as entailing treating "like" things alike); Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 637–38 (1980) (discussing sense of analogy in economics and in law); Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 439 (1983) (economics brings to the law different presuppositions and organizing thoughts). These systems of analogy and classification distinguish one system of thought from another. *Cf.* M. FOUCAULT, THE ORDER OF THINGS xv (1966, trans. 1970) (quoting and discussing set of categories from a "'certain Chinese encyclopaedia' in which it is written that 'animals' are divided into : (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies").

76. *See* Rylands v. Fletcher, [1866] 1 L.R. Ex. 265, *aff'd*, [1868] 3 L.R.-E.&I. App. 330.

77. *See* J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 40–41, 321–29 (2d ed. 1980) (discussing market effects of imposing price controls, and example of San Francisco housing). *See generally* GUIDELINES: INFORMAL CONTROLS AND THE MARKET PLACE (G. Schultz & R. Aliber eds. 1966) (collection of essays on consequences of various forms of price controls); Cheung, *A Theory of Price Control*, 17 J.L. & ECON. 52 (1974) (price controls analyzed as limitations on contracting).

78. *See* J. HENDERSON & R. QUANDT, *supra* note 29, at 34 (although demand usually declines as price rises, the reverse relationship is possible; goods for which this occurs are called Giffin goods); Dwyer & Lindsay, *Robert Giffin and the Irish Potato*, 74 AM. ECON. REV. 188, 191 (1984) (Giffin goods are more likely to be found in poor communities that import most of their food).

79. *See* Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82

number with some integration, taper off with more, and still after that decline?[80] Clearly, there are important judgments to be made about the way that those within a discipline go about constructing their abstractions, even once the goals of the inquiry have been set. Assuming, however, that the technical- integrity expectations have been met, satisfaction or dissatisfaction with an abstraction most likely links in some way to its original assumptions.

It is here that reasonable people must often agree to disagree. For the assumptions acceptable to one abstracter or another can on occasion be as varied as the persons from whom they derive. Not always, of course: There are times when the findings of one episode of research become the assumptions of yet another, so that the wheel need not be continually reinvented. And at other times the assumptions based at first on intuition can quickly be verified by a test.

But there are also times (most of the time, in my experience) when at least one of the assumptions entailed in the abstraction relates to the expertise of another discipline,[81] or to the ordinary knowledge that human beings have,[82] or possibly to both. When this is the case, evaluation of the goodness of an abstraction becomes itself complex. For the choice about one assumption, intertwined as it is with other such choices made within the budget of complexity, may become of necessity a choice about the package of assumptions all together. Nevertheless, if one focuses first on these extra-disciplinary assumptions, progress in framing a judgment can yet be made.

Q.J. ECON. 175 (1968).

80. *See* Offner & Saks, *A Note on John Kain's Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 85 Q.J. ECON. 147 (1971).

81. *See, e.g.*, Akerlof & Dickens, *supra* note 7 (economic analysis of workplace safety, with assumptions about cognitive dissonance made in light of previous psychology research); *cf.* Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1212 (1981) (problem of some economic analysis of law is the use of unsupported abstraction).

82. *See* C. LINDBLOM & D. COHEN, USABLE KNOWLEDGE 8, 12 (1979) (defining ordinary knowledge as "knowledge that does not owe its origin, testing, degree of verification, truth status, or currency to distinctive [professional social inquiry] techniques but rather to common sense, casual empiricism, or thoughtful speculation and analysis"); *cf.* Tushnet, *supra* note 81, at 1214 ("[I]n traditional policy analysis, common sense is used both to select a goal and to determine how to achieve it.").

Lindblom and Cohen point out:

> The most basic knowledge we use in social problem solving is ordinary.
>
> Everyone has ordinary knowledge—has it, uses it, offers it. It is not, however, a homogeneous commodity. Some ordinary knowledge, most people would say, is more reliable, more probably true, than other. People differ from each other in the kind and quality of ordinary knowledge they possess.

C. LINDBLOM & D. COHEN, *supra*, at 15 (footnote omitted). The line between ordinary knowledge and scientific knowledge is not a hard and fast one, and indeed may depend upon the state of the knowledge. For example, the most important way in which ordinary knowledge grows is by turning into scientific knowledge. K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 18-19 (1959). *Cf.* C. LINDBLOM & D. COHEN, *supra*, at 13 n.2 (some ordinary knowledge was once scientific knowledge).

Here we consider, by assumption, assumptions about which the discipline's "expert" offers no special expertise. The economist, for example, is no more expert than other lay persons when the necessary assumptions must include a specification of attitudes toward childbirth or a direction from which the sun is believed to rise.[83] When it comes to assumptions such as these, the economist constructing an abstraction relies upon the expertise of others, or upon ordinary experience. It is therefore possible that a similarly situated economist, with identical skills and technical expertise, would nevertheless obtain results at odds with those of the first, and not because of lack of technical integrity in the work: Assumptions intimately affect outcomes, of course, and for some sets of contrasting outcomes, assumptions will be the only source of difference.

What then should be the relationships between ordinary knowledge and professional expertise, and between the world of the abstraction and the world it seeks to reflect? How, then, should lawyers relate to the expertise economists bring to bear?

A Word From Another Sponsor: Ordinary Knowledge and the Process of Abstraction

An economist thinks in terms of models and theories. But so does the rest of the world. To grab hold of the thought style of economics must mean, then, that one think not only in terms of models and theories, but also in terms of such models and theories as economists employ. This sense of "economicsiness" provides the commonality for binding these thought patterns one to another, while distinguishing them from the thought patterns of other kinds of inquiries and of ordinary experience. Yet, apart from this peculiar economic flavor, the economist's mode of abstraction is not all that different from the mapmaker's or from the thinking entailed in ordinary experience.

I said above that everyone thinks in terms of models and theories, a statement of dubious truthfulness. Unless, that is, one adopts a generously energetic definition of the verb "thinks"—which I now do. Every day we go about life on the basis of very powerful yet unarticulated theories, about the world and how we relate to it. We believe in replication, for example, in that we expect that if we do the same thing today as we did yesterday—eating breakfast, catching a bus—things will turn out the

83. *See* C. LINDBLOM & D. COHEN, *supra* note 81 (professional social inquiry may have "no distinct advantages in stock or use of ordinary knowledge helpful to public policy and many other forms of social problem solving"); D. NORTH & R. MILLER, THE ECONOMICS OF PUBLIC ISSUES 8 (2d ed. 1973) (economist is not qualified "to answer the pivotal question of whether life begins at conception, at 24 weeks, or at birth, [n]or . . . whether or not abortion should be legally permitted or proscribed," but can analyze the economic aspects of the issues).

same as they did before. We believe that if we go to sleep in one location we will wake up the next day in the same spot, that flipping certain switches makes a room lighter rather than colder, that drinking water stifles thirst, and so on. None of these propositions need be true day after day. But they usually are, and indeed the regularity is so striking that we can forget the essential role of theory—here, a theory that the future will be like the past—in even the most simple of daily tasks.

Sometimes this overarching theory, that the future will be like the past, is incorrect. I expect the bridge to be where it has always been because it's always been there, and then one day it is located below its usual spot, having collapsed into the Mianus River. Or, having functioned on the theory that my memory replicates reality, I fail to find the bridge because I am myself in a different spot. And so it goes: We live by theories, by assumptions of regularity, despite the fact that they fail us. We do this because abstractions about the world are necessary to function in it; we must see things in patterns if we are to deal with much information at all. And these abstractions, although they fail us, are better than no abstractions at all. Like the infinite regress of attempting to define all words by using other words, we cannot comprehend everything all at once, without understanding some things first. And those first understandings, inarticulable except in terms of themselves, become the first two-by-fours in the framework within which we build our thoughts. Then, when our theories fail us, we can use that experience to revise the plan of the structure, so that in the future our theories will fail us less.

All of this is what we human beings, not just economists, do every day, and our learning from it constitutes "ordinary knowledge."[84] It is the wellspring from which we draw and to which we replenish knowledge as we go about the continual processes of explanation and prediction, re-explanation and, at times, simply wondering about the world in which we live. This "ordinary knowledge," viewed as both a process of thinking and a reservoir of its results, figures importantly in the development of "scientific theories" such as those of economics.[85] The reservoir services the daily experiences that form the main estate of ordinary knowledge, and also serves as a perception of reality against which scientific theories may be tested.

This process of ordinary knowledge also serves the scientific inquiry by

84. C. LINDBLOM & D. COHEN, *supra* note 82, at 12; n.78; *cf.* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10–20 (1977) (distinguishing "ordinary observer" and "scientific policymaker" based on "the existence of a divergent understanding of the nature of legal language").

85. K. POPPER, *supra* note 82, at 22 (scientific knowledge is result of growth of common sense knowledge, and "[i]ts very problems are enlargements of the problems of common-sense knowledge"); *cf. id.* at 47 (social scientists can draw on introspection as a source of knowledge about behavior, and because of this, have an inherent advantage over those studying natural phenomena).

providing a metaphor and a method. The continual testing of beliefs about the real world, and their consequent reaffirmation or revision have their counterparts in the scientific method.[86] Just as ordinary knowledge calls upon the imagination for its agenda of inquiry, so the paradigm-creating "experts," schooled in the mainstream (but retiring) paradigms, had to rely upon imaginations about ideas outside the profession's then-existing expertise.[87]g This is not to deny the significance of expertise or its indispensable role in the growth of knowledge. Rather, it is to say that the process by which knowledge grows within the realm of the expert is not totally unlike that of its growth in the realm of ordinary experience. Which is also to say, with respect to economic analysis about law, that ordinary experience and other sources of expertise—particularly those of persons not economists—may supply some needed imagination in the abstracting work yet to be done.

And just as the ordinary experience and expertise of lawyers may bring a special perspective to the construction of a framework, so it may prove valuable in adoption of assumptions and the theory's real-world tests. To explore this, I want to switch channels several times to observe some illustrative vignettes—doctor and lawyer shows, mostly—that will prove useful for the discussion to follow.

Switching Channels I: (Mostly) A Medical Tale

In 1797 Benjamin Rush sued William Cobbett for libel. After hearing a markedly pro-plaintiff charge, the jury retired briefly and then returned to order an award of $5000.[88] Despite this victory for Dr. Rush, or more likely because of it, the practice of medicine has never been quite the same.

Benjamin Rush was an eminent Revolutionary Era statesman: signer of the Declaration of Independence, framer of the United States Constitution and the Pennsylvania Constitution, and the first Treasurer of the Mint.[89]

---

86. *See* M. BLAUG, *supra* note 72, at 15 ("In ordinary life, as in science itself, we acquire knowledge and improve on it by a constant succesion of conjectures and refutations, using the familiar method of trial and error.").

87. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 90 (2d ed. 1970):

> Almost always, [those] who achieve the fundamental inventions of a new paradigm have been either very young or very new to the field whose paradigm they change. . . . [O]bviously these are the men who, being little committed by prior practice to the traditional rules of normal science, are particularly likely to see that those rules no longer define a playable game and to conceive another set that can replace them.

Id.

88. Rush v. Cobbett, 2 Yeates 275, 275-76 (Penn. 1798) (Supreme Court sitting as trial court). T. CARPENTER, A REPORT OF AN ACTION FOR A LIBEL, BROUGHT BY DR. BENJAMIN RUSH, AGAINST WILLIAM COBBETT (report of trial to jury)(1800).

89. *See* Rosen, *Benjamin Rush*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 588-89 (1968); Shryock, *Benjamin Rush*, in 8 DICTIONARY OF AMERICAN BIOGRAPHY, PART II

As a physician he was equally luminary, a fact of common knowledge to scholars of history and medicine, and to Philadelphians.[90] Educated at Edinburgh, Dr. Rush founded the first medical society in America, then helped to establish the first libraries and medical schools here.[91] Now regarded as "the father of American psychiatry,"[92] he advocated the recognition of insanity as a form of illness, and campaigned for humane treatment of the mentally ill.[93] He was an extraordinarily prolific and perceptive writer;[94] his treatise on psychiatry remained the standard work in the field for almost a century.[95]

The ardor that characterized Rush's enterprise of psychiatry and politics he brought to other ventures as well. Dr. Rush was a creative theorist, particularly in matters of health.[96] Moreover, he carried his theories into practice, quite literally. To put it in less delicate terms, Dr. Rush bled people to death.[97] According to Benjamin Rush, there exists only one disease among humankind; all the illnesses of body or limb are but various manifestations of it.[98] From this it follows, said Dr. Rush, that there is but one proper treatment for illness, namely, bloodletting, on which each specific therapy is but a variation.[99] On this basis, Dr. Rush became the most actively dedicated bloodletter of his day.[100]

Now, in spirit, this was hardly new. For twenty-one hundred years or thereabouts bloodletting had been standard stuff in the medical armament

---

227–31 (1963).

90. *See* N. GOODMAN, BENJAMIN RUSH: PHYSICIAN AND CITIZEN 1746-1813 162 (1934); D. HAWKE, BENJAMIN RUSH REVOLUTIONARY GADFLY ix (1971); Shryock, *Benjamin Rush From the Perspective of the 20th Century*, in 14 TRANSACTIONS AND STUDIES OF THE COLLEGE OF PHYSICIANS OF PHILADELPHIA 114 (1946-47).

91. Shryock, *supra* note 89, at 229.

92. D. HAWKE, *supra* note 90, at ix.

93. N. GOODMAN, *supra* note 90, at 255.

94. *See* N. GOODMAN, *supra* note 90, at 382–90 (listing Rush's published writings).

95. *See* B. RUSH, MEDICAL INQUIRIES AND OBSERVATIONS UPON THE DISEASES OF THE MIND, (Philadelphia 1812, reprinted 1962); Lloyd, *Benjamin Rush and His Critics*, in 2 ANNALS OF MEDICAL HISTORY 470, 471 (E. Packard ed. 1930); N. GOODMAN, *supra* note 90, at 259.

96. Ironically, one of Dr. Rush's theories, though mistaken in certain respects, could have ended yellow fever had his proposals been taken seriously. Blaming the disease on "noxious miasma" from marshes, he advocated draining them. But the politics of the day made controversial the notion of a local origin for the disease and Rush's theory went unheeded. J. FLEXNER, DOCTORS ON HORSEBACK 105 (1944).

97. *See* C. BINGER, REVOLUTIONARY DOCTOR: BENJAMIN RUSH, 1746-1813, 228–29 (Norton ed. 1966). "[T]ruly, he shed more blood than any general in history." J. FLEXNER, *supra* note 96, at 113.

98. *See* C. BINGER, *supra* note 97, at 228 (summarizing Rush theory); G. CORNER, THE AUTOBIOGRAPHY OF BENJAMIN RUSH 363–66 (same); Shryock, *supra* note 89, at 229 (same); Shryock, *supra* note 90, at 114 (same).

99. C. BINGER, *supra* note 97, at 228; Shryock, *supra* note 90, at 114.

100. N. GOODMAN, *supra* note 90, at 253; Pepper, *Benjamin Rush's Theories on Bloodletting After One Hundred and Fifty Years*, 14 TRANSACTIONS & STUDIES OF THE COLLEGE OF PHYSICIANS OF PHILADELPHIA 121, 121 (1946-47). *See supra*, note 97.

against disease.[101] Sure, there had been debates about which techniques to use for each kind of disease, and whether "venesection," as it was called, was "contraindicated," as it is called.[102] (It was, in certain seasons of the year, like the vernal equinox, and in certain seasons of life, such as infancy and old age—or at least in an earlier age it was so thought.[103]) And it is true that Benjamin Rush participated in these run of the mill, which-vein-to-let-for-what debates that had long been the lifeblood (forgive me) of medical intellectual discourse.[104]

But with Dr. Rush, the practice of bloodletting entered an entirely new era. For, in contrast to his predecessors in the profession, from Hippocrates to the medieval heretics, and from the purifiers of the Renaissance to the doctors of Rush's day,[105] Dr. Rush did things properly: Which is to say, Dr. Rush played by the rules. If the theory said, bleed four-fifths of the blood out of someone, Dr. Rush was willing to do it.[106] A kindly and compassionate physician, he offered his curative to rich and poor alike, until finally he succeeded in raising the mortality rate of Philadelphia.[107] (This is not to say that his influence was limited to the ordinary rich and poor of Philadelphia; his treatment was given also to George Washington, who died shortly thereafter.[108]) With Dr. Rush what was different was simply that he really did it. In the past, bloodletting hadn't really been done in a no-holds-barred allegiance to medical theory; professional expertise had always been tempered, restrained, by common sense[109]—by the ordinary knowledge each of us has deep inside, by that still, small voice that says, being bloodless can't be all that good for you.

Benjamin Rush was honest and loving. He believed in the correctness

---

101. *See* J. FLEXNER, *supra* note 96, at 102; J. SAUNDERS & C. O'MALLEY, ANDREAS VESALIUS BREXELLENSIS: THE BLOODLETTING OF 1539, 6, 7–10 (1948); Pepper, *supra* note 100, at 124.

102. *See* J. SAUNDERS & C. O'MALLEY, *supra* note 101, at 15–19; Pepper, *supra* note 100, at 124–25. *See also* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 302 (26th ed. 1974) (defining contraindication); Pepper, *supra* note 100, at 125 (anemia, which must always have resulted from Rush's bloodltting, is today accepted as distinct contraindication to bleeding).

103. *See* 2 L. THORNDIKE, A HISTORY OF MAGIC AND EXPERIMENTAL SCIENCE 728, 855–57 (1923).

104. *See* Pernick, *Politics, Parties, and Pestilence: Epidemic Yellow Fever in Philadelphia and the Rise of the First Party System*, in SICKNESS AND HEALTH IN AMERICA 246 (J. Leavitt & R. Numbers eds. 1978); J. SAUNDERS & C. O'MALLEY, *supra* note 101, at 13–19.

105. *See* J. SAUNDERS & C. O'MALLEY, *supra* note 101, at 7–10; Pepper, *supra* note 101, at 124–25.

106. B. RUSH, *supra* note 95, at 189–90; *see e.g.*, C. BINGER, *supra* note 97, at 228–29; Pepper, *supra* note 100, at 123.

107. 11 W. COBBETT, PORCUPINE'S WORKS 251, 267–71 (London 1801); S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 290 (1965); Shryock, *supra* note 89, at 229–30.

108. C. BINGER, *supra* note 97, at 246; 12 W. COBBETT, PORCUPINE'S WORKS 20 (London 1801).

109. *See* Pepper, *supra* note 100, at 123; *cf.* J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 12–13 (1961) (comparing theoretical city planning to training and practices of bloodletting physicians, particularly in lack of common sense).

and the healing power of what he did. On the correctness of the bloodletting paradigm, the medical profession agreed with him without dissent (except perhaps for the private agony of admitting to oneself that to do as I say is not to do as I do).[110] And Dr. Rush might have gone on helping people in this fashion until—well, to be sure, until there were fewer that were ill . . . if it hadn't been for William Cobbett.

William Cobbett, better known as Peter Porcupine, was no medical expert at all.[111] The publisher and mainstay author of a Federalist paper, *The Porcupine's Gazette*, he noticed that wherever Rush went, death seemed to turn up, too.[112] Following his nose, which was following common sense, Mr. Cobbett assembled the grim statistics from Philadelphia, figured out the correlation and published it in his newspaper. Cobbett's statistical research was an epidemiological *tour de force* that would have done a modern scholar proud.[113]

The medical establishment rushed (sorry) to defend its own; even ones from competing schools of medicine—who had previously lost no time in attacking Rush *within* the medical profession—now entered the fray on the side of the doctor.[114] Keeping up with the daily newspaper exchanges became a major spectator sport.[115] The more Dr. Rush's friends advised him to ignore Cobbett's attacks, the more Rush became convinced that the future of lifesaving medicine (and, perhaps incidentally, his honor) were at stake.[116] Finally he filed his libel claim. He even won.

But instead of quenching the flames of controversy, the law suit served to fuel them. Cobbett, having been forced to shut down his *Porcupine's Gazette*,[117] now opened a new paper, *The Rush-Light*, devoted exclusively

---

110. *See* Pernick, *supra* note 104 (divergence in belief as to when bloodletting was the therapy of choice became particularly pronounced during the yellow fever epidemic of the 1790's); *cf.* J. SAUNDERS & C. O'MALLEY, *supra* note 100, at 44–48 (sixteenth century physician dissents privately from mainstream theories).

111. M. CLARK, PETER PORCUPINE IN AMERICA: THE CAREER OF WILLIAM COBBETT 1792-1800, 72 (Ph.D. Dissertation, University of Pennsylvania 1939) (Cobbett was political writer and journalist); Reitzel, *William Cobbett and Philadelphia Journalism: 1794-1800*, 59 PA. MAG. HIST. & BIOGRAPHY 223, 228–29 (1935).

112. *See* 11 W. COBBETT, *supra* note 107, at 229–30; N. GOODMAN, *supra* note 90, at 216; *see also* Reitzel, *supra* note 111, at 236; 1 G. SPATER, WILLIAM COBBETT, THE POOR MAN'S FRIEND 106 (1982).

113. *See* C. BINGER, *supra* note 97, at 247; Butterfield, *Appendix III: The Cobbett-Rush Feud* in 2 B. RUSH, LETTERS OF BENJAMIN RUSH 1793-1813, at 1213, 1217; 1 G. SPATER, *supra* note 112, at 106.

114. C. BINGER, *supra* note 97, at 243.

115. 2 B. RUSH, *supra* note 113, at 1213–18; 1 G. SPATER, *supra* note 112, at 80.

116. C. BINGER, *supra* note 97, at 241–42; M. CLARK, *supra* note 111, at 147; 1 G. SPATER, *supra* note 112, at 101.

117. Judge Shippen's charge to the jury made clear that issues of libel had nothing to do with the First Amendment. T. CARPENTER, *supra* note 88. *See also* M. CLARK, *supra* note 111, at 168; N. GOODMAN, *supra* note 90, at 220.

to Dr. Rush.[118] Cobbett could not get enough copies of each issue printed to meet the demand: Twenty-five hundred and then three thousand copies sold out immediately each time, and tattered copies passed from hand to hand.[119] Thomas Jefferson, a Rush patient and friend was appalled by some of the Porcupine Tales.[120] Other political figures cheered from the sidelines as the battle over the dominant medical therapy of the age was fought out in this curious intertwining of Federalist with Republican political rhetoric.[121] The Porcupine's sharp quills brought in $10,000; Peter himself set sail for England, whence he had years before come.[122]

Dr. Rush made some half-hearted and wholly vain attempts to revive his dying practice, but no phoenix gave flight.[123] He abandoned his earlier dream of starting anew in New York City, for Cobbett had preempted that hope with a special edition targeted at the New York market.[124] Rush returned to his scholarly writing, lived quietly the remainder of his days, and died with far less fanfare than did the theory he had catapulted into the public debate.[125]

Bloodletting is not the cure for all ailments, as Rush had contended it is (though it is, even today, a treatment for some).[126] It could survive without substantial threat only so long as common sense kept expertise in check. One doctor could disagree with another over theory or technique, and yet the paradigm remain intact. But the intellectual framework proved fragile: Bloodletting as a whole (apart from dissension in the ranks) could succeed only as long as no one really did it. And when someone finally carried out the theory—and, in effect, for the first time, put it to the test—with compassion for human suffering but without passion for common sense, the theory failed. In the final analysis, ordinary knowledge proved indispensable, first to the extraordinary survival of an unfittest paradigm, and then to the ordinary survival of a people that had succumbed to it.[127]

---

118. Butterfield, *supra* note 113, at 1216. *See also* 11 W. COBBETT, *supra* note 107 (reprint of selections from The Rush Light issues).

119. *See* B. RUSH, TRAVELS THROUGH LIFE, *reprinted in* G. CORNER, *supra* note 98, at 103–04; Butterfield, *supra* note 113, at 1217.

120. L. WITHEY, DEAREST FRIEND: A LIFE OF ABIGAIL ADAMS 304 (1981); Letter from Thomas Jefferson to James Lewis, Jr. (May 9, 1798), *reprinted in* 4 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 240–41 (H. Washington ed. 1861); Letter from Thomas Jefferson to Samuel Smith (Aug. 22, 1798), *reprinted in* 4 T. JEFFERSON, *supra*, at 253–56.

121. M. CLARK, *supra* note 111, at 153–57; Pernick, *supra* note 104, at 247.

122. Butterfield, *supra* note 113, at 1217; Reitzel, *supra* note 111, at 244.

123. J. FLEXNER, *supra* note 96, at 107, 113; N. GOODMAN, *supra* note 89, at 222.

124. M. CLARK, *supra* note 111, at 162.

125. Butterfield, *supra* note 113, at 1215, 1218; B. RUSH, *supra* note 119, at 101–02.

126. Pepper, *supra* note 100, at 125.

127. *Cf.* T. KUHN, *supra* note 87, at 84–85 ("The transition from a paradigm in crisis to a new one . . . is a reconstruction of the field from new fundamentals, a reconstruction that changes some of the field's most elementary theoretical generalizations as well as many of its paradigm methods and

Switching Channels II: (Mostly) A Legal Tale

If infants and the elderly caused bloodletting physicians to give pause, they engendered even greater hesitation when it came to imposing the requirements for trial by battle.[128] Now in principle, there need have been no conflict between the theory of the battle trial and the ability or agility problems of particular combatants. For "the event of . . . private combats, is directed by the judgment of God; and his providence awards the victory to the juster cause,"[129] declared a king of Burgundy who made this trial the law. Surely God could so favor those handicapped in age or physical infirmity, if He would otherwise support the righteous that weren't in tip-top physical shape. Indeed, if anything could serve both to establish legal innocence and to spark religious awe, it would seem to be a blind but righteous party coming to prevail over sighted guilt.

The law responded, however, by exempting some individuals from battle, or sometimes permitting hired champions in their stead.[130] Whether this reflected a distrust of God's attentions, or humility's reluctance to demand more of Him than compulsory attendance, it is difficult to say.[131] But the chasm between the theory and belief about the real world had been, for the time at least, bridged by a sort of band-aid, and the battle trial went on.

And it is true that trial by battle, even if it posed some theoretical and practical problems, had also offered some theoretical and practical solutions. To the innocent party apprehensive of the ordeal, (or, for that matter, to any others) the option of battle provided an alternative mode of trial.[132] Moreover, as "an antidote to perjury,"[133] then lamentably wide-

---

applications.").

128. 3 E. GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 590 (2d ed. 1781) (the old and infirm had either to renounce their claims and possessions or "trust the doubtful aid of a mercenary" to protect their interests).

129. THE BURGUNDIAN CODE § 45, at 52 (K. Drew trans. 1949). Trial by battle was reestablished by King Gundobald of Burgundy in May 502, by edict published at Lyons in response to problems occasioned by perjury. G. NEILSON, TRIAL BY COMBAT 5-6 (1890). Trial by battle was introduced into England in 1066 by William the Conqueror. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 39 (2d ed. 1898, reissued 1968).

130. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 338-39 (Clarendon ed. 1768) (permitting champions in actions regarding property in order to prevent death of either party; if either party were killed, judgment could not be awarded); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 309 (7th ed. rev. 1956); Charter of Henry I issued between 1100 and 1129, *reprinted in* THE HISTORICAL CHARTERS AND CONSTITUTIONAL DOCUMENTS OF THE CITY OF LONDON 3 (W. Burch ed. London: 1884) (exempting London residents from trial by battle).

131. *See* Baldwin, *The Intellectual Preparation for the Canon of 1215 Against Ordeals*, 36 SPECULUM 613, 628 (1961) (noting that clergy opposed trial by ordeal and trial by combat on a number of grounds, including belief that one should not tempt God, and idea that such trials demanded constant miracles, in contrast to Biblical notion of miracles as privileges for a chosen few rather than the right of the general population); *cf.* Fourth Lateran Council, Canon 18, Innocent III (1215 A.D.) (barring participation of clergy in ordeals).

132. 3 W. BLACKSTONE, *supra* note 130, at 338 (permitted where witnesses had died or where

spread, it supplanted at times several systems of oaths that both commoners and kings found wanting.[134] Clearly, parties required to defend their mouths with their bodies, and witnesses that might be called upon to be truthful to the death had an incentive to be careful about the glades and valleys into which their mouths might lead them.[135]

But there came to be concern that errors fell on the side of truthful statements not being offered, for witnesses in particular (and nonathletes in general) exhibited understandable misgivings about the vigor with which they should assert their views.[136] And the converse fear also haunted: Was it probable, or even conceivable, that a losing but ablebodied party could nevertheless be right?[137]

The spirit of such wonderings pervaded the spirit of the laws[138] and once again, adjustments to the perception of reality were made.[139] The set of persons obliged to fight was further limited, and the rules for hiring champions were eased; indeed not only was it "wise to supplement an honest cause with a stout champion,"[140] but for many types of actions, it came to be required.[141] Churches and other institutions kept champions on retainer; and even courts had battlers prepared to maintain the accuracy of a record that might come into question.[142] Championship became a regular occupation, and indeed a common surname.[143] Jurisdiction over

---

defect existed in the evidence); 2 MONTESQUIEU, THE SPIRIT OF THE LAWS 111 (1949) (trial by battle was sometimes permitted because of dearth of witnesses for either party); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 600 (2d ed. 1898, reissued 1968) (appropriate when defendant could not raise enough "oath helpers" to swear to his innocence).

133. G. NEILSON, *supra* note 128, at 6.

134. THE BURGUNDIAN CODE, *supra* note 128, § 45, at 52; 3 E. GIBBON, *supra* note 129, at 589 (trial by ordeal was also believed rife with fraud); G. NEILSON, *supra* note 128, at 4–7.

135. 1 W. HOLDSWORTH, *supra* note 130, at 308 (witnesses could be called on to do battle to prove their veracity); G. NEILSON, *supra* note 128, at 6 (King Gundobald specifically introduced trial by battle so that one's body as well as soul would be at risk).

136. *Cf.* G. NEILSON, *supra* note 128, at 42–43 (instead of pursuing private prosecution, "[it] was natureal that men should shrink from the thankless and dangerous office").

137. 3 E. GIBBON, *supra* note 129, at 590 (noting that law yielded to the strong, not the just); G. NEILSON, *supra* note 128, at 47, 50 (use of champions developed into fighting by "judicial prizefighters" who could be bribed into abandoning their cause). *Cf.* G. NEILSON, *supra*, at 40 ("[A]fter confessing to the king that he had no right to certain lands, [a man] had the effrontary to wage battle for them—and was then fined.").

138. 2 C. MONTESQUIEU, *supra* note 132, at 110–11; *see also* G. NEILSON, *supra* note 128, at 33, 64 (examples of how trial by battle became more limited in effect).

139. *Cf.* T. KUHN, *supra* note 87, at 78 (defenders of epistomological theories "will devise numerous articulations and ad hoc modifications of their theory in order to eliminate any apparent conflict").

140. G. NEILSON, *supra* note 128, at 51–52.

141. 3 W. BLACKSTONE, *supra* note 130, at 337–39 (such trials were required in court martials, in appeals of felony and for civil cases involving writs of right); 1 W. HOLDSWORTH, *supra* note 130, at 308 (trials by battle were used in international controversies in addition to criminal cases and suits involving repayment of debt or reclaiming of land).

142. 1 W. HOLDSWORTH, *supra* note 130, at 309; G. NEILSON, *supra* note 128, at 50.

143. G. NEILSON, *supra* note 128, at 69.

such trials was enthusiastically sought by churches and nobles for the income and perquisites it conferred.[144]

On the whole, the law accommodated all of this admirably, but it was not enough. The battle against battle trials entered a new phase: The causes for which there was battle trial were diminished in number, and a new mode of decision, trial by assize, was allowed.[145] Details of battle procedure abounded; but the details introduced to lend battle acceptability came also to make it complex, until cost and tedious technicalities joined danger as causes for its dread.[146]

Throughout all this stretching across the chasm, the theory itself stayed intact. It came simply to apply to so limited a field of reality that it could in such safety survive. Rather than adapt the theory to its world, the law chose to circumscribe it, and the successive contractions of its sphere of applicability constituted its effective demise.[147] Thus the battle trial left space for a new theory, one that could, for the first time by oaths plus reason, span the chasm with an honest-to-goodness bridge.[148] In large part because of dissatisfaction with the battle (and the other God-dependent judgments its system had joined),[149] the new mode of trial, the assize, could blossom with theoretical richness[150] and become the dominant mode of trial.

---

144. *Id.* at 13–15.

145. *Id.* at 33. Remarkably, for a short time before the advent of trial by assize, following the withdrawal of the Church from the conduct of the ordeals, judges were instructed in 1219 that for certain causes of action they could conduct no trials at all. Various makeshift arrangements were made for existing or imprisoning the most serious possible offenders, and taking bonds for others. *See* S. MILSOM, *Historical Foundations of the Common Law* 358–61 (1969).

146. W. FORSYTH, TRIAL BY JURY 125 n.1 (London 1852); R. GLANVILLE, *A Treatise on the Laws and Customs of England* 45–46 (1189) (J. Beams trans 1900).

147. *See* G. NEILSON, *supra* note 128, at 64–65 (exemption granted to Londoners was rapidly followed by exemptions for other burghs); 1 F. POLLOCK & F. MAITLAND, *supra* note 132, at 224 (English law was rapidly confining judicial combat within very narrow limits); *cf.* T. KUHN, *supra* note 86, at 77 ("[W]hen confronted by even severe and prolonged anomalies [scientists] may begin to lose faith and then to consider alternatives, [but they never] renounce the paradigm that has led them into crisis.").

148. G. NEILSON, *supra* note 128, at 33–35; *cf.* T. KUHN, *supra* note 87, at 52 ("[F]undamental novelties of fact and theory . . . [p]roduced inadvertently by a game played under one set of rules [require for their assimilation] the elaboration of another set. After they have become parts of science, the enterprise, at least of those specialists in whose particular field the novelties lie, is never quite the same again.").

149. *See* 1 W. HOLDSWORTH, *supra* note 130, at 299–312 (discussing older modes of trial and their drawbacks); *id.* at 321–27 (development of criminal procedure and its related modes of trial); *id.* at 113–19 (older modes of trial in civil disputes); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 113–19 (5th ed. 1956) (ordeals, wager of law, and battle).

150. *See* 1 W. HOLDSWORTH, *supra* note 130, at 312–21, 327–30 (development of assize and jury trial); 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 130–33 (1926) (development of law of evidence and principles of reasoning that paralleled growth of theory of jury trial); T. PLUCKNETT, *supra* note 149, at 106, 120–31 (development of trial by jury and rational approach to jury trial). Trial by battle was officially abolished in England in 1819. 59 Geo. III, ch. 46 (1819).

Switching Channels III: Yet Another Medical Tale

Although bloodletting drew upon professional expertise, still other treatments were left to the ministrations of those with ordinary knowledge. Popular knowledge of the eighteenth century, for example, pointed repeatedly to one cure for the dreaded tarantula bite:[151] "[Tarantulas] are not venemous, but in hot Weather; at which Time, whoever is bit by them after some Time loses both Sense and Motion, and dies if destitute of Help. The most effectual Remedy is *Music.*"[152] And here, the person of ordinary knowledge turned to a different kind of expert for help.

> The Musician tries a Variety of Airs, till he hits upon one, that effects [sic] the Patient, who upon that begins to move by Degrees; first keeps Time with his Fingers, Arms, and Legs, afterward is violently agitated in every Part of his Body; and then leaps up, begins to dance, and increases in Activity every Moment; till after five or six Hours, being very much fatigued, he is put to Bed and left to sweat. The next Day the same Air brings him out of Bed for a new Dance. Which Exercise being thus contained, the Distemper is abated in the Space of four or five Days; . . . and the Patient begins then to recover his Sense and Knowledge by little and little.[153]

The patience and skill of the musician could prove indispensable, for on-the-job research was often needed for success.

> As Music is the common Cure, so they who are bitten are pleased, some with one sort of it, and some with another; one is pleased with a Pipe, another with a Timbrel, one with a Harp, and another with a Fiddle; so that the Musicians sometimes make several Essays before they can accommodate their Art to the Venom: but this is constant and certain, notwithstanding this Variety, that they all require the quickest and briskest Tunes; and are never moved by a slow dull Harmony.[154]

The occasional tarantula bite called forth crowds of concerned citizens, and, miraculously, musicians arrived at the first call for help.[155] Indeed,

---

151. C. ENGEL, *Music and Medicine*, in 2 MUSICAL MYTHS AND FACTS 84, 100 (1876); 8 GROVE'S DICTIONARY OF MUSIC AND MUSICIANS 308 (E. Blom ed. 5th ed. 1954) [hereinafter cited as GROVE'S]; Stockbridge, *An Essay on the Nature and Properties of Sound*, in W. BILLINGS, THE NEW ENGLAND PSALM SINGER (1770), *reprinted in* 1 THE COMPLETE WORKS OF WILLIAM BILLINGS 11 (K. Kroeger ed. 1981).

152. Stockbridge, *supra* note 151, at 11 (emphasis in original).

153. *Id.* at 11-12.

154. *Id.* at 12.

155. Tabor, *Wolf Spider: The Beast that Lent its Name to Dance*, DANCE MAG., Jan. 1973, at 63, 63A (spider bites would increase as crowds gathered to watch; often observers would claim to be

apparently intending to nip the bite in the bud, so to speak, musicians were known to precede the tarantula in arrival at the scene: Particularly where hungry tarantulas were likely to roam, hungry musicians roved the vineyards, too, prepared to offer aggressive, as well as defensive, protection.[156] A sort of forerunner Works Progress Administration, the tarantula inspired composition and performance on a scale that has, perhaps, not been witnessed since. Whole towns were first debilitated and then cured in an epidemic of tarantula bites and dancing that swept across Europe—and then, at least in reputation, across the ocean to New England.[157]

Now the theory that music was the cure for a tarantula bite could be difficult to falsify, particularly in its time. For the rigor with which crowds conscripted musicians—not to mention the vigor with which the musicians volunteered themselves—assured that no man, at least no bitten man, was an island. That did not, however, deter inquiry by the scientists of the day: An ostensibly poisonous spider was shipped from Apulia, Italy to Naples, in order to bite a rabbit under laboratory conditions; but only the spider, and not the rabbit, danced, even to the full panoply of tunes.[158]

Then scientific inquiry bent when it should not have done so: Concluding the inadequacy of his test, its author offered in its stead a scientific theory in *support* of the cure. This physician, and others of his time, acquiesced in what seemed, at first, to be amazing if it were true.[159] Thus, attempts at scientific rebuttal were followed at times by expertise's surrender—surrender to a different vision of the facts before one's eyes or surrender concerning the viability of the scientific medical response.[160]

Perhaps because of the tarantella and the bloodletting that followed—or perhaps because the venom isn't poisonous—everyone seemed to get well.[161] There existed some doubts about the cure, to be sure, even in its high days; indeed, there existed doubts about the purported dangers of the disease.[162] But the cure, and perhaps even the disease, fulfilled a need—a

---

bitten and join the dance).

156. P. SCHOLES, THE OXFORD COMPANION TO MUSIC 1011 (9th ed. 1955); Tabor, *supra* note 155, at 63A.

157. *See, e.g.*,Stockbridge, *supra* note 151, at 11; Tabor, *supra* note 155, at 63A.

158. Sigerist, *The Story of Tarantism*, in MUSIC AND MEDICINE 96, 109 (D. Schullian & M. Schoen eds. 1948); Tabor, *supra* note 155, at 63A.

159. Sigerist, *supra* note 158, at 110–11; Tabor, *supra* note 155, at 63A. Interestingly, Charles Stockbridge, *see supra* note 151, was himself a physician. *See Charles Stockbridge*, in C. SHIPTON, BIOGRAPHICAL SKETCHES OF THOSE WHO ATTENDED HARVARD COLLEGE 492–93 (1965).

160. *See* Sigerist, *supra* note 158, at 110–11; Tabor, *supra* note 155, at 63A; *cf.* Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgment*, in GROUPS, LEADERSHIP AND MEN 177–90 (H. Guetzkow ed. 1951) (social and personal conditions induce individuals to resist or yield to group pressures even when the latter are perceived to be contrary to fact).

161. P. SCHOLES, *supra* note 156, at 1011.

162. C. ENGEL, *supra* note 151, at 100; Tabor, *supra* note 155, at 63A.

need for expressing melancholy, or providing misery with its desired company . . . or simply a need to dance.[163] And so, while scientific knowledge of the day was thus stumped or stunted, ordinary knowledge, such as it was, held sway.

Returning to the Sponsor

What, then, to make of professional expertise, which can be right but can also be wrong? When The Economist meets up with The Law, what is either of them to do? To ask these questions is to ask how—in what ways—can we come to know, and how in particular can we come to know about law? To this question The Economist brings not the answer, but one answer, one way of confronting the complexity of the world.

Economics is always the economics of something-or-other, and hence the assumptions, even the most critical of them, are assumptions about *something else*, in this case, about the law. So the lawyer's expertise complements that of the economist, and the other way 'round.[164] Economists bring to such assumptions a sense of structure for the abstraction—a sense of what is tractable and what is not—but beyond that sense, indeed, before it can be brought into play, they must learn about the law. And while such knowledge is to an economist a matter of ordinary knowledge, if it is known at all, it is within the lawyer's realm of expertise.[165]

Moreover, when it comes to deciding where to spend the complexity pennies, the economist has in mind some structure, but the ensuing decisions entail legal expertise: Which aspects of the law of nuisance best characterize it, if but one or two or three can be taken into account? What are the hallmarks of the criminal law, and does a given economic abstraction handle them in an appropriate way?[166]

Decisions about such things are matters of judgment,[167] and so are eval-

---

163. Sigerist, *supra* note 158, at 113–14 (suggesting that the disease was kind of neurosis caused by Church's repression of need to dance); Tabor, *supra* note 155, at 64A (suggesting tarantella was caused by mass hysteria or need to rebel against Church's prohibition of dancing); *cf.* C. ENGEL, *supra* note 151, at 102–03 (discussing Abyssinian equivalent of tarantism, the tigretiya, stating that disease was simply depression, for which music and dance provide effective cure).

164. *See* THE ECONOMIC APPROACH TO LAW, *supra* note 6, at 26 (because of complementary nature of law and economics "collaboration between lawyers and economists will be increasingly fruitful in the future").

165. *See* Hansmann, *supra* note 5, at 225 (development of economics scholarship is directly proportional to the amount of judge-made law in respective subfields of law); *but cf.* Klevorick, *supra* note 5, at 241–42 (examining, and excepting from, Hansmann theory).

166. As Kelman has noted:

> One of the reasons the "economics of crime" literature seems so Martian to most criminal law professors is that imprisonment is seen simply as an in-kind substitute for fines, and the *level* of punishment is seen as reflecting the *cost* of violations . . . . The *moral* separation of crime and tort is simply wiped out.

Kelman, *supra* note 73, at 275 n.6.

167. *See* Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV.

uations of the abstraction itself.[168] If the challenge of economic thinking is indeed the proper use of abstraction,[169] then a judgment about the abstraction entails not only an understanding about how the abstracting is done, but also of the world to which it relates. The economist that knows something about the law and the lawyer that knows something about the thought styles of economics will be well able to make such judgments.

But to assign to each a sphere of ordinary and professional expertise is not to say quite enough, for the lawyer and the economist each also stand to gain from the ordinary knowledge that the other can bring to bear. The venerable battle trial, after all, came to reflect these ordinary thoughts. And had it not been for Peter Porcupine, a dangerous medical treatment might have continued yet longer. Ordinary knowledge, as its own style of thinking and as a reservoir of its results, may serve as a basis for speculative invention, as an inspiration for future thought.[170]

The interplay of these forms of knowledge is essential, for the style of abstraction in part determines the inquiry's results.[171] And the latter implies, to my thinking, not only that a newcomer adjusts for the assumptions—like sliding forward the seat in somebody else's car—but also that one recalls in the end where they came from, that one remembers that they are not always real. Abstraction is a means of seeing something that was not visible before. But economic abstractions are not the world itself; I cannot fully believe in them any more than I can expect to take a hike along a map. They are useful fancies, often essential fancies, but fancies nonetheless. "It does require maturity to realize that models are to be used but not to be believed," cautioned an eminent econometrician.[172] When an

---

553, 561 (1980) ("lawyer-economist should be hightly skeptical of the empirical assumptions on which he or she has based his or her analysis" when conflict exists with conception of justice).

168. *See* Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Common Law*, 8 HOFSTRA L. REV. 591, 624–25 (1980) ("As logic transmits truth from premises to conclusions, one might reasonably favor the model that captures important aspects of the world more accurately in its assumptions.").

169. *See supra* pp. 1598–1600.

170. *See* N. HANSON, PATTERNS OF DISCOVERY 4–19 (1958) (seeing is "theory-laden" but differences in seeing and in interpretation of what is seen do not necessarily reflect differences in technical training, although they may do so); C. LINDBLOM & D. COHEN, *supra* note 81, at 15:

> Despite the professional development of specialized investigative techniques, especially quantitative, most practitioners of professional social inquiry, including the most distinguished among them, inevitably rely heavily on the same ordinary techniques of speculation, definition, conceptualization, hypothesis formulation, and verification as are practiced by persons who are not social scientists or professional investigators of any kind.

See supra pp. 1590, 1604.

171. *See* pp. 1–5, 105; W. HIRSCH, *supra* note 23, at xiii (most of essential assumptions underlying microeconomic theory are not met in real life"); *cf.* M. Friedman, *Essay on the Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3, 14 (1953) (assumptions of theory need not be realistic).

172. H. THEIL, PRINCIPLES OF ECONOMETRICS vi (1971); *cf.* THE REPUBLIC OF PLATO 381 (trans. J. Davies & D. Vaughan 1900) ("painting, or to speak generally, the whole art of imitation, is busy about a work which is far removed from truth"); Stigler, *What Does an Economist Know?* 33 J.

abstraction is wrong, when it's deceptively different from the world, it is the abstraction that must be changed and not the subject of its endeavor.[173]

But as Professor Polinsky has effectively told us, it is the thought that counts. One need not agree with every economist about everything, or indeed agree with any about much. The theories and the numbers economists offer should constitute a beginning of conversation, rather than its end. As one person that engages in abstracting, I might not model things as another person does. Professor Polinsky, for example, chooses not to focus on the equity-efficiency relationship, and spends his complexity pennies on analyzing risk attitude instead.[174] But the difference between us is just a caveat I may attach to his results in my mind . . . and indeed, he may do the same for mine. So long as I can understand the goals of his inquiry (or anyone else's) I can discern where I dissent from the substantive assumptions or where I would allocate complexity differently. And so long as the abstraction has technical integrity, I can follow it to the end. Not an end I agree with, necessarily, but nevertheless an end. It is the thought that counts, and in that thought we can agree to meet.

A Final Act

Economists bring to any scene that they enter some powerful analytical tools. Their sense of "like" and the metaphors that exploit it allow one to see things not visible before. With it we can learn not only why hay-wire is like housing or bridges like theatres, but also why prosecution can be like investing [175] and why some accidents but not others occur.[176] If we think law can make a difference—or if we want to know whether it does—we need to know these things.[177]

LEGAL EDUC. 311, 312 (1983) ("[A]ll such deductions and inferences are exercises in economic logic or terminology, not valid economic analyses of the working of real markets.").

173. *Cf.* Bauer & Walters, *The State of Economics*, 18 J.L. & ECON. 1, 23 (1975) ("failure to recognise the limitations both of [economics] as a whole and of some of its methods, neglect of direct observation [and] a lack of reflection . . . have all contributed to the confused and perplexing state of economics").

174. *See, e.g.*, pp. 58-63 (reconsidering remedies for breach of contract in terms of risk preferences of parties and allocation of risks between parties).

175. *See* Forst & Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEGAL STUD. 177, 180-84 (1977).

176. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 119-61 (2d ed. 1977) (analysis of the incidence of accidents and the role of care in preventing them); Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975); Chelius, *Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems*, 5 J. LEGAL STUD. 293 (1976); Diamond, *Single-Activity Accidents*, 3 J. LEGAL STUD. 107 (1974).

177. *See* Kitch, *The Intellectual Foundations of "Law and Economics,"* 33 J. LEGAL STUD. 184, 184-85 (1983) (contribution of economics and law scholarship should be judged by the answers it gives); Leff, *supra* note 6, at 459-62 (contribution of analyses such as that of Posner in *Economic*

Yet, to employ these metaphors, these forms of abstraction, wisely is to force oneself to make choices, whether one focuses on them or not. For entailed in the decisions about assumptions and the complexity budget is also the decision about how much complexity one believes appropriate to the task, and that decision itself entails a balancing of the virtues of complexity against the virtues of its avoidance.

Sometimes the abstractions can be simple ones that yet capture the essence of their world. At other times, however, more complexity is necessary if one wants to come to know; to avoid complexity then can be to enlist with the cause of ignorance, or even to know that which is not true.[178] If one fails to consider a factor that truly relates, or if one shies away from the more complicated form that would better depict the relevant relationship, the resulting findings are suspect, and one cannot know they are right.[179]

An example depicts one way that this can be: In a world where the "best" outcome isn't available, is the closest thing to "best" the thing for which one should strive? Sometimes yes: If you promise me a million dollars, and then can give me only $900,000, I will take it; for having almost a million dollars is almost as good as having a million. But sometimes "almosts" of this sort are not almost as good: If I am flying to Hawaii and the airplane almost makes it, I am really out of luck. The theory of the second best[180] says this reaction is understandable: When the optimal outcome can't be achieved, the second best one may be quite different from the best. This answer is not a very satisfying one if the object is a yes or no result; it offers instead a sophisticated form of agnosticism . . . a statement that, in order to know the right answer, one will have to inquire some more. And if one declines to go further, if one declines the additional

---

Analysis of Law is in pointing out that decisions favoring one party or another are not cost free to those parties, to others in classes to which each belonds, or to persons besides those parties and groups); Scott, *Answers Are Needed More Than Perspectives*, 33 J. LEGAL EDUC. 285, 285 (1983) (dissenting from notion that the important contribution of economic analysis is not to give answers to legal questions but, more modestly, to provide a different perspective); *see, e.g.*, R. BORK, THE ANTITRUST PARADOX (1978) (discussing differing conceptions of proper role of antiturst law and their implications for legislation, enforcement activity, and judicial decisionmaking; Macaulay, *Law and the Behavioral Sciences: Is There any "There" There?*, 6 L. & POL'Y Q. 149 (1984) (review of accomplishments of law and social science).

178. *See* Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 641 (1980) (liability rule that is efficient as between two potential litigant-classes can be inefficient once third-party or spillover effects are taken into account).

179. *See* J. KMENTA, ELEMENTS OF ECONOMETRICS 392–95 (1971) (if relevant explanatory variable is omitted, estimates of least squares regression coefficients may be biased and inconsistent); *id.* at 399–400 (estimation of nonlinear relationshiop by only a linear functional form is special case of omission of relevant explanatory variable and therefore may yield biased and inconsistent results).

180. *See* Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1957–1957).

complexity, she confronts the prospect of "knowing" something that is wrong.

And yet complexity, too, may pose problems; the blackened page that began as a sparsely informative map testifies to that.[181] Ockham's Razor would cut away all that can be done without.[182] Although abstractions more complex can be more like the world, they can, for exactly that reason, tell us less.

Indeed, the problem of the complexity-level decision is precisely this difficult choice: How to judge when more or less complexity is worth its cost?[183] And then, beyond that question, how to know once the complexity and assumption choices have been made, whether one's abstraction, in some sense at least, is right?

Empirical testing can lead us toward answers of sorts. One sort is simply comparison: Once a theory is cast in sufficiently specific form,[184] we can appraise it by comparing it to our experience in the world.[185] Moreover, although we may engage in empirical research in order to test the theory, we may gain insights of other sorts as well.[186] From successive empirical tests we may learn what will, in the future, give us theories that are better still.

But the proper form and significance of empirical tests do not meet with universal accord.[187] Even if one assumes that results are unambiguous, there is interpretive work yet to be done. When one finds from these test that the theory comports with the world, one can say only that the

---

181. *See supra* p. 1600.

182. *See* Carré, *William of Ockham*, in M. CARRÉ, REALISTS AND NOMINALISTS 101, 107 (1946). *But cf.* M. BLAUG, *supra* note 72, at 25 (simplicity of Newton's gravitation theory was not apparent to his contemporaries).

183. Even William of Ockham was willing to entertain complexity in his theories when he found it to be of advantage. *See* M. CARRÉ, *supra* note 182, at 108 (in fourteenth century realist-nominalist controversy, Ockham argued that there is no single identical and simple entity which is present in each of a number of particular things at the same moment).

184. *Cf.* Kornhauser, *supra* note 172, at 633–34 (efficiency notion employed in some descriptive law and economics theories is insufficiently precise to afford meaningful empirical testing); Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 80, 87 (1959) (in contrast to incremental approach of ordinary policy decisionmaking, academic problem-solving approach relies on theory that typically is "insufficiently precise for application to a policy process that moves through small changes").

185. *See* Klevorick, *supra* note 5, at 245 (need for empirical work in law and economics is clear, but supply is lacking); Kornhouser, *supra* note 172, at 610–34, 636–37 (reviewing role, importance, and contributions of research addressing descriptive claim of efficiency of law).

186. We may learn the magnitudes of particular effects at issue in the theory. *See, e.g.*, J. KMENTA, *supra* note 179, at 205–16 (presenting three methods for estimating regression parameters). Indeed, the fact of doing the test may keep the theory in closer touch with reality. *See* Hansmann, *supra* note 168, at 231.

187. *See* M. BLAUG, *supra* note 72, at 10–28, 94–128; *id.* at 26 ("what we cannot do is to pretend that there is on deposit somewhere a perfectly objective method, that is, an intersubjectively demonstrative method, that will positively compel agreement on what are or are not acceptable scientific theories").

theory is consistent with it (or the other way 'round). Before we can say that the theory is correct, we must find a justification for induction, a task not yet successfully done.[188] Indeed, since theories can never be proven, and only possibly contradicted,[189] we can hope to know a theory's truth value only when the theory appears to be wrong. And even to know this much, we must place crucial reliance on the form and manner of testing. Moreover, it is always possible to point to sources of unreliability for these results and to assert that discrepancies "will disappear with the advance of our understanding"[190]—and such caveats do often foretell what is to come. We can create definitions and methodologies, so that we sometimes assign the term of "knowing,"[191] but apart from knowing this label—apart from attaching it, or reading it—we do not necessarily know more.

Were we to follow à falsificationist course, we would reject the theories whose empirical tests fail. But if so, we would do both too much and too little. Our "true" theories would be but those that have not yet been falsified,[192] and our false ones would be abandoned rather than tried again. "If any and every failure . . . were ground for theory rejection, all theories ought to be rejected at all times,"[193] surely an unsatisfactory state.

So, we continue to use empirical knowledge for inference, to reason from what we have seen to what has heretofore been unknown. We do this even though induction is not necessarily "true,"[194] and indeed it can

---

188. *See* M. BLAUG, *supra* note 72, at 11–17; J. KEYNES, A TREATISE ON PROBABILITY 233–77 (1921, reprinted 1963) (explaining induction and seeking justification for it). *Cf.* B. RUSSELL, PHILOSOPHY 80, 83 (1927) ("Scientific induction is an attempt to regularize [the process of conditioned reflexes or association] which we may call 'physiological induction' ").

189. *See* M. BLAUG, *supra* note 72, at 12–17.

190. K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 50 (1965).

191. This is indeed what Popper suggests, by means of defining scientific method. *See id.* at 55; M. BLAUG, *supra* note 72, at 18–20 (discussing Popper's approach to scientific methodology).

192. *Id.* at 17.

193. T. KUHN, *supra* note 86, at 146. Indeed, had such rejections occurred at critical moments of inquiry, theories worth pursuing might well have been abandoned. The discovery of Neptune illustrates some of these problems. Based on calculations about disturbances in the orbit of Uranus, John Crouch Adams and Urbain Jean Joseph Leverrier, in independent researches, suggested the existence of a planet in the place where Neptune was later found in 1846. *See* R. LYTTLETON, MYSTERIES OF THE SOLAR SYSTEM 214–27 (1968). Hailed as a triumph of mathematical achievement and of astronomical theory, *id.* at 227, the discovery was found to have entailed errors in the relevant calculations which, inexplicably, did not foreclose success, *id.* at 228–29, 233; had the test of their theory occurred instead in 1770, the relevant calculations would have been in error by about 30. *Id.* at 249. Predictions of the same sort that led fortuitously to the discovery of Neptune pointed to the existence of yet another planet, Vulcan, but that planet was never found; M. BLAUG, *supra* note 72, at 6. Despite this empirical conflict with theory, the theory continued to be developed.

Ironically, it was the rejection of previous empirical research that made possible the "discovery" of Neptune in 1846 rather than three-quarters of a century earlier, when Joseph Lalande reported its discovery: Because his observation was at odds with *his* theory, Lalande believed his observation to be erroneous. *See* M. GROSSER, THE DISCOVERY OF NEPTUNE 139 (1962); W. IVINS, ART & GEOMETRY: A STUDY IN SPACE INTUITIONS 54 n.4 (1946)

194. *See supra* note 188; Gardner, *Order and Surprise*, 27 PHIL. OF SCIENCE 109, 11–12 (1950);

be wrong.[195] Empirical research depends on our concept organization for its validity,[196] and on bothersome, unspoken assumptions. We assume, for example, that we see what is before us. But we cannot satisfy even this most essential of assumptions: For we censor and at times censure what passes before our eyes, and this is true at the most basic level of perception. Whenever we see things, we are editing our vision by means of our past experience.[197] Moreover, even when we want to see all, we cannot do so uniformly: Wholly apart from the editing function, we see with acuity only a small slice of the world that happens to lie straight ahead; and apart from even that problem, we see visual stimuli only some of the time.[198] "As we habitually elect for one or the other [image] so we make assumptions on which we base our philosophies and our accounts of the world."[199]

And so, we cannot truly know if theories are correct, or whether instead they are false. Our ability to distinguish theories consistent or not with the world depends on our methodology, which is itself a part of the paradigm being tested. We cannot count even on our visual observation to be fact. What then can we know, and how can we come to know it? Indeed, how much about our world can we ever come to know?

What is amazing for all this, is that we *can* know, or at least understand, some things. For reasons naught but fortuitous, there is order in the universe, some of which we have discerned. "The most incomprehensible thing about the world is that it is comprehensible;"[200] and this is so de-

---

M. BLAUG, *supra* note 72, at 12–17.

195. *Cf.* D. MACAULAY, MOTEL OF THE MYSTERIES 1–5, 21–25, 40 (1979) (explorer in year 4022 finds remains of Usa society as of its 1985 collapse; construing the motel to be a tomb, he infers from the metal sculptures of animals that surround it—Cougars, Skylarks, Thunderbirds, all neatly labeled--that animal worship figured importantly in Yank burial customs).

196. *See* J. PIAGET, BIOLOGY AND KNOWLEDGE 345 (1971) (the concepts by which we organize our sense of the world are a sytem in state of perpetual adaptation).

197. *See, e.g., Eye and Vision, Human,* in 7 THE NEW ENCYCLOPEDIA BRITTANICA MACROPAEDIA 91, 115 (15th ed. 1979):

> In the extreme temporal fields (*i.e.*, at the outside of the fields of vision), entirely different objects are seen by the two eyes, and the selection of what is to dominate the awareness at any moment depends largely on the interest it arouses. Where the fields overlap, and different objects are seen by the two eyes . . . the final percept is determined by the need to make something intelligible out of the combined fields.

Despite the fact that the retinal image of the external world is "essentially flat and two-dimensional," *id.* at 113, we can perceive depth and form, in contrast to which a camera sees a flat image. "We recognize shapes of objects by experience, knowing that certain combinations of tones, light and shade effects, indicate shapes of which we have tactile knowledge." J. SLOAN, GIST OF ART 43 (1939). See N. HANSON, *supra* note 174, at 6–8 ("People, not their eyes, see" and disparities among people in what is seen arise from *ex post* interpretations, not from disparities in fundamental visual data).

198. *See Eye and Vision, supra* note 197, at 103 (threshold for vision is best expressed in terms of frequency of seeing); *id.* at 104 (visual acuity is the power of the eye to resolve stimuli separated in space); 7 THE FOUNDATIONS OF OPTHALMOLOGY 36, 368–70 (S. Duke-Elder ed. 1962) (discussing visual acuity and its measure).

199. W. IVINS, *supra* note 193, at 6–7.

200. Gardner, *Postscript* in M. GARDNER, ORDER AND SURPRISE 109 (1983) (quoting Einstein).

spite the fact that any account of the world—even physics, as Plato said—is only a likely tale.[201] The universe "is under no obligation to behave with such polite regularity;"[202] it could have been other than the ordered one we know. But it is not.

It may be that the universe that appears ordered to us is not ordered at all, but that the order it has is only the order we see in it. Indeed, any universe conceivable by the mind will be in some way ordered, if only because of our own limitations, because we must see things in patterns —abstractions—if we are to understand them at all.

Therefore, using these abstractions, we search. We become more informed. We approach but can never attain full knowledge. In the meantime, as a matter of policy (personal or otherwise) we operate on the basis of knowlege we do have, ordinary or scientific, legal or economic, more or less complete, whatever. We do this because, and we do it when, to do without it would be even worse.

By this means, we come to know some things, if not with the finality of eternity, at least with the degree of certainty that allows us to exist differently, perhaps even better, afterwards than before. We can, for example, make adjustments for our knowledge that smoking is one of cancer's smoking guns, even though we do not yet know all the relevant causal links. Indeed, even if this knowledge is in the future found to be wrong in certain ways—if, for example, "cancer" is not the right entity on which to focus after we reclassify the world[203]—we shall have had less of its suffering in the mean-time.

When to use such partial knowledge, and when instead to embark on the inquiry again from its start, are things that we can know about as well as we can know any thing at all. So when we make these decisions, we must rely for the process of knowing on the same forms of knowledge that are its products once done: that which is ordinary or scientific to us, that which is ordinary or scientific to others.

Moreover, while we search among and draw upon these sources of knowledge, the most difficult challenges may arise not from the dearth of explanations but from the cacophony among which we must choose.[204]

---

201. F. CORNFORD, PLATO'S COSMOLOGY 28 (1937). Indeed, it could instead have been the case that "everything would have been produced by everything and at random. Horses, for instance, might be born, perchance, of flies, and elephants of ants; and there would have been severe rains and snow in Egyptian Thebes, while the southern districts would have had no rain." 1 SEXTUS EMPIRICUS, OUTLINES OF PYRRHONNISM 337 (Loeb ed., R. Bury trans. 1961 of 200 A.D. manuscript) (Bk. 3, ch. 5).

202. Gardner, *supra* note 200, at 110.

203. *See supra* notes 74–79.

204. "Most problems of theoretical appraisal involve . . . a three-cornered fight between two or more rival theories and a body of evidence that is more or less satisfactorily explained by both theories." M. BLAUG, *supra* note 72, at 25–26.

The competition may pit ordinary knowledge against scientific expertise but it may also, or instead, pit scientific theories one against another, or the common senses that we have against themselves.

Choosing among competing explanations is difficult under any of these circumstances. For ordinary knowledge can be right but can also be wrong, and this is true for scientific knowledge as well. Two theories that are wrong do not make a right: Dr. Rush's bloodletting theory fared reasonably well in the competition against others of its genre, and—when the form of therapy was up for grabs—against the alternative of quinine bark and wine.[205] In choosing among competing explanations, empirical testing and internal standards for a theory may help us on some occasions; but at other times, any rigid rules of discernment—or, to put it less delicately, of guessing[206]—can lead us to the wrong.

What does make a difference is all these things: these rules, these habits, wisely employed. In our choices among theories we must rely on empirical knowledge, on intuition, on insight—but also on courage, on intellectual interest, and on other (sadly) fuzzy, touchy-feely things. How else can we know to reject bloodletting even when the experts say it is right, but continue researching the wallflower rabbit, even while the rest of the world is dancing? How else can we know, with more than hindsight, that the era of the battle trial is effectively drawing to a close, indeed, that its sphere has shrunken and vanished? And perhaps most difficult of all, the question: How else can we know all these things *at once*, except by turning to the best judgment we can bring to our endeavors to find out? We can do no more than that; more importantly, if we are ever to know, we should do no less.

In our efforts to know more about law, we want to use economics wisely—relying not only on the expertise economists can offer, but on the ordinary knowledge all of us can bring, as well as lawyerly and other expertise. It is neither wise to reject economics wholesale, as some would do, nor to adopt it wholesale, as some might hope.[207] The resolution of conflicting explanations is difficult, but if we try, this too we can come to know in some fashion. This resolution will not follow easy, obvious rules: Some explanations will be simple; others complex. Some will derive from technical economic models; others from frameworks already familiar

---

205. *See* Pernick, *supra* note 103, at 246.

206. *See* G. D. HARVEY, EXPLANATION IN GEOGRAPHY 35 (1969) (characterizing scientific knowledge as "a kind of controlled speculation"); A. KAPLAN, THE CONDUCT OF INQUIRY 126 (1964) (what characterizes scientific observation is deliberateness of search and control of process of observation); POLYA, INDUCTION AND ANALOGY IN MATHEMATICS v, vi, 3-4 (1954) (plausible reasoning, such as in economics, draws upon experience in its attempt "to distinguish a guess from a guess, a more reasonable guess from a less reasonable guess").

207. *See supra* notes 4 & 5.

within the law.[208] Some models will be realistic; others, to be useful, may have to abstract quite far.

When all this has occurred we will have knowledge—not perfect knowledge, or even the best there ever will be, but more knowledge than before about the order that is our world. There is much to be said for understanding more about law and the behavioral response to it, for understanding law not just as it lays in the text, but as it plays in the courts. To get to this point, however, we must be able to judge when common sense is called for, with respect to Philadelphians or the blind; and we must judge not only when bloodletting should be ended, but when rabbit-watching should begin. When we have learned these things, when we have done all this, we will know about the law what we did not know before.

And then, we shall know yet one more thing—we shall know the wonder, the joy, of knowing more. Like the mapmaker soaring high above the mountains, The Economist with The Lawyer can show us what was not visible before. True, it's not a free lunch. Quite the contrary. And yet in the freedom of its vision is an occasion for delight.

---

208. Indeed, as Lawrence Friedman has pointed out, the latter two categories overlap. Friedman, *Two Faces of Law*, 1984 WIS. L. REV. 13, 14 (economics "is a powerful, and quite general, tool of analysis that everybody who writes or thinks about law uses, consciously or not. It is also . . . part of the legal culture, at least for some aspects of the legal system").

Gossiping About Ideas

Reconstructing American Law. By Bruce A. Ackerman. *Cambridge: Harvard University Press*, 1984. Pp. viii, 118. $16.00

George L. Priest†

I do not know whether Tom Wolfe has reviewed Rawls' *A Theory of Justice*,[1] and I cannot remember a serious critique of Habermas or Horkheimer in recent issues of *People* magazine. It is this novel intellectual form, however, which the multi-talented Bruce Ackerman refines in *Reconstructing American Law*.[2] The book's bold objective is to account for the intellectual sources responsible for the expansion of federal governmental activity since the 1930's. But Ackerman is not interested in the inherent strengths or weaknesses of the justifications for government action, nor quite in the influence of these ideas on the actual growth of government. Instead, Ackerman is concerned with how policymakers, particularly lawyers, have talked about these ideas. The subject of consequence to Ackerman is the relationship over the last fifty years between justifications for government action and the content of what Ackerman calls, variously, "law-talk,"[3] "lawstuff,"[4] "legal discourse,"[5] "legitimated [legal] conversation,"[6] and the "new language of power."[7]

This unusual approach represents a new and significant synthesis of the central theme of Ackerman's scholarly work. In 1977, in the first book of the series, *Private Property and the Constitution*,[8] Ackerman described two world views competing for control of modern legal culture—views which he called "ordinary observing" and "scientific policymaking." According to Ackerman, each conception sought to dominate the characterization of modern legal issues by imposing different constraints on legal language. The battle between them would determine control over "the lin-

---

† Professor of Law, Yale University. I am grateful to Owen M. Fiss and Anthony T. Kronman for very helpful criticisms of an earlier draft, and to Franco Romani for encouragement, but I am responsible for what remains.

1. J. RAWLS, A THEORY OF JUSTICE (1971).
2. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984) [hereinafter cited by page number only].
3. P. 10.
4. P. 15.
5. P. 21.
6. P. 10.
7. P. 24.
8. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) [hereinafter cited as PRIVATE PROPERTY].

guistic practices of a special group of conversationalists . . . trained as lawyers."[9] Ackerman illustrated the hypothesis by showing that the various and confused approaches toward interpreting the takings clause were only different elaborations of one of the two competing linguistic methods.[10]

Ackerman's concern with language was generalized in 1980. In *Social Justice in the Liberal State*,[11] Ackerman employed the method of "constrained conversation" as a technique for drawing out the implications of his philosophy of neutrality.[12] Here again, it was language or conversation that dominated the presentation, although the link to Ackerman's concerns in *Private Property* was left totally obscure. In *Social Justice*, dialogue and conversation appeared to serve chiefly as an organizing conceit for Ackerman's argument. Ackerman hints in the book—although he never really develops the point—that the preoccupation with conversation about moral ideas is something more than conceit. Dialogue and conversation, of course, are methods of legitimating one's views about social policy. But there is also a suggestion that the process of conversation possesses moral significance in itself, derived in some way from its seemingly guaranteed success in leading individuals to confront and accept Ackerman's moral imperatives.[13]

Reconstructing American Law reveals the unity and ambition of Ackerman's vision over these many years. The book is a chronicle of a conflict that Ackerman claims has dominated legal culture since the 1930's, pitting the world view of the pre-1930's "reactive state" against the world view of the "activist state" inaugurated with the New Deal. The conceptual approaches of the reactive and activist states closely resemble ordinary observing and scientific policymaking of *Private Property*.[14] Moreover, the battleground for the competition between these contrasting conceptual approaches is the content of dialogue about legal issues. In *Reconstructing American Law*, however, the legal dialogue, the "law-talk," shows itself to possess a new significance. In his earlier books, conversation represented only a reflection of more substantive intellectual differences or a technique

9. *See* Ackerman, *Four Questions for Legal Theory*, 22 NOMOS 351, 351 (1980) (describing ambitions of *Private Property and the Constitution*) [hereinafter cited as *Four Questions*].

10. *Id.* at 351–53.

11. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) [hereinafter cited as SOCIAL JUSTICE].

12. *Id.* at 8–10; *see Four Questions*, *supra* note 9 (elaborating conversation theme of *Private Property and the Constitution*).

13. *See* SOCIAL JUSTICE, *supra* note 11, at 357–75. For an effort to extend Ackerman's approach to dialogue beyond its role in *Social Justice* itself, see Agger, *A Critical Theory of Dialogue*, 4 HUMANITIES IN SOC'Y 7 (1981); *see also* Weale, Book Review, 65 MINN. L. REV. 685 (1981) (discussing role of conversation in *Social Justice*).

14. The link between "ordinary observing" as a conceptual framework and the commitment of the reactive state to laissez-faire is made clear in *Four Questions*, *supra* note 9, at 367–69.

for presenting a moral argument. In the current book, conversation itself becomes the central phenomenon of importance. The ideas that form the foundations of the contrasting world views are necessary to stimulate legal conversation, but it is the subsequent conversation or dialogue about the ideas that is truly important.

As we shall see, many unusual and peculiar conclusions result from Ackerman's focus on conversation about ideas, rather than on the ideas themselves. Indeed, Ackerman's approach initiates a truly novel form of legal scholarship: the Rona Barrett theory of intellectual history. According to this approach, specific ideas are worthy of little attention. How people talk about ideas is the matter of moment. Original ideas are only minor source points for creative elaboration, in the same way that knowing what Henry Kissinger *actually* mumbled at Studio 54 would spoil the fun.

I. A Theory of the Ackerman Project

Ackerman's subject is the transformation of the concept of law from that of the "reactive state" of the 1930's to that of the "activist state" of today.[15] As Ackerman tells the story, policymakers prior to the 1930's had complete faith in the just and efficient operation of competitive market forces. They saw no need for the federal government to manipulate the country's economic welfare or concern itself with questions of social justice. Moreover, America's geographic isolation eliminated the need for more than minimal investments in military force.[16] The thoughtful lawyer viewed "self-conscious state intervention in the market economy as a relatively extraordinary event."[17] The only relevant law was the common law, whose role was dispute resolution.

This view of the world constrained the form and content of legal argument: "No legal argument [was] acceptable if it require[d] the lawyer to question the legitimacy of the military, economic, and social arrangements generated by the invisible hand."[18] The law served only to complement the market, and legal issues were conceived of in terms of their market analogues. The paradigmatic dispute was between two parties who together were "in the best position to develop the facts and values relevant to a just decision."[19] The dispute could be resolved in a manner consistent

15. The core of Ackerman's book appears as an introductory essay to a Symposium sponsored by the *Yale Law Journal* on the role of the activist state fifty years after the New Deal. *See* Ackerman, *Foreword: Law in an Activist State*, 92 Yale L.J. 1083 (1983).

16. Pp. 24–28.

17. P. 7.

18. P. 25.

19. P. 26. Ackerman explicitly draws from the Kuhnian concept of paradigms. P. 60 n.16. Thus, it is odd that he regards a reluctance to challenge the legitimacy of some prevailing conceptual frame-

with governing principles of justice by asking a lay jury to determine which of the litigants "deviated" more sharply from established market norms.[20]

The New Deal fundamentally contradicted this view of the role of law. Most important, according to Ackerman, was "the sheer quantity" of New Deal legislation,[21] which reduced the common law from its preeminent position to "only one branch of a trinitarian legal system," which now also included "statutory enactment and bureaucratic practice . . . as constitutionally legitimate sources of general principle."[22]

Yet although the New Deal repudiated the laissez-faire foundations of the "reactive state"[23] and generated a completely new legal order, it did not affect the way policymakers talked about the law. Until roughly 1960, lawyers and policymakers continued to view the law in "reactive state" terms: to regard the competitive market as the norm and government intervention as the deviation. How was this possible? According to Ackerman, the post-New Deal contradiction between the law as it existed and the law as lawyers understood it was mediated by Legal Realism.[24]

Here, Ackerman's story becomes complicated. The intellectual mission of the Realists was to destroy the theory that the individual common law fields (property, torts, and contracts) were cleanly distinguishable and internally coherent.[25] The belief in a coherent common law had inspired the efforts of the first Restatements of Law, which were catalogues of principles of each of the common law subjects. The method of the Realists was to unveil the "so-called organizing concepts of the common law" as "empty boxes concealing a host of distinct fact situations that required a sensitive response by Realistic lawyers with situation sense."[26] According to Ackerman, the essence of Realism was skepticism about abstraction and confidence in intuition.[27] The Realists, however, were skeptical of all abstractions. As a consequence, they successfully destroyed the theory of a unified common law, but did not supplant it with their own affirmative conception of law. Moreover, the Realists' emphasis on particularistic complexity snuffed out all other efforts to create a theory of law consistent with the extensive governmental intervention of the New Deal. Legal Realism, according to Ackerman, was essentially "a culturally conservative

work as characteristic of only the reactive state world view rather than of all world views.

20. P. 27. The similarity of thinking of the reactive state to ordinary observing described in *Private Property* is obvious. *See supra* note 14.

21. P. 7.

22. P. 14.

23. Pp. 17–18.

24. Pp. 12–22.

25. Pp. 11–22.

26. Pp. 15–16.

27. P. 13.

movement."[28] Realism allowed the legal profession to "survive the political crisis [of the New Deal] with its basic discursive equipment intact."[29]

The conceptual revolution that provided the vision for the modern activist state was the Chicago School law and economics of Ronald Coase. Coase provided "a model of a new form of power-talk,"[30] in which every human activity affects other human activities and all questions are questions of coordination. The Coasean approach compelled systemic, rather than particularistic, examination of every problem of social policy. Ackerman acknowledges the cautionary tenor of Coase's original article.[31] But as Coase's article has come to be understood by lawyers, caution is merited only in the absence of transaction costs.[32] In the real world, transaction costs are always present. As a consequence, Coase's influence on the "conversational domain" was to show a world characterized by pervasive market failure.[33] After Coase, understanding what is truly at stake in a legal issue requires "the complex description of the ways in which actors, constrained by heavy transaction costs and bounded rationality, are likely to respond to an array of second-best legal interventions."[34] For Ackerman, Coase's Chicago School economics provides the conversational basis for massive governmental intervention in all sectors of human life.

Coase and the economists, however, provided no guidance as to the values which such intervention should express. Instead, fashioning affirmative values for modern legal discourse—what Ackerman calls reconstructing law—is the task of modern moral philosophers. Ackerman's careful survey of modern moral philosophy identifies two philosophers in particular who have successfully influenced modern "Constructivist argument": John Rawls in his well-known *A Theory of Justice*[35] and Ackerman himself in *Social Justice in the Liberal State*.[36]

It is Ackerman's description of these two alternative moral approaches that reveals the deeper conception of the book and its position in Ackerman's intellectual project of the past decade. Ackerman does not regard the modern moral conversation as complete; the reconstruction of American law is still in progress, and will continue for many years. As Ackerman rigorously compares Rawls and Ackerman as alternative philosophical pathways toward such a reconstruction, Ackerman finds Rawls

28. P. 19.
29. P. 17.
30. P. 46.
31. P. 55; *see* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
32. P. 55.
33. P. 58.
34. P. 56.
35. J. RAWLS, *supra* note 1; *see* pp. 93-99 (discussing Rawls and his contributions to filling Realist legal vacuum).
36. Pp. 99-101.

wanting. Ackerman criticizes the abstract and alien character of Rawls' technique of the veil of ignorance.[37] Moreover, according to Ackerman, the bargaining metaphors that attend the decision process behind the veil cannot be fully descriptive of "the basic terms of activist legitimacy,"[38] presumably because consensual bargaining is the essential feature of the now-deposed world of laissez-faire.

A superior way of determining the substantive values appropriate for our activist state is "legal disputation itself."[39] Ackerman invokes our nation's history as evidence: "When Americans think they have been deprived of their rights, they characteristically express their grievances in legal terms—and insist that courts, no less than legislatures, take their demands for justice seriously."[40] It is the legal process of complaint and answer that compels each citizen to frame "a legally acceptable response to the question of legitimacy: What gives you, rather than me, the right to the resource we both seek to employ?"[41]

Here, the connection between Ackerman's moral philosophy and the current book becomes clear. In *Social Justice in the Liberal State*, Ackerman claims that all exercises of power require justification, and that all questions of moral legitimacy can be resolved by invoking two principles of neutrality: (a) no citizen's conception of the good is better than that asserted by any other citizen, and (b) regardless of conception of good, no citizen is intrinsically superior to any fellow citizen.[42] The task of *Social Justice* is to apply these principles to the wide range of questions of social policy in order to define and justify the proper contours of our liberal state.

The peculiar feature of *Social Justice*, however, is the technique Ackerman adopts to define the implications of the neutrality principles. Ackerman is not content with simple explanation or straightforward reasoning. Instead, he addresses each issue by constructing an imaginary dialogue between two individuals, in which, invariably, one asserts a position that Ackerman opposes and the second invokes one of Ackerman's neutrality principles at the right moment, shocking the other discussant into silence. From my own experience, I suspect that many readers found these incessant dialogues distracting, and increasingly tedious, although some review-

37. Pp. 94–96. Ackerman possesses a highly developed sense of the alien. Ackerman's philosophical technique is to present spaceship dialogues over the distribution of manna, moderated by his Space Commander. *See, e.g.*, SOCIAL JUSTICE, *supra* note 11, at 44, 55–56.

38. P. 96.

39. *Id.*

40. Pp. 96–97.

41. P. 97.

42. SOCIAL JUSTICE, *supra* note 11, at 10–11.

ers praised them as "fascinating" and characterized by "verve."[43] At a minimum, the technique of "constrained conversation" appears to be a very peculiar stylistic device because it bears no obvious relation to Ackerman's substantive premises and conclusions beyond satisfying the requirement of legitimation. Toward the end of *Social Justice*, Ackerman suggests a grander role for dialogue: Dialogue by itself can lead individuals to accept the neutrality principles because it requires acknowledgement of the autonomy of others and skepticism about the reality of transcendent meaning.[44] Thus, there may be a double-faceted interrelationship between dialogue and the neutrality principles: Dialogue as a legitimating method is constrained by the neutrality principles. In addition, the technique of dialogue requires its participants to confront their personal non-neutral predispositions and may lead to acceptance of the neutrality principles. But this argument is not fully developed.

Reconstructing American Law, however, reveals Ackerman's deeper purpose and the unifying themes of his seemingly disparate scholarly work. Ackerman the lawyer is constructing a moral philosophy of lawyering, and demonstrating that this philosophy, with the intellectual apparatus of dialogue that fuels it, can explain the most important development in the United States and the western world of the past century: the tremendous expansion of government and the rise of the activist state.

As I interpret Ackerman's idea (it has never been stated in these terms),[45] it is this: The legal process compels litigants to engage in a form of argument in which one party makes a claim of right to which another party must respond. This form of "conversation" leads parties to accept values similar to Ackerman's neutrality principles.[46] Ackerman, of course, hopes to speed along this process by open advocacy of the neutrality principles. The fundamentally dialogic character of the legal process, however, suggests that it ought to be regarded as the central and fundamental source of moral value in a liberal society, because of its role as a source of moral training through argumentation and as the institution that expresses and applies moral values of the greatest legitimacy in contexts of competing moral claims. Certainly, the moral superiority of the legal process to the democratic political process is clear.[47] Conversation within the

43. Agger, *supra* note 13, at 11; Walzer, Book Review, NEW REPUBLIC, Oct. 25, 1980, at 39, 40.

44. SOCIAL JUSTICE, *supra* note 11, at 357–75. Of course, dialogue is not a necessary condition for the acceptance of these principles.

45. Ackerman gives a somewhat different—though I believe incomplete—account of his project in *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1045 n.61 (1984) [hereinafter cited as *Discovering the Constitution*].

46. Presumably, the citizenry will accept these values once everyone becomes involved in litigation.

47. Ackerman's preference for the judicial over the democratic process is criticized in MacRae, *Scientific Policymaking and Compensation for the Taking of Property*, 22 NOMOS 327 (1980).

democratic process is of a much different character. Claims of personal advantage, in some guise, are commonplace.[48] Moral precepts, such as the neutrality principles, may exert some suasion on the political conversation,[49] but they do not act as determinative constraints as they do over legal dialogue.[50]

Thus, changes over time in the content of conversation within the legal order describe the changing basis for the moral legitimacy of the state. Ackerman demonstrated in *Private Property and the Constitution* that the most important change in the legal conversation of the past century was the shift from a world view that embraced legal reasoning using the concepts of ordinary language and that was committed to laissez-faire to the New Deal world view of scientific policymaking, which justifies and legitimates today's activist state. The current book, *Reconstructing American Law*, presents the detailed history of this transformation in the legal conversation during the past fifty years. But because legal dialogue possesses an inherent moral significance, Ackerman's book is more than history: Ackerman's chronicle of law-talk is the record of our country's moral growth.

II. Law-Talk and its Sources

I wish to make clear at the outset that I greatly admire Ackerman's ambition and the sustained seriousness of his scholarly project. The explication of the sources of the expansion of government in western society obviously is a subject of the greatest importance. To link the explication to a coherent and defensible moral philosophy would constitute a stunning intellectual achievement. Even on a more limited scale, a careful definition of the relationship between legal scholarship and some set of dominant conceptions of law is worthy of serious attention, and various of Ackerman's specific points are highly compelling. Yet there is a peculiar character to Ackerman's account of the activist state that calls for more detailed examination.

I have mentioned that Ackerman's approach cannot be described accurately as traditional intellectual history. Indeed, although Ackerman's subject is the influence of ideas on general conceptions of government, he devotes no attention whatsoever to the original ideas themselves. Despite the central role of Legal Realism—mediating the conflict between laissez-

48. For abundant illustrations, see B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981) [hereinafter cited as Clean Coal].

49. Social Justice, *supra* note 11, at 275.

50. Ackerman's current project is to describe with more care those conversational constraints operative in the legislative and constitutional process. *See Discovering the Constitution*, supra note 45, at 1052-57.

faire and the New Deal—there are only passing references to the writings of the Realists. Similarly, though Ronald Coase is the hero of the piece—because he provided the justification for the activist state—there are only two references to Coase's writings, and none to any element of the massive literature debating and expounding Coase.

Of course, Ackerman should be judged according to his argument rather than his erudition, but the specific meanings that Ackerman attributes to these writings are most curious. According to Ackerman, the legal conversation has drawn from the writings of the Realists and Ronald Coase messages that are exactly the opposite of the messages intended by the authors and of the interpretations that most students of these authors have long accepted.

For example, Ackerman describes Legal Realism as essentially a conservative movement whose approach permitted the legal order to retain its commitment to laissez-faire principles and to ignore the revolutionary changes that the New Deal introduced into the legal system.[51] This is a very unusual interpretation of Realism. First, the most important writings of the Realists preceded the New Deal and, in particular, the "switch in time" that Ackerman has identified as marking the triumph of the activist state.[52] Indeed, the more common interpretation of Realism is that the movement helped prepare the way for the New Deal's triumph.[53]

Ackerman concedes that Realist writings undermined the presuppositions of the conservative legal order of the 1930's. But he characterizes the Realists as only debunkers and neglects the dominant normative theme of the Realist enterprise. Most Realists were strongly opposed to laissez-faire and were sympathetic to, if not an inspiration of, the legislative and regulatory ambitions of the New Deal. It was not commitment to laissez-faire economics and hostility to the activist state that put Jerome Frank and William O. Douglas at the Securities and Exchange Commission, Thurman Arnold at the Antitrust Division, and Walton Hamilton at the T.N.E.C. Investigation.

Moreover, it is impossible to reconcile the Realists' empirical efforts—which were by far the most distinctive aspect of the movement—with sympathy to a laissez-faire legal regime. Realist empirical work sought to show how limited the relationship was between the free-market concerns of legal doctrine and the actual and more "realistic" concerns of legal administration. The empirical work of William O. Douglas

51. Pp. 11-22.

52. *See Four Questions*, *supra* note 9, at 368; *Discovering the Constitution*, *supra* note 45, at 1052-57.

53. *See* Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, 569-74 (1979).

on bankruptcy[54] and that of Charles E. Clark on law administration[55] and automobile accidents[56] sought to demonstrate that the normative commitment of legal doctrine to laissez-faire principles ignored the most important issues that faced judges, juries, and magistrates in administering the law.[57] This work was intended radically to undermine the legal regime dominant in 1930, characterized by the approach of *Lochner v. New York*,[58] by showing that the principled coherence of the regime was desperately out of touch with the true problems of legal administration. The radical nature of the Realist vision may appear limited in comparison to modern critical thought. But it is the baldest form of anachronism to describe Jerome Frank, William O. Douglas, and Thurman Arnold as leaders of a conservative movement. Ackerman's focus on the Realists' faith in intuition and "situation sense" is appropriate only to the work of Karl Llewellyn,[59] eccentric and idiosyncratic even in its own time.

Ackerman's description of the influence of Ronald Coase is even more peculiar. As Ackerman tells the story, Coase is the founding father of the activist state because his work convinced the legal community that market imperfections were pervasive. Even the lay reader will appreciate that giving credit for the modern activist state to a central figure of Chicago School economics is, well, a novel insight.[60] But lay judgment aside, Ackerman's interpretation completely misreads Coase. There are two central lessons in Coase's famous article.[61] The first is behavioral. Coase demonstrates that regardless of the law or of any initial allocation of resources, the only obstacle to a subsequent reallocation is transaction costs. It follows that one can expect private parties to react to changes in the law by rearranging their mutual affairs to preserve the optimal allocation of resources (given transaction costs) and to seek always to reduce transaction costs in order to facilitate future rearrangements.

The article's second lesson relates to social policy. By a variety of nu-

54. *See* Clark, Douglas & Thomas, *The Business Failures Project—A Problem in Methodology*, 39 YALE L.J. 1013 (1930); Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932).

55. Clark, *Fact Research in Law Administration*, 2 CONN. B.J. 211 (1928).

56. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

57. *See also* Clark & Moore, *A New Federal Civil Procedure* (pts. 1 & 2), 44 YALE L.J. 387, 1291 (1935) (explicitly normative effort to reform civil procedure).

58. 198 U.S. 45 (1905).

59. *See* Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224 (1942).

60. Oddly, in an earlier book of Ackerman's, *The Uncertain Search for Environmental Quality*, Ackerman documented how various government agencies commenced a form of systemic, scientific policymaking with respect to pollution in the Delaware River during the 1950's nearly a decade before the publication of Coase's article. *See* B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY (1974) [hereinafter cited as UNCERTAIN SEARCH].

61. Coase, *supra* note 31.

merical examples, Coase shows that no governmental intervention or nonintervention can be shown to improve the allocation of resources. First, there are technical limitations on any demonstration of allocative improvement: Transaction costs cannot be measured; moveover, there is never sufficient information available to understand ultimate economic effects.[62] More importantly, because of the reciprocal nature of *all* incidents of social harm and the absence of adequately developed moral theories regarding the multitude of activities affected by the legal system, changes in welfare are always ambiguous. The particular implication of this conclusion is that the Pigovian imperative of internalizing the costs of each factor's operations in order to equate private and social costs is nonsense, and cannot be shown to improve social welfare systematically.

These two lessons provide a very strange blueprint for an activist state committed to curing market failures. Coase's message is ultimately nihilistic. After presenting repeated examples in which attempts to correct market failures only further reduce social welfare, Coase concludes that economics provides no guide whatsoever to social policy. "As Frank H. Knight has so often emphasized," Coase announces, "problems of welfare economics must ultimately dissolve into a study of aesthetics and morals."[63] In fact, Coase's moral judgments over the years were profoundly hostile to every form of the activist state. Coase explicitly dedicated his work as editor of the *Journal of Law and Economics* to the battle against governmental regulation.[64] In his earlier work, Coase severely criticized even the "expansion" of government in the sixteenth century to preempt the private market for mail delivery.[65] Coase's articles condemning government regulation[66] and those that he solicited and published in his *Journal* formed the intellectual foundation for the deregulation movement, which constitutes a sustained attack on the activist state[67] and the most serious commitment to laissez-faire since Mill's *Principles of Political Economy.*

---

62. The argument of Coase's article is explained in more detail in Priest, *The Rise of Law and Economics*, J. LEGAL EDUC. (forthcoming).

63. Coase, *supra* note 31, at 43.

64. *See* Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163, 191-92 (1982).

65. Coase, *Rowland Hill and the Penny Post*, 6 ECONOMICA 423 (n.s. 1939); Coase, *The Postal Monopoly in Great Britain: An Historical Survey*, in ECONOMIC ESSAYS IN COMMEMORATION OF THE DUNDEE SCHOOL OF ECONOMICS 1931-1955, at 25 (J. Eastham ed. 1955).

66. *E.g.*, Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Coase, *The Interdepartment Radio Advisory Committee*, 5 J.L. & ECON. 17 (1962); Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979).

67. Ackerman acknowledges the deregulation movement. *See* p. 32. He attempts to reconcile it with governmental activism by interpreting the objective of the movement as "eliminating misbegotten or obsolescent initiatives." *Id.* In my view, Ackerman's interpretation neglects the fundamental commitment of this literature to a return to laissez-faire of the reactive state in place of governmental activism.

III. The Integrity of Law-Talk

It might be said that accusing Ackerman of misreading the Realists and Ronald Coase misses the point. Ackerman does not purport to present a standard intellectual history of the important literature of the past fifty years. Perhaps it is enough that Ackerman is interested in describing the dialogue or conversation between lawyers and policymakers that derived from the writings of Coase and the Realists. The original texts themselves should be considered only starting points.

This, I believe, is the most defensible reading of Ackerman's book, but its shallowness is apparent. Ackerman does not define the relationship between original ideas and the morally loaded dialogue of interest to him, in this book or in any other in the series. Nor does Ackerman present evidence confirming his hunches as to the content of the legal conversation. Clearly, Ackerman is not interested in dialogue between the original scholars themselves, which could be expected to be true to the ideas of the scholars. Nor does he seem to be interested in the dialogue about the original ideas within the secondary literature[68] which would closely follow the ideas. Ackerman does not explain how ideas are translated by policymakers or, at yet a lower level, lawyers, in any systematic way that identifies their dialogic positions.

What do we know about the development of dialogic content? From Ackerman's history, we can infer that the post-Realist and post-Coasean conversations bear no substantive relationship to the original texts from which they are said to derive. The dialogues of interest to Ackerman are in substance completely contradictory to the original ideas. One must conclude that at best these conversations are based upon impressions of the original texts, filtered and finally perverted, in subsequent accounts. Put more sharply, Ackerman's dialogue cannot be distinguished from unconstrained gossip about theories of government. The content of this gossip may or may not bear any resemblance to the original theories themselves.

Ackerman may believe his history of law-talk, but its implications are devastating to Ackerman's larger intellectual enterprise, if not to ninety-nine percent of modern legal scholarship. If Ackerman's description is accurate, he has shown that ideas have no coherent influence on social policy. He has demonstrated that in the world of governmental policy, a scholar will gain equal credit for an original idea or for its converse. Indeed, there is no link whatsoever between a theory or idea and how it will be interpreted by policymakers. Lawyers and policymakers have engaged for the last half-century in a dialogue inspired by the works of the Realists and Ronald Coase that entirely neglects the substantive conclusions of

68. To which he makes no reference.

these works. Although the Realists were regarded in their own time as radicals, they were actually conservatives; Chicago School economists, while openly and bitterly hostile to all forms of governmental interference with the marketplace, actually elaborated upon and perfected today's activist federal state.

It follows from this conclusion that the efforts of lawyers and legal scholars to work out sensible and effective ideas about how the government might act to improve the lives of its citizens are futile. However brilliant and persuasive to scholars—and few scholars have failed to be persuaded by the Realist attack on formalism or by the Coase theorem—ideas have neither autonomy nor ultimate influence. Moreover, Ackerman's conclusion implies that to criticize government behavior as unreasonable or ill-founded[69]—that is, for its failure to conform to some set of rational principles—is a foolish waste of time, because it ignores the true source of influence. The dialogue from which policies are derived need not correspond to any logical implication of its original premises.

If Ackerman's account is to be believed, the role of dialogue itself is diminished from the lofty position suggested in *Social Justice.* If there is no necessary connection between the content of dialogue and the original principles that inspire it, how can we be assured of the moral integrity of the dialogic process? Why will dialogue generate a commitment to neutrality as opposed to a commitment to personal domination or other nonneutral positions? Must we not suspect that there are forces, other than the dialogic process or the neutrality principles themselves, that are defining the content of legal dialogue?

One might answer that I am still judging Ackerman too harshly. Perhaps Ackerman meant that the Realists and Coase serve only as emblems of different conversational styles: of the conservative legal thought that preceded the New Deal and of the systemic analysis characteristic of New Deal policymaking. But this justification, I believe, undercuts the foundation of Ackerman's project. If the Realists and Coase are emblems, then Ackerman's conception of conversation has no coherent content. Ackerman's definitions of the reactive and activist conversations become so broad that they embrace totally opposing views on the central issues that the conversations describe. The legal conversation of the reactive state embraces both a commitment to laissez-faire and Realist opposition to laissez-faire. The legal conversation of the activist state incorporates both New Deal regulation designed to supplant laissez-faire and Chicago-school commitment to laissez-faire designed to supplant New Deal regulation. Perhaps Ackerman has some deeper conception of activism and reac-

69. For one example, see CLEAN COAL, *supra* note 48.

tivism that transcends the simple chronology hinged at the New Deal. But it remains unexplained.

IV. Reconstructing Ackerman

These criticisms should not be read to suggest that Ackerman's project is unredeemable or hopelessly confused. No one doubts that the explanation of the rise of the modern activist state is perhaps the central question of modern political economy. Moreover, Ackerman's distinction between the world views of ordinary observing and scientific policymaking are powerful explanations of much of modern legal discourse. Prominent scholars besides Ackerman have attempted to define the unique moral forces of the legal process,[70] and, in my view, Ackerman's insistence on neutrality is a promising starting point.

Yet Ackerman's work in its current form stands as something less than a coherent project. Each of the books contains insights that are imaginative and that have influenced legal scholarship. But Ackerman aspires to produce more than a collection of insights, and his readers should demand more as well. In my view, Ackerman must elaborate five aspects of the theory before it forms a comprehensive and coherent intellectual project.

First, Ackerman must define more clearly the moral significance of the dialogic process itself. What moral force inheres in dialogue that is independent of the moral argument of the dialogue itself?[71]

Second, Ackerman must define more clearly the moral significance he finds inherent in the legal process. Except as metaphor, the complaint and answer of modern litigation, couched in strategic formality, do not closely resemble a moral dialogue. Can Ackerman identify some moral content to the legal process that is separate from the moral content of the legal rules?

Third, Ackerman must elaborate the relationship between the dialogic character of the legal process and theories of the appropriate role of government. *Private Property and the Constitution*'s review of litigation involving the takings clause demonstrated persuasively to me that dominant theories of government influence the structure of legal argument. But the character and direction of the relationship has never been made clear. Has the dialogic process of litigation somehow generated different theories of government? Or is the legal process only a medium for the expression of conceptions of government derived from other sources?

Fourth, Ackerman must consider how a new vision of government can arise when preexisting conceptions of the world constrain the legal conver-

70. *See, e.g.*, L. Fuller, The Morality of Law (1964); Pound, *The Economic Interpretation in the Law of Torts*, 53 Harv. L. Rev. 365 (1940).

71. Michael Walzer makes a similar point in Walzer, *supra* note 44, at 40.

sation as tightly as he suggests. More specifically, Ackerman must offer an account of the origins, conversational or not, of the New Deal. The rise of the New Deal and of scientific policymaking is the central phenomenon of Ackerman's entire enterprise. Yet Ackerman, to my knowledge, has never attempted to explain the New Deal in terms consistent with his theory. In *Reconstructing American Law*, Ackerman provides savvy commentary on intellectual currents from mid-nineteenth century reactivism to late-twentieth century law and economics. But the New Deal and its scientific policymaking remain strangely (and damagingly) exogenous to the account.

Finally, Ackerman must provide more convincing evidence that the actual growth of government is related to ideas about government—to the translation of these ideas in the legal conversation, as well as to some feature of the legal process. Ackerman seems committed to idealistic, rather than materialistic, explanations of behavior and, in particular, of government behavior. Yet his elaborate praise of Ronald Coase and the central position he gives in many of his works to the economic approach toward behavior[72] seem contradictory. Ackerman attempts to reconcile the contradiction in *Reconstructing American Law* by characterizing economic analysis as only relevant to a conception of facts, while some richer philosophic framework can control policymaking.[73] If world views and societal conceptions are as dominant as Ackerman believes, this approach is untenable. For Ackerman's project to be convincing, he must show the superior force of idealism to materialism as a determinant of government behavior and, perhaps, of individual behavior as well. The casualness of his treatment of ideas in *Reconstructing American Law* suggests the contrary.

These problems stand as substantial obstacles to the completion of Ackerman's project. But consider the context of these criticisms. However imposing the obstacles seem, the project Ackerman has conceived is of far greater dimension. Indeed, the ambition and sustained seriousness of the author are extraordinary. There will be sufficient insight in any book by Bruce Ackerman to make it worth reading. But Ackerman promises much more.

---

72. *See, e.g.*, PRIVATE PROPERTY, *supra* note 8, at 168–75; CLEAN COAL, *supra* note 48, at 66–74; UNCERTAIN SEARCH, *supra* note 60, at 9–165.

73. Pp. 46–71.

Breaking the Silence of Doctor and Patient

The Silent World of Doctor and Patient. By Jay Katz. *New York: The Free Press,* 1984. Pp. xxi, 254. $15.95.

Walter Wadlington†

In 1910, a professional educator named Abraham Flexner confronted the dismal conditions then prevalent among North American medical schools. His celebrated *Report on Medical Education in the United States and Canada*[1] has long been considered a major catalyst for the radical reshaping of medical education that soon followed.[2] A glance back at Flexner's report reminds us of the primitive state of both medical science and medical education earlier this century. In some schools, Flexner's principal inquiry necessarily was limited to counting cadavers[3] and bunsen burners, checking for running water, and determining admissions requirements, if any.[4] Such conditions may be difficult to comprehend for anyone who has set foot in a modern teaching hospital. Today's experts may worry that medical education has ossified[5] in the Johns Hopkins mold,[6] but few would deny its success in training persons in the specialized skills needed to make use of the enormous technological achievements of recent years. The public is generally confident not only that the string of recent biomedical conquests will continue without interruption, but that

---

† James Madison Professor of Law, University of Virginia.

1. A. FLEXNER, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1910) (Bulletin No. 4).

2. Although the Flexner Report is widely accorded this credit, it has been suggested that the movement toward reform already was under way by the time Flexner reported and that many of the changes would have occurred in any event. *See* Kessel, *The A.M.A. and the Supply of Physicians*, 35 LAW & CONTEMP. PROBS. 267, 268-69 (1970).

3. In at least one instance, this did not require counting beyond one. *See* A. FLEXNER, *supra* note 1, at 205.

4. Many of the descriptions in the report are quite vivid. For example, one school was described as having "a laboratory for histology, in which a small centrifuge is the only visible object of interest; a small laboratory for elementary chemistry in a dark cellar; and an indescribably foul dissecting room in a dark building, once a stable." *Id.* at 297.

5. *See* Chapman, *Should There Be a Commission on Medical Education?*, 205 SCI. 559, 560 (1979).

6. Johns Hopkins at that time was the model preferred by Flexner and subsequently adopted widely by American medical schools. Its key feature was status as a graduate professional school within a university, where students commenced with study in the basic sciences and then moved to clinical training in a hospital.

modern medicine will make it possible for many persons now alive to benefit significantly from these developments as soon as they occur.

Given the great technological breakthroughs already incorporated into modern teaching curricula and facilities, some might consider it audacious to suggest the existence of any shortcomings in today's medical education sufficient to justify critical examination by a latter-day Flexner. If there are problems today as dire as those uncovered by Flexner, they do not stem from the scientific dimension of medical training, but from the human problems accompanying the new technology or exacerbated by it. Individuals' increased willingness to turn to courts and legislatures to secure rights to personal autonomy in many differing contexts[7] prompts us to question whether some of the long-accepted tenets regarding the physician-patient relationship are antithetical to contemporary views about personal liberties. If there is need for serious introspection or external appraisal of medical education today, the critical area of focus is its "humanist" content, with specific emphasis on the respective roles and rights of doctor and patient.

It is the latter area, and some of the key problems within it, that Professor Jay Katz addresses in *The Silent World of Doctor and Patient.*[8] Although many have written about this general subject in recent years under the rubric of "informed consent,"[9] that term has become equivocal in its legal meaning and its interpretation by physicians. In one sense Professor Katz's book may be considered inextricably linked to "legal" informed consent; one chapter is specifically devoted to it, and the entire book is relevant to an appreciation of why this new legal doctrine developed, why confusion surrounds it, and why many regard it as having failed to fulfill its original promise. But the book goes far beyond the limited scope of informed consent: It perceptively analyzes the reasons why physicians and patients communicate between themselves so sparsely and ineffectively. Dr. Katz examines typical interactions between physician and patient today, explores the historical and psychological underpinnings of the relationship, and assesses the importance of reevaluating both

---

7. One illustration is the development of the right of privacy. *See* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

8. J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984) [hereinafter cited by page number only].

9. For a cross-section of the informed consent literature, see C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY (1984); 1 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP (1982); Capron, *Informed Consent in Catastrophic Disease Research and Treatment*, 123 U. PA. L. REV. 340 (1974); Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137 (1977); Meisel & Roth, *What We Do and Do Not Know About Informed Consent*, 246 J. A.M.A. 2473 (1982); Plant, *The Decline of "Informed Consent"*, 35 WASH. & LEE L. REV. 91 (1978); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970).

the traditional allocation of decisionmaking authority regarding medical treatment and the flow of medical and personal information among physician, patient, and other interested persons. The result is a sensitive work that should lead to some soul-searching introspection among physicians, and that could well provoke serious reassessment of some key aspects of modern medical training. It also presents some caveats for law reformers concerning the potential effectiveness of steps they might be considering for the purpose of affording patients greater participation in the decisionmaking process.

I. A Longstanding Silence

Dr. Katz begins by documenting how, from the time of Hippocrates until several decades ago, few referred to any duty of physicians to converse with their patients. The American Medical Association's first Code of Ethics, published in 1847, is reprinted as an appendix.[10] Dr. Katz urges that this lengthy and remarkable document, influenced by the work of English physician Thomas Percival almost half a century earlier, "should not be dismissed as a historic relic."[11] Despite its replacement with a short, modern version that provides few formal guidelines from which one might glean the accepted tenets of physician-patient relations and communication (plus a body of interpretative opinions by the AMA's Judicial Council),[12] Dr. Katz suggests that "[t]he original sentiments, so it seems, lived on in spirit, although not in the printed words, for physicians were not given new and reasonably specific instructions on how to interact with patients."[13]

The tradition of physicians' determining both what they should disclose to patients and the extent to which physicians should ascertain and consider patients' views in "packaging" or promoting a particular treatment is longstanding. The simplistic, popular phrase, "You're the doctor," indicates the degree to which our culture accepts the physician's decisionmaking role. The 1847 Code of Ethics included a separate article with ten subsections on "Obligations of Patients to Their Physicians." Subsection 1 sets the tenor:

> The members of the medical profession, upon whom is enjoined the performance of so many important and arduous duties towards the community, and who are required to make so many sacrifices of comfort, ease, and health, for the welfare of those who avail them-

10. P. 230.
11. P. 22.
12. The American Medical Association Principles of Medical Ethics (1980) is also reprinted in an appendix, at p. 237.
13. P. 22.

> selves of their services, certainly have a right to expect and require, that their patients should entertain a just sense of the duties which they owe to their medical attendants.[14]

Subsection 6 explains: "The obedience of a patient to the prescriptions of his physician should be prompt and implicit. He should never permit his own crude opinions as to their fitness, to influence his attention to them."[15] And subsection 7 admonishes:

> A patient should, if possible, avoid even the friendly visits of a physician who is not attending him—and when he does receive them, he should never converse on the subject of his disease, as an observation may be made, without any intention of interference, which may destroy his confidence in the course he is pursuing, and induce him to neglect the directions prescribed to him. A patient should never send for a consulting physician without the express consent of his medical attendant.[16]

For the physicians, article I of the Code advises that:

> Reasonable indulgence should be granted to the mental imbecility and caprices of the sick. Secrecy and delicacy, when required by peculiar circumstances, should be strictly observed; and the familiar and confidential intercourse to which physicians are admitted in their professional visits, should be used with discretion, and with the most scrupulous regard to fidelity and honor . . . .[17]

Subsection 4 of that Article adds:

> A physician should not be forward to make gloomy prognostications, because they savor of empiricism, by magnifying the importance of his services in the treatment or cure of the disease. But he should not fail, on proper occasions, to give to the friends of the patient timely notice of danger when it really occurs; and even to the patient himself, if absolutely necessary.[18]

No doubt there have been changes in physician demeanor and physician confidence in their own capabilities since 1847. The individual physician-patient relationship, however, still retains a near-sacrosanct status—a phenomenon ignored by criticism directed at particular medical practices.

---

14. Pp. 231-32.
15. P. 232.
16. P. 233.
17. P. 231.
18. P. 231.

But from over a century ago, there remain many vestiges of rules about how to deal with patients and to manage the decisionmaking process.[19] While patients at one time might have accepted unquestioningly the physician's role as primary or absolute decisionmaker as an article of medical faith, this role is increasingly subject to question, criticism, and legal challenge.

II. The Silent Treatment in Today's World

Dr. Katz makes clear his belief that expanded participation by patients in decisionmaking will not come easily. He suggests that the idea of sharing the decisionmaking burden will itself create new tensions and also bring out old ones. In chapter four, he examines the tension of *authority*—should physician, patient, or both make decisions? The tension of *autonomy*—can anyone but a physician decide?—is examined in chapter six, in which he suggests that the term autonomy has been absent from the medical vocabulary because doctors believe that patients lack the capacity to participate in decisionmaking. He chooses to use the term "psychological autonomy," which in his scheme "speaks to persons' capacities to reflect about contemplated choices and to make choices."[20] He carefully explains his belief that "a comprehensive definition of individual autonomy must take into account the conscious and the unconscious, rational and irrational forces that shape all thoughts and actions . . . ."[21]

The third tension Dr. Katz addresses is that of *uncertainty*. Given the extraordinary degree of technological achievement, one might ask whether there is significant disagreement about the "correct" or appropriate medical treatment in many, if not most, cases today. If there is little or no difference of opinion about what is deemed medically correct, the admonition of article II, section 7 of the 1847 Code of Medical Ethics[22]—that patients should not converse with doctors other than their personal physicians—should be unimportant. But anyone familiar with medicine knows this certainly does not exist. As Dr. Katz states it: "Medicine's vast ignorance about the etiology and treatment of disease places difficult, and at times insurmountable, burdens on physicians both to sort out for themselves knowledge from ignorance and to communicate in a comprehensible

19. A largely historical chapter points out that the "age of science" in medicine in this country began about 150 years ago, shortly before the 1847 Code described above. Pp. 30–47. This chapter explains how it was the widely publicized discoveries of science that won public support for allopathic physicians, who in effect won out in the power struggle to gain control of the monopoly of medicine. Allopathic physicians relied upon more powerful medicines and their clinical intuitions, while homeopathic physicians prescribed minute doses of drugs and followed stricter dogma. Dr. Katz concludes that this delegation of exclusive power to one group of healers itself had a stifling effect on consideration of increased patient participation in decisionmaking. Pp. 43–47.

20. Pp. 105–06.

21. P. 129.

22. P. 233.

fashion their certainties and uncertainties to patients."[23] This raises the question whether anyone—doctor or patient—can make an informed decision. In his chapter, "Acknowledging Uncertainty: The Confrontation of Knowledge and Ignorance," Dr. Katz explores situations in which highly regarded physicians disagree on the appropriate decision for particular conditions. More alarmingly, he portrays a situation in which doctors may reach a conclusion to which they cling resolutely even though scientific support for it is tenuous. The differing approaches to radical mastectomy provide one example of this phenomenon. Dr. Katz also uses this illustration to examine and explain the peremptoriness of some physicians' differing conclusions about the medical "correctness" of alternative procedures without considering the patient's own highly personal views about matters such as quality or length of life.

One might fault the use of the more spectacular "hard cases" as illustrations were they not integrated so well into the theme of the book. One example is Katz's analysis of the encounter between Dr. Christiaan Barnard and his second heart transplant patient, Philip Blaiberg, before that highly experimental procedure was undertaken. One might easily come away from Blaiberg's account with the sense that the patient was prepared to undergo the procedure as much to help secure professional immortality for the doctor as to lengthen the patient's own lifespan.[24] What one gleans from the account of an interview with the doctor about his encounter with Blaiberg, in contrast, is that Barnard sized up the patient by some intuitive process to determine if—from the doctor's perspective—the operation was worth trying.[25] He perceived the patient's enthusiasm as sufficient to support the belief that the operation was warranted. There is no indication that the doctor sensed a special need for full disclosure even under these extraordinary circumstances.[26]

III. The Legal Doctrine of Informed Consent

The rule that competent patients must consent to their medical treatment is basic in our law. In practice, consent usually is implied from the patient's appearance before the physician in all but the more drastic or dangerous medical procedures. And until the doctrine of informed consent began to take shape some twenty-five years ago,[27] there was no legal

23. P. 86.
24. Pp. 131–32.
25. Pp. 134–35.
26. Nor does this concern for disclosure appear in the account of Dr. Barnard's interview with Louis Washkansky, the first heart transplant patient. Pp. 135–36.
27. Although the early decisions of Pratt v. Davis, 118 Ill. App. 161 (1905), *aff'd*, 224 Ill. 300, 79 N.E. 562 (1906), and Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914), contain language about patient self-determination in medical decisionmaking, these courts did not develop the doctrine of informed consent in any sophisticated fashion. Dr. Katz suggests, and most scholars probably would agree, that the doctrine as we know it today dates from the decisions in Salgo

mechanism to ensure that the patient would be advised about risks he or she would undertake by consenting to specific procedures. The key purpose of obtaining a formal (typically written) consent to riskier interventions, such as surgery, was to protect the doctor against intentional-tort suits based on unauthorized invasion of the patient's protected interest in bodily integrity—in short, to avoid a possible action for battery.[28] The doctrine of informed consent, which requires that a doctor give his or her patient information about certain risks of the proposed procedure as well as alternatives to it, eventually developed in the context of negligence, however, rather than intentional tort. Thus, in theory, inadequate disclosure under this new doctrine of negligence law would not vitiate the patient's consent secured for the purpose of immunizing the physician against a successful battery action. To qualify as actionable under negligence, the patient would need to prove a different set of elements, including the existence of a particular physician's duty to disclose information and the fact that whatever disclosure took place failed to meet the minimum standard required under the circumstances. To satisfy the causation element, it also would be necessary to convince the factfinder that, had the appropriate disclosure been made, the patient would not have undergone the treatment. Pigeonholing the action in negligence eliminated or minimized the likelihood of punitive damages, which courts ordinarily award only in cases of intentional torts such as battery, and even then only if the plaintiff can show legal malice.[29]

Introduction of the doctrine of informed consent, even in this less severe fashion, led to consternation and confusion in the medical world. The distinction between the consent needed to avoid a potential battery action and the duty to disclose sufficient information for a patient to share more effectively in the decisionmaking process was variously misunderstood, misconstrued, or repressed. Though the action in negligence almost certainly presented less potential exposure in terms of tort liability than other developments, such as the expanded use of res ipsa loquitur[30] or the adoption of a "discovery" approach to limitation of actions for medical malpractice,[31] many viewed the negligence action as a serious threat to physicians individually in terms of liability, and to medical practice generally because of the changes in protocol that might be necessary to accommodate it. The latter concern no doubt was realistic in terms of the doctrine's potential for forcing physicians to engage their patients to a greater

---

v. Leland Stanford Jr. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957), and Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960).

28. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); RESTATEMENT (SECOND) OF TORTS § 14, at 26 (1965).

29. *See* Smith v. Courter, 531 S.W.2d 743 (Mo. 1976).

30. *See* Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975).

31. *See, e.g.*, Robinson v. Weaver, 550 S.W.2d 18 (Tex. 1977).

degree in the decisionmaking process. Though some physicians obviously have been influenced by the doctrine,[32] it is unclear whether many have in fact altered their practices to involve patients in decisionmaking, and whether the responses that have been developed are appropriate.

Courts long have accorded customary medical practice great weight, however, in determining the standard of care under the negligence formula.[33] Thus, one issue that soon arose was whether courts would define informed consent by what patients would deem it appropriate for them to know in order to make their decisions.[34] Some jurisdictions, by allowing physicians to set the standard for disclosure, effectively precluded consideration of what patients individually or collectively might prefer.[35] Of equal importance, some courts adopted an "objective" standard ("what . . . a prudent person in the patient's position [would] have decided if adequately informed of all significant perils"[36]) to determine whether a patient would have opted for treatment, thus effectively denying consideration of personal factors that might have been of special importance and persuasiveness to the individual patient. An illustration of this is the case of the woman who chooses not to undergo a radical mastectomy because of personal reasons regarding life-style or bodily integrity rather than longevity. While the objective standard no doubt affords great protection to the physician, it does so at an unacceptably high cost to the patient. Dr. Katz's arguments have convinced this commentator that consideration of each patient's personal needs and concerns is essential to achieving the original goal of informed consent, namely, shared and individualized decisionmaking.

Dr. Katz deals specifically with the legal development of informed consent in his third chapter. But throughout the book, he points out various reasons that physicians have offered to explain why it may be undesirable to disclose too many medical details or to involve patients too extensively in the process of medical decisionmaking. As previously noted, one reason is that patients are incompetent to make "correct" medical decisions, a view that ignores the possibility that what might be considered "correct" from a scientific standpoint might have a personally devastating effect on

---

32. The conclusions of the Lidz study, *see* C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESAK & L. ROTH, *supra* note 9, at 326, indicate that it is the informed consent doctrine rather than the physician-patient relationship that probably has been restructured.

33. For example, courts require expert testimony to establish the medical standard. When courts determine the standard as a matter of law in extreme cases, such as Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974), they often are accused of "practicing medicine." For a discussion of expert testimony in cases involving informed consent, see Canterbury v. Spence, 464 F.2d 772, 791–92 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

34. *See* Cobbs v. Grant, 8 Cal. 3d 229, 239–42, 502 P.2d 1, 7–8, 104 Cal. Rptr. 505, 511–12 (1972).

35. *See* Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976).

36. *See* Cobbs v. Grant, 8 Cal. 3d 229, 246, 502 P.2d 1, 11–12, 104 Cal. Rptr. 505, 515–16 (1972).

some patients. Courts have not been quick to incorporate this distinction into law, as the previous illustration regarding the "objective" test for causation in informed consent actions illustrates. It may be informative to note the remarks of one Justice of the United States Supreme Court who, after observing that "[o]ne might well wonder, offhand, just what 'informed consent' of a patient is," then responded:

> [W]e are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.[37]

Such a definition of informed consent may in fact be the widely used model in practice; it also exemplifies the approach taken by some states that have adopted statutes on the subject.[38] Nonmedical entrepreneurs are selling pads of preprinted consent forms tailored to alert patients to the risks of specific operations. Some hospitals give their patients books to read about the dangers of procedures such as anesthesia. The obvious goal is to explain the potential risks sufficiently enough to safeguard against liability. Critics of such gamesmanship anticipate that someone will bring an action for "overtell," based on the thesis that such impersonal measures unduly deter patients from obtaining medical care to which they would consent if there were adequate explanation of the need for it and the consequences of not undergoing it. The legal doctrine of informed consent thus has led to the development of a new set of confusing and counterproductive practices, without necessarily contributing substantially to the goal of more constructive interaction between patient and physician.

This should not come as a surprise. Just as we frequently expect too much from medical technology, those who are concerned about the world of silence between physician and patient may expect too much from the legal system as a means for breaking that silence. The medical curriculum is generally as lacking in serious conceptual offerings about law as it is in courses on ethics. The thought that physicians might respond to the subtle nudgings of the legal system by changing deeply rooted practices is too optimistic. Not all lawyers are convinced that litigation is the appropriate vehicle for change; many still support the proposition that the goal of tort law is compensation rather than implementation of professional reform. And even though some do consider tort law to be the most important mechanism for maintaining quality control in the health care delivery sys-

37. Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976) (Blackmun, J.).

38. Some statutes, for example, list specific risks that must be communicated to the patient if they exist. For a review of the various informed consent statutes, see Meisel & Kabnick, *Informed Consent to Medical Treatment: An Analysis of Recent Legislation*, 41 U. PITT. L. REV. 407 (1980).

tem, Dr. Katz's goal of protecting human dignity through subjective consideration of individual patient's views may simply be beyond the effective reach of tort principles. As an item of "preventive law," however, it seems worth noting that despite the lack of empirical data on which to base their advice, some lawyers counsel physician-clients that one of the best ways to avoid being sued is to talk to patients. One rationale is that patients may suspect that a physician who stops talking to them, or does not address their problems after what the patient perceives to be an untoward result, is in effect acknowledging fault. More important, it would seem, would be for the attorney to counsel the physician that greater participation early in the process would alert the patient to the possibility of a poor result and thus would remove the patient's cause for suspicion.

IV. The Concept of Psychological Abandonment

In his closing chapter, Dr. Katz asserts:

> The history of medicine is the history of physicians' caring but silent devotion to what they believed their patients' best interests dictated. Doctors were rarely heard to invite patients to share the burdens of decision with them. Instead, the voices heard were those of doctors' hopeful and reassuring promises, however truthfully, evasively or deceptively made, of doctors' orders, however gently or harshly uttered, and of patients' compliant assent, however cheerfully or resentfully given.[39]

He then suggests that "[w]hen physicians did not listen to patients, or responded perfunctorily to their questions, or dismissed their doubts and concerns, patients felt abandoned."[40]

"Abandon" is a powerful word, both in the context of medical ethics and of the legal duties inherent in the physician-patient relationship. Dr. Katz clearly recognizes this. Though he explains that he is referring to "psychological" rather than "physical" abandonment, his use of the term indicates an intention to emphasize the significance of the problem. Given the way in which tort doctrine develops in our common law system, one might speculate about whether someone will attempt to force greater physician disclosure by asserting an action for psychological abandonment. Is the concept any less feasible than informed consent was several decades ago?

In the final chapter, Dr. Katz also addresses the special problems of interaction between physicians and dying patients. As a psychoanalyst, he

39. P. 207.
40. P. 207.

recognizes that death seems to be the most taboo of subjects about which patients wish to talk. He considers this to be equally true of physicians, who "have an intriguing love-hate relationship with death: It is both their ally and their enemy."[41] As to the former, he points to instances of doctors wittingly or unwittingly exploiting patients' anxieties about death to secure obedience to medical orders. At the same time, doctors may consider the death of their patients to be a personal defeat. The physicians' own psychological needs may lead them to prefer "reassuring and hopeful nondisclosure to disclosure of reality in situations of impending death."[42]

V. Do We Need a New Flexner Report?

Dr. Katz believes that "[t]he radically different climate of physician-patient decision making" that he envisions "cannot be implemented by judicial, legislative, or administrative orders."[43] Instead, he contends, "[m]eaningful change can come about only through medical education and the education of patients. *Both* physicians and patients must rethink basic assumptions about their relationship and about mutual decision making."[44] In a gesture to practicality, he acknowledges that physicians must lead the way in such a process. For change to occur, physician-educators must be prepared to address it in serious fashion.

It is interesting to speculate on whether development of the informed consent doctrine would have been materially different had a study such as *The Silent World of Doctor and Patient* been available during its early formative period. Inadequate comprehension of the depth of the historical and psychological roots of the concept of physician as decisionmaker probably contributed to some of the decisions that have caused the doctrine of informed consent to be less than effective for accomplishing its underlying purpose. Its inclusion within the negligence framework, for example, probably made it inevitable that an objective standard would prevail in at least some critical respects and that medical custom would play an important role. Most importantly, it simply may be the case that a tort doctrine cannot force such a radical departure from long entrenched habits and strongly held beliefs, whether rational or irrational.

If Dr. Katz is correct in his assessment of the importance of developing a new approach to physician-patient interaction, and in his conclusion that the best, if not the only, way to effect such change is through education, then we may need a detailed study of the ways in which medical education perpetuates a paternalistic role in medical decisionmaking, and of better ways to equip physicians to deal with the human problems

41. P. 213.
42. P. 219.
43. P. 228.
44. Pp. 228-29.

spawned by our expanding technology. Some medical schools now offer little more than a series of brief consciousness-expanding sessions about major social issues (in the "Plato to NATO in an hour" genre), considering that these topical gambols suitably discharge any educational responsibilities in the field of ethics. Advocates of more extensive and innovative instruction in the humanities and law often find that curriculum committees in medical schools are unable to make course time available for them. But it is not the incorporation of humanities courses that is so key to Dr. Katz's thesis; indeed, adding such courses may deflect attention from the real problems at hand. What seems most needed is a combination of serious introspection by all physicians of their own approach to patients, and an evaluation of how the present educational system socializes developing physicians in this regard. If the latter task were undertaken, it would be desirable for some of the examiners (no one examines anything without a committee today) to be non-physicians, just as Flexner was. Some of the more imaginative and potentially instructive work regarding issues of contemporary health care delivery is being produced by persons based primarily outside the medical school environment.[45]

The Silent World of Doctor and Patient may well upset many members of the medical profession with its frank portrayal of physician-patient encounters that fail to recognize patients' individual capabilities to comprehend and reason, and that exclude patients' subjective concerns from becoming factors in decisionmaking about their treatment. Not all physicians practice in such a manner; those who do so seem convinced that their approach serves the best interests of their patients. Dr. Katz has set forth the problem with perception and elegance. He has offered explanations, often with a distinctly psychoanalytical base, as to why many seemingly antiquarian practices persist in the face of enormous change on the scientific side of medical practice. Though some may disagree with his conceptual explanations, or about his conclusion as to the avenue for necessary change, such disagreement should not detract from the importance of this provocative work. If taken seriously by the medical profession at large, it could be a catalyst for voluntary change, thus obviating the need for even a mini-Flexner study and helping to resolve confusion over the still-floundering legal doctrine of informed consent.

---

45. Illustrations include R. FOX & J. SWAZEY, THE COURAGE TO FAIL: A SOCIAL VIEW OF ORGAN TRANSPLANTS AND DIALYSIS (2d ed. 1978); J. KETT, THE FORMATION OF THE AMERICAN MEDICAL PROFESSION: THE ROLE OF INSTITUTIONS, 1780-1860 (1968); P. STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982).