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# Foreword: Law in an Activist State

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By saying that we live in an activist state, I mean to mark a special feature of our self-consciousness: an awareness that our society's existence depends upon a continuing flow of decisions made by politically accountable state officials. The sources of this activist consciousness are several. Most obvious is the general recognition that our society's continued existence depends upon the military sanity of its political leadership. Second, and only slightly less pervasive, is the belief that the nation's economic welfare depends upon steering decisions made in Washington, D.C.—both at the macroeconomic level and through the regulation of particular sectors of economic life.[1] Finally, there is the widespread acknowledgment that the distribution of wealth and status is a central issue for political debate determination. Poverty, racism, and sexism are not inexorable givens; they are the consequences of systematic practices in which state officials are self-consciously involved, from the moment at which they grant or deny an impoverished mother a free abortion to the moment at which

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Some of the themes presented here grow out of a decade-long conversation with Mirjan Damaska, of the Yale Law School, who will be developing them in different, but complementary, ways in a forthcoming book on comparative law. I am also grateful to many of my friends at Columbia, Yale, and elsewhere for their extremely helpful comments on earlier versions of this essay.

1. This recognition must be distinguished from the particular ways a political administration discharges its steering responsibilities. Thus, the Reagan Administration does not deny the need for a coherent economic policy, but asserts, rather more stridently than some of its recent predecessors, that *its* comprehensive program will at last lead us to the promised land. Similarly, the present Administration has proved singularly incapable of generating political support for a massive return of regulatory authority to the states. *See* Mashaw & Rose-Ackerman, *Federalism and Regulation*, in THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT (G. Eads & M. Fix eds.) (forthcoming).

Medicare sustains, or fails to sustain, the last efforts to prolong life.

It is within this context of social perception—a context that gained its historical reality during the administration of Franklin Roosevelt—that I mean to situate the evolving legal culture. In looking back upon the New Deal, I will not attempt an appraisal of the substantive merits of any of its particular initiatives. Instead, I shall consider whether, after fifty years of arguing out the particular meanings of bits and pieces of activist law, lawyers can begin to see larger patterns in the professional effort to make sense out of our existing legal situation. This exercise will suggest that the transformation of legal discourse engendered by the New Deal is deeper than one might initially suppose. Not only has the rise of the activist state forced lawyers to argue about new fact-patterns; it is also leading them to revise the very pattern of a professionally competent "statement of the facts." Not only has the profession been obliged to recognize the legitimacy of new values; lawyers are also beginning to conceive the very nature of value controversy in a new way.

While cultural diffusion is a complex and uneven affair, the new forms of factual description and normative evaluation are slowly becoming familiar to larger groups within the profession. Talk of market failure and externality, Pareto-efficiency and Rawlsian-maximin, is no longer dismissed as hopelessly idiosyncratic. When arguments invoking these and other such notions are now introduced into legal conversation, some of the participants have heard similar-sounding talk before, and others are vaguely aware that such rhetorical maneuvers have been used elsewhere to win arguments before administrative agencies, or legislatures, or courts. Although most of the bits and pieces of the new rhetoric originated in universities, I shall not be treating them as if they were an odd set of trendy topics in law, economics, philosophy, and other esoteric disciplines. Instead, what we are witnessing is the birth of a distinctive form of legal discourse: a professionally stabilized rhetoric that increasing numbers of lawyers will be obliged to master if they hope to translate their clients' grievances into a language that power-holders will find persuasive; a new language of power, premised on a distinctive set of attitudes toward fact and value, that I shall call Legal Constructivism.

I do not expect this birth announcement to excite general jubilation. The propagation of a new language of power cannot fail to be a traumatic event for a profession whose stock-in-trade is persuasive argument. Most obviously, the new form of law-talk threatens countless lawyers with the risk of professional obsolescence. More insidiously, the new discourse poses a threat to the profession as a whole: Does not the very effort to talk law in a different way suggest some deep disappointment with the old way of doing justice? These dangers to lawyerly self-esteem will provoke

endless efforts at professional reassurance. The new law-talk will be continually exposed as a sham and repeatedly condemned as immoral. Particularly crude and insensitive applications of the new learning will be greeted with poorly concealed delight by lawyers who wish to dismiss the movement as aberrational and thereby avoid the need for the analytic retooling it seems to demand.

The transparent obscurantism of many of the critics, however, should not obscure their challenge to my claim that there *is* something in all this smoke of legal disputation to be fired up about. And so it will be my first task to induce you to suspend the disbelief naturally provoked by my thesis and explain why our legal generation has been challenged by history to engage in a rare act of collective creation: to construct a new language of power that does justice to the aspirations for justice of our fellow citizens. This will require a rather abstract discussion of the way in which the legitimation of an activist state fundamentally reshapes the lawyer's conversational agenda, forcing the profession to address new questions in a new way within a changing institutional setting (Part I). It is only then that we can gain a larger perspective upon some of the more prominent Constructions already put in place by the pioneers of the last generation (Part II). These individual achievements, I hope to persuade you, add up to a whole that is larger than the sum of its parts. Rather than providing one or another isolated insight, they are enabling lawyers to carry on a disciplined conversation about facts (Part III) and values (Part IV) in a way that is responsive to the distinctive demands imposed upon legal discourse by the rise of an activist state. Indeed, once one exposes the activist character of the new language of power, it will become plain that the pioneering Constructions of the past are very primitive indeed, and that if the profession is to make the most of its new conversational resources, it will have to build Constructions of a kind that some of the most notable pioneers would have hated to live in.

## I. Forms of Law-Talk

Why, then, is it even plausible to suppose that the rise of an activist state would engender a fundamental transformation in the character of legal discourse?

To answer this question, we first require a clear conception of the limited kinds of legal argument possible in a polity untainted by activist ideas. For euphony, I will call such a place the purely *reactive* state. Having established this conceptual baseline, we can then systematically investigate the conversational consequences of repudiating reactive political premises and replacing them with activist political principles.

To forestall predictable misunderstanding, I must emphasize that my

reactive and activist models are not to be read as pop-historical cartoons of the American legal past. There has never been, nor will there ever be, a time in American history when all legal conversation can be organized by a single discursive model.[2] The point of the models is not to serve as bits of bad history, but to alert us to a present possibility: that the activist dimension of our legal discourse has, fifty years after the New Deal, reached a critical stage in its practical importance and theoretical development.

### A. *Reactive Lawyering*

Imagine what the practice of law would look like in a purely reactive state. In such a hypothetical polity, the military, economic, and social foundations of daily life are not conceived as raising questions of self-conscious and systematic political decision. Instead, the "invisible hand" is allowed to govern such matters. Military defense is left to the oceans, economic welfare to the market-place, social justice to whatever-emerges-from-the-millions-of-free-decisions-made-each-day-by-countless-Americans.

For the present, I am entirely uninterested in exploring the merits of these (familiar) views. Instead, my aim is to emphasize the way the reactive state's systematic political allegiance to the invisible hand constrains the conversational moves open to lawyers trying to translate the grievances of their clients into legally persuasive arguments. On this level, the implications are obvious enough. Legal argument is restricted by something I shall call the "reactive constraint":

> No legal argument shall be acceptable if it requires the lawyer to question the legitimacy of the military, economic, and social arrangements generated by the invisible hand.

Although this conversational constraint is of a purely negative kind, it gives a definite shape to the reactive professional culture. While the constraint forbids lawyers from questioning the invisible hand, it imposes no similar bar upon lawyerly efforts to glorify the social expectations generated by existing social practices. There are, in particular, five features of the ensuing lawyerly exchange that may be usefully emphasized.

First, the legal conversation deals with the appraisal of particular actions against the background of ongoing social practice; thanks to the reactive constraint, the legitimacy of an entire practice is never open to frontal

2. For a more extensive discussion of the different uses of discursive models, see Ackerman, *Four Questions for Legal Theory*, 22 NOMOS 351 (1980).

legal challenge. Of course, prevailing practice may change over time, and so the appraisal of particular actions may change as well, but these slow changes in social practice are conceived by the legal disputants as exogenous to the self-conscious decisions made within the legal culture. So far as lawyers are concerned, the only thing worth talking about is the particular trouble generated by the actions of particular people at a particular time. The cumulative impact of these decisions upon the ebb and flow of institutional life is something that no reactive lawyer would discuss in a professionally disciplined fashion before a legally authoritative tribunal.

This leads directly to a second defining feature. So far as the law is concerned, the only decisive question is whether the challenged action deviates from institutionalized norms. Each lawyer tries to provide a persuasive account of ongoing practice that makes the opponent's conduct appear deviant, and his own client's behavior, innocent, justifiable, or, at the very least, excusable.

Given this focus on the deviance of particular actions, it follows, third, that the original disputants are typically in the best position to develop the facts and values relevant to a just decision. Their particular actions, after all, generated the dispute in the first place, and so they should be in a good position to organize the presentation of the relevant evidence. Similarly, as well-socialized citizens, good lawyers are familiar with the prevailing social practices that serve as the source of governing norms. While opposing advocates will, of course, interpret established expectations in a way that puts their clients' actions in the most favorable light, reactive decisionmakers have no reason to expect that advocates will ignore any factors relevant to a mature appraisal of deviance.

Indeed, under proper guidance from an official, there is no reason why a jury of laymen cannot make the ultimate decision about deviance. Indeed, the jury trial may well serve as the paradigmatic example of popular participation in, and control over, the legal system. In contrast, even a popularly responsive legislature is viewed with suspicion.[3] No system of legislative rules can hope to reflect the complex web of principles well-socialized people use to elaborate the structure of institutionalized expectation. The very effort at codification bespeaks intellectual arrogance: Why try to lay down rules when a jury of laymen can deploy its subtle common sense in an individualized appraisal? Moreover, even a relatively successful code will soon become obsolete as expectations evolve under the benign guidance of the invisible hand. The mere fact that the legislature is democratically elected should not permit it to go on arrogant and unwise

3. For a particularly extreme statement, see J. GRAY, THE NATURE AND SOURCES OF THE LAW 170-73 (rev. ed. 1921).

lawmaking escapades. For the jury is also a democratic institution and better adapted to handle the central problems of reactive lawmaking. Rather than framing comprehensive codes, legislators should be modest in their ambitions, addressing well-defined problems that somehow escape the ken of the case-oriented jury. Call this fourth feature of the reactive model: the dominance of lay adjudication over popular legislation.

Finally, while the effort to define deviance may involve a host of complex contextual arguments, the legal conversation will have a natural end. There is only so much that can be said about particular actions before the conversation gets repetitive. The only thing left to do is for the jury to engage in a densely textured judgment upon the defendant's conduct—either it was deviant or it was not. If it was, the defendant should set things right; if not, not. Next case.

### B. *Activist Lawyering*

Now assume that, for one reason or another, the dominant opinion among the citizenry no longer holds that the country's military, economic, and social problems can take care of themselves without self-conscious tending. Assume, further, that the citizenry insists that law and lawyers have a central role to play in activist governance. Consider, then, how these simple changes will transform the profession's conversational repertoire.

Most obviously, the subject of legal conversation will no longer be limited to the appraisal of individual actions against the background of presumptively legitimate social practice. At least some of the time, the ongoing practice itself will be the source of the legal challenge. While the reactive lawyer is exclusively concerned with determining individual deviance, the activist lawyer is also concerned with identifying actions that seem innocent but require modification if the entire system is to function acceptably. What could be more innocent than a society at peace, happily minding its own business—except when a hostile enemy threatens? What could be more innocent than selling a good at a price the buyer is willing to pay—except when free markets, left unregulated, generate systematically inefficient and unjust results? What could be more innocent than flushing a toilet—except when a billion daily flushes destroy a precious ecosystem?

Such problems require a radical revision in the ways lawyers talk. First, the activist lawyer will require a new way of describing the relevant facts. It would be incredibly time-consuming, for example, to describe the practice of auto-driving by reporting that Roe drove from *A* to *B*, Doe drove from *C* to *D*, and so on. It would also miss the point of activist concern, which is to assess the extent to which the practice, considered as

a whole, requires self-conscious legal regulation if it is to operate in an acceptable fashion. To discharge this function, the lawyer must somehow develop a *structural* statement of the facts that reveals the ways an activity might be feasibly reorganized to avoid or ameliorate the inefficiencies and injustices it may be generating. If lawyers are successful in producing such an account, moreover, their very triumph will serve to push them ever deeper into the structural enterprise. For it will quickly become obvious that the regulation of one activity—say, auto-driving—will have an important impact on the way other activities—walking, breathing, and the like—are organized. Should we not, then, try to understand these important "second-order effects" by embedding the initial description into a more comprehensive structural account?

In practice, of course, this quest for ever-broader understanding must be kept under reasonable control, lest it delay necessary decisions in a continually expanding and pointlessly expensive fact-finding spiral. In principle, however, the activist lawyer has no objection to the selective investigation of second-order effects—and is likely to develop lore defining the occasions, and institutional contexts, in which such explorations are worthwhile. In contrast, the very notion of a disciplined assessment of second-order effects is alien to the reactive lawyer's frame of reference. The reactive objective is to do justice to the very particular facts of the dispute demanding resolution, rather than waste precious time on idle speculation. If a series of particular decisions yields untoward results, the consequences will be considered whenever "any visible inconvenience doth appear."[4]

From an activist perspective, this cavalier attitude toward the future does not merely generate avoidable hardship; its self-confident assertion of future reactive prowess is often unjustified. Given the high costs of litigation and legislative lobbying, many systemic "inconveniences" may never appear in a way that is "visible" to reactive decisionmakers, because the injured parties may lack the money, energy, and organizational incentives to force their grievances onto the reactive agenda.[5] The refusal to interpret particular facts in light of their social and economic context seems guaranteed, in the end, to achieve only one objective: to blind the reactive lawyer to the very existence of the systemic failures that motivate activist concerns.

The activist's structural statement of the facts, moreover, only serves as a prologue to a continuing disagreement over the proper shape of legal

4. The dictum is from Lord Nottingham's judgment in the Duke of Norfolk's Case, 3 Ch. Cas. 49 (1682).

5. *See, e.g.*, Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980).

conversation. Having rejected the reactive preoccupation with the elaborate description of particular actions, the activist is now in a position to challenge a second defining feature of the reactive model: its concern with the extent to which challenged actions offend institutionalized expectations. The reactive lawyer's search for individual deviance will begin to seem patently myopic, often leading to a pernicious kind of scapegoating in which an individual actor is wrongly held responsible for the inadequate workings of the invisible hand. The proper place to begin the normative argument is not with assertions of individual deviance but with the reasons the existing practice, considered as a whole, may be considered inefficient or unjust. Once viewed in this systemic way, it will rarely seem plausible to see an entire practice as deviant. Car-driving, for example, does make breathing and walking more difficult, but this does not suggest that we should all walk to work; market exchange may well exacerbate many kinds of social injustice, but this hardly implies the desirability of suppressing all markets. Instead, the activist legal task is to design a better form of accommodation between competing activities than the one thrown up by the invisible hand.

If they are to hope for a reasoned effort at such an accommodation, activist lawyers will have to deal with values far more abstractly than their reactive counterparts. Rather than appraising individual actions against the background of concrete social practice, they must learn to assess the extent to which concrete practice conforms to the social ideals affirmed by prevailing activist legal principles. For reactive advocates, in contrast, such an abstract normative inquiry forces lawyers beyond their proper role into the vagaries of social engineering, and is fated to tragic failure.

It is a serious mistake, however, to take reactive prophecies of doom at face value. While an explicit concern with the legitimacy of social structures does set activist lawyers apart, it does not commit them to call for an ever-deeper penetration by government officials into ongoing social life. Insofar as they live in a *liberal* state, activist lawyers will be constantly emphasizing the risk that heavy-handed intervention can become counterproductive, illegitimate, or both. In addition, an ongoing concern with deregulation will seem a vital component of the activist enterprise: It is only by eliminating misbegotten or obsolescent initiatives that we may project the polity's energies into those areas where focused intervention will enhance, rather than diminish, the exercise of individual rights and the quality of collective life. Activist value-talk, in short, is entirely consistent with a strong commitment to limited government. Indeed, so far as the activist is concerned, it provides the best way of assuring that government's limited energies will not be exhausted in wrongheaded scapegoat-

ing and empty gestures.

The new kinds of structural description and evaluation challenge, in turn, the third feature of the reactive model: Parties to particular disputes can no longer be relied upon to present all the relevant facts, articulate all the relevant values. Their particular controversy may be atypical and create a misleading impression of the problems experienced by most participants in the practice under scrutiny. It follows that the particular arguments advanced by the primary disputants may properly be complemented by others proffered by a bureaucracy concerned with the "public interest" or by lawyers engaged to represent those groups who would otherwise be unrepresented. Moreover, the ultimate decisionmaker will often have cause to be dissatisfied with the state of the record tendered to him, some critical dimension of the dispute having been ignored by the parties who happen to be participating in the decision. In such a case, the activist decisionmaker may well be given the right to express his dissatisfaction in a way that would surprise his reactive counterpart. He might, for example, be allowed to go beyond the record to take notice of important data or force the parties to respond to issues they have ignored. Litigation is no longer conceived as a bipolar dispute about deviance controlled by a small number of private parties. The activist lawsuit is, in principle, expandable into a polycentric dispute[6] in which the decisionmaker may take an affirmative role in defining the relevant facts and values the parties are to explore.

Within this context, the primacy of lay adjudication falls under a cloud. At the very least, untrained jurors cannot be trusted to detect the occasions on which the parties have ignored critical dimensions of the necessary structural description. If they are not to be displaced by expert factfinders, it is only because other (abstract) values justify their continuing participation in activist policymaking. Most notably, the case for jury involvement will increasingly be seen to rest upon its capacity to check the tyrannical abuse of official power by an overweening bureaucracy.[7] Even here, however, lay adjudication will not be endowed with quite the same paradigmatic significance it commands within the reactive interpretation of the legal world. Rather than glorifying jury trial, the activist lawyer

6. I owe the term, and much else besides, to Lon Fuller's seminal essay, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395-401 (1978). For more particular insights into the character of the activist judicial process, I am also greatly indebted to the work of Abram Chayes, Owen Fiss, and Martin Shapiro. *See* M. SHAPIRO, COURTS 1-64 (1981); Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

7. For particularly thoughtful assessments of the modern jury, see M. KADISH & S. KADISH, DISCRETION TO DISOBEY (1973); G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 57-72 (1978).

will now look to the legislature as the preeminent forum for the expression of the popular will. This is where the People speak, through their politically responsible agents, about the best ways to revise existing social practices. It is the lawyer's task to incorporate these new messages into the ongoing scheme of activist governance, as well as to alert the People to basic issues that seem to require their focused attention. The fourth feature of our activist model, then, emphasizes the democratic primacy of popular legislation over lay adjudication. The lawyer's ultimate appeal is no longer to a random audience of twelve laymen, but to a carefully selected group of full-time political representatives, aided by a proliferating group of professionally trained assistants.

It should be plain, fifth, that *this* legal conversation has no end. The People must be constantly apprised of new tensions arising in the activist effort to govern an immense variety of competing activities. Indeed, the questions of principle and policy raised by activist governance overwhelm the time and energy of the small number of elected representatives who speak in the People's name. The lawmaking functions of administrative agencies no longer seem a peripheral matter; instead the quality of decisionmaking in these institutions is a prime question of legal concern.[8] Not only is there a deepening interest in the way statutes shape bureaucratic incentives, but there is also a demand for review procedures that can reliably test bureaucratic actions to assure that structural fact-finding and agency lawmaking are consistent with activist legal principles.

While these review proceedings may be channelled into specialized new tribunals or remitted to more traditional courts, they will everywhere tend to erode principles of finality familiar to reactive lawyers. Although reactive lawsuits come to a natural end when the deviants are forced to repay their debt to those they have aggrieved, the activist lawsuit is but a chapter in a never-ending story of the polity's struggle with an ongoing problem. Particular chapter-endings will, of course, have a special importance for the particular litigants, who may walk away from their lawsuit with a "final judgment" on their particular dispute. Even these final judgments may be reopened, however, with an ease that would surprise a reactive lawyer. For it is always possible that the abstract values served by finality may be outweighed, in a particular case, by changing structural facts and emerging legal values. A final judgment no longer suggests that everything worth saying has been said, but rather that it is best, all things considered, to say no more at a particular time.

Yet, while the unending work of structural appraisal and reappraisal is

8. *See* P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

going on, citizens must face up to the fact that they each have only one life to live; and that, unless they choose the path of revolution, they must conform their conduct to the expectations generated by existing social institutions. This perception, in turn, motivates the last element of my model of activist discourse. It allows us to find a new place for the traditional skills and modalities of reactive lawyering. Although activist citizens no longer look upon social institutions as the natural consequences of the invisible hand, they believe that they often have a right to rely upon the expectations generated by social practices unless and until they are revised through legal process. Thus, when somebody violates existing expectations, the injured party will often see a point in hiring a lawyer to charge the adversary with a wrongful deviation from an established practice in the familiar reactive manner.

Nonetheless, the rise of the activist state potentially transforms the nature of the humblest suit in tort, property, or contract. While, in a purely reactive state, the only question these lawsuits explicitly raise is the extent to which one side or the other deviated from expectations fairly derived from ongoing practice, the fall of the reactive constraint makes it possible for one or another side to attempt a new conversational turn. Rather than justifying a claim in terms of existing practice, a lawyer may seek to persuade the court that such a practice does not deserve state support in the light of the law's ongoing pursuit of structural justice. To take a stark case: Southern blacks of the 1950's did not deny that they were expected to sit in segregated railways and buses. They sought to challenge existing practice as unconstitutional, and the mere fact that they were defending a common law trespass action did not seem to them sufficient reason to defer their challenge.

This does not imply, of course, that the activist state will allow "private" lawsuits to be transformed in activist ways whenever a party tries to do so. All things considered, it may be wise, as Professor Mashaw suggests,[9] to insulate the system of "private law" from many of these activist challenges and divert them to specialized institutions of structural justice. But, then again, it may seem unwise, or even fundamentally unfair, for a private party to gain legal victory by shunting the question of structural injustice into some distant activist forum. The key point here is that the question of coordinating the reactive (private) law with the system of activist (public) law will be one of central significance to lawyers at all levels. It could not, by definition, even arise in a purely reactive culture.

It is the centrality of this *coordination* question that constitutes the sixth, and final, feature of my model of activist legal discourse. Its resolu-

9. *See* Mashaw, *"Rights" in the Administrative State*, 92 YALE L.J. 1129, 1158-71 (1983).

tion will characteristically be a complex business. Only one thing is clear: Whenever a "private" litigant *is* allowed to raise questions of activist justice, the legal conversation in traditional law courts will be particularly tension-filled—seeking somehow to mediate the five preceding features of activist legal conversation with the very different conceptions of fact (one) and value (two)—not to mention adjudication (three), democracy (four), and finality (five)—generated by a purely reactive understanding of the controversy.[10]

## II. From Realism to Reconstruction

In remarking on the rise of the activist state, I hardly wish to claim great novelty of insight. Much of the most important academic work since the last World War is not only pregnant with a similar awareness but is also marked by an effort to construct a new form of professional discourse equal to the challenge of activist legal meaning. The most influential of these Constructive efforts was the conception of legal process advanced by Hart and Sacks,[11] and pursued vigorously by a host of area specialists who looked to Cambridge for inspiration.[12] For this group, it was plain that the profession could no longer see itself as primarily concerned with the (reactive) aim of preparing a case for trial and attacking or defending the jury's verdict on appeal. Instead, lawyers trained by Hart and Sacks were always trying to understand the way their clients' interests were me-

10. For further reflections upon the procedural tensions involved in the coordination of active and reactive themes in a single lawsuit, see P. SCHUCK, *supra* note 8, at 147-81; Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); sources cited *supra* note 6. The substantive dilemmas generated by the effort to define legitimate reliance interests while pursuing activist objectives has been at the center of my own work in property law, *see* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971), as well as that of many others working on the foundations of the common law in an activist polity, *compare* Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (libertarian interpretation of contract untenable) *with* C. FRIED, CONTRACT AS PROMISE (1981) (moral foundations of contract analytically distinct from pursuit of social goals); G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (torts as vehicle for pursuit of complex social goals) *with* Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (moral foundations of torts analytically distinct from pursuit of social goals). For some more general reflections on the relationship between the protection of individual rights and the pursuit of activist ideals, see R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). I have also profited greatly from Meir Cohen's forthcoming book, *Persons and Organizations.*

11. H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958)—undoubtedly the most influential unpublished work in recent legal history.

12. *See, e.g.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); H. WELLINGTON, LABOR AND THE LEGAL PROCESS (1968). I discuss this group further in Ackerman, Book Review, 103 DAEDALUS, Winter 1974, at 119 (reviewing J. FRANK, LAW AND THE MODERN MIND (1930)); *see also* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (relationship of legal process school to legal realism).

diated by the ongoing interaction between court, bureaucracy, and legislature. Within this framework, advocacy before a court was no longer exhausted by an effort to elaborate the structure of institutionalized expectations expressed in the common law. Instead, courts were to be instructed elaborately upon their own lawmaking limitations. Rather than reacting to particular fact-situations as if they were the primary lawmakers, the courts were first to identify those legal functions better performed by bureaucracies and legislatures, the rising stars in the activist legal universe. Indeed, it is this exercise of institutional coordination that gave the judiciary a new professional mission. As a corps of generalists with life tenure, judges were in a unique position to understand the comparative advantages of each of the diverse lawmaking institutions of the activist state, and thereby help different institutions work together in a partnership for the public good.

Yet, however important this step, the legal process construction was plainly inadequate in two particulars. First, and most obviously, these scholars operated with inadequate models of the bureaucratic and legislative processes they sought to assimilate into the legal consciousness. Rather than building realistic, let alone rigorous, models of bureaucratic and legislative behavior, they were content with simplistic conceptions of these alien institutions. While legal process scholars were perfectly aware that legislatures and bureaucracies made bad mistakes, these errors were treated as a series of isolated blunders, not the product of systemic failures. For each individual blunder, the job of the court was to engage the errant institution in Socratic dialogue, focusing the attention of legislators and bureaucrats on dimensions of the problem they somehow missed the first time around. The hopeful implication was that, under proper legal questioning, bureaucrats would make good their promise of expertise, and legislators would redeem their claims to democratic legitimacy. The possibility of some deeper structural failing in the process of activist lawmaking was, apparently, not something that lawyers had much to say about.[13]

An even more serious failing, and the central one for our purposes,

13. This deficiency is slowly being corrected by recent writers in the legal process tradition. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); J. ELY, DEMOCRACY AND DISTRUST (1980); Chayes, *supra* note 6; Fiss, *supra* note 6. Unfortunately, these contemporary writers fail to move beyond the legal process tradition's casual treatment of legislative and bureaucratic phenomena. Thus far, there has been very little inclination to draw on analytic political science in an effort to elaborate the many different scenarios that may ultimately engender one or another breakdown in the legislative or bureaucratic process. For some pioneering efforts along these lines, see W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); S. ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978); Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke, *the F.C.C. and the Courts*, 88 YALE L.J. 717 (1979). For a more general treatment of these issues, see D. MUELLER, PUBLIC CHOICE (1979); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970).

becomes clear when we turn from legal process to legal substance. Here, the Harvard group simply had nothing to offer, other than a vague recognition that new forms of expertise were aborning somewhere in bureaucracy-land. Moreover, when other brave scholars tried to fill this large gap, they succeeded only in generating mass skepticism about the profession's capacity to organize the vast heaps of substantive law thrown up by the New Deal and its successors. There is much to be said, both pro and con, about the extraordinary reconceptualization of legal discourse advanced by Harold Lasswell and Myres McDougal in collaboration with a dedicated group of students whom they inspired in postwar New Haven.[14] The important point here, however, was the profession's refusal to engage in the argument. With the notable exception of international law, the School utterly failed to establish itself as a conversational presence in ongoing professional interchange. Rather than indulge in New Haven Newspeak, the profession reacted skeptically to the very idea that the burgeoning law of the activist state permitted much in the way of cogent legal generalization. The life of the law was to be found instead in the sensitive formulation of highly particularistic rules and the resolute refusal to generalize the rules beyond the particular contexts that gave them meaning.

It is precisely this Realistic attitude[15] toward law that is currently under attack by the Constructive generation now rising to professional maturity. In contrast to the Realist's effort to grasp each particular dispute in its infinite particularity, Constructive lawyers emphasize the danger of exaggerating the legal importance of the idiosyncratic. They call instead for a "statement of the facts" that relates individual conflicts to the more general structural tensions of social life. In contrast to the Realist's refusal to generalize about legal values, Constructive lawyers fear that muddled efforts to improve upon the invisible hand will yield a world even less just and humane than free-market capitalism. They call instead for the systematic test of particular activist interventions by legal principles that seek to capture the basic ideals that have led the American people to embrace activism in the first place. The development of a structural statement of the facts and an abstract analysis of activist values is permitting, in turn, a much broader and richer legal conversation. For the first time in a long time, American lawyers in widely different specialties are beginning to talk to one another in a common language about legal substance, no less than legal process, and thereby to recognize broader inter-

14. A good summary of the Lasswell-McDougal approach may be found in M. MCDOUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 1-127 (1963). For a revealing early pronouncement, see McDougal & Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

15. The character of Realist discourse, and its relationship both to Constructivism and to the rise of the activist state, are discussed more thoroughly in B. ACKERMAN, *supra* note †, at 6-22.

relationships, deeper dilemmas.

No less significantly, this Constructive breakthrough has not been achieved in the grand manner of Lasswell and McDougal, with some masterful Synthesizer providing the rest of lawyerdom with a synoptic vision. Instead, the new language of power is being pieced together out of a very diverse set of insights contributed by a rather disorganized group of scholars and practitioners who borrow ideas from one another when the needs of their particular projects seem to require it. While this pragmatic process of give-and-take is the best evidence of the dynamism of the Constructive enterprise, it does engender dangers of its own—most notably that lawyers may lose sight of the deeper presuppositions that implicitly organize the sound and fury of the work of Construction proceeding all around them.

This danger is all the greater for the ease with which a key element of the new Constructivism admits of misinterpretation. I refer to the complex rhetoric called "law and economics." Instead of coming to terms with this rising movement, some have sought to dismiss it as an ideological smoke screen for a reactionary legal assault upon the humane aspects of the American activist state, an assault that should be resisted by all progressive lawyers. However beguiling this simple interpretation might be, especially when it is trumpeted as the last word in Critical legal theory,[16] I hope to persuade you that it is both superficial and counterproductive. Superficial, because it is based on a failure to investigate those deeper

16. For a particularly conventional statement of Critical wisdom, see Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); for a particularly elaborate one, see Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). On one level, Kennedy's critique represents little more than a rehash of conventional welfare economics. The essay's novelty lies not so much in its analysis but in its neo-Realist motivation. It seeks to demonstrate, once again, that abstract and formal doctrinal analysis cannot yield legal certainty, that only particularistic intuition can yield insight into our activist legal system. *See also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1751-78 (1976) (there is no such thing as an "easy case"); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973) (liberal theory does not offer legitimate distinction between rulemaking and rule application).

But, alas, no critic can reach ground that is higher than the position he chooses to assault. Kennedy's critique does serious damage only to Chicago extremists who believe that "efficiency" is an entirely unambiguous and obviously desirable legal value that permits a pseudo-mechanical identification of "the" correct legal answer in every case. *See* Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of "Legal Entitlements,"* 36 STAN. L. REV. (forthcoming). Indeed, even when considered as a critique of a Chicago cartoon, I do not think Kennedy's demonstration gets to the heart of the matter. While Kennedy is right in thinking that efficiency-talk may often yield an indeterminate solution to a legal problem, American lawyers have long since mastered the art of using legal principles even when they cannot be reduced to mechanical rules. *See* R. DWORKIN, *supra* note 10, at 14-80 (1977) (distinction between rules and principles). The basic inadequacies of the Chicago approach to law and economics are its deemphasis of the pervasive character of transaction costs, *see infra* pp. 1099-1113, and its distorted account of the fundamental values of the American legal tradition, *see infra* pp. 1113-25. Rather than lampooning Chicago cartoons, the task is to build a richer construction of the American legal tradition, incorporating those—and *only* those—contributions of "law and economics" that contribute to this enterprise.

cultural structures that Critical legal analysts claim to emphasize in their own work of demystification. Counterproductive, because this superficial diagnosis will encourage the profession to disdain those Constructive skills that are essential for the promotion of the progressive values the Critics profess to champion. Rather than a hostile assault, "law and economics" permits a vast enrichment of the conversational resources available to lawyers trying to make sense of the legal foundations of an activist state.

Not that I wish to deny the laissez-faire sympathies of some leading Chicago practitioners of the new form of activist law-talk. This is hardly the first time, however, that both True Believers and Critical Critics have managed to mistake the ultimate contribution of the movement they so fervently applaud and malign. While I suppose all of us will have to endure an extended shouting match pairing outrageous and self-congratulatory Chicagoan against obscure and critical Ungero-Marxist,[17] I hope to urge the main line of conversation in a more Constructive direction. Looked upon as a distinctive form of legal rhetoric, "law and economics" is forcing lawyers to argue about facts and values in activist ways. While, as in all pioneering efforts, the emerging discourse is sometimes shockingly primitive, the task is to make Constructive law-talk more sophisticated, rather than to indulge in pseudo-Critical posturing.[18]

17. Or, if Ungero-Marxist seems too much of a mouthful, simply conjoin the last names of any two of the other eminences who are so casually invoked as inspiration by a leading Critic: Foucault, Gramsci, Hegel, Levi-Strauss, Mannheim, Marcuse, Piaget, Sartre. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 564 n.3 (1982); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 210 n.2 (1979). Despite his aspiration to demystify his legal brethren, Kennedy has yet to confront, let alone resolve, the obvious inconsistencies in the views expressed by his favored authors. His fellow Critics, alas, only compound confusion by indulging in name-dropping of their own. *See* Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1060-61 n.1 (1980) (invoking, inter alia, Arendt, Durkheim, Kennedy, Mannheim, Marx, Unger, Weber).

18. This view should not be confused with a more familiar idea. Here "law and economics" is treated as if it were the name of yet another group of social scientists seeking to gain a detached perspective upon the legal system from the vantage point of their social science specialty. While, Lord knows, the legal system can stand all the illumination that it can get, it is not this promise that accounts for the deep anxieties and high expectations that the movement has generated. Not even its most determined opponents object to the existence of a few devoted folk in universities applying social science methods to the legal system—after all, scientific investigation is what a university is all about, and there is no good reason to exempt the legal system from scrutiny. The problem arises only because both supporters and opponents rightly suspect that there is more to "law and economics" than disinterested science; that legal economics offers itself as a new language within which lawyers may discharge their central task of pleading for relief on behalf of their clients. Since it is *this* claim that accounts for the movement's controversial character, I shall not confuse matters by taking up the relatively uncontroversial arguments in favor of "law and economics" as one among many valid forms of interdisciplinary research.

## III. Reconstructing the Facts

To bring the activist presuppositions of the new law-talk to light, reflect upon the parable that now serves as the initiatory rite of passage for all would-be lawyer-economists. I refer, of course, to the mock epic struggle between rancher and farmer presented by Ronald Coase in *The Problem of Social Cost*.[19] In turning to such well-worn pages, I do not wish to present yet another analysis of the precise conditions under which Coase's theorem is a valid part of microeconomic science. Instead, I want to view the Coase story as a model of a new form of power-talk lawyers may use to persuade decisionmaking officials of the merits of their client's cause.[20] When considered in this way, Coase is doing nothing less than inviting us to transform the opening words of every legal conversation—words that inevitably shape all that comes afterward. What is at stake is a radical transformation of that peroration lawyers call, with charming disingenuousness, "the statement of the facts."

### A. *The Coasean Paradigm*

To grasp the activist character of the Coasean lawyer's proposal, begin with his polar opposite. Imagine yourself a perfectly reactive lawyer faced with a paradigmatic reactive legal problem. A farmer comes into your office complaining about the neighboring rancher's unfortunate inclination to allow his cows to eat the farmer's burgeoning crops. How would you go about developing the relevant facts?

We remain sufficiently socialized into reactive habits of thought for the answer to come easily. The place to begin is with the moment at which "the trouble" broke out in an obvious way—here, the point at which the rancher's cows started chomping away at the farmer's crop. In scrutinizing the incident for usable evidence, moreover, the reactive lawyer will have a definite goal in view. Since he is, by definition, concerned with the deviance of particular actions, he will focus upon facts that might support the view that the rancher's actions were not all that the community might fairly demand of him. In sifting these facts, the reactive lawyer will take advantage of a rich set of distinctions that ordinary people use to make sense of established expectations. Thus, he will have a relatively easy time gaining substantial relief if he can persuade a jury that the rancher deliberately allowed his cows to cross over his property line to munch away. In

19. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

20. For an approach to the Coase theorem that begins from the same starting point, see Gjerdingen, *The Coase Theorem and the Psychology of Common Law Thought*, 56 S. CAL. L. REV. 711 (1983). The evident differences between Gjerdingen's work and my own will not, I hope, obscure the complementary character of concerns that we have developed over years of fruitful conversation.

contrast, the rancher's lawyer will seek to convince the jury that the cattle crossing occurred by mistake or through unavoidable accident. The resulting "statement of the facts" will typically report events that are densely packed around the moment of obvious trouble, trailing back in time only in directions made relevant by familiar notions of culpability, excuse, and justification.[21]

1.

If this much is recognized, we are in a position to grasp the fundamental character of the Coasean transformation. The starting point for this reformulation is the assumption that both rancher and farmer were in perfect positions to predict[22] the future consequences of their actions at a time at which they could have made cost-minimizing adjustments in their courses of conduct, or, stated in more formal terms, that both actors faced "zero transaction costs."

To grasp the transforming power of this assumption, consider a hypothetical of the kind that provides a staple of reactive casebooks.[23] Imagine that the cows ate the crops because the supervising cowhand had been utterly incapacitated by a lightning bolt in a freak thunderstorm. Suppose further that immediately after the rancher drove his injured employee to

21. These notions may, in principle, be refined through the art of ordinary language philosophy. *See* Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1 (1956-1957).

22. Note that the predictions imagined here are not probabilistic but deterministic in character. The parties are assumed to know the precise outcome that will in fact be generated by each of their possible courses of action, and not merely the way their behavior will affect the probability distribution of possible outcomes. The deterministic character of prediction follows immediately from the idea of zero-transaction costs: After all, the only reason we settle for probabilistic prediction is the (infinite) cost involved in learning enough about the world to be *absolutely* certain about the future!

Understandably, the idea of perfectly deterministic predictions seems to overwhelm the idealizing capacities of the most resolute modelers amongst lawyer-economists. Even those Coaseans who tend to minimize the reality of transaction costs recognize the costs involved in making deterministic predictions, and typically assume that market actors use the standard probabilistic techniques—mean, variance, and so forth—in guessing about the future. This way of setting up the problem leads to a characteristic emphasis by lawyer-economists upon the parties' attitudes toward risk and the imperfections of insurance markets. *See, e.g.*, A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 51-56 (1983); Arrow, *Risk Perception in Psychology and Economics*, 20 ECON. INQUIRY 1 (1982). For a characteristic application of probabilistic analysis in tort law, see Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120 (1982). Even within this probabilistic framework, however, the parties are presumed to know the *risk* they run when engaging in one or another activity. Hence, they cannot be heard to complain of unfair surprise when the risk they have self-consciously assumed ex ante materializes ex post.

23. Although I shall be ringing changes on Coase's rancher-farmer theme, I suspect that analogous points are most often made in classroom discussion of Vincent v. Lake Erie Trans. Co., 109 Minn. 456, 124 N.W. 221 (1910), which seems to have found a place in most leading casebooks. *See* M. FRANKLIN, INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 379 (1971); C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS 36 (1977); R. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 180 (1982); W. PROSSER, J. WADE & V. SCHWARTZ, TORTS: CASES AND MATERIALS 134 (7th ed. 1982); H. SHULMAN, F. JAMES & O. GRAY, TORTS: CASES AND MATERIALS 47 (3d ed. 1976).

the hospital, he personally rounded up the stray cattle and led them back to his own property. For a reactive lawyer defending the rancher, such a discovery would be a source of rhapsodic delight, since it would give him the best possible chance to persuade the jury that the rancher should not pay substantial damages for this regrettable yet unavoidable accident.

In contrast, the Coasean would interpret these facts in a very different spirit. The nonexistence of transaction costs forces the Coasean to presume that, in designing his cow-herding activities, the rancher has taken into account the probability that lightning bolts could strike. Thus, our rancher was in a perfect position, before the lightning struck, to have hired a second cowboy for the very purpose of controlling the cows during the period of his fallen comrade's misfortune. If, after considering the matter, the rancher decided that an extra cowboy was not worth the cost, he should not be able to plead unavoidable accident when lightning strikes to the farmer's disadvantage. Instead, the destruction of the farmer's crop is the foreseeable consequence of the rancher's self-conscious decision to forego the extra farmhand.

It is no exaggeration to say that there can be no such thing as an "accident" in the Coasean universe, or any other event that might extenuate the rancher's responsibility for his cow's depredations. Regardless of its superficial appearance, *each* action should be treated as if it were the product of the rancher's self-conscious decision to pursue his interests at the expense of his neighbors. It follows that the painstaking reactive effort to assess the deviant character of particular actions—to distinguish the accidental from the deliberate, the excusable from the unjustifiable—is pointless within the limits of the Coasean idealization.

But we have only begun to measure the extent of the Coaseans' destabilization of reactive discourse. Not only do they propose to treat all actions as if they were the product of a consciously chosen plan, they also insist on treating all non-actions in the same way. After all, given the nonexistence of transaction costs, all actors may ponder their decisions to remain inactive as deeply as they consider their affirmative activities. Why, then, should they gain special immunity when harm is the foreseeable consequence of their deliberate passivity?

Imagine, for example, that the farmer could show that there was nobody on his property at the time the rancher's cows came achomping, and hence that he was in no position *to do* anything to prevent the rancher's depredations at the moment trouble broke out on the surface of social life. Given this statement of the facts, it will seem obvious to reactive lawyers that it is the rancher's cows that *caused* the harm, and that, prima facie, it

is the rancher who ought to be held responsible for his cows' actions.[24] In contrast, lawyer-economists will think that this kind of causal talk obscures a clear understanding of the underlying structure of the situation. According to them, no good lawyer should ever forget that the farmer, no less than the rancher, is a potential planner of his activities. Indeed, assuming zero transaction costs, there were countless things the farmer might have done before the event to avoid the possible harm. He could have built an electric fence, say, to repel the cows abandoned by the lightning-struck cowboy. It is this failure to install the fence, no less than the rancher's refusal to hire an extra cowboy, that the Coasean model identifies as a critical fact worthy of legal attention. Simply because this critical fact is less obvious from a superficial account of the cow-chomping incident, it should not be removed from the list of factors that helped to cause the harm. Instead of sifting the facts in search of *the* cause of the trouble, the lawyer-economist urges a conception of causation that recognizes how a multiplicity of factors, operating over a lengthy period of time, contribute to our legal discontents.[25]

But it is one thing to describe the way in which the assumption of zero transaction costs destabilizes the reactive lawyer's fact-finding enterprise, quite another to grasp how this single assumption could accomplish such a significant transformation. The answer may become clearer if we look upon lawyers as if they were storytellers, and "statements of the facts" as their effort to tell convincing stories. Now every good storyteller knows that the point at which his narrative begins will crucially shape the nature of his story line.[26] Events occurring "before" the story starts will inevitably be treated in a fragmentary way, as flashbacks justified only so far as they enlighten the course of unfolding events. In contrast, a credible storyteller must be more respectful of events occurring once the story has begun. After the "beginning," the story must have a stronger narrative structure, linking events together in a compelling way until the story reaches its "end."

And it is precisely here, on this critical narrative matter of beginnings

24. Both the intuitive appeal and the ultimate limits of the reactive approach to causation can be appreciated by a study of R. EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW (1980); Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979); Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457 (1979).

25. The most illuminating expression of this view by a lawyer-economist is to be found in Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

26. I am referring here to yarns of the Zane Grey type. Although the modernist novel has made us familiar with "stories" told in ways that fracture the traditional narrative's temporal and spatial structure, I shall not here consider the reasons why the law typically demands more traditional storytelling from its practitioners.

and endings, that the assumption of zero transaction cost does its work. Rather than beginning with the moment at which the actors get into some form of obvious trouble, Coasean assumptions force the lawyer to start his story at a much earlier point in time: when the parties might have reorganized their activities in a way that would have avoided the trouble entirely. From this ex ante perspective, the harmful actions arising at a later time may only be symptoms of an earlier failure by rancher and farmer to organize their activities in the best possible way. In contrast, the reactive drama begins with the Coasean finale, the moment at which the cows start munching. While, on occasion, the reactive storyteller may feel obliged to flash back to some earlier moment to enlighten the parties' present struggle, the narrative focuses upon the trouble itself. Within this narrative framework, the rancher's failure to hire a second cowboy, or the farmer's failure to electrify his fence, are but two of the countless nonevents whose lengthy elaboration threatens to destroy the narrative integrity of the tale of deviance and destruction that so urgently needs telling.

To summarize this first, and most critical, difference, I will borrow some useful terminology from Mark Kelman[27] and say that the reactive lawyer employs a narrow temporal frame in stating his facts, focusing upon the culpability of the individual actions that constitute the obvious disturbance of the peace. In contrast, the Coasean insists upon a broad temporal frame, beginning at the moment farsighted men and women might possibly have reorganized their activities to avoid the trouble. Within this interpretive framework, the obvious problem serves as a symptom of a potentially larger problem of social disorganization.

27. Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593-94 (1981). As should be apparent, I also share Kelman's larger goal of explicating the interpretive frameworks prevailing in the contemporary American legal culture. Putting all questions of detail to one side, Kelman and I differ principally in the use to which we hope to put our project in legal consciousness-raising. The only question Kelman seriously entertains is whether his interpretive project is in the service of a neo-Marxist search for the subtle ways in which American law stabilizes class domination or a neo-Realist effort to demonstrate the pervasive importance of "inexplicably unpatterned mediators of experience, the inevitable nonrational filters we need to be able to perceive or talk at all." *Id.* at 671. For me, however, there is a third lesson American lawyers may draw from a deeper understanding of the principles implicit in their interpretive practice. Once the question of temporal framing is brought to legal self-consciousness, perhaps lawyers will be able to reflect more deeply upon the ways in which they are constructing legal reality and gradually proceed to make better sense of the politico-legal world in which they find themselves. Rather than accepting Kelman's interpretation of temporal framing as evidence of our collective "non-rationality," we should recall Immanuel Kant's suggestion that the human capacity to interpret events in temporal terms provides a key to the proper understanding of human *rationality*. *See* I. KANT, CRITIQUE OF PURE REASON 139-40, 144-47 (N. Kemp-Smith ed. 1963).

In raising this more constructive possibility, I do not deny the pervasive reality of non-rational and repressive elements in any existing legal regime. But that is not *all* there is to our (or any?) legal system. Instead, the legal culture maintains a certain relative autonomy from other power systems—giving American lawyers the freedom to use their limited autonomy in thoughtful, as well as mindless, ways. Is it not a task of scholarship to support the constructive use of law's limited autonomy?

Now this is just the transformation that is demanded by our model of activist legal discourse. As we have seen, the activist lawyer cannot simply assume the legitimacy of the ongoing structure of activities, but must somehow be in a position to assess the extent to which entire practices (here farming and ranching) require self-conscious restructuring through the legal order. The Coasean's insistence that the legal story begins not with the trouble, but with the way the parties might have reorganized their activites to avoid it, is precisely the point at which the activist lawyer would want to begin.

2.

It is true, of course, that the next stage in the activist legal story—Coase's famous theorem—has been taken by many to teach a very different lesson: warning us about the danger of overestimating the power of law to reorganize activities. As cautionary tales go, however, the Coase Theorem is pretty weak stuff. The crux, once again, is the critical role that the absence of transaction costs plays in Coase's cautionary conclusion. It is hardly dispiriting for an activist to learn that the law would not affect the way in which perfectly foresighted ranchers and farmers organized their activities in a world of frictionless transactions. Everybody is perfectly aware that the real world is no Coaseland, and that the Coase parable can therefore serve only as a prologue that demands completion by a systematic study of the countless transactional difficulties confronting flesh-and-blood Americans as they try to organize their social lives. Thus, the cautionary character of the theorem should not be allowed to obscure the activist implications of the Coasean insistence that *all* legal stories begin at a new narrative starting point. Indeed, the full Coasean statement of the facts is certain to reveal a *rationality gap*—a set of real world structures that makes it impossible for actors to realize the hyper-rational potential revealed by the Coasean prologue.

3.

Only at this point do the narrative accounts produced by different lawyer-economists begin to diverge. While all are aware of the rationality gap, they disagree about the extent to which a "statement of the facts" loses legal credibility by failing to fill the gap with great gobs of thick description. Simplifiers treat the Coasean narrative as more-than-half-the-story. While they recognize the theoretical possibility of market failure, they always seem surprised when they encounter one in the real world, and try their best to convince themselves that the rationality gap may be filled by some very interstitial form of judicial intervention. Complexifiers,

in contrast, treat the Coase theorem as a prologue to a three-part drama: act one, the elaboration of an intricate web of market imperfections; act two, the emphatic denial of the possibility of a perfect solution; act three, 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.

Now, so far as each particular lawyer is concerned, the choice between simplifying and complexifying strategies will be resolved by a complex of personal, political, and even aesthetic motivations. Rather than indulging in curbstone psychoanalysis, however, I am more interested in the longer-term movement of professional culture. Here, there is reason to anticipate a generational drift toward increasingly complex narrative. To speak of legal trailblazers: While the new legal rhetoric's recent past has been too often characterized by sub-Posnerian simplification, the future drift will be toward super-Calabresian complexity.[28] For it is the very success of the simplifiers in gaining attention for the new language of power that will prove their ultimate undoing. The key point here is to recognize that, in the law at least, familiarity breeds the very reverse of contempt. As soon as lawyers are convinced that arguing about transaction costs may win cases, they can be relied upon to complexify the new conceptual apparatus in any way that will suit their clients' interest. Over time, it will become increasingly clear that the varieties of transactional failure are almost infinite and that the profession must develop an elaborate set of categories if it hopes to complete the Coasean prologue in a way that is equal to the wide range of transactional structures revealed by the stream of cases. The predictable result is that the initial parable of the rancher and the farmer will begin to seem a rather easy case of externality, in which only "imperfect information" and the costs of negotiating a full set of "contingency contracts" impede the parties' capacity to reorganize their activities. Other cases will reveal a deeper set of structural impediments. When held up to the light of the Coasean model, our real world will come to seem a place full of pervasive transactional problems with many names—"free ride," "moral hazard," "bounded rationality," "non-convex demand and supply curves," "imperfections in capital markets," and so forth—each requiring

28. The approaches of these authors are set out in R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); G. CALABRESI & P. BOBBITT, *supra* note 7; G. CALABRESI, *supra* note 10. It should be noted that Coase's seminal article was delicately poised between simplicity and complexity: While the essay begins with its path-breaking speculations about economic and legal life in a world without transaction cost, *see* Coase, *supra* note 19, at 2-8, it concludes with a strong affirmation of the importance of taking transactional imperfections seriously in serious law and economics, *id.* at 15-19. At about the same time Coase was writing his essay, Calabresi was reaching similar conclusions in work proceeding independently of Coasean influence. *See* Calabresi, *Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

systematic attention in the analysis of one or another market failure.[29]

This new form of factual analysis, moreover, provides a powerful impetus for distinctive forms of legal generalization. As the complexifying Coasean states his version of "the facts" in more and more cases, it will become ever clearer that different branches of the law treat similar market failures very differently. "Nuisance," "products liability," "fault," for example, will begin to seem different common law labels for handling a set of interrelated problems organized by the existence of similar externalities and related market failures. Since lawyers are taught that like cases should be treated alike, this perception of factual similarity will generate a cognitive drive for a new synthesis. Is it not time to think the externality question through in a systematic way, reconstructing the law to deal responsively with the facts that the new analysis reveals to view?[30]

This question applies with even greater force to the disordered heap of statutory law that dominates today's legal landscape. Vast forests of statutory detail, previously consigned to the wilderness of "environmental law" or "health and safety legislation" or "oil and gas law" or "securities regulation" can be reduced to cognitively manageable terms as soon as they are seen as efforts to come to grips with a series of interrelated market failures. This perception, moreover, makes it possible for legal specialists to increase vastly their range of reference as they debate the proper way of responding to problems arising under their particular statutory regime. While a layman might think that there is almost nothing in common between, say, the problems raised by securities fraud and those raised by air pollution, a common externality analysis makes it possible for lawyers in one field to learn from the regulatory experience in another.[31] The ground is being prepared for a professionally disciplined effort to compare and assess a broad range of responses to market failure in terms of a common legal language.[32]

29. While lawyers can take advantage of an already enormous, and rapidly expanding, technical literature in economics on all these subjects, the work that will have the largest impact will combine technical mastery over the anatomy of transactional failure with a genuine appreciation of legal and institutional complexity. For a seminal contribution of this kind, see O. WILLIAMSON, MARKETS AND HIERARCHIES (1975).

30. For a particularly influential constructive answer to this question, see Calabresi & Melamed, *One View of the Cathedral: Property Rules, Liability Rules and Inalienability*, 85 HARV. L. REV. 1089 (1972).

31. Not that the problems are identical, of course, but that makes the comparative market failure/legal response analysis only more interesting.

32. In this regard, S. BREYER, REGULATION AND ITS REFORM (1982), marks a breakthrough—not so much in the novelty of its conceptual apparatus, but in its systematic and balanced application of the new learning to a host of legal problems characteristic of an activist state. Rather than a path-breaking article, Coase, *supra* note 19, or a brilliant monograph, G. CALABRESI, *supra* note 10, or a student textbook, R. POSNER, *supra* note 28, Judge Breyer's book speaks in a persuasive way to practicing lawyers grappling with the practical problems of activist legislation, administration, and (to a lesser extent) adjudication. Even more important in this respect is the eight-volume treatise by P.

## B. *Extending the Paradigm*

The Coasean reconstruction of "torts" is not only important in itself; it is also paradigmatic[33] of larger efforts by lawyers to reconstruct their interpretation of "the facts" throughout the length and breadth of the legal culture. While this essay cannot hope to establish such a sweeping claim, two brief extensions may serve to render the hypothesis plausible.[34]

### 1.

The first extension follows the Coasean reformulation from its origin in torts to neighboring legal domains. To see the potential here, simply use classical legal language to describe the way in which the Coasean manages the movement from a narrow to a broad temporal framing of the standard torts dispute. By beginning each torts dispute from an earlier point in time, Coase invites us, as it were, to look upon all torts disputes as if they began as problems of contract, in which farsighted farmers and ranchers might bargain their way to a well-defined solution. If this emphasis on contract, however, permits a new perspective on torts, might it not also permit a new perspective on contract?

The answer is yes, and yet there are paradoxes aplenty in the rebirth of contract heralded by Constructive lawyers. For the new emphasis on transaction costs requires the lawyer to reflect upon the inadequacies of contract as an organizational device in ways unknown to his more reactive predecessors. No longer is the treatment of contract limited to the classic excuses and justifications of interest to the reactive lawyer—mistake, impossibility, and so forth.[35] There is a new emphasis upon the way each individual bargain is constrained by different transactional impediments that make frictionless negotiation impossible. Not only do the very same transactional difficulties afflicting tort law—information-imperfections, externalities, and so forth—also pervade contractual settings, but there are also difficulties that are even more salient in contract than they were in

AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (vols. 1-3 (1978); vols. 4, 5 (1980); vols. 6, 7 (forthcoming); vol. 8 (1982))—the first time that practitioners of the new learning have ever aspired to the legal authority that is uniquely associated with the treatise form. For some further reflections on the changing role antitrust has played and is playing in the development of the new form of legal analysis, see *infra* pp. 1108-09.

33. This is not a place to enter into the definitional wars surrounding Thomas Kuhn's use of the idea of a paradigm in his seminal work, T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). It would be disingenuous, however, to deny that Kuhn's work has been a source of inspiration for the present essay.

34. A recent Symposium, published after work on this essay was completed, contains a good deal of material that is relevant to an assessment of my hypothesis. *See* Symposium, *The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983).

35. These classical issues, however, will predictably be subjected to re-analysis. *See* A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW (1979).

torts—"moral hazard," "monitoring costs," "first mover advantages," and the like.[36]

This recognition serves, in turn, as a second source of energy for the activist generalizing impulse. Precisely because contract is a systematically defective tool for coordination, it is natural to search for other legal forms that might transcend the frictions of the contractual setting. However, each of these forms—from the old law of principal and agent, through the modern forms of partnership and corporation, to the varieties of governmental ownership and regulation—is found, soon enough, to solve the transactional problems of contract only to generate new kinds of transactional difficulties of its own.[37]

In addition, the systematic emphasis upon the inadequacies of contract reinforces the sense that the particular troubles brought to the attention of courts, agencies, and legislatures may well only be the symptoms of some deeper organizational failure. As in torts, so in contracts, the Constructive analysis forces the legal conversation to begin at a new point—starting the story with the possibility that the law might reconstruct organizational forms in ways that allow citizens to ameliorate, if not eliminate, the conflicts that appear so intractable on the surface of everyday life.

2.

It is odd, perhaps, to think of the second extension of Coasean analysis as an extension at all. Chronologically at least, the lawyer-economist's description of reality first achieved professional recognition not in the fields of torts and contracts, but in public law areas like antitrust and regulated industries.[38] Indeed, the existence of these conversational beachheads helps explain, I think, the Coaseans' more recent successes in penetrating the legal culture. However disturbing a lawyer may find talk of externality or contract failure, he cannot deny that the relevance of simi-

36. *See, e.g.*, Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979); Williamson, *The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979).

37. In addition to O. WILLIAMSON, *supra* note 29, and Williamson, *supra* note 36, the seminal contribution of Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), has prompted a renewed appreciation of the roots of corporate structure in contractual failure—a lesson that Coase taught long ago in Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

38. *See, e.g.*, C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959); L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION (1952). Indeed, Coase himself can be understood to have achieved his breakthrough in tort law by generalizing the transactional approach to questions of industrial organization he had developed earlier. *See* Coase, *supra* note 37; Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959). Given the historical depth of the lawyer-economist's treatment of industrial organization, it is hardly surprising that the new learning has first expressed itself in the form of an authoritative treatise in this area. *See* P. AREEDA & D. TURNER, *supra* note 32.

lar-sounding stuff is an established professional fact across the dim boundary that separates private from public law in an activist state.[39] Yet, despite its priority in time and its continuing legal importance, I do not think it wrong to subordinate the old law and economics to the new in this sketch of the present legal situation. For, so long as the use of "law and economics" was restricted to a small number of specialities, the distinctive character of the antitrust lawyer's construction of reality could be plausibly viewed as a cultural phenomenon of purely local legal significance—on a par, say, with the use of psychoanalytic discourse by the criminal lawyer when dealing with the insanity defense. It is only with the new law and economics that the cultural whole comes to seem larger than the sum of its parts: when the old law and economics is coupled with the new, the result is not two distinct legal discourses but a *general* legal discourse permitting lawyers, regardless of their field, to draw upon a common fund of Constructive ideas.

Indeed, this fact is signaled by the way in which the old law and economics takes on more general legal meaning for lawyers who were sublimely indifferent to it in the past. No longer denoting isolated specialties, "antitrust" and "regulation" mark conversational areas in which the structural descriptions increasingly familiar in torts and contracts are generalized yet further: from this-or-that struggle between rancher and farmer, this-or-that response to contractual failure, to the way entire sectors of the economy relate to one another. As in the more microscopic forms of structural analysis, legal conversation begins here with an imaginary prologue about life in a frictionless world inhabited by hyperrational actors capable of recognizing all the implications of their organizational activities. Once again, however, the analysis of the frictionless world of perfect competition can serve only as a prologue for real-world analysis, in which one gains an understanding of the way firms exploit underlying production possibilities and transactional barriers to gain competitive advantages over potential rivals. As always, some lawyer-economists—the Chicagoans—tend to become impatient at this point in the story. Just as they would like lawyers to talk torts as if they lived in a world very close to Coase's never-never land, so too they are happiest when talking about antitrust in a world that seriously departs from "perfect" competition only rarely and in well understood ways. But there is nothing that forces the rest of us to mistake the prologue for the play.[40]

39. *See supra* pp. 1092-94.

40. Economic efficiency, of course, is not necessarily all there is to antitrust. Even those—and I am one of them—who resist the Chicago reduction of antitrust policy to "economic efficiency," in the manner of R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978), would hardly deny that the economist's "statement of the facts" is an essential preliminary to the mature legal discussion of the political and economic values at stake in the law of industrial organization.

## C. *Enriching the Paradigm*

We find ourselves, then, in the midst of a very rare event in the life of the law—the rise to professional maturity of a new construction of the facts. How, then, to make the most of our maturity?

### 1.

Beginning on the technical level, it is not too early to call for the next advance in activist fact-finding sophistication. It is one thing, say, to recognize that the Clean Air Act can be viewed as a response to a complex set of externalities or that ERISA, the federal statute regulating private pensions, may be viewed as a response to the problems of contractual failure. It is quite another thing to make the concrete factual findings necessary to frame a professional discussion of the extent to which the Clean Air Act or ERISA can, through proper bureaucratic and judicial interpretation as well as legislative revision, be made into *appropriate* legal responses to the structural problems that have been identified. To take this step, we cannot content ourselves with a graphic description of Smokestack No. 9's belching black discharges or a story about the way the loyal Mary Jones was deprived of her pension by the sudden failure of Bankrupt, Inc. While such anecdotes may catalyze concern, we must set them in a larger context, systematically describing the way a mass of industrial emissions moves from airshed to airshed to cause pollution or the way people move from job to job on their path to an impoverished retirement.

To appraise these facts competently, we must rehabilitate a word that, in current professional usage, functions as little more than an all-purpose term of abuse: "formalism." Whatever may have been true during an earlier time, "formalism" can no longer be taken to imply an attitude of blind indifference to the facts of social life. Instead, it is continuing hostility to "formalism" that will condemn lawyers to fact-finding impotence in the modern era. Quite simply, we are already in the midst of a revolution in information-processing that permits, for the first time in history, a disciplined empirical analysis of the structural facts of central importance to activist legal decision. Increasingly, the call for an appropriate "statement of the facts" will generate mountains of computer printout detailing a proliferating number of scenarios of obvious relevance to responsible activist decisionmaking. And until lawyers understand the formal economic, political, and sociological presuppositions of particular computer analyses, they can play only three roles in the fact-finding process. Most obviously, they may play the obscurantist, and deny that the computer printout is worth the paper it is written on; or they may worship blindly before the shiny new shrine of the American Enlightenment, and believe everything the

computer tells them (so long as it is not patently absurd); or they may play the moralizer and make sure that the manipulators of the black box are not obviously corrupt or biased. And of course, they may combine all three poses in the endless permutations known to every student of modern administrative law.

One thing they will not be able to do, however, is to engage in a meaningful dialogue with the model builders. Yet it is *only* through this dialogue that lawyers can help unearth many of the controversial legal questions that are raised in every effort to state the structural facts. While a conversation between lawyers and modelers can misfire even under the best of institutional conditions, administrative law cannot even begin to take institutional problems seriously as long as lawyers are professionally incapable of carrying on their side of the dialogue. Until the profession achieves minimal discursive competence, the legal pursuit of activist values will increasingly proceed on the basis of a "statement of the facts" that begs all sorts of fundamental legal questions.[41]

Not that every competent lawyer must be put into a position to manipulate the latest computer-software package on his own. The key here, as elsewhere, is to permit the lawyer to ask the right questions—questions that arise time after time in appraising the computer construction of legal reality. My own experience teaching such matters[42] suggests, moreover, that a good deal could be achieved along these lines in a relatively short period of time—certainly no more time than the average law student characteristically devotes to the mysteries of trial practice and the law of evidence.[43] What is lacking at present, however, is a general recognition of the pressing legal importance of questioning computers with the same seriousness that we already invest in cross-examining eyewitnesses to the disturbing events that catalyze the concern of reactive lawyers. It is, in short, past time to redeem Holmes' century-old prediction that the future of the law belongs to the master of statistics, no less than economics.[44] Indeed, to allow law students to continue to graduate without the slightest understanding of statistical reasoning and formal modeling is nothing short of a scandalous dereliction of our professional responsibilities.[45] If

41. The legal challenges posed by a rising technocracy are discussed more elaborately in B. ACKERMAN, *supra* note †, at 105-10.

42. *See* B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1982); B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY (1974).

43. Moreover, entering students can be expected to come to law school with an increasingly sophisticated store of computer lore, thereby making the pedagogic task more manageable over time.

44. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

45. Indeed, insofar as the computer is entering legal education, it is as an instructional gimmick, allowing the student a new form of interactive instruction that may usefully complement more traditional forms of pedagogy. While I have no doubt that "programmed learning" ought to occupy an

we continue down this misguided path, we will in the end break a fundamental promise made by the New Deal: that American lawyers can indeed help keep the law responsive to the changing facts of social life in a way that promotes the activist concerns of their fellow Americans.

There is, of course, a danger here—that the Constructive lawyer of the future may become a computer addict who is obtuse to any fact he cannot model and quantify. The best cure for such a disease, however, is some thoughtful professional training in the uses and abuses of computer-modeling in the activist legal process. For the next generation, moreover, the more serious legal pathologies will arise from acute computer anemia, rather than computer addiction. In particular, a profession of statistical innocents will tend unduly to fixate upon the just-so stories the simplifying Chicagoan will be happy to tell about life in Coaseland, rather than to push onward to the concrete investigation of the transactional failures that arise in the real world. If we are to move beyond Chicago-style simplicities, the cure must be more computer modeling, rather than less; a deeper appreciation of the complexities of market failure and probabilistic inference, rather than an uncritical attack on formalism in all its forms.[46]

2.

And the same is true when it comes to the next generation's effort to move beyond the more fundamental limitations of the Coasean construction of reality. A Constructivist theory that focuses upon the varieties of market failure without paying equal attention to the reality of political and bureaucratic failure is transparently inadequate. Yet we continue to tolerate a professional discussion of these matters that rarely moves beyond the banalities of high school civics. This failure is all the more curious in light of the achievements of the last generation of political scientists. While some of this work requires formal logic for its ready comprehension, almost all of it is easier to understand than modern mathematical economics.[47] There is no excuse for activist lawyers to ignore its obvious relevance to their central concerns: How can we *possibly* under-

important place in legal education, this is *not* the kind of instruction I am advocating here. Rather than programming computers to teach law to lawyers, I am interested in educating lawyers to keep computers under legal control.

46. While critical theorists have been emphatic in their condemnation of "formalism," *see, e.g.*, Kennedy, *Legal Formality*, *supra* note 16, at 377-91; Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 16, they have not yet, so far as I know, specifically focused upon the use of the computer in activist fact-finding. Is it too late to hope that a more discriminating critical attitude toward formalism may yet emerge?

47. Seminal writings in this area include K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); D. BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); A. HIRSHMAN, EXIT, VOICE, AND LOYALTY (1970); M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

stand the activist state without a clear sense of the ways legislatures and bureaucracies can use and abuse their powers?

It is no less obvious that the present-day Coasean has not even begun to consider how the law shapes social perception and evaluation through a complex process of education and indoctrination.[48] Although this is a very great failing, it simply serves to mark Coaseanism, despite its triumph in redefining the legal time-frame and refocusing attention upon the reorganization of activities, as a very primitive form of Constructive thought. It is a strength, rather than a weakness, of the present moment that this failure is so transparent. Collective dissatisfaction serves as the best prod for deeper Construction in the years ahead.

## IV. Constructing Legal Values

The Constructive effort to "state the facts" does more than just impose new cognitive demands upon lawyers who wish to perform credibly in the computer age. It also places great pressure on the legal culture to confront the underlying values at stake in the ongoing effort at activist governance: How to tell a market "failure" from a market "success"? What *are* the legal values endangered by the uncontrolled operation of the invisible hand?

These questions can no longer be consigned by the profession to some faraway conversational domain inhabited by politicians and citizens. With increasing frequency, lawyers will find themselves confronting a cluttered desk heaped high with bureaucratic edicts, judicial utterances, and legislative commands. If they are to shape all this raw law-stuff into persuasive argument, they can hardly avoid reflecting upon the more general activist values that putatively justify all this legal activity. Rather than accepting the reactive constraint upon professional argument,[49] perplexed activist lawyers will look to Constructive essays—of the kind presented by Richard Stewart in this Symposium[50]—for normative orientation.

Though the prevailing rationales for governmental intervention will become a principal subject for lawyerly conversation, the need for *some* kind of professional discipline will, however, remain undiminished. After all, so long as we live in a democratic state, it is up to the People, and not their

48. For a usefully skeptical review of the sociological literature, see Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379; for an illuminating effort to reinvigorate Weberian insights, see A. KRONMAN, MAX WEBER (1983); for my own choices in contemporary cultural anthropology and sociology, see Ackerman, *supra* note 2, at 372 & nn.41-44.

49. *See supra* pp. 1086-88.

50. *See* Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. (1983) (forthcoming). This is not the place to discuss the particular points at which I agree or disagree with Stewart's substantive account of activist legal values. My point here involves the *genre* of activist legal writing which Stewart's essay exemplifies.

lawyers, to decide upon the activist principles that will inform the legal system.[51] If lawyers do not like the principles, *P*, that the People have chosen, they can try to persuade the People to change their mind. In the meantime, they have a democratic obligation to use *P*, rather than not-*P*, in legal argument. How, then, to identify those activist principles that have already been endorsed by the People and distinguish them from the not-*P*s that are still struggling for recognition in the agon of democratic politics? It would be nice, I suppose, if the People's representatives stated their activist principles clearly and incisively on the surface of their legislation. In the half-century since the New Deal, however, American lawyers have begun to reconcile themselves to the reality of a very different legal world, one full of dim light and half shadow.

Not that our legal picture is entirely gray on gray. Certain things *are* so plain as to be beyond serious argument. Fifty years after the New Deal, it is no longer plausible to assert that American law is governed by strict adherence to laissez-faire principles; it is equally silly to suppose that the New Deal has ushered in an era of Marxist collectivism. While right- and left-wing excursions into doctrinal analysis may well contain valuable insights, they inevitably oversimplify our present legal situation, in which a distinctive complexity is generated by the New Deal's effort to depart from Lockean laissez faire without taking the path to Marxist collectivism. The challenge, in short, is to make sense of the distinctive topography of a legal system that aims to occupy the high middle ground disdained by the followers of Locke and Marx alike. How, then, to elaborate and identify the aims of a legal system that is activist without being authoritarian, liberal without being libertarian?

### A. *The Poverty of Welfare Economics*

It is here, once again, that the lawyer-economist is all too eager to offer assistance to the puzzled Constructivist. If economics permits a disciplined way of talking about the facts of market life, will it not also answer the normative questions raised by the new structural facts?

The slightest degree of historical perspective should caution against an overly eager yes. Economics, after all, has suffered its own ordeals during the last half-century. Most important for our purposes is its extraordinary success in purging itself of explicit and elaborate reflection on its relation to the broader problems of political philosophy.[52] Perhaps this absolute

51. *See supra* p. 1092.

52. A philosophically sophisticated history of the past half-century's intellectual developments in Anglo-American economics has yet to be written. For a clever review of the literature, see McCloskey, *The Rhetoric of Economics*, 21 J. ECON. LIT. 481 (1983). For the canonical decree establishing an absolute divorce between economics and philosophy, see L. ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE ch. 6 (1932). Robbins' arguments betray a naive self-confidence

divorce from philosophy was the price economists had to pay for their century-long marriage to English utilitarianism. The only way to free the profession from its former love was to assure it that the entire question that utilitarianism sought to answer was utterly "meaningless." Perhaps, as many economists themselves believe, good positive economics requires the profession to draw a hard positivist line against the infection of factual findings by subjective value judgments. In any event, a pervasive suspicion of elaborate value-talk is now a deeply rooted professional prejudice among economists—one that will take a long time to undo, if undoing there is to be.[53] In the meantime, however, the profession's strong positivist prejudices must be taken into account by any lawyer who wants to master economics for law's purposes, rather than the other way around.

Before following the Chicagoan on a quick raid across the disciplinary frontier in quest of "economic efficiency," Constructive lawyers must recognize that the discipline of welfare economics was not formulated with their interpretive needs in mind. To put it mildly, Hicks, Kaldor, Scitovsky[54] and the rest were not primarily trying to develop a form of value-talk capable of expressing the distinctive concerns of the modern American activist state. Instead, the founders of contemporary welfare economics were seeking to find a place for value discourse within a profession caught up in an extreme form of positivism that called into question the meaningfulness of *any* normative judgments. In such a hostile environment, those seeking to rehabilitate the meaningfulness of normative discourse should be expected to proceed with extreme caution. Only a foolish advocate would try to persuade such an audience of the error of its ways by producing an all-inclusive theory relating principles of market exchange to a comprehensive conception of social justice. Given its positivist prejudices, the audience would simply be unwilling to suspend its disbelief for the time necessary to consider an argument as long and complex as, say, the one to be found in *A Theory of Justice*.[55]

If the advocate was to make any headway at all against the attitude that

in the logical positivism then so important in English philosophy. The frequency with which Robbins is still parroted a half-century later provides the best index of the extent to which professional economists have insulated themselves from the main currents of contemporary philosophy.

53. At the moment, the most important philosophical voice within economics is surely Amartya Sen's. *See, e.g.*, Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463 (1979); Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977). Unfortunately, Sen's philosophical interests, like those of Kenneth Arrow in the preceding generation, may turn out to be so exceptional that they merely confirm the profession's pronounced positivist prejudices.

54. For representative works, see Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941).

55. J. RAWLS, A THEORY OF JUSTICE (1971).

all normative judgments were "arbitrary," he would have to adopt a very different rhetorical strategy—one familiar to any lawyer who has tried to convince a jury deeply suspicious of his client's cause. Rather than produce an elaborate alibi whose very complexity reinforces the jury's suspicions, the rhetorical objective is to advance a "simple" story that seems so "obvious" that the jury would be seduced into suspending, for a moment, its pervasive suspicions. Given the welfare economist's particular audience, moreover, the selection of an "obvious" story is not very difficult. If a jury of professional economists might be induced to believe *anything*, it would accept the notion of Pareto-superiority: if a trade between *A* and *B* makes nobody worse off, and at least one better off, then it is a good thing. After all, what would you think if you were going to spend your entire life describing trading behavior?

However humbling this may seem to the economist, it is only by likening him to a trial lawyer that I can account for a remarkable rhetorical anomaly in the welfare economics literature. Although the writing in this field is notorious for its formalism, subtlety, and complexity, Pareto-superiority is typically presented as if it were some form of self-evident truth whose mere utterance suffices to demonstrate its validity. Repeat after me: What could one *possibly* say against a legal change that one person thinks makes him better off when the change does not make anybody else say that he is worse off?

The answer is that there is a *lot* that could be said: a great deal, for example, about the way capitalist ideological hegemony prevents most of us from understanding our true interests. From the tone of his voice, however, the welfare economist makes it indisputably plain that he means to be asking a rhetorical question, one not to be taken seriously.[56] Indeed, silence is probably his best response: if he actually tried to explain why he thought objections to Pareto-superiority misconceived, ninety-nine times out of a hundred he would merely demonstrate that he was philosophically unequipped for the task.

Do not mistake me. I *do* believe that Pareto-superiority is, in general, an appropriate tool for lawyerly appraisal within a liberal legal system like ours—though even here there are problem cases that can profit from special consideration.[57] My point is not that Pareto-superiority is indefensible in serious legal conversation (indeed, I have written a book defending it),[58] but that it is only within a peculiar professional culture that an ad-

56. In contrast to the normal usage in this essay, "rhetoric" is advanced here as a term of opprobrium.

57. The dilemma of the Paretian liberal is described in Sen, *Liberty and Social Choice*, 90 J. PHIL. 29 (1983); the case of Shifty is discussed in B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 197-98 (1980).

58. *See* B. ACKERMAN, *supra* note 57, especially at 168-200.

vocate might successfully persuade an otherwise skeptical jury that the principle needs no defense.

Once we recognize this, we may gain some lawyerly insight into the next stage in the rhetorical development of welfare economics. As with any other effort to articulate a simple proposition that will serve as moral bedrock, the problem with Pareto-superiority is that it has a very limited domain of practical application. Most real world legal arguments generate results that, even when viewed ex ante, make some people better off only at the cost of making others worse off. As this becomes plain, moreover, only two responses are possible.

The first is purism: as soon as the welfare economist glimpses normative complexity, he refuses to dirty his hands with the messy business of normative judgment. Beyond Pareto-superiority, there is nothing but a forest of subjective value-judgments that have nothing to do with economics. While this is a common attitude among mathematical economists, there are bound to be more down-to-earth folks who insist on talking about the hard cases that arise in real life. And yet, since systematic normative reflection is no longer a professional option, only one response remains plausible: the path that lawyers call reasoning by analogy.

When confronted with one of the numberless hard cases in which *V*'s legal victory means *L*'s loss, the applied economist need not despair. Instead, guided by his structural statement of the facts, he can glimpse a fruitful analogy between his problem case and the easy cases of genuine Pareto-superiority. After all, his "statement of the facts" presents each problem case as if it were a botched bargain whose consummation has been prevented only by a set of market failures. How natural, then, to analogize the *botched* bargains that make so much normative trouble in the real world to the *perfected* bargains that might have been reached in the frictionless world of perfect markets? Once this analogy is made, the promise of relief for normative puzzlement is not far away. Just as the economist readily intuits the goodness of *real* Pareto bargains, can he not also applaud the results of *potential* bargains? Is there really so much difference between the two cases, after all? While *L* may in fact be devastated by the losses he is asked to bear as a result of a potential Pareto improvement, the fact is that *V* would have been willing to buy *L* off were it not for the transactional obstacles blocking *V*'s way. Should the potential for a genuine Pareto improvement not be enough to warrant praise of the legal change as "economically efficient?"

It is true, of course, that the devastated *L*s of this world may not find much consolation in the thought of the hypothetical riches that would have been theirs in the economist's frictionless Utopia. Moreover, just as the economist never tires of telling disappointed *L*s that there is no such

thing as a free lunch, *L*'s lawyer is always free to respond by insisting that there is no such thing as a perfectly persuasive analogy. Indeed, the lawyer knows from long experience that a speaker can use an analogy in a rhetorically persuasive fashion only if he succeeds in inducing his audience to forget the disanalogous features of the troublesome case. After all, real world *L*s have not in fact bargained for anything. Indeed, they emerge from their hypothetical bargains worse off than they were before they were forced into this odd kind of contract. Rather than allowing the applied economist a cheap analogy with honest-to-goodness bargaining, the lawyer insists upon a sober recognition of the differences, as well as the similarities, between the hard cases of potential Pareto optimality and the easy cases of genuine Pareto improvement: When is it fair to hold a loser to hypothetical contracts? What is so significant about contract analogies anyway? Does the applied economist wish to ground his analogy upon a deeper theory of contractarian legitimacy? If so, why? If not, what *are* the principles of political legitimacy that provide the justification for, and constraints upon, the use of hypothetical contracts as a legitimating metaphor in dispute resolution?

It is at this point, alas, that the conversation outstrips the applied economist's positivistic professional repertoire. If forced to justify his analogy, the applied economist finds himself in an awkwardly exposed position. On the one hand, he knows the purists of the profession find his efforts to extend intuitions of Pareto-superiority to hard cases theoretically indefensible. On the other hand, he knows that an effort to justify his recurring invocation of hypothetical contracts will force him into a field, political philosophy, which he is unprepared to enter as a result of his positivistic inheritance. How, then, to answer the challenge to the easy analogy that lies at the foundation of his appeal to "economic efficiency?"

My own conversations with applied economists suggest that by far the most common response at this point is some plea of confession and avoidance. "What choice do I have?," the applied economist asks rather plaintively. Must I really relapse into purism or lunge blindly into the undisciplined expression of subjective value judgments? It is only by speaking in terms of potentially Pareto "economic efficiency" that I can preserve any professional discipline at all in my talk about real world problems. Is it not appropriate for me, then, to distinguish between those "distributional" judgments that are entirely beyond my professional ken and those judgments of "economic efficiency" upon which I *can* pronounce with something-like-professional-competence? True, I cannot explain to you why my guesses about the terms of hypothetical contracts made by *L* in an unreal frictionless world *ought* to determine *L*'s real world fate. But somehow I do believe that it is important to know how much *V* and *L*

might be willing to compensate one another for the losses the law may impose upon them. Don't you agree?

## B. *Toward Law and Economics*

To be sure, activist lawyers reply, but we cannot appraise the legal value of economic efficiency until we press the conversation far beyond the point to which the applied economist is prepared to carry it. Quite simply, American lawyers emerge from a cultural tradition very different from the scientistic positivism that shaped the present orthodoxy in welfare economics. Far from declaring questions of value meaningless, lawyers aim to present the most persuasive normative account that the facts of a case and the legal materials will allow. Instead of encouraging a search for a couple of unproblematic intuitions that will solve all problems of value, their tradition teaches them that simple solutions are invariably simple-minded, that their first and most important duty is to confront the complexity of legal dilemmas in a self-conscious and disciplined way, that the process of debating and refining the issues is no less important than the substantive values that are shaped and reshaped in the resulting public dialogue. Within this cultural context, using economic efficiency as a talisman for mature legal evaluation will inevitably seem woefully naive, no matter how sensible it seemed to hardheaded economists struggling to find a place for value in their positivist subculture.

The weight of the legal tradition will not, however, restrain all lawyers from aping the applied-economics talk familiar on the other side of the disciplinary boundary separating law from economics. Just as some true believers simplify their Coasean statement of the facts by refusing to take pervasive market failure seriously, so too they may simplify their statements of value by trivializing anything that cannot be reduced to economic efficiency. It is this reductionism, of course, that accounts for so much of Chicago's legal notoriety.[59]

Before such a rhetorical strategy can possibly succeed, however, Ameri-

59. It is a sign of the power of the legal culture, however, that trivialization does not come as easily to Chicago lawyers as it does to Chicago economists. Thus, while thousands of applied economists are content to use cost-benefit analysis in their practical activity, it was only an efficiency-minded lawyer like Richard Posner who thought himself obliged to *defend* economic efficiency in philosophical terms. See R. POSNER, THE ECONOMICS OF JUSTICE 48-115 (1981). Not that Posner's effort was particularly successful. Devastating critiques of his work include Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* The Economics of Justice, 34 STAN. L. REV. 1105 (1982); Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980). My point is, rather, that Posner remained enough of a lawyer to see that an elaborate normative defense was a conversational necessity before he could reasonably hope to convince his legal audience of the validity of his approach. In contrast, equally thoughtful Chicagoans who were interested in speaking principally to economists, rather than lawyers, persist in speaking about values in the crudest possible positivistic terms. *See* Becker & Stigler, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977).

can law must be transformed by a political revolution equal in force to, but opposite in direction from, the one whose consequences upon the legal mind this Symposium is investigating. Begin with the epic struggle between New Deal and Old Court that signals the constitutional triumph of the activist state. Since the fall of *Lochner v. New York*,[60] American lawyers have been taught to distrust the very analogy upon which the welfare economist builds his normative certainties. Where the applied economist begins with the dogmatic assertion of the unproblematic character of Pareto-superior contracts, the fate of *Lochner* cautions lawyers against placing any great weight on the abstract value of freedom of contract. Where the applied economist seeks to identify the contractor who would pay the most for the disputed legal right in a world of perfect markets, *Lochner* teaches us the legal folly of equating market efficiency with social justice.

To make matters worse for the Chicagoan, there is *Brown v. Board of Education*.[61] While every lawyer must make his peace with *Lochner*, the terms of this accommodation may be framed negatively: thou shalt *not* imagine that perfected market justice is all there is to American law. In contrast, *Brown* forces lawyers to come to terms with an affirmative value before they can claim an understanding of the deepest aspirations of our existing legal system. Yet when lawyers turn to the welfare economics literature, they will search in vain for an effort to reconcile economic efficiency with *any* conception of equality. Nor will they be much comforted when they turn from the writings of professional economists to those of economically-minded lawyers who hope for an unproblematic translation of efficiency-talk into the law. When Richard Posner, for example, was pressed to explain the evil of slavery, the best he could do was to assure us that, so long as the dollar value of our labor as free persons is higher than our dollar value as slaves, we have nothing to fear from the great god Efficiency![62]

Yet Judge Posner has done us all a service in explicitly advancing such a trivializing account of the evil of slavery. For his example should shock us into recognizing that, so long as *Brown* remains on the books, lawyers cannot accept the notion that judgments about "efficiency" are somehow less controversial than judgments about "distribution." Within our legal culture, it seems far *less* controversial to say that slavery is wrong because it denies each person's fundamental right to equal respect, than to say that it is wrong only if it is inefficient. Rather than serving as an *alternative* to

60. 198 U.S. 45 (1905).
61. 347 U.S. 483 (1954).
62. R. POSNER, *supra* note 59, at 111; Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 246-47 (1980).

"distributional" judgments, "efficiency" is just one way of talking about the distribution of costs and benefits imposed by the legal system, and an *obviously* inadequate way of making sense of our existing legal system. While the applied economist's analogy to perfected bargains might suffice to satisfy the cognitive needs of a profession operating against a bleak positivist background, it cannot serve as a conversation-stopper for lawyers operating against a deeply entrenched tradition of public dialogue about individual rights and social justice. The poverty of welfare economics is especially apparent when one considers that *Lochner*'s insistence on the bargain principle threatened to destroy the standing tradition of legal discourse, while *Brown*'s affirmation of equality marked the greatest triumph of legality in recent American history.[63]

### C. *The Search for Liberal Foundations*

In rejecting Posnerism, however, I hardly wish to encourage a professional relapse into familiar Realist musings upon the inevitable distortion and inhumanity of abstract legal thinking.[64] To the contrary: When we try to do justice in a Constructive way, focusing upon systemic failure no less than on individual deviance, it is not enough to react intuitively to particular features of individual cases. We must also distinguish the idiosyncratic from the systemic aspects of the facts displayed before us, and frame our legal response in the light of the structural, as well as individual, injustices that the case may exemplify.[65] Where the Chicagoans have gone wrong is in the way they propose to stuff the legal vacuum left by the disintegration of Realistic situation sense. In relying so heavily on the discourse of applied economics to define the aims of activist law, they have produced a positivist parody of Constructive legal thought.

63. These arguments, it should be emphasized, are entirely independent of the Chicago School's effort to establish the economic efficiency of the common law. *See* R. POSNER, *supra* note 28, at 416-17, 439-41. I myself find this effort entirely unpersuasive, for reasons developed by Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980), and Priest, *Selective Characteristics*, *supra* note 5, among others. For present purposes, however, the substantive merit of the efficiency hypothesis as a descriptive account of the common law is secondary to the odd legal methodology employed by the Chicagoans. If one is interested in understanding the values expressed by *existing* American law, the place to begin is not with the "common law" but with the Constitution and governing activist legislation—for if these sources express ideals inconsistent with common law, every competent lawyer knows that constitutional and statutory values trump judge-made law in a democratic system like our own. Yet not even the hardiest Chicagoan would suggest that our statutory and constitutional law displays a single-minded devotion to efficiency. It is this point that serves as the crux of the critique advanced in the text.

64. *See supra* p. 1096.

65. To forestall predictable misunderstanding, I do not believe that idiosyncrasy never counts, or that the assessment of individual responsibility for deviant actions has no place in a mature system of activist law. As I emphasized earlier, *see supra* pp. 1088-94, one of the activist's principal preoccupations will be the effort to reconcile his concerns for social justice with his abiding commitment to principles of individual responsibility. Indeed, it has been a principal aim of my own work to present such a framework. *See* B. ACKERMAN, *supra* note 57, at 180-86, 327-48.

Yet even parodies have their value, if only to emphasize what Constructive lawyers cannot afford to ignore if they hope to remain faithful to their own historical traditions. Unlike the applied economist, *we* cannot reduce legal conversation to a guessing game about the ex ante bargains the parties might have reached in a frictionless Coasean world. Instead, freedom of contract makes legal sense for us only within an institutional framework that guarantees individual contractors a fair share of economic power no less than political and civil rights. It is only a theory that locates market freedom within this larger legitimating framework that can possibly provide a general interpretive framework for understanding existing American law.

1.

It is this recognition, I think, that accounts for the resonant chord struck by John Rawls' *Theory of Justice*[66] in American law schools. Rather than using hypothetical contract as a way of begging the question of the legitimate sphere of market freedom, Rawls uses the idea to put the market in its place. The trick, as we all know, is to place hypothetical contractors behind a thick "veil of ignorance," and explore the ways in which they will seek to cope with the uncertainties generated by unfettered market exchange. Such a thought-experiment, Rawls says, will reveal that competitive markets are acceptable only when controlled by an activist legal system that promotes the ongoing redistribution of economic power to the worst-off class, and guarantees civil and political liberties to all classes. Given this conclusion, it should be no surprise that Rawls was just the thing Constructive lawyers needed as an antidote to the abuse of applied economics. He not only provided a framework for understanding the distinctive legal structures of the American activist state, he did so in a way that encouraged lawyers to reflect upon, rather than suppress, the relationship between activist legal structures and principles of legitimacy deeply entrenched in the tradition of Western liberalism.

The Rawlsian contribution to Constructivist argument was equally important on a more technical level. Rather than celebrating the effort to ground value judgments on highly fact-dependent intuitions, Rawls takes a very un-Realistic path to the meaning of social justice in an activist state.[67] On his view, insight into our more particular intuitions will come only if we look upon them from an "original position" in which we are deprived of *all* concrete facts about our particular society. No reader of *A Theory of Justice*, moreover, could fail to be impressed by the way in

66. J. RAWLS, *supra* note 55.

67. I know of no textual indication that Rawls himself has ever seriously considered American Legal Realism in the development of his own positions.

which the use of a veil of ignorance can indeed transform one's prior intuitions about the nature of social justice.[68] This transformation, in turn, raises deeper questions about the Constructive enterprise. Precisely because the veil of ignorance provides a disciplined way to examine initial intuitions, it is important to examine Rawls' black box with a good deal of care. Does the Rawlsian construction serve as an appropriate test of one's initial intuitions? If so, why? If not, might we design a different thought-experiment that *would* serve as a legitimate test?

Rawls' answer to these Constructive questions resonated deeply within our own legal tradition. His effort to reinvigorate the metaphor of a social contract had obvious connections to the historical foundations of American constitutionalism. Was not the Republic born amidst talk of social contract and individual rights? Was it not peculiarly satisfying, moreover, to put freedom of contract in its place by a complex meditation on the metaphor of contract itself?

Despite its many attractions, however, I think it would be a mistake for the profession to succumb to the image of a social contract in its ongoing effort to articulate the legal foundations of our activist state. Not that the rising forms of Constructive argument ought to deny the normative significance of contract, both actual and hypothetical, in the just resolution of a host of disputes. Nonetheless, I want to deny that bargaining metaphors ultimately do justice to our collective pursuit of activist legitimacy. Instead of defining activist justice by escaping to a never-never land that lies behind a veil of ignorance, Americans have another, better, way of defining the basic terms of activist legitimacy.

It is nothing other than the process of legal disputation itself. 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. The beneficiaries of the status quo, moreover, are not free to ignore their fellow citizens' legal grievances. They must frame—on pain of a default judgment—a legally acceptable response to the question of legitimacy: What gives you, rather than me, the right to resources we both seek to enjoy?

Just as defendants cannot respond by ignoring the plaintiff's question, so too they are not free to rationalize their position by offering any and every reason that might conceivably legitimate their legal position. Instead, each legal culture should be conceived as a vast conversational filter that allows only a small fraction of possible justifications to make their

68. For a thoughtful statement of the Rawlsian position, see Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979). For even stronger critiques of intuitionism as an appropriate form of evaluation, see B. ACKERMAN, *supra* note 57, at 349-78; R. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT (1981).

way into the legal conversation provoked by the question of legitimacy. It is this legally constrained conversation that provides the cultural context to which Americans, throughout their history, have resorted in their effort to articulate the basic nature of their rights against, and duties toward, one another. And it is by reflecting upon the appropriate structure of the ongoing legal conversation, rather than in speculating upon the terms of hypothetical social contracts, that Constructive lawyers may be of the greatest service to their fellow citizens.

Two features of the ongoing process of legal dialogue should be of particular importance in the emerging Constructive understanding. The first is the *comprehensive* legal questioning characteristic of an activist polity. Rather than presuming the sanctity of the distribution of power generated by the basic institutions—contract, property, family, market—thrown up by the invisible hand, the activist lawyer recognizes that any citizen disadvantaged by the status quo may appropriately question the legitimacy of existing arrangements. To put the point in more familiar doctrinal language, my first principle of activist justice—comprehensive legal dialogue—can be viewed as a generalization of the idea of procedural due process. Whenever any person finds any of his substantial interests blocked by the legal protection of the interests of competing citizens, he has a prima facie right to demand a hearing at which he is provided with some reason explaining why the law is protecting others at his expense.[69]

And yet, while activist lawyers insist upon comprehensiveness, they also recognize the dangers involved in opening up all power structures to legal questioning. Once established power structures are stripped of their presumptively legitimate status, how is the law to check a political elite from using a momentary electoral victory as a mandate for the totalitarian overhaul of our basic institutions?[70] The question's importance, moreover, is only emphasized by the weakening of the old ways in which lawyers imposed conversational discipline upon the exercise of power. For, as we have seen,[71] many of the traditional features of lawyerly discourse—its

69. While this principle has been compromised around the edges during the past decade of Burger Court adjudication, even conservative commentators have doubted whether these ad hoc limitations will stand up against the force of precedent built up over the course of the past century. *See* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 432-34 (1977). In any event, my argument does not depend on the precise contours of the constitutional guarantee of due process. Quite apart from the Constitution, the tendency toward comprehensive legal dialogue is expressed in countless statutes, not to speak of daily bureaucratic and judicial practice. While exceptions to the general rule do of course exist, and may even be constitutionally tolerated, this should not be allowed to conceal the central role played by comprehensive legal dialogue in the contemporary American understanding of the legitimation process. *See* Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 NOMOS 126 (1977).

70. *See* THE FEDERALIST NO. 10 (J. Madison).

71. *See supra* pp. 1086-88.

focus on institutionalized expectations, individual deviance, party control, lay adjudication, finality of judgment—were organized around the continuing vitality of the reactive constraint, and can no longer be confidently relied upon to restrain the uses of activist power.

Far from yearning for the return of a (non-existent) Golden Age of reactive constraint, my own vision of Constructive lawyering is one in which the comprehensive questioning of ongoing power relationships is carried out under two constraints that prohibit totalitarian transformations. These principles of Neutrality, developed in my book on *Social Justice in the Liberal State*,[72] are rooted in two core elements of our liberal constitutional tradition. The first principle, a generalization of the establishment clause,[73] forbids citizens from justifying their legal rights by asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows. The second principle, an interpretation of the equal protection clause,[74] forbids the legal recognition of any right that requires its holders to justify its possession by declaring themselves intrinsically superior to their fellow citizens. If I am to be believed, moreover, the outcome of this constrained legal conversation will be neither a blanket endorsement of market efficiency, regardless of the inegalitarian distribution of power upon which the market is based, nor a simplistic repudiation of the ideal of free exchange, merely because it inevitably upsets any static egalitarian pattern. Instead, the upshot of this liberal legal dialogue will be the conditional affirmation of market freedom—conditional on the effective recognition of each citizen's right to enter the marketplace with a liberal education and a fair share of economic power. It is only within this basic structure of undominated equality[75] that the concerns of an efficiency-minded lawyer with the reduction of transaction costs and the perfection of botched bargains can take on legal value. In a world like our own, scarred by deeply entrenched patterns of poverty, racism, and sexism, this means that *lawyer*-economists cannot blandly assume that the activist state is merely concerned with the perfection of the market structures thrown up by the invisible hand. Instead, they also must do justice to the collective aspiration to establish the social preconditions for the liberal legitimacy of the market system.

In short, instead of disciplining the activist state by an appeal to hypo-

72. B. ACKERMAN, *supra* note 57.

73. *See* Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961) (neutrality as organizing principle of religion clauses).

74. *See* Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127 (equal protection prohibits state from declaring one citizen intrinsically superior to another).

75. The concept of undominated equality is elaborated at length in B. ACKERMAN, *supra* note 57, at 3-192.

thetical contract, I aim to mediate ongoing political conflict through a legal culture in which public values are developed in the manner of American law, with adversaries arguing out the merits of their claims under certain fundamental conversational constraints deeply entrenched within our legal tradition. Any effort to use efficiency-talk to blot out this dimension of our legal culture must be seen for what it is, a revolutionary effort to blind Americans to a vital element of their standing tradition.

2.

This is not the place, though, to try to persuade you of the merits of liberal dialogue as a method of disciplining the burgeoning powers of the activist state. Indeed, it will take a generation of argument before we can begin to clarify the stakes involved in adopting one, rather than another, competing legal Construction of the pursuit of justice in an activist liberal polity. Rather than immediate clarity, the short-term prospect is the proliferation of competing Constructions.[76] For surely the notions of social contract and liberal dialogue do not exhaust the fund of legitimating ideas available to Americans seeking to make sense of their legal situation. At the very least, we may expect creative efforts to rehabilitate the utilitarian tradition that has been so unfairly eclipsed by the recent orgy of efficiency-talk. There is no reason, though, for us to content ourselves with the resurrection of older philosophies. Few nations in history have ever

76. *See* Dworkin, *What Is Equality?* (pts. 1 & 2), 10 PHIL. & PUB. AFF. 185, 283 (1981). Like Rawls and me, Dworkin seeks, first, to reject utilitarian solutions to the problem of justice and, second, to reconcile market exchange with an underlying commitment to equality in the initial distribution of material wealth. In his work thus far, however, Dworkin has contented himself with an elaborate description of the particular egalitarian-cum-market scheme he favors. What is required, in addition, is an effort to *justify* Dworkin's particular conception of distributive justice in a way that illuminates its relationship to fundamental elements of the liberal tradition. Nor will it do for Dworkin to proclaim that his favorite egalitarian-cum-market scheme is supported by the American commitment to Equality of Respect, and leave the matter at that. The fact is that there are millions of Americans out there who will at first deny that equality of respect implies initial equality in material endowments, and will insist instead that a proper conception of liberty or community or family is inconsistent with Dworkin's egalitarian ipse dixits. The challenge is to explain to such people why the principles of activist political legitimacy they *do* accept should lead them, upon reflection, to adopt egalitarian principles in areas, such as material distribution, that they initially believe should be governed by different principles. It is precisely this task that Rawls and I have set ourselves—by showing how larger conceptions of liberal political legitimacy, based on social contract and liberal dialogue respectively, serve to define the rightful place of material equality and market freedom in a just society. Until Dworkin tries to locate his own egalitarian-cum-market scheme within a larger theory of political legitimacy, it is hard for me to tell how deep our differences go on particular doctrinal issues.

It is clear enough, however, that we are of the same mind on one of the main points that he addresses: rather than measuring equality in terms of each citizen's subjective sense of his own personal welfare, liberal principles should lead to a focus upon each citizen's initial share of material resources. While, in my view, this conclusion falls out of more fundamental arguments, *see* B. ACKERMAN, *supra* note 57, at 45-59; Ackerman, *What Is Neutral About Neutrality?*, 93 ETHICS 372, 377-83 (1983), it is useful to learn that this emphasis on material wealth, rather than psychic welfare, can be supported by Dworkin's more intuitionistic approach.

embarked upon such a large and complex effort to reconcile the competing claims of social justice and individual freedom. Fewer still have survived a half-century without suppressing one value in the name of the other. The practical experience we gain from our successes and failures pushes us onward to a deeper understanding of the legitimating principles of liberal activism.

As our Constructive legal experience deepens and expands over time, moreover, there is every reason to expect that critical legal commentary upon it will proceed apace. Present signs indicate that these exercises in "deviationist legal doctrine"[77] will take at least two forms—one communitarian,[78] the other libertarian.[79] These rival efforts to prepare the way for radically different legal futures will converge upon a single critical truth: that the activist liberal present is incoherent and that the effort to build a Constructive legal understanding on such a makeshift foundation is bound to fail. Whatever else it may accomplish, this ongoing critique should serve to fuel the main line of legal activity. The best way to motivate Constructive legal work is to paint pictures of the brave new worlds that may follow the failure of our present enterprise in liberal activism.

I have no doubt, moreover, that liberal activists have much to learn from a serious dialogue with their critics. After all, if we are to redeem the promise of the New Deal, American lawyers can blind themselves to *neither* the libertarian *nor* the communitarian visions of our dissenting legal brethren. The challenge instead is to grasp *both* of our critics' half-truths at the same time, and build the legal foundations of a world where the affirmation of individual freedom does not conceal the pervasive reality of social injustice, where the affirmation of communal responsibility enriches the significance of personal liberty.

Not that a vigorous and constructive legal dialogue can ever hope to

77. I borrow the term from Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 576 (1983).

78. The most significant theoretical work here is R. UNGER, KNOWLEDGE AND POLITICS (1975), which bears a most problematic relationship to the more applied writings associated with the Critical Legal Studies movement, including Unger, *supra* note 77. Compare, for example, Unger's effort in *Knowledge and Politics* to establish the incoherence of liberalism, R. UNGER, *supra*, at 1-144, with his advocacy of "super-liberalism" in his more recent movement writings, Unger, *supra* note 77, at 602. If Unger now wishes "to remake social life in the image of liberal politics," *id.*, surely he owes us a clear explanation of the extent to which, and the reasons why, he has abandoned his prior judgment finding liberalism philosophically bankrupt.

79. R. NOZICK, ANARCHY, STATE AND UTOPIA (1974) is the laissez-faire manifesto that is most visible to contemporary American lawyers. I myself, however, have gotten more out of F. HAYEK, LAW, LEGISLATION AND LIBERTY (vol. 1 (1973); vol. 2 (1976); vol. 3 (1979)) and M. OAKESHOTT, ON HUMAN CONDUCT (1975). For serious legal critiques of activist state premises, see C. FRIED, *supra* note 10; R. EPSTEIN, *supra* note 24; Epstein, *A Common Law for Labor Relations*, 92 YALE L.J. (1983) (forthcoming). While Fried is more prone to profess support for activist conceptions of distributive justice than is Epstein, I myself believe that there is less of a difference between them than meets the eye. *See* Ackerman, *On Getting What We Don't Deserve*, 1 J. SOC. PHIL. & POL. 60 (1983).

compensate for an apathetic and muddled political debate. Yet the reverse is also true: political commitment is no substitute for legal deliberation. While the future of America depends on the American people, the future of American law depends, in a special way, on us.