"The Enchantress" and Karl Polanyi's Social Theory

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[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?

—Justice Felix Frankfurter[1]

I. INTRODUCTION

I was preoccupied with two projects related to my job as a law professor when Robert Louis Stevenson's previously unpublished short story "The Enchantress" came out in the Fall 1989 issue of *The Georgia Review*.[2] I had just started teaching contracts to forty-six beginning law students, and I was doing research designed to bring some of the insights contained in Karl Polanyi's brilliant but controversial 1944 book *The Great Transformation*[3] to bear on certain features of nineteenth century American contract law. So it happened that both activities were fresh on my mind when I first read "The Enchantress," although I must confess that as a lifelong Stevenson fan my only motive in ordering a copy of the story was to get another good read out of an author whose well-known works *Treasure Island*,[4] *Kidnapped*,[5] *The Master of Ballantrae*,[6] and *The Strange Case of Dr. Jekyll and Mr. Hyde*[7] had always given me such pleasure.

I will have more to say later about Polanyi, and how his theory concerning "the political and economic origins of our time"[8] came to frame the way I reacted to Stevenson's remarkable story of a late nineteenth century woman's sham marriage in pursuit of an economic end. For the moment it is sufficient to state that Polanyi concerned himself with two features that characterized the developing capitalist economies of England and other Western European nations during the nineteenth century. Those features were: (1) the tendency of land, capital, and human labor to be viewed and treated as commodities for sale

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1. United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (dissenting opinion).

2. R.L. Stevenson, *The Enchantress*, 43 GA. REV. 551 (1989) (hereinafter *Enchantress*). The story's original title was "A Singular Marriage," but Stevenson struck it out in favor of "The Enchantress."

3. K. POLANYI, THE GREAT TRANSFORMATION (1944).

4. R.L. STEVENSON, TREASURE ISLAND (Heritage Press ill. ed. 1941).

5. R.L. STEVENSON, KIDNAPPED (Signet paperback ed. 1959).

6. R.L. STEVENSON, THE MASTER OF BALLANTRAE (Cassell ill. ed. 1908).

7. R.L. STEVENSON, THE STRANGE CASE OF DR. JEKYLL AND MR. HYDE (Scribner's ill. ed. 1911).

8. This phrase is the subtitle of THE GREAT TRANSFORMATION.

in a self-regulating market; and (2) a social reaction in favor of reform that arose when people perceived the baleful consequences caused by the application of impersonal and individualistic market principles to the working lives and natural environment of human beings.

The social reaction to the individualism of the marketplace that Polanyi described in *The Great Transformation* bears an interesting resemblance to two phenomena that we law professors observe in going about our teaching and our scholarship.

The first phenomenon is the way law students, especially in the first year, react emotionally to some of the decisions that they read in their casebooks. To put the matter plainly, many students simply do not like it when apparently sympathetic parties lose lawsuits to unsympathetic ones just because an abstract rule of law says they should lose. And it does not always make them accept the result to explain that the decision is justified by some consideration drawn from a judge's or law professor's large stock of normative and policy arguments, such as "the doctrine is efficient," or "respect for the Rule of Law requires us to give the unappealing party its rights."

The second phenomenon is the way that judges frequently manipulate legal rules to achieve results that they consider fair. When the manipulations accumulate to a certain critical mass, moreover, the doctrines themselves sometimes move away from a theory of individualism and towards a theory of social control.[9] In the quotation that introduces this essay Justice Frankfurter identified a "principle" of justice and equity that may help judges justify their activities to themselves and to others. But what really *causes* judges to evade and alter legal rules in the interest of fairness and social control?

The two phenomena that I have just described are linked by the participation of law students and judges in the common law process, as that process is broadly conceived. The making and enforcing of common law rules actually begins long before the filing of a lawsuit. Even if we put the makeup of juries aside, the common law process begins at least as early as the pre-legal socialization of those people who are later admitted to law school, and who then become lawyers and judges. In the words of David Kairys, judges, "like the rest of us, form values and prioritize conflicting considerations based on their experience, socialization, political perspectives, self-perceptions, hopes, fears, and a variety

9. Rules favor individualism if they encourage or tolerate behavior in which all available advantages are pressed, and losses and gains are not shared; rules favor social control if they curb self-aggrandizing behavior by mandating forbearance in the exploitation of advantages, and the sharing of losses and gains. As an example of rule distortions accumulating to a critical mass and then causing the law to change in the direction of social control, consider the official explanation of why the Uniform Commercial Code contains a section on unconscionablity:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or a particular clause therein and to make a conclusion of law as to its unconscionability.

U.C.C. § 2-302 comment 1 (1977).

of other factors."[10] This does not mean that law students and judges do not share certain unique perspectives on social life that are born of their membership in an elite professional culture—plainly they do.[11] But law students and judges are also people, and as such they inevitably are members of overlapping social groups (kinship, religious, racial, economic, political, etc.), and ultimately members of the community as a whole. As Mark Kelman recently put it, members of the legal profession could not successfully perform their function of resolving disputes in society "if their positions were wholly the notions of an isolated subculture whose ideas did not resonate among the disputants."[12] When a judge says his conscience is "shocked" by "exploitive and callous practices,"[13] for example, or when he perceives "a threat to the social order as a whole" from some practice against which his "instinctively felt sense of justice cries out,"[14] we can be fairly confident that the adverse reaction does not arise from some isolated and discretely legal part of the judge's mind.

What causes judges to experience reactions like these? Apart from its intrinsic interest, this question has obvious practical and theoretical importance. For one thing, lawyers always are searching for better ways to predict when fairness will trump doctrine in the cases that they handle. But at a different level the question also should interest those academics and social planners who think that law can be used instrumentally to achieve social objectives. Consider, for example, the argument that the common law can and should be used to promote allocative efficiency. Efficiency may require that a particular litigant lose her case, despite its emotional appeal, so that the appropriate incentives will be communicated to others. But if enough judges (not to mention lawyers and jurors) cannot bring themselves to impose the loss in this and other similar cases, the incentives to behave efficiently will be warped or lost.

Of course, what an American law student or judge thinks is fair today probably does not correspond exactly to what, say, Cicero thought was fair in the first century B.C. A social actor's conception of fairness is significantly contingent on his or her historical context. In the United States since at least the middle of the last century the relationships and institutions generated by a capitalist economy have contributed enormously to the context in which problems of fairness have come to the attention of judges. Karl Polanyi argued that the particular form of market system created by capitalism was an important cause of protectionist institutional changes in the political and economic spheres. This essay takes Polanyi's thesis a step farther, and suggests that some of his insights may apply to changes arising within the common law process, as I have defined it above. In particular, the essay discusses the possibility that there is a system-

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10. Kairys, *Introduction*, in THE POLITICS OF LAW 5 (D. Kairys ed. 1982). *See generally* J. FRANK, LAW AND THE MODERN MIND 108-26 (1930); O.W. HOLMES, THE COMMON LAW 5 (M. Howe ed. 1963).

11. "[W]ho lawyers are, what they do, what is their function in society, how they conceive their roles, and their approach and perspectives are conditioned *largely* by their training and by the nature of the legal tradition to which they were first exposed." W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 353 (1973)(emphasis added), (quoting M. WEBER, LAW IN ECONOMY AND SOCIETY ch. 7 (Rheinstein & Shils ed. 1954)).

12. M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 252 (1987).

13. Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264, 265 (1969)(Wachtler, J.).

14. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 85-86 (1960)(Francis, J.).

atic relationship between the widespread market economy in which modern law students and judges find themselves, and the frequency or intensity of their impulses to evade and alter doctrine in the interest of fairness.

The medium for my discussion of Polanyi's thesis in the context of the common law process is Robert Louis Stevenson's "The Enchantress." The story raises fundamental questions about law, exchange, and human exploitation, and it definitely raised a Polanyi-like social reaction in me. Apart from its content, the structure of "The Enchantress" is like a spell of testimony in a lawsuit: the narrator speaks to the reader about what befell him much as a witness might unfold his story to a judge and jury. These considerations led me to ask the students from my two first-year contracts classes to read the story and fill out a questionnaire telling me what they thought about the behavior of the characters. In doing so I hoped to gain direct access to whatever "social reaction" to the story they might display, and thereby to test the plausibility of the idea that there is a linkage between Polanyi's thesis and the kind of emotional reaction to legal materials that I observe so often in the classroom. Some day these law students will be lawyers, and maybe a few of them will become judges. If Polanyi's thesis of a social reaction to extreme individualism applies to the common law process as well as to other forms of institutional change, then what these and other students think and feel about the kind of human interaction portrayed in Stevenson's story eventually could make itself felt in the development of the law.

The next section gives my own interpretation of "The Enchantress." Section III then summarizes Polanyi's substantive thesis on the causes of political and economic change in the developing capitalist societies of the nineteenth century, and draws attention to certain methodological issues that counsel caution to anyone who would compare the reactions of people living in two different historical periods. Section IV first explores the interesting parallel between Polanyi's thesis and the way that many law students experience legal education, and then reports the results of my student survey. The survey hints at the presence of a significant, though by no means universal, Polanyi-like reaction to "The Enchantress." I should stress that my characterization of the student responses is not offered as a quantitative analysis to "prove" whether Polanyi was right or wrong; instead, it is presented as "thick description"[15] at best, in an effort to illustrate that Polanyi's thesis might help us to understand better why many students respond to legal materials the way they do.

Section V of this essay takes a bolder step. It raises the possibility that Polanyi's thesis also might help us understand some of the distortions and changes that have occurred in the common law over the past century and a half.[16] This claim is not without theoretical problems, however, and obviously

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15. The phrase is borrowed from the chapter title of a book by anthropologist Clifford Geertz. C. GEERTZ, THE INTERPRETATION OF CULTURES 3 (1973) (*Thick Description: Toward an Interpretive Theory of Culture*).

16. Michael Hechter notes that *The Great Transformation* "has become something of a classic" in the forty years since Polanyi wrote it. Hechter, *Karl Polanyi's Social Theory: A Critique*, in THE MICROFOUNDATIONS OF MACROSOCIOLOGY 158, 159 (1983); *see also* A. SIEVERS, HAS MARKET CAPITALISM COLLAPSED?: A CRITIQUE OF KARL POLANYI'S NEW ECONOMICS 15 (1949) ("The scope of Polanyi's undertaking is indeed classic."); *cf.* Rutten, Book Review, 6 ECON. & PHIL. 157, 163 (1990) (there are still reasons "for economists to pay attention to

requires empirical support. I therefore describe an agenda of research that might be followed to determine whether Polanyi's thesis can be extended in the direction I suggest. In closing, I advance the idea, based on Polanyi's book, that the processes of ascertaining and developing the *content* of abstract legal rules, and of *applying* those rules in particular cases, must stand in fundamental tension in any society whose economic institutions permit or encourage people to act out of extreme self-interest. I also suggest that as long as the participants in the common law process act "socially" in the way that Polanyi described, that tension will be resolved by results that frequently go against the instrumental premises of the rules. This idea is meant to go behind Duncan Kennedy's familiar model of the "irreconcilable" conflict between individualism and altruism in the rhetoric of judicial decisions.[17] Although I do not offer a grand theory of adjudication, I do mean to describe a social "structure whose causal properties may be having some effects"[18] on how judges decide cases. That is, I mean to propose a mechanism that holds promise of explaining why altruistic modes of argument frequently appeal to judges, and why altruistic impulses frequently prevail in legal decisions.

II. AN INTERPRETATION OF "THE ENCHANTRESS"

"The Enchantress" is about the efforts of a young woman just turned twenty-one ("an orphan of wealth and beauty")[19] to get her hands on the inheritance her father had left her. The will of Emmeline Croft's late father put all her property under the control of a male guardian, a man who is described as a "great and daring card player" with his own money.[20] Unfortunately, he was also imprudent and reckless with the money of others.[21] Although Emmeline feared that her guardian's improvidence might compromise her finances, she also knew that her father's will left a loophole. It allowed her to marry after the age of twenty-one, and if she did this the guardianship would end.[22] Thus Emmeline had to find a marriage partner in order to achieve for herself some measure of financial security, if not independence.[23] The story is narrated by the

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Polanyi"). Although numerous legal scholars have cited the book in the past decade or so, no one to my knowledge has attempted to apply Polanyi's social reaction thesis to those persons who develop and enforce common law rules. The closest anyone has come to this position in print is Karl Klare's citation of *The Great Transformation* to support the proposition, stated in a footnote, that "[t]he institutional structures *and common law rules* undergirding the so-called 'free market' in labor in the nineteenth century *were socially constructed or conventional*, not 'natural.'" Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 765-66 n.104 (1988) (emphasis added).

17. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

18. The phrase is borrowed from Manicas & Secord, *Implications for Psychology of the New Philosophy of Science*, 1983 AM. PSYCHOLOGIST 399, 402.

19. *Enchantress*, *supra* note 2, at 555.

20. *Id.*

21. The narrator tells us that the guardian "was a famous financier" whose financial dealings collapsed some ten years later in a "singular scandal" that involved "thousands in his fate." *Id.*

22. *Id.* at 568.

23. Emmeline single-mindedly pursues a course designed to end the power of one man (her guardian) over her property, and to severely restrict the power of another man (her future husband). Nevertheless, Stevenson perversely has her insist on an antenuptial contract that puts all of her property, except for £300 a year promised to Edward, in a trust to be administered for her benefit by certain "very reputable city men." *Id.* at 566.

husband she selects, Edward Hatfield, and tells how she goes about reaching her goal.

Robert Louis Stevenson was trained as a lawyer, although fortunately for his readers he decided early on to write stories and novels instead of legal briefs.[24] Nevertheless, as I read "The Enchantress" it seemed to me that Stevenson the author had taken counsel of Stevenson the lawyer. This impression did not come just from the narrator's use of the Latin legal terms "*sine qua non*"[25] and "*ipsissima verba*,"[26] or even from Edward Hatfield's frank admiration for the "very tight piece of draughting" displayed in an antenuptial contract prepared by Emmeline's lawyer Venables.[27] Rather, my impression that Stevenson the lawyer played a large role in the conception of this tale came from its overall structure and tone. It seemed to me that "The Enchantress" was the story of a bargain as a lawyer might see it. Emmeline takes advantage of her superior knowledge of the facts and the law to use the physical act of the marriage ceremony as a means to a purely economic end. In doing so she exercises such a high degree of technical bargaining skill that her own lawyer is made to admire her "remarkable capacity" for business.[28] Emmeline, though not Edward, conceives of the marriage act solely as a legal formality devoid of the sentiment and emotion conventionally associated with marriage in Stevenson's time[29] and, for that matter, in our own.[30] Emmeline reaches her goal by employing the vocabulary of contract law, including such words as "consent,"[31] "offer" and "accept[ance],"[32] "condition,"[33] "promise,"[34] "grant,"[35] and

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> [Stevenson's] father was a builder of lighthouses and wished his son to follow his profession, so at eighteen Robert Louis began the study of engineering. He received a silver medal for a paper suggesting improvements in lighthouse apparatus. But the outdoor life of an engineer overtaxed his delicate health and he was obliged, after three years, to give it up for the study of law. He was called up to the bar in Edinburgh in his twenty-fifth year [in 1875], but never practiced.

The Story of the Author, at 8, in THE MONTHLY MAGAZINE OF THE JUNIOR HERITAGE CLUB accompanying R.L. STEVENSON, *supra* note 4. *Contra* THE CAMBRIDGE GUIDE TO LITERATURE IN ENGLISH 950 (I. Ousby ed. 1988), which claims that Stevenson switched to the study of law because "he had no interest in his father's profession."

25. *Enchantress*, *supra* note 2, at 566.

26. *Id.* at 567.

27. The contract gave Edward an allowance of £300 a year but no control whatever over the estate of his wife-to-be. *Id.* at 566.

28. *Id.* at 568.

29. Consider this statement from a prominent treatise published in 1876, the year after Stevenson was admitted to the Scottish bar as an advocate: "[A]s regards marriage, the motive for its inception (in view of the law, whatever it may be in fact) is purely *personal*,—resting on personal preference and attachment, and excluding all reference to considerations of wealth, rank, or fortune." 1 P. FRASER, TREATISE ON HUSBAND AND WIFE ACCORDING TO THE LAW OF SCOTLAND (2d ed. 1876).

30. *See* "Love and Marriage" (lyrics by Sammy Cahn; music by Jimmy Van Heusen), in S. CAHN, I SHOULD CARE: THE SAMMY CAHN STORY 298 (1974) ("Love and marriage . . . go together like a horse and carriage. . . . Try, try, try to separate them, it's an illusion. . . . Love and marriage . . . You can't have one without the other!").

31. "I will starve no man into consent." *Enchantress*, *supra* note 2, at 564.

32. "And yet, Mr. Hatfield, I do assure you, I make you this offer in all seriousness; and it will be a favour to me if you will deign to accept me." *Id.*

33. Emmeline says that her initial gift to Edward of 1000 francs "is yours without condition." *Id.* at 558.

34. " 'And so,' said she, 'you have not thought better of your promise.' " *Id.* at 559.

35. "If you shall not choose to grant me what I ask, my lawyer has directions to set you up in some respectable business." *Id.* at 563-64.

"bind."[36] What is more, she frequently speaks to Edward as a lawyer might speak to a client when giving advice about the pros and cons of going forward with a business transaction. For example, after Edward naively declares his love for her at the decisive interview when the marriage bargain is struck, Emmeline replies:

> "I think that is rather a pity," she said. "I am not highly emotional myself. Look here: I must be yet more frank. If you say 'no' and go your own way, you are to want for nothing. If you say 'yes' and marry me, understand precisely what you do. First of all, you will get less in money: you will have to sign a marriage contract—you never saw the like of it for stiffness; after what you have done with your own I will not give you a chance to make hay of mine. It will be a loss in money. As for position, you have pledged me your word; you know what to expect: I marry you—not you me."[37]

This is not the kind of talk one expects a famous nineteenth century male author of adventure stories populated mostly by men[38] to put in the mouth of a genteel upperclass Englishwoman of the late 1870s.[39] The content and tone of Emmeline's dialogue are all the more surprising when contrasted with the character and language of the story's male narrator. Edward "blushes" on first sight of Emmeline when, down and out in front of the casino at Royat, he decides to approach her for a handout.[40] At their first interview Edward blurts out "silly speeches," is appalled by the "unbroken silliness" of the life story he tells Emmeline, and asks her to consider whether it is worthwhile to help a "creature so incompetent."[41] After he has fallen in love with Emmeline, Edward feels "ravish[ed]" by her "winning graces," "change[s] faces like a schoolgirl" when she calls him by his first name, and passively permits Emmeline to ask him for his hand in marriage.[42] In short, the story enacts a strange reversal of the stereotypical gender roles that must have prevailed in the minds of most late nineteenth century Englishmen: Emmeline is unemotional, calculating, and businesslike;[43] Edward is romantic, impetuous, and incompetent in worldly matters. Emmeline hints at Stevenson's puckish design for this story when she says upon proposing marriage to Edward that "we have got this thing so very much upside

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36. "I want you to remember that admission; I bind you to it." *Id.* at 562.

37. *Id.* at 564.

38. Professors David and Susan Mann, who discovered the handwritten manuscript of *The Enchantress* in the archives of Yale's Beinecke Library, write in their introduction that "[t]he story . . . departs from Stevenson's tendency to focus, almost exclusively, on male characters." *Id.* at 553. Stevenson himself reportedly gave one reason for the exclusively male focus of *Treasure Island*, his most famous novel: the book was written to please his young stepson, Lloyd Osbourne, who ordered the author to put "[n]o women in the story." *The Story of the Author*, at 7, in THE MONTHLY MAGAZINE OF THE JUNIOR HERITAGE CLUB, R.L. STEVENSON, *supra* note 4.

39. Professors David and Susan Mann claim on the basis of some fairly persuasive evidence that Stevenson most likely wrote the story in 1889 during a sea voyage from Hawaii to Samoa. *Enchantress*, *supra* note 2, at 552. Since the narrator refers to the financial collapse of Emmeline's guardian "some ten years" after the events recounted in the story, it thus seems fair to place those events in the late 1870s. *Id.* at 555.

40. *Enchantress*, *supra* note 2, at 555.

41. *Id.* at 557.

42. *Id.* at 563-64.

43. "I declare nothing agrees with me like business." *Id.* at 563.

down;"[44] and Edward makes that design unmistakably clear when he declares to Emmeline, "you are the man in this story, I the woman."[45]

The conception of marriage as a contractual relationship was, of course, not invented by Stevenson. For instance, Blackstone wrote in 1765 that English law "considers marriage in no other light than as a *civil contract* . . . [a]nd, taking it in this civil light, the law treats it as it does all other contracts."[46] Likewise, the passage in *Ancient Law* where Maine utters his famous dictum that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*"[47] gives the example of the nineteenth century Western European woman. Maine wrote that she was now liberated from the status of tutelage to persons "other than her husband" into a limited form of freedom of contract: "from her coming of age to her marriage all the relations she may form are relations of contract."[48] But the kind of contract that Emmeline employs in "The Enchantress" is quite different from the kind of contract that most eighteenth and nineteenth century English legal writers probably had in mind when they described the marriage relationship.

Max Weber's term "status contract" best captures the sense in which Blackstone and Maine, as well as other pre-twentieth century legal commentators,[49] used the word contract in the context of a woman's marriage to a man. In his sociology of law Weber distinguished two ideal types of contract: a contract by which a person becomes "something different in quality (or status) from the quality he possessed before," and a contract "aim[ed] solely . . . at some specific (especially economic) performance or result."[50] The former type Weber called a status contract, a classification which he said traditionally included a contract to "become somebody's . . . wife."[51] The status contract,

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44. *Id.* at 564.

45. *Id.* at 559. Professors David and Susan Mann note in their introduction that Stevenson's stepson Lloyd Osbourne blocked efforts to publish *The Enchantress* after Stevenson's death in 1894. They speculate that Osbourne either may have thought the story unmarketable because of its curious reversal of gender roles, or may "have believed the story to be too biographical: after all, his mother was a decisive woman who had met Stevenson in France [where Edward met Emmeline]; the young author had followed Fanny to California [as Edward followed Emmeline to Paris and then to England] and married her after her divorce." *Id.* at 552. For a good account of Stevenson's courtship of Fanny Osbourne, as well as the tendency of Stevenson's family and friends fiercely to protect the author's literary reputation, see James Hart, *Introduction* in R.L. STEVENSON, FROM SCOTLAND TO SILVERADO (J. Hart ed. 1966). Hart provides an intriguing quotation from a letter that Fanny Osbourne wrote to a friend before her marriage to Stevenson, describing him as "the heir to an enormous fortune which he will never live to inherit." *Id.* at xvi.

46. 1 W. BLACKSTONE, COMMENTARIES 421 (emphasis added). For an earlier expression of the same idea, see C. ST. GERMAN, DOCTOR AND STUDENT (SECOND DIALOGUE) 231 (T. Plucknett & J. Barton eds. 1974) (treatise first published in 1530 asserts that the promise of a father to pay a man money to marry his daughter "ys a good contracte/ and he maye haue quid pro quo/ that is to saye/ the preferment of hys doughter for hys money"). *See also* ADAM SMITH, LECTURES ON JURISPRUDENCE 441-42, 446 (R. Meek, D. Raphael & P. Stein eds. 1978)(notes of lectures given in 1766 discussing marriage in terms of contract).

47. H. MAINE, ANCIENT LAW 170 (London 1861).

48. *Id.* at 169.

49. *See* E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 155 (W.D. Halls trans. 1984); 1 P. FRASER, *supra* note 29, at 156-57.

50. 2 M. WEBER, ECONOMY AND SOCIETY 672-73 (G. Roth & C. Wittich ed. 1978).

51. *Id.* at 672. Sir Henry Maine almost certainly used the term contract in this sense when he described the power of the nineteenth century Western European woman to form relations of contract by marriage. *See* VerSteeg, *From Status to Contract: A Contextual Analysis of Maine's Famous Dictum*, 10 WHITTIER L. REV. 669, 675 (1989). Progress, as Maine conceived it, consisted of the right of a woman to make her own marriage con-

Weber noted, characterizes most legal relations in primitive social orders, and has existed "even in the earliest periods and stages of legal history."[52] The other type of contract Weber called "purposive." Although purposive contracts have existed in all ages, they tend to proliferate dramatically in modern, market-oriented societies, and they come to supplant status contracts as the predominant medium for legal and economic relations in those societies.[53] The purposive contract is the workhorse of modern business; it is the kind of contract usually associated with discrete economic transactions.

Emmeline plainly did not see her marriage to Edward as a status contract. True, at Emmeline's request the couple did marry in Scotland, where even as late as 1876 marriage caused a woman's legal status to change dramatically for the worse.[54] But Emmeline sought no such degraded condition for herself. Immediately after the marriage ceremony she leaves Edward for good, without so much as a kiss.[55] She then employs her lawyer to write Edward a letter warning him that the couple must never meet again. Letter in hand, Edward must learn from the lawyer at the story's end the true reason why Emmeline chose him as a marriage partner. And in the O. Henry-esque closing lines of the story the lawyer also reveals to him why Emmeline insisted that the couple marry in Scotland: " 'Well, it's quiet,' replied Mr. Venables, 'and then there are great facilities for divorce.' "[56]

To Emmeline, then, this marriage is purely instrumental to an economic end-state in which her husband Edward is to play no role after he has spoken his vows at the altar. This is a Weberian purposive contract if ever there was one. Emmeline sizes up the bargaining position of her future husband accurately: Edward sees himself as an upperclass gentleman whose sense of honor would never permit him to break his pledge of obedience to her,[57] and who can be trusted never to "go to law" (as Venables puts it) after he discovers her true

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tract, rather than having it imposed on her by her family. H. MAINE, *supra* note 47, at 153-60, 169. After the marriage took place, however, the modern woman became subject to her husband's will in a way that changed her pre-contract status considerably. *Id.*

52. 2 M. WEBER, *supra* note 50, at 671.

53. *Id.* at 671-73.

54. For example, a leading treatise on Scottish family law published in 1876 declares that "marriage operates in regard to the wife, so as to sink her person in the eye of the law" and so completely subordinate her to the will and the legal status of her husband that she is "without legal *persona*." 1 P. FRASER, *supra* note 29, at 507; *see also* 1 W. BLACKSTONE, *supra* note 46, at 430 (marriage suspends wife's "very being or legal existence," which is "incorporated and consolidated into that of the husband"). Scotland adopted a Married Women's Property Act in 1877. 2 P. FRASER, *supra* note 29, at 1510. This Act, based upon the statute of the same name that was enacted in England in 1870, improved the common law position of married women only marginally. *See* W. PAINE, THE RIGHTS AND LIABILITIES OF HUSBAND AND WIFE 342 (4th ed. 1905) ("Prior to the Act of 1882, the legislative inroads on the disabilities of coverture were of a comparatively trivial character"). For example, although the Scottish Act permitted a married woman to keep the wages she earned during marriage, the commentator Patrick Fraser thought the Act did not disturb a husband's common law right to refuse consent to his wife's pursuit of a business or trade. 2 P. FRASER, *supra* note 29, at 1513. However, the legal status of married women, at least in England, seems to have changed substantially in 1882, when a more expansive Married Women's Property Act was enacted by Parliament. *See* J. EDWARDS & W. HAMILTON, THE LAW OF HUSBAND AND WIFE 50 (1883) ("the proprietary disablities of a married woman have been almost completely removed"); W. PAINE, *supra*, at 345 (1882 Act confers on married women "a distinct legal entity and a personal contractual capacity").

55. *Enchantress*, *supra* note 2, at 567.

56. *Id.* at 568.

57. *Id.* at 557.

purpose.[58] She regrets Edward's emotional involvement,[59] but does not let his feelings stand in the way of her objective. Instead she prudently warns Edward of the businesslike nature of this affair ("I did not say I wished your love"),[60] though he is too smitten by her to see the truth.[61] Like a skillful but ruthless bargainer Emmeline never fully reveals the true reason she seeks Edward's consent to marry until after the deal is done. And before that time she cleverly gets him to acquiesce in her statement that "if ever I chance to give you anything, you shall not make it a foundation for exacting more."[62] Although Edward is perceptive enough to sense that Emmeline is moved by hidden designs,[63] in the end he willingly allows himself to be used. "I am your chattel," he declares, "do with it what you please."[64]

Emmeline "bought" Edward.[65] Lest there be any doubt about this, Stevenson has her insist through Venables that Edward must accept his price of £300 per year as a "condition *sine qua non*" of the match.[66] Emmeline turns Karl Marx's observation that "[t]he bourgeois sees in his wife a mere instrument of production"[67] on its head: Edward the husband is the instrument by which Emmeline the wife empowers herself financially. But unlike Marx's male capitalist, who allegedly seeks to legitimate his instrumental use of women by uttering what Marx called "bourgeois clap-trap about the family,"[68] Emmeline does not even try to mystify her use of Edward by pretty words. In the end she reveals this marriage for what it is, at least to her: a commodity to be bought and sold on the market.[69]

Especially given its male author and nineteenth century historical context, "The Enchantress" is a truly extraordinary piece of writing. As David and Susan Mann say in their introduction to the story, the "modernity of the tale can be seen . . . in the questions that it raises about social classes and gender roles."[70] At this level the story seems to mock severely the nineteenth century upperclass male's idealized conceptions of honor, love and marriage. Viewed

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58. *Id.* at 568.

59. *Id.* at 564.

60. *Id.* at 560.

61. "Had the accent been on love? Had it been upon the say? 'I did not *say* I wished your love, I did not say I wished your *love*,'" Edward asks himself. In the end he resolves his doubts by picking the wrong interpretation, based on "the look with which she had accompanied and emphasized" the word "love." *Id.*

62. *Id.* at 562.

63. After perceiving a strange look in the eye of the lawyer Venables, Edward tells the reader: "But the fact of this respectable personage being in any way privy to the designs of my enchantress mightily relieved some private and perhaps fanciful anxieties which had tormented me till then. She could not mean to set me in a murder." *Id.* at 563.

64. *Id.* at 565.

65. "You have bought a slave," Edward tells her. "I hope you like him." *Id.* at 559.

66. *Id.* at 566.

67. *The Communist Manifesto*, in KARL MARX: A READER 263 (J. Elster ed. 1986).

68. *Id.*

69. Emmeline knew Edward's name and impoverished circumstances before she met him, a fact which surprised Edward at their first meeting and which suggests that she had been sizing him up as a possible marriage partner for some time. *Enchantress*, *supra* note 2, at 556-57. One of the story's ironies is that Edward started out to "use" Emmeline (as the source for a handout), but eventually found that he was the one being used. It is interesting to note that quite a few of the students who disapproved of Edward (see Appendix, Table 2) wrote that they objected to his beggary.

70. *Enchantress*, *supra* note 2, at 553.

through modern eyes, these conceptions perhaps include what Nadine Traub and Elizabeth Schneider call the "powerful myths about the nature of family relations" that traditionally have supported male domination in the domestic sphere.[71] Indeed, since we learn about Emmeline only out of Edward's mouth, we can never be certain that his description of her actions and motivations was not unfairly biased against her by his own romantic obsessions.

But at a different level "The Enchantress" also can be interpreted as an ironic caricature of the grim end point of a laissez-faire society, where everything and everyone is for sale on the market, and where individual self-interest has run rampant. Stevenson was acutely aware of what he called the "prolonged and crushing" impact that the Industrial Revolution was having on traditional English society.[72] The author's well-known novella *The Strange Case of Dr. Jekyll and Mr. Hyde* explores one aspect of this theme: after numerous episodes of changing to Mr. Hyde, Dr. Jekyll notes with revulsion how the Mr. Hyde he has created by drinking a potion is a man whose central flaw is venal selfishness.[73] Emmeline, though far more appealing as a person than Mr. Hyde, nonetheless like him relentlessly pursues her own individualistic ends by manipulating social conventions.[74] In the end it was the story's intriguing notion that marriage is a market commodity to be selfishly pursued that suggested the relevance of Karl Polanyi's ideas about the nature of economic and social change.

III. KARL POLANYI'S SOCIAL THEORY

A. *The Substantive Thesis*

Polanyi was interested in the tendency of human relations in capitalist economies to be conceived of and treated as commodities. Indeed, he built an entire theory of social and economic development on the adverse reaction he claimed that people of all economic classes experienced when they were brought face to face with a social structure in which human beings were reified as goods to be exchanged in an impersonal marketplace. In particular, Polanyi's controversial book *The Great Transformation*[75] attempted to explain one of the most puzzling features of nineteenth century economic history. How was it, Polanyi wondered, that the self-regulating free market economic system that arose with the Industrial Revolution in Western Europe, and especially in Great Britain,

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71. Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 117, 122 (D. Kairys ed. 1982)(argument that "the law should not interfere with emotional relationships involved in the family realm . . . reflects and reinforces powerful myths about the nature of family relations. It is not true that women perform personal and household services purely for love."); *see* Ashworth, *The Relationship Between Capitalism and Humanitarianism*, 92 AM. HIST. REV. 813, 825 (1987) (nineteenth century family was conceived of as "preeminently a refuge, a haven from the tumultuous world outside").

72. R.L. STEVENSON, *The Amateur Emigrant*, in R.L. STEVENSON, *supra* note 45, at 1, 11.

73. R.L. STEVENSON, *supra* note 7, at 391 ("His every act and thought centered on self"); *cf.* Kakutani, *Dr. Jekyll and Mr. Hyde, as Observed by the Maid*, N.Y. Times, Jan. 26, 1990, at C28, col. 3 ("The novel reflect[s] the Victorian era's troubled reaction to Darwin's theories of evolution"). For an interesting collection of essays on the meaning of Stevenson's novella, see DR. JEKYLL AND MR. HYDE AFTER ONE HUNDRED YEARS (W. Veeder & G. Hirsch eds. 1988).

74. Hyde too sought to pay off the victims of his exploits with cash. R.L. STEVENSON, *supra* note 7, at 316.

75. K. POLANYI, *supra* note 3.

lasted for such a relatively short period of time before the factory laws and other social welfare legislation of the late nineteenth century intervened to restrain it? Paradoxically, both liberal supporters and Marxist opponents of the free market had advanced the claim that social protectionism resulted from economically motivated class action.[76] A modern variation on these explanations is public choice theory, which posits that legislative change is the vectored sum of the pressures that various interest groups bring to bear on legislators.[77] But Polanyi found the economic interests of classes and interest groups insufficient to explain the complex reality of protectionist measures and the widespread support that those measures commanded from people with no obvious self-interest to protect.[78]

The sociologist Michael Hechter describes the apparent dilemma that Polanyi's theory addressed as follows: "The market relation compels individuals to pursue their self-interest to the hilt and penalizes those who act on the basis of some other kind of motivation. But when each member of society acts solely out of self-interest the social order cannot be sustained for long."[79] Polanyi attempted to resolve this dilemma at the theoretical level by positing the existence of a widespread social reaction against the harshly individualistic behaviors that the self-regulating market both encouraged and demanded. Polanyi claimed that this social reaction, supplemented by the economic self-interest of various interest groups, accounted at the empirical level for the factory laws, workers' compensation, the union movement, trade barriers, and other forms of social protectionism that arose towards the end of the nineteenth century to end the brief heyday of laissez faire.

Polanyi developed this explanation for the rise of social protectionism by means of his "thesis of the double movement."[80] The first part of the thesis was the spreading of the market system. According to Polanyi, precapitalist economic life was "submerged" in a broader matrix of human social relationships. Human society did not exist to serve the economy; rather, the economy existed to serve human social needs.[81] Precapitalist social institutions erected "safeguards which protected [the] two basic elements of production—labor and

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76. According to Polanyi, liberals cited the "sinister interest of agrarians, manufacturers, and trade unionists, who selfishly wrecked the automatic machinery of the market," while Marxists insisted on a "crude class theory of social development" in which greedy capitalists, reactionary landlords, agrarian peasants, and the industrial working class vied with one another for ever-larger slices of the economic pie. *Id.* at 151.

77. *See* Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989).

78. K. POLANYI, *supra* note 3, at 152-53; *see* J.R. STANFIELD, THE ECONOMIC THOUGHT OF KARL POLANYI 117 (1986) ("no universal ideological stance" of the many people who supported social protectionism in the nineteenth century). This aspect of Polanyi's thesis is consistent with the modern critique of public choice theory's tendency to rely on what Jerry Mashaw recently called "*post hoc ergo propter hoc* fallacies." Mashaw, *supra* note 77, at 145; *see also* Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 895 (1987).

79. Hechter, *supra* note 16, at 170.

80. K. POLANYI, *supra* note 3, at 144.

81. *Id.* at 43-44, 46. Consider this passage from Allen Sievers' 1949 book on Polanyi's thesis:

> But though the last to become a fictitious commodity, labor was by far the most important. To treat labor as a commodity means to treat the human beings who supply the labor as things produced for sale, and generally to subject men to the necessities of market automaticity regardless of the effects upon these human bearers of labor power. Thus the organization of people into a social system becomes identical with the organization of the labor market and the whole market system. *Hence society becomes subordinated*

land—from becoming objects of commerce."[82] However, the Industrial Revolution brought an expanding economy that demanded a market in labor, land, and capital. These elements of industry "had" to be for sale as commodities because capitalists required reasonably assured access to the factors of production in order to mitigate the considerable risks associated with their long term investments in industrial enterprises.[83] Liberal supporters of the new economic order began to conceive of human labor as "a commodity which must find its price on the market."[84] Prenineteenth century English laws that tied workers to their local communities and guaranteed the lower classes a minimum standard of living were seen as unwarranted interferences with the market and were repealed.[85] For the first time in history, social life was divided into separate "economic" and "political" spheres.[86] This dichotomy, Polanyi wrote, was "merely the restatement, from the point of view of society as a whole, of the existence of a self-regulating market."[87] The dichotomy meant that human beings who needed to work to live now found themselves subordinated to the laws of an impersonal marketplace, where their physical survival depended on their ability to make advantageous wage bargains.

Recent historical research has revealed that price-making markets in some precapitalist European societies were far more prevalent than Polanyi sup-

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to the economy. This arrangement is destructive of human values, values which society is established to protect.

A. SIEVERS, *supra* note 16, at 321 (emphasis added); *see also* PRIMITIVE AND MODERN ECONOMICS: ESSAYS OF KARL POLANYI xliv (G. Dalton ed. 1971) (economic organization in pre-modern societies has "no separate existence apart from its controlling social integument"); Polanyi, Arensberg & Pearson, *The Place of Economies in Societies*, in TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMIES IN HISTORY AND THEORY 239, 242 (K. Polanyi, C. Arensberg & H. Pearson eds. 1957) ("[T]he facts of the economy were originally embedded in situations that were not in themselves of an economic nature, neither the ends nor the means being primarily material."); G. SJOBERG, THE PREINDUSTRIAL CITY 182 (1960) ("The feudal city's class structure is not only interconnected with the familial organization, discussed earlier, but both are interwoven with the economy—evidence, once again, of the interrelatedness among the component elements of the total social structure.")

82. K. POLANYI, *supra* note 3, at 70. Polanyi cited as examples sixteenth and seventeeth century English labor legislation and anti-enclosure policies.

83. *Id.* at 75. This explanation for the rise of markets is pure functionalism. Polanyi has been justly criticized for failing to give a satisfactory account of why the earlier principles of social organization that he claimed were better equipped to promote the social order ever gave way to the free market system in the first place. *See* A. SIEVERS, *supra* note 16, at 327; Hechter, *supra* note 16, at 183.

84. K. POLANYI, *supra* note 3, at 117.

85. *Id.* at 82-83, 117; *see* A. SIEVERS, *supra* note 16, at 60-62 (catalogue of mercantilist legislation protecting premodern English laboring classes). Polanyi focused especially on the abolition of the so-called "Speenhamland Law" by the Poor Law Reform of 1834. Speenhamland was adopted by the justices of Berkshire in 1795, and soon spread throughout many areas of England. The measure essentially guaranteed a minimum wage that was tied to the price of bread. According to Polanyi, "Speenhamland was designed to prevent the proletarianization of the common people;" however, the "Poor Law Reform of 1834 did away with this obstruction to the labor market: the 'right to live' was abolished." K. POLANYI, *supra* note 3, at 82. *See also* E.J. HOBSBAWM, THE AGE OF REVOLUTION 1789-1848, at 167 (1962) (Speenhamland's "chief effect was to encourage farmers to lower wages, and to demoralize the labourers;" the Poor Law Reform addressed this problem by giving the poor "relief only within the new workhouses" and "withdrawing the parish guarantee of a minimum livelihood").

86. *Cf.* Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980) (judges during this period ordered human relationships into separate "private" and "public" spheres, and conceived of the legal powers within each sphere as absolute).

87. K. POLANYI, *supra* note 3, at 71.

posed.[88] Nevertheless, Polanyi's assessment of the *relative* impact of market institutions on nineteenth century society remains essentially correct. Unquestionably the nineteenth century saw a dramatic increase in the extent to which the market penetrated social life: measured both in terms of the quantity of human relationships that became subject to purely market forces, and in terms of the geographic scope (and concomitant impersonality) of market relationships.[89] Polanyi's description of market capitalism's unique *ideological* separation of the economy from other aspects of social life also has withstood the test of time.

Polanyi contended that nineteenth century capitalism's unprecedented commoditization of human beings and their natural environment came at an enormous cost to the mass of people, who were accustomed to living in the context of traditional social structures:

> To separate labor from other activities of life and to subject it to the laws of the market was to annihilate all organic forms of existence and to replace them by a different type of organization, an atomistic and individualistic one.
>
> Such a scheme of destruction was best served by the application of the principle of freedom of contract. In practice this meant that the noncontractual organizations of kinship, neighborhood, profession, and creed were to be liquidated, since they claimed the allegiance of the individual and thus restrained his freedom. To represent this principle as one of noninterference, as economic liberals were wont to do, was merely the expression of an ingrained prejudice in favor of a definite kind of interference, namely, such as would destroy noncontractual relations between individuals and prevent their spontaneous re-formation.[90]

The proliferation in industrializing nations of formally unregulated markets in land and labor coincided with widespread human misery in the nineteenth century, as great masses of people left the land to find their living in dangerous factories and overcrowded, unhealthy cities.[91] According to Polanyi, these and other dislocations and social upheavals were brought about by the unrestrained

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88. *See, e.g.*, McCloskey, *The Open Fields in England: Rent, Risk, and the Rate of Interest, 1300-1815*, in MARKETS IN HISTORY: ECONOMIC STUDIES OF THE PAST 5, 31-32 (D. Galenson ed. 1989)(peasant land market in medieval England).

89. Fromm, *Alienation Under Capitalism*, in MAN ALONE: ALIENATION IN MODERN SOCIETY 56, 60 (E. Josephson & M. Josephson eds. 1962) (noting the unique impersonality of human relations in modern capitalism); North, *Markets and Other Allocation Systems in History: The Challenge of Karl Polanyi*, 6 J. EUR. ECON. HIST. 703, 706 (1977) ("Polanyi was correct in his major contention that the nineteenth century was a unique era in which markets played a more important role than at any other time in history."). For accounts of the American experience, see C. DEGLER, *preface*, in THE AGE OF THE ECONOMIC REVOLUTION 1876-1900 (2d ed. 1977) ("the United States was transformed from an agricultural to an industrial society within a single generation") and R. HIGGS, THE TRANSFORMATION OF THE AMERICAN ECONOMY, 1865-1914, at 1 (1971) (America's vast industrial expansion between 1865 and 1914 "disrupted and then destroyed the older order in economic life."). *See also* Zerbe, *The Origin and Effect of the Grain Trade Regulations in the Late Nineteenth Century*, 56 AGRIC. HIST. 172, 173-74 (1982) (noting change from small-scale, localized agriculture to "complex system of impersonal exchanges" in late nineteenth century America). *See generally* A. BOLINO, THE DEVELOPMENT OF THE AMERICAN ECONOMY 96-102 (1961); A. CHANDLER & R. TEDLOW, THE COMING OF MANAGERIAL CAPITALISM 171-547 (1985).

90. K. POLANYI, *supra* note 3, at 163.

91. *Id.* at 76, 163-77 ("The effects [of the Industrial Revolution in England] on the lives of the people were awful beyond description."). *See also* P. BERGER, THE CAPITALIST REVOLUTION 211 (1986). For a contemporary account, see the graphic description of the squalid living conditions of the working class in London's East End written by the American novelist and social critic Jack London. J. LONDON, PEOPLE OF THE ABYSS (1963). *See also* E.J. HOBSBAWM, *supra* note 85, at 203 ("[T]he contemporaries who deplored the demoralization of the new urban and industrialized poor were not exaggerating.").

individualism that the market system demanded. At this point began the second part of Polanyi's thesis of the double movement:

> Our thesis is that the idea of a self-adjusting market implied a stark utopia. Such an institution could not exist for any length of time without annihilating the human and natural substance of society; it would have physically destroyed man and transformed his surroundings into a wilderness. *Inevitably, society took measures to protect itself*, but whatever measures it took impaired the self-regulation of the market, disorganized industrial life, and thus endangered society in yet another way. It was this dilemma which forced the development of the market system into a definite groove and finally disrupted the social organization based upon it.[92]

It is important to remember that Polanyi wrote *The Great Transformation* in the midst of World War II. Looking back from 1944 at the course of events in this century—including the Great Depression, the rise of fascism, and two world wars—Polanyi sought to explain not only why social protectionism arose in the nineteenth century, but also why the very fabric of western civilization seemed to be unravelling before his eyes. Thus *The Great Transformation* addressed *both* the decline of the self-regulating market, *and* the negative effect that Polanyi thought that social protectionism had on the market economies of the societies that had come to depend on the institutions and huge productive capacity of industrial capitalism. For example, Polanyi saw the rise and intermittent successes of trade unionism in the late nineteenth and early twentieth centuries as evidence of a social reaction against the self-regulating labor market—a social reaction whose function was to maintain a minimum standard of living for the working majority of the population. But Polanyi also claimed that this method of protecting workers "obstruct[ed] the mechanism of the self-regulating market, and eventually diminish[ed] the very fund of consumers' goods that furnished them with wages."[93] In times of economic crisis, therefore, the "routine conflict of interests between employers and employees took on an ominous character,"[94] and tended to produce dangerous social and political instability. As an example of a nation which experienced this process Polanyi cited

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Allen Sievers points out that Polanyi saw the Industrial Revolution as "a *social* calamity, and as such . . . primarily a *cultural* rather than an *economic* phenomenon." A. SIEVERS, *supra* note 16, at 172; *see* Forbath, *The Ambiguities of Free Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 801 (noting social dislocations caused by capitalist labor relations in nineteenth century America). For an interesting contemporary account of the changes wrought by the factory system on the social relationship between employer and employee, see Samuel Gompers' 1883 testimony before the Senate Committee on Education and Labor. REPORT OF THE COMM. OF THE SENATE UPON THE RELATIONS BETWEEN LABOR AND CAPITAL, 48th Cong. 376 (1885)(pre-industrial "spirit of cordiality and friendship" between employer and employee has been replaced by social separation and economic self-interest).

92. K. POLANYI, *supra* note 3, at 3-4 (emphasis added).

93. *Id.* at 231. This part of Polanyi's work looks surprisingly similar to the arguments of some law-and-economics writers that social protectionism is usually inefficient and self-defeating. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 11.1-.4, at 299-307 (3d ed. 1986) (inefficiency of labor laws); Coase, *The Choice of Institutional Framework: A Comment*, 17 J. LAW & ECON. 493 (1974) (inefficiency of protecting consumers against onerous terms in form contracts); Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 558-59 (1984) (enforcement of warranty of habitability in residential leases will ultimately hurt low income tenants as a class).

94. K. POLANYI, *supra* note 3, at 235.

Germany during the 1920s, a society that unfortunately resolved its economic crisis by turning to fascism.[95]

One does not have to agree with Polanyi's dismal assessment of the necessary *effects* of social protectionism, however, in order to accept as plausible his explanation of its *cause*. For my purposes, certainly, it is not necessary to criticize the impulses of judges and law students to be fair as disruptive of the economy (or, if you will, inefficient). I borrow from Polanyi only an hypothesis to explain why those impulses appear to be so widespread.

B. *Methodological Matters*

Michael Hechter locates Polanyi in a sociological tradition, led by Durkheim and Parsons, that is fundamentally opposed to the methodological individualism that practitioners of neoclassical economics apply to social theory.[96] And there is no doubt that Polanyi rejected *economic* self-interest as the key to understanding individual action. According to Polanyi, "[man] does not act so as to safeguard his individual interest in the possession of material goods; he acts to safeguard his social standing, his social claims, his social assets. He values material goods only in so far as they serve this end."[97] But Hechter, who is a leading proponent of rational-choice theory, somewhat overstates his case in claiming that Polanyi totally renounced analysis at the individual level to explain the phenomena described in *The Great Transformation*.[98] To be sure, in several passages of the book Polanyi attributes protectionist counter-reactions against the self-regulating market to "society," as though society as a whole were a conscious entity capable of taking action independently of the individuals who constitute it.[99] Yet elsewhere Polanyi explains protectionist measures as products of the expressed "urge on the part of a great variety of people to press for some sort of protection" when the market economy began to pose a "threat to the human and natural components of the social fabric."[100] As even Hechter notes, Polanyi believed that individual goals and preferences are shaped, if not determined, by the actor's social context.[101] What could be more natural, then, than individuals finding it in their perceived self-interest to press for

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95. *Id.* at 235-36; *see* Comment, *"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to* Mozert v. Hawkins County Public Schools *and* Smith v. Board of School Commissioners, 63 WASH. L. REV. 445, 462 n.101 (1988) ("Karl Polanyi poignantly saw that liberal democracies had failed to use state power to protect even a minimal social order, paving the road for the fascists, who were all too ready to use power to end social disorder.").

96. Hechter, *supra* note 16, at 161-63.

97. K. POLANYI, *supra* note 3, at 46.

98. Hechter, *supra* note 16, at 187. Rational-choice theory assumes the "theoretical primacy of individual actors rather than of pre-existent social groups[,]" and that those actors will rationally select a course of action designed to achieve their particular goals by the most effective available means. *Id.* at 158.

99. *E.g.*, K. POLANYI, *supra* note 3, at 3, 83. Taken in isolation, these passages seem methodologically similar to Durkheim's "social facts," which are those emergent properties of social "wholes" that are said to greatly influence, if not determine, the behavior of individuals. *See* Thompson, *Introduction*, in READINGS FROM EMILE DURKHEIM 13 (K. Thompson ed. & M. Thompson trans. 1985). On the charge that Polanyi tended to reify society, *see* A. SIEVERS, *supra* note 16, at 341.

100. K. POLANYI, *supra* note 3, at 150.

101. Hechter, *supra* note 16, at 182. *See generally* P. BERGER, THE SACRED CANOPY 3-28 (1969); P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

change—through the ballot-box, for example, or through coalitions with like-minded people—when they notice with alarm that their social environment and personal social status are threatened with disruption?[102] The challenge of the self-regulating market, Polanyi wrote, "is to society as a whole; the 'response' comes through groups, sections, and classes."[103]

Even the winners in the laissez-faire "game" may not have been willing to tolerate its harshness once they saw that the costs it imposed on the losers threatened to disrupt the social order upon which the winners' prosperity rested.[104] Moreover, risk aversion could have led the winners at any given point in time to join in efforts to mitigate the market's severity because of uncertainty about whether they would be winners or losers in the future. In short, self-interest could have led even those who did well in the market to value fairness, without the need to posit an inchoate "social" taste for it.

Moreover, it is possible that Polanyi's thesis provides an important mechanism to connect the *ex ante* and *ex post* perspectives on the behavior of historical actors. For example, viewed *ex post* a privileged actor's given choice to support redistributive legislation may appear rational to a modern observer who is taking account of the actor's own long-term self-interest calculated in light of facts known to the observer.[105] But viewed *ex ante* by the actor himself, the choice might have seemed the "right" thing to do even though he actually thought that it was contrary to his own self-interest. A social reaction to the most oppressive elements of the self-regulating market, felt at an individual level, thus actually may have *caused* behavior that appeared economically irrational to the actor *ex ante*, but economically rational to an observer looking at the behavior after the fact.

Polanyi's theory thus does not have to be inconsistent with a micro-sociological explanation of historical events. But what historical events can the theory be made to explain? It is possible that the social reaction to laissez-faire capitalism that Polanyi located in certain nineteenth century European nations was a one-of-a-kind phenomenon, embedded in its own historical context and

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102. *See, e.g.*, S. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914, at 24-47 (1957)(Granger movement and Knights of Labor seen as countermovements by farmers and workers against the advance of market capitalism into nineteenth century American agriculture and labor); N. POLLACK, THE POPULIST RESPONSE TO INDUSTRIAL AMERICA 28 (1962)(Populism as a political movement objected to industrial society's transformation of "the individual into a commodity[,]" and insisted on an economic structure that would recognize the existence of "dependent man"); Abramson, *The Fabian Socialists and Law as an Instrument of Social Progress: The Promise of Gradual Justice*, 62 ST. JOHN'S L. REV. 209 (1988) (Fabian Society was organized in 1884 by people whose "aim was to bring social improvement to English society and emphasize values which were basically spiritual and moral over those accentuating acquisitiveness and materialism.").

103. K. POLANYI, *supra* note 3, at 152.

104. *See* Coleman, *Afterward: The Rational Choice Approach to Legal Rules*, 65 CHI.-KENT L. REV. 177, 182-85 (1989)(movement toward Pareto frontier requires social cooperation, but cooperation requires a distribution of goods that induces individuals to behave cooperatively); Young, *Marx on Bourgeois Law*, 2 RES. L. & SOC. 133, 156 (1979) (Marx explained English bourgeois acquiescence in the Factory Acts on the basis of "bourgeois fear of the working class, which was becoming ever more organized and threatening").

105. For example, an observer might conclude that wealthy and self-interested individuals rationally supported public assistance to the poor, despite the knowledge that their taxes necessarily would increase, because public assistance defused pressure from the lower classes for political change that would have led to more radical forms of wealth redistribution. *Cf.* AN ANTONIO GRAMSCI READER: SELECTED WRITINGS, 1916-1935, at 210-12 (D. Forgacs ed. 1988) (neo-Marxist concept of hegemony).

unlikely ever to repeat itself.[106] If this is true, then it might seem implausible to contend that modern opinions about the conditions created by market-oriented individualism—such as the opinions of my students—would have any bearing on Polanyi's thesis. So, for example, the fact that a large group of people in late nineteenth century England may have abhorred certain features of the free market, and been capable of translating their abhorrence into politically effective action, does not necessarily mean that an otherwise comparable group of people in late twentieth century America would exhibit the same reaction, with similar effect, even if they were confronted by identical conditions.

In other words, almost all social phenomena are contingent. Nevertheless, it is possible that the social reaction Polanyi described is rooted in a widely felt human aversion to seeing people treated as (or being treated oneself as) purely a market good. Undoubtedly the diffusion and depth of such an aversion, as well as its effectiveness as a mechanism for institutional change, would be contingent on social context. The historical examples of slavery[107] and the treatment of women as chattel[108] demonstrate that social discomfort with the effects of imagining people as goods is not a universal and acontextual human trait. However, once such an aversion does set in and diffuse itself during any given historical period, it may become sufficiently powerful and autonomous to persist over a relatively long time, affecting the socialization of many generations.[109] The widespread feeling in America today that human slavery is wrong may be one example of this persistence of social values over time.[110] Likewise, although nearly two hundred years of shifting historical context separate Immanuel Kant from Charles Fried, both men found cause to condemn, on normative grounds, the idea that one person should be free to use another person as a means rather than an end.[111]

What is more, even if members of modern capitalist societies have become used to conceiving of certain spheres of social life in terms of impersonal market

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106. As Robert Gordon observes, "[t]he conditions of social life and the course of historical development are radically underdetermined, or at least not determined by any uniform evolutionary path." Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 100 (1984).

107. *See* Haskell, *Convention and Hegemonic Interest in the Debate Over Antislavery: A Reply to Davis and Ashworth*, 92 AM. HIST. REV. 829, 849, 868 (1987) (noting the relatively late emergence of moral opposition to slavery in Western society). *See generally* H. JOLOWICZ & B. NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 133-36 (3d ed. 1972) (slavery in ancient Rome); M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860 (1981) (slavery in the United States).

108. *See generally* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 628-29 (5th ed. 1956)(bride sale in Anglo-Saxon law); 2 M. WEBER, *supra* note 50, at 688-89 ("wife purchase" in India and Rome).

109. *See* Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 5 (1987) (noting historical mutability of beliefs, but also recognizing the possibility that "despite a diversity of doctrines, convergence on a political conception of justice may be achieved and social unity sustained in long-run equilibrium, that is, over time from one generation to the next."); *Cf.* M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181-82 (T. Parsons trans. 1958) ("The Puritan wanted to work in a calling; we are forced to do so. . . . [T]he idea of duty in one's calling prowls about in our lives like the ghost of dead religious beliefs.").

110. *Compare* M. KELMAN, *supra* note 12, at 158 ("[O]bviously, there are independent moral reasons for detesting slavery . . . .") *with* Posner, *Law and Economics* Is *Moral*, 24 VAL. U.L. REV. 163, 172 (1990) ("[S]lavery is abhorrent in modern society for a wide variety of reasons . . . .").

111. *Compare* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 47 (L. White trans. 1959) (1st Ger. ed. 1785) ("Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only") *with* C. FRIED, CONTRACT AS PROMISE 16 (1981) ("A liar and a promise-breaker each *use* another person," and hence both act immorally).

forces (the "labor market" and the "housing market," for example),[112] this does not necessarily mean that they conceptualize *all* spheres of social life that way. There may remain even today certain enclaves of human relations whose subjection to impersonal market forces would trigger the same kind of protective counter-reaction that Polanyi said arose when labor and land originally were made into commodities. The cluster of relations that together constitute the family may be such an enclave. As Frances Olsen wrote in 1983, "[i]n contrast to the market, in which universal selfish behavior is supposed to result in the betterment of society, the family has generally been expected to be based on less individualistic principles."[113] Consider, for example, the difficult and sometimes emotional controversy over the legal enforceability of surrogate mother contracts, a controversy which frequently embodies a revulsion against the application of market principles to child-bearing.[114]

Marriage is another example of a "family" institution that even modern people may resist thinking of in purely market terms. Marriage in its typical form is arguably one of the most emotional and relational, and least rational and individualistic, of all human transactions. The law seems to agree, despite the fact that legal formalities usually mark the inception of marriage, and that legal consequences flow from its dissolution. Thus, for example, the Uniform Marriage and Divorce Act says that although marriage "aris[es] out of a civil contract," the thing that marriage "is" is "a personal relationship between a man and a woman."[115] The traditional common law attitude towards the relationship that marriage is supposed to initiate is revealed by Lord Atkin's opinion in the case of *Balfour v. Balfour*.[116] A wife should not recover on her husband's broken promise to pay her an allowance during his absence on business, Atkin said, because "[t]he consideration that really obtains for [such a promise] is that natural love and affection which counts for so little in these cold Courts."[117] Even Judge Richard Posner, one of the most ardent supporters of free market principles, cannot bring himself to use the term "marriage market" except as a "metaphor" (albeit an "apt" one) for what men and women do when they look for mates.[118]

An experiment to determine whether people in the nineteenth century actually experienced Polanyi's "social reaction" to the effects of laissez-faire capital-

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112. The markets we experience today are fundamentally unlike the markets that people experienced in the nineteenth century, however. Our markets incorporate many of the public regulatory features that Polanyi said came into being because of a social reaction against the atavistic market structures of the 1800s. In other words, our markets are anything but self-regulating.

113. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505 (1983) (footnote omitted); *see* M. KELMAN, *supra* note 12, at 272.

114. *See, e.g.*, Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581 (1988); Kimbrell, *The Case Against the Commercialization of Childbearing*, 24 WILLAMETTE L.J. 1035 (1988). Judge Posner recently acknowledged that his proposal to permit a free market in babies turned out to be "disturbing" and "shocking" to many people. Posner, *supra* note 110, at 170.

115. UNIF. MARRIAGE AND DIVORCE ACT § 201, 9A U.L.A. 160 (1987).

116. [1919] 2 K.B. 571 (C.A.).

117. *Id.* at 579.

118. *See, e.g.*, R. POSNER, *supra* note 93, § 5.2, at 130. Mark Kelman has noted the tendency of more mainstream conservatives to oppose the introduction of market principles into the family relationship. M. KELMAN, *supra* note 12, at 224.

ism is, of course, no longer possible. However, it still may be possible to approximate the conditions that Polanyi described. One could isolate a sphere of social life that is not yet completely ordered by market principles, and then put modern day subjects in a position to observe that sphere as it is put under the stress of market-oriented individualism. I contend that marriage is such a sphere.[119] And I had something like this vaguely experimental idea in mind when I asked my students to read and react to "The Enchantress." Eighty years ago the historian Carl Becker wrote that "no amount of testimony is ever permitted to establish as past reality a thing that cannot be found in present reality."[120] I do not contend that my students' responses to "The Enchantress" demonstrate the existence of Polanyi's social reaction in the nineteenth century. However, just as an echo makes sound now *and* gives evidence of a sound made in the past, a social reaction against the individualism of the market that is found in people today may tell us something about the plausibility of Polanyi's thesis as an explanation both of the present and of the past.

IV. THE REACTIONS OF FORTY-SIX LAW STUDENTS TO "THE ENCHANTRESS"

A. *Legal Education and Social Reaction*

For some time I had noted with interest an oddly parallel, Polanyi-like resistance that many first year law students display towards the decisions they study in my contracts classes. Many students voice discomfort with the generalizing tendency of a modern contract law that seems to express, as Roberto Unger says, "a tolerance for unrestrained self-interest in the great majority of contracts."[121] The idea that a single, overarching set of largely individualistic legal principles could and should organize and dispose of all the disputes that originate from private agreements did not gain widespread acceptance until the late eighteenth and nineteenth centuries, when the classical common law of contract took shape in England and America.[122] Modern law students perceive this generalizing tendency of the common law in the way that appellate opinions in most contracts casebooks apply a body of abstract principles called "contract law" to such a wide variety of seemingly dissimilar human relations. Lawrence Friedman describes this body of principles as follows:

> "Pure" contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold. In the law of contract it does not matter whether the subject of the contract is a goat, a horse, a carload of lumber, a stock certificate, or a shoe. . . . In contract cases land is treated as a commodity on the market, the same as every other commodity, and the rules are supposed

119. *Cf.* Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713, 726 (1989)("Certain biological constants thus lie at the root of family behavior, and these demarcate the zone of voluntary market exchanges from that of the nonprice, nonexchange economy of the family.").

120. Becker, *Detachment and the Writing of History*, in DETACHMENT AND THE WRITING OF HISTORY: ESSAYS AND LETTERS OF CARL L. BECKER 12 (P. Snyder ed. 1958).

121. R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 83 (1986).

122. *See* F. KESSLER, G. GILMORE & A. KRONMAN, CONTRACTS CASES AND MATERIALS 39 (3d ed. 1986); Gabel & Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW 172 (D. Kairys ed. 1982).

> to be the same as the rules for horses and cows. . . . Contract law is an abstraction—what is left in the law relating to agreements when all particularities of person and subject-matter are removed.[123]

American judges did not begin to "produce" law in any significant quantity until the mid-1800s.[124] In a sense, nineteenth century judges were standardizing the law relating to agreements just as economic actors were making the subject matter of those same agreements into standardized market commodities. Consider, for example, the amorphous and non-uniform notion of "consideration" in preclassical contract law, which may have meant a promisee's detrimental reliance in one context, or the object of a bargained-for exchange in another.[125] By the late 1800s the bargain theory had supplanted this earlier notion of consideration, becoming a uniform doctrinal tool that lawyers and judges used to resolve legal disputes about the enforceability of promises regardless of who the parties were or what the subject matter of a promise might be.[126] This growing fungibility of legal doctrine mimicked the way that the various factors of industrial production, especially human labor, were becoming goods to be bought and sold on the market.[127] Indeed, many authors have noted that the common law's standardized and rationalized approach to consensual transactions probably is functional to the development and maintenance of capitalist economic structures,[128] although the point is far from noncontroversial.[129]

But it is one thing to say in the abstract that a uniform and unifying set of legal rules helps commerce, and another thing to say that as applied in context to a real dispute the rules will gain unqualified acceptance in the minds of the law students, lawyers, and judges who encounter and use them. To borrow Duncan Kennedy's taxonomy for the reading materials normally used in the

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123. L. FRIEDMAN, CONTRACT LAW IN AMERICA 20 (1965).

124. *See* G. GILMORE, THE AGES OF AMERICAN LAW 8 (1977) ("[I]t is pointless to speak of an 'American Law' before the 1800s."); Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1731 (1981) ("[T]ort law did not begin to gain any momentum or achieve any density until mid-century . . . .").

125. *See generally* Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984).

126. *See* G. GILMORE, THE DEATH OF CONTRACT 18-22 (1974); Gabel & Feinman, *supra* note 122, at 172; *see also* Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships* Peerless, 11 CARDOZO L. REV. 287, 326 (1989) (in the nineteenth century "[l]awyers came to believe that contractual disputes should be analyzed and resolved by reference to general and highly abstract principles of law.").

127. Thus Holmes' famous exposition of his "general method to be pursued in the analysis of contract" (including the bargain theory of consideration), O.W. HOLMES, *supra* note 10, at 227-40, came only fourteen years after Karl Marx's observation that the capitalist "regards the labour market as a branch of the general market for commodities." 1 K. MARX, CAPITAL 188 (F. Engels ed. & E. Untermann trans. 1906)(1st ed. 1867). *See generally* J. ELSTER, MAKING SENSE OF MARX § 4.1.2., at 171 (1985)("Capitalism is . . . historically the central form of the market economy, characterized by the fact that even labour-power is a commodity that is bought and sold on the market.").

128. *See, e.g.*, M. WEBER, *supra* note 109, at 25 ("[M]odern rational capitalism has need, not only of the technical means of production, but of a calculable legal system and of administration in terms of formal rules."); *see also* E.A. FARNSWORTH, CONTRACTS § 1.7, at 21 (1982); L. FRIEDMAN, HISTORY OF AMERICAN LAW 244 (1973); J. HURST, LAW AND ECONOMIC GROWTH 285 (1964); Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 IOWA L. REV. 797, 807, 815-21 (1988).

129. *See, e.g.*, Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281, 290 (D. Kairys ed. 1982) (given the "contradictory and incoherent" nature of legal structures "it follows that no particular regime of legal principles *could* be functionally necessary to maintain any particular economic order."); M. KELMAN, *supra* note 12, at 231 (criticizing the "commonplace 'timeless' truth . . . that capitalist merchants, particularly those managing large enterprises, require rule-bound law to reduce risk by increasing legal certainty.").

first year of law school, I too have noticed that students frequently react differently depending on whether the rules are applied to a "hot" case involving a sympathetic plaintiff, an unsympathetic defendant, and an emotionally charged set of facts, or a "cold" case with boring facts that seem devoid of any political, moral, or emotional significance.[130] Kennedy concludes that "[m]ost students can't fight the combination of cold cases and hot cases,"[131] and ultimately give in to the relentless process of socialization known as learning to think like a lawyer. I have never been quite so sure about the depth and inevitability of this socializing process, however.

Undoubtedly the patterns of thinking that traditional legal training instills—especially the tendency to suppress the internal philosophical contradictions that usually characterize complex rule systems—help make most legal rules seem both natural and just in the minds of the lawyers who must practice them, and the judges who must apply them.[132] But surely this legitimation process can only go so far. After all, a judge who overtly alters[133] or covertly distorts[134] an abstract common law rule that the judge thinks is too oppressive when applied to a specific human problem probably was a lawyer once herself, just as before then she probably was a law student. One wonders whence came the judge's impulse to change or misapply the rule, if her legal training permanently blinded her to the rule's lack of wisdom (dare one say illegitimacy?).

I wondered, for example, how my students would feel about "The Enchantress"—a "hot" case where the marriage relationship and one of the parties to it are treated like commodities—after having had two months of indoctrination into the opinions and methods of common law judges. Could my students' feelings about the story shed any light on the plausibility of Karl Polanyi's social theory? Law students cum lawyers are people too; perhaps they have reactions similar to the social reaction to the unbridled individualism of laissez-faire capitalism that Polanyi posited in *The Great Transformation.* Indeed, it might be especially important for Polanyi's thesis that lawyers do experience such reactions. After all, lawyers as counsellors, advocates, judges, and legislators played no small role in making the incremental institutional changes that brought the economies of most industrial democracies from the infancy of laissez-faire to the adulthood of modern welfare capitalism.

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130. D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 9, 12 (1983).

131. *Id.* at 12; *see also*, Horwitz, *Resist Cult of Complexity, Paralyzing Skepticism*, HARV. L. REC., Sept. 19, 1986, at 6 ("One soon fears that too many students are all too willing to 'trade off' their mothers and fathers in order to maximize efficiency.").

132. *See* R. ABEL, AMERICAN LAWYERS vii (1989)(legal profession "propounds an ideology that allows lawyers to escape difficult moral choices by invoking their technical expertise"); Gabel & Feinman, *supra* note 122, at 181.

133. *See, e.g.*, Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958)(Traynor, J.)(subcontractor's bid held irrevocable because of general's reliance on it in preparing his own bid to the owner, despite common law rule that offeror may revoke any time before acceptance); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960)(Francis, J.)(refusing to enforce contractual limitation on car manufacturer's liability for personal injury damages).

134. *See, e.g.*, Newman & Snell's State Bank v. Hunter, 243 Mich. 331, 220 N.W. 665 (1928)(consideration rule distorted to release widow from promise to pay her husband's debt); Mabley & Carew Co. v. Borden, 129 Ohio St. 375, 195 N.E. 697 (1935)(ignoring disclaimer of legal obligation on employer's certificate promising to pay death benefit to employee's named beneficiary).

B. *The Student Responses to "The Enchantress"*

I asked the students in my contracts classes to read the story and fill out an anonymous questionnaire telling me what they thought about it. The forty-six first year law students whom I asked to read "The Enchantress" were enrolled as regular J.D. degree students in one or the other of the two contracts sections that I taught at the University of Washington School of Law during fall quarter, 1989. Twenty-seven (58.7%) were men, and nineteen (41.3%) were women. Their median age was 25, and their mean age was 26; the oldest student was 41, and the youngest was 21.

The questionnaire posed this question: "In your opinion, did any of the following three characters in the story behave improperly?" I chose the word "improperly" rather than "unlawfully" because I was looking to find what Holmes called "intuitions of public policy, avowed or unconscious,"[135] and I thought that asking my students to render a "legal" opinion would unduly filter my access to those intuitions. The questionnaire listed Emmeline, Edward, and Venables, and allowed the respondent to check "Yes," "No," or "Unsure" for each character. The Appendix summarizes the responses for all three characters. It shows that only about a quarter of the students objected to what Edward and Venables did. The following table, taken from the Appendix, presents a breakdown of the responses the students gave to the question as it pertained to Emmeline's behavior. The question was asked after the students had read the story, but before the class had discussed it.

Table 1: Did Emmeline Behave Improperly?

	Total (%)	Men (%)	Women (%)
Yes	30 (65.2)	18 (66.7)	12 (63.2)
No	11 (23.9)	5 (18.5)	6 (31.6)
Unsure	5 (10.9)	4 (14.8)	1 (5.3)
	46	27	19

Nearly two-thirds of the class as a whole expressed the opinion that Emmeline's behavior was improper, and men and women held this view in roughly equal proportions. But the fact that people approved or disapproved of what Emmeline did is less revealing than the reasons they gave for their opinions. Forty-three of the forty-six students gave reasons for their normative conclusions. I have chosen to present representative quotations[136] from each of these forty-three questionnaires to let readers see directly what features of that conduct my students found most significant, and to determine for themselves whether Polanyi's thesis is of any assistance in understanding the students' reactions. Here are the quotations, segregated according to the sex of the respondent

135. O.W. HOLMES, *supra* note 10, at 5.

136. The criterion I used for selecting quotations required each one to be succinctly representative of the opinions expressed in the questionnaire, read as a whole. In some cases I have edited them, but only to correct misspellings, expand abbreviations, or add names and phrases that were necessary to make a quotation intelligible when read out of context.

and how he or she answered the question whether Emmeline behaved improperly:

Male students who thought Emmeline behaved improperly: (1) "She failed to reveal something she knew would be part of Edward's assumptions in forming the contract." (2) "Perhaps Emmeline was a victim of her culture's mores regarding whether women should be capable of administering their own affairs. But perhaps she is a bundle of shameless, venal, acquisitive appetites, and her deception of Edward, despite its rewards, deprives him of his dignity as a human being, for which no monetary compensation is adequate." (3) "Emmeline was immoral and unethical. She married Edward for the sole purpose of defeating the will, with the intent of divorcing him right afterwards." (4) "Her ethics are somewhat lacking." (5) "Emmeline behaved improperly in utilizing Edward merely for her personal gain and hurting him emotionally." (6) "She procured the contract under misleading pretenses. A contract of marriage implies that love and nurturance are to be exchanged, unless otherwise stated." (7) "Once it became evident to Emmeline that Edward was developing some strong emotional attachment to her it was exceptionally cruel to go through with the sham marriage." (8) "Though her motives 'in law' don't matter, morally I believe they do." (9) "Emmeline was not truthful to Edward. She manipulated his feelings and his desire for money." (10) "Emmeline was unethical in abusing the sanctity of marriage." (11) "She failed to disclose her true purpose for marrying. She may well have had no choice of how to obtain her trust fund, but that does not necessarily justify using Edward." (12) "She misled him by making him believe she loved him and wanted therefore to marry him." (13) "People should not prey on other people." (14) "She lied or at least did not tell the complete truth." (15) "Emmeline deceived Edward. He thought he was getting a real marriage." (16) "Emmeline used unethical bargaining procedures—seduction." (17) "Though Emmeline never proclaimed that she loved Edward, she used him in a way that, regardless of any promises he made, he never intended to submit himself to." (18) "Emmeline deceived Edward as to her intentions about the duration of the marriage, and took advantage of Edward's feelings toward her."

Female students who thought Emmeline behaved improperly: (19) "Emmeline misled Edward. She must have known what he wanted from their relationship, yet allowed him to agree to marriage knowing she would immediately leave him." (20) "For one who stresses Edward's honor, she behaves with little herself. She uses Edward's personality for her own benefit." (21) "Emmeline should not have offered Edward money." (22) "Emmeline understood and took advantage, even if it was legal, of Edward's situation as a pauper and a gentleman." (23) "Emmeline, while she never lied, was not entirely honest about her intentions. She was misleading towards Edward." (24) "Once she realized his emotional involvement, it became something more than a business transaction, and she should have dealt with it differently." (25) "Emmeline used Edward to get what she wanted without regard to how it would affect him." (26) "I pitied her for the lack of control she had over her estate, and that in order to achieve her own financial empowerment she had to use Edward." (27) "Knowing that he was in love with her, she shouldn't have asked him to marry her

unless she had at least some feelings for him." (28) "She should have told Edward what was going on." (29) "She took advantage of Edward's foolishness." (30) "Emmeline *used* Edward to get around the stipulation in her father's will. She seems manipulative."

Male students who were unsure about the impropriety of Emmeline's behavior: (31) "I thought that Venables and Emmeline were just engaging in a business deal." (32) "Emmeline didn't need to offer money—Edward would have married her anyway." (33) "He is better off because of her actions, but I do not condone manipulating his emotions for her financial benefit." (34) "Emmeline was misleading."

Female student who was unsure about the impropriety of Emmeline's behavior: (35) "I'm bothered by Emmeline's advantage in their dealings, perhaps due to her lack of complete disclosure of the arrangement being 'bargained for.'"

Male students who did not think Emmeline behaved improperly: (36) "Emmeline gave Edward ample opportunity to back out before the marriage, and Edward should reasonably have anticipated that Emmeline was going to do something dirty." (37) "Edward should have pressed Emmeline more about the terms of the offer." (38) "Edward was in a sense manipulated, but he pursued his manipulation enthusiastically." (39) "There was consideration for all agreements."

Female students who did not think Emmeline behaved improperly: (41) "Emmeline was neither good nor bad. She was amoral. I believe that Emmeline and Edward have a legal right to act in their best interest." (42) "My morals would like to say that Emmeline behaved improperly, but my business sense questions if I would have behaved any differently. If so, it would only have been to inform Edward of the will prior to the contract." (43) "She was a woman whose autonomy was victimized by the laws of the day. Perhaps what is discomforting is that Edward's delusions reflect the expectations that societal mores impose on women." (46) "If Edward was hurt in any way he is partly responsible."

C. *A Social Reaction?*

At the outset, it is important to note the distinct possibility that some or all of the students who disapproved of Emmeline's conduct, male and female, reacted as they did because of gender stereotypes. Women in our society traditionally have been expected to fill non-individualistic roles that stress the importance of nurturing others and maintaining the integrity of the family. Emmeline's extreme individualism (as reported, remember, by Edward) may have provoked alarm because she failed to live up to widely held expectations that women ought to perform these roles, even though such expectations might fairly be challenged on normative grounds as unfair and oppressive.[137] But to

137. *See* Taub & Schneider, *supra* note 71; Heilbrun & Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1916-19 (1990) (noting stultifying effect on women of male-assigned family roles); Olsen, *supra* note 113, at 1567-69 (conceptual dichotomy between market and family limits women's ability to improve their lives).

say that a social reaction against a particular set of facts occurs is, in the first instance, only an empirical claim; it is not a claim that the social structures that form or contribute to the reaction are just. In fact, Stevenson's interesting reversal of gender roles makes the students' disapproval of Emmeline's behavior all the more striking. I frankly expected far more sympathy for Emmeline than I found. That so few students thought nineteenth century society's oppression of women justified Emmeline's misuse of marriage as a means to her own empowerment[138] may be interpreted in a number of ways. Thus, some students simply may not have thought that Emmeline was a member of an oppressed class; or they may have regarded certain means used to combat oppression as morally unacceptable; or traditional social attitudes towards love and marriage may retain their hold on people's consciousness notwithstanding today's more liberated attitudes about the roles women should play in society.

The simple fact that two-thirds of the respondents disapproved of Emmeline's behavior is consistent with the presence of a widespread distaste among my students for the stark instrumentalism that Emmeline employed towards Edward and the institution of marriage. Analysis of the remarks on the questionnaires, however, suggests a more complicated picture. The responses seem to fall into four categories, although some responses contain elements that can be placed in more than one category. The largest group of responses (fifteen) expressed dislike for Emmeline's instrumental use of Edward, including the emotional harm that she may have inflicted on him.[139] Another group of six responses objected to Emmeline's misuse of marriage as an institution,[140] while three responses simply condemned her ethics in general terms.[141] I interpret all twenty-four of the responses in these three categories (a majority of the class) as some evidence of a Polanyi-like social reaction against Emmeline's behavior. None of these students had been exposed yet to the law of domestic relations. Even so, one has little difficulty imagining that they might be predisposed to support the common law's traditional hostility to marriages in which one of the parties is moved by what a leading family law treatise calls "ulterior purposes."[142]

The fourth category of disapproving responses is characterized by an objection to Emmeline's failure to disclose information to Edward about her true motives. There are fourteen of these responses,[143] six of which also contain commentary that falls into one or more of the three other categories discussed above.[144] This type of response focuses on the *tactics* that Emmeline employed. The eight responses that fall exclusively in this category may have seen Emmeline's failure to disclose her motives merely as spoiling the efficiency of an other-

138. Only two responses (#26 and #43) show support for Emmeline on this ground, and only one other (#2) mentions Emmeline's gender as a possible justification for her conduct. *Cf.* Heilbrun & Resnik, *supra* note 137, at 1922 (noting many students' "outspoken and abrasive" reaction to feminist ideas in law and literature classes).

139. Responses 2, 5, 7, 9, 11, 13, 17, 18, 20, 22, 24, 25, 29, 30, and 33.

140. Responses 3, 6, 10, 21, 27, and 32.

141. Responses 4, 8, and 16.

142. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 117-18 (2d ed. 1988).

143. Responses 1, 2, 6, 9, 11, 12, 14, 15, 18, 19, 23, 28, 34, and 35.

144. Responses 2, 6, 9, 11, 12, and 18.

wise unobjectionable marriage "market." However, even if one interprets these responses as supportive of the market, their recognition that the market in this case did not adjust itself to produce a "correct" result is significant in its own right. Emmeline did everything but yell in Edward's ear that theirs would be a marriage of convenience. Surely she revealed "enough" about her lack of interest in a real marriage to provide a plausible argument that her behavior was at least lawful.[145] As Mark Kelman notes, the impulse to press for an expansive definition of the already elastic common law category of "fraud" is frequently grounded in a communitarian ethic that the dominant individualistic rule (no duty to reveal information) suppresses.[146]

Moreover, Polanyi did not contend that a social reaction to laissez-faire capitalism was the only cause of social protectionism. Nor did he contend that whatever social reaction did exist was caused solely by an antipathy to markets. As Polanyi noted, *supporters* of free markets also found themselves drawn into the regulatory movement:

> [N]ot even radical adherents of economic liberalism could escape the rule which makes *laissez-faire* inapplicable to advanced industrial conditions; for in the critical case of the trade union law and antitrust regulations extreme liberals themselves had to call for manifold interventions of the state, in order to secure against monopolistic compacts the preconditions of a self-regulating market. Even free trade and competition required intervention to be workable.[147]

In other words, Polanyi acknowledged that history is multi-causal, and that the success of any given initiative for institutional change can depend on the activities of more than one social group, the members of which may be motivated by more than one concern. Thus, if enough people experience an adverse emotional reaction to a given feature of the market economy, and if enough other people also support change, albeit for different reasons, the change will happen even though it cannot be determined whether either cause would have been sufficient in itself. Looking at the four types of responses given by those students who disapproved of Emmeline's conduct in "The Enchantress," I am reminded of the way that appellate courts operate. The majority of a court can produce a given result even though the members of the majority do not agree on a single rationale.[148] It is even less important that the judges in the majority be *motivated* by the same concerns. For Polanyi's thesis to have explanatory significance in the context either of the classroom or of the common law process, it

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145. Before they read "The Enchantress" my students had read Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817), and Swinton v. Whitinsville Savings Bank, 311 Mass. 677, 42 N.E.2d 808 (1942). These cases discuss the dominant common law contract and tort rule that a bargainer ordinarily has no legal duty to reveal material information about the subject matter of a deal to the other party, even if the bargainer knows that the other party is ignorant of the information and has no reasonable means to learn of it himself. *See generally* K. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 111-26 (1988).

146. M. KELMAN, *supra* note 12, at 21.

147. K. POLANYI, *supra* note 3, at 150.

148. For a famous example, see National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), where a majority of the Supreme Court upheld Congress' power to grant federal district courts jurisdiction over suits between citizens of the District of Columbia and state citizens, but was unable to agree on a single rationale for doing so.

would be enough that some critical number of people (less than all) react as they do because of the social concerns that Polanyi identified.

V. POLANYI'S THESIS AND THE COMMON LAW PROCESS

A. *A Research Agenda*

Judges, like law students, are social actors. Nevertheless, a number of considerations cut *against* the claim that judges qua social actors have experienced and acted upon the solidaristic protective instincts that Polanyi said were responsible for institutional changes in other spheres of political and economic life. One is the traditional elitism and conservatism of the legal profession from which judges are drawn, as well as the profession's commitment to the ethic (Jerome Frank called it a "myth")[149] that law is morally neutral and apolitical, and that judges do not "make" law. Related to this consideration is the historical homogeneity of lawyers in terms of class, race, and gender. As Richard Abel observes, "the nineteenth-century American [legal] profession consisted almost exclusively of native-born Anglo-Saxon white Protestant males."[150] Thus, the limited range of social circumstances from which judges traditionally have come almost certainly affects their perception of the practices that come before them, including their conception of which of those practices are threats to the social order. Finally, it is possible that the economic dependency of many lawyers on the business interests they represent biases their attitudes in favor of the self-regulating market. If this is so, such attitudes may persist even after a lawyer leaves private practice for the bench.[151]

Yet this important fact remains: in the past 150 years judges *have* often manipulated doctrines, and *have* often changed the law, in order to protect those who were disadvantaged in the marketplace. Moreover, these judicial practices seem to be more than just an unconnected mass of aberrations arising from "uniquely individual factors" and "concealed and unrevealed" predispositions of particular judges.[152] Rather, the accumulated weight of common law changes since the nineteenth century suggests a systematic, albeit uneven, movement away from individualism and self-reliance as the sole basis for many legal rule systems. (Consider, for instance, the birth and expansion of the good faith and unconscionability doctrines in contract law, and of strict liability in tort law). That Polanyi's thesis might provide a partial explanation for this movement seems plausible for a number of reasons:

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149. J. FRANK, *supra* note 10, at 40.

150. R. ABEL, *supra* note 132, at 6, 83-108.

151. Max Weber identified this factor as one of the causes of what he took to be the common law's pro-capitalist tilt. 2 M. WEBER, *supra* note 50, at 891-92. *See also* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 135 (1976)(nineteenth century judges "were conservative people, trained in an environment that exalted the values of business"). *But see* R. ABEL, *supra* note 132, at 30-34 (both traditional Marxist and neo-Marxist class analyses of the legal profession "may not throw much light on the behavior of lawyers"); Simon & Lynch, *The Sociology of Law: Where We Have Been and Where We Might Be Going*, 23 LAW & SOC'Y REV. 825, 833 (1989) ("the [American] bar was not a unified professional group in the sense that it shared a common expertise or a common set of values.").

152. J. FRANK, *supra* note 10, at 113-14. Frank thought that these predispositions were usually concealed "not only from others but from the thinker himself." *Id.* at 72.

(1) As the market has become ubiquitous in American society, the number of human relations that arise from distinctly market transactions has increased dramatically. Market transactions, in turn, have become a primary source of the disputes that judges are called upon to decide. These disputes frequently turn into legal cases because one or both parties' sense of self-interest predominates over their sense of cooperation and altruism. Judges therefore have had an opportunity to see in their daily work some of the same kinds of behavior that Polanyi identified as responsible for spontaneous social counter-reactions elsewhere in society.

(2) Judicial decisions would be a good place to look for expressions of a social reaction if such expressions in fact do occur anywhere in society. This is because the traditional notion of laissez-faire (the absence of state intervention in the market) does not strictly apply to the legal process. The institutional position of judges *requires* them to resolve the disputes before them, and judges necessarily manifest public power whichever way they decide a case. This circumstance eliminates the free rider problem that can be an obstacle both to individual adherence to social norms, and to effective individual initiatives to produce social change.[153] Indeed, it is possible for this reason that Polanyi's thesis does a better job of explaining the incremental development of the common law than it does of explaining larger-scale political and economic changes.

(3) The common law system requires judges to apply abstract rules to real people with highly discrete and deeply textured disputes. These people frequently present vivid and emotionally appealing evidence of the harms inflicted by this or that manifestation of the market.[154]

(4) The decisions demanded of judges, though formally constrained by rules, are practically discretionary in a significant number of cases, if not most of them. As Jerome Frank put it sixty years ago, "[t]he court can decide one way or the other and in either case can make its reasoning appear equally flawless."[155]

(5) Judges do not have an obvious self-interest to protect or advance by reaching particular results in the cases before them. As Jonathan Macey re-

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153. *See generally* Hechter, *supra* note 16, at 184 ("Because social order is, at least partly, a public good, the rational actor will free-ride by not complying with inconvenient norms whenever this suits his fancy.").

154. Consider, for example, the gradual erosion of contributory negligence and assumption of the risk as doctrinal bars to compensation for injured plaintiffs in tort suits. *See generally* PROSSER AND KEETON ON THE LAW OF TORTS §§ 65 & 68 (5th ed. 1984). *See also* Bowman v. Great Atl. & Pac. Tea Co., 284 A.D. 663, 133 N.Y.S.2d 904 (1954), *aff'd*, 308 N.Y. 780, 125 N.E.2d 165, 140 N.Y.S.2d 780 (1955) (agency doctrine manipulated to allow contract suit against food retailer by non-purchasing user who was injured by consuming salad oil containing decayed mouse); *cf.* Britton v. Turner, 6 N.H. 481 (1834) (unpaid employee who quit job ten months into a one-year contract can recover in restitution for the value of his work to the employer, despite the fact that the employee forfeited the right to sue on the contract by his own material breach).

155. J. FRANK, *supra* note 10, at 72; *see also* R. SATTER, DOING JUSTICE: A TRIAL JUDGE AT WORK 51 (1990) (sitting trial judge candidly describes the art of judging as "using [the] mind to find *valid* ways to implement the stirrings of [one's] heart"); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 275 (1929)(U.S. District Judge considers the possibility that judges, like juries, "might and did arrive at their verdicts by feeling"). *See generally* M. KELMAN, *supra* note 12, at 202 ("judges will always have to make profoundly political choices in elaborating any rule structure, since each one has within it philosophically clashing elements."); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10 (1984)("[t]he claim that legal theory is infinitely manipulable expresses a universal experience of lawyers").

cently observed, "[t]here simply are no economic theories at all to explain how 'independent' judges, whose incomes are not contingent on the outcome of cases, go about making decisions."[156] The opportunity for a "social" reaction to manifest itself in judicial opinions therefore is greater than in those realms of social life where self-interest is the predominant motive for action.

But to argue the plausibility of Polanyi's thesis as applied to the common law process is not to prove it. Nor do I suggest here anything more than an hypothesis to explain the cause of the judicial impulse towards fairness in litigated cases. At the empirical level, then, what kind of research program might be employed to test whether Polanyi's thesis has any explanatory power in the context of what judges do?

As a preliminary step, one would look for evidence that formal doctrines have been altered over time to ameliorate the harsh individualism of earlier rules, and that the primordial doctrines themselves were applied or circumvented in such a way that their harshness was reduced or eliminated.[157] In short, one would look for evidence that the "double movement" that Polanyi saw in the general political and economic environment of the late nineteenth century has been mimicked by changes within the common law. In fact, the softening in this century of many of the atomistic doctrines of contract and tort law that were first developed in the nineteenth century is a well known story that most law professors tell to their first year law students.[158] Perhaps less well known is a small but growing amount of empirical evidence that nineteenth century judges and juries actually *applied* many tort doctrines that were harsh on their face with what Gary Schwartz calls "impressive sternness to major industries," and with "a keen concern for victim welfare."[159] Empirical work in other fields, including my own, is in progress.[160] Such empirical work explores the possibility that the well-known conservatism of the nineteenth-century American treatise writers who stated "settled" legal rules may not have been

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156. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 93 (1989); *see also* Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 63 (1989). Both Macey and Kornhauser develop models based on judicial self-interest in efforts to explain why judges adhere to precedent even when they think it is wrong.

157. Note that this inquiry would not seek to explain why the individualistic doctrines arose in the first place; it would look only for an explanation of why those doctrines, once announced, became eroded by a social reaction on the part of the judges who had to apply them. (Legislative alterations of common law rules are another topic).

158. *See* G. GILMORE, *supra* note 126; Schwartz, *The Vitality of Negligence and the Ethic of Strict Liability*, 15 GA. L. REV. 963 (1981); *see also* Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 483-88, 541 (1990) (from the mid-1960s through the mid-1980s American judges aggressively expanded plaintiffs' theoretical and practical ability to recover damages for injuries from defective products, making liability law "serve as a system of social insurance").

159. Schwartz, *supra* note 124, at 1720; *see also* Pratt, *American Contract Law at the Turn of the Century*, 39 S.C.L. REV. 415 (1988); Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989). *See generally* Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679, 682 (1984)(contesting the conventional view that the *Lochner*-era judiciary was "servile to big business").

160. *See* Wolcher, The Privilege of Idleness: A Case Study of the Relationship Between Law and Society in Nineteenth Century America (work in progress analyzing the application of the mitigation of damages rule in nineteenth century employment contract disputes); *cf.* Wolcher, *supra* note 128, at 874 (no reported cases between 1930 and 1988 actually enforced the "rule" of contract law that a plaintiff's reliance damages cannot exceed the amount of his expectancy).

matched by the underlying practices of courts, and that the fit between treatise law and case law was uneven across the country.[161]

But these efforts are only an initial showing. Beyond establishing that doctrines were evaded and softened in the interest of fairness to the victims of laissez faire, a rigorous research program aimed at applying Polanyi's thesis to the common law process should also include the following elements:

(1) The very idea of judicial "manipulation" is problematical, because it implies an objective baseline result that is normal and non-manipulative. Yet, as every first year law student is taught, most legal rules have their counterrules.[162] It is a rare case in which plausible arguments to support a judgment for either party are not available. The research therefore should take care to define exactly what counts as a manipulation. For example, if two different results are both plausible given the existing legal materials, a manipulation might be defined as the judge's choice to prefer a result that protects someone who came out poorly in a market transaction, or that penalizes someone who acted selfishly. Such a definition of manipulation does not imply that a contrary result in the case would not be manipulation. Rather, the term manipulation is useful because it identifies a result that is counterintuitive to those who hold the conventional view that common law judges are supposed to (and do) apply the law without regard for their emotional reactions to the facts.[163]

(2) The research should determine the extent to which covert manipulations and overt changes of the common law were influenced by the judge's hostility to the harms caused by market-driven individualism, and the extent to which other factors produced the result. Because judges often obscure the real reasons for their decisions by formalistic doctrinal argument,[164] the research would need to be particularly sensitive to the facts of each case. One would have the beginnings of a confirmation if a pattern of social protectionism emerges based upon the criteria that Polanyi suggested. Walter Pratt's recent article *American Contract Law at the Turn of the Century*[165] is a good example of the kind of methodology that might be employed. Pratt analyzed the facts of several New York decisions from the 1890s and early 1900s in which the courts implied an obligation of good faith in the performance of commercial contracts. He concluded that a common theme in those decisions was the judges' overt "castigation" of parties who acted out of "purely pecuniary motives," and their tendency to protect those parties who were "perceived as being weak" in the

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161. *See, e.g.*, McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 Y.B. SUP. CT. HIST. SOC'Y 20, 25 (noting division among state courts in 1880s and 1890s concerning constitutional validity of protective labor legislation); *accord*, J. FRANK, *supra* note 10, at 55 n.2.

162. *See, e.g.*, F. KESSLER, G. GILMORE & A. KRONMAN, *supra* note 122, at 56-110 (headings on every pair of pages in introductory chapter of popular contracts casebook read "Individualistic Ideals and Their Erosion: Rule and Counterrule").

163. *See, e.g.*, J. FRANK, *supra* note 10, at 111 ("the conception that judges work back from conclusions to principles is so heretical that it seldom finds expression."); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 370 (1973)(dominant liberal theory of justice provides "no basis for the judge to refuse to enforce a rule he thinks is unjust . . . . The judge has no function but to execute . . . [legal rules] as the servant of the legislature.").

164. *See* J. FRANK, *supra* note 10, at 123 ("The directing impulses of judges will not so readily appear from analyses of their rationalizing words.").

165. Pratt, *supra* note 159.

transaction.[166] Although Pratt did not tie his findings to Polanyi's thesis, the thesis obviously finds support in Pratt's identification of a judicial swing away from the atomism of the free market ideal and towards a cooperative and solidaristic vision of contract relations.

(3) As a check for the significance of any social protectionist pattern that is found, the research should compare the results with the pace and content of fairness-driven doctrinal manipulations and changes in earlier historical periods, when a market economy had not fully developed. One would have difficulty explaining the judicial impulse towards fairness as positively correlated to the presence of market institutions if judges in these earlier periods showed a disposition to favor the victims of selfish behavior that was as great or greater than that of modern judges.[167]

(4) A scholar's easy access to printed judicial opinions makes them attractive candidates for empirical inquiry. But these opinions have their limitations as research tools because they frequently do not give the kind of factual detail about a dispute that one would like to see before drawing strong conclusions. Moreover, the "facts" themselves usually are selected by the deciding court according to what the court has decided the result should be. A comprehensive research program therefore should involve at least some analysis of cases at the trial level, including trial court records and perhaps other sources.[168]

(5) The research should account for the different institutional roles played by trial and appellate judges. For example, does an appellate judge's remoteness from the gritty realities of the courtroom make it easier for him or her to ignore what Polanyi called "collectivistic"[169] impulses? On the other hand, does a trial judge's relative lack of influence over the development of abstract legal doctrines make whatever social reaction he or she does experience less effective as an instrument for legal change?

(6) The research also should account for the roles played by lawyers and juries in the common law process. Juries have a considerable influence over outcomes by virtue of their discretionary fact-finding function.[170] Do jurors react as Polanyi described when they are presented with a case where one or more of the parties relentlessly pursued their self-interest in the marketplace? Likewise, are the choices that lawyers make in selecting and representing their clients skewed in any way by the factors that Polanyi mentioned?

(7) At the theoretical level, the research would have to develop an explanation for why lawyers and judges in the early and middle parts of the nineteenth

166. *Id.* at 461; *accord*, Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1548 (1987)(good faith doctrine arose "in response to the extreme selfishness contemplated by classical law"). For a different, explicitly class-based explanation of the good faith doctrine's emergence, see Gabel & Feinman, *supra* note 122, at 178-82.

167. *Cf.* Millon, *Positivism in the Historiography of the Common Law*, 1989 WIS. L. REV. 669 (preseventeenth century English law permitted civil juries to exercise broad discretion with regard to normative judgment as well as fact-finding, and consistent rule application was not a primary goal of the legal system).

168. For an excellent example of the kind of rich descriptive detail that might be uncovered by such research, see R. DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (1978).

169. K. POLANYI, *supra* note 3, at 149.

170. The seminal empirical work on the decisional differences between judges and juries is H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

century found themselves capable of playing such an important role in shaping law to the needs of the marketplace.[171] For example, Polanyi himself noted that "[i]n the advent of the labor market common law played mainly a positive part—the commodity theory of labor was first stated emphatically not by economists but by lawyers."[172] Is it plausible that early judges could overcome whatever social reaction they felt against the consequences of their decisions, while later judges could not resist succumbing to their solidaristic instincts? Perhaps political changes during and after the Progressive Era resulted in the appointment of judges who were more sympathetic to social protectionism than their predecessors.[173] Or perhaps the different historical perspectives of the person who sows and the person who reaps may help provide an answer. Although even Polanyi avoided addressing this kind of question,[174] it obviously requires a response.

(8) The research should be sensitive to the possibility that American judges' historically narrow class, gender, and racial characteristics limited the ways in which they manifested whatever social reaction to the market that they did feel. Consider, by way of example, the contract law requirement that a wrongfully discharged employee mitigate damages by taking reasonably available substitute employment. This requirement, which first found its way into American treatises around the middle of the nineteenth century,[175] was soon qualified to mean that the employee need only take a substitute job that is "similar" (and need not take one that is "greatly inferior") to the position from which he or she was fired.[176] The similarity-of-substitute qualification might be interpreted as a sympathetic judicial reaction against the loss of social status that would be threatened if a wrongfully discharged employee had to take any kind of job in mitigation of damages, no matter how demeaning that job might be.[177] Yet the *elaboration* of this qualification to the mitigation requirement was explicitly crafted to benefit only the professional classes, at least in its earli-

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171. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 xv (1977)("the contractarian ideology of nineteenth century judges was both instrumental (in the sense of promoting economic development) and laissez-faire (in the traditional sense of being hostile to legislative or administrative regulation)."); *cf.* Henderson & Eisenberg, *supra* note 158, at 481, 498-538 (empirical study of reported products liability decisions since early 1980s showing "that changes in judicial decision making are occurring and that current trends favor defendants.").

172. K. POLANYI, *supra* note 3, at 181; *see also* Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643, 665 (1943)("The nineteenth-century judicial attitude towards [state protective labor legislation] was for the most part unfriendly."); McCurdy, *supra* note 161.

173. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 97 (1977)(fairness of fellow-servant doctrine in tort law viewed differently by different "generation[s] of lawyers").

174. *See supra* note 83.

175. S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 261a, at 264 (2d ed. 1848); T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 352 (2d ed. 1852). The first editions of these treatises do not mention the rule. *See* S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 86-89 (1842); T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 366-68 (1847).

176. *See* T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 307-08 (8th ed. 1891).

177. *Cf.* K. POLANYI, *supra* note 3, at 154 (explaining nineteenth century English customs tariffs as a form of social protection for workers, including security against "that painful loss of status which inevitably accompanies transference to a job at which a man is less skilled and experienced than at his own.").

est form. For example, here is how one leading commentator described the rule in 1884:

> If the servant is employed in any special service as a physician, lawyer, dentist or engineer, he would only be required to seek and accept employment in such special business; whereas, if he is hired to do general labor, as a day laborer, farm hand, or the like, he must seek general work.[178]

This example is meant to illustrate the idea that the breadth and depth of a social reaction against the commoditization of certain kinds of human relationships (such as that between employer and employee) is contingent on the background of the person who experiences the reaction. Thus, most American judges in the nineteenth century found themselves capable of adopting the employment at will doctrine for those workers who lacked enough bargaining power to negotiate an express term of employment, and this doctrine arguably played some role in the creation and maintenance of a national labor market.[179] But the similarity-of-substitute aspect of the mitigation rule, applicable to those privileged workers who had been able to secure agreed lengths of employment, cuts the other way. This latter rule obviously drew back from the stark idea that *all* classes of employees ought to re-enter the market after they are discharged and, like non-human commodities, fetch whatever price that their services might bring. More to the point, the fact that a legal result expresses support for those social classes with whom the judge might be expected most easily to identify should not disqualify the result as a possible example of social protectionism.

(9) It seems clear that Polanyi himself deplored the unregulated market as profoundly dehumanizing.[180] Nevertheless, his *empirical* claim that people in the nineteenth century experienced a widespread emotional reaction against the self-regulating market entails neither a normative condemnation of the market, nor a normative preference for non-market institutions. The research should keep this distinction between the empirical and the normative plainly in focus. Thus, as I have mentioned already, the widespread social reluctance to extend market principles to the family has been criticized on normative grounds as oppressive to women.[181] But this normative condemnation does not make the social reluctance any less real, or any less powerful as a potential mechanism to stem or regulate the advance of the market.

B. *Rule Formulation and Rule Application*

No single theory of the judicial process could ever fully explain the complex reality of how judges decide cases. Yet if Polanyi's account of the causes of institutional change in capitalist economies can be extended in the direction that I have suggested in this essay, it would offer a helpful supplement to evolu-

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178. McQuillin, *Damages for Employer's Breach of Contract for Services for Specified Period*, 19 CENT. L.J. 342, 345 (1884).

179. *See* Feinman, *supra* note 151; *see also* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

180. *See* P. BERGER, *supra* note 91, at 237 n.7.

181. *See supra* note 137.

tionary,[182] class-based,[183] and rational choice[184] theories of common law development. For example, it may be that in the short run judges generally *adhere* to the doctrine of stare decisis out of a sense of duty, or even a desire to "maximize leisure,"[185] whereas they occasionally *depart* from precedent for the reasons that Polanyi identified. In short, the proposed application of Polanyi's thesis is offered only as "a partial explanation" that may produce "a more informed synthesis" of how the judicial process works.[186]

I have suggested in this essay that the creation and enforcement of legal rules in the common law process may evoke protectionist social reactions from the actors who are involved in that process—reactions that are caused, at least in part, by these actors' membership in a larger cultural community. If I am right, judges historically may have played (and may continue to play) an important transformative "social" role in the ways in which law relates to the economic structures of capitalism. "Hard cases," Baron Rolfe observed in 1842, "are apt to introduce bad law."[187] Polanyi's insights may help us understand both why judges think that some cases are hard in the first place,[188] and why judges sometimes give in to the temptation in these hard cases to introduce law that is at least new, whether or not one agrees that it is preferable to the old law that it replaces.[189]

Polanyi's thesis also has troubling implications for instrumental theories of law. For example, if Polanyi's ideas about the nature of institutional change apply to the legal process, then even if it is desirable in the abstract to have a totally objective set of efficient common law rules, it may never be possible to implement the rules as intended. That is because abstract rule formulation in theory allows the intellectual calculation of human costs and benefits, but those who *apply* the rule must witness some of the human costs and benefits first-

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182. *See, e.g.*, Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). Some law-and-economics writers have suggested that judges may tend to choose rules that are fair, and that fair rules also may tend to be efficient. *See* Heyne, *The Foundations of Law and Economics: Can the Blind Lead the Blind?*, 11 RES. L. & ECON. 53, 65-66 (1988) (proposing "invisible hand" theory of common law process in which "courts could have developed efficient rules as an unintended by-product of their conscious efforts to develop fair rules"); Zerbe, The Development of Institutions and the Joint Production of Fairness and Efficiency in the California Gold Fields (Might Makes Right) (May 8, 1990) (unpublished manuscript).

183. *See, e.g.*, M. HORWITZ, *supra* note 171; Feinman, *supra* note 151, at 134-35. *See generally* G. KOLKO, THE TRIUMPH OF CONSERVATISM (1963) (Progressive Era's protectionist legislation resulted from efforts by leaders of big business to prevent competition from smaller firms and to maintain existing social and power relations in a new economic context).

184. *See supra* notes 98 & 156.

185. Macey, *supra* note 156, at 94.

186. J. FRANK, *supra* note 10, at 22-23 n.8.

187. Winterbottom v. Wright, 152 Eng. Rep. 402, 406 (1842).

188. *Cf. id.* at 405 (Rolfe, J.)("unfortunate" but true that a manufacturer owes no duty of care to a remote user of his negligently constructed coach, despite the acknowledged "hardship on the plaintiff to be without a remedy.").

189. *Compare id. with* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916)(Cardozo, J.)(duty of care extends from manufacturer of automobile to one who purchased the car from a dealer). *But cf.* R. DWORKIN, *supra* note 173, at 81 ("It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.").

hand, unfiltered by the veil of abstraction. As Karl Llewellyn succinctly put it, the rule applier must work in the arena of "[l]ife struggling against form."[190]

The common law, like history, is profoundly contingent. A given legal rule may have seemed both fit and just for an earlier case. Now an apparently similar case comes along, peopled by parties whose circumstances tug the social instincts of a new judge and a new jury in the opposite direction. Instrumental objectives such as efficiency or maintaining the Rule of Law require that the judge and jury resist the tug and apply the rule. Will they do so? I will borrow a metaphor from war to illustrate their situation: a politician may order an assault knowing in advance that so many troops in the abstract will be casualties; but the soldier who pulls the trigger is forced to see directly who is maimed or killed, and hence is affected in ways the politician never can be. The rule applier, like the soldier, is well placed to experience what Duncan Kennedy calls "the pity and fear aroused in us by the image of a fellow human being at grips with the institutions of formal justice."[191]

Consider, for example, a case that never fails to provoke an emotional reaction from my first-year contracts students. A judge must decide whether to enforce an "add-on" clause in a credit agreement between a retail furniture dealer and a welfare recipient who has defaulted in making payments on a recent purchase. The clause specifies that any furniture that the borrower has purchased from the store in the past will be collateral not only for past loans, some of which are almost paid off, but also for the current purchase. The U.C.C. was not in effect when the contract was made, and existing common law doctrines point towards enforcement of the clause in the interest of freedom of contract despite the buyer's poverty and the hardship she will suffer if the retailer wins. What is more, plausible policy arguments can be made to support a decision for the retailer. Indeed, viewing the issue abstractly and instrumentally, the judge might conclude that enforcement of the add-on clause actually will benefit the poor as a class. Thus, the judge might think, enforcement will convey the message to retailers that they may safely extend credit in the future to poor consumers who would not be eligible for a loan without the ability to pledge their existing furniture as security. Conversely, striking down the clause—as unconscionable, for instance—might make these same poor people worse off in the future, because they have no money for a downpayment or other good security that would induce the retailer to give them credit.

These instrumental arguments for why enforcement of the clause would be efficient, and non-enforcement inefficient, are familiar law-and-economics rejoinders[192] to Judge Skelly Wright's famous opinion in *Williams v. Walker-Thomas Furniture Co.*[193] In *Williams*, Wright announced that unconscionability really had been a feature of the common law in the District of Columbia

190. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 751 (1931).

191. Kennedy, *supra* note 163, at 380.

192. *See, e.g.*, R. COOTER & T. ULEN, LAW AND ECONOMICS 267-73 (1988); Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306-08 (1975); *cf.* Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1059 (1977)("a contracting party's poverty, other things being equal, should militate in favor of, rather than against, enforcing a contract clause.").

193. 350 F.2d 445 (D.C. Cir. 1965).

even before the U.C.C. was adopted, and held that the defaulting buyer should be given a chance to prove that the add-on clause was "so unfair that enforcement should be withheld."[194] But only Wright and his colleagues (not the law-and-economics scholars) had to accept personal responsibility for the effects that enforcement would have had on the real, flesh-and-blood Ora Lee Williams. It would have meant that Ms. Williams and her seven children would have faced life in a bare apartment after most of the fourteen household goods she bought from the retailer over a five year span were hauled away by the sheriff to satisfy a judgment against her.[195] It may well be that judicial support for the retailer's economic self-interest in the *Williams* case would have furthered the abstract overall welfare of society, and even enhanced the welfare of poor people as a class.[196] But Skelly Wright and his fellow judges would have had to sacrifice the concrete welfare and happiness of a real family to reach that hypothetically desirable end, and this they apparently were unwilling to do.[197]

In *The Great Transformation* Polanyi describes an investigation by the nineteenth century economic liberal Albert Venn Dicey into the causes of "anti-laissez faire" sentiment in English public opinion during the late 1800s. What Dicey found provides an apt metaphor for the process I have just described. Although the English market economy was itself the product of deliberate state action, Dicey discovered that "collectivist" legislation enacted by Parliament during the 1870s and 1880s was preceded by a "*complete absence of any deliberate intention* to extend the function of the state, or to restrict the freedom of the individual . . . ."[198] Instead, the countermovement against the self-regulating market bore all the signs of being a spontaneous and pragmatic reaction on the part of many different people. As Karl Polanyi succinctly put it, Dicey's findings showed that "[l]aissez-faire was planned; planning was not."[199] If those who apply abstract legal rules to real human problems perceive concrete examples of unbridled self-interest as a threat to society, the decisions that they render are bound to be influenced by their perceptions despite the attractive utopian ideal that the rules may embody.

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194. *Id.* at 450.

195. *See* Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. 1964), *rev'd*, 350 F.2d 445 (D.C. Cir. 1965).

196. *See supra* note 192. *But cf.* Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U.L. REV. 485 (1987)(using microeconomic models in attempt to demonstrate possible welfare-enhancing effects of enforcing a mandatory warranty of habitability in low-income housing).

197. *Cf.* R. COOTER & T. ULEN, *supra* note 192, at 273 ("Lawyers tend to focus upon individual cases, and this may sometimes create a bias toward finding some form of relief. . . . In such individual cases, the consumer's situation is desperate, and the impulse to provide legal relief is powerful.").

198. K. POLANYI, *supra* note 3, at 141 (emphasis added); *see* A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 68 (1905)(noting "an almost unconscious change in legislative opinion" in favor of "collectivism" and against "Benthamism").

199. K. POLANYI, *supra* note 3, at 141.

VI. CONCLUSION

A wonderful short story originally inspired me to write this essay. Using the human problem that is illuminated in "The Enchantress," I suggested that Karl Polanyi's ideas concerning the causes of institutional change in the nineteenth century might help us to understand some of the behaviors that law professors observe in their students today. I also raised the possibility that the thesis Polanyi developed in *The Great Transformation* may help us account for some of the changes that have occurred in the common law over the past century and a half. In this connection I described a program of research that could be employed to take this extension of Polanyi's ideas beyond the realm of theoretical speculation. Painstaking theoretical and empirical work remains to be done before the suggested application of Polanyi's thesis to the common law process can ripen into an explanation. I hope that this essay will help to stimulate some of that work.

APPENDIX

Table 2

This table presents a breakdown of the responses given to the question "In your opinion, did any of the following three characters in the story behave improperly?" (percentages are rounded to the nearest tenth). The question was asked after the students had read the story, but before the class discussed it.

Emmeline:	Total (%)	Men (%)	Women (%)
Yes	30 (65.2)	18 (66.7)	12 (63.2)
No	11 (23.9)	5 (18.5)	6 (31.6)
Unsure	5 (10.9)	4 (14.8)	1 (5.3)
	46	27	19
Edward:			
Yes	11 (23.9)	7 (25.9)	4 (21.1)
No	23 (50.0)	11 (40.7)	12 (63.2)
Unsure	11 (23.9)	9 (33.3)	2 (10.5)
No Reply	1 (2.2)	—	1 (5.3)
	46	27	19
Venables:			
Yes	13 (28.3)	8 (29.6)	5 (26.3)
No	20 (43.5)	12 (44.4)	8 (42.1)
Unsure	13 (28.3)	7 (25.9)	6 (31.6)
	46	27	19