

# Law and

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*Quite possibly the rose will go on smelling as sweet as it does only so long as we go on calling it a rose.\**

The life of the law has not been logic; it has not been experience either. It has involved "logic," of course, if the word is taken to signify some system of order in terms of which mere experience has meaning. And its subject matter, the interaction among people and between them and the world, certainly can fairly be called "experience." But the law's life has never been one or the other: instead, it is and has always been an attempt to create and maintain a coherent species of "logic" that would not too ridiculously fail to reflect, or even refract, experience.<sup>1</sup> It has been, in short, an attempt to construct a legal system that accommodates the equally exigent demands of being and meaning, and to do so in a universe in which what a thing does is only one of the things that it means, but everything that it means is something else that it does.

In an attempt to explain what *I* mean, I shall first tell a fable about a tribe that never was, then talk about the games and sports and some of the legal procedures of a tribe that is, and then close by speculating about the meaning of the behavior of still a third tribe, the legal scholars.

## I. The First Tribe

Let us suppose there exists somewhere a primitively organized people, call them the "Jondo."<sup>2</sup> This tribe is so primitive that it has divided

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\* Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 109 (1970).

1. It is only fair to Holmes, whose famous aphorism I have used as a parodic diving board into this essay, to point out that the paragraph in which his line is embedded can fairly be read as making a point not very different from mine. See O. HOLMES, *THE COMMON LAW* 5 (M. Howe ed. 1963). See also Gilmore, *Law, Logic and Experience*, 3 HOW. L.J. 26, 36 (1957) ("[W]e are committed to the proposition that we are dealing with both logic and experience—or that experience hath its logic, which logic knoweth not.")

2. My treatment of the Jondo is most certainly not to be taken as "doing anthropology." One does not practice that discipline on imaginary data, and even if I were working with information about a real tribe, I am not equipped to do a real job of anthropological interpretation. The Jondo are not a tribe but a metaphor; I am attempting to illustrate some of the difficulties of "legal science" in terms of this imaginary society, but I am not trying to say anything at all about the Jondo as a unit of human organization.

itself into only two moieties, or subgroups, totemically specified as the Fish-Jondo and the Maize-Jondo. Each moiety is eponymously charged with the production of one of the two Jondo food staples.

The Jondo also possess an elaborate cosmology that includes a complex classification of the heavenly bodies, which are believed to give direction to the sublunary activities of the tribe and its members. In the tribe's world vision, most of the visible stars are organized into vegetable-like constellations; other heavenly bodies, like the moon, sun, planets, meteors, and comets, being more "active," are associated with various animals. This play of the sky sends to every Jondo messages about how his tribe is ordered to be "in tune" with the universe.

Ordinarily, each of the two Jondo moieties stays on its own clearly demarcated side of the village. On two occasions, however, all the Jondo come together. One jointure occurs "when the Great Cod enters the Maize Ear," that is, when the moon rises full in a particular constellation of stars that the Jondo call the "Maize Ear." This celestial event normally occurs in early autumn, and when the sky so arranges itself, all the Fish-Jondo cross to the Maize-Jondo side of the village, help with the maize harvest, and celebrate with a big post-gleaning party.

The other major all-tribe event takes place in early spring, when "the Maize Ear is eaten by the Great Cod," that is, when the maize constellation disappears below the horizon under the setting new moon. At that point all the Maize-Jondo go to the Fish-Jondo (river) side of the village, help cope with the annual run of the river cod, and have another party when it is over.

Now by and large these heavenly arrangements coincide with the two "harvests." But only by and large. Because of yearly variations in the ripening time of maize and the spawning lust of codfish, moon, stars, and organic nature almost never perfectly coincide. Thus, not infrequently part of the spawning run and/or part of the maize harvest is lost. Indeed, sometimes, when heaven and earth are too much out of phase, it begins to look as if *all* of a particular harvest might be lost. When that happens, the "Astronomer Royal" of the Jondo must declare the moon "bewitched," and order the temporary merger of all the Jondo on the basis of where an unbewitched moon *would* be, or, as he puts it, where it "really" is.

After the maize is harvested, it is placed in a number of "grain elevators" shaped like gigantic fish located on the Fish-Jondo side of the village. When the codfish catch is completed, it is salted and cured and then stored in a series of deep burial chambers in the Maize-Jondo territory. Throughout the year, the Fish-Jondo "swim" (very stealthily,

at night) over to the Maize-Jondo's burial chambers and, until interrupted by the Maize-Jondo watchmen, "go fishing" for the preserved cod. The Fish-Jondo take as "bait" sacks of maize, which they leave behind them when, discovered, they flee with their "catch."

This, as one might imagine, leads to disputes. Under such a distribution system the fish-grain exchange ratio is determined almost unilaterally by the Fish-Jondo. So the Jondo also have a legal system, albeit one that recognizes only one cause of action, which may fairly be translated as "tortiously fishing with insufficient bait." When such a complaint is filed, the matter is taken for solution to the Jondo's chief judicial officer, the "Sacred Hermaphrodite."

Among the Jondo, be it said, "hermaphrodite" does not mean half-male, half-female; it means half-fish and half-grain. The Jondo Sacred Hermaphrodite is always the eldest male member of the same family. This family belongs to the Maize-Jondo moiety and resides on that side of the village. But the males in the family suffer from a nasty hereditary skin disease that makes them appear almost "scaly." This dermatological misfortune is hardly mitigated by the family's position as maritally "unclean" to both totems, which leads to a shocking amount of inbreeding.

In any event, the alleged tortious fishing is tried before the Sacred Hermaphrodite. He listens to both sides, then tears open a codfish, wraps it around a maize ear, buries it in a warmed pit, and a day or two later "reads" the decayed result. Generally he awards some compensatory grain to the Maize-Jondo, but since this Jondo skin disease is genetically linked to adult imbecility, the award occasionally goes the other way. When it does, the Maize-Jondo have for a while a very hungry time of it indeed. But then again, Sacred Hermaphrodites who botch the decision two years in a row are always found, before the third year's "trial," floating face down in the river, having sought, perhaps successfully, to join the Great Cod himself in an epiphanic embrace.<sup>3</sup>

What then is one to make of the Jondo?<sup>4</sup> One approach might be to ignore the Jondo cosmology and just describe what they do. The first thing to be noted would be the existence of the tribe, which proves that they have ordered their society so that it is viable at the crude biological

3. The elders among the Fish-Jondo visit the Hermaphrodite to tell him that the Great Cod has appeared and asked for him "to come home." The Maize-Jondo elders then come and publicly rejoice in their totemic brother's honor. The Hermaphrodite joyously makes for the river closely accompanied by the ecstatic elders of both totems, and throws himself face down in the water, with the eldest Fish and eldest Maize helping him to maintain his embrace.

4. Please recall that this is not anthropology, but trope. I am merely working out the implications of my own metaphor. See note 2 *supra*.

level. But more than that, the Jondo can be seen to make a series of moves clearly conducive to material prosperity. They are committed to the specialization of labor in the acquisition of their two staples, and that leads, one might surmise, to productive efficiencies. But when either production group must temporarily be augmented by a pool of less-skilled labor in order to bring in the "harvest," the needed workers are regularly available. And the produce, once acquired, is stored and cared for in what again looks to be a technologically efficient manner, again involving labor specialization.

Moreover, a balanced diet is achieved as protein and fat are exchanged for carbohydrate, and vice-versa. When this primary system of exchange generates temporary misallocations, an adequate legal system is in place to cope with the problem. Since that legal system uses a judge recognized as independent of either major grouping within the society, his judgments are accorded tribal respect. And that legitimacy seems not to be misplaced; an objective study of the final exchange ratio between moieties for any extended period would show that all of the Jondo are more or less equally well nourished.

In brief, it would appear thoroughly plausible to describe the Jondo as organized to achieve economic goals in their tribal and individual endeavors. One could, without blushing, speak of the economic efficiency of the Jondo.

But the same activities among the Jondo could be described in a different vocabulary, tied to a differently perceived pattern. One could see the Jondo, in all things, merely acting out the implications of their cosmology. Fish-Jondo fish and Maize-Jondo cultivate, each apart from the other, in mere imitation of similar empyreal divisions; the distinctions between animal and plant, moving body and fixed body, active and passive, all occur on earth, as they do in heaven. The Jondo come together when the sky does, and depart again on the same sort of cue. Fish-Jondo can move, but Maize-Jondo are more rooted. So the Fish-Jondo swim, bearing grain as bait, to catch their penned totemic brothers. When the Fish-Jondo have greedily fished unfairly, neither Fish nor Maize can be trusted to decide: the arbiter must be a totemic Maize Ear who nonetheless bears the scales of the Great Cod.

Here, then, it would not be absurd to suggest that the "explanation" of Jondo society lies in its symbolic intellectual structure. One *can* see all Jondo activities as but metaphoric dramatizations of the all-inclusive coherence of heaven, earth, and Jondo.

But it cannot be overlooked for long that both analyses would finally end up with a "not quite." Surely the "economic" analyst would puzzle over the Jondo's repeated failure to hit the optimal labor allocation for

harvest maximization. And for all its apparent workability, a more accurate adjudication device could be designed than one that relies almost totally upon the decisions of a congenitally imbecilic trier of fact.

From the other side, an observer attuned to the structure of Jondo cosmology would have to be troubled by the phenomenon of the bewitchable moon. After all, if the Jondo just waited they would have no need for an Astronomer Royal charged with the task of creating imaginary lunar positioning. Eventually the moon would get where it was going, and the Jondo could then mingle in perfect accord with heavenly behavior, and while anthropological cosmologists would admire the Jondo solution to a possible bias problem in a culture of two equal moieties—by linking the Sacred Hermaphrodite geographically to Maize, and metonymically to Fish—they would have a very difficult time with the Sacred Hermaphrodite's mortality patterns: some embrace the Great Cod early, some much later, and some die without any transcendence ceremony at all. What is the pattern *there*?

If, however, one were to stand far enough back from the data of Jondo life to encompass both material and metaphorical frameworks, the anomalies would quickly dissipate. One would just say of the Jondo that at least two different things are important to them: biological survival, which depends on some degree of whole-tribe labor and a fair intratribal allocation of staples; and living with a system of meanings such that heaven and earth are joined in an all-inclusive, internally coherent pattern.<sup>5</sup> Neither pattern can be said to be prior or primary, either logically or socially. Only by what might be called a general equilibrium solution of *everything* could the Jondo have a system of being and meaning that would “work out” correctly and elegantly in each sphere of desire. Lacking that, there must be some “loss,” either in the generality and power of their meaning system, or in the yield from their economic system. Thus in order to preserve the elegance of their cosmic vision, the Jondo will give up some food; to keep from starving, they will suffer some degree of aesthetic decay.<sup>6</sup> But what they will do only in extremity, if then, is accept the total destruction of either their material or their metaphoric universe.<sup>7</sup>

5. See A. LOVEJOY, *THE GREAT CHAIN OF BEING* (1935) for the most magisterial study of such an overarching conceptual system, in that case one helping to shape Western culture for at least two millenia. *But cf.* M. PECKHAM, *MAN'S RAGE FOR CHAOS* (1965) (suggesting that man's desire to perceive order in world around him may lead him in particular situations to ignore information that may well be relevant to understanding these situations).

6. Of course, this two-viewpoint conception itself “works” *only* because I so set things up.

7. Although, as noted before, this portion of the article does not represent an attempt at anthropological analysis, the work of a large number of anthropologists has affected my

## II. The Usa

The Jondo do not really exist. They were invented solely to illustrate a way of talking about social phenomena that might aid in understanding the workings of a real society. Let me, therefore, try to use a similar method to talk about the Usa.<sup>8</sup> The Usa control a vast and rich domain. Politically and economically they are organized so complexly that any Jondo coming among them would likely expire from mere bewilderment. Instead of having two moieties, two staples, two totems, the Usa are divided into literally countless classes—territorial, familial, occupational, political, ideological. A seeming infinity of resources is divided, subdivided, traded, combined, produced, and reproduced. Where the Jondo had only the problem of allocating their produce between Fish-Jondo and Maize-Jondo, among the Usa there is a vast network of distribution, allocation, production, and exchange serving to satisfy as fully as possible each and every Usa's needs and wants.

Since the Usa form so large and various a society, one cannot in any reasonable space describe anything approaching the fullness of Usa life.<sup>9</sup> Indeed, almost any single element or institution of Usa society is too complex to describe totally.<sup>10</sup>

There appear to be, however, aspects of Usa society that might be illuminated, if only dimly, by casting on them the same kind of light

thinking. Somewhat to my surprise, from among the long list I would cite the work of a Marxist anthropologist as the most influential. See M. GODELIER, *PERSPECTIVES IN MARXIST ANTHROPOLOGY* (R. Brain trans. 1977). A summary of Godelier's message (though hardly in his own terms) would be that Hegel ought to be neither left on his head nor (as Marx claimed he had) set on his feet, but made to turn continual somersaults between a determining material reality and an equally determining conceptual structure. See M. DOUGLAS, *PURITY AND DANGER* (1966); D. SPERBER, *RETHINKING SYMBOLISM* (1975); cf. C. LÉVI-STRAUSS, *THE SAVAGE MIND* 3 (1966) ("In both cases [primitive and modern] the universe is an object of thought at least as much as it is a means of satisfying needs.")

8. I have decided to refer to our own society as that of "the Usa" to make it easier to use the metaphorical paraphernalia developed by my trope of the Jondo. This time, however, the society involved is not imaginary. It exists, and therefore can be misdescribed, and to the extent I do so, my commentary will also be off the mark. Thus if I fail to draw a picture of these particular elements of our society that the reader feels is adequate, he should feel free to disregard whatever else I say.

Moreover, to some extent my description will certainly be inaccurate. It will, for one thing, be necessarily incomplete. For another, the use of "tribal" language will, to some extent, if only connotatively, falsify perceived reality. And finally, my observations are empirical, but only in a sense of that term that most sociologists, for instance, would consider a mere mockery.

9. That would also be true, by the way, of any real tribe the size of the Jondo. See, e.g., the four-volume bare start undertaken by Lévi-Strauss, his "Introduction to a Science of Mythology": *THE RAW AND THE COOKED* (J. Weightman & D. Weightman trans. 1969); *FROM HONEY TO ASHES* (J. Weightman & D. Weightman trans. 1973); *L'ORIGINE DES MANIÈRES DE TABLE* (1968); *L'HOMME NU* (1971).

10. See pp. 1008-11 *infra* for some of the methodological significance of this fact.

played over Jondo society. Consider (since we are lawyers) the Usa "Trial."

### A. *The Trial*

Among the Usa, as among most other peoples, every so often there are disputes. The other techniques and institutions available to the Usa to deal with such mutual unhappiness—screaming at each other, refusing to do business with each other, refusing to go to dinner together, reciprocal libel and slander, and so on<sup>11</sup>—for some reason do not work. When that happens, one of the annoyed Usa will take the initiating steps toward bringing into play the Usa Trial.

First, he will seek out a Trial Champion, one of an expensively trained caste of Usa who, for a price, will press the disputant's claim. The Champion will begin this new phase of the interaction between the parties by serving, on behalf of his employer, a Challenge. This document, ordinarily couched in a special, archaic vocabulary, will accuse the other of some behavior understood among the Usa to be rotten. The Challenge will demand that the other disputant appear, at a particular time, in a special place, before a caste of quasi-sacred functionaries, the "Judges," to give the lie to the charge. This usually forces the recipient to hire a Trial Champion of his own to file, on *his* behalf, the Answer. In equally ritualized language, the Answer may deny the calumny, deny that it *is* a calumny, and/or assert a counter-calumny of its own.<sup>12</sup>

Once the Challenge is given and accepted, there usually ensues a substantial and costly period of preliminary sparring between Champions. During this time, the Champions engage in divers reciprocal harassment and data-gathering activities controlled, but only to some extent, by the Judges. Many disputes leave the Trial system during these early formal interactions as the parties exchange things of value (money, submission ceremonies) to signal their formal accommodation to each other.<sup>13</sup> But sometimes, after substantial delay (for this is one of the few places in Usa society where one cannot exchange something of value for a better place in line), the parties and their Champions will

11. See Leff, *Injury, Ignorance, and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970) (discussion of dispute-resolution techniques among Usa).

12. There are other possible responses to a Challenge, for instance, that the dispute is not the sort that can be settled in the Usa Trial, or at least not before this particular Judge.

13. As a general rule, the parties can, by mutual agreement, withdraw from the Trial even into its latest stages.

actually find themselves together at the "special place," ready to confront and terminate their dispute.

These "special places" are almost unique in architecture and interior decoration among the Usa. The rooms are large and imposing, nothing like "home" or most "work" rooms among the Usa, and have lavished upon them a large number of Usa awe symbols—very high ceilings, carved plaques, banners. An area in the Trial room is set aside for each of the combatant teams. These areas are of equal size, have equal accouterments, and are symmetrically placed equidistant from a raised, central platform where the Judge sits. The Judge is "really" just another Usa, but he is always dressed up in a peculiar costume signaling his temporarily supraordinary status. He is addressed with archaic honorifics, and he is understood to be omnipotent *within that room*. That is, during the proceedings no licit power on earth exists superior to his, and the parties and the Champions from time to time practice elaborate deference ceremonies to signal their subservience to that power.

Frequently, the Judge is assisted in some of his functions by a group of helpers, typically twelve in number. They too are ordinary Usa, but they too are visually distinguished at the Trial: they sit together in a sharply differentiated space, which is also sometimes raised (though never as high as the seat of the Judge). This separated helpers' space is usually perpendicular to the spaces of Judge and parties, connecting them, but only peripherally.

Unlike the Judge, the helpers wear no odd costumes and are not trained for their roles at all. In theory, they are initially chosen by a random selection device, supplemented by another winnowing process designed to remove potential helpers with too close an affinity to one of the contestants or his Champion. But in practice, this second procedure removes from the final panel of twelve anyone who might have particular expertise, or even knowledge, of anything relevant to the dispute.

Once the proceedings are under way, almost a weird symmetry obtains. The contestants alternate moves according to strict rules of precedence and subsequence, and the temporal symmetry applies even to sub-moves. No party has an opportunity not shared by the other, and when simultaneity is impossible, corrective reversals are the rule; he who starts the initiating dyad of moves, for instance, finishes the concluding dyad.

Moreover, the ordinary rules of Usa discourse are superseded at the Trial in favor of a new set of rules about who may talk when and about

what. Disputes about this special Usa Trial etiquette frequently must be posed to the Judge for authoritative determination, for the rules governing this etiquette represent arcane knowledge, and possession of it is one of the most valuable assets of both Champions and Judges. Trial etiquette bears only the slightest relationship to ordinary Usa modes of investigation and description. To pick just one instance, in most situations the Usa rely extensively, even in important matters, upon reports by other Usa of what still other Usa claim to have observed. But during the Trial (subject to some peculiar exceptions) such method of discovering what happened is formally “unclean” and excluded.

At the close of the Trial, the dais-raised, oddly dressed Judge, sometimes aided by his group of helpers, will declare the “winner” of the confrontation. Much of the time this will entail giving an answer to complicated questions of fact as if only two quantities—all and none—exist. For instance, if the dispute involves the proper understanding of complex communications between two parties over time, the Judge and his helpers will likely behave as if the only interpretations available are (a) contract or (b) no contract.

In any event, the Judge will at last tell one of the parties to do something with respect to the other (or tell him that he doesn’t have to), and this decision (subject to the severely limited “appellate” power of other oddly dressed people in other symmetrical rooms whose discourse rules are even more straitened) may be aggressively enforced by the Usa society; behind every Usa Judge stands ultimately the naked power of the 101st Airborne Division of the Usa army.

It should be recalled, however, that the initiating Challenge demands that the challenged party “give the lie” at the Trial to the nastiness therein asserted. Although a great deal else goes on before, during, and sometimes after the Trial, the purpose of the Trial itself, at least in form, is primarily to ascertain the truth about an event, to determine whether particular states of fact did or did not obtain some time in the past.

This is significant for an understanding of the place of the Trial in Usa society. A large and growing number of serious, intelligent, and reasonably persuasive studies of the Usa Trial and associated institutions have pointed out the extent to which they are integrated into the Usa production, distribution, and consumption systems.<sup>14</sup> The substantive legal rules applied at the Usa Trial seem largely designed to further the “efficiency” of the Usa system. Obviously, if the rules are

14. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 399-460 (2d ed. 1977).

so designed, the facts to which those rules are applied must also be accurate, for surely an efficiency-oriented "law" applied to a false view of the world can have none but inefficient effects. If efficiency demands, for instance, that promisors keep their promises, it would hardly be efficient to enforce promises never made, or to fail to enforce ones that were. And if liability is imposed after accidents to deter negligent behavior, how silly it would be to deter the careful and reward the reckless.

### B. *The Ludic Metaphor*

All this is but to say—what is obvious—that the Usa Trial is part of the total Usa society, and serves some of the same economic purposes served by other institutions in that society.

But there are other interesting aspects of Usa society that also seem to be connected with the Usa Trial, at least as directly as these "economic" activities are. Indeed, there seems to be another well-formed conceptual structure among the Usa that plays the same role vis-à-vis the Usa legal system as Jondo cosmology plays in the Jondo system. At least one major variety of Usa activity *looks* very much more like Usa Trials than do Usa agriculture, or manufacture, or marketing activities.

The Usa do, of course, farm, work, and trade. But even the most casual observer of Usa society cannot help but note that its members take part, either as participants or spectators, in a vast array of activities that they call "sports" and "games." They have "baseball," "football," "basketball," "tennis," and "golf." They have "chess," "checkers," "bridge," and "Monopoly." And these lists hardly begin to exhaust the scope of the activity. Indeed, although no careful empirical analysis has been made, it would not appear laughable to suggest that the Usa expend more time, energy, and interest on their sports and games than on any other kind of activity, notably more than they spend in their more directly "economic" activities, like "working" or "trading."<sup>15</sup>

15. This is true even if one considers only the activities of adult Usa; their young, as it happens, seem to be even more intense "players." See, e.g., J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932), especially Chapter 1, "The Rules of the Game," for an instructive description of the game of marbles among schoolboys, and E. ERIKSON, *TOYS AND REASONS* (1977).

Some statistics on this phenomenon are instructive. In 1974, attendance at major sporting events—excluding high school athletics, Little League baseball, etc.—was 273,247,000, up by one-third from 1965. U.S. NEWS & WORLD REP., Sept. 8, 1975, at 46. Participation in sports is also high, and growing. A land mass 50% larger than the state of Rhode Island, or 1.2 million acres, was occupied in 1974 by this country's 12,299 golf courses, which were used by over 15 million golfers; a survey in that year also estimated that 34 million Americans play tennis from time to time. *Id.* at 47. In 1972 there were 847,000 amateur

Comparatively little scholarly attention has been given to this aspect of Usa society, which I shall call its "ludic" element.<sup>16</sup> This neglect is surprising, because even a cursory look at the phenomena suggests at least surface regularities that would seem to justify orderly examination. Indeed, when one looks at those activities considered "games" or "sports" among the Usa, some striking generalizations come immediately to hand.<sup>17</sup> One notes first of all that games or sports in Usa society<sup>18</sup> are ordinarily played in clearly demarcated spaces set off from the background of other activities. There are boards, fields, arenas, stadiums, and so on. These spatial arrangements, indeed, are frequently integral to the play, as when particular significance is given to transgressing a boundary.<sup>19</sup>

Moreover, this boundedness is not limited to space. Games are notably subject to rules designed to signal formal beginnings and ends, either in terms of elapsed time<sup>20</sup> or a stated number of iterations of moves within the game,<sup>21</sup> or in terms of the exhaustion of a given and unreplenishable supply of consumable resources.<sup>22</sup>

Second, the players in any game are treated for purposes of the game

softball teams, indicating over seven million participants, and almost 140 million bowling lanes. T. KANDO, *LEISURE AND POPULAR CULTURE IN TRANSITION* 219 (1975). Mass communications also distribute the sports culture, as when over 40% of the population watches the Super Bowl. *Id.* Moreover, I do not include activities like seduction or politics in my total, though the Usa themselves regularly refer to them as "games" or "sports."

16. The classic work dealing with the subject broadly is J. HUIZINGA, *HOMO LUDENS* (1950) (actually completed a dozen years earlier). It is from this title that I have derived the term "ludic." A more recent conceptual study of play is R. CAILLOIS, *MAN, PLAY, AND GAMES* (1962). See also *GAMES, PLAY, LITERATURE*, Vol. 41, *Yale French Studies* (J. Ehrman ed. 1968).

There is also a reasonably large literature treating games and sport from the point of view of particular disciplines, for instance, psychology or sociology or economics. See, e.g., G. LEONARD, *THE ULTIMATE ATHLETE* (1974); M. NOVAK, *THE JOY OF SPORTS* (1976).

17. It must be stated at the outset, however, that it is most likely impossible to define "play," "game," or "sport," that is, to state what is necessary and sufficient to the labels, in such a way that everything anyone thinks of as a game or a sport will be successfully included. I doubt that the concepts or their objective expressions are of the type that admit of this strong form of definition. I shall be trying only to convince at least some readers that there exists a wide variety of activities that resemble each other enough so that the assertion that they form, in some sense, a family would not be gainsaid. See L. WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 1967), especially ¶ 100, page 45°.

18. I shall hereafter frequently use "game" to cover both those activities so denominated among the Usa, and those usually called "sports" by them. For present purposes whatever distinguishes "game" from "sport" in our culture's ordinary language seems of little significance.

19. Consider, for example, the foul line and "the stands" of baseball, the side-line of football, the gutter of bowling.

20. E.g., football, soccer, basketball.

21. E.g., baseball, bowling, horseshoes.

22. E.g., checkers, bridge, Monopoly.

as formally identical.<sup>23</sup> They each have the same access to the field and the mechanisms of play, and the same formal entitlements (if not simultaneously, then at least in equal succession).

Third, the rules that govern the game are absolutely binding during any play thereof. They are not open to question in any nongame terms—justness, for instance, or legitimacy or efficiency—for they do not so much regulate the activity as constitute it.<sup>24</sup>

Last, and most important, the aim of the game activity is “in” the game, that is, the aim is defined as part of the game, or better, as part of that which defines the game.<sup>25</sup> The most significant thing about games, therefore, is that they have a resolution, a definition of the *meaning* of every act within the game, including, ordinarily, a definition of what it means to say that one has “won” or “lost.” A game is an activity in terms of which you can know with some precision what you did and how you came out. Although no human activity can be totally free of ambiguity, a “game” is so set up as to reduce ambiguity to a minimum. “Can he do that?”, “Is that permitted?”, “What does that mean?” are questions designed to be, most of the time, easily answerable in terms of the game itself.

In Usa games, therefore, if one achieves the defined “end” of the game but in so doing ignores any of the defined constraints, *one has not won*. This is true even if there is no enforcement power in all of Usa society able to do anything about it, for all definitional systems are self-enforcing. The richest and most powerful Usa, immune to external force, without conscience or fear, cannot win a game of “chess” by moving his “Queen” like a “Knight.” He may be told by his opponent (and everyone else) that he has won. He may believe he has won. But he hasn’t. He may, of course, have won a different game, but

23. This generalization must be tempered by reference to the use of “handicaps” in some agonistic games when the probable outcome is so clear, given what is known about the actual contestants, that all suspense would be removed were structural inequalities not built into the particular contest. Also, the identity referred to in text means the formal equality of each player on a team, not vis-à-vis the members of his own team, but in relation to his “opposite number” on another team.

24. That is not to say that the rules of games cannot be changed, but only that they are immovable during any particular play. If any normative element justifies this rigidity, it is that the players have freely chosen to play the game by those known rules.

25. The few students of the ludic in culture have tended to choose pretty much the same defining criteria. See J. HUIZINGA, *supra* note 16, at 28 (“play is a voluntary activity or occupation executed within certain fixed limits of time and place, according to rules freely accepted but absolutely binding, having its aim in itself”). See also R. CAILLOIS, *supra* note 16, at 7 (“The confused and intricate laws of ordinary life are replaced, in this fixed space and for this given time, by precise, arbitrary, unexceptionable rules . . . . The game has no other but an intrinsic meaning. That is why its rules are imperative and absolute, beyond discussion.”)

not a game of chess, for chess is *defined* among the Usa as a game in which Queens cannot move like Knights. No power on earth is strong enough to break through the three, thin, parallel lines of the definitional sign in the expression  $p \equiv q$ ; twenty armored divisions cannot make a system in which  $p \equiv q$  into one in which  $p \equiv \bar{q}$ . The most that a wielder of force can do is change the rules so that  $p \equiv \bar{q}$  (or  $p \equiv r$ , or whatever), and then prevent anyone from playing under the previous rules.

But that is hardly the same thing. The only point in playing a particular game lies in winning without violating its rules of constraint. There is a behavioral correlate to the logical situation described above. That is, there seems to exist in Usa society a unique kind of satisfaction from game playing, a perceived "good" for which, given the prevalence of game playing, there appears to be no close substitute. It is not the only kind of satisfaction, nor is it felt by all people, nor is it felt by anyone all the time. But it is very important and very widespread. It is, if you will, an "aesthetic" good that proceeds only from attempting clearly to achieve a stipulated result under conditions severely constraining the method of achievement, such that the achievement under such conditions is possible but not certain.<sup>26</sup>

Indeed, I would even go further than that. Although as a psychological matter, it is perhaps perceived by most Usa as better to win than to lose, it seems that, given how hard it is in the ordinary "playing" of "real life," including economic activity,<sup>27</sup> to determine how one came out, it is a joy independent of victory to be engaged in an activity that allows for a determinate result. Even clearly losing may, at least some of the time, be a pleasant alternative to a lifetime of never knowing.<sup>28</sup> If utility is tied to knowing the result, then the result must be easy to determine. It is therefore not enough that "win" be the product of clear definition, but it is also important that the objective embodiment of that defined state be easily perceived. There must be some reasonably

26. It is not true, of course, that the particular ludic aesthetic emphasized here is the only source of pleasure derived by the Usa from their sports and games. There is a good deal of evidence, for instance, that among the Usa achieving actual personal dominance over someone else is also a source of intense satisfaction. A game is a way to act that out too.

27. See A. LEFF, *SWINDLING AND SELLING* 13-16, 49-50 (1976) on some of the ambiguities of actual economic trading.

28. One chess grandmaster observed:

If a combination forcing a win has been found, nothing avails the opponent, for the demonstration of the win can be grasped. In Life it is different. There the struggles are not so indubitably terminated as in a game. The game gives us a satisfaction that Life denies us.

E. LASKER, *LASKER'S MANUAL OF CHESS* 114 (1947).

precise "scoring" system, a significance system in terms of which one can determine the "result" of every "move," and of the aggregate of all moves, which together constitute a play of the game.

One of the most common devices to achieve that clarity in Usa games is the definition of results in ordinal rather than cardinal terms. That is, the central vocabulary of most Usa games is that of comparatives—faster, heavier, longer, more—and those particular comparatives called superlatives—fastest, heaviest, longest, most—which remain merely ordinal, differing only in that they are comparative to all prior plays of the same game. Since these comparative terms use "natural" standards of the natural world, they have the added advantage of well-known, simple, and precise calibration. But other games and sports have other ways of defining the achievement of the "significant" or "meaningful" act. Certainly (to pick just one instance of many) the positional victory of "chess" is not a simple matter of achieving some physically palpable ordinality.

In all of the ludic activity of the Usa, however, the rules are formulated such that a certain amount of something is defined within the game as the "right" amount. More is not better, nor (most of the time) is it worse; it is, strictly speaking, in terms of the game, *irrelevant*.

This aspect of Usa ludic rules is perhaps clearest when one considers games that define achievement against spatial constraints. For example, the home run in baseball is a ball hit into the stands, on the fly, in fair territory (all as defined). For purposes of the game it makes not a whit of difference how close to the stands a fly ball is hit so long as it falls short, nor how far a home run is hit so long as it clears the fence. In football, there are no additional points for a football kicked far over the crossbar, nor is there more of a victory in chess for blocking a King's move with two threatening pieces for each possible square. In Usa games, enough is enough.

Moreover, this same "more is not better" rule applies to the ultimate result of most games, the "final-win" rule. Baseball, for instance, is won by the team that gets *more* runs. *One* more run will do it and more than that will not do it any more. A team that wins 1-0 wins; a team that wins 2-0 or 12-2 or 27-4 still just wins. In terms of such a game, enough is all.<sup>29</sup>

Or, to put the matter in other terms, in all games there is a defined

29. Asserting that clarity of result, or significance, is a source of human pleasure does not imply, of course, that it is the only source. Winning (or losing) 27-2 is a different experience for most people from getting the "same" result 1-0, and it may have significantly different effects on the lives of the players *outside* the context of the particular play. See note 26 *supra*.

point past which the return to increased production does not merely diminish but vanishes. Because of the definitional structure of the game, optimal production is not “as much as possible,” but “just enough.”

To summarize, the Usa play and watch a huge number of games, with a range and intensity of interest that identifies the activity as highly significant in their culture. Moreover, every game is freely chosen, in the sense that playing and watching are not, like labor, tied to biological necessity, or even (except for Usa gamblers and professionals, who are not playing at all, but working) to material wants. Once in the game, a player cannot question the rules; they *define* the game, and although the penalty for violating them may be expulsion in some organized Usa games, in all games rule violation brings aesthetic defeat; the penalty for winning by cheating is winning by cheating.

Moreover, games are so designed that whatever the rules define as “score” or “win,” the players all have *formal* equality of opportunity to achieve them.<sup>30</sup> No player or “side” may properly do anything that the other may not do, simultaneously or in equal turn. Whatever the actual powers of the players, as far as the game is concerned the players are indistinguishable.

In addition, games *define* playing, winning, and losing; they give palpable *significance* to physical and mental activity. More particularly, it is the nature of the game solution that it be, so to speak, an aesthetic solution to a practical problem: one does something and can be seen to do something that “fits” the rule that gives it significance.<sup>31</sup> One is not attempting to amass or consume; once the point in the pattern is found and fitted, the returns to increased production are zero.<sup>32</sup>

### C. *The Game of the Trial*

Returning from the playing fields of the Usa to the Usa Trial itself, what appears is a process for investigating empirical evidence that looks very much like an agonistic game.<sup>33</sup> The Trial does seem more or less well adapted to providing the more or less accurate data needed for the rational operation of the Usa “economic” system. It appears, that is, largely capable of answering the question “what happened” at the legally relevant time.

30. The aleatory aspects of many games do not undercut this “equality” since if something is actually a matter of pure chance, then all dependent upon it are equally served.

31. See Moore, *Wittgenstein's Lectures in 1930-33*, in *AESTHETICS* 88 (H. Osborne ed. 1972).

32. On the psychic satisfactions of winning by a large margin, see note 29 *infra*.

33. That is, a contest, a game played against an opponent.

But the connections between the appearance of the Trial and the vast corpus of games in the enveloping society indicate that the Trial is not *only* a vehicle for determining fact. It is, after all, inherently implausible that an epistemological inquiry in the form of an agonistic game maximizes thoroughness and accuracy of factual determination.<sup>34</sup>

What one observes, rather, is an artifact like the Jondo trial, the embodiment of two separate social impulses. Jondo society balances the requirement that the protein-carbohydrate exchange ratio not flout the demands of biology too grossly and the equally exigent need to maintain the central place of cosmological metaphors in Jondo life. In this Usa instance, the nonmaterial realm is not cosmological but, in the broadest sense, ludic.

Nor can this ludic element in Usa society easily be dismissed as peripheral or trivial. The values of the game—formal equality of opportunity, freely assumed behavioral constraints presented as unassailable rules, the perfect clarity of the meaning of mere activity—are manifest as values in other nongame activities. Rule-bound “artistic” activities—metrical poetry, for instance, and almost all music—seem to be affected by some of the same ludic impulses.<sup>35</sup> Even the formal equality of majoritarian democracy is arguably the political embodiment of the impulses toward stipulated equality and determinate result in the face of substantive diversity and complicated compromise. Indeed, the Usa concept of justice, which sometimes seems to describe little more than bilateral symmetry and reciprocity, can itself be seen as deeply ludic.

But this does not mean that the Trial among the Usa is just a game. Indeed, that it is not just a game is the most significant thing about it.

34. Criticisms of epistemological weaknesses in the common law trial are neither new, see, e.g., J. FRANK, *COURTS ON TRIAL* (1950), nor obsolete, see, e.g., Frankel, *The Search For Truth—An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). If nothing else (and there is much else), it is unlikely that empirical truth is always on the side of the more skillful Champion, especially when the ability of the Champion is frequently a partial function of the wealth of the championed. See Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc. REV. 95 (1974).

35. Both Caillois and Huizinga also argue the strong affinities of ritual and theater with games. See R. CAILLOIS, *supra* note 16, at 21, 82; J. HUIZINGA, *supra* note 16, at 19-27. Recall also Robert Frost's remark about Carl Sandburg: “His [Sandburg's] works prove you can play tennis more imaginatively with the net down, or so he maintains.” *SELECTED LETTERS OF ROBERT FROST* 499 (L. Thompson ed. 1964).

For an excellent discussion of some other forms of “nourishment” trials might generate, see Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975). Ball points out that, “if trials and oral arguments are, as much so as decisions, the ‘good’ consumed, then they have inherent value and no adequate substitute.” *Id.* at 107. See also K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 6-7 (1963) (noting “enjoyment of the decision process as a form of play”).

For one thing, it is *not* for all the players freely chosen.<sup>36</sup> But much more important, the very fact that the Trial actually allocates things of material and emotional value means that it is *not* clearly demarcated as a game, either pictorially or causally. The outcome of a trial has an *effect*, hence another meaning in the world outside the sacred time and place. It is like a game of chess in which, when the King is mated, a real king dies.<sup>37</sup> The meaning of each move is thus not defined wholly in terms of any game, but simultaneously in terms of that real world the complexity and uncertainty of which may be the source of the Usa game impulse in the first place.

If, however, the Usa Trial is not a game, it is not not a game either. It is, like the Jondo Sacred Hermaphrodite, an amphibian cultural artifact that embodies, simultaneously, at least two different social mechanisms. Like the Sacred Hermaphrodite, who is connected causally to food allocation and metaphorically to the universe, the Usa Trial reflects simultaneously the causal and metaphoric universes, both integral parts of Usa life but neither dominant over the other.<sup>38</sup>

### III. The Tribe of Scholars

If the Usa Trial has such an “amphibian” nature, then some currently fashionable approaches to understanding our legal system are, of necessity, severely limited in their power actually to explain what is going on.

Consider, for instance, what one of its most eminent practitioners calls “the ‘new’ law and economics”: “the application of the theories and empirical methods of economics to the central institutions of the legal system.”<sup>39</sup> The idea is, once again, to turn legal studies into a “science.” Or, as the same author puts it in the manifesto appearing in the law journal he founded:

The aim of the *Journal [of Legal Studies]* is to encourage the application of scientific methods to the study of the legal system. As biology is to living systems, astronomy to the stars, or economics to the price system, so should legal studies be to the legal system:

36. The ability to buy one's way out of most Trials does not affect this contention. “Freely chosen” means that the only cost of not playing is not playing.

37. See J. SHKLAR, *LEGALISM* (1964) (deploring an asserted tendency among lawyers to overlook the fact that law is not only a game); cf. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1078 (1975) (considerations of political morality may affect legal decisions but rarely affect decisions of referees in true games).

38. Cf. Ackerman, *Correspondence*, 87 YALE L.J. 436, 438-39 (1977) (discussing relations of autonomy and dominance among concepts).

39. Posner, *The Economic Approach To Law*, 53 TEX. L. REV. 757, 759 (1975).

an endeavor to make precise, objective, and systematic observations of how the legal system operates in fact and to discover and explain the recurrent patterns in the observations—the “laws” of the system.<sup>40</sup>

But references to biology and astronomy are references to realms in which the objects of observation have (or at least are deemed to have) no symbolic structures of their own with which they can transform their own experience. What happens to a star or a molecule *is* what it means. Neither one has a cosmology, or a game, of its own, but is wholly the subject of someone else's. Thus one can observe the behavior of stars and molecules in one set of terms, *our* one set, for they are deemed not to have any terms of their own.<sup>41</sup>

To put this another way (one with which economic analysts are familiar and to which they will likely be sympathetic), stars and molecules do, in a sense, consume goods, but only people manufacture “commodities.” That is, for people the object of consumption is not only that which is bought in the market, but also that which is produced by combining the market good with other “elements of production” already possessed by the consumer. This “commodity,” which is “manufactured at home” out of market goods, is really the object of consumption.<sup>42</sup>

But what if one of those other “elements of production” were a gigantic symbolic or metaphoric system that “consumes” a Trial, for

40. Posner, *Volume One of the Journal of Legal Studies—An Afterword*, 1 J. LEGAL STUD. 437, 437 (1972).

41. Thus they can be, once classified, treated as identical for our purposes.

It should be noted that economics, as a social science, had to await the advent of objects of exchange that could be considered “identical” for analytic purposes before it could become at all useful for explaining or predicting real transactions. It is not, therefore, an accident that *The Wealth of Nations* begins with Smith's famous vignette describing production in a pin factory. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 4 (E. Canaan ed. 1937) (originally published in 1776). That passage is important not only for what it says about division of labor and comparative advantage, but also because of the pins themselves. Without standardized market goods, scientific statements about human responses to such goods would have been almost laughable. How would one test the “law” that price and quantity demanded are in an inverse relationship, in a culture in which one transaction involves the trade of three pigs for a niece, and another involves the trade of a different niece for two cows, where one niece is matrilineal, the other is patrilineal, and there is a pig totem but no cow totem?

42. See Stigler & Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 77 (1977), for a particularly clear exposition (albeit later combined with a strikingly naive use) of this “new theory of consumer choice.”

In the traditional theory, households maximize a utility function of the goods and services bought in the marketplace, whereas in the reformulation [through the new theory of consumer choice] they maximize a utility function of objects of choice, called commodities, that they produce with market goods, their own time, their skills, training and other human capital, and other inputs.

*Id.*

instance, not just as part of the commodity "information," but simultaneously as a separate "ludic" commodity? This latter good would be produced by linking the Trial to formal equality, existential clarity, and so on. In such a case, one cannot simply talk about the impact on society of changes in legal rules, procedures, or institutions unless one can discover their effects in this symbolic realm. That is, one cannot talk scientifically about the consumption of anything unless one knows what is being consumed, but one cannot know the nature of the "commodity" unless one understands the commodity formation process among the people whose activities are to be scientifically studied. The "scientific" statements of the astronomer or biologist could apply to people only if people *in fact* functioned like atoms and molecules, that is, if people could not transform experience in terms of a complex structure of meanings. But as soon as one concedes that the meanings people attach to goods and experience help create the commodities they "consume"<sup>43</sup> (including those they treat as incentives or deterrents<sup>44</sup>), then there is not much point in analyzing their activities as if their behavior were solely that of matter with no admixture of mind.<sup>45</sup>

Thus one would be forced to conclude that this kind of "scientific"

43. The problem is not that of comparing apples and oranges; it is the problem of comparing apples and the word "apples."

44. That is, as long as people respond not to signals but to signs. See E. LEACH, *CULTURE AND COMMUNICATION* 9-16 (1976), for a reasonably clear and very brief introduction to anthropological linguistics, with its "signals," "symbols," "signs," and so on.

45. Consider, for example, the recent flap in the law journals about the deterrent effect of capital punishment. It is, by and large, a body of serious, intelligent, even creative work. See Symposium, *Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 *YALE L.J.* 164 (1975), where some of this literature appears, and where most of the rest of it is cited. And in their own terms, the various articles are powerful and persuasive, albeit often of contradictory conclusions. Compare, e.g., Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *AM. ECON. REV.* 397 (1975) (concluding that capital punishment deters murder) with Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 *YALE L.J.* 187 (1975) (questioning reliability of Ehrlich's evidence that capital punishment deters murder) and Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 *STAN. L. REV.* 61 (1975) (suggesting that empirical proof that capital punishment deters murder is beyond capacities of social science).

But it is arguable, I think, that the decision in *Jurek v. Texas*, 428 U.S. 262 (1976), effectively to reinstitute the death penalty tentatively outlawed in *Furman v. Georgia*, 408 U.S. 238 (1972), had little to do with the deterrence of murder. Between those two cases the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), legalizing abortions, another case arguably dealing with the constitutional status of willfully imposing death on another. It is possible that at least contributory to its decision in *Jurek* was the fact that in the two preceding terms the Court had ruled that (a) it is unconstitutional to kill a being found guilty, pursuant to elaborate procedures, of killing another, and (b) it is unconstitutional to prevent the killing of a being *ex hypothesi* not guilty of anything. It might be argued that the Court faced the dissonance of those two decisions in *Jurek* and decided to come down foursquare in favor of death.

This oversimplifies the cases, of course. That is the point. It is altogether likely that metaphoric "reasoning" cuts across, indeed rolls right over, the subtleties of ratio decidendi.

study is elegant, attractive, useful, and, as an attempt to present a total picture, ultimately doomed.<sup>46</sup> As I said earlier, it appears that, with people, what a thing does is only one of the things it means, but everything it means is another thing that it does. If then there is, as yet, no "science" of the generation, combination, and transformation of these meanings,<sup>47</sup> which are, for people, as real and efficacious as money and jail, then there can be no science of law either.

### Conclusion—The Spectre of Gilmore's Rose

At this point, Grant Gilmore formally enters, not as an afterthought but as a central figure in the foregoing analysis. Substantially everything in this essay has been a meditation upon his epigraphic rose.<sup>48</sup> It has been an attempt, with reference to a single artifact of our legal system, to begin to explore the implications of his insight that everything that is is rooted both in nature and culture, and that *both* those "grounds," simultaneously at work, affect what everything is, does, and means.

All I did, in fact, was challenge one metaphor with another. The

46. This, by the way, raises another problem. If one draws empirical data for interpreting legal phenomena from the legal system itself, *see, e.g.,* Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972), one runs a serious danger of using biased and incomplete information about the real world. By hypothesis, the legal system, including both the trial stage and the process of generating an appellate opinion, is elaborately "gridded" so as only to let some of the data through. An agonistic game, after all, is a very special filter for information. To ask "what really happened" of a reported case is something like trying to find the mood of a centerfielder by reading a box score. *See* M. POLANYI, *PERSONAL KNOWLEDGE* 277-79 (1958).

47. If there were such a science, it would be, I suppose, some massive combination of psychology, sociology, linguistics, anthropology, and even economics. The only alternative would be to assume that people *were* like planets and molecules.

Indeed, it is significant, I think, that when faced with this very problem two fine economists were driven to attempt to turn people into simple organisms. *See* Stigler & Becker, *supra* note 42. In that essay, "taste" is treated as essentially identical and unchangeable for all persons, *id.* at 76, and totally independent of either culture or class, *id.* at 89. In effect, the authors treat "taste" as something genetically determined, and at the species level no less. Having thus by a *coup de main* countered some of the scientific difficulties inherent in trying to generalize the actions of nonidentical entities, they found it reasonably easy to construct "commodities" for these entities, albeit by using cocktail-party-level sociology. *E.g.:* "The commodity apparently produced by fashion goods is social distinction: the demonstration of alert leadership, or at least not lethargy, in recognizing and adopting that which will in due time be widely approved." *Id.* at 88. Using these ad hoc invented "commodities," the authors found it much easier to "explain" data that otherwise endangered the persuasiveness of their science.

It is always touching to watch a scientist (and in this Stigler and Becker are not alone) trying to fit dissonant data into a cherished explanation, like an infant doggedly trying to cram the bunny cut-out into the puppy slot.

48. As quoted in the dedication to this article, Gilmore suggested, "Quite possibly the rose will go on smelling as sweet as it does only so long as we go on calling it a rose." Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 109 (1970).

one I challenged has it that all human actions can, so to speak, be arranged along the filaments of a single, albeit enormously complex, web. That web might be so extensive and complicated that perceiving now all the connections among all the points ranged on it is effectively impossible. Indeed, it might even be conceded that such complete knowledge will never be gained. But the metaphor still has it that the connections are all in the same terms, lie in the same dimension, and are at least theoretically all knowable.<sup>49</sup>

My own move was to suggest that there is, in fact, no single uniquely explanatory web, but rather that there is a second relevant web too. I suggested that experience can be seen in three-dimensional space, and that there is another organization of data in that space, ranged on a different plane with a different configuration. This second web can be seen as intersecting the first, thereby incorporating into itself many of the same points that make up the filaments of the first. The interweaving of the webs is such that any change in one would necessarily change the other and everything "on" it. Thus neither is necessarily prior to, or dominant over, the other; nor can either explain the other solely in its own terms.

But that is pretty much all I tried. I cannot specify completely my own competing web, its size, contour, or angle through the space of experience. I can dimly see that trials are "connected to" games and thus to other activities carried out under self-imposed, strongly defined, and "arbitrary" rules. Since one of those simplifying rules, appearing in agonistic games at any rate, is that all participants are formally "identical," the trial also seems "connected to" other cultural artifacts, like democracy. I cannot even, however, say very much of interest about the nature of these connections: "looks like," "associated with," "pictorial analogue," "metaphor," "metonym," "aesthetic fitness"—all in all, not much.<sup>50</sup>

Nonetheless, it seemed to me rather a pretty move, helping to "explain" some puzzling things, certainly doing so better than any single-plane approach like "economic analysis of law." And, indeed, that was

49. See Leff, *Law and Technology: On Shoring Up A Void*, 8 OTTAWA L. REV. 536, 538-39 (1976) (discussing questions that are deemed to be, but for unavoidable empirical problems, totally answerable).

50. One important element of this uncertainty lies in our ignorance of the way metaphoric structures are put together. Some elements may be central to the maintenance of the entire structure, so the "cost" of their elimination would be the cost of losing the entire system of which they are a part. To change the baseball rule that a runner is symbolically eliminated by a tag (of him, or of a base) would transform baseball into something more like football, where a player's "elimination" from a play requires physical stoppage (though not actual death). Now football is a good game too, but it might be exceedingly "costly" to the particular aesthetics of baseball to transform it so totally.

Professor Gilmore's contention in the work in which his rose appeared.<sup>51</sup> He was arguing that no one can understand the history of the law of products liability merely by describing its incentives and disincentives, internalizations of accident costs, risk distributions, and so on. Such economic considerations are just a few of the factors that determine the relevant legal rules, and probably not the most important factors at that. Hence he could not help but find himself skeptical about the real-world significance of the economic analysis of products liability.

But Professor Gilmore also espouses a more radical position, one that I hate a lot, and that I do not hate less just because it is almost certainly true. As he puts it in his Storrs lectures:

For two hundred years we have been in thrall to the eighteenth-century hypothesis that there are, in social behavior and in societal development, patterns which recur in the same way that they appear to recur in the physical universe.

... [T]he hypothesis is itself in error. Man's fate will forever elude the attempts of his intellect to understand it. The accidental variables which hedge us about effectively screen the future from our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse. So far as we have been able to learn, there are no recurrent patterns in the course of human events; it is not possible to make scientific statements about history, sociology, economics—or law.<sup>52</sup>

Myself, I do not doubt that he is right. I pretended in all the foregoing to be saying something useful with my two planes, my symbolic webs, all my paraphernalia. But I have no warrant to believe, indeed I do not believe, that there exist only two mysteriously interconnected planes, the ludic and the material, that determine the shape of our trials. Why not many more, an infinity more, as mysteriously generated and interpenetrated as the chosen two?

But if that were so, it might be wiser to recognize that there are in fact no separable webs, but that the whole composite of webs together should be conceived of as an enormous crystal lattice connecting all the points on all the filaments making up all the webs in all the planes. And even that would be a simplifying lie,<sup>53</sup> for it would share with the

51. See Gilmore, *supra* note 48.

Professor Gilmore would not put it this way, but I will anyway: we have a chance of understanding the role of incentives and fault in products liability law as soon as we can figure out why, in our culture, *Der Rosenkavalier* can be an opera, while *Der Kartoffelkavalier* can be only a joke.

52. G. GILMORE, *THE AGES OF AMERICAN LAW* 99-100 (1977).

53. Cf. D. SPERBER, *supra* note 7, at 48 ("[O]ne cannot deduce from the position of a term on one axis the position it will occupy on others.")

one-web metaphor, and with my two-plane redaction, the same mendacious tendency (which, I suppose, is the defining falsehood of all scholarship): to see all that is as in theory understandable.<sup>54</sup> In effect, scholarship represents the ludic move raised to its highest power by acting as if reality itself can actually be played to a determinate conclusion.

If legal scholarship only interprets reality to the extent that we impose rules of meaning on it, then whatever we do is no more (albeit, if we're lucky, no less) than what has been done by all those with or against whom we continue playing: Bracton, Coke, and Blackstone, Langdell and Williston, Holmes, the West Publishing Company, the American Law Institute, and the current crop of "economic analysts."<sup>55</sup> We are, after all, just people driven by the ultimate mystery of our own situation to be ludists of the unknowable.

The truth is, I fear, as Grant Gilmore sees it:<sup>56</sup> all we can understand, and that not very well, are the games we ourselves generate and eventually, but predictably, lose. Ultimately, the law is not something that we know, but something that we do.

All right, all right, amen. But at least there is this: on the way to those final defeats, there are, at least for some, some beautiful innings.<sup>57</sup>

54. See Gilmore, *The Age of Antiquarius: On Legal History in a Time of Troubles*, 39 U. CHI. L. REV. 475, 484 (1972) ("[o]ur obsession with unity, certainty and predictability").

55. Even the ludism of scholarship lends itself to an agonistic stance that adds to the meaning of the activity.

On the organizing value to any muddled culture of the threat of conquest by more primitive notions, see C. CAVAFY, "Expecting the Barbarians," in *THE COMPLETE POEMS OF CAVAFY* 18, 19 (R. Dalven trans. 1976):

And now what shall become of us  
without any barbarians?

Those people were a kind of solution.

56. See Gilmore, *supra* note 48, at 106: "[W]e do not, by our conscious deliberate act, ever 'change the law.' The law changes itself, in response to mysterious and largely unperceived forces, of which we can take account only by hindsight"; and *id.* at 116: "[E]xcept in the simplest situations, thinking clearly and acting sensibly really have nothing to do with each other." Compare Gilmore, *Law, Logic and Experience*, 3 How. L.J. 26, 40 (1957): "Ultimately, we can never explain anything. The best we can do is to set particular events in a broader context . . . ."

57. See *Writings of Grant Gilmore*, 87 YALE L.J. 905 (1978).