2014

Fight the Hypo: Fake Arguments, Trolleyology, and the Limits of Hypotheticals

Jethro K. Lieberman

INAUGURAL LECTURE NO. 1

FIGHT THE HYPO

FAKE Arguments, Trolleyology, and the Limits of Hypotheticals

BY

Jethro K. Lieberman

MARTIN PROFESSOR OF LAW
NEW YORK LAW SCHOOL

TRIBECA SQUARE PRESS

Fight the Hypo

FAKE Arguments, Trolleyology,
and the
Limits of Hypotheticals

INAUGURAL LECTURE NO. 1

Fight the Hypo

FAKE Arguments, Trolleyology, *and the* Limits of Hypotheticals

An Inaugural Lecture
April 26, 2014

by
Jethro K. Lieberman
Martin Professor of Law
New York Law School

TRIBECA SQUARE PRESS
2014

Tribeca Square Press, 185 West Broadway, New York, NY 10013

Tribeca Square Press® is a registered trademark of
New York Law School
Anthony W. Crowell, President and Dean

ISBN: 978-0-9904547-0-0

Manufactured in the United States of America

BOOK DESIGN:
Kathi Georges

Set in New Baskerville LT Std 11/15.5, with Interstate

Tribeca Square Press Book No. 14

Editor's Note

This is a lightly revised version, with footnotes, of the Inaugural Martin Professorship Lecture, delivered by Jethro K. Lieberman at New York Law School on April 26, 2014.

FIGHT THE HYPO

Chairman [Arthur N.] Abbey, Dean [Anthony W.] Crowell, members of the board, colleagues, alumni, students, friends, and a special tip of the hat to my dear wife Jo for making the trip:

I'm thrilled to be here this morning and my heartfelt thanks to Anthony Crowell for the honor of the appointment and making it all possible.

In casting about for a topic, I considered drawing something of interest from the courses I conventionally teach; for example, "paradoxes of 19th Century interstate taxation cases under the Commerce Clause, with special reference to prudential standing" — all in favor of that one, raise your hands — or "gerunds, nominalizations, and dangling participles: the crisis in American compositional

practice." But it dawned on me that you probably listen to lectures like these from your CLE providers all the time.

It's likely to be more fun, and possibly even more enlightening, to think out loud about something closer to all of us — I mean, what we do in the law school classroom. I want to reflect for a few minutes — I hope you won't think it an eternity — on the core of the law school experience, and suggest that some of what we've been doing might not make sense. I know that this claim comes as a surprise.

Because this is a lecture, not a treatise or an article, I have a certain luxury: I do not intend to settle issues but to provoke.

I mean to talk about the core of the law school experience. What is law school all about? Let me put it in three words.

The first word is "Suppose." It's how we often begin. Suppose this, suppose that, and suppose the other thing. You've been there. Me too. I can still remember, and with chills, my criminal law professor, just months shy now of 50 years ago, calling out his *Suppose*. He supposed a lot about Martians, newly landed on the planet, wholly ignorant of earth and human culture, but, he assured us, fully conversant in English.

The second and third words are "it depends." That phrase is what students, if they're quick, soon learn to respond to resist their Socratic interlocutor,

who threatens to drag them down an unwelcome path leading to complete intellectual and emotional confusion.

At the heart of the "suppose" and the "it depends" is the hypothetical (or what I will mostly refer to as the "hypo"): The situation with questions attached that we toss into the classroom like a bomb with a short fuse. The burden of my remarks this morning is to suggest that we don't always know, we aren't always consistent about, and we rarely make it clear what we've learned when we force an answer to the hypos we pose.

To make these airy abstractions concrete, let's inspect a class of hypos with a distinct advantage: they concern a problem that we all have intuitions about — *runaway trolley cars*. Trolley cases have been so widely studied over the years that they now constitute an academic sub-discipline called Trolleyology. I'm not kidding you. In fact, just in the past few months two popular books on runaway trolleys have been published to considerable notice.[1] Really!

I'm going to pose two trolley hypos and ask you by a show of hands how you respond. (This *is* a law school: you didn't think you'd get away scot free, did you?) Each of the trolley hypos has a name and this first one is called Spur (or sometimes Switch).

---

1 Thomas Cathcart, *The Trolley Problem or Would You Throw the Fat Guy off the Bridge?* (New York: Workman, 2013); David Edmonds, *Would You Kill the Fat Man? The Trolley Problem and What Your Answer Tells Us about Right and Wrong* (Princeton: Princeton University Press, 2014).

Suppose a trolley is speeding along the tracks. The conductor decides to slow it down but the brakes fail. The trolley is a runaway. You are standing nearby watching and see, to your horror, that five people are tied to the tracks just ahead. If no one does anything the trolley will run them over and they will die. Luckily, you spot a switch that will allow you to divert the trolley to a spur or side track. Unfortunately, someone is tied up on that track also. Luckily, though, it's only *one* person. What do you do?

Let's see a show of hands. How many of you would pull the switch and send the trolley along the spur, leading to the death of only the one person rather than the five?[2] Hands in the air. Don't be shy. We won't take your names. You won't be graded.

All right, hands down. Now, how many of you would *refuse* to pull the switch, preferring to let the trolley run its course, leading to five deaths rather than one?

You voted roughly four to one, consistent with other respondents. Experiments with different audiences during recent years show that about 80% of those asked about Spur vote to sidetrack the trolley and let one die rather than five. Most of us, it seems, are card-carrying utilitarians. The greatest good for the greatest number.

---

2 It probably would not have changed your mind had I said "causing the one man to die rather than the five." Do you suppose it would change the minds of others inclined to pull the switch?

Now a second trolley hypothetical, this one called Footbridge. You are on a footbridge directly over the trolley tracks. Looking back you see the runaway trolley rushing along. Looking ahead, you see the five people tied to the track. Desperate to find some way to avert this impending disaster, you spot a fat man standing near you on the footbridge, looking down from the edge. You realize that if you push him over he will fall onto the track, just ahead of the trolley. He is heavy enough that he will stop the train and save the five men. Of course, he will die in the attempt.

Hands again: all those who would push the fat man onto the tracks?

Hands down, and again, those who would not push the fat man onto the tracks, sparing him but letting the five men die?

This time the vote is quite different: about 45 to 1 against. You are much more severe than the general population. Experimenters have found that only about a third of test subjects will vote to push,[3] whereas, as I have said, upwards of 80% or more will send the trolley down the spur.

How can we account for this discrepancy? Those who would pull the switch in Spur usually say that by the time they realize what's about to happen, it's a done deal. Someone is going to die. You have it in your power to save more at the expense of fewer. You

3 Joshua Greene, *Moral Tribes: Emotion, Reason, and the Gap between Us and Them* (New York: Penguin Press, 2013), p. 215.

didn't set these events in motion; you just chanced to be there at that moment close to the switch. In Footbridge, by contrast, you confront an innocent man, unrelated to the unfolding disaster. If he dies, it's because you personally killed him. It's obviously immoral to kill an innocent man, even if to save others. Does that sound correct? Is that how you would explain the difference? If so, you are not a utilitarian but — I'm going to use the technical term here — a *deontologist*. That just means, for those of you have forgotten Philosophy 101, that you believe people have certain rights not to be used, no matter the consequences.

Or perhaps you *don't* see a discrepancy between Spur and Footbridge. For it turns out, on closer inspection, that the explanation of the difference that I just gave really won't wash. In both cases, someone is going to die; the alternatives in each are five or one. The one man tied to the tracks is as innocent as the fat man. In each case, the choice is yours. If that's so, and many people believe it is, then we face a big problem. How can we differentiate our choices, given our feelings that it's right to spare the one in Spur and improper to kill the fat man in Footbridge?

That's what trolleyology is all about. It's the attempt, by some very smart people, to try to sort out our instincts about morality through a series of hypotheticals about runaway trolley cars. The trolley problem was devised in 1967 in an article about

abortion.[4] The author was Philippa Foot, a well-known Oxford philosopher who happened to be the granddaughter of President Grover Cleveland. She used Spur as a minor example to sort through the perplexities of the abortion question — mind you, this was years before *Roe v. Wade*. Trolley problems were made more rigorous and brought into the mainstream philosophical conversation in articles by MIT philosopher Judith Jarvis Thomson beginning in 1976[5] and in a 1990 book on rights.[6] Since then the commentary has exploded, and just this past year, as I said, trolleyology has found its way into the popular conversation in two books. The literature has spawned quite a number of variations, including Loop, Two Loop, Lazy Susan, Six Behind One, Tractor, Obstacle Collide, Extra Push, Tumble, Remote Footbridge, Footbridge Switch, Trap Door, and many others, including some situated not on trolley tracks but in hospital rooms; for example, Transplant. For lack of time, I won't detain you with any of these variations.

---

4 "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review*, vol. 5:5–15 (1967), reprinted in Philippa Foot, *Virtues and Vices* (Berkeley: University of California Press, 1981), pp. 19–32.

5 Judith Jarvis Thomson, "Killing, Letting Die, and the Trolley Problem," *The Monist*, vol. 54:204-217 (1976) and "The Trolley Problem," 94 *Yale L.J.* 1395-415 (1985); see also Thomson, "Turning the Trolley," *Philosophy & Public Affairs*, vol. 36(4):259-274 (2008), in which she seems to have recanted her earlier position in Spur.

6 Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990).

But how do we explain the difference most of us feel in sparing the five in Spur and sparing the one in Footbridge? One mainstream philosophical explanation is known as the Doctrine of Double Effect, a principle that traces at least as far back as St. Thomas Aquinas. In essence, it says that it's morally permissible to take an action that might prove harmful if it's merely a *side effect* of a laudable action. As long as you don't intend the harmful result, even if you *know* it's likely to happen, you are still acting morally. For example, you intend to save the five men, and you can do so by throwing the switch to divert the trolley down the side track. It's regrettable that someone else is tied up, but your intention is not to kill him. You'd be *delighted* if he managed to untie himself and scramble out of the way. In Footbridge, however, you *do* intend to kill the fat man. True, you're doing so to spare the five, but you are using the fat man directly as a means to your end, not as a side effect. You would not be happy if the fat man, having fallen on the track, managed to rally, stand up, and step off the tracks just in time.

Many people accept this double effect doctrine as the explanation. You might also. But some of you may see a pretty thin line between tossing the fat man down and supposing that the single man, tied tightly to the tracks, might get away. You might blush to argue that the difference between a murder indictment and a humanitarian award is how plausibly you can make your intentions innocent when

you say of Spur, "well, I didn't mean to kill that poor fellow; I thought there was a chance he'd escape; I wasn't *absolutely* sure he'd be run over."

Lately, a new explanation for the discrepancy has surfaced, and from a surprising quarter. This new account has emerged from experimental psychology and neurology, not from analytic arguments of philosophers. The psychologists and neurologists have come up with a startling finding. They say that your intuition has nothing to do with philosophy or reason: it has to do with brain structure.

In briefest compass, the explanation is this: We have certain neural circuitry in our brains, circuitry put there for reasons of evolutionary pressure when humans were coming down from the treetops in the jungle. Joshua Greene, director of the Moral Cognition Lab at Harvard, and one of the leading pioneers of these studies, summarizes the point in his current book, *Moral Tribes*, through the metaphor of the camera. These days, most cameras have two modes of operation: *manual mode*, in which the photographer chooses what speed and aperture opening to use; and *automatic mode*, in which you just point and click, leaving it to the internal mechanism to figure out the parameters instantaneously. Manual mode takes longer but gives the photographer much more control and precision. Automatic mode is reliable for many sorts of pictures, but not all.

Just so, says Greene, our brains have evolved a manual-mode response and an automatic-mode response to harm-filled situations. When we contemplate Spur, we go into manual mode (because we are not directly using personal force against anyone as a means to an end); this mode permits a utilitarian judgment to emerge. The automatic response takes over when we are presented with Footbridge. We have a "gut feeling," a snap emotional judgment, that it's wrong to *directly* use a person as a *means* to an end, especially if it involves using our own *personal force* to seriously harm or kill him. As Greene puts it, our brain is wired to be "emotionally but not cognitively blind to side effects."[7] In other words, alarm bells go off automatically if we perceive ourselves (or someone else) immediately causing personal and direct harm to another person as a means to an end. But the bells remain silent if the harm is a side effect of what we're trying to do. Of course we *understand* the side effects—it's just that alarm bells don't go off automatically. We have to pause and think about it. That's why we immediately suppose something's wrong with pushing the fat man over the bridge, but then, when we stop to consider it, have difficulty understanding the difference between *killing* one on the tracks to save five, and *pushing* one over to save five.

This is a fascinating explanation, and it's not mere speculation. Experimental results back it up.

7 Greene, *supra* note 3, p. 224.

For one thing, people with defects in or injuries to particularized brain regions are much more likely to say they would toss the fat man off the bridge, suggesting that there really is an automatic-mode gizmo in our circuits that in some people is impaired. People also are more likely to approve of death to the fat man if the facts of Footbridge are varied a bit. For example, when respondents are told the fat man is standing on top of a trap door, and by pushing a button they can open the door to drop him straight down to the tracks, many more people are likely to say that they would push the *button* than that they would push the *man* over the edge themselves. So your different responses to Spur and Footbridge can be explained as a combination or interaction of two factors. As Greene sums it up:

> If you harm someone using personal force, but as a *side effect*, that doesn't seem so bad. . . . And if you harm someone as a *means*, but without the use of personal force, *that* doesn't seem so bad. . . . But if you harm someone as a means *and* you use personal force, then the action seems wrong to most people. . . . Thus, it seems that harm as a means of using personal force is a magic combination.[8]

I'm willing to accept these conclusions. Who am I to challenge scientific findings? But I'm not persuaded that they explain the discrepancy between

8 *Id.*, p. 222.

our instincts about the different moral resolution of Spur and Footbridge. I think the difficulty may lie in the hypos. Let me treat you to one more trolley example, this one, I think, of my own devising.[9] I call it Evil Man.

Let me set the stage. Our professor has just presented Footbridge to a student sitting in the third row. The student has concluded, as most of us do, that it would be wrong to kill the fat man. Why? asks the Professor. Explain yourself. "Well," says the student hopefully, "because he's innocent." Of what? "I mean," the student continues, confidence building, "he has nothing to do with the trolley."

"Suppose," says the Professor, "that he's Hermann Göring."

Silence from the student. This is a modern-day classroom.

The Professor eventually says: "You don't know the name Hermann Göring?" The student blushes, remains silent.

"Hermann Göring was Hitler's second in command, chief of the Luftwaffe, a plunderer of European art and treasure, ruthless scum. Also, he was quite obese."

"Oh," says the student, now enlightened.

---

9 Thomson considers at some length in her essays who the potential victims might be and the difference that that might make. Unlike Evil Man, her examples mostly center on the victims' relationship to the tracks and how they came to be in harm's way.

"Suppose, then," the Professor continues, "that Hermann Göring, a well-known fat man, is standing on the bridge, in a contemplative mood, watching the trolley move east."

"Does he have anything to do with this trolley?"

"No."

"What about the five men?" our student asks, getting the hang of it.

"What about them?"

"Who are *they*?"

"*They* happen to be five scientists who are on the verge of discovering a cure for cancer. If they somehow wriggle out of the ropes and get back to their lab this very afternoon, cancer is defeated."

"Oh, well in that case," says our eager student, "by all means, push him over."

"Whatever happened to 'but it would be wrong?'" the Professor says triumphantly, and our poor student once again is struck dumb and doesn't understand what just happened or how he got there.

Evil Man seems to contradict Greene's hypothesis. The difference between Spur and this new version of Footbridge is not the difference between means and side effects or personal force vs. indirect force or action. It is about the character of the potential victims, since as our student concluded and as many of you may agree, it's permissible to use personal force as a means to kill

one person to save others, as long as the one to be killed is really evil and the five to be saved are really good.[10]

Perhaps you are thinking I'm playing a trick. It can't both be right and wrong to push the fat man over. I propose that there *is* a trick, and that the trick lies buried in the nature of the hypo. The trolley hypothetical, like many others, is what I have called a FAKE hypothesis or argument.[11] F - A - K - E stands for Facts Are Known Exactly. In this class of hypotheticals, you construct an argument resting on a foundation of facts all of which are positively

10 Perhaps the evolutionary psychologist can easily enough explain the student's reaction to that too: it would make sense, after all, for evolution to have selected a neural gizmo that makes it more likely to make a snap judgment to refrain from killing a friend or even a stranger than a known enemy. A very recent study, published three days before I delivered this lecture, reported on an experiment suggesting that another variable may also affect moral judgment in Footbridge. The study found that people will more likely sacrifice the fat man if they are asked in a foreign language, rather than their native tongue, how to respond to the Footbridge problem. The experimenters concluded that people are more likely to offer utilitarian solutions to moral problems (though not by a huge percentage) when they are separated from the emotional overtones of their own language. Albert Costa, Alice Foucart, Sayuri Hayakawa, Melina Aparici, et al., "Your Morals Depend on Language," *PloS ONE* 9(4):e9842. doi:10.1371/journal.pone009842 (April 23, 2014). Accessed on May 15, 2014, at http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0094842. This result appears to be consistent with Greene's conclusion that "utilitarian judgments depend more on cognitive control." Greene, *supra* note 3, p. 127.

11 A term I coined in my recent book, *Liberalism Undressed* (New York: Oxford University Press, 2012), p. 90.

known. You instruct your students or your readers that the conditions to be considered are precisely and only the ones specified and that they may be wholly relied on as true when formulating an answer.

A simple yet powerful FAKE argument, one that has echoed down the pages of human history, begins with this claim: "God told me to . . ." The argument goes like this: When God tells you to do something, it is moral to do it. So if God tells you to kill your first-born, you not only may but should do so. Of course, you recognize right away that as lawyers we could never permit such an excuse. The law allows no defense to a homicide charge that would permit you to plead that God gave you the order. And for a simple reason: we know of no way to establish the reality of your defense. Only in Hypoland do we know it to be true.[12]

That was, I now realize, the problem with *my* criminal law professor's class of hypotheticals involving the

12 I mean, of course, a defense that would permit a verdict of not guilty that would free the defendant. To establish a defense of insanity, however, the law might permit you to prove what is known as a "deific decree delusion." In construing its insanity statute, the Colorado Supreme Court said that even a defendant who knows killing is unlawful, may "be judged legally insane where, as here, the defendant's cognitive ability to distinguish right from wrong with respect to the act has been destroyed as a result of a psychotic delusion that God has decreed the act." *People v. Serravo*, 823 P.2d 128, 140 (Colo. 1992). The defendant need not prove the truth of the claim, merely that because of a mental disease or defect he believed it. Thanks to Robert Blecker for the reference.

ignorant English-speaking Martians. He often would press them into service to show that drunk drivers couldn't help themselves — or something like that. But what was specified in the hypo cannot apply on planet earth. In fact, it is an even worse FAKE argument than the God hypothesis. We can at least imagine what's assumed when a defendant asserts that God told him how to act. It's possible, I suppose, that some day God will make his presence known to the satisfaction of everyone and tell us just who it is he's talking to. But it's not possible to imagine that someone can speak English (or any language) and be wholly ignorant of the meanings, connotations, and implications of words and their cultural underpinnings. The facts of the Martian hypo were totally disconnected from its power to teach us anything about how the law is or ought to be. But, I suspect, my professor would not have let us say so. Had we pointed out the fatuousness of the hypo, he likely would have retorted, "well, just accept it as fact and answer the question." That, I think, is an impossible request. And had a student answered it, the assumptions under which the student was laboring would likely never have surfaced. The answer would be worthless and the professor would not have tested what the student knew or was actually thinking about.

The way around the discrepancy between Spur and Footbridge, then, is to understand that the question that follows the Suppose is ambiguous. Perhaps you are being asked whether on these precise facts it's permissible to do what you're asked to

do. The smart listener says, well, It Depends. What if the fat man is Hermann Göring? What if I'm not strong enough to push the fat man over? What if he resists me? What if he isn't really positioned to land at the precise point on the track? What if my timing is off and he falls on top of the trolley, not in front of it? What if he isn't heavy enough to stop it? What if in our tussle I topple over with him? It's these sorts of wholly rational thoughts about the real world that are not permitted to be raised as objections when confronted by a FAKE hypo. We live, however, not in a FAKE world but in a REAL one, where R - E - A - L stands for "Really, Exactitude Ain't Likely."

Joshua Greene of Harvard seems to recognize the point, without considering whether it calls into question the validity of his test subjects' answers. He says:

> Now you may be wondering — people often do — whether I'm really saying that it's right to push the man off the footbridge. Here's what I'm saying: If you don't feel that it's wrong to push the man off the footbridge, there's something wrong with you. I, too, feel that it's wrong, and I doubt that I could actually bring myself to push, and I'm glad that I'm like this. What's more, in the real world, not pushing would almost certainly be the right decision. But if someone with the best of intentions were to muster the will to push the man off the footbridge, knowing for sure that it would save five

> lives, and knowing for sure that there was no better alternative, I would approve of this action, although I might be suspicious of the person who chose to perform it.[13]

But there is a "for sure" only in the realm of the FAKE, not in the world of the REAL.

I don't mean to exhaust you but I do mean to push on a little further. Perhaps all of this confusion and apparent contradiction arises because the hypos concern morality, a notoriously open-ended, proof-elusive field of inquiry. Perhaps the problem of the FAKE hypo does not infect the world of pure logic. Alas, I'm afraid that it does, and I offer you just one story, the so-called Linda hypothetical, made famous by Daniel Kahneman, the Nobel Prize-winning cognitive psychologist, and his collaborator, Amos Tversky. Here it is.

> Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations.[14]

Now I'm going to ask you to say which of the following two statements is more probable:

A: Linda is a bank teller.

---

13 Greene, *supra* note 3, p. 251 (emphasis supplied). Greene says that his experiments have "controlled for people's real-world expectations," (p. 214), but I'm unclear whether those tests show that respondents might answer as they do because they reject the hypo's premises.

14 Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011), p. 156.

B: Linda is a bank teller *and* active in the feminist movement.

Which is more probable, A or B? Raise your hands if you think that it's more probable that Linda is only a bank teller than that she is *both* a bank teller *and* active in the feminist movement. Okay, now a show of hands if you think it's the other way around: more probable that Linda is both a bank teller and active in the feminist movement than that she's "just" a bank teller. It looks like we're voting two to one for B.

The answer? According to the logicians, A is always more probable than B. It's more likely that Linda is just a bank teller than that she is both a bank teller and a feminist activist. Can we be sure the logicians are correct? Cass Sunstein, the prolific law professor now at Harvard, as recently as two days ago in *The New York Review of Books,* in a review of one of the current trolleyology books, says we can.[15] If you said B rather than A you've committed the so-called "conjunction error." It is, says Sunstein, "an obvious mistake: a single outcome has to be more likely than one that includes both that outcome and another." An event A, the logicians proclaim, is always more probable than two events, A and B. But I suspect we're in the grip of a FAKE argument, which works only in the mathematical realm in which facts can be supplied precisely.

---

15 Cass Sunstein, "How Do We Know What's Moral?" *New York Review of Books*, April 24, 2014, p. 16 (reviewing Edmonds, *supra* note 1).

Suppose we're picking marbles out of a hat. Specify that there are an equal number of well-mixed identical black and white marbles. Let's say that event A is the selection of a black marble from the hat. And let's say that event B is the selection of a black marble, followed by the selection of a white marble. In that case, the logicians are correct. The probability of drawing a single black marble is 50%. The probability of drawing a single black marble followed by a single white marble is 25%. Any gambler understands these odds.

But Linda isn't like a bag of well-mixed marbles. Linda is a human being with a background. Let's say that Linda, given her background, would be willing to be a bank teller (to have a steady income, and guaranteed free evenings) *only* if she could also be active in the feminist movement (calling to mind Oscar Wilde's celebrated quip that "The problem with socialism is that it takes up too many evenings"). If Linda can't be active in the movement she doesn't want to be a bank teller. She'd do something else. If you asked me which is more probable for *me*, being a professor or being a professor *and* a writer, the answer is the latter, because if I couldn't be a writer while being a professor then I wouldn't take the job of professor.[16]

16 The answer may also depend on how the question is framed. I'd answer B if the choice was (A) being a professor or (B) being a professor and a writer, but A if the choice was (A) being a writer or (B) being a writer and a professor.

That explains a lot about the jobs I have had — and the jobs that I've never considered.

What I'm suggesting is that people can (and often do) think about verbal puzzles by importing their own variations, intuiting or assuming hidden variables. In the listeners' minds, the facts of non-mathematical puzzles are *not* known exactly. We *do* read into these little hypotheticals our (perhaps automatic but nevertheless informed) beliefs about human characteristics. To say that Linda would more likely be a bank teller than a bank teller *and* a feminist activist will trouble many of us, who understand that people don't just change their deepest convictions. It's unreasonable to expect us to refrain from extrapolating Linda's likely path from what little we're told about Linda. She *is* likely to continue her passion for social justice. Why would Linda desert her passion in order to become a bank teller?[17]

17 Of course, we could be told more about Linda. Perhaps her parents fell ill and she was required to take a job that would give spare time to care for them. Then we'd understand why she'd be a bank teller and not also an activist. Or perhaps we'd view the matter differently if Linda had become the bank manager. She wouldn't have time to be an activist. Or she might consider that being identified with a particular political cause would not be good for the bank, and she is conscientious (she takes her fiduciary duties seriously as a manager); hence she forgoes her personal inclination. All of these are things we'd think about, and reach nearly instantaneous judgments about, when the puzzle is posed. That we answer the hypo with an instinct about human psychology does not mean we are being illogical. It means that the interlocutor (the researcher who has devised the hypothetical) hasn't thought it through — or hasn't thought through what his test subjects are thinking. That's why the answer to the professor's *Suppose* ought always to be *It depends.*

Still not convinced? Let's try this one:

> As a child Linda regularly went to baseball games with her father, who managed the major league team in town. She always had dinner from the concession stand at the ballpark. She still loves the stadium food, which she always consumed with condiments. Which is more probable?
>
> A: At the ball game last night, Linda ate a hot dog.
>
> B: At the ball game last night, Linda ate a hot dog and also ate mustard.

See what I mean? I'd vote for B. Wouldn't you? The conjunction error be damned. To insist on it as an absolute is to forgo the possibility that the human subject knows things that the experimenter hasn't considered. Formal propositions are never absolutes in the real world. In the realm of these mathematical hypotheticals, events are independent. But they never are in the human world of motivations, interests, passions, and desire. The student or subject who answers the Linda question is not necessarily wrong in assessing those characteristics to decide how she might actually behave.[18]

---

18 In delivering the lecture, I did not mention that as a child Linda always ate her stadium food with condiments. Relatively few in the audience raised their hands when asked whether they would choose B. Several people told me afterward that they would have chosen B had I specified Linda's taste for condiments as an element of her story. Whether their reaction is typical of

Well, you may say, impatient for me to conclude, all that's very interesting — I certainly hope you find it interesting — but what does any of it have to do with law and the legal system? We lawyers are surely more sophisticated than that. We don't — other than my criminal law professor — deal in FAKE arguments. Alas, in fact, we do. Since my time is short, three brief illustrations must suffice.

A prototypical example is the problem of cross-examination of the truthful witness. This problem has been most thoroughly and fruitfully explored by Professor Monroe H. Freedman of Hofstra Law School, whose first published law review article, nearly half a century ago, on the general problem of the lawyer's responsibility for maintaining truth in the courtroom so infuriated then Judge Warren Burger that he and two other judges sought to have Freedman disbarred just for writing the article.[19] Freedman sought to show, among other things, that if the client was likely to, or actually did, commit perjury the code of professional responsibility puts the lawyer in an impossible

people generally is hard to say, since this group of lawyers and law professors was on high alert from the nuances of the hypos to which they had been exposed in the immediately preceding minutes. Their reaction does suggest that people are sensitive to the nuances of the question and will not all draw the same inferences from the compact hypotheticals they are given.

19 Freedman tells the story in Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975), Preface.

situation. Freedman advocated allowing the lawyer to cooperate with the client in presenting false testimony.[20] He rested his analysis in part on the code's attitude toward cross-examination. Freedman asked us to imagine an elderly woman with impaired eyesight and a nervous disposition who testifies truthfully that she saw your client at a certain location near the scene of a crime that he has been wrongly accused of having committed. Her testimony will almost surely result in your client's conviction. But you are confident that you can shake her testimony by vigorously cross-examining her. May you ethically make mincemeat of her? Freedman's answer (as indeed, the code of professional responsibility's answer) is that you may. His point was that destroying the truthful witness has the same effect as facilitating the lying witness. As you will have guessed by now, I don't doubt the answer, I doubt the premise of the hypothetical. If it's known to a certainty that she is telling the truth, it *cannot* be moral to tear her apart. Indeed, if we knew to a certainty that she was telling the truth, what would be the point of even putting her on the stand? The judge should just instruct the jury that the defendant was indeed at the particular corner at the particular time and the witness did indeed see him. It is only because we cannot assume omniscience, because we *do not have* absolute knowledge,

20 Freedman's account is fine-grained and sophisticated; he did not suppose that just anything goes.

that we can justify testing claims through cross-examination.[21]

A like infirmity attends some hypotheticals designed to probe the question of legalizing assisted suicide. In a 1997 Supreme Court case, *Washington v. Glucksberg*,[22] the plaintiffs argued that terminally ill mentally competent adults have a right to commit "physician-assisted" suicide. The claim was essentially that the Constitution recognizes a fundamental liberty interest in "self-sovereignty"; as long as someone consents to die, the state may not prohibit others from assisting him to achieve his end. The Court, I think sensibly, rejected that view. Chief Justice Rehnquist pointed to the absence of any longstanding historical tradition of assisted suicide. But a more direct reason is at hand. To have overturned a ban on assisted suicide would have freed the assistant, without any statutory safeguards in place, to assert a claim that the decedent had consented to be helped to his own demise — a claim more easily asserted than disproved and that we understand can be trusted only in Hypoland.[23]

---

21 See Monroe H. Freedman and Abbe Smith, *Understanding Lawyer's Ethics* (Newark: Lexis-Nexis, 3rd ed., 2004), pp. 163-164, 225-226.

22 Washington v. Glucksberg, 521 U.S. 702 (1997).

23 For a curious, real-world case (not involving terminal illness), see John Eligon, "Assisting Suicide to Be Focus of Trial in Motivational Speaker's Death," *The New York Times*, February 10, 2011, p. A20. The victim's killer offered as a defense that the victim, Jeffrey Locker, drove up to him on the street and asked to be killed so that his family would receive insurance money.

Finally, a fictional example from a classic movie — but no less real for that, since it suggests the American weariness with the legal procedures we employ to avoid the problems of the hypos we've been examining. *The Talk of the Town*[24] is about a detached law professor (imagine that!), played by Ronald Colman. His character is an unemotional idealist whose only passion is for the intricacies of the law. He has always dealt with the tumult of life at one remove. He is renting a house in the country while waiting to be nominated to the Supreme Court. Meantime, the town loner, played by Cary Grant, is falsely accused of arson and winds up hiding out in Colman's house. Through madcap twists and turns, Colman tells the landlady, who is convinced of Grant's innocence, that he cannot involve himself in the problems of people. But in the end Colman kidnaps the real culprit, hauls him back to the courtroom, where he fires his gun into the ceiling to stay the townspeople from lynching Grant. Colman "quiets the mob by telling them that the law is their most precious possession and that they must always respect its processes."[25] As a result of his heroics, our professor is nominated and confirmed to the Supreme Court. In an analysis of the image of the lawyer in popular culture, Robert C. Post says of *The Talk of the Town*:

---

24 *The Talk of the Town* (Columbia Pictures, 1942); directed by George Stevens; screenplay by Irwin Shaw and Sidney Buchman.

25 Robert C. Post, "On the Popular Image of the Lawyer: Reflections in a Dark Glass," 75 *California L. Rev.* 379, 381 (1987).

> It is a wonderful moment. The man who has just forcibly kidnapped the criminal is lecturing the crowd on the virtue of the law. The paradox is not accidental, for the very thrust of the film is that Colman's willingness to break the law qualifies him for the Supreme Court. Sometimes, in other words, the lawyer must be lawless in order to uphold the law. Put that way, of course, we can begin to recognize a classic American theme.[26]

I think that that wonderful moment has a different meaning. The audience recognizes that Colman the lawyer did right because *the audience*, transported to Hypoland, has been assured of the facts. The world's opaqueness has evaporated because *we have been told* by the omniscient writer who the real culprit is, and so we can cheer the professor's character-altering bravado. But outside the theater, we know no such thing. Our neighbors' frustration with the rule-abiding lawyer and his fidelity to a mind-numbing process is very often a reflection of rage and bafflement at the world's uncertainties. But we know better and we need to teach better. Asking whether we may kidnap the culprit whom we know to be guilty is to ask whether we may avoid the law to fulfill the law. Only in movies.

Some years ago, a business law textbook gave a bit of practical advice to students: In trying to

---

26 *Id.*, p. 382.

understand the law, don't quarrel with the hypo, just answer the question.[27] I'm a bit rueful about that advice, since I was the one who wrote it. As you can tell, I've been reconsidering. So I end, as I began, with three words: *Fight the hypo.*

27 Jethro K. Lieberman and George J. Siedel, *Business Law and the Legal Environment of Business* (Ft. Worth: The Dryden Press, 1992), p. x.

ABOUT THE AUTHOR

Jethro K. Lieberman has had a varied career in law, journalism, and education.

He earned a B.A. in politics and economics at Yale University, a J.D. at Harvard Law School, and a Ph.D. in political science at Columbia University

Following law school, he served on active duty as a Lieutenant in the Judge Advocate General's Corps of the U.S. Navy from 1968 to 1971, stationed at U.S. Naval Air Station Patuxent River and later at the Office of the Judge Advocate General. He then worked as an associate in the antitrust and trade regulation department at the law firm Arent Fox in Washington, D.C., leaving to become vice president and general counsel of Stein and Day Publishers, a New York trade book house. For nearly ten years thereafter he was the founding Legal Affairs Editor of *Business Week Magazine*. In the early 1980s he was vice president of a non-profit dispute resolution institute now known as CPR International Institute for Conflict Prevention and Resolution, where he founded and edited a newsletter on dispute resolution still being published.

While at CPR, he began his teaching career in 1982 at Fordham Law School. He moved to New York

Law School in 1985, where he was director of the writing program for more than two decades, associate dean for academic affairs (2000–2007), a role he reprised in Spring 2012, and vice president and director of academic publishing. Over the years he has taught 16 different courses, including Constitutional Law, Freedom of Speech, Law and Society, Military Law, and Advanced Writing Skills for Lawyers. For several years he was adjunct professor of political science at Columbia University, where he taught the undergraduate course in constitutional law.

He is the author, co-author, or editor of more than 30 books, including *The Litigious Society* (Basic Books, 1981) and *The Enduring Constitution* (West and Harper & Row, 1987), both of which won the American Bar Association's top literary prize, the Silver Gavel. An outgrowth of *Liberalism Undressed* (Oxford University Press, 2012), a study of the harm principle, his current project, tentatively titled *Taking Offense*, is a study of a world-wide phenomenon: the human proclivity to take offense and the increasing push to regulate and restrict speech in the name of avoiding offense. For his complete bibliography, visit www.jethrolieberman.com.

ABOUT THE MARTIN CHAIR

The Martin Professorship, established with the support of the Martin Foundation Inc., was created in memory of Lester Martin (1907–1959). An industrialist and financier, focused mainly in the printing and textile industries, Martin was also a noted philanthropist. At the time of his death, he was Chairman of the Board of Trustees of the Grand Street Boys' Foundation, which began by giving scholarships to students from welfare families and grew to assist individuals, colleges, and organizations and had a related organization called the Grand Street Boys Association, a political club that counted judges, lawyers, senators, congressmen, and businessmen among its members. A number of New York Law School graduates, including Senator Robert Wagner and Mayor Jimmy Walker, were active members of the Grand Street Boys' Foundation. In 1979, the Foundation established an endowed scholarship fund to provide annual scholarships to NYLS students; these scholarships are still being offered today.

ABOUT THE AUTHOR

Jethro K. Lieberman is the author of *Liberalism Undressed* (Oxford University Press, 2012), *A Practical Companion to the Constitution: How the Supreme Court Has Ruled on Issues from Abortion to Zoning* (University of California Press, 1999), *The Enduring Constitution* (West Publishing and Harper & Row, 1987), *The Litigious Society* (Basic Books, 1981), *Crisis at the Bar: The Unethical Ethics of Lawyers and What to Do about It* (W. W. Norton, 1978), *The Tyranny of the Experts* (Walker, 1970), and author, co-author, or editor of more than 25 other books. He was appointed to the Martin Professorship at New York Law School in 2013.

ISBN 978-0-9904547-0-0
90000
9 780990 454700