

Duke Law Journal

VOLUME 1986

DECEMBER

NUMBER 6

LAW, ECONOMICS, AND THE PROBLEM OF LEGAL CULTURE

BRUCE A. ACKERMAN*

I.

It was not always this way. There was a time, not so very long ago, when lawyers treated economists with the same benign condescension they still bestow on practitioners of countless other specialties—biologists or statisticians or psychoanalysts. Doubtless, a lawyer might call on one of these specialists to respond to a question of legal significance, but there was never any question about who was in charge. Lawyers and judges, using their traditional techniques of interpretation and argument, determined when, where, and how nonlegal experts were to enter into the legal conversation: “Don’t call us, we’ll call you.” If, for example, lawyers found economists useful when arguing about antitrust law, but useless when talking about torts, the economist was expected to know his place and speak only when spoken to.

It is precisely this easy sense of cultural supremacy that has given way over the past quarter century. Traditional lawyers, regardless of their field, increasingly confront a new kind of law and economics—one that challenges the very questions they ask, not to mention the answers they think plausible.

The new law and economics comes in two varieties. There are the *strong* lawyer-economists who seem to believe that the *only* appropriate forms of legal argument are those that can be cast in a way that is acceptable to economists. This group finds its spiritual home at the University of Chicago. The *weak* lawyer-economists are not so imperialistic. They

* Beekman Professor of Law and Philosophy, Columbia University. This is a revised version of the Brainerd Currie Lecture, delivered at Duke University in March 1986. It is a pleasure to thank the following people for their very helpful comments: Meir Dan-Cohen, Ronald Dworkin, Kent Greenawalt, Alfred Hill, Mark Kelman, Jerry Mashaw, Henry Monaghan, Peter Strauss, Cass Sunstein, and Joseph Vining.

believe that economic analysis ought to play a pervasive, but not an all-important, role in legal discourse. Their main task is to integrate the distinctive grammar of law and economics into traditional forms of legal discourse, producing a richer conception of appropriate legal argument. Although this complex business is going on in many places, I think its spiritual home has been the Yale Law School.

Now I myself am a weak lawyer-economist. However weak or strong they may be, all lawyer-economists must confront the doubts, anxieties, and opposition of their fellow legal practitioners. After all, lawyers and judges have been arguing with one another for centuries. During this time, not a single lawyer has sought to vindicate the merits of his case by explaining to a judge that "the point of tort law is to internalize externalities,"¹ or that "we should elaborate the law of contract with the aid of the theory of moral hazard,"² or that "we should understand the Supreme Court's latest opinion with the aid of Kenneth Arrow's General Impossibility Theorem."³ Of course, traditional lawyers have sometimes taken economic factors into account, but they have never thought it necessary to develop an elaborate technical apparatus to assess these factors' legal significance. In contrast, the new movement seems to be uncommonly adept at manufacturing jargon—to the point where leading law journals may become utterly unintelligible to long-time practitioners who had naively supposed that they were capable of reading the *Harvard Law Review* without professional assistance. More disturbing still, the new jargon seems to be penetrating an increasing number of decisionmaking centers where law is spoken in the United States—courts as well as agencies, legislatures as well as the executive branch. For good or ill, powerholders actually seem to be impressed by all this talk of multiple regression analysis and Pareto optimality!

Not, mind you, that the legal tradition has been averse to technical jargon during the millenia of law-talk that antedated the discoveries of Guido Calabresi and Ronald Coase in the 1960's.⁴ Only it was a different jargon; and the simple fact of difference would be enough to account for the vast professional anxiety generated by law and economics. Quite bluntly, the new movement threatens traditional lawyers with technological obsolescence: How precisely do they propose to respond on that

1. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* 143-50 (1970).

2. See, e.g., K. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY AND PUBLIC POLICY* 14-15 (1986).

3. See, e.g., Easterbrook, *Ways of Criticizing The Court*, 95 HARV. L. REV. 802, 813-32 (1982).

4. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

dread day when they confront a regression analysis that purports to identify their client as the party who has wrongfully failed to “internalize externalities”?

This question is no laughing matter in a profession whose stock and trade is persuasive argument. If traditionalists cannot master the new jargon that powerholders find meaningful, they will be displaced by lawyer-economists who do not labor under a similar disability. Yet, for those of us who can afford to view the matter more dispassionately, the jargon of the lawyer-economist raises a different challenge: Does this new wave of neologism reflect some deeper change in the way American lawyers talk and think about justice? Or is it a superficial linguistic shift, signifying nothing more than another turn in the endless wheel of legalistic mumbo-jumbo?

Given the legal system's addiction to jargon, the mumbo-jumbo hypothesis should not be casually dismissed. To give it some precision, consider the possibility that the neologisms generated by law and economics are produced through a simple process of *coded displacement*. Suppose, for example, we studied the way a traditional lawyer uses a traditional term (T-term)—say, “proximate causation”—and compared it with the way a lawyer-economist uses one of his neologisms (N-term)—say, “cost-externalization.” If the lawyer-economist were to deploy the N-term precisely on those occasions when the traditionalist uses the familiar T-term, the relationship between the two terms could be expressed by compiling a simple codebook. By looking up the term “proximate cause” in the book, our perplexed traditionalist would find the precise word he needed to function persuasively within the N-lexicon. If each T-term could be mapped onto a corresponding N-term in this way, the new vocabulary advanced by law and economics would be revealed as a perfectly coded displacement of traditional discourse.⁵ Such a discovery, of course, would trivialize the new movement: old wine has merely been poured into new bottles without any change in spiritual content.

Suppose, however, that our comparison of T-terms and N-terms did not reveal this pattern. Ideas that could be expressed in a simple and direct way in one idiom required complex circumlocution in the other and vice versa. More generally, suppose the T- and N-lexicons organize the universe of legal problems along very different lines, each emphasizing different types of facts and values as significant in the just resolution of disputes. Given such contrasting patterns, a codebook translation of

5. Of course, there is probably no such thing as a *perfectly* coded displacement in which an N-Term functions as a substitute for the T-Term it displaces in each and every traditional use. The text is dealing with ideal types that hopefully clarify real world possibilities.

individual T-terms onto individual N-terms would serve only as a crude, and often grossly misleading, guide to the perplexed traditionalist. Before he could operate persuasively within the transformed legal culture, it would no longer be enough for the traditionalist to turn to a simple codebook. Instead, he would have to immerse himself in the new *conversational repertoire* that allowed N-lawyers persuasively to connect legal phenomena quite unrelated to one another under the T-system.

Such wrenching changes in conversational repertoire occur, of course, much more rarely than do coded displacements. Nonetheless, they do occur. A notable example is the destruction of the common law forms of action during the nineteenth century. The cultural implications of this transformation would be lost if we simply mapped N-terms onto the T-terms they displaced in codebook fashion. Although this is obvious enough in retrospect,⁶ it is far more difficult to speculate about future transformations of the legal culture. Nonetheless, my own immersion in the conversational universe of the lawyer-economist convinces me that a similar cultural shift may be in the making. If the movement does succeed in reconstructing the language of American law, American lawyers of the next century will not merely be substituting bits of economic jargon for coded traditional counterparts; what is at stake, rather, is a proposal to transform the basic conversational repertoire that American lawyers now use to persuade one another—and their fellow citizens—of the justice of their clients' complaints. Given the central place of law in defining the terms of American public life, this effort at cultural reconstruction should provoke serious attention even from people whose first instinct is to avoid quibbling lawyers whenever possible.

At present, we have not gotten very far in analyzing the conversational shifts that have generated such pervasive anxieties. Thus, by far the greatest controversy has centered around the lawyer-economist's appeals to "efficiency" as a way of resolving legal disputes.⁷ Although this question is important, the movement's challenge to traditional legal cul-

6. Unfortunately, we do not yet possess a searching and comprehensive account of this great transformation of the nineteenth century. For glimpses, see F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (1936); G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980); and Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205 (1979).

7. See, e.g., Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 *HOFSTRA L. REV.* 509 (1980); Dworkin, *Is Wealth a Value?*, 9 *J. LEGAL STUD.* 191 (1980); Dworkin, *Why Efficiency?*, 8 *HOFSTRA L. REV.* 563 (1980); Kronman, *Wealth Maximization as a Normative Principle*, 9 *J. LEGAL STUD.* 227 (1980); Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 *J. LEGAL STUD.* 243 (1980); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487 (1980); Posner, *Utilitarianism, Economics and Legal Theory*, 8 *J. LEGAL STUD.* 103 (1979); Rizzo, *The Mirage of Efficiency*, 8 *HOFSTRA L. REV.* 641 (1980).

ture cannot be assessed by a critique of this single term in the lawyer-economist's codebook. Long after extreme claims for (one or another conception of) "efficiency" have been abandoned, American lawyers will still be struggling with the deeper aspects of the lawyer-economist's effort to reconstruct American law—at least if I am right in suggesting that the new movement aims to transform the basic conversational repertoire available to American lawyers. To come to terms with this challenge, we must move beyond the analysis of single terms like efficiency; we must instead grasp the *system* of concepts by which lawyer-economists organize the legal world and the distinctive way this system reshapes the kinds of questions, no less than the sorts of answers, that will seem most important to practitioners within the transformed legal culture. Only then can we begin to come to terms with the traditionalist's root anxieties:⁸ Does the new conversational repertoire undermine the American lawyer's capacity to express the American people's traditional principles of truth and justice? Or does it, instead, enable lawyers better to express their fellow citizens' evolving understanding of the principles that should guide the pursuit of justice in modern society?

Now I am optimistic about the conversational possibilities opened up by the new movement. This short essay, however, does not try to convert you to my view. It will be enough if we can clear away some of the obstacles that presently block serious analysis. I fear that some early efforts to put law and economics in its place have managed to obscure the nature of the lawyer-economist's cultural challenge. My first task, then, is to consider two familiar, but competing, misdiagnoses of our present situation. These rival interpretations come from opposite poles of the legal academy—one is associated with some, but not all, members of the Chicago School; the other, with some, but not all, partisans of the Critical Legal Studies movement. For all their transparent

8. These anxieties are expressed powerfully by George Fletcher, see Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Joseph Vining, see J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986); and James White, see J. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984). Despite my differing substantive views, I greatly admire these writers' emphasis on the significance of legal culture and the importance of understanding its deeper organizing principles. I am troubled, however, by the one-sided way in which they undertake their cultural analyses. Although they offer many insights into the deeper structures of traditional legal rhetorics, they do not attempt a similarly sympathetic examination of more modern forms of legal discourse. This failure in critical balance predictably leads them to take a rather strident reactionary stance on the questions raised by this article. Since they are blind to the conversational possibilities opened up by the new legal rhetorics, they emphasize only the cultural impoverishment we will suffer by the erosion of traditional forms of expression. Although these losses are very real, they only make up one side of the ledger in a balanced account.

disagreements, both groups have managed to trivialize the challenge that law and economics poses to the traditional conversational repertoire of American law. After working my way to a couple of dead ends, I shall try to break the impasse by running an interdisciplinary raid upon some neighboring departments of the university: Perhaps some busy group of scholars has already developed well-honed tools that will do justice to the cultural challenge of law and economics? Unfortunately, the results of this excursion are largely negative, though potentially empowering: if American lawyers are to put law and economics in its place, they will have no choice but to think for themselves.

II.

I shall begin my guide for the perplexed traditionalist with those Chicagoans who have most assiduously sought to justify the ways of the lawyer-economist to their fellow lawyers. As good conservatives, these apologists for the new learning have sought to console the traditional lawyer by minimizing the challenge the lawyer-economist poses to traditional legal discourse. According to these Chicagoans, traditional private law is already instinct with an "implicit" economic logic.⁹ "All" that the lawyer-economist proposes to do is to make traditionalists fully self-conscious of the economic logic that has guided the law all along. If this is right, the traditionalist's opposition to the lawyer-economist's jargon would seem short-sighted. At the very least, the victory of the new legal rhetoric would not lead lawyers to repudiate their common law heritage. At best, the conversational repertoire of the lawyer-economist would invite a deeper appreciation of the common law tradition and encourage its legal revitalization.

Much to their credit the Chicagoans have not been content to announce the marriage of Economic Efficiency and the Common Law. They have done something far better. They have presented an argument that explains how such a remarkable liaison could have come about. The seminal point, first made by George Priest¹⁰ and Paul Rubin,¹¹ has a solid core of common sense. Imagine that two people, *A* and *B*, find themselves considering whether they should sue each other in a common law court. If *A* persuades the court of the merits of his case, *B* will lose \$5000. If, however, *B* persuades the court to adopt his proposed solution, the court will announce an economically inefficient rule that will

9. For a descriptive account that emphasizes the putative efficiency of common law doctrine, see R. POSNER, *ECONOMIC ANALYSIS OF LAW*, 29-246 (3d ed. 1986).

10. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

11. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

cost A \$10,000. If this is all we know about A and B , we would expect the A s of this world to spend more of their time and money convincing courts to adopt the "efficient" rule than would the B s in pushing courts away from efficiency. For each A stands to lose \$10,000, while each B has only \$5000 at stake. Moreover, even if a B does succeed in winning an initial lawsuit, future A s have a powerful incentive to relitigate the matter in their ongoing effort to save \$10,000 in damages. In contrast, once an efficient rule is adopted, B s will challenge the rule less frequently and vigorously because they have only \$5000 at stake on each occasion. Thus, even if judges had no self-conscious concern with economic efficiency, and decided each lawsuit by flipping a coin, the common law would evolve over time in the direction of efficiency. Behold the promised demonstration: the economics of civil procedure suggests that the spirit of the Common Law is nothing other than the pursuit of Economic Efficiency itself!

As always, a big problem with this just-so story lurks in the recesses of the Chicago School's *ceteris paribus* clauses. The Priest-Rubin result obtains only in the never-never world of neoclassical economics, in which there are no transaction costs in learning the law, estimating its economic impact, and organizing for purposes of litigation. Once these and other real world obstacles are factored into the equation, the Chicago School's effort "to prove" the efficiency of the common law backfires. Indeed, a rich literature details a variety of realistic models emphasizing the systematic ways in which the unchecked pursuit of economic self-interest by litigants may drive common law systems to massively *inefficient* results.¹²

12. See, e.g., Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 141-50 (1980). To their great credit, both Priest and Rubin have recognized the limited application of their original "efficiency hypothesis" to real world common law systems, and have more recently directed their attention to more fruitful inquiries. See, e.g., P. RUBIN, *BUSINESS FIRMS AND THE COMMON LAW* 173-80 (1983); Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

Similarly, Richard Posner seems to have dropped the favorable discussion of the Priest-Rubin hypothesis from the most recent edition of his textbook. Compare R. POSNER, *ECONOMIC ANALYSIS OF LAW* 439-41 (2d ed. 1977) with R. POSNER, *ECONOMIC ANALYSIS OF LAW* 527-28 (3d ed. 1986). Unfortunately, Posner has done little more than cut a hole in his text, and has failed to use the opportunity to rethink his basic position. A passing remark does suggest, however, a grudging recognition of the inadequacy of a purely economic theory of the legal process. In a discussion of "What Do Judges Maximize," Posner does not rely on normal economic theory to account for the putative efficiency of the common law. Instead, he points to "a strong social consensus in favor of the efficiency criterion" to account for its use by common law judges. *Id.* at 506.

The interesting thing about Posner's invocation of "social consensus" is not the empirical evidence he gives to support this claim—he gives none. Instead, it is the kind of inquiry that Posner is endorsing here. For reasons that will appear later, see *infra* pp. 940-41, economists are not very good at elaborating the character of any "social consensus" that may or may not exist in the United States. This is an inquiry for which sociologists and anthropologists have a pronounced comparative advantage. By invoking "social consensus" as a causal explanation for the putative efficiency of the

So much, then, for the first dead end. American law will not embrace the Chicago ideal of economic efficiency through some "invisible hand" process modeled on the economist's idea of perfect competition. If this ideal gains legal acceptance, it will be because lawyers and judges convince themselves that economic analysis makes sense as a way of analyzing their legal problems. Before buying into the Chicago rhetoric, however, it will pay us to examine their shiny new product with care, alert to the subtle ways in which it blinds us—as every rhetorical tradition must—to some parts of our legal reality by emphasizing others.

In saying this, I am happy to find common ground with the Critical Legal Studies movement, which has performed a noteworthy service in dramatizing the importance of an ongoing critique of the existing forms of legal culture. My problem with some, though not all,¹³ of these self-proclaimed Critics is the superficial way in which they go about their cultural investigations. The Critics I have in mind have defended themselves against the lawyer-economist by exhuming the least persuasive elements of the American tradition of Legal Realism. On this extreme view, legal doctrine is an infinitely manipulable set of dogmas that lawyers and judges can use to justify any outcome they happen to want.¹⁴ In emphasizing the indeterminacy of legal doctrine, our latter-day Realists do not restrict themselves to the notorious "hard case," in which legal decisions are preceded by an agonized period of indecision. For these critics, there is no such thing as an "easy" case: all doctrine is infinitely malleable. So far as they are concerned, the lawyer-economist has committed original sin, variously labeled "formalism" or "conceptualism." He actually believes that, at least some of the time, lawyers can say that some rules are better or worse than others, and that these arguments might actually have some impact on judges' decisions!

Since this belief in doctrinal efficacy, according to the Critics, is utterly misconceived, the task is to expose the lawyer-economist for the mystifier he really is. Thus, there is a critical literature that tries to show that the lawyer-economist's analytic kit bag *never* allows him to get *any-*

common law, Posner is implicitly recognizing that his commitment to economics is driving him to a methodological dead end, and is suggesting the need to undertake the course of reflection sketched in this essay.

13. The Critical tendency I mean to criticize is roughly the one James Boyle calls "the subjectivist, personal, phenomenological strand" in his recent survey. See Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 688 (1985). My own approach to cultural analysis has more in common with the "structuralist, impersonal, patterned strand" that Boyle finds in many Critical writings—though how much more depends on particular writers and writings.

14. See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821-22 (1983).

where at all in deciding whether one side or another has the better legal argument. Instead, it is asserted that in *each* and *every* dispute, *each* side can make *equally good* arguments on its own behalf within the law and economics framework.¹⁵

Now, to put it mildly, there is something suspicious about this critical effort to reduce a complex form of rhetorical practice like law and economics to such readily dismissable proportions. It is rather like saying that Christianity is utterly indeterminate because it allows Baptists, no less than Catholics, to assert that they, and they alone, have discovered the Truth about Jesus. Although such ongoing struggles attest to a tradition's vitality, the Jew or Moslem would be rather surprised to learn that it evidences the utter indeterminacy of Christian rhetoric. It seems plain to the non-Christian critic that Baptists find it much harder to disagree with Catholics in some ways than in others. If the radical critic tries to penetrate the surface of confused debate about Jesus, he should be able to isolate the deeper rhetorical structures that do indeed shape the Christians' ongoing struggle for legitimacy in the eyes of God and Man.

Rather than engage in a parallel endeavor, however, our latter-day Realists have made life easy for themselves. By asserting the radical indeterminacy of law and economics, they suppose that, in contrast to their Christian brethren, these latter-day practitioners of the Liberal Enlightenment faith founded by Adam Smith and James Madison are talking utter gobbledygook, that they live in an utterly degraded symbolic universe in which every symbol is equally persuasive—and hence equally meaningless—on each and every occasion.

Now, I have a very different view of the professional practice of law and economics.¹⁶ For present purposes, though, I am not interested in convincing you that I'm right and the latter-day Realists are wrong on this descriptive matter. Instead, I want to enter the equivalent of an old-fashioned demurrer to the Critic's "indeterminacy thesis." I shall suppose that, after lengthy analysis of the relevant rhetorical practices, the super-Realists convince us that they are absolutely right in every aspect of their cultural critique: we emerge persuaded that both the traditional legal culture and the new law-and-economics view are as radically indeterminate as the super-Realists say they are. I make this concession in order to move the conversation onward to the next obvious question: Even after we become convinced Critics, does it follow, as is often sug-

15. For the strongest presentation of this view, see Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

16. For a view close to mine, see Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169 (1984).

gested,¹⁷ that we should use every means at our disposal to oppose the rise of law and economics?

I don't see why. By hypothesis, our Critic has just shown us that the displacement of traditional legal rhetoric by law and economics merely involves a change of one shell game for another. Since lawyers can manipulate either shell game to get any result they want, it does not seem to matter *which* shell game they choose to play. To put the point in a way that is currently trendy in Critical circles, the super-Realist critique deconstructs itself. If every legal rhetoric is radically indeterminate, then the adoption of law and economics could not do any more harm than the adoption of any other legal rhetoric. It is only if law and economics *does* give a determinate shape to the character of persuasive argument, it is only if lawyer-economists *do* tend to make more bad decisions than other lawyers, that we should be especially interested in criticizing the new movement. The clear-thinking critic must choose: *either* legal culture is radically indeterminate *or* law and economics is a bad thing, not both.

But it would be a mistake to leave the super-Realists hoisted upon their own fundamental contradiction. If we move beyond deconstruction, we may be able to learn something very positive from their efforts at radical critique. So let us try to isolate the basic idea that drives the indeterminacy thesis. As best I can see, it is the utterly *unrealistic* conception of human nature presupposed by latter-day Realists. At the bottom of the Critic's critique is an extraordinary image of the lawyer as a cognitive superman. Before anybody can manipulate a legal rhetoric, he first must learn the prevailing legal doctrines and find their secret weaknesses and soft spots. This is not an easy task. It is far more common for lawyers and judges to be mastered by apparent doctrinal stability than for them to master a legal rhetoric sufficiently to manipulate it in creative ways. Insofar as they recognize these limitations of lawyerly capacity, however, the super-Realists seem to consider them a form of "false consciousness"¹⁸ that might be rectified by liberating legal education.¹⁹

My own, contrasting, view of human nature derives from the writings of people like Herbert Simon²⁰ and Clifford Geertz.²¹ Lawyers, like

17. See, e.g., Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

18. For a provocative development of this theme, see Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

19. See D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

20. H. SIMON, *MODELS OF MAN* (1957).

21. C. GEERTZ, *LOCAL KNOWLEDGE* (1983); C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

all other *homo sapiens*, operate under severe cognitive limitations. They have neither the time, nor the energy, nor the ability, to manipulate every aspect of the legal culture at will. Instead, their standard operating procedures are shaped by the rhetorical schemes into which they have been socialized. Rather than supposing that lawyers can be the perfect masters of their legal culture, it is more rewarding to consider the different ways in which different legal cultures constrain lawyers and judges as they argue about particular disputes.

We should reject, then, the super-Realist's critique of the lawyer-economist's "neoformalism" as itself based on an unrealistic conception of human nature. In saying this, I do not suggest that legal culture is the *only* causally relevant factor in explaining legal decisions. Obviously, a whole range of other factors—political and economic, sociological and psychological—play important roles. Even if legal culture accounted for "only" ten or twenty percent of the whole story, however, its contribution would be worth studying for its own sake.

III.

Having come to two dead ends, we can now make a bit of progress. If we, first, reject Chicago and assert that the lawyer-economist's new forms of argument do not merely restate traditional legal conclusions, and if we, second, reject the Critic's indeterminacy thesis and assert that the lawyer-economist's proposal to reconstruct American law may well yield different legal results, then we may at last formulate an interesting question: How would the assimilation of law and economics into the traditional conversational repertoire of American law change legal outcomes?

This is an empirical question. It asks us to develop models of the legal culture that might explain how a change in conversational repertoire ultimately yields changes in legal outcomes. Once we begin to take the legal culture seriously on the level of positive theory, it will not be long before we are also obliged to confront an obvious normative question: Would it be a good thing for American legal culture to be reconstructed in the manner proposed by the lawyer-economist?

Although the answers we give to this question will be linked in complex ways to our empirical models, I should emphasize that the two questions are, in principle, quite distinct. And the same is true when we gaze into the future and guess how the law and economics movement will fare in the decades that lie ahead. Thus, it is perfectly possible to conclude that the lawyer-economist is trying to reconstruct legal discourse in a thoroughly bad way, and yet believe that there are deep forces within

American society that make him the likely victor over his traditionalist opponents. It is no less possible to come to an opposite, but equally gloomy, conclusion—and predict that, despite the great value of the lawyer-economist's proposal, it will be crushed by the forces of tradition within the legal culture. For the present, I am not interested in contributing to either of these pessimistic visions or to some more hopeful image of our legal future. It seems more useful to consider the extent to which existing conceptual tools allow the lawyer-economist to answer the fundamental questions generated by his own proposal to reconstruct the legal culture. It is here that we encounter a paradox. If the lawyer-economist hopes to answer the positive and normative questions posed by his very existence, he must himself transcend the limits of modern economics.

To understand why, begin by focusing on the empirical side of the matter. Quite obviously, it will be a tricky business to construct a model that, even in principle, is capable of predicting the legal consequences of the changes in conversational repertoire proposed by the lawyer-economist. To make my point, however, it will only be necessary to consider two threshold issues. It seems reasonably obvious that, whatever else our modelbuilder must do, he must find a way to characterize, first, the traditional conversational repertoire employed by American lawyers, and, second, the distinctive features of the novel rhetoric deployed by lawyer-economists. Until he can describe how the new conversational repertoire differs from the old, our modelbuilder cannot even hope to understand the lawyer-economist's potential impact on the traditional legal culture.

Yet, given these threshold issues, we can begin to appreciate the limited utility of neoclassical economics in this particular modelbuilding effort. The fact is that neoclassical economics takes an extremely reductionist view of culture in general and conversation in particular. Indeed, it is no exaggeration to say that neoclassical economics has tried to show how much of the world we can explain *without* self-consciously taking into account the distinctive characteristics of human beings as symbol-using animals.²² As a consequence, economists have little to contribute to the analysis of the ways lawyers have talked to one another in the past or the ways lawyer-economists might talk to one another in the future.

Consider, for example, the brief conversation that is presupposed whenever supply and demand curves cross in perfect competition.

Buyer: Are you willing to sell this widget for \$100?

Seller: Yup.

22. For an insightful account, see D. McCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985).

Buyer: Fine. Here's my money.

Seller: O.K. Here's the widget.

This is a rather simple conversation, simpler by far than the ways in which lawyers and judges normally talk to one another about legal disputes. Economists, however, have not tried to analyze the symbolic structure of such simple conversations.²³ More generally, they have not even begun to question their reductionist approach to culture and communication. For example, a great deal of law and economics rightly concerns itself with the ways actors use legal forms in adapting to problems posed by ignorance and uncertainty. In dealing with these issues, however, analysts characteristically adopt models that ignore the distinctive ways in which human beings communicate with one another. The problem of "searching" for a "bit" of information by talking to another human being is treated as if it were identical to the way we search for a "bit" of copper or some other physical object. This, to put it mildly, is an oversimplification.

To correct a predictable misunderstanding, I hardly wish to condemn the economics of information because of its reductionist treatment of symbolic communication. The limits of the human mind absolutely require every scientific endeavor to simplify certain aspects of reality in order to investigate others with care. As a research strategy, the economics of imperfect information is one of the most fruitful sources of insight into the economics of law.²⁴ However, like every other research strategy, it ultimately runs up against its self-imposed limits, one of which is marked by the problem before us. To understand the impact of the lawyer-economist on American legal culture, we simply must be able to conceptualize conversational repertoires in a way that is far more complex than those presently used in economics.

IV.

Well then, I can hear you say, if modern economics does not tell us how the lawyer-economist will affect the law, what discipline *can* tell us?

Speaking abstractly, the answer is easy enough: we must look to the sciences of culture to explain how best to understand both traditional legal culture and the ways in which it might be transformed by the law-

23. For a rare work that does explore the symbolic dimension, see A. LEFF, *SWINDLING AND SELLING* (1976).

24. See, e.g., O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985); O. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975); Gordon & Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761 (1985); Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

yer-economist's distinctive conversational repertoire. I categorically reject, therefore, the standard economist's condescending attitude toward other disciplines that *do* take seriously the deep problems that are generated every time social meanings are exchanged through symbolic processes. Some of these disciplines are ostentatiously "humanistic"—looking to such diverse authors as Quine,²⁵ Gadamer,²⁶ or Derrida²⁷ for illumination. Others are, if only by comparison with the first group, more scientific in their methods, with practitioners in fields like anthropology,²⁸ sociology,²⁹ and sociolinguistics.³⁰ However alien their methods may seem to the economist, *these* are the disciplines that lawyers must consult if they hope to gain perspective on the potential contribution the lawyer-economist offers to the development of American legal culture.

This is, of course, discouraging news; it is no secret that the cultural sciences are in a state of crisis. Indeed, the surface confusion may be so disheartening that we may too quickly succumb to counsels of despair. Professor Stanley Fish has championed such a view, arguing powerfully that theoretical disputes about the nature of legal culture have absolutely no utility for the thoughtful legal practitioner.³¹ According to Fish, the practicing lawyer should look upon books of legal theory in the same skeptical way that a would-be basketball player looks upon treatises that teach him how to shoot a spheroid through a hoop. Just as a basketball player would be much better advised to watch the pros and get on the court and move the ball around himself, so too should a would-be lawyer watch and practice the conversational moves of his professional models as they throw the conversational ball around in the hopes of scoring points with judges, bureaucrats, and legislators. Theory just doesn't matter; it's immersion in rhetorical practice that counts.

Now, surely, I do not want to reject Professor Fish's important point. Immersion in the prevailing practice of argument *is* absolutely necessary for any would-be professional. Nonetheless, Professor Fish has ignored the special way in which the rise of law and economics makes

25. See, e.g., W. QUINE, *WORD AND OBJECT* (1960).

26. See, e.g., H. GADAMER, *TRUTH AND METHOD* (G. Barden & J. Cumming trans. 1975).

27. See, e.g., J. DERRIDA, *OF GRAMMATOLOGY* (G. Spivak trans. 1976).

28. See, e.g., C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); M. DOUGLAS, *NATURAL SYMBOLS* (1970); M. DOUGLAS, *PURITY AND DANGER* (1966).

29. See, e.g., P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966); E. GOFFMAN, *FRAME ANALYSIS* (1974).

30. See, e.g., B. BERNSTEIN, *CLASS, CODES AND CONTROL* (2d ed. 1974); V. VOLOSHINOV, *MARXISM AND THE PHILOSOPHY OF LANGUAGE* (1986).

31. See, e.g., Fish, *Consequences*, 11 *CRITICAL INQUIRY* 433, 438-39 (1985); Fish, *Fish v. Fiss*, 36 *STAN. L. REV.* 1325, 1347 (1984).

theory a practical necessity for lawyers. To make my point, let me tell a story that begins, but does not end, with a casual analogy between law and basketball.

Suppose that, at Time One, we walked into a law-space with Professor Fish and saw a bunch of pros scoring legal points by making the verbal equivalents of hook shots and dunks. At Time Two, however, something odd begins to happen. Though our basketball players keep on playing and scoring, other folk appear with hockey pucks and ice skates, and prepare to play on the very same field as the basketball players. As the hockey enthusiasts lace their skates, thin strips of ice appear on the basketball court and hockey goals are placed at right angles to the basketball hoops. Not only is the field half-prepared to greet its new participants, but some hockey referees skate onto the court and start keeping score as the players take to the ice.

In the beginning, the basketballers respond to this change in their environment with a peculiar mixture of superiority and contempt. Basketball players begin to show each other how easy it is to run on ice on their way to a dunk shot; basketball referees reprimand hockey officials when skaters obstruct the "real" game in too obvious a fashion.

Things, however, begin to get really interesting at Time Three. After the first generation of cultural coexisters have died out, a new breed takes the field. Some wear skates, all right, but they manage, with increasing skill, to use their sticks to loop basketballs high and through the basketball net; some still wear sneakers but they have mastered the art of kicking a puck at great speed into the hockey goals. Rather than protesting, moreover, the fans keep on shouting their approval, even when basketballs land in the hockey goals and pucks make it through the basketball nets.

The next move is up to the officials. Should they give credit to the team that kicks the puck through the hoop or should they cry foul? Surely, it has now become a matter of *practical* importance—for the players and the fans no less than the officials—to ask: What game are we playing anyway? Should we move forward to hockey, backward to basketball, or upward to a new game altogether? Professor Fish, and many other modern literary critics, may find such ultimate questions too pretentious for their taste. Only they should not deny that answers to such questions have practical value. Instead, they should simply say—as they have every right to do in a free country—that they are not interested in helping judges out when lawyer-economists glide into court and try to block traditionalists from moving the conversational ball in the good old way that previously had assured legal victory. These judges, and the rest of us, are right to ask themselves what kind of legal game they want to

play a generation or two down the road, and to be impatient with critics who fail to see that the very nature of the game is up for grabs.

Let us suppose, however, that critics like Professor Fish choose to stay on the sidelines as other Americans think about, and struggle over, their legal future. Even as kibitzers, they may still play a useful, if ancillary, role in clarifying the nature of our legal present. I have no doubt that an acute critic of today's legal culture could isolate many conversational moves in which lawyers are creating new metaphors and analogies by combining elements of the older common law tradition with the new law and economics and scoring legal points by making the equivalent of a "dunk shot with a hockey stick" or defending a legal goal by "kicking a basketball away from the goalie." Moreover, as relative outsiders, literary critics like Professor Fish may well have an advantage over legal professionals in isolating these mixed metaphors and showing the rest of us how they do their work of legal persuasion. Many well-trained lawyers have become so accustomed to running on ice while making a lay-up that they may barely notice that something funny is happening on the way to legal victory. It is not, then, merely a restless trendiness among legal academics that has recently led them to turn to literary criticism as a source of insight into the nature of their legal predicament. If critical sensibility prepares us for anything, it is an insightful description of the shattering consequences that follow when two rhetorical traditions collide and try to coexist with one another within a single interpretive community.³²

V.

Yet, while critical descriptions of the present legal culture are important, they can only serve as preliminaries to the ultimate normative question: How *should* American lawyers respond to the lawyer-economist's invitation to reconstruct American law?

Now this is a philosophical question—and one for which traditional Anglophone jurisprudence provides us with surprisingly little assistance. This is because English-language philosophy of law is largely concerned with *external* questions—questions that can be intelligently addressed without a deep immersion in the rhetorical practice of any particular legal culture. Consider, for example, the first question of English analytic jurisprudence: What *is* law anyway? In proposing answers, philosophers do not generally suppose that they must immerse themselves in

32. For my own efforts along these lines, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Ackerman, *Four Questions for Legal Theory*, in NOMOS XXII: PROPERTY 351 (J. Pennock & J. Chapman eds. 1980).

the rhetorical tradition of American law, English law, or any legal culture at all. Instead, a layman's acquaintance with legal phenomena is supposed to provide all the experience needed to judge the traditional dispute, say, between positivists and natural lawyers.³³

A similar external perspective characterizes the rich jurisprudential literature on "law and morality." In these studies, professional philosophers generally do not try to bring a deep and broad understanding of a particular legal culture to bear on their subject; instead, they are content to report, in a relatively summary fashion, a narrow range of legal doctrines that concern their particular problem—problems like the suppression of obscenity or the protection of privacy or the criminal punishment of faultless conduct. Having done their legal duty, their discussion quickly proceeds to the main business at hand—the sustained elaboration of the political and moral stakes raised by the legal doctrines in question. From all I can tell, moreover, this external tendency in the philosophical literature reflects the bias of standard jurisprudence courses, especially those taught in philosophy departments. The course I have in mind begins by asking "what is law," proceeds with a selection of problems in "law and morality," and ends on yet another external theme, confronting the problem of civil disobedience and a citizen's prima facie obligation to obey the law. Although it is hard to predict classroom response to Socrates' dialogue in the *Crito*, or Martin Luther King Jr.'s letter from a Birmingham jail, I suspect it does not often lead to an immersion in the rhetorical particularities of Greek or American legal culture.

In saying all this, I do not dispute the importance of external jurisprudence. Nor do I mean to suggest that there is absolutely nothing written of philosophical interest from an internal point of view. Hart and Honore's outstanding work, *Causation in the Law*,³⁴ reveals a deep understanding of the prevalent patterns of English legal rhetoric. On this side of the Atlantic, Karl Llewellyn's *Common Law Tradition: Deciding Appeals*³⁵ is another suggestive internal work, and one whose central distinction between the Formal Style and the Grand Style has an obvious—if complex—relevance to the rhetorical transformations generated by law

33. This is true, for example, of H.L.A. Hart's classic defense of positivism, see H. HART, *THE CONCEPT OF LAW* (1961). On a deeper level, however, Hart's book marks an important turning point. One of the book's innovations is its emphasis on the importance of the "internal" point of view taken up by engaged participants in an ongoing legal system. See *id.* at 85-88. Thus, Hart does not suppose that an external observer can successfully identify a system's "rule of recognition" without consulting the participants' internal practice of legal argument. *Id.* at 99. By building the internal point of view into the very definition of law, Hart's positivism invites the deeper internal investigations of the kind required by a philosophical treatment of law and economics.

34. H. HONORE & H. HART, *CAUSATION IN THE LAW* (2d ed. 1985).

35. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

and economics. I suspect, however, that such books are more often cited than read, and more often read than discussed, in courses on legal philosophy. Yet, if professional philosophers hope to assist lawyers as they struggle with the questions raised by law and economics, they will have to find inspiration in work of this less fashionable kind. As I have suggested, the lawyer-economist raises an internal challenge to the traditional ways American lawyers have argued about the facts and values raised by legal disputes. A philosopher who wishes to deal sensitively with this challenge cannot restrict himself to the external perspective; he will have to roll up his sleeves and go to work with other first-year law students who hope to acquire a working familiarity with the current rhetorical practice of American law.³⁶

Indeed, until we gain more recruits from America's philosophy departments, I suspect that the thoughtful lawyer is best advised to look further afield for useful clues in coming to terms with law and economics. In particular, the great tradition of German social theory has much to teach us.³⁷ When put in neo-Weberian perspective, the lawyer-economist's effort to reconstruct legal discourse is not quite so novel as it sometimes seems, either to its practitioners or its critics. Instead, it may be seen as the most recent in a long series of efforts by Western lawyers to construct a relatively autonomous and rationalistic form of legal discourse—a centuries-long struggle that Weber saw as one of the most distinctive features of the modern West.³⁸ Similarly, we have a good deal to learn from contemporary German social theorists, like Habermas³⁹ and Luhmann,⁴⁰ who have sought (in very different ways) to move beyond the Weberian vision of modern law and society. But the hard truth is that none of the German post-Weberians have reflected upon the particular cultural problems generated by the rise of the lawyer-economist—in part because the law and economics movement has not yet made much of an impact in Germany. If American lawyers are to put law and economics in its place, then, they will have to think for themselves.

This leads me to the point where, perhaps, I should have begun: my

36. Ronald Dworkin's recent book, *Law's Empire*, only came to hand after this essay was completed. Yet, plainly, it too deserves mention as an important work in internal jurisprudence that should encourage the philosophical perspective described in these paragraphs.

37. The work of Chaim Perelman is also useful. See, e.g., C. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (1969); C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* (1963).

38. For an insightful treatment, see A. KRONMAN, *MAX WEBER* 72-95 (1983).

39. 1 J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1984); 2 J. HABERMAS, *THEORIE DES KOMMUNIKATIVEN HANDELNS* (1981).

40. N. LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (1985).

recent book, *Reconstructing American Law*.⁴¹ For it is here where I have made my own first steps toward an assessment (both positive and normative) of the lawyer-economist's contribution to American legal culture. Rather than summarize the arguments made in the book, it seemed better to elaborate more clearly the concerns that led me to write it, and thereby encourage you not only to read my own essay on the subject, but to move beyond it.

41. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984).