

# BOOK REVIEWS

## A THEORETICAL FOX MEETS EMPIRICAL HEDGEHOGS: COMPETING APPROACHES TO ACCIDENT ECONOMICS

### A REVIEW OF

THE ECONOMIC STRUCTURE OF TORT LAW. By William M. Landes\* and Richard A. Posner.\*\* Cambridge, MA: Harvard University Press, 1987. Pp. ix, 329. \$27.50.

### AND

ECONOMIC ANALYSIS OF ACCIDENT LAW. By Steven Shavell\*\*\* Cambridge, MA: Harvard University Press, 1987. Pp. viii, 312. \$30.00.

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In the preface to *The Economic Structure of Tort Law*,<sup>1</sup> Professor William Landes and Judge Richard Posner claim that theirs is "the first book-length study of the economics of tort law."<sup>2</sup> In accomplishing this feat they barely outstripped Professor Steven Shavell, whose *Economic Analysis of Accident Law*<sup>3</sup> also was published in 1987. The joint appearance of these books is fitting for a number of reasons. The books together synthesize the contributions of economic analysis that have increasingly dominated the legal literature of tort law during the last 15 years.<sup>4</sup> The authors are uniquely qualified to provide this synthesis as their own prodigious scholarship encompasses a startlingly broad array of tort topics.<sup>5</sup>

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<sup>1</sup> W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) [hereinafter LANDES & POSNER].

<sup>2</sup> *Id.* at vii.

<sup>3</sup> S. SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987) [hereinafter SHAVELL].

<sup>4</sup> See LANDES & POSNER, *supra* note 5, at 4-9.

<sup>5</sup> See, e.g., W. LANDES & R. POSNER, *AN ECONOMIC THEORY OF INTENTIONAL TORTS* (1981);

The juxtaposition of their publication benefits both works—as the books are better viewed as complements than as substitutes. While each book begins by laying out the same simple models of tortious behavior, the books represent starkly different and competing visions of tort economics. This is true not only because several chapters of each book are derived from the authors' specific contributions to the field, but more basically because the authors have fundamentally different approaches to combining law and economics.

Landes and Posner boldly assert their thesis in their book's first sentence: "[T]he common law of torts is best explained as if the judges . . . were trying to promote efficient resource allocation."<sup>6</sup> The goal of their book is to test this positive economic theory by analyzing common law decisions to see if the rules there expounded are efficient.<sup>7</sup> Shavell's work, in contrast, has no unified thesis to defend. His approach is to develop a variety of tort models, but to let the reader, for the most part, decide which models' assumptions most closely fit a particular factual context.<sup>8</sup> In developing these models, Shavell pays more attention than

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Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985); Landes & Posner, *Tort Law as a Regulatory Regime for Catastrophic Personal Injuries*, 13 J. LEGAL STUD. 417 (1984); Landes & Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981); Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980); Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978). See also, e.g., Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J. L. & ECON. 587 (1985); Shavell, *Liability for Harm versus Regulation of Safety*, 12 J. LEGAL STUD. 357 (1984); Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271 (1984); Shavell, *Tort in Which the Victim and Injurer Act Sequentially*, 26 J. L. & ECON. 589 (1983); Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120 (1982); Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982); Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980); Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980); Shavell, *On Moral Hazard and Insurance*, 93 Q. J. ECON. 541 (1979).

<sup>6</sup> LANDES & POSNER, *supra* note 5, at 1.

<sup>7</sup> Landes and Posner call their hypothesis "the positive economic theory of tort law because no rival positive economic theory of tort law has been proposed." *Id.* at 1 [emphasis in original]. Their positive theory of torts shares interesting similarities with critical legal theories. Both types of theories can make positive predictions about legal texts. See, e.g., Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997, 1000 (1985) ("Contract law describes itself as more private than public, interpretation as more objective than subjective understanding, consideration as more about form than about substance."). Both are also susceptible to the criticism that the authors may only choose to analyze judicial decisions that favor the maintained hypothesis.

<sup>8</sup> The authors have also structured their books differently. Landes and Posner have integrated their economic models into the narrative of each chapter. Shavell conversely has a separate mathematical appendix for each chapter, as well as parallel notes on the literature, and the legal rules of different countries.

The uniformity of Shavell's presentation has a double-edged quality. While the structure makes Shavell's work a better reference by allowing readers to quickly locate the model or literature summary they seek, the bifurcation of narrative and appendix breaks the flow of his argument at times, especially in comparison to the lucid prose of Landes and Posner. Having the mathematical appen-

do Landes and Posner to systematically analyzing alternative assumptions, and more attention to how changing these assumptions can affect the operation of different liability rules.<sup>9</sup>

Perhaps the difference in the books' methodologies can most easily be seen by contrasting their views of liability rules with that of John Prather Brown. In 1973, using a simple economic model of torts, Brown demonstrated that strict liability, negligence, and contributory negligence could be equally effective in efficiently deterring injurer negligence.<sup>10</sup> Working in the wake of this influential early piece, Landes and Posner have what might be considered an embarrassment of riches.<sup>11</sup> And indeed, at times they need to rely on ancillary costs, such as the administrative costs of litigation, to argue that one liability rule is superior to another.<sup>12</sup>

In sharp contrast to Brown's equivalence theorem (and to Landes and Posner's positive theory), Shavell is responsible for what might be called an impossibility theorem. For in introducing the effect of "activity levels" into the analysis,<sup>13</sup> Shavell demonstrates that under certain assumptions no liability rule can induce the socially efficient amount of care:

[N]o rule . . . induces both injurers and victims to choose optimal levels of their activities. . . . The reason, in essence, is that for injurers to choose the correct level of their activity they must bear accident losses, whereas for victims to choose the correct level of their activity they too must bear accident losses. Yet injurers and victims cannot each bear accident losses.<sup>14</sup>

Thus, in looking at the same economic phenomena as Landes and Posner, Shavell not only fails to endorse the efficiency of the common law, but suggests situations in which efficient outcomes are unattainable.<sup>15</sup>

The authors' differences are also reflected in their attitudes toward

dix in the back sometimes makes the textual narrative sound conclusory with the guts of the argument separated into the appendices' mathematical proofs.

And while Shavell systematically lays out the literature in sections at the end of the chapters and the appendices, he often addresses current academic controversies in the text without directly acknowledging his academic adversary. The uninitiated reader thus gets the feeling at times of hearing only half the debate. See, e.g., SHAVELL, *supra* note 7, at 17 (discussing least-cost avoider); *id.* at 30 (discussing the reciprocal nature of harm).

<sup>9</sup> For example, Shavell discusses how consumers' perception of risk, *id.* at 54, or insurers' ability to monitor insureds' due care level, *id.* at 211, alters the analysis.

<sup>10</sup> Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973).

<sup>11</sup> Brown's equivalence result could alternatively be viewed as a boon to the efficiency theory of the common law. After all, how could the common law go wrong if so many forms of liability can be efficient? Within this set of equally efficient common law rules, however, the positive economic theory of Landes and Posner is inherently indeterminate.

<sup>12</sup> LANDES & POSNER, *supra* note 5, at 82.

<sup>13</sup> See Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

<sup>14</sup> SHAVELL, *supra* note 7, at 29.

<sup>15</sup> See also *id.* at 211 (describing insurance equilibrium in which insurers cannot observe injurers' level of care).

comparative negligence. Shavell concludes that "no persuasive theoretical argument" supports preferring contributory negligence over comparative negligence on efficiency grounds.<sup>16</sup> Both liability rules can perform the prime objective of inducing optimal levels of due care.<sup>17</sup> For Shavell, the two liability rules can only be distinguished by "rather subtle" and offsetting differences: contributory negligence should have lower administrative costs, while comparative negligence should spread risk more efficiently.<sup>18</sup> Landes and Posner, however, describe the movement to comparative negligence as "a contradiction to the positive economic theory of tort law."<sup>19</sup> Because Landes and Posner assume away risk-aversion,<sup>20</sup> the risk-spreading advantage of comparative negligence is eliminated<sup>21</sup> and the higher administrative costs of apportioning damages makes comparative negligence rules inefficient. Thus, in describing one of the most important recent changes in American tort law, Shavell remains theoretically agnostic, while Landes and Posner give witness to definitive conviction.

In fact, for Shavell the whole enterprise of trying to determine whether or not tort law is, on balance, efficient is "not especially fruitful."<sup>22</sup> His most general reaction to Landes and Posner's efficiency hypothesis is contained in his conclusion:

[N]ot only does there seem to be considerable consistency, but there also seems to be substantial ambiguity and inconsistency between the liability system that we observe and the regime that is best given the criteria of optimality and the models examined here.<sup>23</sup>

Although Shavell's agnosticism is less inspiring, it lends a certain objec-

<sup>16</sup> *Id.* at 294.

<sup>17</sup> This result, extending Brown's equivalence theorem, was first developed by David Haddock and Christopher Curran. See Haddock & Curran, *An Economic Theory of Comparative Negligence*, 14 J. LEGAL STUD. 49 (1985).

<sup>18</sup> SHAVELL, *supra* note 7, at 294 n.2.

<sup>19</sup> LANDES & POSNER, *supra* note 5, at 82. This "contradiction" is not truly at odds with their larger theory that legislatively made law tends to be inefficient, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* xx (1986), as 35 of the 42 adopting states have adopted comparative negligence by statute. Indeed, the statutory movements toward both comparative negligence and contribution occasion an example of extremely suspect econometric analysis in which Landes and Posner purport to test whether states that "weight efficiency heavily (as judged by their public policies)" are less inclined to legislatively adopt these inefficient rules. After failing to describe two of the regressands, the authors report regressions with R-squares of .02 (with coefficient t-statistics no greater than 1.74) and conclude there is "a positive and significant relationship between [government inefficiency variables] and the probability that a state allows contribution." LANDES & POSNER, *supra* note 5, at 221-22.

<sup>20</sup> LANDES & POSNER, *supra* note 5, at 55-58. For a criticism of this assumption see Balkin, *Too Good to be True*, (Book Review), 87 COLUM. L. REV. 1447-1483 (1987).

<sup>21</sup> Landes and Posner acknowledge that "if potential victims and injurers are risk averse . . . , if insurance is unavailable, and if the cost of apportionment is small, the sharing of the damages may be preferable to having one party bear all the losses." LANDES & POSNER, *supra* note 5, at 82.

<sup>22</sup> SHAVELL, *supra* note 7, at 294 n.3.

<sup>23</sup> *Id.* at 294.

tivity to his analysis—he has no commitment to look for specific results. While Landes and Posner's stated goal is explicitly non-normative, there is the risk that in testing their efficiency theory they have become emotionally invested in its conclusions. Indeed, at times it seems that they, much more than Shavell, are laboring under some kind of burden to find efficiency explanations of common law rules.

This is nowhere clearer than in Landes and Posner's analysis of the common law's refusal "to impose liability for failure to assist a stranger in distress no matter how low the costs of assistance would be or how great its benefits."<sup>24</sup> Landes and Posner trot out an elaborate model to suggest that this common law rule of no liability may be efficient even when encouraging rescue is efficient. They argue that imposing liability on potential rescuers will cause them to avoid activities in which they might encounter a duty to rescue—so that there might actually be less rescuing if liability is imposed. A closer look at their model, however, leads to exactly the opposite conclusion. The assumption that potential rescuers will be motivated by the potential of liability to change their behavior indicates that they would fail to rescue if they came upon a victim and there was no threat of liability. Thus, within their model there would be no rescues in a no-liability world, because potential rescuers encountering a victim would not choose to incur the costs of rescue. Landes and Posner must compare a zero-rescue equilibrium under the no-liability rule with possibility of rescue (albeit with *ex ante* substitution) under the liability rule. Since something is always bigger than nothing, the logic of their model indicates that the common law rule is inefficient.<sup>25</sup>

In criticizing Landes and Posner's test of common law efficiency, however, one should not lose sight of the fact that their goal is more interesting and more difficult than Shavell's. Shavell's approach has the analytic attraction of correctness—given the assumptions of his models, his conclusions necessarily follow. But Shavell does not take the additional step of testing his models' empirical implications. Taking this difficult step to empiricism is the core of Landes and Posner's enterprise. Instead, Shavell is content to describe in an analytically rigorous fashion testable (but untested) implications of many different models. Thus, if Landes and Posner are hedgehogs who know one thing (but very well) and Shavell is a fox who knows many,<sup>26</sup> it is important to emphasize that

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<sup>24</sup> LANDES & POSNER, *supra* note 5, at 143.

<sup>25</sup> Indeed, Landes and Posner compound this error by praising the common law exceptions to the no-duty-to-rescue doctrine (involving for example the duty of a railroad to assist an ill passenger). As the authors correctly point out, all the common law exceptions "involve an actual or potential contractual relationship." *Id.* at 147. But this means that the common law only imposes a duty to rescue in those situations in which it is least necessary—as these potential victims can contract *ex ante* for their rescue.

<sup>26</sup> See I. BERLIN, *THE HEDGEHOG AND THE FOX* 1, 2-4 (1953). Berlin developed the

their knowledge stems from different sources. Landes and Posner's monolithic view of efficiency, although theoretically informed, is known empirically,<sup>27</sup> while Shavell's conclusions are derived from purer theory.<sup>28</sup>

In his conclusion, Shavell asserts that the value of his book will "depend on whether the assumptions studied capture important elements of reality, on the degree to which the analysis helps to organize thought about the effects of liability and the insurance system, and on the extent to which the analysis identifies effects that the reader does not consider obvious."<sup>29</sup> Both books abundantly succeed when tested against these criteria. The authors provide provocative and insightful foundations for an economic knowledge of our liability system. But beyond this considerable achievement, the products are clearly differentiated as the authors set about their tasks in different ways. For those who think that economic analysis must yield uniform or uniformly conservative conclusions, these books will offer methodological insights into the variety of ways there are to "do economics."

Finally, I would suggest that the next wave of economics research should more carefully model the production of torts. Other areas of economics have developed elegant and tractable expressions for a wide variety of production functions.<sup>30</sup> Many of the economic models of torts can be reconceived as classical production functions that transform certain inputs, such as the parties' due care, into a product, such as the expected damage of a tort. While many tort models currently turn on the explicit nature of tort production,<sup>31</sup> the tort literature has generally failed to address issues of economies of scale or scope in the production of torts that has been central to analysis of production in other economic arenas.<sup>32</sup>

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hedgehog/fox dichotomy from a line of the Greek poet Archilochus which says, "The fox knows many things, but the hedgehog knows one big thing." *Id.* at 1.

<sup>27</sup> More specifically, their empirical approach entails a comparison of what the positive law is with a prior theoretical determination of what an efficient rule would be. Indeed, Berlin's hypothesis that "Tolstoy was by nature a fox, but believed in being a hedgehog" might aptly be extended to Landes and Posner's positive theories. For while they wish to focus upon common law efficiency, it is in the telling of their individual stories that they, like Tolstoy, show their true strength.

<sup>28</sup> Witness, for example, Shavell's unqualified conclusion that if there is no uncertainty over injurers level of care, injurer's will not purchase liability insurance. SHAVELL, *supra* note 7, at 212.

<sup>29</sup> *Id.* at 291.

<sup>30</sup> A production function is a mathematical formula expressing how inputs may be transformed into outputs.

<sup>31</sup> See, e.g., SHAVELL, *supra* note 7, at 17 (describing least cost avoider); LANDES & POSNER, *supra* note 5, at 210-14 (describing joint care and alternative care).

<sup>32</sup> See generally W. BAUMOL, J. PANZAR AND R. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 67-93 (1982).

## “ONTOLOGICAL” NATURAL LAW?

### A REVIEW OF

NATURAL LAW AND JUSTICE. By Lloyd L. Weinreb.\* Cambridge, Massachusetts: Harvard University Press. 1987. Pp. ix, 320. \$25.00.

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H.L.A. Hart's 1953 inaugural lecture as Professor of Jurisprudence at Oxford, *Definition and Theory in Jurisprudence*,<sup>1</sup> began a revolution by introducing the methods of analytical philosophy to the study of what law is.<sup>2</sup> Hart's revolution gained in momentum as one after another of his philosophical insights transformed or powerfully challenged our understandings of law. His important claim that law must be understood in a crucial aspect in terms of reasons for action<sup>3</sup> is the starting point even for contemporary natural law theorists like Dworkin, Soper, and Finnis.<sup>4</sup>

In *Natural Law and Justice*, Lloyd Weinreb invites us, among other things,<sup>5</sup> to start a counterrevolution by recalling what he calls the “ontological natural law position.”<sup>6</sup> He seeks to restore “the original understanding of natural law as a theory about the nature of being, the human

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<sup>1</sup> ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21 (H.L.A. Hart ed. 1983).

<sup>2</sup> ‘What law is’ is not the same as ‘what the law is.’ The former is a problem of general jurisprudence. The latter concerns the law of some legal system. See Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109, 109-11 (1987).

<sup>3</sup> See H.L.A. HART, THE CONCEPT OF LAW 54-56, 134-35 (1961); H.L.A. HART, ESSAYS ON BENTHAM 18 (1982). See also J. RAZ, PRACTICAL REASON AND NORMS (1975); J. RAZ, THE AUTHORITY OF LAW (1979); J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (2d ed. 1980).

<sup>4</sup> See generally R. DWORKIN, LAW'S EMPIRE (1986); J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); P. SOPER, A THEORY OF LAW (1984). Both the main contemporary legal positivists, like Hart and Raz, *supra* note 3, and these leading contemporary natural law theorists, hold that law is normative in that it guides conduct through the provision of reasons for action. The main difference on this central issue concerns whether these reasons are moral, social, or prudential reasons for action. See Burton, *Rhetorical Jurisprudence: Law as Practical Reason*, 62 SO. CALIF. L. REV. (1989) (forthcoming).

More generally, legal positivist philosophies regard law as a matter of social fact and insist on separating law and morals conceptually. Natural law philosophies insist that morals are conceptually connected with law. Not all philosophies of law, however, fall neatly into one or the other camp, and it can be questioned whether the traditional division is very important.

<sup>5</sup> This review will focus on the first half of the book, which concerns the theory of law. The second half, which concerns the theory of justice, seeks to synthesize political concepts of liberty and equality within a theory of justice which is analogous to the theory of natural law.

<sup>6</sup> L. WEINREB, NATURAL LAW AND JUSTICE 4 (1987) [hereinafter WEINREB].

condition in particular.”<sup>7</sup> His ultimate concern is to focus attention on the important problem of human freedom in a causally determinate world.<sup>8</sup> Weinreb dismisses legal positivism and, more important, contemporary natural law for failing to address this question. He criticizes the effort to understand the law’s role in guiding our actions;<sup>9</sup> for Weinreb, Hart’s widely accepted focus on law in terms of reasons for action is misplaced. The contemporary debates about what law is have a “curiously arid quality” and have lost their “speculative worth”<sup>10</sup> because, to him, contemporary natural law theorists have forsaken their birthright.

In this review, I argue that Weinreb’s invitation should be declined. *Natural Law and Justice* manifests a faulty understanding of contemporary jurisprudence and its philosophical forebears in classical jurisprudence regarding what law is. The existence of human freedom is presupposed by, but is not the subject of, the important philosophical treatments of the nature of law. Free will is an important philosophical problem in its own right. However, that problem is separate from the nature of law because there is nothing distinctively legal about it.

## I

Professor Weinreb’s history of natural law begins with Homer and proceeds chronologically through contemporary writers. His major thesis is that, in the development of natural law jurisprudence, there is a significant discontinuity in that “ontological natural law” has been reduced to “deontological natural law.”<sup>11</sup> The former, which he claims characterized natural law through St. Thomas Aquinas, mainly concerns the nature of being and human freedom in nature. The latter concerns the obligatory force of (positive) law, in common with legal positivism. Weinreb urges that natural law jurisprudence return to its original “ontological” focus.

Ancient thought, according to Weinreb, manifested a belief that the course of events in the world is the fulfillment of a normative natural order. Nature was both a factual and causal and also a normative order, governed by laws that were moral and physical. Weinreb notes that, to our way of thinking, the very idea of a normative natural order is a confusion of “is” and “ought;” that is, a natural order may exist, but from its existence follows nothing about what we should do. Weinreb does not believe that this was so for the ancients. In *Antigone*, for example, Creon’s hubris leads to a parade of horrors which destroys him. Weinreb suggests that Creon recognizes both that he was doomed to set in motion the disasters that struck and thus is not responsible and that,

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<sup>7</sup> *Id.*, at 7.

<sup>8</sup> *Id.*, at 4-7.

<sup>9</sup> *Id.*, at 97-101, 259-63.

<sup>10</sup> *Id.*, at 4.

<sup>11</sup> *Id.*, at 3.



because the acts were his, he is responsible.<sup>12</sup>

The definitive statement of natural law is to be found in Aquinas' *Treatise on Law*.<sup>13</sup> To Aquinas, natural law "demanded a reconciliation of the specifically Christian belief in an active Creator God and the providential nature of His creation with the existence of evil and the personal experience of human free will."<sup>14</sup> The reconciliation was effected by treating natural law as the human being's participation in the Eternal Law, which is God's Providence. Humans thus participate by having the imprint of the natural law in human nature as an inclination to act so as to fulfill their proper end. This depends on the "ontological premise . . . that every thing in the natural order has a nature or essence and has a tendency to fulfill it. The essence of man, the rational creature, is reason."<sup>15</sup> Thus, human freedom is consistent with the natural order because nature requires that humans be free in order to realize their natural essence.

Weinreb suggests that subsequent philosophical developments distanced the discussion from "ontological natural law." The contract theorists, in particular, sought to justify the civil state through the device of a social contract. In doing so, he suggests, they supplanted the natural order with the modern state. The problem of humankind's place in nature consequently "appear[s] in other guise as part of the effort to describe the relationship of the individual to the state."<sup>16</sup> The movement from ontological to deontological natural law is completed by Kant, according to Weinreb. Kant's account of human freedom and responsibility is supposedly derived from a reality whose "chief credential is that it is beyond experience. For Kant himself, the deontology that results is an integral part of his epistemic ontology."<sup>17</sup>

Weinreb argues that contemporary natural law forsakes its birthright. Whereas the older theory insisted that the laws of nature are normative, "contemporary theories insist that what is properly called (positive) law satisfies moral requirements."<sup>18</sup> This interpretation has its basis in the "deontological" move just described:

[I]f the state replaces nature as the determinate order in question, the result is curious and unexpected. Substituting the laws of the state for the laws of nature, one<sup>[19]</sup> formulates the proposition that the positive law invariably

<sup>12</sup> *Id.*, at 22.

<sup>13</sup> 28 ST. THOMAS AQUINAS, *SUMMA THEOLOGICAE* (Blackfriars ed. 1975) (Prima Secundae, Questions 90-97) [hereinafter cited by question and article number].

<sup>14</sup> WEINREB, *supra* note 6, at 54.

<sup>15</sup> *Id.*, at 57.

<sup>16</sup> *Id.*, at 67.

<sup>17</sup> *Id.*, at 90. L. Weinreb's understanding of Kant's legal philosophy is questionable. See E. Weinrib, *Law as Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987) and sources cited therein.

<sup>18</sup> WEINREB, *supra* note 6, at 3.

<sup>19</sup> Weinreb does not indicate who in particular is the "one" who formulates the proposition. Surely it is not Dworkin, who denies that the law in evil legal systems justifies the official use of

coincides with principles of a just social order.<sup>20</sup>

Weinreb acknowledges that the parallelism between the laws in nature and the positive laws in the civil state generally is overlooked for good reason. The relationship, he reminds us, "is now thought to have been based on a fundamental mistake."<sup>21</sup> That mistake is the violation of the Humean dictum against deriving an *ought* from an *is*.<sup>22</sup>

Weinreb, however, wishes to show that "the issue does not rest on a mistake after all."<sup>23</sup> Contemporary natural law has no point for him unless it seeks to show that human freedom is possible because the civil order is both determinate and necessarily normative.<sup>24</sup> The obligatory force of law thus is an issue that "never was part of natural law."<sup>25</sup> Despite its appearance, as Weinreb puts it, "the contemporary debate between legal positivism and natural law . . . is about the ontological status of (normative) law—the justice of nature—or, as we now put it, the nature of justice."<sup>26</sup>

## II

A history, or any other narrative, cannot reasonably claim to be true unless it nonarbitrarily packages the data it purports to describe in an appropriate conceptual scheme. In *Natural Law and Justice*, the conceptual scheme lies at the high level of philosophical abstraction at which "ontology" and "deontology" are used to mark a claimed discontinuity between contemporary and medieval versions of natural law. Weinreb's use of the concepts, however, is in my view a confusion of metaphysics and ethics that generates a misleading history of natural law.

Ontology is a branch of metaphysics involving a theoretical study of existence itself—of what entities there are, considered apart from whatever can be predicated of or known about them.<sup>27</sup> The philosophical problem of universals and particulars, for example, is a problem

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coercion, yet allows that evil law is properly called law in a "preinterpretive" sense. See R. DWOR-KIN, *LAW'S EMPIRE* 101-8 (1986). Surely it is not Finnis, who views positive law which lacks some of the features of law in the focal sense as law in a deviant sense which may deprive it of goodness. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHT* 276-90, 363-66 (1980). Surely it is not Soper, who believes that the positive law always has some moral force due in part to the officials' good faith claim to be doing justice; however, he does not hold that this claim must be valid for there to be law. See P. SOPER, *A THEORY OF LAW* 91-5 (1984).

<sup>20</sup> WEINREB, *supra* note 6, at 97.

<sup>21</sup> *Id.*, at 98.

<sup>22</sup> D. HUME, *A TREATISE OF HUMAN NATURE*, 521 (Penguin ed. 1969).

<sup>23</sup> WEINREB, *supra* note 6, at 98.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at 100.

<sup>26</sup> *Id.*, at 259.

<sup>27</sup> *DICTIONARY OF PHILOSOPHY* 255-56 (A. Flew ed. 1979). See, e.g., BENTHAM, *Ontology* in BENTHAM'S *POLITICAL THOUGHT* 45 (B. Parekh ed. 1973); W.V.O. QUINE, *On What There Is*, in *FROM A LOGICAL POINT OF VIEW* 3 (W.V.O. Quine ed. 1962) (To be is to be the value of a variable).

within ontology. The question whether human actions are free or determined classically concerns whether free will can be predicated of human actions, not whether human actions exist. Thus, the problem of human freedom is not ontological in the ordinary sense.

Deontology, however, is not related to ontology in any way that is suggested by the superficial morphological relationship between the words. Weinreb assumes a deeper relationship by treating deontology as a matter of disconnecting our prescriptions from what there is ("de-ontology"):

Natural law occupies so untenable a position because its defenders, having rejected the idea of normative natural order out of hand, misunderstand the history on which they build . . . . Natural law's contemporary proponents . . . have accepted the burden of providing an unmetaphysical grounding for their position; and . . . have substituted deontological arguments for ontological ones.<sup>28</sup>

Deontology, however, is a part of ethics concerned with the rights and duties of moral agents under rules, emphasizing the priority of the right over the good. Deontological ethics generally permit or prohibit acts due to the intrinsic properties of the action in its circumstances in light of a rule or other norm. Deontology ordinarily stands in contrast to teleology and other consequentialist ethical theories that emphasize goals and the priority of the good over the right. Consequentialist ethics focus on the consequences of an action on the state of affairs in the world, permitting or requiring those acts which have good consequences and prohibiting other acts. The ethics of the right and the good concern the reasons for which we ought to act, not the reasons for true beliefs about the world or our place in it. Both are normative, by contrast with ontology.

Contemporary natural law is not necessarily "deontological." There are contemporary natural law theories which are committed to metaphysical realism, so they are not "deontological" in Weinreb's sense of prescriptions disconnected from what there is. Dworkin's rights thesis is an example of a deontological theory of adjudication which holds that rights are real.<sup>29</sup> Moreover, natural law theories need not be "deontological" in the conventional sense. Some contemporary theories give priority to the right while others give priority to the good. Finnis' leading contemporary treatment of natural law, for example, is a theory of the good and realist.<sup>30</sup>

Weinreb's conceptual distinction contrasting ontological and deontological natural law thus confuses metaphysics and ethics. As will be seen, the discontinuity marked in his history of natural law disappears

<sup>28</sup> WEINREB, *supra* note 6, at 100-01.

<sup>29</sup> R. DWORKIN, TAKING RIGHTS SERIOUSLY 90-94, 101-30 (1978). See also Moore, *A Natural Law Theory of Interpretation*, 58 SO. CALIF. L. REV. 277 (1985).

<sup>30</sup> J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 100-34 (1980). The concept of "realism" in this context is very different from American legal realism.

with the abandonment of that conceptual confusion. His interpretation of subsequent thought then seems misconceived. When the history is reviewed through standard philosophical concepts, the distinction between theoretical and practical reason becomes salient. The story then displays significant continuity from Aquinas to Kant to contemporary natural law as espoused by Finnis and others.

Roughly put, theoretical (speculative) philosophy seeks to understand the reasons for true beliefs about the world, ourselves, and our place in the world. Practical philosophy, by contrast, seeks to understand the reasons for which we ought to *act*.<sup>31</sup> Weinreb's main interest lies on the theoretical side of this divide: He seeks to "restore the original understanding of natural law as a theory about the nature of being, the human condition in particular."<sup>32</sup> His goal thus might be better expressed as a return to "theoretical natural law." But this would leave vital practical problems involving the nature of law unattended.

The distinction between theoretical and practical reason goes back to Aristotle<sup>33</sup> and is essential for understanding Aquinas. Aquinas treats law as a matter of practical reason. Thus,

Law is a rule and measure of acts . . . . Now the rule and measure of human acts is the reason, which is the first principle of human acts . . . . [A] law is a dictate of the practical reason . . . . [Law] is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.<sup>34</sup>

Though rejecting the priority of the good in Aquinas, Kant also treats law as an idea of practical reason.<sup>35</sup> Finnis' treatment of law as practical reasonableness<sup>36</sup> broadly continues the main natural law tradition in this respect:

[T]he term 'law' has been used with a focal meaning so as to refer primarily to rules made . . . by a determinate and effective authority . . . for a 'complete' community . . . , this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems . . . for the common good . . . . This multi-faceted conception of law has been reflectively constructed by tracing the implications of certain requirements of practical reason . . . .<sup>37</sup>

Weinreb advances a brief argument against interpreting Aquinas'

<sup>31</sup> See, e.g., I. KANT, *CRITIQUE OF JUDGMENT* 7 (J. Bernard trans. 1951). Practical philosophy itself is not an exercise in practical reason because it does not result in action. It is an effort to understand reasons for action and, thus, is directed to action only in an indirect way.

<sup>32</sup> WEINREB, *supra* note 6, at 7.

<sup>33</sup> ARISTOTLE, *NICOMACHAEN ETHICS IN THE BASIC WORKS OF ARISTOTLE* 927, 1022-27 (R. McKeon ed. 1941) (Bk. 6, Chs. 2-5).

<sup>34</sup> Q. 90, Art. 1; Q. 91, Art. 3; Q. 90, Art. 4, *supra* note 13.

<sup>35</sup> E. Weinrib, *Law as Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987).

<sup>36</sup> J. FINNIS, *NATURAL LAW AND NATURAL RIGHT* 100-03 (1981). Practical reasonableness, or ethics, addresses the problem of how to bring principles expressing the general ends of human life to bear upon definite ranges of project, disposition, or actions.

<sup>37</sup> *Id.* at 276-77.

natural law as a matter of practical reason. This argument is crucial to justify the discontinuity he claims between Aquinas and Finnis:

[I]f we think of natural law principally as a standard of morality or guide to conduct, [Aquinas'] theory is worth little; its directives are too general and abstract. If there is a natural law, we may ask, how do we discover it and apply it? How can we know our obligations concretely? Unless that epistemological question is answered, the ontological claim remains practically useless. Aquinas' main concern, however, was not practical; he was not primarily interested in resolving particular moral dilemmas. . . .<sup>38</sup>

Weinreb is correct that principles of right conduct in particular circumstances are not to be found in the *Treatise on Law*.<sup>39</sup> This fact does not, however, show that Aquinas was not mainly concerned with practical reason in that study.

Aquinas treats natural law as a guide to action by providing an understanding of the natural law's place in practical deliberations. Aquinas thus indicates that natural law exists in all persons as an inclination to "act according to reason: and this is to act according to virtue."<sup>40</sup> He offers as well the first substantive principle of natural law from which to reason: "good is to be done and ensued, and evil is to be avoided."<sup>41</sup> Aquinas does not thus fail to be "practical"—a concept which in this context should not be understood in the non-Aristotelian and non-Thomistic sense of immediately useful. He supplies appropriate deliberative starting points, which are "practical" because they are directed to (concern reasons for) action, however remotely. No claim is thereby implied that natural law is sufficient to prescribe, without further reasoning and judgment, what to do on particular occasions.<sup>42</sup> Consequently, the his-

<sup>38</sup> WEINREB, *supra* note 6, at 62.

<sup>39</sup> The principles of right conduct are found in the *Treatise on Justice*, 37 ST. THOMAS AQUINAS, *SUMMA THEOLOGICAE* (Blackfriars ed. 1975) (*Secunda Secundae*, Questions 57-62), and the *Treatise on Injustice*, 38 ST. THOMAS AQUINAS, *SUMMA THEOLOGICAE* (Blackfriars ed. 1975) (*Secunda Secundae*, Questions 63-79).

<sup>40</sup> Q. 94, Art. 3, *supra* note 13.

<sup>41</sup> Q. 94, Art. 2, *supra* note 13.

<sup>42</sup> Weinreb's claim that Aquinas was primarily concerned in the *Treatise on Law* with the nature of being, rather than practical reason, thus is challenged directly by the following passage:

Now a certain order is to be found in those things that are apprehended universally. For that which, before aught else, falls under apprehension, is *being*, the notion of which is included in all things whatsoever a man apprehends. Wherefore the first indemonstrable principle is that *the same thing cannot be affirmed and denied at the same time*, which is based on the notion of *being* and *not-being*: and on this principle all others are based [citing Aristotle's *Metaphysics*]. Now as *being* is the first thing that falls under the apprehension simply, so *good* is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently the first principle in the practical reason is one founded on the notion of good, viz., that *good is that which all things seek after*. Hence this is the first precept of law, that *good is to be done and ensued, and evil is to be avoided*. All other precepts of the natural law are based on this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.

Q. 94, Art. 2 (emphasis original). The conceptual distinction between theoretical and practical reason, as explained above, is at the center of this discussion. The natural law enters only after the

tory of natural law is continuous from Aquinas to Finnis in a crucial dimension, and natural law joins issue with legal positivism's focus on law as imperative or normal.

The very abstract concept of practical reason unifies the main approaches to general jurisprudence as competitors within a field.<sup>43</sup> H.L.A. Hart's great contribution can be understood as a revival of the philosophy of law as a branch of practical philosophy, along with moral and political philosophy. Perhaps the legal skeptics, against whom Hart reacted, saw indeterminacy in adjudication through the spectacles of theoretical reason—as if law in the legal sense must have the objectivity, neutrality, and determinacy of a classical scientific law.<sup>44</sup> Hart's answer to this shared premise of formalism and skepticism about adjudication,<sup>45</sup> which involved the well-known idea of discretionary, penumbral applications of open-textured rules, is like Aquinas' answer to an earlier skeptic:

The practical reason is concerned with practical matters, which are singular and contingent: but not with necessary things, with which the speculative reason is concerned. Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences.<sup>46</sup>

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passage from theoretical to practical reason, and the good then is identified as the first principle of practical reason and hence law. So natural law contains many precepts apprehended by the practical reason, which precepts are based on the good and guide human action. The nature of being is not irrelevant; Aquinas was a teleological realist and held that the natural law exists in us. However, the *Treatise on Law* is mainly about what natural law is and how it guides action.

<sup>43</sup> See Burton, *Rhetorical Jurisprudence: Law as Practical Reason*, 62 SO. CALIF. L. REV. (1989) (forthcoming).

<sup>44</sup> See Burton, *Judge Posner's Jurisprudence of Skepticism* (manuscript on file with the Northwestern University Law Review).

<sup>45</sup> See S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 188-93 (1985); H.L.A. HART, THE CONCEPT OF LAW 135 (1961).

<sup>46</sup> Q. 91, Art. 3, *supra* note 13.

## TAKING LAW AND SOCIETY SERIOUSLY

### A REVIEW OF

LAW AND THE SOCIAL SCIENCES. Ed. by Leon Lipson\* and Stanton Wheeler.\*\* New York: Russell Sage Foundation, 1986. Pp. viii, 740. \$37.50.

*Robert M. Hayden\*\*\**

For those dissatisfied with the Langdellian paradigm of law as a science for which the only relevant materials are found in law libraries, three major paths out of its confines have been established in recent years: Critical Legal Studies (CLS), Law and Economics (L&E), and Law and Society. The CLS route takes one from the law library only into the general university library, where the works of famous dead Europeans are to be used to "deconstruct" modern law as an ideological structure that serves to maintain domination by a ruling class. For most CLS scholars the road stops there; there is a strong anti-positivist bent to the movement which keeps most of its practitioners from looking closely at the outside world.<sup>1</sup> The L&E path leads out of the libraries and supposedly into consideration of what's going on in the world, but the elegant theories of L&E are generally so hedged by unrealistic assumptions that their relevance to ongoing social life is doubtful.<sup>2</sup> CLS may thus be characterized as an intellectual movement that takes neither law nor society very seriously, viewing both as mystifications, while L&E takes law seriously but not society, since the assumptions of the models are so unrealistic. Neither is likely to be very useful to anyone interested in investigating the practical interplay of law with various levels of social life.

The third path, that of Law and Society, leads directly into consid-

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<sup>1</sup> The tenuous relationship between CLS and positivism is discussed (with perhaps unwarranted optimism) in Trubek, *Where the Action is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

<sup>2</sup> Thus, for example, a field investigation of the paradigm case of one of the major L&E theories found that while the real-life situation was much as the theory predicted, it was so for reasons exactly opposed to those cited by the theory's proponents. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986). An accurate prediction based on faulty reasoning surely does not speak well for the theory.

eration of precisely such issues. A multi-disciplinary enterprise, *Law and Society*<sup>3</sup> scholarship takes both realms seriously, and looks at the ways that they affect each other. For those interested in exploring this third path, the volume under review may be the best introductory text since the second edition of Friedman and Macaulay's *Law and the Behavioral Sciences*.<sup>4</sup> Unlike that work, however, *Law and the Social Sciences* is not patterned after the law school casebook, but instead consists of twelve essays written by scholars from the fields of law, anthropology, sociology, psychology, and political science. The essays and their authors are:

1) *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations and Bibliographical Resources* (Sally Falk Moore); 2) *Law & Normative Order* (Richard D. Schwartz); 3) *Law & the Economic Order* (Edmund W. Kitch); 4) *Adjudication, Litigation & Related Phenomena* (Marc Galanter); 5) *Legislation* (David R. Mayhew); 6) *Implementation & Enforcement of Law* (Jeffrey L. Lowell); 7) *Punishment & Deterrence: Theory, Research & Penal Policy* (Jack P. Gibbs); 8) *Lawyers* (Richard L. Abel); 9) *Private Government* (Stewart Macaulay); 10) *Access to Justice: Citizen Participation and the American Legal Order* (Austin Sarat); 11) *Social Science & Legal Decision-Making* (Phoebe C. Ellsworth & Julius G. Getman); 12) *Methods for the Empirical Study of Law* (Shari Seidman Diamond). There is also a brief introduction by the two editors.

The volume, which originated in what was then the Committee on Law and Social Science of the Social Science Research Council,<sup>5</sup> was formulated as a volume of assessment. Accordingly, the chapters are meant to provide broad overviews of their topics, and not to be either speculative essays or summaries of research. This orientation is fortunate, because the work was a long time in preparation. The articles were apparently commissioned in the late 1970s, and many of the authors indicate that their contributions were completed in the period 1979-1981, some saying that they attempted partial revisions later. Thus, in terms of the currency of the research, many of the articles were already somewhat dated by time the book appeared in 1986. Nonetheless, all of the essays are of good quality, and can be recommended as starting points for those who wish to learn the major issues and basic findings of empirical research on the interactions of society and law.

In a short review it is impossible to consider each of the twelve articles, but some of them are particularly noteworthy because of their wide scope.

Moore's piece is perhaps the most comprehensive, yet concise, introduction to the literature on comparative law now available, covering an-

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<sup>3</sup> *Law and Society* in this review refers to the approach of scholars whose activities center on the Law and Society Association (founded 1964) and its journal, the *Law and Society Review* (1966).

<sup>4</sup> L. FRIEDMAN AND S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (2d ed. 1977).

<sup>5</sup> The Committee has since been disbanded.



thropological studies of legal phenomena in particular tribes, the typologies of comparative lawyers, comparative studies by social scientists, and the use of legal materials in grand-scale social theory.

Galanter's chapter could serve as the basic text for a seminar on the legal process. It begins with legal and political debates on American litigation, and then draws on comparative material from Australia to Yugoslavia as well as American research to explore the nature of adjudicatory institutions, their personnel, actions, and effects.

Macaulay stays closer to home geographically, but calls on an enormous range of materials from different disciplines to explore the relevance of law to the social structures that stand between the individual and the state: associations, corporations, churches, and other such collective bodies.

Schwartz turns easily from jurisprudence to social theory and back in considering how legal structures may draw normative concepts from the wider society and in the process restate, and thus perhaps change, those concepts.

For those unschooled in social science methods, Diamond's chapter is an admirably succinct overview of that topic in the specific context of the study of law and legal activity from different disciplinary perspectives.

The goal of producing summary assessments of various aspects of the Law and Society enterprise has not led to dry, uncritical recitals of authors, texts and classic problems. Gibbs' chapter on punishment and deterrence questions the viability of the deterrence concept as a fruitful field for research. The articles by Galanter, Moore, and Macaulay raise so many questions in their consideration of theories and evidence that they cast new light on their topics and provide leads for innovative research. Similarly, Sarat's article on citizen participation in the American legal system takes a sustained look at a topic usually handled with platitudes, and sets a considerable research agenda for those who would consider the topic further.

One way in which Law and Society scholarship differs from CLS and L&E is that it has generated little broad theory. The articles in *Law and the Social Sciences* reflect this situation, as does the structure of the collection as a whole. The editors suggest that common themes underlie many of the contributions, such as relative power, costs, symbolism, and social change,<sup>6</sup> but broad theory in Law and Society research, and in the articles, remains inchoate. There are no Ungerian permanent revolutions posited, nor Posnerian visions of a minimal state. Each author uses middle-range theory to investigate his or her selected topic and explain the findings. The juxtaposition in these articles of the findings of empirical research with what either high theory or generally accepted wisdom

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<sup>6</sup> LAW AND THE SOCIAL SCIENCES 8-10 (L. Lipson & S. Wheeler eds. 1986).

would lead one to expect is itself enlightening, since it frequently forces the reader to reconsider his or her premises concerning our knowledge of the way the world works.

Inducing such reconsideration may in fact turn out to be the major contribution of the Law and Society enterprise. The chapter by Ellsworth and Getman notes that social science is generally used most at the lowest levels of legal activity (e.g., commitment hearings and other individual case assessments) and least at the level of formulating rules meant to have broad applicability. On the other hand, they also suggest that the most important effects of social science on law occur when knowledge generated by empirical research gains general acceptance. The studies represented by and assessed in the articles in *Law and the Social Sciences* give some indication that Law and Society scholarship is growing increasingly sophisticated in producing work that questions received wisdom and is thus shifting the grounds on which law and legal scholarship operate.

## RETHINKING THE COMMUNION BETWEEN THE COMMON LAWS OF ENGLAND AND THE UNITED STATES

### A REVIEW OF

FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS. By P.S. Atiyah\* and R.S. Summers\*\*. Oxford: Clarendon Press, 1987. Pp. xx, 437. Index. \$65.00.

*Christopher Osakwe* \*\*\*

Law, like music or language, is a form of cultural expression. Because it is the product of its own indigenous civilization, law is deeply rooted in the history of a given nation. As such it reflects the tradition, psyche, ethos, and psychology of the people. Even when two countries belong to the same family of laws, their legal systems are invariably different. Whenever the law of a parent system is transposed to a foreign habitat, the recipient society often subjects the received law to a process of acculturation. This is why England and the United States, in spite of the fact that they belong to the same legal family, are nevertheless separated by a common law. For the same reasons the laws of Spain and Mexico, both of which are members of the civil law family, are as different from each other as is flamenco music from rancho.

A second axiom of the modern theory of comparative law is that the taxonomic character of a legal system is determined not by its substantive law, but rather by a totality of four institutional factors,<sup>1</sup>—legal infrastructure, legal methodology, legal style, and legal ideology. I am not saying, however, that substantive law altogether does not add flavor to the character of a legal system. Certainly some general principles of substantive law help to shape a system's legal style. In this indirect way substantive law does somehow influence the pigmentation of a given legal system. The point, however, is that the real personality of a legal system is not revealed solely by an examination of the particular rules of its substantive law, whether public or private. This new thinking about the na-

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<sup>1</sup> The contextual meanings of the terms "legal infrastructure," "legal methodology," "legal style," and "legal ideology" are defined in Osakwe, *The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System*, 21 TEX. INT'L L.J. 1, 4-5 nn.4-7 (1985).

ture of legal systems marks a radical departure from the originalist doctrine in comparative law, according to which substantive law, especially private law, was deemed to be the most important yardstick for measuring the quality and quantity of a legal system. Today, a good comparatist is one who, while studying the law of any country, looks not merely at the particular rules of its substantive law, but rather at the many processes and institutions by which substantive law is transformed into reality.

Over the years many books have sought to compare English and American legal systems, with varying degrees of success. Professors Atiyah and Summers have added a significant new dimension to the comparison of common law's two most important legal systems. Now for the first time in the history of modern comparative law, we have a new methodology that constructs a fairly elaborate theoretical framework for looking at "formality" as an attribute of a legal system.<sup>2</sup> Professors Atiyah and Summers have produced a richly textured book on legal theory as well as comparative law. It is a compelling, mind-expanding account of how local culture exudes from the pores of any legal system. It posits a revealing new theory for analyzing styles of legal reasoning. Equally important, it paints an infinitely more complex portrait of the quantitative differences between the English and American legal systems, even though one might disagree with the authors' characterization of the similarities between these two legal systems as superficial.<sup>3</sup> It seems to me that the bonds which bind English and American legal systems are much deeper than the differences which separate them.

The book posits two theses. The first contends that despite their similarities there are profound differences between the English and American legal systems, and goes on to assert that the English system is highly formal while the American is highly substantive. In support of this proposition the authors proffer evidence to show how legal reasoning in many different contexts—whether in dealing with rules generally, or with statutes, or with case law—tends to be more formal in England and more substantive in the United States. In the opinion of the authors, English legal reasoning generally exhibits higher levels of what they call context formality, interpretive formality, mandatory formality, truth for-

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<sup>2</sup> One should note perhaps that this book is not the first to propose that "formality" should be viewed as a taxonomic attribute of law. The first study to do so was 1 K. ZWIEGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 71 (T. Weir trans. 2d ed. 1987). In a passage comparing methods of statutory construction in the English and French legal systems, Professors Zweigert and Kötz note that "the pedantry and pettiness of [English] legislative language is attributable not only to the desire to leave judges the least possible scope for construction, but also to a certain formalism of legal thought. . . ." *Id.* at 275. The book then contrasts the "formalism" of the English common law with the "consensualism" or "anti-formalism" of continental European law.

<sup>3</sup> P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS (1987).

mality, rule of law formality, and enforcement formality, than does the American counterpart.

A second thesis of the book contends that there are no simple linear causal explanations between the styles of legal reasoning and the other factors that the authors identified as correlating with such reasoning.<sup>4</sup> At the same time, the authors are not quite willing to concede that causal relationships do not exist between these two elements of a legal system. They say that their failure to establish such linkage "does not mean, however, that such causal relationships do not exist."<sup>5</sup> They further opine that these factors actually reinforce each other, so that in the end it becomes impossible to trace simple linear causal relationships.

A disappointing aspect of this book is the fact that the authors' first thesis fails to rise above the level of dogma. It remains essentially an unproven belief that is formed on the basis of the authors' judgment and backed solely by their experience. Like the authors, I believe that English law is more formal than American law. Unlike them, however, I do not believe that there is any demonstrable remote or proximate causation between the noted institutional differences and the thesis of this book. I rather think that the relationship between these two phenomena is symbiotic, not causal. In fact, both of these character traits are attributable to a common cause, *i.e.*, the culture of the individual country.

Having said that, I must add that even though their thesis remains unproven, they have, in my opinion, produced a novel and useful theoretical framework for analyzing legal systems in general—an invaluable contribution to legal theory. Their contribution to comparative law, however, is more modest. To the vast literature on the theory of comparative law this book forms no more than a footnote, albeit a precious one. It contains a series of ripe observations about the differences in the institutional foundations and cultural underpinnings of English and American laws. The fact that the authors seem to have ignored the relevant literature on comparative law<sup>6</sup> is equally noteworthy. It strikes me as odd that a book that purports to advance our knowledge about the taxonomy of legal systems, and particularly about the etiological influences of legal institutions within a legal system, fails to cite even one major work in comparative law throughout the entire discussion of this theme.<sup>7</sup>

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<sup>4</sup> *Id.* at 410.

<sup>5</sup> *Id.* at 411.

<sup>6</sup> A useful guide to the vast literature and current thinking on these aspects of comparative law may be found in: 1 K. ZWIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW, *supra* note 2, at 68-73; R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE STUDY OF COMPARATIVE LAW 12-20 (3d ed. 1985); M. GLENDON, M. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL LAW, COMMON LAW AND SOCIALIST LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, WEST GERMAN, ENGLISH AND SOVIET LAW 34-38 (1985).

<sup>7</sup> P. ATIYAH & R. SUMMERS, *supra* note 2, at Cl. 10-14.

Is this curious gap in research perhaps attributable to the fact that, by their own admission, the authors' "qualifications lie in the fields of law and legal theory,"<sup>8</sup> not in comparative law?

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<sup>8</sup> *Id.* at v.

## AIDS LAW FOR CITIZENS

### A REVIEW OF

**AIDS AND THE LAW: A GUIDE FOR THE PUBLIC.** Edited by Harlon L. Dalton,\* Scott Burris,\*\* and the Yale AIDS Law Project. New Haven, Connecticut: Yale University Press, 1987. Pp. xvii, 382. \$25.00 (cloth), \$7.95 (paperback).

*Leonard S. Rubinowitz\*\*\**

The AIDS epidemic has caused many people to stop doing business as usual. This book is a case in point. It was conceived by a group of Yale Law School students and faculty members as a way to "do something" about Acquired Immune Deficiency Syndrome (AIDS). The group developed the conceptual framework, decided on the specific topics to cover, and solicited and edited chapters by legal, medical, and public health scholars and practitioners. *AIDS and the Law* reflects an extraordinary effort by more than two dozen editors working with a similar number of authors over an eighteen month gestation period.

In the Preface, Professor Dalton suggests terms for assessing this volume. He identifies as the project's overriding goal "to sift through the law as it relates to AIDS and to communicate what we find to the people who most need to understand the law's sweep."<sup>1</sup> The implicit interrelated objectives include: 1) use by an intended audience that is not primarily lawyers, but consists instead of educators, policy makers, legislators, and the vast array of other professionals who must struggle with the increasingly pervasive legal issues generated by the disease; 2) accessibility to readers untrained in law, "without sacrificing precision or sophistication"<sup>2</sup>; 3) scope sufficient to cover the broad range of important legal issues; 4) adaptability to the rapid changes in medical knowledge and the state of the law with respect to AIDS; and 5) sensitivity to the highly political nature of these issues, particularly the role of fear in society's response to AIDS. In spite of the tensions inherent in this ambi-

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<sup>1</sup> *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* xi (H. Dalton, S. Burris, & The Yale AIDS Law Project eds. 1987).

<sup>2</sup> *Id.* at xi.

tious agenda, *AIDS and the Law* goes a long way toward filling a major gap in the literature.

The assumption that non-lawyers had an unmet need for legal resources on AIDS seems very well founded. The list of professionals with a need to know about AIDS-related legal questions continues to grow, as these issues surface in almost every setting imaginable. However, the burgeoning AIDS-related legal literature is addressed primarily to legal scholars and practitioners.<sup>3</sup> This volume is the first systematic treatment of AIDS and the law designed for the wide range of professionals who have a critical role to play as society addresses the extraordinary implications of the disease.

The audience for this book may turn out to be both broader and narrower than intended. In addition to the professionals the editors targeted, PWAs (persons with AIDS), people who are seropositive (test positive on a blood test, indicating exposure to the virus that causes AIDS), and their families, lovers, and friends may find this book extremely useful. It may help them decide whether to pursue legal remedies as a means of addressing practical problems. Discussions of the legal aspects of education, employment, housing, insurance, and other issues give such readers an idea of the terrain they enter if they turn to lawyers for assistance.<sup>4</sup> For those who do so, the book can facilitate their full participation in decision-making that may be critical to their future. In short, this book is not just for professionals.

At the same time, the book may not be as useful as other available sources for lawyers handling AIDS-related matters or for legal academics. Because of the effort to reach professionals other than lawyers and the broad scope of the book's twenty chapters, specific subjects do not receive the in-depth analytical treatment available in the spate of recent AIDS-related law review articles,<sup>5</sup> including those by authors represented in this volume. Moreover, the constantly changing state of the

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<sup>3</sup> There are some exceptions. For example, several books on the practical aspects of dealing with AIDS have included brief overviews of legal issues for lay readers. See, e.g., Rubinfeld, *Legal Aspects of AIDS*, in AIDS: FACTS AND ISSUES (V. Gong and N. Rudnick eds. 1986); L. Martelli, F. Peltz, & W. Messina, WHEN SOMEONE YOU KNOW HAS AIDS: A PRACTICAL GUIDE 79-98 (1987); AIDS: A SELF-CARE MANUAL 175-214 (B. Moffatt, J. Spiegel, S. Parrish, & M. Helquist eds. 1987).

<sup>4</sup> In discussing the case of Ryan White, a teen-age boy with AIDS denied entrance into the Kokomo, Indiana schools, Frederick Kass concludes that "disputes over school entry may become protracted and require resources unavailable to most children. Moreover, for children with a shortened life expectancy, the rewards of such extensive efforts may be limited." AIDS AND THE LAW, *supra* note 1, at 77.

<sup>5</sup> See, e.g., *Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. 1 (1985); Hermann, *AIDS: Malpractice and Transmission Liability*, 58 COLO. L. REV. 63 (1986-87); Leonard, *Employment Discrimination Against Persons with AIDS*, 103 DAYTON L. REV. 681 (1985); Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); Banks & McFadden, *Rush to Judgment: HIV Test Reliability and Screening*, 23 TULSA L. J. 1 (1987); Commentaries, Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching*, 100 HARV. L. REV. 1782 (1987), and Clifford



law may make the several loose-leaf services on AIDS<sup>6</sup> more useful for practicing lawyers than a published volume like *AIDS and the Law*. Nevertheless, lawyers entering this legal arena may find the volume a useful introduction to the vast array of AIDS-related issues.

In deciding to address non-lawyers primarily, the editors committed themselves to making the volume accessible to lay readers. They selected authors with a track record of communicating with people outside the legal profession, and used the editorial process to ensure that the chapters would be comprehensible to the intended audience. To the extent that someone tainted by legal training can discern, the book succeeds admirably in this regard.<sup>7</sup> Authors define and explain basic terms and concepts needed by non-lawyers in order to understand common law, constitutional, and statutory issues that AIDS raises. Discussions of basic legal issues are accurate, while avoiding theoretical and technical questions that would be of interest primarily to legal scholars and practitioners. Moreover, the legal discussion in each chapter is limited to matters central to the particular topic, with cross references to treatment of related questions in other chapters. Finally, the editors provide a glossary of AIDS-related medical terms, to make the volume more accessible to those unfamiliar with that vocabulary.

Professor Dalton's self-assessment of the volume's scope seems on the mark.<sup>8</sup> He confesses some embarrassment and dismay about the omission of topics such as the impact of AIDS on Hispanic communities and legal issues related to licensing of new drugs. Discussions of developing and testing potential vaccines and more extended treatment of issues related to nursing homes and other residential health care facilities would also have been useful. Still, Professor Dalton appropriately concludes that the book's "scope and reach" are "remarkable."<sup>9</sup> First, the editors recognized the need to provide a context for discussing legal is-

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& Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806 (1987).

<sup>6</sup> See, e.g., AIDS Policy & Law (BNA); AIDS Law & Litigation Reporter (University Publishing Group); AIDS Legal Guide (Lambda Legal Defense and Education Fund, Inc.).

<sup>7</sup> It is difficult for anyone past the first few weeks of law school to make this assessment. As I said in a talk to entering Northwestern Law School students, reflecting on my own law school experience: "It is very difficult to know what you didn't know when you didn't know it. Translated into-English, this means that some of the things that I learned in that first year became so deeply etched in my brain that they became part of me, and I forgot that I hadn't known them before law school." Rubinowitz, *Four Questions*, THE NORTHWESTERN REPORTER, Spring 1987, at 5.

As a senior faculty member on Northwestern Medical School's AIDS Mental Health Education and Evaluation Project, I have struggled with making legal issues accessible to non-lawyers, including health care professionals, police personnel, and Catholic educators. In making presentations to non-lawyers, I have developed an appreciation of the difficulty of the task, as well as the ways of doing it effectively. Thus, in spite of my taint, I feel confident in judging the book a success in this regard.

<sup>8</sup> AIDS AND THE LAW, *supra* note 1, at xv.

<sup>9</sup> *Id.*

sues. Although medical discussions of AIDS abound in the literature, the two chapters on that subject are particularly clear and helpful, and lay the groundwork for subsequent legal analyses. The brief historical discussion provides a helpful perspective by discussing the dilemmas society faced in dealing with the spread of venereal disease in the early part of this century. Other useful contextual discussions focus on the importance of education as a means of reducing transmission of AIDS and the conflicting cultures of physicians and lawyers that may impede society's efforts to deal with the AIDS epidemic.

Moreover, the scope of the legal discussion is so broad that lay readers can use the book as a reference work. It treats constitutional and statutory discrimination questions, torts issues in transmission of AIDS, application of landlord-tenant law, and access to insurance and medical care, among other matters. It considers a similarly wide range of institutional settings—schools, the workplace, the military, prisons—and groups impacted most directly by the disease—intravenous drug abusers, Blacks, and the lesbian and gay communities.

The editors also sought to produce a work that was both timely and enduring. The rapidly changing environment of AIDS necessitates trade-offs in this regard. Timely and up-to-date discussions are destined to be out-of-date in their particulars in short order. General, conceptual treatments are likely to be more lasting, but less immediate and relevant for the intended audience. For the most part, the editors and authors walked this tightrope effectively. The medical and legal issues addressed will be with us for many years to come. Methods of transmission, the meaning of discrimination in this context, the tension between public health objectives and individuals' rights, and liability related to transmission of HIV infection are long-term questions. However, several chapters emphasize medical and legal specifics—the findings of particular studies or the details of regulations—thus risking becoming obsolete with subsequent research or changes in law or policy.<sup>10</sup>

The final challenge Professor Dalton identifies grows out of the fact that AIDS is an intensely political issue. Explicit or implicit political positions are embedded in any effort to discuss AIDS-related legal issues. This book has a quite consistent political perspective, advocating "compassionate" and "humane" treatment, defined in traditional civil libertarian terms—prohibition of discrimination, protection of confidentiality, absence of mandatory testing, and guaranteed access to insurance and medical treatment.

The consistent focus on rights provides coherence for the book, but it runs the risk of preaching to the converted. The chapters are uneven in

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<sup>10</sup> Discussion of the limitations in studies would have underscored their tentative nature. For example, studies finding no evidence of transmission of the virus by "casual contact" involve relatively small numbers of subjects.

the attention they pay to alternative perspectives on the left or the right, and to trade-offs implicit in approaches they advocate. For example, although the chapter on insurance and a few others consider cost questions, most do not ask who should pay for the extraordinary direct and indirect costs of AIDS.

Fear also receives short shrift in a number of chapters.<sup>11</sup> Although Professor Dalton's Preface raises important questions about the role of fear, the book does not fully realize the promise of that initial discussion. Some authors seem to assume that education will alleviate "irrational" fear substantially, if not eliminate it. This view may underestimate people's mistrust of research findings on the methods of transmission of AIDS and their skepticism about whether precautions will be implemented effectively. Other authors argue that the law should ignore the fact of fear and should focus instead on serving the interests of those most directly affected by the disease—on the assumption that this coincides with society's interests. Those that are skeptical of this perspective when they begin the book may remain so when they finish it. Even so, they will benefit greatly along with other readers from this extraordinarily comprehensible, comprehensive, and coherent volume—a major contribution to the literature of AIDS.

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<sup>11</sup> For a suggestion that the law attend to questions about allocations of costs and fear, among other matters, in responding to the AIDS epidemic, see Rubinowitz and Shapo, *Confronting the AIDS Challenge*, NAT'L. L.J., March 7, 1988, at 13.

## CONSTITUTIONAL LAW AND HIMMELFARB ON SOCIAL HISTORY

### A REVIEW OF

THE NEW HISTORY AND THE OLD: CRITICAL ESSAYS AND REAPPRAISALS. By Gertrude Himmelfarb.\* Cambridge, Massachusetts: Belknap Press of Harvard University, 1987. Pp. 209. \$20.00.

*Mark Tushnet\*\**

Professor Gertrude Himmelfarb is a distinguished historian whose works have dealt primarily with the ideas of the Victorian era. In this collection of essays she turns to historiography. She finds the "dominance" of the new social history to be a "cause for reflection and concern."<sup>1</sup> The new social history, as Himmelfarb sees it, directs its exclusive attention to social forces operating through the activities and lives of large numbers of ordinary people. Migration patterns, population growth, literacy rates, and the like are its concerns, not parliamentary politics or the influence of great thinkers on their eras. This kind of focus is morally and politically troubling, according to Himmelfarb, because it "denie[s] both the efficacy of individuals and the possibility of freedom."<sup>2</sup>

The essays are filled with apocalyptic imagery,<sup>3</sup> which leads a reader not engaged as Himmelfarb is in intradisciplinary polemics to want to say, "Lighten up." It is, after all, one thing to see a world in a grain of sand and rather another to see the decline of Western civilization in the *Journal of Social History*. Himmelfarb's polemical purposes, to which I will return at the end of this review, also lead her to occasional serious misreadings of some of those she criticizes.<sup>4</sup> As one who reads histories to glean their significance for constitutional law, I find Himmelfarb's

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<sup>1</sup> G. HIMMELFARB, *THE NEW HISTORY AND THE OLD: CRITICAL ESSAYS AND REAPPRAISALS* 5-6 (1987).

<sup>2</sup> *Id.* at 11.

<sup>3</sup> See, e.g., *id.* at 8, 21, 47-48, 54-55.

<sup>4</sup> See, e.g., *id.* at 42-43, treating the arguments of Robert Fogel and Stanley Engerman as claims about indisputable scientific truth, rather than as inferences drawn from their evidence by informed and sensitive historians. When Himmelfarb finds authors more to her taste she can read them sensitively and in a way that enlightens her readers. *Id.* at 56-57 (on Carlyle and Disraeli), 143-54 (on Macaulay).

concerns strikingly overstated.<sup>5</sup>

I concede at the outset that the perspective I bring to Himmelfarb's argument is a peculiar one. The scholarship of constitutional law has focused on the Supreme Court, an elite political institution of the sort Himmelfarb says the new social historians ignore, and on legal doctrine, an intellectual enterprise of the sort she says they deprecate. Further, to the limited extent that constitutional law scholarship is concerned with history, it deals with the intent of the framers of the original Constitution and the Reconstruction amendments—again an elite group and, as to the 1787 framers, an intellectually sophisticated one as well. Yet I believe the influence of the new social history on constitutional law scholarship has been entirely salutary. I will briefly discuss three areas to illustrate how beneficial that influence has been.

The first is the revival of interest in republicanism.<sup>6</sup> Republicanism holds that public policy ought to result from concern for the public good, not from the aggregation of merely private interests, and that the best guarantee of such concern is a citizenry imbued with civic virtue. A number of constitutional law scholars have recently argued that republican ideas should be retrieved, as a counter to liberalism's asserted focus on individualism and rights. They have drawn their arguments primarily from the work of intellectual historians, especially J.G.A. Pocock and Gordon Wood, who examined the rhetoric and arguments of the generation of 1787 and discovered strong republican themes expressed there. In the hands of Wood and, earlier, Bernard Bailyn, republicanism was more than a set of ideas believed to be true by those who adhered to it. These historians demonstrated that republican themes made sense to the framers' generation because those themes resonated with the colonists' experience under British rule. That demonstration, however, *is* social history. It exhibits what Himmelfarb says the new historians lack, namely "a proper respect for the moral imagination of those contemporaries [they are] professing to describe."<sup>7</sup>

Perhaps, however, this case is special. After all, the primary influences on the revival of interest in republicanism were intellectual histories, and even if one extends one's attention to groups like the Committees of Correspondence, which had more members than the fifty-

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<sup>5</sup> That conclusion need not impair Himmelfarb's overall argument, which is about the dominance of the new social history within the historical profession. For some skeptical observations see *infra* note 20. Himmelfarb does set her sights on psychohistory as well as social history, see, e.g., HIMMELFARB, *supra* note 1, at 36-41, 107-20, but there it is plain that she is firing at an insubstantial target. No one could seriously contend that psychohistory is anywhere near a position of dominance, and it is plainly less significant within the historical profession than ordinary intellectual history of the sort Himmelfarb does. (Indeed, I suggest that psychohistory is quite marginal to the historical profession, which gives Himmelfarb's attack on it something of the air of shooting fish in a barrel.)

<sup>6</sup> See, e.g., Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. (forthcoming).

<sup>7</sup> HIMMELFARB, *supra* note 1, at 69.

five at the Philadelphia convention, one is still dealing with a relatively restricted group. In the hands of its initiators, the republicanism thesis was at most something like cultural history rather than social history.

Here, though, it is important to locate the republican revival in its present-day context. Interest in republicanism revived because republican ideas seem to be helpful in filling in gaps left by a purely liberal account of contemporary constitutional law. Republicanism probably could not have fulfilled that function if it had been merely an archaic set of ideas held by some of the framers but long since discarded; it could fulfill that function if republican ideas had persisted throughout United States history. Intellectual historians might have shown the persistence of such ideas, for example, by re-presenting John Dewey to us. As it happened, the social historians were the ones who showed how republicanism persisted as a dissenting tradition which can be retrieved today without breaking abruptly with the continuity of United States history.<sup>8</sup>

Within the field of constitutional law scholarship, then, social history has been influential by laying out the social foundations of political practice. In this way it denies Himmelfarb's claim that "the new historian cannot concede the preeminence of politics in the Aristotelian sense, which presupposes man to be a 'political' animal . . . ." <sup>9</sup> Indeed, I would have thought, from my disciplinary orientation, that the point of social history was to show how politics in the Aristotelian sense pervades the social order.

Social history's concern for the preeminence of politics has mattered as well in the second area where it has influenced constitutional law scholarship—the discussion of the Reconstruction Era amendments. The congressional debates preceding the adoption of the fourteenth amendment are filled with statements about the degree to which the amendment would protect civil, political, and social rights.<sup>10</sup> To understand these debates, the constitutional law scholar must retrieve a set of distinctions that is no longer readily available in legal discourse. The debates themselves help, but more important is the assistance one gains by placing those debates in their political context. And that context in turn can be better understood by studying the social setting in which politics was located. We know something when we learn that the framers of the fourteenth amendment wanted to eliminate abusive practices under the Black Codes adopted by Southern legislatures after slavery was abolished. We know much more when we come to understand, through Leon Litwack's work, how the people affected by those codes character-

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<sup>8</sup> See M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 5-6 n.13 (1988).

<sup>9</sup> HIMMELFARB, *supra* note 1, at 9.

<sup>10</sup> See Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause*, Dr. Du Bois, and Charles Hamilton Houston, 74 J. AM. HIST. 884, 885-90 (1987).

ized the forms of oppression they experienced.<sup>11</sup> Precisely because the distinctions among civil, political, and social rights were conceptions that pervaded the ordinary discourse of nonelite nonlawyers, we can understand the intent of the framers of the fourteenth amendment better by attending to the kinds of popular concepts to which social historians direct attention. I would have thought that this was exactly displaying "a proper respect for the moral imagination" of the people of that era.

This example illustrates another potential contribution of the new social history to political and intellectual history. As historians influenced by the hermeneutic tradition have emphasized, today's scholars cannot claim to arrive at an understanding of the ideas of the past simply by thinking about what the words they find in the documents they study would mean to people today. Instead, understanding comes from comprehending what the words meant in the social and intellectual culture in which they were used. To the extent that a historian is interested in how ideas were politically effective, the new social history makes an essential contribution. And even historians interested solely in the relations among ideas—the purest sort of intellectual history—may well be enlightened by studies of how people other than the great thinkers they study used concepts resembling those used by their subjects.

A third area in which social history has been helpful to constitutional law scholarship is the ongoing discussion of the efficacy of liberal rights in promoting the long-term interests of oppressed people. Reacting to the canonization of the Warren Court, scholars associated with Critical Legal Studies began to describe the conceptual and practical limitations of the work of that Court and its predecessors.<sup>12</sup> These scholars relied in part on their experiences with then-recent social movements but did not, I think, draw much directly from the new social history. The so-called critique of rights elicited responses from minority scholars that combined analytic points about the utility of the language of rights in justifying the demand that the interests of minorities be considered, with knowledge born of experience and the social history of the civil rights and labor union movements.<sup>13</sup> This conversation continues, and it is too early to sort out social history's impact on it (and perhaps the relevant social movements are too recent to be the objects of social history).<sup>14</sup> That there has been an influence, though, seems to me undeniable.

As I see it, then, constitutional law scholarship has been affected by the new social history by becoming sensitive to "the efficacy of individuals and the possibility of freedom" as revealed, rather than denied as

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<sup>11</sup> L. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1979).

<sup>12</sup> This group, it should be noted, includes the present author.

<sup>13</sup> For a collection of these responses, see the symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297-447 (1987).

<sup>14</sup> Most of the literature of which I am aware has consisted of memoirs rather than histories, or studies by sociologists and political scientists rather than by historians.

Himmelfarb has it, by the new social history.<sup>15</sup> It is just that the new social history has shown us that individuals are efficacious and free all the way down, not merely at the elite level. This influence has been quite beneficial. Himmelfarb might respond that she would not be surprised at this. Her concern lies with what she sees as the dominance of social history among historians. In a field like constitutional law scholarship, concerned as it is with high politics and reasoning as expressed in legal doctrine, social history cannot be dominant and, it might be said, can have a salutary (because appropriately and necessarily limited) influence.

Still, to an outsider the pitch of Himmelfarb's essays is so intense as to make one wonder what exactly is at stake. The essays are manifestoes, or better, countermanifestoes, whose language has the characteristic overstatement of such documents. One wonders, though, why a countermanifesto is necessary. Occasionally one senses that Himmelfarb's target is Marxism, for the new social history is, in her eyes, overly concerned with "the masses" and "forces" that operate invisibly by means of laws of history. Yet, as Himmelfarb points out, economic historians utilizing market paradigms have also contributed to the new social history.<sup>16</sup> She has some respectful things to say about the historical work, though not the politics, of Eric Hobsbawm and E.P. Thompson, two British Marxist historians.<sup>17</sup> These comments suggest that Himmelfarb deplores bad social history but respects good social history. It is hard to quarrel with her on that. I doubt that anyone seriously contends that bad social history is better than good intellectual or political history, nor, I suspect, would Himmelfarb defend the proposition that all works of intellectual or political history are either good or at least better than any work of social history.

One would be puzzled at a manifesto whose primary claim was that good things are better than bad ones. At the risk of invading a turf that Himmelfarb believes is made of quicksand, then, I offer the following account of this manifesto. The first thing to note is that in some ways intellectual history is "easier" to do than social history.<sup>18</sup> That is, the

<sup>15</sup> HIMMELFARB, *supra* note 1, at 11.

<sup>16</sup> *Id.* at 42-44 (though she cannot avoid a parenthetical comment about the "striking" "parallel to Marxism" of these works).

<sup>17</sup> *Id.* at 80-87. Having said this, I should also note that Himmelfarb's political sympathies are so evident that one wonders, after reading the following comment, what she thinks of Allan Bloom and Diane Ravitch on the education of today's adolescents: After describing a social historian's skeptical comments on answers an inspector of education received from children in a remote area of France in 1864, Himmelfarb observes, "The reader might be more impressed by the fact that in 1864 in that backward region there were village schools and visiting inspectors than that the children failed to answer those questions. (One wonders whether they would not have responded more intelligently had the questions been differently worded . . .)" *Id.* at 125.

<sup>18</sup> In the field of legal history this has been a theme pervading the historiographical comments of Willard Hurst and Lawrence Friedman, who have criticized, without (I am afraid to say) enormous success, the focus in United States legal history on the development of doctrine. Hurst, *Old and New Dimensions of Research in United States Legal History*, 23 AM. J. LEGAL HIST. 4 (1979).



basic research materials for intellectual history are books written by notable authors, available in nearly every decent research library. To do intellectual history, you simply have to read the books and think hard about them. In contrast, to do social history, you have to grub around in dusty records, figure out what records matter to you, and extract some nonobvious conclusions from materials compiled for reasons other than to make the life of the mind easier. This may explain why, despite Himmelfarb's assertions about the dominance of social history, the *Journal of American History's* list of recent dissertations always includes more works in intellectual history than in social history.<sup>19</sup>

The relative ease of the enterprise of intellectual history has important consequences. If we assume that there is a tradeoff between intelligence and energy, then for any particular distribution of intelligence and energy in a historian, work in intellectual history is likely to be more productive than work in social history; the energy saved by not having to search for materials and the like will be expended on the deployment of intelligence in the analysis of the literary works that the historian takes as his or her subject. If the distribution of intelligence and energy among intellectual historians is roughly the same as the distribution among social historians, intellectual history as a whole is likely to be better than social history as a whole, for the same reason. Himmelfarb's concern about the dominance of social history enters the analysis when social historians are more intelligent and energetic than intellectual historians. Under those circumstances, the inherent advantage of intellectual history disappears.<sup>20</sup>

One therefore needs something like a sociology of historians' interests, for it may be that the dominance that Himmelfarb discerns results from the fact that in recent years social history has attracted smarter and more energetic scholars than intellectual history has. Consider the possibility that Himmelfarb is right about the dominance of social history. That may mean only that the people she associates with are not as intelligent and energetic as the social historians, which may account for the

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<sup>19</sup> The list of recent dissertations in 73 J. AM. HIST. 1144-53 (1987), has 58 dissertations in the category "Intellectual and Cultural" and 39 in the category "Social." If one adds dissertations in legal and political history to the first category, and those in economic, black, and women's history to the second, there are 80 dissertations in the first group and 79 in the second. This is so informal that it could not possibly qualify as "new social history," but I should note that the analysis consisted simply of a count of titles without any analysis of the content of the dissertations. It may well be the case that some of the dissertations in "cultural" history would fall within Himmelfarb's definition of the new social history. (To be picky about it, a social historian attuned to issues of scientific method would note that this count depends on the categorization scheme developed and applied by some anonymous editor, a scheme that itself calls for analysis.)

<sup>20</sup> The full story is as usual more complicated. For example, intellectual history is harder to do than social history in the sense that it is likely to be rather more difficult for people of equal intelligence to come up with new and interesting things to say about the canonical writings in intellectual history, as against saying new and interesting things about a community—J. Morgan Kousser has suggested "Serbo-Croatians in Akron"—about which nothing has ever been written.

need for a countermanifesto to attract better people into her field. What is more, it may mean that the people she associates with are not as intelligent and energetic as she is. By this I mean to direct attention to the obvious generational issues at stake in Himmelfarb's polemics.

A deeper cut at the generational issues requires an additional generalization about the enterprise of doing intellectual history. Doing intellectual history is a way of flattering yourself. By doing it you associate yourself with people whom you and your colleagues believe to have been great minds, and some of their greatness is—you think—bound to rub off on you. After all, you are engaged in a conversation across time with the ideas of these great thinkers. In their own times they engaged in such conversations with other very smart people, so you, a person who engages in those conversations, must also be very smart. In contrast, it takes more work than it is worth to flatter yourself in the same way when you do social history. Social historians study the inglorious, making them somewhat less mute. Aside from redefining the canon, though, even social historians cannot make their subjects into the Miltons they might have been. Perhaps a social historian can become a vicarious participant in a social revolution of the past, which may for some substitute for his or her inability to participate in such a revolution today. I doubt that you can get quite the same kind of rush from doing that as you can from associating yourself with the greats of the past.

It is not the undefined "greats of the past," though, with whom intellectual historians associate. Given the way the canon is defined, the association is with great white (mainly, in this country, Anglo-Saxon and Protestant) men—that is, with a sharply defined "Great Tradition." In this light Himmelfarb might be seen as representative of a particular social type, the New York Jewish intellectual.<sup>21</sup> That type established its rightful place in the WASPy world of the academy at least in part by claiming for itself the right to participate in the conversation of the Great Tradition. Younger scholars may not appreciate the real benefits they have received from the efforts of the New York Jewish intellectual as a social type, but, having found the academy open to them, they need not fight the old battles once again.

Himmelfarb's essays thus may fall into a familiar genre, the lament by a member of a social type whose period of accomplishment has passed and whose achievements are underappreciated by the new philistines. When Himmelfarb writes that "the old [history is not] contemptible simply because it is old,"<sup>22</sup> it is difficult to avoid hearing the tone of the lament.

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<sup>21</sup> It may be that Himmelfarb devotes attention to psychohistory despite its insignificance within the historical profession, see note 3 *supra*, because psychoanalytic ideas have been particularly influential among New York Jewish intellectuals.

<sup>22</sup> HIMMELFARB, *supra* note 1, at 101.

## THE ECONOMICS OF INSURANCE LAW

### A REVIEW OF

DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY. By Kenneth S. Abraham,\* New Haven, Connecticut: Yale University Press, 1986. Pp. 254. \$25.00.

*W. Kip Viscusi\*\**

Until recently, insurance law was one of the backwaters of legal scholarship. Of course, a number of case books and texts have analyzed this area, but insurance law has not attracted the same degree of legal scholarship as areas such as antitrust, contracts, and torts. In *Distributing Risk*, Professor Kenneth Abraham of the University of Virginia School of Law attempts to remedy this inadequacy by applying an economic and policy analysis to this class of legal issues. Using this conceptual framework, Professor Abraham reviews the foundations of current insurance law and outlines needed reforms. The result is a book that will probably be widely cited in the insurance law literature.

In Chapter 2 of *Distributing Risk*, Professor Abraham outlines his two part conceptual approach. First, Abraham delineates the fundamental purposes of insurance law, such as economic efficiency and equitable distribution of risk. Economic inquiry into insurance law typically ends here. In addition, Abraham discusses a second area: the institutional context of insurance law, including the role of legislatures, administrative agencies, and the courts.

Abraham's discussion of the purposes of insurance law is the stronger of the two topics he covers. Abraham analyzes the economic underpinnings of insurance, the problems of moral hazard in which insured parties alter their actions after receiving insurance, the problems of adverse selection in which a specific insurance policy attracts disproportionately high risk insurance seekers, and the equitable distribution of risk. Although his economic analysis is generally sound, I would suggest that Abraham has read the Coase Theorem<sup>1</sup> once too often. The Coase Theorem is, of course, one of the most powerful tools of law and economics. In pollution contexts, for example, it asserts that victims of pollution will contract with polluters to eliminate pollution if doing so is efficient

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<sup>1</sup> See, Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

and if transaction costs are zero. Abraham ties many aspects of insurance and potential deficiencies in the insurance market to this theorem. In the insurance context, however, the Coase Theorem is minimally relevant since it sheds little light on the main problems of adverse selection and moral hazard. Abraham's attempt to apply the Coase Theorem by lumping such concerns under the general heading of transactions costs is strained. Abraham's analysis is generally thoughtful and correct, but his emphasis on the Coase Theorem is misplaced.

The subsequent discussion of fair risk distribution is illuminating and reading it would be profitable both to lawyers and to economists. In an insurance scheme based on traditional economics, an individual's insurance premiums will reflect the risks he creates for the insurance company. The result should be a range of insurance rates. For example, male teenage drivers and others with poor accident histories would pay extremely high rates. State laws limit distinctions insurance companies may draw in categorizing policyholders. For instance, race generally cannot be a distinguishing characteristic, and in some states neither can gender. As a result of these statutes which restrict insurance companies from categorizing individuals based on certain personal characteristics, insurance companies often infer personal characteristics from driving histories. Consequently, these distinctions are necessarily grounded more in politics than economics. Abraham does a superb job of reviewing the various theories of distribution that might be applied to analyze the appropriate allocation of risk-bearing by insurance in such instances.

The final section of the conceptual framework involves institutions. Abraham's discussion of institutional roles is weaker than his discussion of the purposes of insurance. However, he does provide a comprehensive perspective on legislators, insurance commissioners, and the courts.

In the remainder of *Distributing Risk*, Abraham applies his framework to several insurance law issues. The issue of greatest general interest is toxic torts in Chapter 3. Insurance for environmental hazards, such as asbestos and Agent Orange, is problematic, Abraham argues, at least in part because these mass toxic torts generate substantial damages. Also, the deterrence value of insurance is low in this context because of the great length of the latency period, the time between the toxic risk and the injury in fact. Abraham argues that as a result, injury awards for mass toxic tort victims do little to promote effective insurance incentives.

Abraham explores several mass toxic tort issues in detail. An issue of particular note is Abraham's treatment of the limitations that subrogation has in this context. He concludes this section by advocating a new role for the insurance industry in which mass toxic tort insurance need not be mandatory. He argues that requiring insurance companies to provide coverage in this context is ineffective. Abraham analyzes a hypothetical mandatory insurance scheme and concludes that it would require the insurance industry to "play an authoritative role—perhaps even an

authoritarian one—in making decisions about the way other businesses conduct their operations.”<sup>2</sup>

In the next three chapters Abraham discusses issues of traditional insurance policy coverage. Chapter 4 explores efficiency and fairness goals in the classification of risks. Chapter 5 questions why the law upholds insurance contracts based on the expectations of the insured. Finally, Chapter 6 outlines the problems of coordinating different types of insurance coverage.

Abraham devotes one chapter to a legal topic that is currently hotly debated: risk classification. Abraham suggests an analytic foundation for approaching risk classification, which ranges from specific proposals, such as the use of mileage as a risk gauge, to general insurance objectives, such as emphasizing risk reduction in a classification scheme. He also explores issues such as experience rating, which gives any reader a firm foundation in the basic principles underlying insurance.

Using this framework, Abraham then addresses policy issues, such as the fairness of using specific attributes in classifying individual risks. Classifications based on immutable characteristics, such as age, race, and sex, are particularly controversial. Abraham argues that although there is a correlation between these characteristics and risk, linking insurance to these characteristics does not promote risk-averse behavior. Thus, no deterrence results from these classifications. At stake is higher insurance industry costs. This is due in part to adverse selection, in which individuals with high risk characteristics purchase insurance in disproportionately large numbers. Legitimate social policy reasons exist to reject classifications based on certain personal characteristics. One example of this rejection is the subsidization of automobile insurance rates to high risk drivers. Abraham suggests that this subsidization, however, represents an attempt to aid victims of automobile accidents who otherwise would not obtain any relief.

Abraham explores these and other issues with originality and insight. Although *Distributing Risk* does not exhaust all insurance law issues, its scope is reasonably broad. It is also quite thorough in developing an intellectual foundation applicable to almost any insurance problem. This book should be required reading for all insurance lawyers. It should also be invaluable to economists and insurance industry officials. *Distributing Risk* is well written and should have a major impact on insurance law for many years. Yale University Press should give *Distributing Risk* more extensive commercial production and provide aggressive advertising. This would ensure the wide readership that *Distributing Risk* deserves.

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<sup>2</sup> K. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 62.