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POST-REVOLUTIONARY LAW AND ECONOMICS: A FOREWORD TO THE SYMPOSIUM*

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The Lanec (short for Law and Economics) movement of the 1970s hit the legal landscape like a nuclear device and permanently irradiated it. A couple of decades later, as we sift through the fallout, we are entitled to ask whether anything fundamental has changed. Every contributor to this Symposium seems to answer yes. Maybe they're like the book reviewer who believes deep in her heart that the book is worthless, but if she reveals it the editor will conclude that there is no point in printing her review. Contributor Leonard Jaffee is infuriated and outraged by the vision that Lanec provides,¹ Judge Richard Posner patiently defends it,² George Cohen is troubled by a

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1. Leonard R. Jaffee, *The Troubles with Law & Economics*, 20 HOFSTRA L. REV. 777 (1992). I enjoy arguing with my friend, Leonard Jaffee, but will resist the temptation on this occasion to utterly demolish his footnoted criticism of my article on legal theories.

2. Richard A. Posner, *The Strangest Attack Yet on Law and Economics*, 20 HOFSTRA L. REV. 933 (1992). Judge Posner and I were colleagues on the law review back in law school in 1960 and have been friends ever since. He is always stimulating and provocative; he is clear; he writes beautifully; he is a joy to read. If he had not become enamored of economics, but rather had taken up a different interest, such as cultural anthropology, my guess is that the reigning discipline in law today would be cultural anthropology. And,

warp in the vision,³ and Linz Audain⁴ and Linda Schwartzstein⁵ doggedly search for ways of linking Lanec to other recent jurisprudential movements in order to prove it guiltless by association. All of these writers seem to feel that Lanec makes a difference.

Let me put my own biases on the table, if they're not apparent already.⁶ In general I applaud the greater precision that has come to legal studies through economics as well as through the other social sciences. Since many judicial decisions are proclaimed to be based on policy considerations, at minimum we owe judges sound empirical research and statistical clarity regarding social policies. Although I reserve judgment on whether, in any given case, a party's fate ought to be decided on the basis of general social policy (are judges in the social transfer-payment business?), or even *whether* broad policies can constrain judicial decision-making,⁷ at least one cannot seriously dispute the proposition that *if* policy considerations are to be assumed to be relevant to judicial decisions, they ought to be grounded upon hard data accurately presented.

But has Lanec changed the nature of the law? I'm not sure that it has lived up to the hopes or hypes of its original enthusiasts. The initial hope—one that I once shared—is to take the subjectivity out of judicial decision-making.⁸ Lanec says this can be accomplished by a

frankly, we'd be better off.

3. George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941 (1992).

4. Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017 (1992). Professor Audain tries to find a bridge that connects three subdisciplines: Crits, Law and Economics, and Feminism. He views with alarm the apparent inability of people in one subdiscipline to understand the writers in either of the other two subdisciplines. He wants to find a "jurisprudential mush" that combines the three subdisciplines, *id.* at 1058, and eventually finds it in the concept of "agency cost," *id.* at 1102. These two words solve all of our problems.

5. Linda B. Schwartzstein, *Austrian Economics and the Current Debate Between Critical Legal Studies and Law and Economics*, 20 HOFSTRA L. REV. 1105 (1992). Professor Schwartzstein proposes that a link between the Crits and the Laneckians can be found in Austrian Economics.

6. In an earlier article, I attempted to criticize several of the normative assumptions of Lanec. See Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1, 43-45 (1983).

7. I argued the indeterminacy of "policy" arguments in 1979. See Anthony D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63 (1979), reprinted in ANTHONY D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 56 (1984). For a perhaps more analytical cut at the same argument, see Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990).

8. See Anthony D'Amato, *Can/Should Computers Replace Judges?*, 11 GA. L. REV. 1277 (1977) (an early algorithm for totally objective judicial decision-making).

simple compared quantification: comparing the values of the parties by counting dollars. If the defendant values the decision more than the plaintiff, that is a good Lanec-reason to award the decision to the defendant. On the other hand, if the defendant in a tort action, for example, was the cheapest accident avoider, that is a good Lanec-reason to award the decision to the plaintiff.⁹ If in a child-custody case the father is willing to spend more dollars on the child than the mother is willing to spend, award custody to the father. The invisible hand of the marketplace, with some help from its Lanec practitioners, thus controls the decisions in the courtroom, and not idiosyncratic judges. What Lanec promises us is predictability and a thriving economy.

I. THE SIREN SONG OF QUANTIFICATION

Although worshipping the dollar is for many folks a way of life, Lanec elevates it to a moral principle. Even poor (pure?) scholars who lack dollars can at least count them. But one major problem with this approach is that economic theory concedes an inability to quantify interpersonal comparison of utilities.¹⁰ How is it possible, therefore, to compare the parties' utilities in dollar amounts? For example, in a child custody suit, suppose H is willing to spend ten thousand dollars a year on the child and W is only willing to spend one thousand. Does that mean H values the child more? Even if H's ten thousand dollars is only one percent of his wealth, while W's one thousand dollars is fifty percent of hers? Not just in this case, but in all cases, there are many other nonquantifiable values at stake. In his contribution to this Symposium, Professor Jaffee sketches in a host of these softer (i.e., non-hard currency) values. In brief, while the dollar looks like a unit of quantification of values, the only value it really quantifies is monetary value.¹¹

9. Why? Pareto says so. He assures us that these strategies will increase the quantity of the world's wealth. For a dash of skepticism about wealth-maximization, see Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989).

10. The interpersonal comparison of utilities is what law does in every case! If economics can't do it, how could economics be relevant to law? See Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53 (1992).

11. As Professor Radin has so well stated it: "In my view, the market paradigm corresponds to universal commodification in rhetoric because it conceives of the person as a profit-maximizer, conceives of all realms of human activity as competitive markets, and conceives of all deviations from competitive markets as attributable to market failure." Margaret Jane Radin, *On the Domain of Market Rhetoric*, 15 HARV. J.L. & PUB. POL'Y 711, 712

Calling on economics to decide individual cases is like calling in a plumber to do heart surgery. To be sure, the heart has various valves in it, and the arteries are like pipes, and so forth. But an honest plumber will say that you called the wrong person. Similarly, the fact that many cases involve numbers and charts (e.g., antitrust cases), and most cases involve money damages payable in dollars, does not mean that economists should decide these cases. Since economists cannot make interpersonal comparisons of utilities, they cannot point the way toward the correct decision of any actual legal dispute.¹²

Lanec, of course, disagrees. A moderate Laneckian might try to salvage the situation by saying that, although dollars cannot measure the true utilities in a case, at least it provides a quantifiable tool that can help guide the judge. This proposition is tricky because it contains a germ of truth. Judges have always taken into account the dollars involved in a case as one measure of the parties' values. And clearly they ought to go on doing so. But the dollars should be kept in perspective; there are many other values which may be more important even if they are softer. The danger of Lanec is that it puts too much emphasis on the dollars. In a sea of soft values, the dollars stand out like islands of refuge. Lanec encourages the parties and the judge to concentrate on the dollars by using charts, graphs, diagrams, and formulae, often in mind-numbing quantity. Once a judge takes the trouble to assimilate this barrage of data, it is only human to suspect that the judge will want to utilize the fruits of such hard-earned labor by seizing upon the economic "proofs" as if they provide a neutral reference point for deciding the case. As a result, the welter of economic data Lanec provides is very likely, in a given case, to swamp considerations of justice and fairness.¹³

II. COASE MEETS THE EFFICIENT BREACHER

If for the preceding reasons some of us believe that Lanec can just as easily derail justice as deliver it, we might also be skeptical that economics delivers social policies that can or should constrain

(1992).

12. Judge Posner makes the first point, but of course, not the second. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 79 (1981) ("The 'interpersonal comparison of utilities' is anathema to the modern economist, and rightly so, because there is no metric for making such a comparison.").

13. Unless, of course, you believe, along with Judge Posner, that justice is equivalent to economics. See POSNER, *supra* note 12.

judicial decision-making. To be sure, if we take away justice *and* policy from Lanec, practically nothing will remain. Hence, Laneckians seem to insist, at the very minimum, that using economics to solve legal problems contributes to good social policy.

But the strange thing is that at the very birth of the Lanec movement, Ronald Coase presented a theorem that stands for the proposition that a rational market economy is unaffected by the legal allocation of entitlements.¹⁴ Or to restate the Coase theorem, it doesn't matter which party wins a lawsuit because the market will proceed to do its business as usual (if transaction costs are insignificant). Hence, at its birth, Lanec should have been stillborn. Whatever room there is in society for economics as a social science, it follows from Coase's theorem that there is little or no room in society for law based on economics. Of course, every Lanec scholar, after solemnly intoning Coase, has proceeded to ignore the Coasean result. (It's the same thing they do with interpersonal comparison of utilities.) They have no choice; Coase's theorem is a killer.

Laneckians have deluged us with a vast number of social inferences from questions of legal entitlements. They have told us how judges should decide cases based on economic theory. They have in fact created a whole new jurisprudential religion based on stacks of dollars. But their problem was that the very cornerstone of their religion—Coase's theorem—says that there could be no such religion. Instead of being a saviour, Coase was a skeptic. Naturally, this wasn't the first time in religious history that the Founder's message was ignored by acolytes who were faced with the practical problem of raising money to build churches so as to create jobs for themselves. And so, the Laneckians proceeded to do business as usual, despite Coase's epistle. Judging from the vast amount of journal-print devoted to Lanec, and the appearance on every law school faculty of several economics-trained professors, lawyers can indeed make a living out of economics.

Let me restate Coase once more: any initial legal assessment of entitlements has no effect—in a market economy and in the absence of significant transaction costs—in determining which party ultimately gets to use the entitlement. In other words, *everything* that law is worried about, *everything* that people sue for—"who gets the entitlement?"—has *nothing* to do with what economics worries about, which

14. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

is the utilization of resources to create wealth. (Of course, as Coase said, this applies in the absence of transaction costs—but transaction costs aren't often that significant.¹⁵ They are negligible in the case that we shall presently consider—the case of the “efficient breach.”)

The irony of Coase's theorem spawning the Lanec movement is like the irony of Marxism, which failed in industrialized Europe where it should have succeeded, and succeeded in a backward agrarian economy where it should have failed. Seventy years later, the Soviet Union dissolved itself and repudiated the Marxist revolution. By the same reckoning, if we're lucky by the year 2030, legal scholars should be on the verge of concluding that Coase was right and Lanec was a largely misplaced enterprise.

Of course I exaggerate. But let me offer at least one significant example in defense of my position. It is the single example that is most discussed in the essays in this Symposium: the problem of the “efficient breach.” The notion that law ought to allow efficient breaches of contract is strongly associated with the Lanec movement and constitutes one of its claims to fame.¹⁶ Hence I cannot be accused of seizing upon a dubious or marginal example to show why Lanec is irrelevant to law.¹⁷

15. In an earlier article I argued that lawyers earn their livelihood from transaction costs, so *they* care very much about that which Coase assumed away. D'Amato, *supra* note 6, at 44. Of course from a Coasean point of view, lawyers are not adding any value to the transaction. (Strangely enough, Professor Jaffee argues against my point about lawyers by stating simply that transaction costs are “overhead.” See Jaffee, *supra* note 1, at 813. This is a strange, formalistic dismissal of an argument by a non-formalist.)

If it is lawyers who primarily benefit from transaction costs, why, then, are people willing to hire lawyers? Clearly, people care very much about who gets the entitlement. The market economy may not care, but people care. Since it is people who bring lawsuits and not the market economy, Lanec addresses and continues to address the wrong constituency. Lanec asks us to assume that, by addressing the market economy, they are saying something of relevance to individual parties in lawsuits. But this is only an assumption—an assumption that Coase proved to be wrong.

Many Lanec scholars will insist that in the real world, transaction costs will remain significant. Perhaps so. But Lanec theory tells us that it is always desirable to reduce transaction costs as much as possible, because they amount to “waste” in the system. But note what happens as we progressively reduce transaction costs: Lanec theory itself becomes progressively irrelevant! For if we get transaction costs down to zero, Coase tells us that all theories are irrelevant (for the reasons I suggest later in this Article).

16. According to Judge Posner, Lanec gave us the name “efficient breach.” See Posner, *supra* note 2, at 935.

17. If the reader wants to ponder an even “larger” example, consider the Lanec claim that the common law, on the whole, is efficient. This claim, early associated with George Priest but subsequently absorbed by the Lanec movement as a whole, suggests that sound economic principles have won out in the common law as a whole, leading to increasing

The paradigmatic case of the Efficient Breacher involves three parties. I'll follow Professor Jaffee's nomenclature and list the cast of characters as follows:

Breacher: a "primary supplier of goods for manufacturers."¹⁸

M-1: a manufacturer who contracts to purchase from Breacher a quantity of goods.

M-2: another manufacturer who offers to pay Breacher a higher price for the same goods.

Breacher, living up to her name, breaks the contract with M-1 and delivers the goods to M-2. M-1 sues Breacher for violation of contract.

Under Lanec's preferred theory, Breacher is entitled to break the contract so long as she pays M-1's monetary damages. But M-1's monetary damages are only consequential damages as in *Hadley v. Baxendale*;¹⁹ they do not necessarily include capturing the higher price that M-2 is willing to pay.²⁰ I'll call the net difference between M-1's damages and M-2's price the "higher use net amount." Breacher is the party who pockets this higher use net amount; that of course is why she breaks the contract with M-1. Lanec applauds; after all, Breacher has demonstrated, by M-2's willingness to pay the higher price, that she has found a higher and better use for the goods. M-1 should have no gripe, according to Lanec, because M-1 is getting the benefit of his bargain in damages. Indeed, the difference between M-1's damages and the price that Breacher gets from M-2 represents, under Lanec, society's gain in the higher and better use to which the goods are put. Or as Professor Cohen succinctly puts it, the law of contracts should allow "the promisor to breach whenever the breach is

efficiency. Compare that with the claim associated with Darwin: "survival of the fittest." How do we know who the "fittest" are? Simply by seeing who survived! Similarly, how do we know that the most "efficient" cases have survived the common law evolutionary process? Simply by seeing which cases have survived! Those cases that have survived we call "efficient." The Lanec notion that common law is "efficient" introduces a conservative, if not intellectually lazy, element: we can *justify* what judges do by simply observing what they do. Our justification consists in the honorific label "efficient," a label which evokes special warmth among Lanec practitioners.

18. Jaffee, *supra* note 1, at 785. Judge Posner calls Breacher "S," M-1 "1," and M-2 "2." See Posner, *supra* note 2, at 935.

19. 156 Eng. Rep. 145 (1845).

20. Judge Posner notes that consequential damages are more easily recoverable now than in *Hadley v. Baxendale* days. See Posner, *supra* note 2, at 936. However, the entire point of the "efficient breach" theory is that there exists some net difference between M-1's damages (however they are computed) and the higher price M-2 is willing to pay.

Pareto superior to performance."²¹ As Cohen explains Pareto optimality, the breach should be allowed when the breach and the payment of damages "leaves the promisor better off and the promisee no worse off than if performance occurred."²²

True, Breacher is greedy. But that is "good" and "efficient" according to Lanec. So summarizes Professor Jaffee,²³ whose own preference would be to award specific performance to M-1. Specific performance, in the case of fungible goods, would in this context amount to awarding M-1, and not Breacher, the higher use net amount.

Professor Cohen also sides with M-1, but his approach is more formalistic than Professor Jaffee's. By regarding M-1 as owning the contract rights, Professor Cohen almost agrees with Professor Friedman that the breach is a "theft" by Breacher acting in collusion with M-2.²⁴ But not quite; Professor Cohen would allow an occasional efficient breach from time to time. In his own example, Professor Cohen would *disallow* an efficient breach if M-1 wished to *resell* the contract right at a profit.²⁵ In that case, Professor Cohen argues,

21. Cohen, *supra* note 3, at 961.

22. *Id.* Hence what I call the "higher use net amount" is equivalent to society's gain. However, the entire Paretan comparison violates the stricture against the interpersonal comparison of utilities. Vilfredo Pareto left us with no metric to operationalize his formula. Economists have not been able to determine when one person is "better off." So the usual sleight-of-hand takes place: (1) Pareto optimality is solemnly intoned, and (2) comparisons are made in dollar amounts. The move from (1) to (2) is impossible, but legal economists do it all the time.

Note the inclusiveness of the impossibility. First, if two people, A and B, do not have the same wealth, then any dollar is (usually) more valuable to the poorer person than to the richer one. The wider the wealth gap between A and B, the less is a dollar a reasonable unit of measurement.

However, the narrower the wealth gap between A and B, the more likely is the destructive emotion of envy to rear its head. For example, a professor is more likely to be envious of his colleague who just got a thousand dollar raise, than envious of the president of his university who just got a twenty-thousand dollar raise or the president of a nearby corporation who just got a twenty million dollar bonus. For an illuminating analysis, see Aaron Ben-Ze'ev, *Envy and Inequality*, 89 J. PHIL. 551 (1992). Since envy is a strong and destructive emotion, we could well argue that if A pockets the higher use net amount, B's degree of envy can exceed A's sense of satisfaction. Thus, Paretan optimality might transform itself into Paretan nonoptimality in those close cases where it could otherwise be measured in dollars. Cf. Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 556 (1980). Professor McAdams would like to salvage Lanec by moving envy into the list of fundamental considerations. See Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 14-18 (1992).

23. Jaffee, *supra* note 1, at 798.

24. See Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 3-4 (1991).

25. What should we make of the later distinction introduced by Professor Cohen that

there is no efficient breach (that would award the "higher use" amount to M-2) because M-1 was in it for profit. The question I'd like to ask Professor Cohen is this: if his theory is adopted by the courts, won't *every* party in M-1's position, who naturally wants to capture the higher use amount, mouth the appropriate words ("I was in it primarily for the profit") in order to win the case? Can't we expect parties to adapt their litigative rationales to the legal formulas that can win for them?²⁶ If so, how does Professor Cohen's theory help us in the real world?²⁷

Both Professors Jaffee and Cohen end up opting for litigation as opposed to a bright-line rule. They condemn the efficient breach theory because it provides a bright line—i.e., Breacher gets the higher use net amount. They also dislike the specific performance rule (Cohen dislikes it more than Jaffee) because it says that M-1 always gets the higher use amount. Judge Posner has two better reasons for disliking specific performance: the need for costly judicial supervision, and the problem of impossibility.²⁸ But there's no point in getting hung up on "specific performance." The only point at issue in the "efficient breach" case is, "who gets the higher use net amount?" In short, it's a question of calculation of *damages*, and not necessarily a question of the extraordinary remedy of specific performance. Thus the legal issue here is simply: should M-1 be able to capture the higher use net amount in M-1's legal action against Breacher?

M-1 wins only if M-1 finds another buyer after the contract is signed? For Professor Cohen says that if M-1 enters into the contract already knowing that another buyer (at a higher price) exists, then M-1 is acting opportunistically and should be denied the resale profit. Surely, if Professor Cohen's formula is adopted by the courts, M-1 will simply withhold the information that he knew of another buyer before the contract was signed. Or, even if M-1 admits that he knew of another buyer, there is still "many a slip twixt the cup and the lip." Surely M-1 was taking a risk; shouldn't he get the reward for risk-taking? Or, to put it differently, why should Breacher get the reward for the risk that M-1 took? Breacher could have absorbed the risk himself, simply by keeping his house off the market until a higher bidder than M-1 came along.

26. I'm not necessarily talking about fabricating a strategy to win a case (although obviously this often happens in the real world). Rather, anyone in business—anyone participating in the market, as a matter of fact—can say with some degree of justification that she is "in it for the profit."

27. Actually, it can help lawyers who are informed enough to coach their clients into saying, "I was in it just for the profit," and penalize lawyers who are not current with legal literature such as Professor Cohen's article. But if promoting justice is the goal (as it seems to be for *all* of the contributors to this Symposium), then how can one defend a system where similarly situated litigants win or lose depending on whether their lawyers are conversant with the latest legal theories?

28. Posner, *supra* note 2, at 936-37.

What would Coase say? His theorem predicts that *all* theories—Professor Jaffee's, Professor Cohen's, Judge Posner's, the "specific performance" theory, the "efficient breach" theory, the "higher use net amount" calculation of damages, all of them—are irrelevant! It doesn't matter what the legal rule is; the economic result will be the same. The parties will simply negotiate so that the asset winds up in the most productive hands.²⁹ Or, in other words, you can't use market analysis for determining which theory is correct, because the market comes out the same no matter what the theory.

It is surely time to begin taking Coase seriously. Coase's theory can be thought of as a "null result" theory. Let me restate it for the third (and final) time as follows: *in the absence of transaction costs, the economic consequence of the initial assignment of legal entitlements is a nullity*. Null theories have been extremely important in the history of science. Einstein's theory of relativity of 1905 was one of them: *in the absence of friction, the physical consequence of bodies moving in uniform rectilinear velocity is a nullity*. (I've restated both the Coase and Einstein theories to highlight their similarities.)

Simply stated, Einstein's theory of special relativity is that you can't tell from any internal measurements whether the room you are in is moving (so long as the motion is uniform and not accelerated³⁰). The problem Einstein had to deal with was that it was known by 1905 that light travelled at the absolute rate of 300,000 kilometers per second. If there was a way to measure your speed relative to light's speed, you could in fact tell if you were in motion. Thus, suppose you are in a spaceship travelling uniformly at 400,000 kilometers per second. Since you would be travelling faster than any light beam, the light at the back end of your spaceship would never reach the front end, and hence you would immediately know—by virtue of this internal observation alone—that you were travelling at a uniform motion. Einstein's solution was to conclude simply that it was physically impossible for anything to travel faster than light; thus, such an experiment is in principle impossible.

Well, if you can't travel faster than light, what about a spaceship

29. There is no, or practically no, problem here with transaction costs—Breacher, M-1, and M-2 know each other and are communicating with each other. If there *are* transaction costs, the market will readily supply persons who may reduce those costs efficiently—brokers, accountants, lawyers, finders, arbitrageurs.

30. If the motion is accelerated, you can tell by dropping something and watching it describe a curved arc. This thought experiment was the basis of Einstein's general theory of relativity in 1916—that "gravity" and "accelerated motion" are indistinguishable.

travelling uniformly at *half* the speed of light? An accurate measurement inside the spaceship, and an accurate clock, could find that a beam of light from the back end of the spaceship would take longer than it should have taken to reach the front end, and *that* would tell you that your spaceship is indeed in uniform motion. This was the hardest challenge to Einstein's theory. He solved it by making an incredibly bold assumption (which since then has been experimentally proven): your time slows down when you are travelling fast. Your time slows down progressively as you travel faster, until—if you reached the speed of light (which you cannot physically reach)—your time would stop entirely. "Time" includes all your biological functions and all clocks in the spaceship.³¹ Hence, in measuring the speed of the beam of light, you would find that it still travels at 300,000 kilometers a second (because your measurement of a "second" is attenuated due to the speed of your spaceship—the "second" is longer for you). In short, there is no possible experiment you can make inside the spaceship that can prove that it is moving.³² Even though the speed of light is absolute, time itself conspires with nature to frustrate any different outcome in measuring light's speed.

Einstein's computation underlines the need to take a null result seriously. Taking relativity seriously means abandoning our basic theories about time and simultaneity—our notion of time is the same for something that occurs "here" as it is for something that occurs "there." Taking Coase seriously requires us to do something less cosmic but perhaps more cosmetic: give up all the elaborate "policy" theories that Laneckians have been spinning.

Applying Coase to the case of the Efficient Breacher, we must conclude that the world's wealth will neither go up nor down depending on whether Breacher or M-1 pockets the higher use net amount. For example, suppose Breacher has a copper mine, M-1 contracts to buy the next month's output for use in automobiles, and then M-2 comes along with a higher bid for the copper which he needs for his

31. Thus, theoretically, if you could travel at nearly the speed of light, you would grow older very slowly; when you came back to earth, you would only be a few years older but the earth would have aged thousands of years and you would find yourself in the distant future! This phenomenon has given rise to the "twin" paradox: a brother travels in space, and comes back far younger than his twin. See L. MARDER, *TIME AND THE SPACE TRAVELLER* (1971).

32. Again, with the caveat that it is moving at a uniform speed. If the spaceship is *accelerating*, then you can feel the effects. The effect you feel is one of "gravity." As previously noted, this was the insight that led to Einstein's General Theory of Relativity.

airplane manufacturing business. The simple fact of the matter is that M-2 will wind up with the copper. He will either get it from M-1 or from Breacher, depending on what the law says about who pockets the higher use net amount. What is legally relevant is economically irrelevant—namely, whether Breacher or M-1 will pocket the higher use net amount. If the rule in our jurisdiction is the “efficient breach” rule, then Breacher will pocket the higher use amount. If the rule in our jurisdiction is something like Jaffee’s “specific performance” rule, then M-1 will pocket the amount.³³ If Jaffee’s is the rule in our jurisdiction, Breacher will simply inform M-2 that she, Breacher, no longer has legal control over the copper since she has contracted to sell it to M-1; M-2 will then call up M-1 and buy the copper at the higher price.

To be sure, M-1 may be unwilling, for an undisclosed reason, to sell the copper to M-2 at the higher price. Perhaps that reason is, all things considered, the copper is actually worth more to M-1 than that higher price. If that’s the case, then M-1’s use has turned out to be, in fact, “higher” than M-2’s! Thus the copper has wound up in the most productive hands, just as Coase would have predicted.

But consider how inefficient the “efficient breach” theory would be in such a case. Under our assumption that the copper is worth more to M-1 than to M-2, Breacher would have an added incentive to break the contract with M-1, make a contract with M-2, break the contract with M-2, and go back and make a contract with M-1 at the highest price of all. Breacher gets a windfall by reneging on his original contract with M-1 and then eventually selling the copper to M-1 at a much higher price. What good is making a contract to buy a commodity if the seller can at any point break the contract and then offer to sell you the commodity at a much higher price? Breacher simply gets a windfall if the price of copper rises *after* he has contracted to sell it to M-1.

But perhaps the law could be induced to mitigate this one-sided windfall by giving M-1 an equal opportunity to break the purchase contract if the price of copper goes down. Would such a legal provision salvage the “efficient breach” rule? Yes, but only by practically

33. “Something like” Jaffee’s specific performance rule—because as I said earlier, the real question here is, who pockets the higher use net amount? A specific performance rule, of course, would be equivalent to saying that M-1 pockets the higher use net amount. My claim is that we don’t need “specific performance” to do that job; all we need is an appropriate rule of contract-law damages.

destroying contracts to sell goods. Why should either the buyer or the seller enter into a contract to sell goods if the contract is not binding on either side? If either side, after signing the contract, can break it if the price of the goods moves in that side's favor, *every* contract to buy goods will be broken whenever there is enough of a change in the price of the goods (enough to exceed the original purchaser's consequential damages³⁴) between the time the contract is made and the time the goods are delivered.

Let us return for a moment to M-1's undisclosed reason for not selling the copper to M-2 at M-2's higher price. What if the reason is not that M-1 values the copper more, but rather that M-1 wants to drive M-2 out of business?³⁵ Is that a good reason, after all, to keep Breacher in the picture and award the higher use net amount to her? As between M-1 and Breacher, Breacher may well desire to keep M-2 in business whereas M-1 may well have a motive to drive M-2 out of business. So, in this situation, keeping Breacher in the picture (and keeping the "efficient breach" rule in place) may help to thwart an attempt by M-1 to drive M-2 out of business by not selling the copper to M-2. But notice how artificial this scenario is. In the first place, if there is any danger of M-2 going out of business, Breacher may well offer the copper to M-2 before offering it to M-1—given our assumed incentive on Breacher's part to keep M-2 in business. Secondly, if M-1 really wants to drive M-2 out of business, M-1 will surely take delivery of—or take title to—the copper at the earliest possible opportunity, and then sit on it.³⁶ Putting these two considerations together, we find that the proponent of the "efficient breach" theory who uses the danger of M-1 driving M-2 out of business as a rationale for that theory, must only be talking about that window of

34. In the situation where the copper eventually winds up in M-1's hands (at the highest price), it is not even clear that M-1 can deduct from the purchase price an amount equal to his consequential damages. For in fact he would have a hard time proving consequential damages if he ends up with the copper; those damages would be clearly proved only if the copper in fact ended up in M-2's hands. At the very least, a court would consider M-1's claim for damages to be highly speculative. Thus, as a practical result, whenever the price of copper goes up, Breacher would have an incentive to break his contract with M-1 and then turn around and offer to sell copper to M-1 at the higher price. (If an M-2 is needed just to make the transaction look believable, a "strawperson" M-2 can be found. Thus we would simply be introducing another legal fiction into the law.)

35. This possibility may have been obliquely suggested by Judge Posner in his contribution to this Symposium when he refers to "high transaction costs and a possible breakdown in bargaining" between M-1 and M-2. See Posner, *supra* note 2, at 936.

36. Why? Because Breacher could always act *illegally* and sell the copper to M-2 so long as Breacher has physical control over the copper.

opportunity between M-1's entering into the purchase contract and the delivery of the goods to M-1. It is only within that window that M-2 could miss his opportunity to purchase the copper. If M-2 is in danger of going out of business, then surely M-2 should be wide awake about problems of supply, maybe even more alert than M-1. Thus, it is unlikely that the small window of time between contract and delivery will make any critical difference here. But if it does, perhaps sleepy M-2 deserves to be weeded out by the marketplace.

III. THE REAL WORLD MEETS THE EFFICIENT BREACHER

The real world of business takes care of all these problems through commodity exchanges. Unlike the academic world of Lanec and its followers, the real world finds manufacturers like M-1 routinely speculating in commodities as well as obtaining its supplies through commodity markets. For example, M-1 routinely buys copper for use in its manufacturing processes. Because copper fluctuates in price, M-1 has assembled its own purchasing staff which in the course of time develops expertise in the prognostication of copper prices. When the staff believes that copper prices may go up, M-1 will probably purchase advance supplies of copper as a hedge against price rises. It does this largely "on paper"—by purchasing copper contracts for future deliver, or even by purchasing call options on copper (or selling put options). But M-1 soon discovers that its own expertise is underutilized if its purchasing staff is charged only with assuring a steady source of copper for M-1. Thus, sooner or later, M-1 will capture this expertise—engage in efficient behavior, as the economists might say—and start to speculate in copper. If M-1's staff believes that copper will soon rise sharply in price, M-1 will purchase long-term options on copper even in excess of the amount of copper that M-1 projects it will need in its own manufacturing business. Then, when the price of copper goes up, instead of taking delivery on these long-term options, M-1 will simply sell them in the commodities exchange and take in the profit.

In the real world, accordingly, there is a blurring of the roles of M-1, M-2, and Breacher. A manufacturer, by virtue of in-house expertise, also becomes a buyer and seller of commodities. We no longer have "pure" manufacturers; we have companies which buy and sell on the input end and in some cases buy and sell on the output end.³⁷ (Food processing conglomerates are good examples of compa-

37. Many companies do not have in-house commodity experts, but rely on the expertise

nies that engage in commodities speculation both in terms of the unprocessed food stock they take in and in terms of the processed products that they sell.)

This blurring of roles, and the accelerating rise of commodities markets, practically outlaw any notion of "efficient breach." Commodities exchanges would go out of business if "efficient breaches" were possible, because that would potentially disrupt each and every option contract. Businesses need the certainty of getting the price they have bargained for. They reduce the uncertainty of price fluctuations by hedging their purchases, or even speculating, in the commodities markets. Hedging would be impossible if the seller of the commodities could break the option contract at will simply by finding someone who will offer a higher price.³⁸ (Of course, if the particular jurisdiction happens to have an "efficient breach" rule, then every commodity contract offered for sale on the commodities exchange will contain a liquidated damage clause that captures the full higher use net amount. Thus the practical effect is the same—the "efficient breach" rule will not apply in commodities exchanges.)

We therefore find that even as Lanec believes it has offered a sophisticated theory of contracts in its notion of "efficient breach," the real world is marching steadfastly in the opposite direction. I'm sometimes surprised at how unacquainted the Lanec theorists seem to be with the operations of real capital and commodity markets.

IV. DOING IT BY DEFAULT

We can reach Coase's null result without Coase. Recent legal literature encourages us to think of all the rules of contract as default rules. These rules tell us how to enter into a contract, and what the legal consequences are of entering into contracts. No one is forced to enter into a contract. But if you decide to enter into a contract, then what you get is a bundle of legal rules telling you what a contract is. This bundle of legal rules are default rules. One of those default rules in Jurisdiction X can be the "efficient breach" rule: that Breacher, and not M-1, pockets the higher use amount. In contrast, in Jurisdiction Y, the default rule can be Professor Jaffee's "specific performance" rule: that M-1, and not Breacher, pockets the higher use amount. In

of commodities brokers whose sole account is the company.

38. Nor would it be hard to find such a person. Such persons exist, by definition, as market players and speculators. Their "bid prices" control the actual price of the commodity.

brief, a "contract" means different things in the two jurisdictions because they have different default rules regarding breaches. The contract you buy into in Jurisdiction X is not the same as the contract you buy into in Jurisdiction Y, although the contracting parties are free to write their own efficient breach rules into the contract in either jurisdiction. (Of course, some rules of contract are access rules and not default rules. For example, an agreement to commit a crime is barred by an access rule—no matter what wording you use, the courts won't enforce that so-called "contract."³⁹)

The free market can bargain around all default rules. Whether the contractual rules are found in statutes and precedents, or in the actual contracts entered into by the parties, the sum total of all these rules only have the real-world effect of shifting entitlements among persons. They do not have the effect, Coase tells us, of changing the use to which entitlements are put. If the airplane manufacturer is willing to pay a higher price for the copper, he will get the copper. The question of who gets enriched—Breacher or M-1—is simply not a market question.

In sum, it seems to me simply outrageous that the Lanec movement has been able to sell judges and academicians a theory that economics is overwhelmingly important when, in fact, it has no bearing at all on the one question that lawyers and judges want to know the most about—who gets the entitlement? For all the talk in the law reviews, the bottom line is that economics is disabled from telling us whether Breacher or M-1 should get the higher use net profit.

V. HOW, THEN, DO WE DECIDE SPECIFIC CASES?

All of law is an extremely elaborate, cumbersome, yet intellectually intriguing, tautology.⁴⁰ We delude ourselves in thinking that we

39. This is just a way of saying that the government has the final say in what services it will provide to the public through its court system. If the government does not want to provide judicial protection for certain contracts (such as a contract to commit murder), then judicial protection simply will not be available for such contracts. We are talking about the definition of "contract" whether we are talking about default rules or access rules.

40. Except, of course, when one rule contradicts another. Then law is not, strictly speaking, a "tautology" any longer. In instances of contradiction, law becomes purely arbitrary—it is anything the judge wants it to be.

My best example of the tautological nature of law is to look at *any* Restatement. You find black-letter rules of law. Then you find illustrative examples. The examples follow logically from the black-letter rules. The Restatement as a whole is a neat logical construct. But the problem is, how do you apply any of the black-letter rules, or any of the examples, to the real world? We have to make numerous evidentiary assumptions—that people and their

actually “apply” it to particular cases so as actually to resolve them.⁴¹ Each case involves interpreting the law, and interpretation can often be extremely problematic, in the sense that reasonable (and imaginative) interpreters can differ in any given case whether “the law” they interpret should point to a victory for the plaintiff or the defendant.⁴²

The same is true of theories; any theory can point to a victory equally for the plaintiff or the defendant in any case.⁴³ Unfortunately, theories are the mainstay of most academic lawyers. Lanec is just One Very Big Theory. It does not and cannot solve a single case (test this proposition by hiring a leading economic expert for the plaintiff and another leading economic expert for the defendant, then listen to them argue with each other for as long as you’re willing to pay for their time or until you can no longer remember the underlying merits of the case).⁴⁴

Justice is only possible when real human cases are decided in accordance with just decisions in past real human cases.⁴⁵ The simi-

complex circumstances “fit” the apparent definitions of the words used in the black-letter rules. In any given litigation, once we know what the black-letter rules are, the entire trial is devoted to a contest of conflicting testimony with respect to whether the parties and their situations fit or do not fit into the key words in those black-letter rules. Finally, a jury (or fact-finding judge) makes the determination. How? It’s a mystery. The losing side will invariably say that the fact-finder was wildly wrong.

41. Oliver Wendell Holmes rightly said that generalizations don’t solve particular cases. Yet most judges would like us to believe that rules decide cases—it’s a good way of making it appear to the parties that an impersonal force has decided their case. Psychologically, this lets the judge off the hook. But sensitive judges know that the legal rules do not decide the cases before them—at the very least because there is no rule to tell them whether to apply the set of legal rules offered by the plaintiff in her brief or by the defendant in his brief.

When there is no rule at all, most judges make one up. But that puts them into the business of becoming mini-legislators. They have stepped out of their judicial role and become Cardozo-judges, legislating in the interstices, but legislating nevertheless. They are the worst kind of legislator, because they do it *ex post facto*—they make up rules that they then apply to the case at hand. And they hide it by pretending that they are finding and not making these rules. (This point has long been made by legal realists. I only repeat it here for the purpose of completeness. In my view, since legal rules don’t decide cases anyway, there is no need to invent a legal rule to decide a case.)

42. For a full statement of this argument, see Anthony D’Amato, *Counterintuitive Consequences of “Plain Meaning,”* 33 ARIZ. L. REV. 529, 567-74 (1991).

43. See D’Amato, *supra* note 9.

44. You can achieve the same effect costlessly by attending a trial in which two corporations are battling over a huge amount of money and the judge is known to have great empathy for economics.

45. Many of the Lanec scholars would resist my notion of justice not because they think it’s vacuous but because it takes them out of the economics business. For whatever “justice” means, it certainly is a larger notion than satisfying human wants, which is all that

larity-of-fact between cases, and not rules in texts, is the engine of justice. A judge, or any other person asked to make decisions, develops a "sense of justice" over time by the empathic consideration of many cases and controversies. A case is a human event; it is not like a word, but like a happening. A statute, however, is made only of words. A legal rule is made only of words. A word is nothing but a stimulus to our memories that recalls for us real-world instances where that word was used (including the instances in which we learned the word in the first place). Our memories are data banks, similar to collections of legal precedents. Each new case presents a new challenge to our data banks, because a new case never "fits" exactly any prior case. No legal rule, made of words, can ever exactly "apply" to any case because the words were invented and used in the past without the present case in mind. The words of the rule exhaust their compulsion upon us when they serve heuristically to recall for us past cases for our consideration. (In this regard, I've been pleased to adopt Rudolf Carnap's strikingly original philosophical position that similarities, and not words or verbalized concepts, are primitive to the human mind.⁴⁶)

The attempt to cast a wider and finer-meshed net over all human activities by enacting codified rules (or even by enacting Judge Posner's *The Economics of Law* in its entirety) is, I believe, doomed to failure. Not only do we fool ourselves in thinking that a code solves specific cases, but in fact the more fine-meshed the code, the *greater* the resulting real-world indeterminacy! This is an argument I've made at greater length elsewhere.⁴⁷

What if we did away with all rules? (Or, at least, did away with them in cases of first impression? I would then argue that *every* case is, in substance, a case of first impression.) What would we substitute? One possibility is Judicial Empathy Toward the Litigants.⁴⁸ An excellent source for examining such a possibility is Professor Jaffee's contribution to the present Symposium. If we put aside Professor Jaffee's preference for M-1 in his Efficient Breach discussion—a formalistic preference which may indeed be somewhat at odds with

economics purports to do. Perhaps Professor Cohen moves toward this larger notion of justice even as he tries to keep his contribution to this Symposium within the Lanec confines. Professor Jaffee deliberately breaks out of those confines in the second half of his contribution.

46. See Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990).

47. D'Amato, *supra* note 6.

48. I don't say it's the only possibility, but that's a story for another day.

his general dislike for formalism—there are several points we can extrapolate from his essay as a whole:

1. Even in “economic” matters, it is necessary to take a pure common law approach.

2. The pure common law knows no rules of relevance. In other words, nothing is ever *ipso facto* irrelevant.

3. The biography of the litigants is relevant.

4. In an essay on the law itself, the biography of the author is relevant.

5. If an essay is to be totally anti-Lanec, then it has to be extremely personal. Laneckians dislike personal things; they want people, like dollars, to be fungible. Laneckians strive for pseudo-objectivity, for quantization. What makes Professor Jaffee’s article seem so threatening to Laneckians is that it is outrageously personal, subjective, qualitative, unfungible, unquantifiable (and perhaps in part, according to Judge Posner, irrational). Have Jaffee and the *Hofstra Law Review* started a trend?

6. When relevance goes out the window, justice may tiptoe in.

7. Justice is achieved only after laborious and lengthy consideration.

8. In an overworked judicial system, we may have to take some shortcuts. But is it ever proper to take a shortcut if it is done at the expense of shortchanging justice?⁴⁹

9. A wise and empathic judge may be better than a judge who went to law school and got good grades.

10. Is making money for your client the only thing that counts for lawyers? Since he is so thoroughly anti-economic in his essay, Professor Jaffee surely is being consistent when he suggests that if a client is clearly in the wrong, his lawyer should try to talk him out of trying to win.⁵⁰ Horrors! What will happen to lawyers if they don’t try always to win money for their clients and themselves? Might lawyering eventually become—shall we dare say it—an esteemed profession?

49. Is Professor Jaffee’s preference for M-1 such a shortcut?

50. I’ve made a similar plea. See Anthony D’Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 3-4 (1990).