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THE TROUBLES WITH LAW AND ECONOMICS

Leonard R. Jaffee*

In this Article’s first Part, the author sets Law and Economics’ own devices against its fundamental proposition: In free contractual pursuit of personal wealth, we find the best means of serving nearly all of our legitimate interpersonal and social interests.

Using the classic "efficient breach" case as paradigm, Professor Jaffee argues that all contracts cases defy judgment of whether agreement or breach is efficient—that every such case is intractably ambiguous and threatens inefficient or vagrant costs, profits, or demoralization. He offers instead specific performance as the preferred remedy for breach of contract. He argues that neither ex ante nor ex post contractual adjustments—whether toward an agreed remedy like liquidated damages or modification of obligation—sufficiently resolve such cases or stay their threats, since we cannot ever know what is needed to compensate properly. He concludes that no formal, allocative agreement, in any case (commercial, tort, domestic relations, or any other), can be adequate to manage reliably or determinatively the interests we would have it serve or protect, and therefore, that Law and Economics’ fundamental proposition is unsound and we are foolish to rely on such agreements.

In Parts II and III, the author demonstrates—through the protagonist of a dialogue—that Law and Economics has an even deeper flaw, a mentality that Professor Jaffee sees as both causing and following grave psychological ills. The protagonist observes that Law and Economics infatuates itself in a preoccupation with allocative efficiency—to the virtual exclusion of critical considerations like vast under-utilization, and the consequent dire waste of our resources (including our health and psychic lives, even life itself). He argues that Law and Economics does not merely

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In a few instances, I’ve caused citation form to deviate from what The Bluebook prescribes. I alone—not this law journal’s editors—am responsible for these deviations. The deviations are just formal—mostly use of parallel citations to state court cases, citations that give the reader security—reference always to official reports (which, sometimes, regional reports don’t accurately copy).

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promote a measure of wealth and welfare which entrenches the existing, harsh wealth distribution, but it propagates a vital misconception of what constitute wealth and welfare, their substance, sources, and meanings—a misconception that vitally diminishes humanity, and life. These faults owe themselves to a belief that greed best advances social wealth and welfare.

In Part VI, the author offers paths toward solutions that are implicit in the critical implications of Parts II and III. Paths that lead to simplicity, feeling, instinct, intuition, and empathy; away from money, efficiency, and greed.

FOREWORD

What follows is mostly the work of the late P.J. (Phillip Joseph) Anachronis [Ah nah KRO nees], my dearest friend and near alter ego. Mostly I'm just editor.

The body's first part is much an unpublished paper he delivered at a symposium on Economics in Law. I combed and filled it out a bit, as Mozart's student completed the Master's Requiem. The rest is mostly a record of his chat with Moderno Conoscenzo, who attended the original paper's delivery. There I contributed turns of phrase or idea, and little briefs to make ties you may need.

Some footnotes are mine, but most his. He didn't care whether I distinguished them; and, since my computer program won't let me run two footnote streams at once, I ran them together, as if all Anachronis's, or mine.

The Preface, too, is near-all Anachronis's (my work there, as elsewhere, mostly editorial). It handles the body's four parts as if they were the same, in order and circumstance. Anachronis's mind worked that way—saw his whole past a single, unifying source, its contents indiscrete in motivation, even (save as in dreams) in time.

In the first part (or point, as Anachronis put it), the talk is with you, in the second through fourth, Moderno. For Anachronis, all communicants became the same—universal others to whom he offered up his sight, though none might apprehend. He never offered sparingly, in resignation or ware, as (Camus notwithstanding) Sisyphus presented rock to heaven, but with animal faith, as Kierkegaard's wight postman carried mail. He often read Kierkegaard.

L.R.J.
Preface

Law and Economics says we ought to make our welfare with efficiency. Sometimes it defines "efficiency" in high terms, with names like Pareto Optimum: 'A state is optimum if any change would hurt at least one person, help no one.' Or Pareto Superior: 'A move is more efficient if it makes at least one better fixed, and nobody worse off.'

But its everyday words worship greed: "A rule is efficient if it maximizes profits from market transactions."

To avoid silly, sidetracking dispute, I'll confess one might define "efficiency" in ways that make Law and Economics scholars happier, or less annoyed. I'll admit that the third definition must account for lack or fault of information, for transaction costs (which include the costs of getting and judging facts), and for externalities; and I'll account for these problems more than Law and Economics won't. I'll concede that, as Law and Economics understands it, "greed" is not essentially bad—includes "a dynamic desire for improvement of personal welfare."

But such smoother meanings' cool rococo music belies the normal—real—emotions. And I won't concede I ought to substitute another word, like "eagerness," or that I ought to call the greedy "enterprising."

At Law and Economics's heart is defense of gluttony. It says we're hopelessly avaricious, but apologizes that our manifest greed incidentally reaps arrays of benefits more valuable than passionate work, joy in life, love and giving, the resonance of empathy. And that's trouble.

Oh, greed and gluttony aren't bad. But each is sick. Sick, not bad. Each is hunger out of incompletions of self—frailties of ego, if you wish—a damming compensation in craving woven into character. But that's not my only point. The social effects make sickness—even inefficiencies, impediments to welfare. Now I read my last sentence, and I think that, despite its raking, it's dishonestly genteel. I ought to have said: These hungers come of hurt and deprivation, parent hardship, longing, pain.

So, I have two big gripes against Law and Economics. One is that it's sick and spreads sickness. The other's that it doesn't work in ways it claims, or do what it pretends.

The second gripe is lesser, except in its bearing on the hard costs—the costs to feeling creatures—in the consequences of the
pretense and cheat. I'll give it a little less space.

Here's my plan. With a simple case, I'll uncover Law and Economics's illusion, defaults, their harvest. I'll speak to you as if we had the law that lawyers think we have, and as if the law were whatever one wants. I'll bare Law and Economics's root flaws, misfocuses, deep lacks—get down into honest talk about its sickness and harm. I'll offer alternative, for lawyers and for all.

Before I start, I need to make a disclaimer, a statement of what I suppose you'll call politics. And I need to explain my style.

Politics: I'm not a Marxist, or Socialist—anything of that left. Libertarians are too formal, too often ignorant, of hard fact or sound sense, the casts of feeling. I'm an anarchist of a sort like Kropotkin. I believe, without hope, that we, and the world, need us to live in empathic order, with the justice of empathic adjustment. If I know anything, I know only this: We defraud ourselves with intellect and its words, know nothing but what we feel, don't feel enough, and too often bad or not good. Those are my most pertinent biases and beliefs.

Style: In my first point, you may find my style just a little informal, sometimes a little too personal, especially for the topic and exercise involved. You'll notice a dearth of authority (except where object of criticism).

Ideas are sound because they're sound; or they're not. Heavy language is sloppy thought. I am my words when I say them, and they are my responsibility. Dispassion and detachment pretend, mask bias, lie, cover truth, emotional truth.

In my second through fourth points, you may find my style bizarre, dramatic, too intimate and blunt—upsetting, gripping at times, or irritating, maybe outrageous. You may want to think it's out of

1. See Peter Kropotkin, Mutual Aid (Huxley ed. 1955). Arnold Patent made a modern, practical variant. Arnold Patent, Death, Taxes, and Other Illusions (1989); Arnold Patent, You Can Have it All (1987). Arnold's on the right track. But he hasn't seen enough of the positive importance of biology, the biological need for pride, for active release of repressed emotion, for the taste of retribution just as for the ecstasy of love, even for the right food made the right way. And he depends his premises on his own religious visions, which, however lofty, can't be anyone else's. Sometimes his suggestions are assertions that beg questions he answers with weak explanations or bare insistence, and the reader is left to faith unearned. Too often he sets his prescriptions on "universal principles" of unclear stuff and origin, or on the design of "God, the infinite," in whom one may believe and place hope, if one wants, but whom, so immensely beyond, no one can prove or know.

place in a learned periodical. You may wonder why such letters would emerge in this piece, from the person who argued my first point so rigorously.

We need not learned theory, discipline in law, but sense and feeling, feeling's sense. I hope to get your mind's attention, and your credence, with the rigor of my first point, and so earn your attention through the rest. I hope you'll think: "If he can dissect so logically, deconstruct so carefully such hard formal matters, maybe his other offerings deserve my indulgence."

I hope I'll reach your sense outside your mind, appeal to your feelings, deep feelings, touch you in places and in ways that commend you away from intellect and into your humanity. I open my person, friendships, loves, my life, even my failings, so you may believe, emotionally, what I say, take it seriously even where it hurts. Only in these ways can I offer you what matters of what I have, get you to see what matters in you and humanity.

My hope needs fitting language—of deep sense, of feeling, insight, intuition, of palpable empathy, the language of drama and poetry. I can't touch your humanity through rhetoric, or the diction of mind.

If I want you to know a condition, I must show you, as your living it would. I can't declare a feeling's truth. I must give you vivid means to taste it as yours. If I want you to reach an apprehension I've absorbed, I must put you in it, as if in your life.

So, much of my latter points' unfoldings flow through snatches of real, felt events recalled in story and poem, in dialogues and tales that may speak to you as dreams, surreal allegories, like Baghavad Gita or Kierkegaard's Abraham and Isaac (Fear and Trembling)—except they're true, but for some names, changed for the sound of it, or to protect innocents. (Oh, wait. I use dramatic license twice, just twice—in painting a gesture of my now wife, and in casting a scene from the lives of Maggie and Rollo and their twins—but only to tell you emotional truths untainted with the dry clutter of pure history.)

I guess I'll get some sarcasm, like Posner's reactions to some good, even vivid, pieces that tried to encourage our simple humanity, feeling's sensibility, to resurrect empathy where intellect has controlled through hard fathers in our economics and law.3 That's a risk

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I take quite knowingly, a risk that rides as fleas the only talk that counts—of heart and gut, with you where you really live, if you live.4

PART I: THE ILLUSION

A. Prologue

Law and Economics people mostly write about allocative efficiency. Sometimes their topics seem to be others, like the rationality of requiring certain disclosures from corporate stock dealers in primary or secondary markets. But then, too, the topic's the same—in the case I just gave, the efficiency of a certain cost-of-risk allocation. And the doctrine's the same: "In most cases, contractual allocations are better than governmental ones." So at this point I'll limit my criticism to Law and Economics's thinking on allocative efficiency.

Coase's famous cattleman/farmer hypothetical illustrates well the failing of the Law and Economics religion. It tries to teach the doctrine that liability—hence law—is irrelevant to allocative efficiency if competition and information flow are perfect, and transaction costs and externalities are zero. The supposed corollary is what I restated above—the superiority of contractual allocations. But both beliefs assume away ubiquitous troubles—inadequacy, and indeterminacy, of information and its meaning, unavoidability, and indeterminacy, of transaction costs and externalities.

These beliefs assume that market price is market value and that market value's "true" social worth. But the market's always part blind and deaf, and rarely fathoms what it wants. And suppliers are always errant or late in their senses of price.

We are sublimely silly to imagine that any human contract can comprehend all the benefits and costs that it, or its breach, may effect, because we can't identify the implications, but only artificially define them. These troubles are true if only since no one can be certain of the "true" spread, depth, or elements of any definition of anything, especially matters so subjective as benefits, costs, the relevance, or meaning, of information, value, valuation . . . .

So, for instance, no supplier can ever know whether any actual price is a "true" one (the price the consumer would really know to be the highest he would pay if he knew everything relevant). No suppli-

(1986).

4. See Jaffee, Empathic Adjustment, supra note 2.
er can ever know, unless too late, the true cost of any investment of her factors of production or any choice of disposition (its terms or realization, or anything else about it).

If Law and Economics answers that the imprecisions of "free"-market contractual allocation are lesser than those of any other system, my response is that the answer is unprovable. No one can secure enough of the relevant information. If we had it all, still no one could be sure how to interpret it, if only since no one can be certain how to gauge a measure like value or valuation.

If we had a regulation system free of corruption (of all corruption's forms), that system might be less imprecise simply if it could mandate normally effective definitions where the free market's subjectivity and indirection preclude them. If, now, Law and Economics answers that all regulations' words must be ambiguous and so, too, their definitions, my response is that the answer proves my point. Like all symbols and ideas, all Law and Economics language is ambiguous.

5. Please remember that I'm an anarchist, not a socialist. I argued regulation's "superiority" only to further my criticism of Law and Economics, not to propose more government. Economic interests and disputes are worth social adjustment only when they, and their remedies, are personal. What of the social interest in Law and Economics, or in any socioeconomic system? It is a symptom of mass psychological disorder. The cure must be personal, rather psychoanalytic-like, in the end, a return to the simplicity of "primitive" feeling. In Parts II through IV, I make this the subject of much talk, from many angles. See also Jaffee, *Empathic Adjustment*, supra note 2.

6. I'll answer later whether "free-market" economy means more freedom and utility. That question needs more stuff and space. Here I only want to introduce the problem of indeterminacy.

Every good poet knows just two things: (1) Only feeling is real. (2) All words, even those of just one meaning, are ambiguous, because all symbols depend on the uncertain designs of their makers and circumstances and the uncertain perceptions of both sayers and receivers. Eventually rhetoricians saw most of the poet's second truth. See Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 152 n.16 (1990) [hereinafter D'Amato, *Pragmatic Indeterminacy*]. Legal Realism, now Critical Legal Studies, has extended the truth to Law and Economics. For a brief overview of the extension, see Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 508 (1986). Compare Anthony D'Amato, *Can Any Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989). But see infra note 21, for my criticism.

But this is very abstract. Let me offer a case of substance.

I pick a matter appropriate to test law’s tendency not to decree specific performance, but to remit claimants to limited “expectation”-damages. Law and Economics people like this tendency (doctrine of “efficient breach”), think it efficient: Since Breacher wouldn’t breach unless the breach would net Breacher a gain even if Breacher has to pay the other party that party’s consequent loss, the breach must be efficient. Breacher must be able to net a profit that implies that the market values Breacher’s alternative disposition more than it would value the disposition the contract required.

Why this case? Remember Law and Economics’s central idea, that we order our affairs best, most efficiently, with free-market transactions, with contractual, rather than legal, solutions. A corollary is that law ought not interfere much more than to put parties in the positions they’d be in if they’d realized appropriate contractual advantages. Appropriate contractual advantages are efficient ones.

But what if the corollary fails, works inefficiency, even diminishes welfare? Law and Economics will argue that the fault isn’t its central idea, but law, or bad law, or bad judges, or mistaken or inefficient lawyers and businesspeople.

Not so. The proof is: With or without law, no contractual provision can avoid or solve the problems that infect legal or social efforts to make contractual arrangements work efficiently, with net welfare

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_ing Indeterminacy with One Bold Thought, 85 NW. U. L. REV. 113 (1990); Stanley Fish, Don’t Know Much About the Middle Ages: Posner on Law and Literature, 97 YALE L.J. 777 (1988); Stanley Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 TEX. L. REV. 551 (1982); STANLEY FISH, Is THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

Disclaimer: Though D’Amato and Fish offer very useful analyses, I can’t support all they say. Elsewhere (in Unknowability and Friends, infra), I take both to task.


Right now I’m also writing a piece that puts the poet’s whole view. It’s called Unknowability and Friends. I expect it’ll be published about when this is; until it is, the manuscript will be available through this piece’s publisher. Meanwhile, wait till you get to this piece’s third part, The Etiology, which offers related insights.

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If you journey backwards from a case of "efficient breach" through an "efficient" legal remedy, you may discern the essential, incurable defect in Law and Economics's central idea. You see critical failures in the root corollaries. You must then wonder whether the idea, itself, is essentially flawed. Can an extralegal, purely private, market transaction cure the ills that the legal apparatus created or couldn't undo? I'll try to show you the answer's negative, the central idea doomed.

B. The Test Case—Industrial Supply

Breacher is a primary supplier of goods for manufacturers of various products. Breacher made and breached a goods-delivery contract with manufacturer number one ("M-1"). M-2, a manufacturer of a similar but different product, offered more for the same goods, and Breacher couldn't supply both M-1 and M-2. The law remits M-1 to the damages rule in Hadley v. Baxendale (or some similar recovery rule). The remedy makes M-1 "whole" as law thinks M-1 deserves. Breacher isn't accountable for losses that are either "beyond" Breacher's "notice" or too "remote" (maybe losses of bargain, good will, or advantage, losses against which M-1 can plan or insure but Breacher, a very "valuable" kind of firm, can't, not viably, or efficiently).

C. Legal Rule's Effects in Open and Closed Markets

Now assume both Breacher's market and M-1's supply are open—geographically and numerically. If M-1 must pay another supplier—the only one—more than the price set in M-1's contract with Breacher, Breacher will pay M-1 the difference. If M-1 takes M-1's future business elsewhere because M-1 can't sustain reliance on Breacher, Breacher still will have a market for its goods, and at M-2's price. No net loss, but a gain to Breacher and society, right?

Why would M-2 pay Breacher more than what M-1 promised? Maybe Breacher's price to M-2 was less than the other supplier's. If so, Breacher would have to pay M-1 damages greater than the differ-

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7. I know the standard retort—that Breacher wouldn't breach because damages would be greater than the gain from switching to M-2. But bear with me while I take you briefly on an unexpected route. Later (see infra note 14 and surrounding text) I'll map the startling relationship between an "efficient" breach's likelihood and the state and cost of alternative supply. The relation carries devastating implications for the doctrine of efficient breach.
ence between M-1’s and M-2’s prices. The loss would be heightened by settlement or litigation costs. Whether society would profit, break even, or not, would depend much on whether (as, here, supply price wouldn’t tell) M-2’s use is good as, better than, or inferior to M-1’s. Breacher didn’t breach because of M-2’s product’s value. The breach imposed the cost of making an extra contract. So the breach doesn’t prove its utility.

If Law and Economics answers that a rational Breacher would have accounted for the price M-1 or M-2 would have to pay another supplier, my rejoinder will be that Breacher may not have had the right information. Another supplier might have set price to reflect knowing Breacher’s breach forced M-1 to find alternative supply—in haste. Or the supply market might have changed just as Breacher breached, and M-2 may have anticipated this. In neither case ought ignorance save Breacher from paying for the consequence. Unlike Breacher, M-1 couldn’t have had timely or useful notice. Breacher either caused or made manifest their information deficiency’s cost.

Suppose M-1 can’t find alternative supply, loses product contracts. Or M-1 can’t make or perform the contracts because alternative supply isn’t timely. The contracts made M-1’s reason for dealing with Breacher. The law won’t make Breacher pay M-1’s loss, unless Breacher had timely notice of the prospect (when Breacher contracted with M-1).

Law and Economics will say efficiency’s served: Breacher wouldn’t breach if Breacher knew the prospect would cost Breacher damages that would eat up Breacher’s gain from selling to M-2. Therefore, either the damages wouldn’t swallow the gain or Breacher hadn’t notice that it might. The latter’s M-1’s choice (lower price but chance of loss). The former’s Breacher’s and society’s gain.

But that analysis assumes away too much. Suppose, for instance, M-2’s product isn’t more valuable than M-1’s, but much the contrary true. Breacher promised M-1 lower price because of M-1’s bargaining skill, unrelated to Breacher’s market or M-1’s profit expectation. Society would lose getting M-1’s more valuable product (that M-1’s buyers will buy at price higher than M-2’s will pay) at lower cost (M-1’s lower payment that would let M-1 put more into M-1’s more valuable enterprise). Breacher’s profit would follow M-2’s poor bargaining, not supply’s or product’s worth.

Law and Economics may want me to start with a cleaner case—where Breacher had perfect information: The problem of information is separate from the problem of allocative efficiency.
Nonsense. You can’t test efficiency except against circumstance. It’s a matter of act and effect, and they, starting with valuation, are perceptions. Yet no one ever can know all of what may be relevant or how perfectly to interpret what maybe-pertinent evidence is available. So you model absurdity if you exclude the problem of knowledge by assuming it perfect.

Breacher can’t know enough because even M-1 can’t. The breach’s effects will happen the rest of M-1’s life, maybe forever.

You may want to disregard “remote” ones—slow shifts in the subtle ingredients of trust or respect, emotional changes among M-1’s employees, their families, acquaintances, creditors, pets—the kinds we try to train each other to forget, even before they occur, or pretend away. But they issue whatever your preference, and they bend affairs by myriads, through our psychologies, our future apprehensions of maybe like cases. And you need question deeply, carefully, why you, law, or Law and Economics may want to deny them attention. They make our lives, however hard you insist on their inconsequence.

You may think such costs too thinly relevant to allocative efficiency, or too “idiosyncratic” and “actuarially unmanageable,” or better shunted off to a tort law that will think the same things. Your thinking would reflect your choice to warp and narrow, unnaturally, your vision of what wealth is and what gives it. I’ll criticize that choice’s real content and psychology in a dialogue I’ll report in Parts II through IV, below. Here is for testing just its coherence in working theory.

So, assume, for a moment, that Breacher knows all Breacher must to predict whether breach will net Breacher gain despite Breacher tenders M-1 damages. Suppose Breacher will net gain, and M-2’s product is more valuable than M-1’s. Still, society may lose.

Suppose Breacher keeps on breaching, every time an M-2 offers more than an M-1, just as the doctrine of efficient breach intends. Each time, Breacher nets a gain, even after Breacher compensates the victim.

Assume, as Law and Economics does, that legal doctrine influences commerce, buyers too. Although the other supplier will charge a premium despite its supply’s not better than Breacher’s, buyers may react to Breacher’s unreliability, switch to the alternative, permanently. But either they’d gone to Breacher because of the alternative’s premium, or the alternative will charge the premium because they felt compelled to switch. So they may instead arrest or slacken buying, turn to next-best uses.
No matter, says Law and Economics. Breacher’s conduct has both front and back. The switching buyers see its back. The front is that Breacher’s performance tracks greater profit. If profit reflects value—of Breacher’s supply to alternative buyers or those buyers’ products to the market—it will offset any premiums the alternative supplier may charge and any buyers’ demoralizations and withdrawals. Both Breacher and society will net a gain.

But the offset’s an assumption that reality may well belie. Whether Breacher will find more M-2s depends upon how many empathize with M-1. Breacher’s conduct may cause a spring of M-2 metamorphoses, especially if M-1’s only remedy is judgment for the premium, despite the extra transaction cost of dealing with the other supplier and the expenses of any concessions to M-1’s purchasers anxious over delays.

Suppose M-1 could recover losses of contracts that faded because the premium forced M-1 to ask a price higher than M-2 asked or because M-1 couldn’t get timely alternative supply. Still M-1 would not recover the extra costs of dealing with the other supplier, or settlement or litigation costs, or incidental harms or expenses that no one may have foreseen. Then M-1 might drop his product’s quality, and maybe lose more customers, or invest in other, maybe lesser, opportunities. These events, together with the pressure of Breacher’s unreliability and its effect on M-1’s reputation, might ruin M-1, and maybe move like buyers to next best uses.

The situation might give M-2 markedly superior position (because of lesser competition). M-2 might gouge customers.

Whatever its value, M-1’s product is valuable—if only to customers who can’t or do not want to pay M-2’s prices for M-2’s product and would be satisfied with M-1’s. Even if, as Law and Economics insists, economics ought not account for an allocation’s wealth-distributive effects, still, many to the poorer or frugal may, in fact, mean more wealth than would few to the rich or extravagant.

Suppose Breacher hadn’t timely notice of M-1’s product-contract expectation (and wouldn’t owe M-1 its loss). Breacher set M-2 a price just marginally higher than M-1’s was to be. M-2 could profit even more from gouging customers, while M-1 might have offered them a near-same product at much better price. The difference, a market cost, wouldn’t even be Breacher’s gain.

D. Efficiency and Indifferent Wealth-Maximization

Here Law and Economics may assert the Coase theorem. Social
welfare is aggregate wealth. So law must care about maximizing wealth, not whose wealth is maximized.\textsuperscript{8} It may be M-2’s, and need-

\begin{itemize}
  \item \textsuperscript{8} I accept only for argument, just here, the “rightness” of not caring whose wealth is maximized. We ought to care. Some, many, many too many, don’t have enough wealth in their deep poverty. Others have much too much money and acquisition yet still little or no wealth; they’re often poorer than the poor. See infra Section I of this Part and Parts II through IV.

  \begin{itemize}
    \item But those are matters of feeling. This Part’s purpose is elsewhere—the illogic and logically untenable theory of Law and Economics. And I ought to offer here a logical deconstruction of Law and Economics’s Credo that allocative efficiency is sufficient for the achievement of wealth maximization and that an allocation’s wealth-distributive effects are either irrelevant to wealth maximization or inappropriate for economics’s consideration.
  \end{itemize}

  \begin{itemize}
    \item Economics, and law, are unscientific, and risk a war, or tyranny, of tastes. Law and Economics says, if they account for who has, or ought to have, wealth. If we treat a dollar as a dollar whoever holds it, we keep analysis “objective,” “scientific,” “rational,” keep it free of froward moral imponderables, like who’s more valuable, or needier. See Richard A. Posner, \textit{Law and Economics Is Moral, in Debate: Is Law and Economics Moral?}, 24 VAL. U. L. REV. 163 (1990), replying to Robin Paul Malloy, \textit{Is Law and Economics Moral?—Humanistic Economics and a Classical Liberal Critique of Posner’s Economic Analysis}, 24 VAL. U. L. REV. 147 (1990).
  \end{itemize}

  \begin{itemize}
    \item So suppose an “unnatural” monopoly. Law and Economics says we oughtn’t to impeach the monopolist’s desert of the wealth redistribution he receives—from those who pay his inflated price, a premium they could have kept or spent on more value, had they not had to pay it to him. His purchasers may be more disgustingly avaricious than he, or he may contribute the premium to worthiest charity. We ought only ask: Does the monopoly net society a loss through deproliferation of purchases (because the monopolist’s purchasers can’t buy the second things they could have bought with the premium they must pay the monopolist) or through buyers’ resigning to a lesser, “next best” alternative because they can’t afford or refuse to pay the monopolist’s price? Compare Posner, \textit{Law and Economics Is Moral, supra}.
  \end{itemize}

  \begin{itemize}
    \item Nonsense. (Or sincerest sham?)
  \end{itemize}

  \begin{itemize}
    \item What makes a good or service “next best”? The “reason” is subjective valuation based on imperfect, even stilled, information, conditioning, and education.
  \end{itemize}

  \begin{itemize}
    \item What makes us find a “loss” in a failure of second purchases? The “reason” is just subjective opinion that the second things are good and the first thing (the monopolist’s offering) insufficient.
  \end{itemize}

  \begin{itemize}
    \item If people keep buying the monopolist’s offering, is her price “right”? Its “rightness,” or “wrongness,” is illusion that happenstantially conditioned and imperfectly informed subjectivity makes “real.” One man’s decent deal may be some woman’s folly.
  \end{itemize}

  \begin{itemize}
    \item Still, Law and Economics says these events are “objective” signs because they’re expressions of the market—a proliferation so vast that it must reflect a valuation one can call “normal,” “unbiased.” But our markets are proliferations born and raised of biases—misapprehension, unhealthful conditioning, stupidity and abysmal education, false, inadequate, or greed-warped information.
  \end{itemize}

  \begin{itemize}
    \item Americans have bought billions of McDonald’s hamburgers, fries, and Cokes, and our government’s subsidized (with a one-year payment of $10,000,000 of our tax money) McDonald’s dumping more of them on once-healthy Japan (see infra note 44)—despite the undeniable truth that such food and drink are deadly as the American diet is pathological. True rationality makes absurdly irrelevant whether McDonald’s has competitors or the market a choice like that company’s stuff. See also infra note 43.
  \end{itemize}

  \begin{itemize}
    \item For a couple centuries, the market—the pricing system—has preferred white bread to
  \end{itemize}

\end{itemize}
dark and disdained whole grain for meat, at the cost of prolific disease and early mortality. But peasant poverty's wisdom has prevailed just in absence from hospital beds. Maybe the market's taste will be damned as it's damned our health. But I can buy five pounds of organic brown rice for what you pay for a pound of sirloin or rump roast. See also infra Parts II through IV.

If the market is the measure, you can say that money in your hand is more valuable than in mine if you can say one product's better and another's next best. If your taste prevails, so does your money, and its capacity to multiply, through savings or power as in number. To dollars, your possession and mine are uses just like one product's purchase rather than another's, and none has value more or less uncertain than the rest.

A widget's market value is how its market values what the widget does. My market value is how the market sees what I can do, if only through my looks.

Humans are products or resources to other humans, even if none's your idea of a slave. Measured against the "best" potential employee, another employee's an employer's next best use. In the eyes of economics—honest, consistent economics—the same's true of mothers, fathers, daughters, sons, husbands, wives, friends, lovers...everyone. As my dogs are my children, some others' children are their dogs.

This truth isn't limited to people's special capacities to render services. It also lives in the product market. Your product is "better" than another's because you were able to design, produce, and market it so. Its "goodness" and "worth" are direct functions of your unique ability and imagination—about as much as they are functions of others' subjective appreciations of those qualities or their manifestations in your offering.

If the market says I'm worth less than you, then money paid to me is partly wasted if it could have been paid to you. The market wants you, more than me, promoted. It believes you offer more with what you have. So money in your hands is worth more than in mine.

Money has subjective value. And its worth differs hand to hand, culture to culture, group to group, not just by geography.

Because of variance in cost-of-living and social milieu, an Alabama dirt farmer's dollar may be worth "objectively" more than a New York City condo dweller's, just as a Deutsche Mark in France isn't a Deutsche Mark here. The business and credit markets will treat very differently a Ross Perot's cash investment and mine, though the dollar amounts are the same.

Money's not just medium of exchange, but a good. And we purchase it as we do food and auto leases.

It's a security—a claim against a treasury. We buy it not just with obligations, payments of interest, or different currency (dollars for yen), but with other goods.

A merchant negotiates its price when she adjusts how many of what kind of thing she offers to pay for it. "He'll give 3 oak ricks per $100? I'll give 4, mixed hardwood."

To say it's "legal tender" or "medium of exchange" is to deny reality. Try getting a swank hotel room on a deposit not of a credit card voucher but cash. Try giving a $20 bill to an inner city gas station attendant just after midnight. See also D'Amato, Pragmatic Indeterminacy, supra note 6, at 167-70.

Even wealth is a good of value that varies from person to person. Whether I have this or that amount of wealth will do much to determine whether I can exact this or that payment for being guarantor or surety or offering my backing or my name to a product or service venture. But if I got my wealth by inheritance and haven't wisely and notoriously invested it, it won't have the wide influence it would if I earned it through brilliant and famous entrepreneurialship. I may get more for my dollar-value in fancy restaurants, but not at the bank.

This Part demonstrates that Law and Economics works blithely with subjectivities like
n't be Breacher's or M-1's, or the poor or frugal rather than the rich or extravagant. Welfare improves if only the few rich and extravagant pay M-2 an aggregate greater than the total of what all poorer or frugal customers would pay M-1.

If M-1's use were more valuable than M-2's, M-1 ought to have renegotiated with Breacher, beat M-2's offer, if the amount would be less than the least premium M-1 would have to pay another supplier. If M-1's product can substitute for M-2's, then one might say the

market valuation of goods and the wealth maximization implications of allowing a crop farmer, rather than a cattleman, a certain resource. See also infra note 21 (cost allocation). So where is its cause, in reason, not to work with subjectivities like whether wealth will be more valuable if distributed to consumers rather than monopolists?

Law and Economics's method—its "science"—doesn't avoid distributive considerations. It merely shifts levels of distributive concern—from the corrigible to the mysterious.

To say that a monopoly may net "society," or "the market," a loss is to say that the monopolist obtains wealth at the cost of many, many other, un-named people treated as a mass rather than a collection of individuals. But the social or market loss must translate into wealth deprivation for this Sarah or that Jim.

So long as Law and Economics pretends that the trouble's an amorphous, unindividuated one, it can, it thinks, pretend that its analyses don't imply valuations of competing wealth distributions. But if you expose the pretense, you see that Law and Economics's "science" is a farce.

What's the true reason for Law and Economics's insistence not to take account of wealth-distributive considerations? It's threefold.

First: The Law and Economics character can't endure the emotional and intellectual ardor or moral responsibility one must spend to value, openly, competing wealth distributions, or people.

Second: Though that character says its libertarian taste recoils from the presumptuousness of judging people's values, it means it's satisfied with the distribution tendency it sees—a narrow one, toward powerful gluttony and greed.

Third: To convince itself that it's objective and scientific, and so less morally or socially accountable, it lures itself to believe that logic or statistics can measure allocative efficiency (where it can't evaluate distributive merit)—despite the measurer must rig facts and premises. If the statistician can't quantify a variable, or the logician specify it, she either cons us that she can or cheats the item from her calculation. Her method depends on artificial premises—the law of large numbers, the normal curve and standard deviation, the validity of Aristotelian generalization and the existence of discrete, absolute facts, the availability of true prior probabilities . . .

Imponderables, of fact as well as moral, blur the relative values of resource allocations—about as much as they do the relative values of distributions of wealth. Taste—really character—explains the choice to see one set but not another. For Law and Economics to lead us with its "science" is for Law and Economics to impose on us its taste, a dominion of its prelates' characters.

Lest you think this footnote implies I'm a socialist, I ought to tell you I oppose redistribution and regulation, except by extralegal distributive justice. I oppose law as much as economic regimes. See supra text related to note 2, and Jaffee, Empathic Adjustment, supra note 2. The problem and solution are for individuals, inside, and for parents and the very few good psychotherapists, or zen masters, or nature apart from humankind. See infra Parts II-IV; Jaffee, Empathic Adjustment, supra.
renegotiated price would be what M-1 ought to have offered in the first negotiation, since Breacher's supply would serve M-1's manufacture the same as M-2's. Or one might say the renegotiated price is efficient because it doesn't put M-1 to the next best use (that involving the cost of the premium the other supplier would exact) and because the drop in M-1's profit may be offset by M-2's investment elsewhere.

But in the first case, the total of M-2's gouging profits may not offset M-1's ruin or switch to next best use. The problem's cause isn't profit for real value, but for the postural advantage M-2 got because of M-1's business misfortune. And maybe (I'll build this point in Parts below) a bowl of rice means more to the starving than to people fatted up on pheasant and cherries jubilee—an allocative, not distributive, consideration.

In the second case, the drop in profit may not be offset. M-2 may have offered too much, because she misread the market. And the question isn't value to M-1's manufacture, but value to M-1's business. The other supplier (S-2) may demand a premium because Breacher threatened breach and S-2's the only remaining supplier, or because S-2 wants to weaken Breacher through a profit-eating money judgment. M-2 may not be able to find the right investment—or any in time to keep afloat, not because M-2 isn't valuable, but because she's new and circumstances changed, uncontrollably, for the worse.

The market will lose M-2's utility. Breacher will win. Both M-1 and M-2 will lose. The market will pay a higher price, if it doesn't get inferior product. And the new arrangement didn't account for demoralization, an indiscriminate malaise.

Suppose Breacher often breaches but knows and accounts for each M-1's loss potential and all remedial rules. As is ever equally impossible, Breacher always makes a transaction-cost-free settlement that pays the M-1 all losses related to Breacher's breach.

Then, in an open market, Breacher may always find acceptable buyers despite Breacher's unreliability may demoralize some. We can't be sure. We can't know how many won't rely on Breacher's settling so well or on their finding enough financial support or good customers even in the high uncertainty of supply (or how many won't deal with snakes, whatever the efficiencies or rules).

If many buyers turn elsewhere, Breacher's price may have to fall and other suppliers' rise. We can't know the effects will balance or the product values not diminish.

Breacher and buyers and public will be far less safe if the
market's closed. Suppose Breacher's potential buyers are few, alternative suppliers just two, and their supply uncertain or short. Then Breacher's conduct likely may eventuate in two inefficiencies. Buyers will change resource uses—invest in next best uses. Even buyers like M-2 will feel they couldn't count on netting gain enough for long term profit. Soon, losing too many buyers, Breacher will turn to a lesser enterprise, maybe fail.

Someday another firm may take Breacher's place and other buyers reenter. Meantime, the market will want, or pay an inflated price.

This closed-market case may be any or all. One can never be sure of the store of M-2s or the costs and lay of supply.

Law and Economics might answer that if Breacher's breach is inefficient, Breacher ought to be "punished." But the answer begs case-by-case treatment—sensitive balances, of breach value against resulting extra costs, third-party injury, threat of demoralization. Before we dealt with the universe of actual cases, we couldn't know whether we'd kept the rule.

9. Recall that when M-1 suffers Breacher's breach, M-1 may have to pay a premium to another supplier or may not be able to perform M-1's product contract. The costs would be the premium or loss of product-contract value, or both, plus the cost of bargaining for the alternative supply, plus the law's limit on recovery of damages, plus the cost of not being able to plan for such eventualities (since Breacher's behavior is highly unreliable, and insurance uncertain relief, with cost neither damages nor subrogation would offset). Such costs can demoralize.

10. See, e.g., Richard Craswell, Contract Remedies, Renegotiation, and the Theory of Efficient Breach, 61 S. CAL. L. REV. 629, 665-68 (1988) [hereinafter Craswell, Contract Remedies]; compare Roger D. Groot, Specific Performance of Contracts to Provide Permanent Financing, 60 CORNELL L. REV. 718 (1975) [hereinafter Groot, Specific Performance]. I have many questions of Craswell's propositions, those of the pages I just cited and other, related ones elsewhere. But in this Part of my essay I burden you with many long, thick footnotes laden with criticisms of other authors who say and fail to consider more or less the same things Craswell talks about or assumes away. So I'll remit you to those other footnotes, and hope you'll make enough connection.

11. An M-1 may tend to give Breachers sufficient Hadley v. Baxendale notice. And Breachers aren't negligent. They determine quite willfully not to perform, to shift their performances to where the better profit lies. Unless when Breacher enters a contract with M-1 Breacher is sure of a better, certain offer from M-2, Breacher would still contract with M-1, despite accountability for M-1's losses of bargains. Even if Breacher expected, at least actuarially, such better offer, Breacher would still contract with M-1. Breacher's choice would be "efficient."

A cool, calculating Breacher likely anticipates the risk of demoralization, and determines, rightly, that short-term efficiency requires disregarding it. Information's and knowledge's wide, inescapable imperfections explain both much or all of Breacher's not accounting for most of the other losses I have and will have dug out of Breacher's breaches and M-1's not manipulating Breacher into accounting for them.

Unless Law and Economics would hold Breachers accountable for "remote" losses
Could the rule be useful as a preference in apparently balanced cases? There the issue wouldn’t occur, because Breacher would have prevented or absorbed, as needed, all losses M-1 justly claimed.

In any case that makes the issue, the trouble is law’s limiting relief to damages—whether just extra costs of substitute supply or other losses (“loss of bargain”) recoverable under Hadley v. Baxendale. At best, legal damages always are short, if only they don’t include litigation or collection costs, which often deter even pursuit of just compensation.

We couldn’t “punish” Breacher with a judgment that we’d know would surely, but only, deter Breacher’s breaching in like cases and satisfy M-1, the potentially demoralized, and the public, just enough to avert social loss. So we must wonder whether to permit specific relief quite because legal damages are too often or always—we can’t know which—unable to accomplish efficiency.

Even if our law awarded winners litigation and collection costs, the award’s litigation would make more costs to litigate. Arbitrarily exorbitant damages may be the only near-solution short of specific relief. But the amount would need to be high enough to cover all ancillary costs, and then some.

from “distant,” “incidental” harms from otherwise-efficient, non-negligent private market transactions, Law and Economics would not say Breacher ought to be “punished.” See also Craswell, Efficient Breach, supra note 10, at 665-68. But those harms can eventuate in substantial inefficiencies. And we can avoid them by holding Breacher accountable—through specific relief.

The sloth of specific relief is just a choice. We could summarily decree performance conditioned on M-1’s posting bond or assuming liability for restitution if M-1 doesn’t show strong likelihood of monetarily irreparable harm—to her, to others, through demoralization . . . . Or, no less soundly than Law and Economics asserts (despite indeterminacy) the contrary, we could decide that long-run utility indicates a rule that we hold promisors to their promises. Cf. infra fourth paragraph of note 20.

Compare Craswell, Efficient Breach, supra, at 667: “[M]aking liability contingent on defendant’s having been found to violate a cost-benefit standard would still create some risk of punishing efficient behavior.” And “[w]hether it is worth designing some other standard that would eliminate that risk cannot be answered,” because “[a]t most this argument . . . removes an economic objection . . . without establishing an affirmative economic case.” (Emphasis mine.) If the question is “some” risk, and one can’t “answer” it, the evidence is “at most” ambiguous.

In this Part, I try to show that Law and Economics’s essential theory and premises depend on clearer, wider, deeper indeterminacy. Good feeling, though, doesn’t. See also Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law, 80 HARV. L. REV. 1165 (1967), infra note 12 for, implicitly, a third sort of view—the divergence of utility and fairness and the value of the latter—a Rawls-inspired view my recognition doesn’t intend to support. See Jaffee, Empathic Adjustment, supra note 2, at 1194-95, and generally.
Law and Economics allows that certain externalities indicate specific relief where the costs (here, litigation and enforcement costs) aren't greater than the cost of the externality (here, loss caused by demoralization). Because our information and interpretation are always uncertain, we can't know we can bear the cost of finding the information we need to determine whether efficiency lies in a punitive damages award. At some level—we can't be sure to know—the costs would be inefficient even if put on a Breacher of majestic resources, because the effect might prohibit society's realizing a Breacher value worth more than the virtue of Breacher's punishment.

Or is retribution priceless? If it is, or isn't, all claims are candidates for specific relief, since precluding Breacher's M-2 deal is retribution, or moots it.

We needn't worry about supplying M-2. At lesser price, M-2 can buy from the supplier Breacher's breach would have taken M-1 to. If no such supplier, then, too, specific relief, or consequential damages if Breacher remains short of goods and M-2 satisfied Hadley v. Baxendale.

Or law could scrap the relevant equitable doctrine, though not the doctrine of efficient breach. But that would beg an amazing explanation.

E. Intractability, Specific Relief, and Deterrence

So, the exception would swallow the rule—unless we insist on disregarding it. But why disregard it? Is demoralization actuarially intractable and—because beyond planning or prudent avoidance—a cost that efficiency tells us not to recognize, but leave where it falls? The question's bogus.

12. This is implicit in the Coase theorem. It implies that resource allocation ought to follow price, except where information deficiency, transaction cost, or externality make private and social (extracontractual) consequences diverge. "Efficient breach" follows price, but law (society) ought not to allow breach where such divergence will occur. See Richard H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960).

Cf. Michelman, supra note 11, at 1214-15. But notice that Michelman, not a Law and Economics scholar, fails to explain why demoralization costs ought not to be accounted for in the calculation of efficiency gains or losses. See also Note, P.F.M., Jr., Utility, Fairness and the Takings Clause: Three Perspectives on Land v. Nelms 5, 9 VA. L. REV. 1034, 1061 (1973): "Michelman's analysis ignores this caveat: because compensability is determined by balancing the homogeneous risks of net long-term gains and losses, fairness has been transformed into utility."

Few, maybe two, Law and Economics scholars might support specific performance in any such cases. See infra last three paragraphs of note 13 and notes 20, 25, 27, 31.
We can avoid the trouble just by not letting Breachers breach, at least in any kind of case where inefficient demoralization is a probable risk. The trouble’s the contrary rule—the law’s choosing expediency over utility.

Breacher did think the M-1 contract attractively profitable when Breacher entered it, and can’t prove the M-2 contract’s value greater than the costs M-1 and society would suffer from Breacher’s breach. Maybe (we can’t know) this is true, or possible, in more cases than not. Consider that absence of alternative supply seems itself ground for specific relief.

If Breacher’s breach is “efficient,” why wouldn’t consequential damages be sufficient? If M-2’s offer is “efficient,” it must cover that cost to Breacher and give him gain too. That here the goods have become “unique” isn’t the answer. Some things unique aren’t worth two others’ deal with them, if the only question is the relative value of that deal and the alternative use.

The answer is the demoralization that flows from what each M-1 must feel a wilful, capricious conversion of the opportunity of her enterprise. Cash for “cover” may leave M-1 about the opportunity she had before the breach. But cash instead of that opportunity ought to be her choice, she, and many others like her, must think.

If Law and Economics answers that I’m playing with psychology when the issue is efficiency, my rejoinders will be two: Much, very much, of Law and Economics’s argument is very amateur, and very superficial, psychology (and I will deal with some of it below). Good feeling is the ultimate kind of benefit and bad feeling the ultimate kind of cost.

Throw in a few more frills and you get a good case for specific performance. Specific performance depends upon just the uncertainties and legal damages limits I’ve discussed. Equity makes it available not just because it finds that the claimants’ legal damages would be inadequate and their losses irreparable, but also because it apprehends that the implications or frequency of such cases may well injure or demoralize a critical number of reliant or like-positioned parties.13

13. The frills may include matters like (a) the likelihood that a decree (with any necessary appropriately-measured equitable money relief tacked on) can issue in time to save M-1’s product contracts, those dependent upon Breacher’s performance, (b) the usual stuff—ineffective legal remedy and irreparable harm—can include effects on the interests of third parties, third-party classes, and the public, and (c) in other areas where cases bear harm prospects like those of M-1 v. Breacher, the difficulty of finding and calculating the demoralization and other indirect but significant effects of a contract breach.
Keeping aware that the case variation in question does not involve absence of alternative supply ("cover"), see U.C.C. § 2-716 subsections (1) and (3) and § 2-716 Cmts. 1-3 (1990). These provisions intend to "further a more liberal attitude than some courts have shown in connection with . . . specific performance"—an "attitude" inconsistent with the doctrine of efficient breach, if §2-716 applies to any variation of M-I v. Breacher, except, perhaps, that where M-I can't obtain "cover"—but an attitude that may not operate just upon a showing of likely general demoralization. Cf. Selective Builders, Inc. v. Hudson City Savings Bank, 137 NJ. Super. 500, 349 A.2d 564 (1975) and Groot, supra note 10 (specific enforcement of commitments to advance funds for commercial land-interest purchases and land development).

Land interest finance cases aren't materially different from M-I v. Breacher, because land deal finance dollars are fungible goods to a real estate developer to whom land lots are inventory. We all know the cliché that equity grants specific performance of land contracts "because land is unique." The truth is elsewhere. Land is "unique" only because we perceive it so; and our perception of land depends upon our related personal and social concerns—including the resource's psychological meanings and its scarcity.

That's the ultimate point of Centex Homes Corp. v. Boag, 128 NJ. Super. 385, 320 A.2d 194 (1974) (refusal of specific performance of condominium unit purchase agreement). If you have a good sense of the realities of home sales, even "look-alike" condo sales, you ought to question the Boag court's treatment of the facts, because one can find uniqueness where the court couldn't. Still, you may find the Boag court teaches adequately the lesson that inadequacy of legal relief and irreparable harm are the first sine qua nons of specific performance even in land contract cases. The corollary is that even where we habitually believe contracts usually don't crave specific performance, we may find, if we look again (and better) that they do.

See also infra note 30. There I offer makings of arguments for injunction against Breacher's breach cast as interference with Breacher's contract with M-1 and, a fortiori, with M-1's third-party contracts that depend on Breacher's performance.

The real problem isn't whether an M-1 can get specific performance; it's whether she can get it timely at bearable cost. Too often, the decree won't be awarded till the contract's purpose is dead and plaintiff's money short. So M-1 may prefer to buy substitute supply and seek reimbursement through a damages award. But this problem is the courts'—their choice—not that of economics or justice. See supra note 11.

Alan Schwartz argues for enforcement of specific performance agreements. Alan Schwartz, The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damages Measures, 100 YALE L.J. 369, 387-89 (1990) [hereinafter Schwartz, The Myth]. But he would not support enforcement in the present variation of M-1's case: M-1 can, however awkwardly, obtain alternative supply. So enforcement would be inefficient, because damages are "monetizable," and renegotiation isn't "cheap" (at least since the interests and tensions are too many and subtle). See id. at 388.

Others would fear exploitation: Specific relief having no reason in "efficiency," M-1 might assert it just to exact "large" payment for its avoidance. Schwartz thinks this risk unlikely. But his reason doesn't determine the critical question. It is just a surmise that exploitation wouldn't occur, and its bases are only "impressionistic evidence" of European practice under more lenient standards and our law's current notion of adequate legal remedy and its dilatory rules of equity process and proof. See id. at 388-89. The question—whether allowing specific relief is efficient—doesn't depend on equity's view of legal damages or the speed or ease of equity's machinery.

If settlement or renegotiation costs Breacher whatever M-1 honestly sees she needs to come out truly whole, the payment may be more than damages law allows, but not unjust, and Breacher can choose performance. Why oughtn't we think "large" Breacher's price to M-
The intractability, the indeterminacy, of the problems involved, the inestimability of extracontractual effects (like demoralization)—these troubles make every such case and its subjects unique, make every such case’s rumblings socially awesome. In other, parallel cases, where the promisors, like Breacher, have some means to avert such massive confoundments, equity has sided with claimants in M-1’s circumstances.

Breacher’s conduct isn’t just mistaken; it’s greedy, designed by greed. But that, Law and Economics says, is good, “efficient”—conduct law must encourage. Look again—at matters Law and Economics (sights locked to perceptions that seem to curry its theory) tends not to discuss.

Continue to assume Breacher can’t, with existing stock, supply both M-1 and M-2, but M-1 has an alternative source of supply. The other supplier (“Jim”) will charge a premium, maybe at least partly because Jim knows of Breacher’s breach and inclination to treat promises cavalierly. Else initially M-1 might have dealt not with Breacher, but with Jim.

Why doesn’t M-2 buy from Jim? Why, even, doesn’t Breacher buy from Jim (if Breacher could at price less than M-2 will pay and still get payment from M-1)?

Suppose, as is likely (since Jim’s a wholesaler), Jim’s price is no greater than M-2 would pay Breacher, and M-2 would buy from Jim. We would see no difference in the social benefits and costs related to M-2’s state and market—as if Breacher sold to M-2.

Breacher would neither pay M-1 damages, nor suffer or cause M-1 to pay litigation costs or expenses of settlement. M-2’s transaction costs in a Jim deal ought to be about the same as in a Breacher deal, and M-1 wouldn’t pay the extra transaction costs of dealing with both Breacher and Jim, or incur a loss of less than full compen-

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2, a substitute supplier’s premium to M-1, the difference between real full compensation and the net recovery one gets from a damages judgment, the price M-2 charges M-2’s customers? Answer lives only in subjective valuation, or compliance with prevailing taste. Breacher made a promise then “worth while,” and M-1 relied; and the trouble comes of Breacher’s breaking it out of greed fed by M-2’s marketing or market demand, results of problematic psychological forces, not a god-like, objective imperative Law and Economics calls “efficiency.” See infra Parts II-IV. See also Jaffee, Empathic Adjustment, supra note 2.

If equity or full efficiency is the object, Breacher ought to perform. A breaching Breacher would not put M-1 or reliant third parties really in even the monetary position they’d be in if Breacher didn’t breach—if only because of incalculable or noncompensable costs of negotiating substitute supply and relieving third party harms and “remoteness” limits on duty and relief. Cf. supra note 11, and infra note 22.
sation for suffering a breach. The strategy would net a three-item saving.

Suppose, instead, greedy as Breacher is, Breacher buys from Jim to sell to M-2. (Jim, equally greedy, and unforeseen, is willing, at the premium he’d charge M-1.) M-2 has no other supply. Or (as is possible, since Breacher’s two lower profits may well be greater than what he’d get ditching M-1 to sell to M-2) Breacher’s price to M-2 will be the same as if for the stock Breacher promised to M-1.

This strategy too would net a saving, though one item less than where M-2 buys from Jim. Jim might charge Breacher more if Jim knew about M-2, her endurance of high price. But likely Jim doesn’t, else likely M-2’d buy straight from Jim.

Either case demonstrates the inefficiency of the contrary alternative—“efficient breach.” Either also shows efficiency in sticking to your deals—as if your promisee has no alternative.

You can find no retort in the suggestion that Breacher must breach because M-2 has faulty information. Rather, you must see in these cases further reason to believe that rarely, if ever, is an M-1 responsible for any threat of inefficiency, since cost savings ability lies mostly, if not entirely, in the M-2, the Breacher, and any Jim.

M-1 gladly would tell M-2, even Breacher, what M-1 knew to find out Jim, and Jim, greedy as he is, would, and should, make his stock potential known to Breacher and M-2 (the former both for purposes of competition and for those of making sale). So these cases further justify belief that equity should award M-1 specific relief, partly to teach both Breachers and M-2s.\(^{14}\)

\(^{14}\) Cf. infra notes 30-31 and accompanying text.

Breacher would learn: Each future breach’s cost would be either having to forgo still another M-2-like buyer or having to pay M-2 damages because supply won’t cover both shipment to M-2 and specific performance of the M-1 contract. M-2 would learn not to interfere with contracts of fellow Ms, like M-1. Cf. infra notes 30-31. And compare the alternative of M-2’s buying from M-1, and related matters, which I discuss below and infra note 23. See also infra notes 22-26 and surrounding text.

Having read the last few paragraphs, Tony D’Amato wrote me that specific relief would just shift profit from Breacher to M-1, and leave the Coase theorem intact. Here’s the argument: Jim’s price is $12, Breacher’s to M-1, $11. If the law made M-1 suffer Breacher’s breach, Breacher would sell to M-2 for $20, make $9 more than if Breacher’d sold to M-1, pay M-1 $1 in damages, and net $8. Since M-1 gets specific relief, M-1 would sell Breacher’s goods to M-2, buy from Jim at $12, and net $8 (plus the originally expected profit, though from Jim’s goods, not Breacher’s). So, a guaranty of specific relief doesn’t change the amount of wealth, only its distribution, and, “in the abstract,” we have no reason to prefer M-1 over Breacher.

But the argument has four flaws: (1) M-2’s and Breacher’s improbable stupidity, not
specific relief to M-1, probably explain why neither of them bought from Jim (and pocketed the $8 profit). Breacher's stupidity would be compounded by Breacher's putting a price of just 11 to M-1. (2) Suppose M-1 can't get specific relief, and M-2 is just ignorant of Jim, but isn't yet obliged to Breacher. M-1 might buy from Jim and sell to M-2 for $19, for a $7 gain. (3) The argument is off the point—the making or reduction of cost efficiency. So, it doesn't account for ripple-effects of reliance impairment or the expenses of transaction redundancy—costs beyond "cover"—that breach would threaten. (4) Since we can't anticipate the particulars of such situations, we're better off with the demoralization avoidance in forcing Breachers to be reliable.

Do you doubt M-1 would tell about Jim? She would if she wasn't assured specific relief. Then she couldn't stop Breacher's selling to M-2 unless she told M-2 about Jim. If M-1 knew Breacher threatened breach, to reduce transaction costs, she might offer Breacher maybe 50¢ to induce him to buy from Jim to sell to M-2 (though maybe she'd try to beat Breacher to the prospect). Breacher would prefer that deal over breach, if the difference between (a) the extra transaction's cost and (b) the probable cost of settling or litigating compensation—or (a), itself—were negative, zero, or less than 50¢.

In his Introduction to this Symposium; D'Amato, Post-Revolutionary Law and Economics: A Foreword to the Symposium, 20 Hofstra L. Rev. 757 (1992) [hereinafter D'Amato, Foreword]; Tony repeated his argument, despite he'd read the preceding paragraphs of this note. He even added flaws to his argument.

Tony said "[t]here is . . . practically no, problem . . . with transaction costs [in M-1 v. Breacher]" because "[i]f there are transaction costs, the market will readily supply persons who may reduce those costs efficiently—brokers, accountants, lawyers, finders, arbitrageurs." Id. at 766 n.29. But: (a) How much will/can they reduce the costs in this case or that? (b) Will they not, themselves, impose transaction costs, even sometimes (we know not how often) increase costs of buying, servicing, or producing?

Tony mis-stated the Coase theorem—in a way intimately relevant to this note and the thesis of this Part of this piece. He said: "Let me restate Coase once more: any initial legal assessment of entitlements has no effect—in a market economy and in the absence of transaction costs—in determining which party ultimately gets to use the entitlement.” Id. at 761.

But the Coase theorem also accounted for externalities. An initial entitlements-assignment does have (efficient) effect if it precludes or causes internalization of all externalities. Free-market transactions and events are inefficient if they create or allow externalities. Demoralization and its costs are externalities. Tony eventually say part of this:

But consider how inefficient . . . "efficient breach" theory [can] be . . . . 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 . . . . 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? . . . . But perhaps the law could . . . mitigate this one-sided windfall by giving M-1 an equal opportunity to break the purchase contract if the price of copper goes down. [The law does this. LRJ] . . . Why should either the buyer or the seller enter into a contract . . . if the contract is not binding on either side? . . . [E]very contract to buy goods will be broken whenever there is enough of a change in the price of the goods . . . .

Id. at 768-69 (footnote omitted).

Tony's insight is an entry into the realization that this Part has pressed—the realization that the "efficient breach" doctrine necessarily causes and fails to account for incalculable externalities—externalities that render the doctrine inefficient. So Tony’s insight proves my
But more's to learn. Suppose Breacher's cost is $10, Breacher's price to M-1, $16, to M-2, $20, and Jim's price $19. Then M-2 had no reason to buy from Breacher, whose profit is excessive and must drive up M-2's price to her market, at greater cost for the end consumer, but with no enhancement of the quality of goods. Since transactions will be three instead of two, the cost will be still more.

If Breacher must perform for M-1, M-2 will buy from Jim. Transactions will be fewer, and since price to M-2 will be lower, she could charge her market less, or make more. An efficient M-2 wouldn't give Breacher cause to breach.

The same would be true whatever Jim's price, unless it's equal to or greater than Breacher's; and, in the latter case, Breacher wouldn't breach, since damages to M-1 would just put Breacher even or short. If no Jim existed, M-1 couldn't "cover" and would get specific relief.

These cases don't just support specific relief, but expose the illusion of "efficient breach"—even the probability of a breach that looks efficient. They force the question: How, but for stupidity—not efficiency—would M-2 ever give Breacher cause to breach?

From this deduce: (a) A rational, informed M-2 wouldn't induce (successfully) a rational, informed Breacher's breach in any case involving alternative supply, irrespective of whether Breacher's price is greater or lesser than the alternative suppliers'. (b) The doctrine of efficient breach is nonsense in every case where the parties can know the state of an existing alternative supply. (c) A rational, informed M-2 would induce (successfully) a like Breacher's "efficient breach"

point and destroys his argument.

In his Foreword's n.33, Tony says that "we don't need 'specific performance' to do [the] job" of putting higher use value in the economically appropriate pocket (M-1's), because "all we need is an appropriate rule of contract-law damages." But some, maybe-actual damages, and externalities, are incalculable. So, the choice is between "specific performance"—which avoids such incalculability problems—and "guessy" damages law that will worsen externality costs, because a too-high or too-low damages award (almost always the case) will create externality.

Contracts account for relevant benefits and costs only if their terms, or terms the law imposes on them, allocate efficiently, and fairly, all the benefits and costs of the deal's subject and consequences and the parties related conduct. Remedies law must accomplish the accounting where the parties and the contract's terms don't. Damages judgments can't complete the job, but always permit unearned benefits and costs, inefficient and unfair allocations.

The relevance of "fairness"? Unfairness causes demoralization, its inefficiency.

I'll add here—here because it's good as any place—that Tony's Foreword puts a few other arguments that deserve debunking, but that I'll trust your critical reading rather than spend more space on picky debate.
only in the unlikely case where Breacher holds the only supply and M-1’s legal consequential damages are certain to be less than Breacher’s premium from M-2; but there M-1 can get specific relief, if timely. If M-2 ignorantly—and inefficiently—promised Breacher, M-1 might bribe Breacher to buy from Jim to sell to M-2. How scant the purview of “efficient breach”!

F. The Deficiency of Agreed Relief and the Grand Fault in Law and Economics Theory

1. The Deficiency of Agreed Relief

Can buyers avoid these problems—even prevent externalities—if they insist on liquidated damages clauses? If they can, but don’t, the costs are their fault, their “creation,” which they ought to bear.

The answer is that compensation agreements wouldn’t dispose of all interests or leverages like M-2’s or Jim’s, or even Breacher’s in relation to M-2 or Jim. So they couldn’t avoid the inefficiency of the situations I have displayed. Neither, even, might a promisor’s agreement to suffer specific performance, if only because the buyer’s quid-pro-quo concession, and its negotiation, might cost too much and the courts stand inclined to deny enforcement, for fear (which Law and Economics shares) that such clauses are tools of extortion or inefficient.¹⁵

Hadley v. Baxendale and the “definition” of allowable “liquidated damages” would prevent buyers’ recovering all their losses. So they’d still be demoralized.

The “definition” of allowable liquidated damages is the situation where a court will allow them. That situation has two conditions: (1) The parties make a reasonable estimate of the allowable damages a breach will cost;¹⁶ and (2) a court could not practicably fix those damages after they actually occur.¹⁷

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¹⁵. See Schwartz, The Myth, supra note 13, at 387-89. Schwartz questions the courts’ refusal to enforce such provisions. But his reasons are only speculation and current, unnecessary, court behavior. See supra note 14. And his objective is just a narrowly-defined “efficiency”: Is the parties’ quantifiable production-relevant aggregate a net profit or net loss? Production means the market-supply the parties supposed to be their bargain’s subject. The “net” too often excludes transaction costs and near-always externalities. See also infra notes 20-26 and accompanying text.

¹⁶. Otherwise the provision is a “penalty” and the law will remit the parties to noncontractual relief. See 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1054 (1964), CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 599-608 (1932), and cases cited infra notes 17-18, 20.

¹⁷. Some decisions put the second condition differently: The parties couldn’t practicably
Consider the sizeable frequency of courts' refusing to enforce liquidated damages clauses (because they're "penalties" or "unreasonable" or because a court can measure fairly the actual damages) and the cost of litigating such frequently litigated matters. Consider the law's limits on damages—those that preclude many "incidental" or "remote" losses (good will, future advantage...), or losses of the chance of which the breaching party had no notice. One can't recover in liquidated damages what one can't recover through contract law.

But suppose no legal limit on agreed damages, or, as Law and Economics suggests would be efficient, no judicial review of compensation clauses. Still, damages agreements couldn't prevent understandable demoralization or other externalities.

If, as must be (because of ubiquitous uncertainty if not the rest of the definition of liquidated damages), a court couldn't accurately or fairly measure actual, full losses, then the parties can't securely estimate them. So, M-1 and other like buyers won't be able to protect themselves adequately with compensation provisions, and not just because they won't know what to demand.

If, for safety even against less likely losses, an M-1 demands what he believes surely, so at least, enough to cover all real, though


But this is silly: (a) The law-respected point of liquidated damages clauses is avoidance of the difficulty of litigating actual damages (after breach). Courts grant enforcement if they can't calculate actual damages better than the parties did before they occurred; (b) Rarely, if ever, can contracting parties practicably fix all possibly allowable damages before they occur, unless the only allowable recovery is a known sum certain, like a contract price or loan commitment's or debt's face amount. Then, analytically if not in legal jargon, the case is either one in debt or specific performance.

So we must see differently the "alternative" statement of the second condition: When they entered the contract, the parties reasonably anticipated that a court could not practically fix the actual allowable damages.

But the "new" idea—the parties' reasonable anticipation—is not new, but implicit in my original statement. If the parties' reasonable anticipation were contrary, they would have nothing to resolve by contract, so long as the law requires court intervention where damages must always have appeared given to a court's ready measure.

Even if the alternative statement were different from my original, my thesis wouldn't change. Its point is that no liquidated damages provision will solve the problems Breacher makes for Law and Economics and the theory of efficient breach—whatever time the law examines.

18. Or "unconscionable." See Feller v. Architects Display Bldg., Inc., 54 N.J. Super. 205, 148 A.2d 634 (1959). About "penalties," see supra note 16. "Unreasonable" agreed compensation is an amount not immaterially greater than legal expectation or the damages a court would award without the agreed compensation clause. So is a "penalty."
partly subjective or “idiosyncratic,” possibilities, Breacher either wouldn’t agree or would raise price. In Breacher’s perception, either (a) the demand is certainly more than enough to cover all possibilities or (b) the amount would eat up Breacher’s profit from a deal with an M-2.

M-1 might forego, or refuse, agreed compensation, take his chances with judicial relief, or another supplier, if the other’s price or compensation position is better, if not “right.” But, if Breacher’s position is commercially rational and the supply is truly fungible, a “better” supplier would, we’ll see, be “inefficient” as M-1’s compensation demand.19

What of an alternative-contracts contract or an option? The change is only in the name. The same problems obtain. Whatever their form, such provisions are inadequate in uncertainty, insecure in practice and law, and too often cost too much.20

19. About the psychology, economics, practical difficulties, law-significance, and ethics of this paragraph’s, and related, observations, see infra note 20, and notes 22-28 and 31 and surrounding text.


On the matter of alternative contract vs. liquidated damages: One might say the question is whether the parties made alternative contracts or a single contract with a certain, stipulated remedy. Compare Roger D. Groat, Specific Performance of Contracts to Provide Permanent Financing, 60 CORNELL L. REV. 718 (1975). But see Lowe v. Massachusetts Mut. Life Ins. Co., 53 Cal. App. 3d 718, 127 Cal. Rptr. 23 (1976) (liquidated damages, not option, because loan contract bilateral and provided definite performance with additional charge for contingent breach but did not obligate the borrower to take the lender’s offer of loan, despite the borrower’s deposit had the function of earnest money)—and notice that an option is unilateral but an alternative contract arrangement may be bilateral.


If you like the irony of avowedly indeterminate “rules,” see RESTATEMENT OF CONTRACTS § 344 (1932), and id. cmt. c and illus. 1, which give us the heartening news that courts often confuse alternative contracts and invalid liquidated damages provisions or illegal penalties and, when they do find alternative contracts, limit recovery to the lesser of the cash amount involved in the stipulated money-payment option or the market value of the other alternative performance.

Goetz & Scott, supra, see that the doctrine of efficient breach, Hadley v. Baxendale, and normal expectation damages limits deny the breach victim “adequate compensation” (id. at 556-57) because they strictly favor the breacher even though efficiency might just as well obtain from either strictly favoring the victim or permitting or encouraging an accommodation somewhere between the two extremes. Id. at 562-68. They offer the hypothesis that “in the absence of unfairness or other bargaining abnormalities, efficiency would be maximized by
the enforcement of the agreed allocation of risks embodied in a liquidated damages clause." *Id.* at 578 (emphasis in original). Since, they say, standard efficient breach and damages doctrines either fail to channel victims into purchases of efficient third-party-provided insurance for "idiosyncratic harm" (which the breacher may often be able to provide profitably) or prevent such purchases, potential victims ordinarily ought to be able to seek coverage in liquidated damages provisions. *Id.* at 579-86.

Quite apart from their language's awkward abstruseness, their effort is, despite their imposing graphs and math, very wanting. Virtually throughout, their discussion supposes that true idiosyncratic damages are uncertain and unquantifiable. But they reject the obvious implication (that liquidated damages provisions must too often overvalue or undervalue losses) with bare assertions, like the proposition that extremes of full idiosyncratic loss compensation and traditional damages have indistinguishable efficiency consequences. *Id.* at 568. And, upon premises of purely theoretical measurements of efficiencies of thoroughly unproved "subjective preferences" of the parties, they set a proposal for a presumption in favor of liquidated damages. *Id.* at 562-65, 569-83.

Though they see the fault of "efficient breach" where "cover" (alternative supply) isn't available, they argue rather conclusorily for uncertain subjective satisfaction in liquidated damages rather than specific performance displacement of the doctrine of efficient breach, even, one must, apparently, conclude, where the U.C.C. would permit. Compare *id.* at 571-72, 579-83 (appearing to suggest liquidated damages to cover risk of breach and no alternative supply) with *id.* at 569-70 and n.46 (recognizing U.C.C. provision for specific relief where "subjective values represented by the non-breacher's indifference curve are not reflected in any established market" or alternative supply isn't available, but not resolving whether specific relief is superior to liquidated damages in such situations).

Goetz & Scott fail to account satisfactorily for information problems and costs. Mostly they disregard the matters. See, e.g., *id.* at 562-68, 578-83, 587. At 574 n.55, they say that by eliminating recoverability of idiosyncratic losses, the doctrine of efficient breach and traditional damages doctrine achieve an "increase in ascertainability" because they reduce "the number and complexity of the relevant facts." If "the transaction costs of optional, more inclusive alternatives . . . [i.e., liquidated damages provisions] are relatively modest, then . . . [the traditional doctrine and rules produce] cost savings in most cases while not unduly disadvantaging the parties . . . where a specially negotiated recovery rule is . . . cost effective."

But, by the Goetz & Scott hypothesis, "ascertainability" occurs in a regime that limits fact relevancy and precludes negotiated solutions that cover idiosyncratic losses. So the breach victim is disadvantaged (whether "unduly" neither we nor Goetz & Scott can speculate), at least if, as we can't determine, the litigation cost savings don't offset losses unrecoverable under the limits of traditional doctrine and rules.

At 591-92, Goetz & Scott say that if liquidated damages provisions reflect free information exchange, the provisions maximize efficiency. So law ought to enforce them unless it has evidence of interference with knowledge.

But what's interference? If the concept "interference" doesn't comprehend the impediment of non-omniscience, then the law can't know whether an agreed remedy is efficient. If it does include that impediment, the law, being non-omniscient, still can't know. So the question is whether the law efficiently halts the inquiry where it does. How can we know, since none is omniscient? The question requires judgement of the indeterminable—whether the solution is to stop, arbitrarily, at, say, the point where traditional doctrine does, or to preclude breach. (Recall that even Goetz & Scott say efficiency obtains irrespective of whether the law is the doctrine of efficient breach or a doctrine that instead saves the breach victim all losses, at least all perceived ones. *Id.* at 562-68.) The answer must be what feels right, since, with such imperfect information, we can't know what's efficient. Goetz & Scott don't
consider this problem. See also infra note 28.

At 587, treating the implications of post-contracting changed conditions that may bear upon efficiency of breach, Goetz & Scott assert: "It is tempting to measure these [renegotiation] costs against expected savings in litigation costs and propose whichever rule promotes the least costly alternative." But, since the measure must be post-breach, the traditional regime "would produce additional litigation costs in all cases." So, the more efficient rule is one that enforces liquidated damages provisions, because the parties "must be assumed to have taken all the expected costs into consideration . . . ." (Emphasis mine.)

How can we assume they took all costs into consideration? Maybe because we presume so irrefutably, on the premise that their failure is either their fault and so properly their loss or the costs don't deserve consideration. Maybe because the costs aren't "expected." But both assumptions assume away too much—like knowledge of costs and their worth or effects and the propriety of disregarding the unexpected.

They don't treat the problems of unforeseen premiums, demoralization, and externalities I discuss in the text above. That's fitting, because they see the issue solely as efficiency measured by the interests of the contracting parties. And, being of minds magnetized to quantifiable "efficiency," they don't imagine questioning whether we really find genuine utility in the "wealth" their intentions would maximize.

A related failing of the Goetz & Scott analysis, implicit in much of its treatment of information troubles, is its handling of transaction costs. Put aside the starker arbitrary hyperboles, like the naked assertion that a certain set is the cost configuration of "most" or "all" cases, or the vacant insistence that a certain uncertain condition "must" be truth. (See examples above.) Consider, instead, the Goetz & Scott tendency to find that negotiated remedies save transaction costs. (Again, see examples above.)

Goetz & Scott seem not to see what their thesis can't endure. One such matter is whether savings (of litigation costs greater than remedy agreement costs) are greater than losses (to the parties, to others, and to the public) that the agreement didn't but ought to have accounted for. They don't tell us why the transaction costs aren't irrelevant—why, since law can, even if arbitrarily, control transaction costs, we oughtn't be asking, instead, about the costs of imperfect information, or the measure of value. Another matter is whether breach is efficient, ought to be allowed.

Liquidated damages clauses just provide an alternative means of buying out of a promise. Though they may involve lesser transaction costs, they don't, themselves, solve the problem, if only because human non-omniscience, and suspicion and greed, confound the question: Is the other party asking more than she needs or my interest will tolerate, and how can I know not only her intentions and need (which she may not know), but also my own interest's tolerance?

Some other Law and Economics scholars doubt the virtue of liquidated damages provisions where Goetz & Scott may not. See Jason Scott Johnston, Strategic Bargaining and the Economic Theory of Contract Default Rules, 100 YALE L.J. 615, 618-19, 620-26, 639-47 (1990) [hereinafter Johnston, Strategic Bargaining] (seeing some utility in liquidated damages clauses but only in a few cases narrowed by surreal assumptions) and Schwartz, The Myth, supra note 13 (offering argument that implies we find little utility in liquidated damages provisions). But caveat: Johnston doesn't begin to account for efficient breach. See Johnston, Strategic Bargaining, supra, at 644-47. He and Schwartz fuel their analyses with weird logic and unproved and questionable assumptions about information procurement and human psychology. Of the latter trouble, here are some examples. (See also, e.g., supra note 13, and infra note 28.)

(A) Schwartz: If buyer and seller both have imperfect bargaining information, buyer would set liquidated damages below full compensation. If seller performs, buyer gains from paying the lower price that has followed buyer's understating his valuation of the seller's...

The gain will exceed the loss when the seller has considerable bargaining power . . . . [Then] she is able to [charge] a price . . . close to the buyer's "revealed" valuation—the valuation that the contract's damage measure specifies . . . .

The high valuing buyer does better by "revealing" a falsely low valuation and paying the correspondingly low price. Hence, buyers sometimes may accept contracts with undercompensatory liquidated damages clauses.

*Id.* at 379.

But how, if seller breaches, will buyer's gains offset his losses? He has inadequate agreed compensation, likely also litigation costs, and either loss of bargain or uncompensated costs of obtaining substitute performance ("cover"). Why assume, or encourage, buyer misrepresentation (which an honest person might call cheating or fraud, since buyer may be able to avoid the compensation agreement if higher *legal* damages are clear)? Maybe Schwartz doesn't believe such misrepresentation the norm. His end proposition, quite despite his premises, was highly subjunctive—"sometimes may." *See also, e.g., infra* notes 22-26, 28 and surrounding text.

(B) Johnston: Setting up analysis of a Shipper v. Carrier case, Johnston assumes that "there is a finite limit" to full consequential damages and that the limit "is known by the carrier." Johnston, *supra* this note, at 627 (emphasis in original). If a condition is or can be independent of other conditions, surely one can, validly, assume it away from a case—exclude it or make it hypothetically certain—to isolate analysis of another condition. But here the two probabilities—"finite" limit (can the limit be any but finite?) to consequential damages and the limit's knowledge by the carrier—*cannot* be independent, *always* are interdependent. As, if possible, the probability of the limit increases, so must the probability of knowledge of the thing limited, the consequential damages; and, as the latter probability increases, so does the probability of knowledge of the probability of their being limited. So, if you *assume* one is certainty, you necessarily assume a greater probability of the other, provided both are possible (neither zero probable).

I don't mean one can't validly assume or exclude, hypothetically, a variable that is neither independent of nor perfectly dependent on another, or that dependence must always be absolute (as if exclusion of some part of one's probability necessitates exclusion of all of the other's). I only mean Johnston plays bad tricks with reality and logic, because he treats as if independent and independently assumable, or dismissible, the two variables "limit to consequential damages" and "known by the carrier."

Dependence works downwards, as well as up. As either probability decreases, so does the other, and if either is *actually* impossibility, the other may be at best unlikely, for some part of that other must also be impossibility.

If, then, either of Johnston's assumptions is, in fact, improbable or impossible, then the other is suspect. Consider the "known by the carrier" assumption. One of Johnston's principle premises is: In the real world, buyers (shippers, here) often don't want to disclose their true valuations of their sellers' performances (carriers', here). *Id.* at 617, 620-39. That, itself, says the "known to the carrier" assumption is not very likely.

But we don't need Johnston's view of real inclinations to disclosure of valuations. All we need is the obvious: Rarely, if ever, can even the shipper know all her damages, at least during contracting, in the waiting for performance, and when breach occurs. Effect on good will, for instance, always is unknowable. For the same reason, such effects, as damages, have no "finite" limit, at least because "damages" is a matter of apprehension, not objective fact.

Johnston and others operate on similarly unrealistic premises about the effect a liability rule has on efficiency of bargaining. One is: If liability is "unlimited"—raised to the level of foreseeability—then, if a "low loss" promisee knows the probability of breach, price, and
2. A First Glance at the Grand Fault in Law and Economics Theory

Some of the trouble, like negotiation habits and some ingredients of judicial review, may not be necessary. Still, too much is original sin—unknowability, uncertainty, the assumption that externalities will tend to vanish if the parties resolve between them the matters they think concern them—or the harvest of capitalism’s religion of greed. Original sin? Must I demonstrate that every Law and Economics theory supports inconsistent consequences? Magnitude of inconsistency eventually reduces to trouble of degree, and the demonstration would

precautions, will be efficient. Promisee will adjust compensation to fit breach probability and promisor will adjust accordingly his precautions and price. (By a distillation of Johnston’s arguments and those of others he discusses. See id. at 620-36, especially at 621-25, 633-36.)

But foreseeability—of both breach’s probability and its consequences—is unknowable till after all events, including occurrences of evidence about the parties’ actual impressions or our always-ultimately-arbitrary judgment on what the parties’ unknowable knowledge ought to have told them to foresee. (That is why such liability’s “unlimited.”) So, compensation and precaution may be too low and, therefore, price too high, and the result far from optimum. Had precaution been higher, promisee might have had a performance value greater than net compensation. This would be optimum if the cost of performance with greater precaution would have been less than the costs of breach. We can’t know these things. We can only cut short our accounting for events.

Pursuing a solution to some such uncertainties, Johnston suggests: If we “monitor, ex post, the correspondence between the promisee’s actual damages and the liquidated damages amount, and refuse to enforce disproportionately large liquidated damages,” then “liquidated damages clauses [will] become an informationally feasible method for a promisee to communicate that her consequential damages will be unusually high.” Id. at 647. We can do this, of course, if we put all relevant people and interests (could we know them all?) into time machines, and adjust the clauses to fit the consequences after, yet before, they occur. Or do we find ourselves just doing what the law already does—deciding, after breach, whether the agreed damages clause is a penalty?

Either way, we have to suffer the cost of monitoring and rendering judgments about the results. Either way, we can only assume, against reality, that parties tend to bend their liquidated damages provisions to fit such monitorings, and that the bending will, at once, press disclosure of valuation truth and produce efficient results that approach perfect compensation. But if our world is surreal and the assumption is sound, why do so many Law and Economics scholars—like Posner, Ayers & Gertner, Bebchuck & Shavell, Goetz & Scott, Schwartz, Johnston—dispute the matter, and so much? See id. They even dispute the Coase theorem that liability rules are irrelevant to efficiency if, as is impossible, transaction costs and externalities are zero. See id. at 624-26.

Cf. supra note 11 and last three paragraphs of note 13 and infra notes 22-26, 28.
take volumes. Right now, volumes of books and law journals bear

21. Tony D’Amato tried to make the demonstration in his Can Any Legal Theory Constrain Any Judicial Decision?, 43 U. MIAMI L. REV. 513 (1989), a mere 26-page article. Tony’s central idea was sound, and greatly telling, and much of many of his arguments useful. But his effort was flawed—importantly—and I must put it to criticism: to remove from the virtue of its idea the pallor of insufficiency, and to offer clear premonition of the method and stuff his idea’s proof requires. I do this very reluctantly. I know Tony’s good and noble heart and respect greatly the bulk of his writing and thought and his freely giving and courageous championings of deserving sensitive causes. And I owe him thanks for his bountiful criticisms of my work and for this opportunity to develop this deconstruction I might not have conceived but for the provocation of his effort’s lead.

Tony’s effort bore two kinds of flaws. First: It purported to demonstrate “systematically” that no legal theory, no Law and Economics theory, could constrain any court decision. That required showing the impossibility true either for all cases or for all classes of cases. Instead it selected, nonrandomly, a very few case varieties that didn’t cover our system of judicial decisionmaking. Second: It assumed away definitional problems, didn’t account for all the interpretations or implications of facts or all the arguable solutions to the problems it evoked from them, and sometimes it drew inferences or interpretations that were only marginally credible, or it lambasted only the less-likely solutions. I won’t illustrate the first kind of flaw, because the entire piece and the universe would be the necessary illustrations. I’ll offer just a few examples of its second kind of flaw, since my essay’s debate is elsewhere.

Tony posed a hypothetical case of a testator’s ordering destruction of a Cazanne painting. He explained, well enough, the likely, and intuitive, disposition—an injunction against the destruction. (Since I expect you anticipate most details, I’ll skip them.) Then Tony argued the opposite: Destroying the painting would appreciate the value of other Cazannes; injunction would diminish the scope of, therefore devalue institutionally, private property; injunction would devalue all paintings because owners wouldn’t hold absolute power of disposition; lower prices (for paintings) would discourage the production of art. Id. at 514-16.

Tony’s purpose was to prove that the price-maximization principle is hopelessly ambiguous, because it always justifies opposing outcomes to all cases. But Tony’s argument is both incomplete and inconsistent, because it assumes away the definition of “wealth” and assumes away the questions whether the institution of property will maximize “wealth” (increase it more than any alternative would) and whether every instance of property must imply “wealth.”

The destruction—the unavailability of injunction—might just as well discourage great artists from producing great paintings, at least for sale, because great artists, emotional and proud as they are, would fear their works would be at the mercy of mad testators. (Some actual great artists didn’t and don’t produce for market.) Such artists might hoard their paintings and provide for their being unavailable to the world even after their (the artists’) deaths. “Wealth” here may be the world’s having available for its spiritual uplifting the sights of great paintings, rather than the capital value of a painting as a saleable chattel. The best means may not be property, but social (state, U.N., electoral ... ) monopoly of control of great art. (I know “great art,” like “art” and “great,” is ambiguous. But that’s another problem, and I discuss it enough elsewhere.)

Tony also tried a similar deconstruction of the theoy of Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910), the majority opinion in which, Tony said, his law school’s Law and Economics buffs called the best example of the wealth maximization principle at work in a judge’s conscious decisionmaking. D’Amato, supra, at 516. There plaintiff claimed $500 damages from the owner of a ship, because a great, unanticipated storm buffeted the ship against plaintiff’s dock, where the ship was moored.

Tony posed this wealth-maximization justification: To the shipowner, $500 damages
was a cost far less than that of losing the ship. Id. at 517. About this justification, Tony wondered only how it could stand if the captain was prudent to keep the ship moored instead of loosing her to risk the storm in open water. Id. 

Tony's wonder is flawed. It assumes away the prospect that the dockowner was not imprudent (even though the dock was capable of being injured). It also assumes away the question what, if anything, prudence (of what meaning) has to do with wealth maximization. And it misses much.

But the Law and Economics justification is discreditable. It assumes, very questionably, that the shipowner must bear whatever cost obtains—judgment for the dock owner, or ship loss.

Why—if, as everyone on the bench and at bar agreed, the captain was prudent to keep the ship moored during the storm? Was prudence really involved?

The ship captain's choices were two, highly uncertain sets of risks—injure dock or ship or both, but maybe neither, if ship stays moored or lose ship or suffer its injury, or maybe neither, if ship returns to sea. The two risk sets were not just uncertain but beyond control, except insofar as the captain could choose one or the other. But to say that he chose the prudent set is to disregard the real but indeterminable prospect that no injury might have occurred, to dock or ship, had the ship gone back to sea, just as the dock's injury was fortuitous, might not have occurred. If one takes serious account of that prospect, one can see that the dock injury could have been the greater cost, since, when the captain made his choice, risks were the only costs.

This vision's critical. The captain couldn't mitigate losses. They were beyond his rational control. So we must ask: Could the dockowner have mitigated them?

Why wasn't the dock, hence its owner, at fault for inviting ships to dock in storms but not being strong enough to withstand the inevitable buffeting? What if paying the dock damages destroys the shipowner's business but wouldn't have destroyed the dockowner's? To say that the dockowner's business was more valuable because it could absorb more cost is to beg the question whether it ought to absorb the cost because the dockowner hadn't paid it to make the wharf buffettproof. That question suggests that the wharf may have been better, or alone, able to avoid the injury, at least if the cost would have been less than damages or their risk.

Then, too, when shall we value the two businesses? In what universe (of firms, enterprises, benefits, prospects, risks, costs) shall we value it, and by what standards (economic, psychological, moral)? I do not forget that we must, to further, fairly, Tony's question to Law and Economics's theory, stick to the principle of maximization of wealth, not stray into matters of morals, taste, righteousness, or fault. Still our possibilities are open when we determine what is wealth.

To deconstruct Law & Economics's belief in the case's majority decision, Tony argued that wealth maximization theory could support the dissent's would-be decision against the dock owner (because the dock owner may be better positioned to mitigate damages): Dockowners can reduce the costs of effects of buffettings by ships, if they raise rents to pay for improvements. Id. at 518.

Tony's analysis missed the prospect of setting rents to cover repair or insurance. If insurance costs less than buffettproofing and maintenance, or even damages or repairs, more's the better—if efficient insurer. Too, suppose dockowners could set rents at rates that will not induce shipowners to go elsewhere or invest in next best uses. They will ensure the optimum allocation of resources. The cost will spread easily among all relevant shipowners. None's business will fail. The public and market will cheer.

Tony's criticism was irrelevant, if, as to many of the Chicago School, "wealth" is not humanistically utilitarian enough to comprehend the values and costs of personal attitudes and the wisdom or prudence, even the beauty, of individual judgments. Or is prudence just self-
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interest, and if so, why oughtn't the prudent entity bear the costs of prudence (like the prudence of deciding to risk the dock instead of the ship, the dock that was the subject of another's property)? This needs analysis.

Suppose, as is not uncommon, an actuary would have believed that such injurious buffetings were unlikely and that the probable cost of any such event would be far less than preventive measures—just as Ford Motor Company decided that the cost of redesigning Pinto gas tanks was far greater than the cost of paying bodily injury and wrongful death claims, just as most people decide that the costs of million-dollar-or-more liability insurance and driving better are more than the cost of the risk of bankruptcy. Would, then, the dockowner have behaved efficiently not to have raised rents to support such measures? If prudence were an issue, one could say the dockowner wasn't imprudent. Is "prudence" empathic wisdom or effective greed? See infra notes 27 and 32, and Parts II-IV.

The question might be the dockowner's insurance: If the dockowner had purchased adequate coverage, the insurer, if anyone, not the dockowner, would have sued the shipowner. Why not adequate coverage?

But this question just begs others: If the insurance were higher coverage, could the insurer recover from the shipowner if it paid the dockowner insured? That question shows the circularity of it all. That the dockowner might have raised rents to cover better insurance doesn't, itself, imply that the wealth maximization principle points to making the dockowner liable or even to relieving the shipowner of liability. Could the shipowner insure against liability to the dockowner? Whose insurance would cost more? Suppose the dockowner's premium were much less than the shipowner's. Still, suppose the dockowner raised rents to pay the premium and ships docked at cheaper elsewhere: Dockowner must operate in a cutthroat market, on narrow profit margins; the world needs docks, but the ship market, and its markets, don't appreciate sufficiently the cost.

That much might have lurked in Tony's next criticism—that one can turn the tables still another time, against the dissent. But it didn't:

[A] court can speculate that vessel-owners are in a better (cheaper) position to choose the docks at which . . . to moor than dock-owners are to choose which vessels may moor at their docks . . . . [W]ealth can be maximized by putting the loss-reducing incentive to select the most suitable dock—the least likely to be damaged . . . —on the vessel owner . . . . [D]ifferent vessel-owners will self-allocate their ships to the docks best equipped . . . , reducing the need for all docks to engage in improvement . . . so as to be able to service a large range of vessels. Even so, some dock owners will be motivated to improve . . . so as to attract a wider range of risk-averse vessels, and also advertise their improved facilities . . . .

D'Amato, supra, at 518-19.

This argument doesn't notice that shipowners might be able to pass the costs on to passengers and shippers (even to customers, where ships carry their owners' goods). So it doesn't reach the problem of what to do when they can't.

It implies—against itself—that dock owners have reason to assume their docks will withstand buffeting from the ships that moor at them. So it implies that dock owners are better positioned to minimize costs or damages—by warding off inappropriate ships.

It disregards the real prospect that ship owners aren't well positioned to assess which docks are best mooring sites. Can their captains do the assessing while the ships pass by docks? Must they hire engineers to inspect dock facilities—the whole world's? Ought they do it each alone? Ought just one find the data, sell it to the rest, and will it be sufficiently individualizable, at what costs? Or ought they pool their investigation, pay the costs of trusting that the result will work for each? Compare the case of a tenant's taking premises with latent defects the owner ought to have been aware of but didn't disclose—or, better, a
similar case of a hotel room rental or a one-week lease of a cottage at a seashore resort. Can dockowners account for ship quality variance more efficiently than can shipowners account for dock quality variance?

These questions suggest questions about other kinds of insurance. Suppose the dockowner's accountable. Then what of, say, an agreement to hold the dockowner harmless and pay her damages? Can the parties absorb the potential benefit and spread the costs more efficiently than they could those of some alternative, like legal enforcement of a disclaimer—"Dock here at your own risk and pay for all consequences to ship or dock"—printed on a giant sign posted on the dock?

Will or ought the agreement cover emergencies and the disclaimer not, because, despite the greater and uncertain transaction costs, the shipowner can better obtain the potential price benefits and plan for and spread or absorb its costs? Might all dockowners post such disclaimers or require such agreements? To what effect?

Is either precaution better than indemnity or casualty insurance? Will its cost include purchasing such other insurance or freezing into self-insurance reserves some otherwise-useful or elsewhere-needed capital? To what effect?

Would anything change if the dockowner weren't accountable or the shipowner were instead? Might not the dockowner yet demand such an agreement or post such a disclaimer?

Whether she or the shipowner or no one suffers tort accountability, the dockowner might insist on the shipowner's being contractually obliged to pay certain dock-injury costs. And she might exact exculpation even if no one or the shipowner is tort accountable. The law can change, even retroactively. And it's unclear as it stands.

Is the answer in the market's valuation of the shipowner's enterprise and the shipowner's valuation of the dockowner's offering? But how do we learn—for any moment or any time? And what about differences among transaction costs—one fuzzy set for each of the three legal possibilities?

Could the shipowner pad the ship? How does one, practically, pad a ship—well enough to preclude injury to all the docks at which the ship may, or may need to, moor? What of the costs of stowing the padding and fixing it for docking and re-stowing it on departures? What would be the costs of padding that stays fixed—the costs of design and materials and a higher drag coefficient and more frequent replacement?

Would the cost—including information costs—spreadable less or more efficiently than would the cost of injury-preventive dock-improvement? How can we know whether the shipowner will be able to bear and spread the cost of physical precaution better than the costs of higher mooring fees?

Will the answers be unaffected by whether the law holds the dockowner or shipowner accountable? Might they be unaffected because maybe in either case padding the ship will lower the dockowner's risk and "ought" to lower the dockowner's price? Or will inclinations change because of the existence and allocation of incentive to avoid litigation costs?

Ought the dockowner pad the dock? With what, how thick, against what, how often replaced? And what's the cost of adequate experience?

The possibilities go on and on and on and get more and more boggling. The audience must near-panic at the possibilities—feel the impossibility of consistent theory.

In each case—Cézanne, Ship v. Dock—one might find several more sets of questions and ways to reverse outcome (most of which implicit in the matters I did examine). But the subjects of those two cases are not, directly, subjects of this piece, as they were subjects of Tony's. And they're not this note's only subjects or sufficient for its purposes.

Tackling the bearing transaction costs may have on the case for wealth maximization theory, Tony said that theories about transaction costs can't save the wealth maximization principle. One of his arguments is:

Nor can the avoidance of transaction costs be transmuted into a "policy" argument,
because ultimately a transaction cost is only in the eyes of the beholder. What looks like a transaction cost to the parties looks like the entire point to the attorneys—a house in the country, golf course privileges, and a college education for the children. Who can say that the parties are worse off in a regime in which there are readily available attorneys, even if some of the cost of that ready availability is to pay the lawyers "transaction costs."

Id. at 520.

The argument's illogical. The cost of attorney availability is or isn't a "transaction cost" only because of the context—the transaction being planned or enforced, in or about which a party may want an attorney. If the transaction is, say, a sale-of-goods deal, the attorneys aren't parties, but overhead, just as would be a sales agent. In a contract for legal services (call it LSK), the promisor attorney is a party if the matter is that contract or its enforcement. But if LSK becomes a matter of dispute, another attorney is overhead if that other attorney's function is to help the LSK client sue the LSK promisor attorney or to help the LSK promisor attorney sue the LSK client. What of the house in the country, golf privileges, and college education in Tony's argument, in which Tony's language itself distinguishes attorneys from parties? Those objects aren't subjects of the sale-of-goods contract. So if the parties' attorneys' fees payments finance those objects, the payments are transaction costs. Again Tony's trouble is inattention to matters of definition.

I always agree that all definitions are ambiguous (indeterminate) because they depend infinitely upon other definitions. But the world of mind suffers many varieties and orders of definitional indeterminacy. We can pick a certain single definition of "transaction costs"—something that rather fits what most Law and Economics writers write about ("overhead" or "expenses not direct costs of the production or service in issue"). Then, though we face infinite ambiguity, Tony's argument doesn't fit, because it attacks a different area of ambiguity.

[In his Introduction to this Symposium, Tony misrepresents the preceding two paragraphs' treatment of transaction costs: "Strangely enough, Professor Jaffee argues against my point about lawyers by stating simply that transaction costs are 'overheard.' This is a strange, formalistic dismissal of an argument by a non-formalist." (non-formalist' meaning, I believe, me). D'Amato, Foreword, supra note 14, at 762 n.15 (citation omitted). I hope you saw: (a) that I use "overhead" as a fair, likely-to-be-well-understood code for a very fact-complexed idea; (b) that I meant to suggest an array of functionally related but diverse prospects when I said transaction costs include "'overhead' or "expenses not direct costs of the production or service in issue"; and (c) that I limited my consideration to what Tony purported to make his subject—"what most Law and Economics writers write about," their idea of transaction costs.]

I expect Tony will argue that "area" is ambiguous or indeterminate. That may be so insofar as one concerns oneself with the definition of the term "area" rather than its referent. But if one considers the term in relation to its grammatical/syntactical referent, one sees that the different areas of ambiguity are different terms.

True: all terms are indeterminate (if they are symbol). Still, if a term, like every English word, has a fairly agreed definition, then that term's indeterminacy is distinct from the indeterminacy of all other terms that don't share the same fairly agreed definition. That's so even though the definition is only fairly agreed and each of the definition's constituents is ambiguous, because the indeterminacies there-involved are yet different from the indeterminacies of, say, words that are made of entirely different letters and bear definition by words with structure and common denotation different from those that define other terms. The short of it is: Just as the mind concedes many orders and magnitudes of infinity it must concede many orders and magnitudes of indeterminacy; and if many, then different.

But transaction costs are indeterminate—at least unpredictable and frequently in calcula-
thousands of pages of "objective" debate about contract and breach efficiency, and that, itself, demonstrates the matter's indeterminacy. So the question is what you, like Law and Economics scholars, want to believe or disregard, and why.

No one's ever unbiased. Objectivity's hoax. We "find" issues because we want to see them, miss others because we can't abide what they may tell. Our characters decide what troubles and solutions we find.

Our only truth is pure feeling—like the feeling of starvation, or physical pain, even if it's "psychosomatic." But we confuse our feelings with emotions, call them logic or truth.

Law and Economics's central trouble is its disregard of feelings, the kind its scholars don't worry about much, because they're characterologically indisposed or too well financially fixed, and, if a dirt poor Appalachian farmer or Third World peasant is to judge, they always were.

Bias is the great flaw in Law and Economics. Believing in greed, its scholars expect it, see it working where it isn't. Believing in rules they believe efficient, they imagine such rules channel conduct toward efficiency. They're satisfied to disguise reality as an economic clockwork that will tick out efficiency if only we keep it running free. Never mind that even they hear awkward rhythms, random beats.

They argue on assumptions that negotiation is costless, that information is perfect, that damages rules determine how or why great masses of promisors set price, perform, breach, react to liquidated damages proposals, that Hadley v. Baxendale does or doesn't muscle promisees to disclose their true valuations of promisors' promises, that unknown or uncertain gains or losses are certainly greater or lesser than uncertain others. They assume that negotiating parties...
and consumers can behave "rationally"—as if value and self-interest were logics, and logic absolute, nothing of emotion or warpages of character, as if life were calculable as math would be.²³

possibility and effect of negotiating or renegotiating remedies); Johnston, supra note 20 (e.g., Hadley v. Baxendale's influence or its lack); William P. Rogerson, Efficient Reliance and Damages Measures for Breach of Contract, 15 RAND J. ECON. 39 (1984) (e.g., costless renegotiations). See also supra notes 11, 13, 20 and infra notes 23-32 and text accompanying note 24.

In Law and Economics scholars' prolific disagreements over matters critical to Law and Economics's validity and reliability, you can see Law and Economics's systemic weakness and indeterminacy. See Craswell, Contract Remedies, supra note 10 (especially its footnotes), where you can find a good sample of inconsistent theories among Law and Economics scholars.

Sometimes their biased logic may be stunning, even though the issue is simple yet tangential. Here's a short example. On the way to arguing against specific performance agreements in cases like most variations of M-1 v. Breacher, Professor Schwartz says:

The parties preferences respecting specific relief ... may be too context-dependent to support the creation of a general default. On the other hand, some rule is necessary. Perhaps the best solution is to make damages the default, in consequence of the general promisee preference for substitutional relief, but to enforce specific relief clauses. ["An implication of this solution is repeal of the rule that promisee/buyer can always get specific performance of a promise to sell realty. There seems to be no evidence that such promisees commonly prefer specific relief to damages. To the contrary, agreements to sell real property frequently contain liquidated damages clauses."]

Schwartz, supra note 13, at 388 and n.38.

From "too context-dependent" follows "some rule is necessary"? By what logic? Is the point to make preferences not "too context-dependent"? Why? Wouldn't it be improbable, because existing rules, hard and harsh as they are, have left parties to their "too context-dependent" preferences? Why is a rule ever necessary, at least if the better efficiency lies in rational free-market transactions?

Nowhere did Schwartz prove, either by logic or by empirical demonstration, that promisees prefer damages. If they do, but their preference is "too context-dependent," why make a rule that specific relief agreements shall be enforced? If that were the rule, why, in any logic, would it indicate repeal of the corollary "rule" that real estate buyers always get specific performance decrees—especially when that's no longer the rule. Supra note 13. The answer can't be that we have "no evidence that such promisees commonly prefer specific relief to damages." A near-identical premise led to Schwartz's proposing the rule that courts enforce specific relief agreements. We have no proof "to the contrary" in the fact of liquidated damages clauses in real estate sale contracts. Those clauses may reflect desire for an option, not a preference. They may be—often are—boilerplate the broker community added to form agreements it supplies both buyers and sellers, or just hedges against remission to court-determined damages.

See also, e.g., infra notes 23-26, 28, 31.

23. One can find striking examples in Samuel A. Rea, Jr., Nonpecuniary Losses and Breach of Contract, 11 J. LEG. STUD. 35 (1982). Its subjects are (or include, Rea doesn't always make clear which) cases like a package vacation seller's delivering the buyer an unpleasant experience. The buyer's losses are substantially nonmonetary—emotional. In the introduction, Rea says Law and Economics thinks "contract law should attempt to minimize the cost of making contracts, prevent bad faith breach . . ., encourage efficient breach, encour-
age efficient reliance, and compensate the victim of a breach.” *Id.* at 36. Rea’s comment is: “Since contract law has several functions, it is not surprising that a single damage measure will fail to achieve all of the objectives.” *Id.*

Remember the kind of case that typifies Rea’s subject! For such cases, how can the law encourage both efficient breach and, simultaneously, efficient reliance? The suggestion’s bizarre. Yet Rea just offers the banal concern that the law hasn’t supplied itself all the tools it needs to achieve all those purposes.

Under the title “Moral Hazard” (party’s failure to use risk-reducing precautions), Rea begins: “The model can be generalized . . . .” *Id.* at 50. So, we must infer that we may model and generalize particular people’s protective anticipations of peculiar emotional reactions to unexpected vacation experiences. And, because “precautions are assumed to require some effort and therefore cause disutility for the buyer, the existence of insurance coverage will induce the buyer to take less care.” *Id.* The vacation buyer will, then, buy insurance against a bad vacation! Find the buyer demented enough to buy such insurance and the insurer silly enough to provide it. Still you must find the buyer who will take less care. He needs a good vacation not insurance proceeds. If he doesn’t get it, the proceeds may not help till next year, or ever, and he may be an emotional washout, or worse, by then. Life is short and time doesn’t repeat.

Compare a more probable case. Business interruption or errors and omissions insurance. Such coverage doesn’t make insureds careless, if only because they want to be insured at a palatable premium. Most people buy insurance to cover the very rare, thoroughly unexpected, catastrophe. Vacation insurance? The insured is hardly likely to be contributorily negligent (careless or wanting of precautions), with or without insurance, not, I admit, because of fear of premium increase or nonreinsurance (which seem weird concerns in such an even weirder case), but because people can’t be “negligent!” to themselves about getting to have fun, which is a kind of abandon, not an enterprise that bids diligence.

If “insurance” is liquidated damages, little changes. Even if, for a bearable price, buyer could get seller to agree to full, or excessive, compensation for nonpecuniary loss, buyer’s conduct would be the same. Buyer’s carelessness wouldn’t cause breach. The parties couldn’t predict the value of any emotional loss. Their estimate all too likely would be high or low in relation to price—inefficient. Such agreements’ only relevant influence would be the seller’s adjusting his precautions, if price were “low.”

But wait: “It is reasonable to assume that the seller cannot monitor the precautions of the buyer and cannot make the damages contingent on the buyer’s precautions. Therefore, the buyer will act as if his behavior has no effect on the cost of the contract.” *Id.*

Nonsense! Seller will not monitor the precautions. Imagine the vacation seller’s monitoring buyer’s check on whether seller made all reservations or filled the tank with fuel! “Therefore the buyer will act as if his behavior has no effect on the cost of the contract”? Irrespective of monitoring (which might occur only in a rare case where seller’s performance depended on buyer’s conduct), buyer’s behavior will not affect the cost of the contract. The contract’s a take-it-or-leave-it, boilerplate deal with one-sided control. That’s why buyer wouldn’t think to structure or fail to structure his precautionary behavior to affect the cost of the contract—even were seller a disbarred attorney. Buyer’s only structuring will be his decision whether to take the deal—risk and compensation being what they will be (despite he, like most, likely won’t imagine them). Surely buyer oughtn’t to have to buy alternative vacations to protect against breach.

Rea does observe that in most “reported cases” of nonpecuniary loss, buyer couldn’t affect the probability of breach, but says that where buyer is buying “a product he may be able to take precautions that will lower the probability of failure.” *Id.* at 50. He offers no example. If the product is ready made, is precaution investigating the product and alternatives? Is that taking care to prevent breach? If the product is made to order, unless buyer
participates in its making, his behavior can't make seller's breach more probable. If precaution means giving seller information sufficient to enable seller to perform, then the problem isn't breach. If precaution means mitigation of damages, one can only wonder what one ought to do to avoid feeling quite bad as one would without precaution. The loss, recall, is nonpecuniary, very much emotional.

You're in a fine restaurant. You don't eat meat, dairy products, sugars, or certain vegetables and sea foods—a restriction of both morals and health. You read the menu, see ingredients, exclude certain dishes, ask the waiter to make sure that the forbidden ingredients aren't in any of the dishes you're interested in. The waiter doesn't comprehend that you don't want those ingredients, or any of their byproducts, in any form—because he can't appreciate your concern. Eating some vegetable, you notice a taste like pork (which you ate until you were thirteen). The waiter says that the flavoring includes bacon. You're horrified, your evening ruined. The waiter treats you as if you were demented and the owner says, loudly, that you ought not come back. What ought a court consider? Surely not mathematics. What ought you to have done? Shall the court say the loss is noncompensable—though it cuts out the contract's heart?

On these premises, Rea says: "Given the level of damages the buyer will choose a level of precautions, \( r \), so as to maximize

\[
U^* = p(s,r) V(Y - g, r) + (1 - p(s,r)) V(Y - d + m, r),
\]

(15)

The first-order condition is

\[
p, (U - Y) = - [pV_r + (1 - p) V].
\]

(16)

Taking the total differential of equation (16), one gets

\[
\frac{dr}{U_r} = \frac{(1 - p) V_r - pV}{D}.
\]

(17)

Id. at 51. But math, here, is, at best, surreal.

Upon extensions of his math, Rea concludes: "[T]he effect of higher damages on the buyer's precautions lowers the net benefits of increased seller precautions. Therefore, the damages will be lowered as a result of moral hazard on the buyer's side."

But if damages are high and buyer, therefore (according to Rea), reduces precautions, a rational, liability-sensitive seller's precautions must improve. If damages are lower and, therefore, buyer's precautions better, the effect isn't better benefit of seller's precautions (which will drop), but of buyer's. The question is who ought to undertake how much precaution. That question depends on who can use better precautions. The answer ought to determine the level of damages, if precaution-burden-allocation ought to determine it at all. But can it? Cf. supra note 21.

If precaution is insurance in the form of agreed compensation, still the question's who's better positioned for precautions. If seller is, why ought buyer pay the cost (buy compensation), likely either at too-high price for seller's full diligence or with too-low relief for seller's breach. Neither party can do more than guess in a setting of some ignorance, apprehension, antagonism. But one thing's sure: Seller made the promise and controls it, and buyer paid. Why not let seller risk a price too low to cover damages?

Intuition suggests that we can't, with reason, presume widely that buyers do have substantial precautionary capacities. Then, oughtn't we set damages high, on the notion that sellers ought not offer what they can't take adequate precautions to ensure? Surely a seller is insufficient if he offers a performance beyond his diligent means. If it is within his diligent means, why oughtn't damages law spur him to supply it? Can't he set price accordingly? The trouble's the same as if the law presses buyer to buy precautionary compensation: How to measure price against uncertain uncertainty.
This returns us to the matter this footnote started with—simultaneous encouragement of efficient reliance and efficient breach. Rea’s trouble, Law and Economics’s trouble, isn’t confined to purchases of package vacations. Even where the case is fully commercial, one that Law and Economics would consider a question of purely of monetary harm, the problem deserves much more concern than Rea and Law and Economics spend on it.

We can’t encourage both efficient breach and efficient reliance unless we define “efficient reliance” so that it occurs only when breach is inefficient. But how shall promisees learn, timely, whether breach will be “inefficient,” or whether changed circumstances will make performance so? If breach might be efficient, promisee’s precautions won’t affect his reliance’s efficiency, unless precaution is paying a “price” that will stave off breach. Then precaution seems a different investment.

People and firms tend not to be prophets with perfect information. So the problem isn’t just making more damages rules and coordinating them well. It’s real inconsistency of objectives. And it’s inherent in Law and Economics—and must be, so long as our law and economic regimes would try to promote welfare with greed. If promisees must rely, for hope, on benefit from investment, law must encourage their reliance. But it needn’t encourage promisors to breach, unless greed is the law’s commitment.

We have alternatives that can survive self-interest. One is this: Disallow wilful breaches with specific performance decrees (unless specific performance would reap slavery). Encourage third parties with better offers to make them to promisees.

Judge Posner says the second idea’s inefficient because it involves more transaction costs. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 107, 118 (3d ed. 1986).

Nonsense! If the third party didn’t have to deal with promisee, she’d have to deal with promisor. If promisor breached, we’d see litigation or settlement costs (either paid positively by both parties, or paid in promisee’s forgoing suit because litigation costs are higher than likely recovery). If promisor didn’t (couldn’t) breach, we’d see only the costs of a transaction between third party and promisee. The immediate question would be whether the third party will pay for promisee’s contract right an amount effectively greater than promisee’s net expectation in his existing plan for use of promisor’s performance. I can’t pretend to know whether the transaction costs would be less than the litigation or settlement costs, but I’d guess so because of what (after nearly 51 years of life) I do know about purchase negotiations and (from too much experience) about litigation. Compare infra notes 24-26 and surrounding text.

To be fair to Rea, and Posner, I ought to acknowledge that one can find many too many other examples. Three are Goetz & Scott, Liquidated Damages, supra note 20; Schwartz, The Myth, supra notes 20 and 22, and infra notes 24-26, 28; and Johnston, Strategic Bargaining, supra notes 20 and 22.

Johnston seems to want all things cleaner and tidier than any reality but endless toilet training. So he wants all our litigations’ evidence and risk-distribution-value uncertainties reduced to math, and pushes his wish through his cool, distanced fancy of our universe, a fancy he designs blind to challenge, even mathematical challenge. See Jason Scott Johnston, Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty, 61 S. CAL. L. REV. 137 (1987), where, without acknowledging published arguments, even mathematical arguments, to the contrary, he styles a mathematical “model of rational fact-finding” without regard to whether one might achieve irrationality, and a particularly insensitive injustice, if one makes the uncertain and deeply subjective appear mathematically clear, as a necromancer controls both weather and the furies.

Compare (for a vision of a universe Johnston doesn’t want to see) my works on mathematical probability and proof (including the one still in manuscript), cited supra note 6. Math is indeterminate—to the germ of its being. See Jaffee, Blue Buses & Concealed Convicts, supra note 6 (manuscript).
That's how they'll treat much of M-1 v. Breacher. And I have tried to tune my arguments to their typical assumptions and according to their style. But somewhere, and it may as well be here, I must object that people and events don't obey their models.

Even in greed, the market and parties don't set price according to some clear ratio to appreciable clear value, if only because they haven't amenable senses of values or sufficient information or facilities that offer "true" or "valid" measures of the worths of arrangements or things. Even if they try to make their valuations and transactions account for legal rules, they are adrift as in other experience, except pure feeling, because legal rules and their effects are indeterminate as anything else that must filter through emotion and mind.

But, to deconstruct sufficiently the Law and Economics philosophy, one doesn't need to rely on its thick, wide problems of psychology and method. One can cut out its gut—its belief in the efficiency of free, profit-motivated deals. One need show only that freely bargaining parties can't account efficiently for the risks of loss and harm that attend their would-be bargains. So I'll return us to the problem of agreed relief, as Law and Economics scholars tend to debate it.

3. Liquidated Damages and the Pricing System's Inadequacy

Recent Law and Economics scholarship insists that buyers won't like "supracompensatory" liquidated damages clauses (those that would secure better than "objective," legal "expectation"). Why?

Others assume damages rules can inspire efficiency if they set initial entitlements where most would set them by contract. So, if, say, most promisees are low-risk bargainers, a low-level damages rule will reduce costs of bargaining. Compensation negotiations will occur only in the relatively few cases where promisees have higher-than-normal risk. See Johnston, Strategic Bargaining, supra, at 623-25. But vagrant and untrackable reality precludes the assumption about most promisees' risks. So any damages rule threatens to be inefficient.


Schwartz says buyers will, sometimes, accept undercompensatory agreed damages clauses. (Johnston makes related, but somewhat different, statements.) I have doubts (about Schwartz's reasons and their conditions), because Schwartz's logic depends upon untidy and unreal assumptions. I criticize such assumptions, of Schwartz and others, often elsewhere in this Part (see, e.g., infra notes 24-26, 28, 31). So here's a teaspoon.

Schwartz says, rightly, that the probability that the seller will perform is equal to the probability that the cost (either of performing or foregoing a later offer) will not be greater than the damages she must pay if she breaches. Just so, if the seller has strong relative bargaining power, the buyer may agree to low compensation either to forestall the seller's
If buyer set agreed compensation high as full subjective value of performance, buyer would suffer three troublous effects: Seller competition would decline and with it the surplus available to buyers. Seller either wouldn’t sell or he’d raise his price to cover agreed compensation; and performance might be secured but at the expense of discouraging efficient breach and at the risk of not meriting buyer’s cost.

If this assumption is sound, it weakens badly Law and Economics’s central principle—the superiority of free, private, contractual allocations. Liquidated damages clauses are the principle’s best defense: ‘A freely negotiated agreement is the most efficient solution to every kind of problem, even a dispute about a con-

breach or to influence downward the seller’s price.

But what seller can know precisely his relative bargaining power or the probability that he may get a delectably better, later offer (enticingly lower compensation obligation or appreciably higher price). And how can we know? Even if the seller has a history of such better offers, the history will not yield better than a Bayesian subjective probability of another of certain degree. If the history is sparse or zero, the probability would be an irrational guess much rougher than your prediction of what three rolls of dice will tell about a future fourth.

Schwartz puts a statistical formula for the setting price. The math is illusory. See infra note 26. The assumptions are unreal.

One assumption is the quantifiability of the seller’s relative bargaining power. In Schwartz’s model, relative bargaining power determines how close price will come to the buyer’s likely performance-valuation, and, relatedly, whether the buyer will agree to low compensation in consideration of price. But, where relevant information is imperfect, as in too many cases, bargaining power’s relative value also must be at best a Bayesian guess, as must the seller’s determination of the buyer’s probable numerical valuation of performance. And buyers and sellers can’t, or rationally won’t, hire statisticians to do the divining, unless they’re premium firms or the stakes and capital are high enough. (Law and Economics must oppose a rule that would make all parties hire them.)

A seller can have fair sense of his market power. But even if he then can count on some other offer or potential buyer, he can’t make a rational Bayesian guess at that buyer’s valuation or, therefore, the appropriate price to offer her, unless he can predict the buyer, herself—her bargaining power, priorities, negotiating skills.

An unwary buyer might just fall into the strait of low liquidated damages. He doesn’t count to theory, I suppose. A wary buyer may agree to low stipulated compensation if (1) the seller insists, but offers maybe-disproportionately low price, and (2) low compensation and price don’t imply substantial probability that the seller will breach, but, say, thinness of the seller’s market and the seller’s sense that capital value of the deal will offset compensation if the seller unintentionally breaches, and (3) the buyer believes probable that the net of (a) the relevant liquidated damages amount over (b) the cost of obtaining it would be greater than the net of (c) legal claim recovery or settlement over (d) the cost of its realization.

The trouble is that buyers can set such apprehensions only on guesses. Schwartz doesn’t mind guesses (see supra this note and infra notes 25-26 and 28). But he doesn’t consider this set of buyer beliefs, maybe because they hinge on collection costs. Schwartz would reduce collection costs by two ineffective means—abolishing judicial review of compensation agreements and encouraging illusory private-agreement attempts to avoid collection cost inefficiency. See infra note 28.
tract—its meaning, effectuation, and default.'

The assumption would weaken the defense, and so the principle—with two iron impeachments of free market transactions: They can't account for all kinds of levels of palpable damages from breaches. If they design to account for all such damages they will impair the promisee's prospect for gain, produce inefficiency.

The assumption is partly sound—partly. Its reasons depend much on strained logic, and uncertain psychology, gamesmanship, and rule of compensation. The second, more complex and telling reason—that price will discourage "supracompensatory" compensation demand and that supracompensatory compensation clauses would discourage "efficient" breach and may not merit buyer's cost—deserves good text space. I'll criticize the other—reduction of both competition among sellers and surplus for buyers—swiftly, in the margin.²⁵

²⁵. The text (before and after this note) offers sufficient deconstruction. See also, e.g., supra notes 13, 20, 22, 24 and infra notes 26-28, 31-32. This note has two jobs: extra deconstruction of ideas I challenge in the text; reinforcement of the succeeding text's handling of bargaining problems and psychology. The text's handling is relatively simple, terse, meant to rely on implication, so that details won't hide the larger goal they serve. This note anticipates particularist criticisms. It doesn't pretend to answer all, point for point; but, in concert with the rest of this Part, it tries to sketch an appreciable design of redoubtable preparation.

Schwartz, The Myth, supra note 13, assumes that full compensation is excess compensation because he measures compensation as does traditional law—by "objective" expectation (market value of performance) or "foreseeable" loss of immediate bargain. And Schwartz says that in competitive markets this measure maximizes buyers' surpluses, because the measure reduces costs of entry into seller markets and therefore maximizes seller competition, which maximizes surpluses available to buyers. So Schwartz says buyers will prefer to contract for legal-level compensation, not higher. See id. at 373-76.

But the argument proves too much. The same reasoning suggests that buyers would agree to sub-legal-level compensation, at least because they could contract for lower price, which would offset the risk of inadequate compensation. Schwartz answers that sellers would breach too often. Id. at 374. But the answer may have to assume, proofless, that the proportionality of compensation and price won't tend to be similar from contract to contract. If it does tend to be similar, an undercompensatory damages clause may not give a seller reason to breach unless he wants to get quick advances in executory obligation assets despite uncertainties of both performance (his and buyer's) and transaction and collection costs. Or a high price for a high compensation clause may signal likelihood of breach, since it says seller is much concerned to cover an outlay for compensation. But any of these configurations may just imply faulty bargaining. See also supra note 24.

Schwartz says the same of perfect information cases: Only legal-level compensation will get the seller to deal and maximize the seller's inclination to perform. The reason? Essentially the same, except Schwartz expresses the assumption (implicit in his first argument) that the seller "has the higher discount rate"—that the seller wants fast gains while the buyer will await greater profit. Schwartz, supra, at 376-77. So we see no reduction in his argument's flaws, but the further trouble that it rests on the impossible premise of perfect information.
Schwartz intuits and calculates statistically that in imperfect information cases, buyers prefer legal-level agreed compensation to "supracompensatory" contractual relief. If buyer wants a promise of high compensation, seller will demand a too-high price. *Id.* at 377-82.

Legal-level compensation never compensates fully, if only because of law's refusal to award recovery of most collection costs and real, but subjective, peculiar or "remote" losses. The value of performance, to both buyer and seller, includes the value of not paying collection and extra transaction costs, and, at least for buyer, also the value of not risking real but unrecoverable losses. So legal damages make a short standard for negotiating agreed compensation. If, as Schwartz, himself, argues, *see supra* note 24, sellers tend more to breach when compensation is set low, then sellers must tend to breach when they risk paying only legal-level agreed compensation. *See id.* And Inadequate compensation clauses may also encourage sellers to use threats of breach to extort concessions from buyers. *Cf.* Schwartz, *supra*, at 386-89, 397.

In the text that follows this note, my analysis implies that a seller might want to cover some degree of a buyer's "remote" and subjective risks because the seller has a low discount rate (prefers good will and long term profit to flash cash). Whatever the frequency of such sellers, buyers may ask "supracompensatory" compensation also because of the stress of uncertainty of collection and extra transaction costs and good will loss or liability to third parties. And if information is imperfect, sophisticated buyers may be able to bargain for adequate compensation without agreeing to a subjective-expectation-eating price, since most sellers are neither actuaries nor seers. *See also supra* note 24, and *infra* this note.

Many buyers don't want any liquidated damages stipulation, unless they can withhold from *Hadley v Baxendale* notice their expectations' true, full values, so that price will be low in relation to the benefit but the agreed compensation won't be less than legal relief. *See also* Johnston, *Strategic Bargaining*, *supra* note 20, at 620-21. The seller may be the party pressing for a compensation clause. The buyer would have strong leverage against high price, even if she demanded more than legal-level damages, if only the demand would cost seller less than he'd suffer if he had to pay a judgment and suffer litigation costs.

So, Schwartz's thesis is partly false, unless we may, as we please, invent or deny human psychology and disregard cavalierly, as uninfluential excesses, whatever losses normal people feel hurtful but the law doesn't recognize. *See also* Goetz & Scott, *Liquidated Damages*, *supra* note 20 (by limiting liquidated damages to legal-level compensation, the penalty rule induces buyers to protect full value with inefficient third-party insurance or suffer inefficient breaches, and it produces unnecessary litigation costs).

Professor Schwartz offers several other seemingly white insights into buyer and seller bargaining psychology. And my credibility owes more criticism.

In a footnote to a mathematical analysis of liquidated damages bargaining psychology in cases where sellers don't know buyers' valuations, Schwartz says:

This analysis does not specify the seller's beliefs respecting the probability that the buyer who rejects the contract [with high price and compensation provisions] has a high or low valuation, but these beliefs may matter: To see why, suppose the seller believes that such a buyer has a high valuation with probability .9. Then, when the buyer rejects, the seller's best response may be to offer [the high price and compensation contract] again. Since the buyer's discount rate is positive, if the seller pursues the strategy of offering [the high price high compensation deal] again, the high valuing buyer may do better accepting it initially rather than waiting. The low valuing buyer would never accept [that deal].

Schwartz, *supra*, at 382 n.24.

Schwartz neither says why or by how much the buyer's discount rate is positive nor accounts for the opposite case. But assume the premise. Still the case's psychology is much fogger than Schwartz's subjunctives suggest. The buyer may yield to the seller's repetition
What price "reflects" the level of compensation? If price equalled compensation, buyer (B-1) wouldn't profit even from seller's (S's) performance. Under any rule, then, S must expect that B-1's gross loss-of-bargain (her purchaser's payment) will exceed price, or B-1 wouldn't deal. S's profit margin oughtn't change with change of compensation agreement; S's interest is the ratio of compensation to price. So, any rule and any compensation agreement may discourage breach, except "efficient" breach, and may put B-1 nearly where Law and Economics says she "expected" to be.

Such a state may appear efficient if B-1's compensation is not greater than the full, non-insensible value of avoiding breach, even if it's greater than highest legal relief. If no B-2 will pay a price high enough to let S gain after paying B-1, B-1's use is best. If a B-2 will pay S enough for that gain, the situation's better: B-1 gets her bargain's benefit. Her market suffers no loss not offset by B-2's market's satisfaction. S nets gain the B-1 contract wouldn't have availed him. B-2 earns profit.

Yet, whether a rule or compensation agreement will discourage breach, even efficient breach, depends on the parties's bargaining powers, abilities, and psychologies. What price is too high for B-1 depends on B-1's belief about what other price and compensation arrangements she might obtain from other sellers and what profit she thinks the minimum attractive one. If her bargaining power and ability translate her belief and taste into a price-to-compensation ratio that gives her hypercompensation for a relatively low price and so still a good margin between price and actual performance value, then even S's "efficient" breach may be deterred.

Make transaction costs zero, S's goods cost 6, his price 8, alternative supply price 10, value to B-1 10, value to her market 12, but 4 the agreed compensation, and value to the best market 16. B-2 has the best market, but her Hadley v. Baxendale notice says her valuation is 12. (B-2's market has iron bargaining power, and S hasn't access to it.) Even if S could set price at 11, he wouldn't breach his

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not because the buyer believes the seller knows the buyer's valuation, but because the buyer is tired and doubts whether negotiating with another seller will cost more than any price or compensation advantage the buyer might obtain. Or the buyer may not adequately appreciate his position, since the buyer may be a human.

Schwartz's mathematical analysis, id. at 380-81, tries to determine the low value buyer's preference of price-and-compensation-measure configurations where the options are two significantly disparate sets—high compensation and high price, and low compensation and low price. See infra note 26 for exposition and criticism.
The result is "inefficient" if price and profit determine wealth. B-1's lower-valuing market gets S's goods. B-2 will invest in a lesser use or buy from a higher-pricing seller.

But really we don't know whether the result is inefficient. Put aside whether market price truly equals value (a matter for Parts II through IV, below). We can't ever realistically assume away transaction costs. No one ever can predict the size of full compensation, if only because of the uncertainties of good will losses, the chance of great, ragged fluctuations in market, price, and opportunity, unexpected liability (from B-1's formula-style compensation promise to one or more of her purchasers or even through retrospective change of judicial rule), and costs of collection and mitigation transactions. B-1 may have misestimated value. Or values may have changed.

Suppose 17 is the true value to B-1's market. B-1, now better appreciating her market, would have paid at least 14. But S does breach for a B-2, who offers to buy for 13, her market having offered 14. Worse, specific performance will be untimely, and B-1's actual losses will be 7. Why?

B-1 can't supply her market or must charge more for her goods (as where her "cover" charges a premium greater than her compensation). Or B-1 will suffer enormous loss of good will and a depression of her ability to supply best uses (as where B-1 must pass inferior goods to her market, or loss of bargain means capital shortfall that stays optimum investment of which B-1 is capable). Or B-1 unexpectedly finds herself accountable for tort damages to a person who relied on B-1's better supplying one of her purchasers, but the damages won't make good the entire loss to B-1's market, all of which received less than what B-1 had promised in reliance on S's obligation . . . .

Not just B-1, but her market, the best market, too, will suffer. B-2's market's satisfaction won't offset B-1's or B-1's market's loss, especially if the markets are unrelated and incomparable (had utterly different uses for S's goods). The public oughtn't suffer the parties' ignorance or mistake.

Now, suppose, again, S gave B-1 a hypercompensatory compensation clause. B-2 offers S more. Ought the courts enforce the agreement (despite any contrary damages rule)? Maybe the answer's "clear": Either (a) the idea is insensible, because we can't know whether what looks like too much is too little (as where B-1's failure to supply her purchases creates damages ripples that B-1 didn't imag-
But maybe it’s not clear. Reconsider answer (b): If S pays lesser compensation but keeps (or offsets) the portion of the price that reflects inflation to cover the agreed extra compensation, won’t S get a windfall? Assume the answer’s yes, and the court gives B-1 the agreed hypercompensation.

S breached because B-2, with market different from B-1’s, will pay enough to cover B-1’s compensation and still give S profit greater than from the deal with B-1. Awarding B-1 the agreed compensation didn’t prevent S’s “efficient breach,” and does save B-1’s loss. But the hypercompensatory relief won’t serve its purpose—discouraging breach. And it cuts efficiency, pushes up the price B-2 pays and passes the cost to B-2’s market. Does it, after all, also give B-1 a windfall?

Reexamine the court’s choice—its award of hypercompensation. Why didn’t it instead award “expectation” compensation and cut the excess in S’s price? Assume the reason is that B-1’s price agreement drove up B-2’s price, which, though her market will bear it, doesn’t reflect utility to the extent that it, like B-1’s price agreement, reflects the excess in the compensation B-1’s contract provided.

Suppose, again, specific performance would be untimely. After S and B-1 made their deal, alternative supply failed, but B-1’s market bettered and would pay what B-1’s compensation would be.

Agreed compensation would be “efficient”—not hypercompensatory. We don’t know which came first—the “hypercompensatory” chicken or the high-value market egg. Market value increased because it was destined to increase. Else it wouldn’t. So, what had looked like hypercompensation wasn’t. Surely compensation efficiency is a matter of “actual” market forces, not B-1’s knowledge and insight.

Or maybe B-1 had got the wrong market but right compensation. The threat of such compensation influenced the price B-2’s market would bear. Now, even if B-1’s first market wouldn’t pay the compensable amount, B-1 has the right market—B-2’s, by way of B-2 and S.

Am I inventing unusual cases? Hardly.

Reality doesn’t follow Law and Economics’s hypotheses of the economics aptitudes or forensic and statistical skills of contracting parties. And its estimates of human behavior are biased amateur psychologists’ wishes. Its mathematical models may be able to trace
markets and bargains after they occur (a possibility I'll put only for argument). But (as any honest statistician will agree) they can't predict them. Witness even the disagreements among forecasts of eminent economists and the differences between economists' theories and the nation's economic behavior and experience.

We can know only that markets, opportunities, and costs all fluctuate, and parties often mispredict—as cases vary infinitely with players and conditions, and people very often fit results to the sets of their imaginations. A court could just as well find that B-1 was prophetic rather than frightened ("risk-averse") when she set compensation. The result supports either premise.

B-2's market bears S's price partly because of notice of the hypercompensatory rule. We can't say market valuations don't always, or oughtn't, bend under such pressures. The problem is Law and Economics's theory of wealth (whatever the market, informed, will bear) and how to maximize it (bargains designed by greed). That theory must make too many ragged consequences noncontractual means must mend, too many for the theory to withstand.

"Punishment" (hypercompensation) is inefficient only if you don't appreciate the value in retribution. But it is valuable—psychologically, even biologically necessary—and so appropriately influences market price, and efficiency (since it may deter demoralization, encourage reliance).

Still, is contractual punishment an impossible or ineffective ideal? Argument: B-1 must pay for it, in the higher price S will demand to offset the cost. So it doesn't redistribute wealth, but does somewhat discourage "efficient" breach.

The argument's too short. It misses at least two problems.

If compensation provision prevents "efficient" breach, we must question whether breach would be efficient. The answer must depend on what the deterrence saved or why we call the compensation provision "hypercompensatory."

Suppose the provision's excess over "expectation" reflects the buyer's earnest estimate of collection costs. Suppose damages are inestimable, unless the estimator's an arbiter, like a hard legal rule—rather than empathic apprehension or informed, patient hindsight. Maybe not having to accord retribution gives society more than it loses from not enabling B-2 to supply her market.

Whether S will make B-1 pay, fully, for S's punishment depends on whether S can predict or control its amount and probability. Damages always unpredictable, the contract states compensation by formu-
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la keyed to kinds of risk, rather than by dollar amount. S must set price on guess and relative bargaining power, and it may be low. Or law might decide it always will read such compensation high enough to keep an S’s price from erasing the compensation’s punitive effect—or read an S’s price at a punitive level below such compensation.

Even if S knew the amount of compensation, B-1 wouldn’t buy at a price that would cancel the hypercompensatory portion, if she’s hypersensitive to risk of breach. In any case, either S won’t deal or he’ll more likely perform because he can’t so likely set a B-2’s price to yield profit from the B-1 contract’s breach.

What of the ubiquitous risk of uncertain, intractable costs of collection, or litigation and enforcement? The answer returns us to the questions of the value of retribution, and how much law ought to treat compensation as prediction, and what prediction ought to mean, what it ought to tell.

Maybe B-1 oughtn’t have to pay twice to have S punished—one in higher price and again in collection costs. Yet suppose B-1 thought she was providing costs of collecting for negligent breach, and she set the amount too high. If S, a wilful breacher, had to pay for the mistake, his payment would be partly hyperpunitive, would it not? If the provision doesn’t stipulate a way to segregate compensation for negligent breach, how are courts to know what shall be punishment? If the provision makes a failing try at the segregation, what are courts to do?

Ought B-1 to be punished for the mistake—by our leaving S unpunished for a wrong because B-1 wasn’t artful enough to measure it precisely? Is the answer that one takes the self-help one gets? Suppose the law would have awarded B-1 more had B-1 not got the compensation provision into the contract. Did B-1’s intent, not her mistake, intend less? Is the answer that her mistake was unilateral? Does S’s price evidence that? Ought S to prove the evidence? Was compensation level B-1’s concession to S’s price? Maybe it was a steer both thought a pregnant cow.

Recall that compensation isn’t set in dollars, but by formula. What if the parties weren’t accountants and the formula was mistaken reflection of intention? Was it mistake, or imprecision of prediction? Are such problems like any other ambiguity?

Are these questions off track? If punishment’s the point, why are bilateral intentions important—except to determine S’s motive or B-1’s “consent”? Ought we care whether S’s wrong was a wrong be-
beyond B-1, or a wrong not covered by the law of tort? What if tort law's mistaken, or unconcerned, or captured by Law and Economics, its disdain of empathy, its amateur psychology, its worship of illusory efficiency?

Suppose, in a negotiation of a compensation agreement, an actuarially-minded, "low-discount-rate" S might adjust price only to account for risk of paying agreed compensation, if top compensation amount, though markedly higher than price, isn't beyond S's capacity to absorb loss. The risk would depend partly on (a) S's determination to perform, (b) the cost of settling or litigating B-1's claim under the clause, and (c) the probability that B-1 would mightily prevail. Compensation level makes efficient (wilful) breach unlikely.

Even with strong bargaining position, S might devalue the risk of paying the compensation for negligent breach or interference from unforeseen events, if B-1 offers special advantage, like the security of eventual clear, good profit from B-1's reliably repeating bulk purchases, or eventual market control. So S might set price lower than the compensation level otherwise might suggest.

Suppose, again, B-1 wants compensation set by formula keyed to kinds of risks. Maybe, if B-1's formula and risk predictions are earnest and fair, S will yield on trust, if only B-1 agrees to a provision for renegotiation if actual compensation were beyond S's, or both parties', contemplation, or beyond S's capacity to absorb loss that B-1 can withstand. Rather than the standard of shock, the parties choose the guide of B-1's and S's post-breach conditions and prospects and the relative foreseeability of their losses.

If breach occurs and the gross profit S expects (from whatever performance to whomever) is substantially less than the full compensation the agreement would require, then the parties will renegotiate compensation. The bargaining points will include savings of costs of litigation, some advantage over legal relief, and B-1's embarrassment or indignation. And renegotiation might work even if S sells to a B-2 some of what S promised to B-1. The breach might be S's tender of goods defective for B-1's purpose but useful to B-2.

This may seem both efficient and fair—within the limits of unknowability and the parties' subjectivities. But it's too peculiar to effect general "efficiency," just as an efficient contract regime is an unattainable. It depends on unique business conditions, sensibilities, tastes, priorities (like security and long-term gain over flash profit),
and benevolent good faith, not greed—surely not mathematics.26

26. Compare ninth-from-last through fifth-from-last paragraphs of note 23, supra, and infra Part III.

Preface to this note’s text: I’ve set my criticism in ordinary language. Even if you’re not math-inclined, you should be able to follow it, if you just don’t go blank when you see the math, which, except for + and - and occurrences of fractions and multiplications, you needn’t understand.

Schwartz says we must measure probabilistically the gain the “low value” buyer ought to expect from the high-compensation-and-price configuration, but nonprobabilistically the gain the buyer ought to expect from the other configuration. We must measure the high-value-configuration expectation at \( v_h(v_h - p_h) + (1 - v_h)(v_l - p_l) \) and the low-value-configuration expectation at \( v_l - p_l \), where \( v_h \) and \( v_l \) are “high value” and “low value” and \( p_h \) and \( p_l \) are “high price” and “low price.” Schwartz, The Myth, supra note 13, at 381.

This analysis—in the first price measure’s limiting prior probabilities to \( v_h \) and \( 1 - v_h \), and in the absoluteness of the second measure, \( v_l - p_l \)—assumes either full performance or full breach and nothing between, in a model world where actual price, actual performance-value, and actual compensation entitlement always vary proportionally. But in the real world, partial breaches are common. And when they occur, the question must be whether compensation ought to be nonproportionate to the extent of breach though price ought to be proportionate to the degree of performance, or vice versa.

The compensation provision’s (or the legal rule’s) terms may not allow coverage of the special costs of buyer’s having to find a partial substitute supply or having to manage the consequences of the buyer’s own partial failure to perform third-party contract obligations that depended on full performance by seller. The cost of half breach may be more, or less, than half the value of performance, but the odd amount may result from troubles beyond the “expectation” of either party. Or if (hypothetically) both parties anticipate all troubles, still the case may threaten unchartable variance in effective value of compensation—because of erratic disproportional variance in price and noncompensable costs (like collection expenses). See also infra note 28.

Math can’t measure cleanly, if at all, the probabilities of such erratic disproportionalities, such unforeseeabilities. The variables are too subtle, soft, uncertain, and subjective. But if you, like Schwartz, want the game to come out quantifiable, you will make it so in your perception. Cf. Jaffee, Of Probativity, supra note 6; Jaffee, Prior Probability, supra note 6; Jaffee, Blue Buses & Concealed Convicts, supra note 6; Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 HARV. L. REV. 1329 (1971).

So, too, Schwartz’s math can only guess at the real risks and psychologies that spin around prospects of full performance or breach. It can’t measure real parties’ rational apprehensions that, between negotiation and the last relevant moment after performance or breach, value may fluctuate even if only in some “low” range of unclear limits. An easy example is a buyer’s expectation of gain measured by the difference between price and a percentage of a third party’s profits related to use of the product the buyer makes partly with the seller’s supply. (Buyer gave seller Hadley v. Baxendale notice.) A harder one accounts for buyer’s good will. (Assume counsel can cover such matters in a liquidated damages clause that will, or ought to, survive litigation—an assumption appropriate if the question is efficiency, not legality.)

In Schwartz’s mathematical analysis, prices (\( p_h \) and \( p_l \)) derive from

\[
p = v - \frac{v^2}{2} + \frac{x^2}{2}
\]

(The multiplier \( x \) expresses the seller’s bargaining power as a variable with range of 0 to 1.) Schwartz, supra, at 381, solving a complex price formula, infra. The troubles here are two
related kinds—disguised arbitrariness, disguised mystery.

Why must or ought the denominators be 2 and 2, rather than adjustable, to 2.5 and 1.5, or 1.8 and 2.2 or some other combination? If you believe in econometrics, immediately my question must make you doubt my gift for math. The formula:

\[ p = \frac{cd + (1 - v)x + (v - c)}{cd} \]

Id. at 380, can't admit of such solution. Were its solution's denominators adjustable, they would appear to adjust the value of the variable (seller's bargaining power) that \( x \) supposes to adjust for; so they would appear redundant. I don't mean to suggest that the formula doesn't describe accurately the object it describes. I mean to shake your thought into questions that take you back beyond the formula, show you that the formula describes the wrong object, cannot describe a "right" one.

Why must the seller's relative bargaining power operate only on just quite half the square of the probability of buyer's valuation (half the square of her expectation)? Why, despite seller's actual cost, must seller's price be at least the difference between buyer's expectation and half its square?

Seller's price ought to reflect seller's power to retain value of the thing he allocates to buyer. What's the value of the thing he allocates? The surplus of benefit over cost. If buyer wants benefit of seller's product, buyer must pay seller's cost—except in the extraordinary case where seller's untoward circumstance forces him to sell below his cost. Assume the ordinary. The question, then, will be: How much of the surplus can the seller retain (in price)?

The answer depends on seller's relative bargaining power, which depends mostly on subjective and indeterminate variables, like the seller's and buyer's psychologies and demands for their products, and these aren't rightly quantifiable. But can one quantify any components of seller's bargaining power?

Seller's bargaining power partly depends on the probability of a next best buy. If one disregards all subjective variables (like the psychology of the next best buyer) and blinds oneself to indeterminacies (like the measure of alternate demand), one might quantify this component as (A) the next best buyer's would-be expectation—the product of (i) the next best buyer's valuation of seller's performance and (ii) its probability—multiplied by (B) the probability of that buyer. Why not use probable price to the next best buyer, rather than her expectation? (1) One must compare (a) the seller's position vis-a-vis the next best buyer with (b) his position vis-a-vis the buyer in question; and the seller's position (chance of sale) depends on his prospective buyer's valuation before it depends upon price, which depends on that buyer's valuation. (2) One surely would be caught in a circle of uncertainty if one compared the price seller would put to the next best buyer. (3) One must compare like kinds.

But how use that quantity? Compare it with the probability of buyer's expectation. If all other variables are excluded, seller's power to retain surplus depends on the relation of (q) the probability of the valuation of seller's alternative market to (r) the probability of buyer's valuation—because seller's market power depends on probable buyers' expectations in seller's performance.

So \( x \) would be \( P_e / e \), where \( P_e \) is "probability of next best buyer," \( e \) is "next best buyer's expectation," and \( e \) is "buyer's expectation." Say \( P_e / e \) is .8(9) and \( e \) is .5(11). Then seller's relative bargaining power, so described, would be .73. Price would be seller's cost, plus surplus (\( e \) in excess of \( c \) multiplied by the value of his relative bargaining power:

\[ p = c + x(e - c) \]

If \( c = 6 \), then \( p = 6 + .73(9.9 - 6) = 8.847 \). Seller's profit will be 2.85, and buyer's 2.15, if seller performs and buyer realizes her expectation.

Is my price-calculation tenable? Schwartz's price-calculation isn't God-given, even if the fashion in econometrics. It accounts for variables, or not, according to the vision and inclinations of its proponents. It isn't "truth." Though it may be more "sophisticated," it isn't less irrational, but counterintuitive. Mine likely more-than-not approximates business practice.
Still, Law and Economics may say I've proved its thesis—that freely negotiated bargains best serve efficiency and maximize wealth: Unknowability and the parties subjectivities are limits that are constants for all conceivable contracts and regimes.

But, however seemingly efficient and fair for the parties, this solution, too, doesn’t have the right stuff. It won’t account for information that is inaccessible, uninteresting, or insensible to the parties, or externalities like demoralization, or the deleterious meanings unattended information may have for outsiders, even remote participants in B-1’s market and persons variously interested in S’s business state.

How demoralization? If the parties negotiate, intelligently and sensitively, a fair, efficient solution, why would anyone be upset?

Others may, understandably, disagree with the parties’ notions of intelligence, sensitivity, fairness, and efficiency. They may notice insoluble problems: B will be foreclosed compensation for unexpected or mispredicted prospective loss, unless she’s guaranteed further renegotiation. The further guarantee will defeat itself; it will justify S’s like later claim, and B’s further rejoinder, and on, and on, till contract is illusory, uninviting, insecure.

Such self-defining arrangements threaten spiral negotiation and collection costs that no compensation agreement can anticipate or

So, if freely negotiated contracts (unregulated market transactions) best serve efficiency and wealth maximization, my calculation is sound, and Schwartz’s argument at best critically uncertain.

But both calculations are incomplete, in too-narrow, pretended objectivity. Consider, openmindedly, x’s calculation—not which one, but whether at all. The calculation must be what it cannot—a mathematical determination of the bargaining-power-related joint implications of (a) demand for seller’s performance, (b) demand for, or utility of, buyer’s use, (c) the power of seller’s bargaining skills, (d) the power of buyer’s bargaining skills, (e) the parties’ relative actuarial skills, (f) the parties relative access to information that may be pertinent to price, risk, and value, and their relative abilities to interpret gainfully that information, (g) seller’s taste for profit, (h) seller’s “discount rate,” (i) buyer’s taste for profit, (j) buyer’s “discount rate,” (k) seller’s taste for risk in buyer (price default, having to compensate), (l) buyer’s taste for risk in seller (breach, performance value shortfall) . . . .

Enough being enough, I failed to state some variables. Some, though, like investment, capitalization, debt service, are implicit in one or more of those I listed ("discount rate," taste for profit . . . ). I might have paired some I stated separately, or stated separately some I paired (the parties’ relative actuarial skills, the parties relative access to information . . . ). No matter. This is what's important: You can't quantify (but only make a numeric-seeming guess) at the value of bargaining power, because you can't quantify, except mysteriously, the bargaining power implications of such variables or the relation among them. All are either subjective or indeterminable. And they're of different kinds and orders—like fibrillation and orangutans or electric current and bassoons. Law and Economics can't insist on calculating just for the "objective" variables, because freely negotiated (unregulated) transactions are substantially subjective.
workably comprehend. An S’s self-interest makes doubtful his concess-
on to B’s claim of embarrassment or indignation. S did set the
condition that his obligation may diminish if his efficient breach
turned out his baleful loss.

Demoralization is feeling. If others recoil at being stuck, ulti-
mately, with such “best” assurance, they will invest only reluctantly,
or with resigned guile. But these problems commend themselves to
feeling’s sense, not the “rigor” of Law and Economics. Maybe you,
too, want not to recognize all feeling all the time. But why? Too few
resources? Strained patience? Such limits are character’s choices of
allocation.

We’d have more time and capacity for empathic understanding,
if we didn’t spend our personal resources on the program of Law and
Economics, if we put our energies and attentions to feeling life. We’d
have more feeling, more feeling life.

Externalities—beyond demoralization? Never mind the obvi-
ous—untraceable injury to innocent human health or nature, as in the
Agent Orange case. Law and Economics scoffs at such stuff, remits it
to an ineffective tort law, then, perhaps, to taxation that doesn’t cure
the harm. Suppose S’s breach stops B from satisfying an obligation to
another, A, who therefore can’t fulfill his promise to his promisee P.
P loses good will, then, eventually, but not well traceably, loses his
business.

But the simple trouble is that the renegotiation leaves the parties
where they started—at determination of relative foreseeability. A court
may not see the matter better. Still, at least it would be relatively
disinterested—to the extent it hasn’t Law and Economics’s normal
vision of “objective expectation” and isn’t chary of administrative
costs.

Adjudication is more expensive only if procedural rules cost
more than negotiation and private enforcement—and they needn’t.
Fear, if not greed, is a muscular block to the parties’ cheap renegoti-
ated solution—especially here, where the problem wouldn’t occur
were S not in an acid strait. Settlements often fail and remit parties
to court. The same risk, at least, must imperil renegotiation, which
puts the parties to making new allocations, not just maneuvering an
arrangement that seems fixed.

Law and Economics tends to shrug away such matters, despite
they contribute to the ultimate values of things and behaviors parties
contract about. Here it meets the unshruggable. What Law and Eco-
nomics may think nicely efficient, empathic sensibility was to supply.
But it was miserably fertilized in a very bad egg—a Law and Economics scheme.

One way to understand is to consider a novel remedy—specific relief with adjustment for losses that B–I’s financial state and empathy might make concessions to. Parts II through IV hope to help you through a hard but more revealing way—seeing that Law and Economics fathers titanic externality, vast depredation of the wealth of life.

G. Fission & Modulation: Mirage of the Contract Principle

Problems of information, transaction and settlement costs, externalities—and the play of emotion—overwhelm Law and Economics’s theory. Doctrines like “efficient breach” and Hadley v. Baxendale beg many more questions than they can answer even imperfectly. The problem of M–I v. Breacher can be a problem in any contract, so long as our system is greed. That liquidated damages

27. Information-fostering rules can’t solve these problems, since, whatever the devices, greed will hold back, obscure, or deny what threatens it. In no way can we make parties react fairly rather than greedily when they confront facts that threaten their greedy self-interest—nor even (history has taught) with vicious criminal law, bribery, or lawless brutality, and especially when the legal and socioeconomic systems encourage, even worship, commercial greed.

The only answer is ending greed and living empathically. But we can’t do that, except each of us, personally, through character adjustment, which one can achieve only through deeply introspective self-criticism, as one might experience in, say, effective psychoanalysis (a very rare phenomenon), or maybe Zen training, or Orgonomy, or from luck and growth in elder age.


The use of the word “nature” itself suggests the dominant strategy that allows—or at least should allow—natural lawyers to counter the threat of particularization. The obvious source of human needs and desires is not culture, but human nature . . . . It rests [not on “how persons are socialized” but] in the common set of biological necessities . . . .

Back of the battle for survival is the looming threat of scarcity. There is never enough to go around, so that conflict within groups and across groups is . . . inescapable . . . . It is, moreover, a condition that calls forth its own type of human personality . . . . Over time greedy organisms that have all of what they produce, and some of what others have produced, will fare better in competition with more generous organisms . . . . As the process continues, the pure altruist keeps a smaller and smaller share . . . until the retained share is insufficient to allow survival or the reproduction of its own kind.

27
At a descriptive level, these theories explain how individuals maximize their welfare under conditions of scarcity and uncertainty. This theory of individual self-interest is not only a theory of conflict and competition, it is a theory of cooperation as well. The organism that goes it alone has no insurance to fall back upon when things go bad, and is unable to engage in any projects that require the coordination of two or more actors. [So, self-interest] encourages voluntary arrangements with some, and recognizes that although conflict may promise great gains, it also holds out the possibility of devastating losses.

Epstein, Utilitarian Foundation, supra, at 719-21.

Q.E.D for Law and Economics? The argument's full of misassumptions and false steps.

Lone carnivores (leopards, pythons), lone rodents (chipmunks), for instances, survive very well only with competitive self-interest. Humans, like elephants and whales, are essentially noncompetitive, communitarian. Human infants are incompetent for many months after birth. In primitive settings, like the original humans', human infants needed the almost constant attentions of their mothers. If mothers had to forage, unaided, too many human infants wouldn't have survived, and the race would have become extinct. The human male had to tend the mother, find food for her and their children. Family, mother-centered family, was a biological necessity. That family was giving and empathic—mother feeling and giving to child, and father mother, as mother nurtures father and child, the father emotionally, the child thoroughly. Giving and empathy explained human survival.

Scarcity is illusion, or choice. The world still is full of what humans need—superabundant—if you see it right. The problem (the subject of Parts II through IV) is post-primitive humanity's wide mistake about what humans need, and, consequently, its self-depredation and waste of resources it needs for happy life. Until (as may be soon) we destroy it, the world, if we wish, will bear us, as it always would, an abundance of the natural grains and vegetables that are the only things we were designed to eat. (I support this proposition at appropriate places in Part II.) Unless we continue, ignorantly, to want otherwise, we can have an even greater abundance of all else we need—joyous work, love, empathy, mutual aid, good feeling, health, good fun.

Alone, we humans are still weak, not because of a scarcity of things we need, and not just because of the frailty (even psychic frailty) of our infants, but because we don’t have powerful muscles, claws, wings, fur, great agility, the means to scamper among branches of trees, the size and suppleness to wriggle into holes or hide under water lilies, the biology to reproduce hundreds at a time . . . . So we must work together.

I agree that all creatures are, in the beginnings and ends of all motives, quite selfish. And I take the premise even further than Epstein does.

We are incapable of altruism. See also Iaffee, Empathic Adjustment, supra note 2, at 1183-87. Altruism, like self, or hatred, is empty abstraction; the feeling of fear, love, joy, or hunger (or its satisfaction) isn’t. We love because we’re selfish, because it feels good. We can give because we’re selfish, even if we get no intended consideration, because the giver gets more joy than the object of the giving.

But that kind of selfishness has consequences and implications perfectly opposite the kind that Epstein explains. It places our interests’ greater, eventually sole, satisfaction in love, giving, and trust.

Think about it. Use your native, innocent sense. If we didn’t have to worry about threats from our own species—could count on people’s supporting and loving each other—we’d suffer no threat but weather, cataclysm, creatures of other kinds. But if we didn’t injure the nature that feeds and clothes us, gives our senses many pleasant wonders, nature’s threats would lose number.
clauses offer no solution is sufficient proof that Law and Economics rests on illusion. The proof finds ironic reinforcement in significant occasions of Law and Economics's self-defeat, even in the indetermi-

Our nature, our biological nature, makes empathy an imperative. See supra (implications of human infant frailty); Jaffee, Empathic Adjustment, supra, at 1169-1219, especially at 1169-76, 1196-1205, 1208-10, 1214-19. Empathy is selfish, but neither foolish nor competitive, even if naïve. It's selfish if only because the human organism needs. But its effects are everyone's good.

Karl Marx was a pathologically angry and unhappy, pessimistic, arrogant man. But, as devils often best see good, he described quite well, in spite of himself, what nature says ought be our way—from each according to ability, to each according to need. But as Marx designed to warp the way, we much misconceive it. Its choice must be spontaneous. If you make it a rule, a system, force it with sanction, it transmutes to disappointment, deprivation, repression. Id.

We need to work—need work for its own sake, work that feels good, makes us happy in the doing, satisfying work that produces what we love as producing it is love. We need to help each other find, and do, such work. We need to love and give, because that feels good. The more we love and give, the more we get. If you supply my need without return, still you reap reward—if you love the work, and need it to love. Your fellow does you service if your work satisfies her need. Your fellow owes you having need you can so satisfy with your work and love. Whatever you provide, you get what you need. But you cannot demand. Attention to your need, not your gluttony, is your life's expectation. And you and the next fellow may need not to supply another's need or demand.

That you cannot—if you cannot—see your welfare so is only that the blind and straitened taught you fear, distrust, aggression. You fear you'd work too hard, get little while others lazed and took too much. Hard learning has hardened into character that won't let you see.

If you work because the doing's joy, you neither work too much nor worry that your effort satisfies your fellow. You need to do the work you need, no more, no other. And asking otherwise denies your need. If others bear sense and feeling, they won't demand of you or resent their work's serving your desire.

I admit this isn't much the learning of our time or the past we wish to see. I concede that what are our common learnings are reasons to be ware. I'm no fool, if empathic. But these are reasons also for patience and compassion, and for taking the time for talk's like Anachronis's with Modemo Conoscenzo, a dialogue Parts II through IV report to you. We can't do more, except in ourselves. Good sense can't be forced by law or sanction, but must take its time and way, from senses native within. See id.

But from the beginning of humanity's time, "primitive" people have been family-centered communitarians who live Karl Marx's golden rule. You'll see this among the Hopi and Zuni, in Melanowski's Trobrianders, in many African and East Indies tribes, in pre-European Polynesians, Aborigines, Maoris . . . . You see it magnificently in traditional Bushman life, where family is the whole society and each member does what each does best, the whole product of the whole being divided according to individual need. Bushman families dwelled (some still do) in the Kalahari Desert, maybe the world's harshest. Yet they always smiled and laughed and sang a lot, had plenty of fun with each other, and everything they needed. They were sublimely happy till the Boers and English and Zulu invaded. Were the invaders better because they weren't happy being where they'd been? Are we sophisticates happier, or more stressed, because of our contraptions and what we think our great knowledge? See id. Compare infra note 60 and surrounding text (Indians and Bushman clans) and p. 880-82 (Hopi and Zuni).
nacy and deconstructibility of Law and Economics's self-criticisms. So Law and Economics can't be coherent theory.

Liquidated damages clauses ought to be the quintessential reflections and proofs of the core Law and Economics theory that contractual transactions ought, generally, to govern human affairs. If Law and Economics is correct, contractual solutions ought to bear fewer and lower transaction costs and externalities than do judicial ones, even arbitration. At least they ought to avoid inefficient breaches.

No contract can be perfect and complete. Still, if, to all's fair-informed satisfaction, a contract provides for every affected person's relief from loss upon mistake or breach, then it provides the best utility in our imperfect economic world.

The same should be true in the field of injuries like torts. That conduct is tortious ought to mean only that imposing liability maximizes wealth. If the threat of liability stirs the potentially liable to satisfy their antagonists' appreciable interests with risk-allocating contracts that intelligently (and sensitively) avoid tort litigation costs, again the greatest available utility will be served. Planning would be frequent and efficient, and action safer, cheaper, better insurable. If law were to be "right" this way, contractual arrangements should have avoided it before it occurred.

If product can be positive, cost minimization must maximize utility. So, the theory goes, if a contract does anticipate costs and compensation well, it maximizes wealth. There is Law and Economics's fatal theoretical flaw, a weakness in the germ of its birth, a species of the formalist's fixed dependence on the deceptively indeterminate.

Law and Economics cannot show that free negotiations can resolve efficiently any inefficiency in freely negotiated contractual arrangements. Therefore, Law and Economics cannot show contractual allocations efficient, since, if only because of ubiquitous uncertainty and intractable transaction costs, no contractual allocation (of any benefit or cost) can be efficient. Rather, Law and Economics scholars can't agree, and their debates only make their case worse. This must be so.

Law notwithstanding, no contractual provision can cover reliably what efficiency (or fairness) would demand of Breachers or wrongful negotiators—who are as much tort-duty violators as promise breakers. If law can't account for all affective benefits and costs transactions really bear—just as contracts seldom foresee a less disutile allocation or law—we must infer both contract law and contract are inadequate.
That shouldn’t be a surprise. All law is contract, all contract, law.  

28. This note relates to the whole of the paragraph this note’s signal accompanies. About contract breachers’ and wrongful negotiators’ being tort duty violators, see infra note 30, but with apprehension that “wrongful” includes unempathic and negligent, even if neither “inefficient” nor currently “wrongful” in the conscious mind of law. About the rest, along with my discussion above and in note 31, infra, what follows will do.

If compensation agreements don’t work or aren’t efficient, then Law and Economics’s core principle is a snake that eats its tail and a spiral anomaly. No single contract cleanly allocates all the benefits and costs it may cause or affect. That truth presents three choices: (1) Do nothing more but let empathic sensibility, accident, or force prevail. (2) Charge society to relieve the untoward consequences. (3) Try to solve the problem contractually. But (3) is self defeating, because the first contract’s essential deficiency must also be the second’s; none can cover all consequences and impose no untoward costs. Then the choice is social remedy or the risks of life. But if social remedy, then contract. Always, contract ultimately explains the relation of ruler to ruled, however seemingly arbitrary and brutal the rule; since always the ruled can resist. That leaves life, where empathic sensibility ever has been the solution. But you may think I digress. So, more on contract.

Contractual allocation, like contract interpretation, always is ambiguous, because language, as symbol, always is. I showed this variously in various illustrations in this Part. See also supra notes 6 and 21; cf. infra note 30. So, all contracts’ consequences, like those of performances and breaches, must be indeterminate, both in reference to the contracts they relate to and because of the indeterminacy of perceived events. Again, see supra this Part and notes 6 and 21. Cf. infra note 30. In the text, I showed that contract-provided solutions are more of the problem. Addicted to caution, I’ll supplement the showing here.

Liquidated damages adjudication involves highly subjective, painfully indeterminate issues—reasonableness, practicability, objective foreseeability—that make proof and defense very difficult, and costly. Law and Economics scholars have argued that litigation-cost savings can make agreed damages provisions efficient, where judicial remedies cannot, and that courts ought not review those provisions because the review must produce wasteful costs, direct and indirect. See infra. See also supra notes 20 and 22-26. Cf. supra note 13. Compare Goetz & Scott, Liquidated Damages, supra note 20 with Schwartz, The Myth, supra note 13, at 387. But compare Richard A. Epstein, Beyond Foreseeability: Consequential Damages in the Law of Contract, 18 J. LEG. STUD. 105, 116 (1989) with id. at 118. The argument is false, and inconsistent.

The law materially and problematically limits enforcement of agreed damages clauses. If the law did not sternly limit them, with special rules of reasonableness and impracticability of ascertainment, still the law would much limit enforcement. Such clauses are painfully difficult to draft well. Ambiguities and unforeseeabilities abound, beg litigation, ex post negotiation. So long as greed and it’s stupidity manage socioeconomics, people will litigate any contract term if they believe they stand to gain dollars or cut money costs.

(Though maybe infrequently, need for retribution will encourage efficient breach victims, like M-1, to sue even if the outcome must be a loss. In my third year at law school, a notable federal judge offered me a clerkship, and I accepted. A week later I was offered an assistant professorship at a law school. Friends among my teachers gave me the misadvice that I ought to take the teaching job because the market was closing fast. I could, they said, write my way into a better position—more likely than I’d get one after clerking. I breached my clerkship contract—told the judge why. He was outraged, terribly ego-wounded, and threatened me and my teacher friends, nearly sued me, though he wouldn’t have achieved money gain. Now I empathize.)

Law and Economics scholars insist that some rule is always needed, but all ought maximize efficiency, or wealth. If so, we must have judicial remedies at least to channel
agreements toward greater efficiency.

Professor Schwartz says courts ought not review negotiated alternatives to efficient judicial relief, at least because negotiated agreements save litigation costs and review adds them back and so inhibits just claims to compensation or encourages promisors to extort forbearances from relief. See Schwartz, supra, at 387.

But Schwartz's proposition depends much on the premise that we can trust private negotiations to be efficient. Law and Economics scholars haven't proven that premise. And (as several of this Part's footnotes reflect) they continue to debate hectically its incidence, so hectically that they haven't staked out a point where they can agree the premise is sure.

Schwartz says compensation agreements "are no more likely than other contract terms to malfunction." [Sic.] Id. But other contract terms malfunction all too frequently. And they are reviewed. We can infer that Schwartz would have all contract review abolished. Yet he, like his colleagues, says we must have a legal rule for agreed remedies. See supra note 13 (quote of Schwartz). Whatever else it isn't, a rule is nothing without sanction, which, here, is nothing without review, since, wanting likely possibility of carrot (tax break, market privilege . . .), we need a stick.

Schwartz fails to consider how often efficiency explains claim inhibition, or "extorted" forbearance of relief. Such is the case wherever the promisee's provable real loss is very slight but the litigation costs to defendant would be great and the promisee resists settling for some amount greater than her claim but less than defendant would have to pay in judgment and litigation costs.

Acknowledging the trouble that even nonlitigational collection costs may arc downward agreed damages efficiency, Schwartz analyzes some prospects for contractual solution. Schwartz, supra, at 396-98. There he recognizes some of the uncertainty problems and "moral hazard" in express provision for allocation of collection costs:

[E]ach party is the most efficient bearer of the risk that it will incur collection . . . costs. The magnitude of these costs is difficult to predict . . . hence, the typical contract would . . . award a party "reasonable" attorneys' fees . . . . . .

Counsel would have an incentive to devote excessive resources to the prosecution or defense . . . because . . . litigation costs are less than the expected final burden . . . . . . Also, the cost of an attorneys' fee clause is hard to calculate ex ante.

Thus, each party probably would charge . . . too much for bearing the moral hazard risk[ and] . . . a party that requests a legal fee clause [may] . . . rather sue than work disputes out privately. [So] . . . legal fees clauses seldom are observed in commercial contracts although courts will enforce them. Id. at 397. Schwartz understates the problems.

Consider whether each party can best bear that party's own collection cost risk. Suppose a party can't obtain insurance coverage of the risk, and actual costs turn out surprisingly unbearably high. Had the party the insurance, maybe (and this is an issue) the insurer would be subrogated, but two collections would happen instead of one. Yet (as is common) the insurer may, by contract, collect for the insured—without first paying. We see three possibilities, among others, and uncertainty where the efficiency lies. Cf. supra note 21 (discussion of Vincent v. Lake Erie Transp. Co.). [I needn't answer whether the insurer may be inefficient in itself, or in not writing a policy or writing one inefficiently. That's irrelevant (to which party better bears the risk), as it is unclear. Cf. id.]

Courts often enough do not enforce such provisions because of their vagueness and amenability to abuse; at least, they don't award the attorneys' fees claimants quite what they demand—even if some fair, rational appreciation suggests that the demand is reasonable—just as some courts (Schwartz admits) treat as a "penalty" a compensation provision that tries to include collection costs. The name change (from compensation to attorneys' fees) doesn't change the effect.
H. The light in Darkness: Pragmatic Relief

For practicing lawyers, one moral is: Don’t spend much time or client money drafting or negotiating liquidated damages clauses. They

If, as seems true, judicial process is too often necessary to collection clauses’ enforcement, then such clauses beg the question of their efficiency. We can’t know whether the cost of negotiating such clauses plus the cost of litigating them may be less than the cost of judicial collection process without them.

Having recognized the impracticability of collection cost allocation provisions, Schwartz considered cooperative reduction of collection costs. Here he suggests making contracts clear! Schwartz, supra, at 397. That’s impossible, except to the extent attorneys, like, apparently, Schwartz, run out of imagination about the ambiguity of language. See supra notes 6 and 21; cf. infra note 30.

Schwartz added: (1) Performance bonds; (2) collateral that can be privately repossessed; and (3) arbitration clauses. Schwartz, supra, at 397.

But how can one make remedy “(1)” efficient (or fair) if one can’t make attorneys’ fees provisions so? For both, the deep trouble’s the unpredictability of collection costs.

Even if no Constitutional Law questions clouded remedy “(2),” how would the parties avoid moral hazards? The hazards include those likely reflected in the cost of replevin of collateral wrongfully repossessed. Replevin, too, is an unpredictable collection cost.

Unless the clause sets efficient, if not fair, limits to arbitration, we can’t know whether remedy “(3)” will cost less or more than litigation, which, because of judicial presence, can sometimes be less tortuous. And, if the clause tries to set efficient or fair limits, it risks erring under the same uncertainty that makes inefficient and unfair provisions for direct allocation of collection costs or attorneys’ fees. Even if it costs less (the alternative being to make judicial process cheaper), remedy “(3)” leaves us with the problem whether the cost reduction will be enough to permit efficiency even in an otherwise-efficient breach. We can’t be sure unless collection costs must be low enough, or zero, which is impossible.

I haven’t seen a try better than Schwartz’s, and I can’t imagine one. So I must conclude that private negotiations can’t solve the transaction cost problem. I sense that Schwartz had the same feeling. He added, at least for cases of “unsophisticated” bargainers, a consideration of government assistance. But the assistance, Schwartz says, would involve the same measures sophisticated parties (like Schwartz, no doubt) would use. They don’t work privately, and Schwartz doesn’t, as no one can, tell us how the government can be successful here, where sophisticated private parties can’t. Rather, Schwartz questions the efficiency of government involvement. See id. at 397-98. I can’t resist adding the to-me-obvious: No one is sufficiently “sophisticated”—because the uncertainties must thwart anyone’s search for “efficient” cure.

But this array of detail may hide the critical fault. The “efficient” legal limits on damages and specific performance are supposed, surreally, see supra notes 13, 20, 22, 25-26 and infra note 30, to channel parties to efficiency in price, cost-allocation, performance, and compensation agreements. The limits can realize the supposition only if they impose sanctions. If the supposition were correct, the sanction would have to include the costs of litigating relief and the corollary costs of judicial review of liquidated damages clauses. These litigation costs themselves must be supposed to channel parties into efficient terms (terms that very probably would survive litigation and therefore avoid or lessen its costs). But litigation costs, and the costs of avoiding them, are overhead—inefficient. So the suppositions—and Law and Economics—are self-defeating. Or the solution is to abolish law.

See also supra this Part’s §§ C-F and infra this Part’s § H.
don’t work much, cover little well—often cost more unrewarded litigation expense than would an argument for specific performance or for exception to ordinary contract damages rules.

By manipulating, not relying upon, information, you can avoid Hadley v. Baxendale and expand the realm of “ordinary and natural consequences of breach.” If, before you form a contract, you give the other party careful (not too much) notice of a contingent breach’s danger to one’s special reliance and expectation, or if you cast your interests beyond Hadley’s reach, you may secure entitlement to much loss of bargain.29

One may even snare a good-will-loss recovery. One can give proper notice. Or one can picture evidently one’s market’s norm of behavior and prepare and style the facts in ways that transmute a breach into a tort—negligence, interference with contractual or business advantage, induced reliance dashed to injury . . . . And one may accomplish specific performance with devices of other name—injunction, maybe replevin, coupled with full loss-of-bargain damages. The prospects are limited only by the bounds of the lawyer’s skillful imagination.30

29. Compare Goetz & Scott, Liquidated Damages, supra note 20, at 572. One may be able to avoid Hadley’s limit by casting one’s lost profits interest into another field where Hadley doesn’t operate. See Johnston, Strategic Bargaining, supra note 20, at 617, 620-22. Some Law and Economics scholars say parties won’t often give precise, thorough Hadley notice because it involves disclosure of strategic bargaining information. Id. They’re right—so long as they can assume, and foster, greed and appropriate “intelligence.” But reality, especially intelligence, needn’t be so. See also infra Part IV in connection with Parts II-III. But if they are so, then one can just disclose kinds and areas of risk, rather than amounts.

30. But you must be critically creative, impress the intellect. You must make specific performance appear inevitable or make magic alternatives of same effect. This footnote (even this article) isn’t the right place for a thorough demonstration. But I’ll offer you a taste that I hope will move you to your own cooking, like Duncan Kennedy’s in Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEG. EDUC. 518 (1986). The taste will be of interference with contract and replevin (even if called restitution or something else) or injunction plus full loss-of-bargain damages for past injury. (I won’t talk about M-1’s claim, if any, against M-2 for the latter’s interference with M-1’s contract with Breacher—because it’s irrelevant.)

Recall that Breacher and M-1 were parties to a goods delivery contract—Breacher the supplier, M-1 a manufacturer. Suppose the law does, or might, treat the goods as M-1’s soon as M-1 gives full consideration and the time set for delivery has occurred. Then replevin could be a remedy. Breacher would be in wrongful possession of chattels titled in M-1. Cf. U.C.C. § 2-716(3); U.C.C § 2-716(1); U.C.C. § 2-716 Cmts. 1-3.

I anticipate the argument that my logic is circular because (some) courts (might) have said the premise (title in M-1) would depend upon whether M-1 was entitled to specific performance. The argument misses the point—why specific performance. If the reason is present but the technicalities not, the reason is nonetheless present as support for replevin, unless
you don't want to see it. The same's true of whether Breacher must have "converted" the goods. He did when he promised them to M-2, unless you want to say he didn't.

On like reasons, and because intentional contract breaches that interfere with benefits of bargains are interferences with contract, logic allows that Breacher's conduct is a tort to M-1's property—a prospective, or partly future, tort, that equity may enjoin. If the tort can be stopped and undone in kind, but not at law, then equity may remedy it by injunction—here, by ordering Breacher to deliver the goods.

Without explanation, and citing only four cases (which are conclusory or weakly reasoned) Prosser says that "of course" a promisor can't interfere with her own contract—despite other cases, known to him (see PROSSER, infra, at 990 n.26), held the contrary. See WILLIAM L. PROSSER AND W. PAGE KEETON, PROSSER & KEETON ON TORTS 990 (5th ed. 1984) [hereinafter PROSSER]; RESTATEMENT (SECOND) TORTS (Ch. 37); FOWLER V. HARPER, FLEMING JAMES JR., AND OSCAR S. GRAY, THE LAW OF TORTS (2d ed. 1986) (Ch. VI) [hereinafter HARPER & JAMES], don't even recognize the question, and the RESTATEMENT's black letters provide only for third party interference. Their positions are silly as the old insistence that a proprietor can't convey to himself or a shareholder sue her corporation. The same person can hold two capacities, even be two entities. Repudiation can injure assets in ways and to extents contract law doesn't treat adequately. Willful or reckless malperformance is harmful to interests and sensibilities contract law wasn't developed to attend.

Suppose a criminal defense attorney prevents exculpatory evidence from reaching the court's attention because his client's enemies have seduced the attorney to conspire with them to destroy the defendant, their competitor. A landlord renders impossible her performance of the covenant of quiet enjoyment and impedes her tenant's obtaining a lease benefit within his entitlement. A real estate contract promisor repudiates the agreement by which he was to acquire the property he offered to sell.

In each of these cases, the promisor, as if a third party, can have interfered tortiously with the promisees' receiving the benefits of their contracts. No matter that ethics rules might supply relief against the attorney. Such rules are new and uncertain. No matter that the landlord is liable in covenant. The tenant holds the present estate and the landlord has interfered as if a stranger. No matter that the real estate promisor has agency law liability. He precluded realization of the subject-matter on which the earning of the commission hinged. No matter that the service partner might have violated an anticompetition covenant or breached a fiduciary obligation. She also was an outsider (another firm's owner) who stole the partnership's contract benefit to interfere with its expectation of advantage in it.


despite plaintiff, defendant's broker, had told defendant it was for sale, and appellate court held interference with contract action not stated because plaintiff hadn't pleaded defendant's guilt of malice, but gave plaintiff leave to amend complaint; Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982) (landlord interfered with tenant's contractual expectation and business advantage because of breach of implied covenant of good faith); Cherberg v. People's Nat'l Bank of Wash., 88 Wash. 2d 595, 564 P.2d 1137 (1977) (landlord interfered with tenant's contractual expectation and business advantage when landlord bad-faith breached repair covenant).

See also Shapoff v. Scull, 222 Cal. App. 3d. 1457, 272 Cal. Rptr. 480 (1990) (owners, managers, directors, or shareholders can interfere with their entity's contract if their acts accomplish their entity's breach of their contracts and their acts are not pursuits of their entity's legitimate interest, citing Collins v. Vickter Manor, supra); Exxon Corp. v. Allsup, 808 S.W.2d 648 (Tex. App. 1991) (employment contract assignee's breach can interfere tortiously with employee's realization of employment contract benefits); St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1981) (landlord tortiously breached implied covenant of good faith when it contracted with tenant's competitor and so enabled competitor to grab business prospects that were purpose of lease, and apparently landlord would have been guilty of interfering with covenants had landlord had improper motive or used improper means); Trimbale v. City and County of Denver, Col., 697 P.2d 716 (Col. 1985) (by implication: malicious or fraudulent breach can make promisor accountable for interfering with its own contract, even if through employee); Hurst v. Picture Theatres, Ltd., [1915] 1 K.B.D. 1 (theater owner interferes actionably with owner's viewing contract with patron when owner, through employee, breaches viewing contract by removing patron before show is over); Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975) (bank can interfere tortiously with customer's business advantage when bank dishonors customer's check after setting off against customer's checking account customer's notes to bank and refusing to release warehouse receipts for customer's inventory); Bandag of Springfield, Inc. v. Bandag, Inc., 662 S.W.2d 546 (Mo. Ct. App. 1983) (franchisor can interfere tortiously with franchisee's franchise expectations).


Injunction is readily available to stop or prevent interference with contract. See PROSSER, supra, at 1002; Hurst v. Picture Theatres, Ltd., supra. Hurst, like M-1 v. Breacher, was a two-party, breach-as-interference case, which, though a damages action, offers some leading original thinking on the matter. Damages may include virtually any proximate injury, even mental anguish over the treatment involved in an interfering breach. See Exxon Corp. v. Allsup, supra. See also Prosser's general propositions about damages, in PROSSER, supra, at 1003-04.

In one or more ways, each case and hypothetical above fairly parallels Breacher's. Though you, like me, may find poetic a court's holding Breacher accountable for contract interference with his own contract, we ought to see that M-1 needn't put his case on that idea. Breacher's breach also will interfere with M-1's contracts with the parties he supplies, contracts that depend upon Breacher's performance. Prosser pushed a doctrine that would require a showing that Breacher's conduct be an independent tort. See PROSSER, supra, at 991-94, 997-1001. Cf. HARPER & JAMES, supra, § 6.10; RESTATEMENT (SECOND) TORTS, supra, § 766C. But their insistence just begs the question why Breacher's conduct isn't a tort. And in my discussion and citations above and earlier in this piece you'll find ample reason to think it. Also, some of the cases above imply that willful breaches are just as
bad as torts if they interfere unjustifiably with contract expectations or wantonly breach the implied covenant of good faith.

PROSSER, RESTATEMENT (SECOND) TORTS, and HARPER & JAMES insist that the law oughtn't recognize simple negligent interferences with contract, at least where the conduct involves no independent tort to person or property. See PROSSER, supra, at 997-1001; HARPER & JAMES, supra, § 6.10; RESTATEMENT (SECOND) TORTS, supra, § 766C. One might fairly say that Breacher would only negligently interfere with M-1's contracts with his purchasers—both because Breacher may not have "knowledge" of those contracts and because Breacher doesn't intend to interfere with them.

The law has allowed an insurer recovery for a third party promisor's negligent breach of the promisor's contract with the insured, where the promisor's negligent breach makes the insured promisee liable to a third party and the insurer must pay proceeds to cover the promisee's liability. Yet Prosser won't cast these cases as interferences with contracts (see PROSSER, supra, at 999, treating the claim only as subrogation), just as he won't truck the promisee's claiming "interference with contract" for his promisor's breach of her contract with him.

That stubbornness is silly, and inefficient, since the measure of subrogation is precisely the measure of what tort liability would be and the insurer must sue on the right of the promisee. Even though they're not "on point" because their issue isn't recovery for "negligent" interference with economic interests, the cases above show the silliness and inefficiency, if you ask, because, in their ways, they cut through wasteful formalism and react to the moral imperatives of issues. (I admit you don't need to use them, since you can find quite enough cases that are "on point." But their jewel is your being open enough to be able to use them, or anything else, once you see how to husband insight with feeling.)

Harper & James tend to redescribe cases that allow such recovery, even though the redescription makes no difference in measure of relief. So they say Cue v. Breeland, 78 Miss. 864, 29 So. 850 (1901), really was an insurer's subrogation case, despite the court allowed interference with contract damages for a defendant's negligent injury of a bridge where plaintiff had a prior contractual obligation to repair it. See HARPER & JAMES, supra, § 6.10, at 326 (2d ed. 1986). See also id. § 6.10 at 326-39, recasting still more cases into other "traditional" molds. But Cue is not apparently a case of insurer's subrogation. The repair contract was just that, or a maintenance agreement, not an insurance policy, and saying it makes the promisor an insurer requires playing word and fact games. (I grant you that some noninsurers can obtain subrogation, for paying an obligation rightly that of another who would be unjustly enriched if he did not make the payer whole. But Harper & James do not put their casting on this ground.)

(I owe the note that Gray, Harper's and James's new co-writer, may not take his elders' position. Maybe he is responsible for the apparent giving way we see reflected in id. at 340-41.)

Why prefer the law to presume a claim states some other "traditional" ground for the relief prayed? Why disapprove claims of purely economic injury from negligent interferences with contracts? Why cling to "tradition" if something else makes more sense—accommodates reality more aptly, feels like better relief, costs less . . . ? Why disallow purely economic damages for interference with contract if the same damages are available for the same claim of a different name?

Suppose (for analysis of both the Prosser and the Harper & James positions) that the damages measures would be different. Say a contract breach victim might recover more in tort (for interference with contract) than in contract.

Prosser and Harper & James may say we must prevent the breach victim from avoiding more restrictive remedy rules of contract law. The latter reason may seem concerned with preventing slick pleading from evading important policy. But the policy is only dry technical-
ity if its evasion would do good, render justice.

The "evasion" would happen only if (a) the courts are irrationally inconsistent or (b) tort remedy's greater relief is appropriate or contract relief unfairly inadequate. If (a), courts need only straighten out their practice; for, whether they are inconsistent is up to them. And the fact of contract law's position doesn't imply that the straightening must lead to its reaffirmation and the exclusion of tort relief. If (b), contract law deserves the tort remedy evasion or the contract remedy needs to be redesigned.

Suppose the problem's just a lack of other, "traditional" name for a certain negligent-interference-with-contract claim set on purely economic injury. Why is that reason to deny cognizance? Cognizance ought to depend on distributive justice, not theory, doctrine, academic taste, or history, which are always ambiguous as unnecessary.

Harper & James say law has limited negligent economic injury relief to cases of physical harm to person or subject of property. Yet, for many years tort law has given relief for negligent injuries to many forms of "intangible" property. Older cases limited the "group of persons to whom the defendant may be liable," but didn't decline cognizance of this kind of claim. PROSSER, supra, at 745 (negligent misrepresentation that injures intangible economic interests). So, broker is accountable for negligent injuries to securities interests, just as copyright infringement is a tort even if it's negligent. The limit is foreseeability of harm. See id.

The issue is: What's "foreseeable"?

See also J'Aire Corp. v. Gregory, 24 Cal. 2d 799, 598 P.2d 60 (1979) (if building contractor's undue delay postpones realization of business with which the contractor has no contractual relation, the delay is tortious interference with the business's realization, even though the delay itself doesn't involve tortious acts); Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) (negligent interference generally allowable, the matter depending on proximate cause). Compare the shift from Robins Dry Dock v. Flint, 275 U.S. 373 (1927) (no purely economic claims of negligent interference, interpreted, see HARPER & JAMES, supra, § 6.10, as explained by concern for efficient cost-allocation) to Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978), which virtually repudiated Robins Dry Dock because fairness requires relief in many such cases. (The Venore Transportation court pretended to distinguish Robins Dry Dock on the point that the time charterer's hire payment was suspended at the time of the wrong. But suspension of the hire's payment doesn't, itself, suspend the hire. And, respecting plaintiff's interference-with-contract argument, the Robins Court made nothing of the point. It set its decision on the ground that defendant had no knowledge of plaintiff's contract, plaintiff's time charter with owner of the ship that defendant dry dock company negligently delayed in dry dock.)

But much of this is analogy-and-distinction analysis that assumes the characterization its opponents' narrow minds insist on—the characterization "interference with contract." The characterization makes the issue seem to be whether one can interfere with one's own contract. That question seems to suggest the problem whether the promisee asks the court to remedy the promisor's acting against the promisee's own interest. And maybe that's why Prosser considered the matter preposterous (amazingly, despite the breach may net the promisor gain!).

The problem vanishes if instead we say the promisor interferes with the promisee's realization of the advantage the promisee can, under law, expect or wilfully, in bad faith, behaves so as to impair, or deprive promisee of, that advantage. The advantage is the expected value of the contract, partly the value of the promisor's performance. If the promisor commits an intentional bad faith breach that creates a situation that prevents the promisee's realizing that value, then the promisor's conduct has interfered tortiously with the promisee's realization of the advantage the promisee was entitled to expect.

The case is even easier if we see that, by repudiating its M-1 contract, Breacher has denied that contract's existence, and so can't logically hold M-1 to that contract or to con-
These data-processing techniques are extracontractual. They are plays with the same ubiquitous indeterminacy that makes all compacts and law, and Law and Economics, a powerful imagination, but just illusion.\(^\text{31}\)

tract relief. Since as repudiator Breacher is a “stranger,” Breacher’s actions aren’t breaches, but torts.

Now consider that one can readily enjoin interference with contract, see supra, though, as a breach of contract, the interference wouldn’t be enjoinable if the promisee couldn’t obtain specific performance. Again, the question is: Which is fair, reasonable, empathic, more beneficial—\textit{in the case}? The question isn’t just what’s “efficient” with current money-wealth distribution.

To knit into a standard the ideas the cases reflect, you must do four things:

(a) Keep an open, fluid mind, feed it feeling’s insight
(b) Breathe deeply enough to break, up and through, the egotistical rigidity of “black letter law” or pigeonholing doctrine that leading authorities tell courts they have wrought.
(c) Let your moral sense lead you to the careful distinctions and extensions that will make the outcome you want seem so clearly right that the court can’t imagine how it didn’t see its inevitability in the first place—as if the law had always been that way.
(d) Try to select the right jurisdiction and judge, match them to the right theory and argument, or learn the character of court and judge and style your theory, argument, and emotional appeal to fit.

31. Here, again, see infra note 32, Professor Richard Epstein holds that remedy availability ought to follow the “intention of the parties”—“steer the parties to redefine their rights by voluntary transfer.” \textit{Richard A. Epstein, Inducement of Breach of Contract as a Problem of Ostensible Ownership}, 16 J. LEG. STUD. 1, 41 (1987) [hereinafter Epstein, \textit{Inducement of Breach}]. One gathers that the parties “intend” efficiency and, therefore, that the injured promisee must have anticipated and accounted for the prospect of the third-party-induced “efficient breach” of the promisor.

I really don’t know why the proposition’s statement doesn’t make transparent its absurdity. But, if, Epstein being who he is, I must respond as if the statement were plausible, I’ll remit you to this Part’s discussion of the inadequacy of liquidated damages (since, parallely, Epstein suggests, id. at 40, that the promisor and promisee can obviate interference problems by providing, in their contract, provisions that “spell out their respective rights in the event that a third party should appear on the scene”).

There, supra §§ F-G, I showed the absurdity of asserting that the promisee is at fault because the promisee didn’t insist on liquidated damages to cover the prospect of an “efficient”-yet-inefficient breach. Partly the absurdity is belief in knowability of pseudo-events like efficiency. Partly it’s the belief that one can, with something we call “intent” (actual, imputed), prepare rationally for such indeterminacies.

Epstein admits such “clauses might be too expensive to negotiate in the ordinary employment contract” but insists that “this hardly seems the case with rock stars and athletes.” \textit{Id}. Those clauses are too expensive quite (Epstein acknowledges) because the parties risk too many, indeterminate possibilities for interference, breach, and loss. And this is true even for rock stars and athletes, if only because the faces and cravings of greed are of infinite number and variety and the infinity in the “big time” is greater than most. Lavish worlds are more enticing as they are more manifold of illusion. Just read Hollywood gossip columns or watch television shows about the “stars” and the “rich and famous” or talk to loose-mouthed sports or entertainment lawyers, and you’ll see.

Maybe sensing these weaknesses in his argument, Epstein adds: “My guess is that these contracts would not contain any general expectation damage formula . . . .” \textit{Id}. [Emphasis mine.] No kidding! Expectation damages would be inestimable, compare id. at 37, and much “speculative” (Epstein’s word, \textit{id}. at 37), in law’s mind. Epstein’s first solution is \textit{(id.}
at 40) "a far more administrable system of payments and restrictions." But no system of payments and restrictions can adjust truly satisfactorily a set of events that no one can fully know even after they occur. So surely every such contract will suffer omissions.

What does Epstein suggest about omissions? Injunction isn't the most efficient remedy. Renegotiation is: "In many cases there will be only three parties, and if they are part of a continuing business, some concerns with long-term reputational effects might well ease the way to cooperative solution." Id.

I applaud, loudly, the urging for cooperative solution, compare infra Part IV. But I doubt that Epstein imagines empathic, giving behavior, rather than the self-interested kind, enlightened by better appreciation of prospects for greater personal profit or lessening, if not displacement, of personal cost.

And, here too, the risks are indeterminate, not only factually, but legally, since, though Epstein sees "no reason to think . . . the common law rule makes renegotiation impossible, courts have trouble distinguishing renegotiations from modifications and knowing what to do about which. See, e.g., Wilbur Smith & Assoc. v. National Bank of S.C., 274 S.C. 296, 363 S.E.2d 643 (1980) (the relation of two contracts [a 15-year exclusive listing brokerage contract that, by express terms, bound heirs and assigns and provided for sale price to be set by parties' mutual agreement after third party's use-study recommendations, and a later form-agreement that set price but also reduced contract term to 60 months and did not bind heirs and assigns], made a questionably decided issue whether the second contract reflected the first contract's completion or mere modification rather than a renegotiation and substitute agreement). See also supra note 28's discussion of judicial review of compensation clauses, private alternatives to judicial determination and collection of compensation, and private allocations of transaction costs. Cf. supra notes 20, 22-26, 28.

In the end, Epstein says:

But even if renegotiation doesn't succeed, the rule may have done its job by promoting the security of transactions. The rule prevents parties from breaching when they hope to be able to outrun the consequences of the law. So long, therefore, as the power of revision remains a part of the original contract, the social losses, if any, from the tort of inducement of breach . . . are limited by the cost of reworking the termination provisions in the original employment contract.

Epstein, Inducement of Breach, supra, at 40. (Emphasis is mine.)

I presume Epstein means not "limited by the cost" but "limited to the cost" in "are limited by the cost of reworking the termination provisions . . . ." (Otherwise his proposition would be very obscure, because it would mean that social cost was abated by the parties' incurring the costs, including additional transaction costs, of the reworking.) But see supra note 28's discussion of the irony of the arguably efficient channeling effects of transaction costs. Still, again, Epstein disregards or assumes away fourth-party interests, demoralization, and contracting parties' inability to find and calculate all costs.

The trouble isn't so much outrunning legal consequences as it's negotiating omnisciently the allocation of benefits and costs. The trouble is overwhelming if the negotiation must account for externalities—as it ought—to be efficient alternative to injunction.

But if the problem is preventing the third party from "outrunning the consequences of the law," the trouble is that renegotiation won't promote reliably the security of transactions. The law's consequences, even its applicability, are greatly uncertain and elusive, as are the events and risks the law may or may not seek to control. See supra note 30. See also §§ C-F, this Part, and notes 28 and 30.

Now, recall that Epstein's argument treats only cases of interference with employment contracts of individuals and firms, not union deals. So his position is immensely weak, because it must flag, very pale, if put to work in the full commercial universe, where contract breaches and interferences can produce shock waves vastly wilder than the consequences of
Another moral is: Don’t spend too much time on contracts. All suffer the same, root defect—indeterminacy of perception, language, knowledge, concept. Learn the senses and guts, the frailties and strengths, of parties and courts, present and potential. If you won’t learn empathy and justice (Part IV, below), then study how to alter others’ beliefs and sights. Fact and power, not theory or law, make sanction from official and court, as from competitors. Fact and power are our perceptions, what we make, or what we settle for.

I. Premonition of Blindness in Light: A Wind of Moral Flaw

Law and Economics assumes too much to say that wealth and beneficial liberty maximize if contracts are enforced just under limits of sufficient tort law. Tort law isn’t, and can’t be, guard enough against the harms of contracts in a system of greed. Tort law—all law—must be indeterminate, and warped. Greed husbands pain and lack, not wealth. Law and Economics is humanity badly telescoped. It’s obsessed with proving welfare maximizes best from “efficiencies” of discrete economic transactions of particular self-interested parties. The obsession dismisses everything that doesn’t fit—all other interests, all other possible orders of welfare, the rest of life, which may

the average termination of an individual’s employment.

Epstein asserts that “it is precisely with nonstandard goods and services that inducement of breach is likely to take place.” [Sic.] Epstein, Inducement of Breach, supra, at 37. Hence he limits his discussion to interference with unusual employment contracts. Why? “There is little reason for any merchant to induce a breach of a contract for 100 bushels of number 10 wheat if that wheat can be obtained at the same price elsewhere.”

But often, too often, grain prices vary. (I know because I shop around for grain in bulk.) Goods and services are nonstandard, or not, because of the interests, circumstances, facilities, and perceptions of buyers and sellers, not because of anything inherent in the services or goods. Often enough people induce breach for reasons quite independent of the quality or quantity of the contract’s subject or despite the subject is “standard”—to get competitive advantage, to reduce competition, to take over a business or market, pure spite, and (despite some authorities insist one can’t negligently induce breach) negligence (since one’s behavior can induce in others’ minds the causes of behavioral effects one didn’t even imagine and surely didn’t intend—as is the wont of neglect). One can find such cases among those I cite supra note 30, and in PROSSER, supra, at 987 nn.93-97 and 991 nn.31-35.

Still, all these problems are only variable symptoms. The root trouble is the insensitivity of thinking the matter purely intellectual, or quantitatively economic, when its really emotional—the meaning of wealth. See infra Parts II-IV. Reconsider Epstein’s proposition about athletes and rock stars. Think about a pro quarterback’s making 15 million to take a ball from between another player’s legs and hand or throw it to yet another—so that a tenth of our society’s males can waste nine hours every autumn week staring at T.V. broadcasts of other men’s redundant, unproductive, brutal acts. Then think about their wives, and our nation’s homeless. If you’ve studied poetry and serious music, I don’t have to tell you how outrageous the earnings of rock stars.
be all that really is life.\textsuperscript{32}
all modern business’s nonempathy, dishonesties, trespasses, and neglects, all its sharp, insensitive, warped selfishnesses, because those behaviors are too frequent and widely distributed. Not just their spread and magnitude, but their deep causes, make them law-intractable, because they proliferate more rabidly than hydras and infest the institutions, and too many of the people, that make our juridical systems. See Jaffee, Empathic Adjustment, supra note 2.

Even were most of us free of such infirmity, we could never even near-accurately identify the interests of “strangers,” or even who is “party,” not “stranger”—just whom a contract ought to be considered to “intend” to cost or benefit. Whom tort law covers and how are matters lawyers have debated for hundreds of years, just within Anglo-American legal society. So, to leave “third party” problems to tort law is to remit the people to a swirling, flickering nebula. If such uncertainty bounds two contracting parties’ freedom, then neither third parties nor the two engaged in the contract are safe. At any time, a “stranger” may vanquish that freedom, or it may unjustly vanquish him. At any time, the stranger may emerge in the body of one of the contracting parties. See supra note 30.

Such uncertainty’s insolubles aren’t special issue of peculiar species of law. They’re inherent in the inescapable limits of humanity’s abstracting intelligence. We reduce reality to the indeterminacy of myriad symbols, because we cannot know it.

Epstein’s view of “welfare” harbors a presumptuous assumption—the assumption that what Western nations value in money is human wealth, serves humanity’s welfare. Just so, he insists (implicitly) that humans are entitled to treat the rest of nature as object of a desired sphere of influence, as object to be treated as humans please unless just human law, not nature’s imperatives, constrains.

And these sorry ideas bear particular, human-level corollary just as devilish for humankind—the assumption that each of us is doing what one ought when each submits to some irrationally elected or appointed official’s dangerously biased and uniformed dictate of what “protection” tort law shall provide or impose. See, e.g., ALBERT CAMUS, THE STRANGER (1942) and virtually any of Franz Kafka’s works. And consider Marquis De Sade’s refusal to be a judge because he had committed, or would commit, every transgression for which he’d have to sanction a fellow human. Compare Jesus’ similar cautions, like “judge not lest ye be judged,” and “he without sin throw the first stone.”

The very idea that we have tort law is a monumental infirmity. It twists into unrightable tangles the cords of distributive justice. See Jaffee, Empathic Adjustment, supra note 2; D’Amato, Pragmatic Indeterminacy, supra note 6, at 148-79, 187-88, and other D’Amato works cited in that note; Duncan Kennedy, Legal Formalism, 2 J. LEG. STUD. 351 (1973). But see my criticism of D’Amato’s Pragmatic Indeterminacy in Jaffee, Unknowability and Friends, supra note 6; see also D’Amato, Gregor Samsa, supra note 6; CAMUS, supra, and Franz Kafka’s works.

At its heart, the trouble here is an assumption that benign freedom requires “law”—like the tort law Epstein consigns our third-party welfare to. How can we protect our tenderest feelings with a tort law fashioned to privilege aggressive competition, however emotionally distressing, so long as the aggressor’s conduct seeks its owner’s money gain and only incidentally the victim’s injury. [This is common limit on recovery for interference with contract or business expectation. See RESTATMENT (SECOND) TORTS §§ 766-69 and id. Supplement §§ 766-69 (case digests); HARPER & JAMES, supra note 30, §§ 6.12-6.13, especially § 6.13.

Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928), proved our tort law captured by a Law and Economics even cooler, more unempathic than Epstein’s. The court had no evidence that Mrs. Palsgraf’s claim would put the railroad in jeopardy. The court’s disposition ought to have awaited a case where such a threat was clear. Till then, the cost ought to have been an expense a decent railroad and risk-sharing and empathic passenger-public would want to bear together.
This is Law and Economics's critical trouble—the trouble in its motivation, vision, and effect. You can find the trouble many ways.

You can see that Law and Economics fails its ostensible goal—social welfare. Some have argued this through the insight that Law and Economics's notions of efficiency (the theory's immediate object) assume, as if a premise, the existing wealth distribution, grotesquely cruel to the bulk of Earth's, and this country's, human population. But the argument misses the trouble's heart—the idea or meaning of wealth, sense of what it is.

You can, if you want, let me show you—through the opening of Law and Economics's deepest void. The void is blindness to underutilization, its cruelest forms of waste, its embodiment in denial

A victim's suffering isn't lessened when she's told the aggressor (contract breacher, tortfeasor, unempathic bargainer) acted just for gain or that maybe, eventually, an elusively efficient may give her benefit (thriving commerce, cheaper or better public transportation) to salve some of her emotional, even physical, loss. Instead, her pain and anxiety deepen, or she hardens to ice, when she perceives the aggressor's willful insensitivity and Law and Economics's law's applause. Preference for money gain over personal feeling explains the choice not to protect the victim but to support the aggressor. A tort law that follows capitalism's drives is a tort law that is cold to great, wide suffering, a law of warped sense of wealth.

Maybe Epstein's plainest troubles are two: His notion that the question is whether we ought to let two people do together what each can do freely alone. His staring at the utility of enforcement.

When two people do something that makes a contract, they aren't necessarily doing something together. Often, too often, in our society, they are doing things to each other, things that greed, not friendship, inspires. Cf. Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563 (1982); but know that, while I agree with a good lot of Kennedy's factual observations, I dissent from his solution, because either it's Marxist or, see Jaffee, Empathic Adjustment, supra note 2, at 1176-80, and Tushnet, supra note 6, it's nihilistic.

But the trouble isn't just enforcement. It's also nonenforcement. I show that Law and Economics fosters inefficiency (and immorality, emotional harm) where it supports the doctrine of "efficient breach" and the general unavailability of specific relief.

Of the senses I tried to wake up in Modern, a most vital was an apprehension that many of the Earth's and all life's troubles come not merely from society's treatments of particular agreements, but from human commercial purposes, their effects. Other species are, but for humanity's engagement, ecologically benign whatever their minute predations, partly quite because they have neither commerce nor the psychology that induces it.

Epstein says we'd get all the protection we need, and efficiently, in traditional defenses to contract enforcement—defenses like "duress" and "incompetence," and a like-limited defense of unconscionability. See Epstein, supra. But those devices fit few cases and don't imagine problems like M-I v. Breacher or the West's sore misapprehension of wealth and commercial depredation of life on Earth.

I don't suggest the solution is more or different law, socialist or other. We don't need more arrogance of hard fathers and bumbling mothers. We need empathic liberty and empathic justice.
of wealth. To see, we need language alien to legal scholarship. We cannot penetrate the void with words of its own, the gripping ice of its reign.

Words aren’t just the means of meaning, but meaning itself, to their makers just as to their receivers, as each greets their sounds and sights. Your ideation rules your thought, even your emotion. If you speak the language of the academy, of Law and Economics, you’re imprisoned in its mind, can’t see it.

Argument—on wealth or welfare—fails for being argument, as all the proverbs of the law, and law’s apologists, are walking dead. The problem is finding sense from feeling. Insight is feeling. Feeling is life.

(Oh, the footnotes? They’re afterthoughts, mostly things your learned hindsight will predict I ought to have included, or instances of concession to conventions you may need crave.)

**PART II: THE LAPSE AND THE VOID—UNDERUTILIZATION AND THE PROBLEM OF WEALTH**

[Two law professors stand in a lounge. They wear name tags, the kind you get at symposiums. I, Anachronis, am one. The room is dim, near-vacant as spare. The other man, Moderno, much my younger, introduces himself, offers small talk. Soon he becomes intense, and I suggest we take a table. He speaks long on his theory of efficient rules and regimes. Throughout, he barely touches his martini. I, sipping at an Irish beer, listen, intently, without a word. Looking pleased at his conclusion, Moderno pauses, sighs, half content, half in doubt, looks down as if to gather more thought, takes up his drink. For a minute or more, we sit silent, fiercely silent. Then I speak.]

*Anachronis:* Some days ago, driving down an Interstate, speeding to teach a class, I saw a groundhog sitting on the shoulder. It was chewing some carrion, debris from another creature’s meeting with truck or car. I couldn’t stop—traffic to the right, to the front, to the rear, sweeping me onward. So I gave a horn warning. In the mirror, its image chewed on. “But groundhogs aren’t carnivores—eat greens, bark, nuts, maybe some fruit, incidental bugs . . .”

*Moderno:* Wait, An-A chronis!

*Anachronis:* That’s “Ahnah kRO nees.”

*Moderno:* Sorry. But what’s that got to do with underutilization, or the spread of wealth?

*Anachronis:* Oh, you need of your abstracting mind, some declaratory grist for your cerebral cortex. Okay.
A. The Troubles

*Anachronis* [continuing]: Our nation—the human world—prodigiously underutilizes resources. The trouble has two forms: harmful waste; and harmful waste. The first is failure to make the most of what we’ve already put to use (not getting peak efficiency from machines, not recycling nonrenewable resources or nature-endangering products, not educating our fellows so they may produce what they truly need . . .). The second is the consequent waste (abuse as well as unnecessary use) of other resources put to taking up the “slack” the first waste leaves.

Even the sense of “slack” often makes waste: Perceptions of “need” tend to be issues of gluttony or warped values, as we see in planned obsolescence or George Bush’s oil-gluttonous and nuclear-power-dependent 1991 energy policy.

Worst is waste of human resources—specially the waste that comes of warping people away from natural development. *That* kind of waste turns humans sick—denies them whole pleasure, wholesome energy, chokes their empathy, smothers their gifts of insight, poisons their values, empties them into anxious gluttony, our worst image of the raven or shark, a devil’s armageddon to all Earth’s life—just for price.\(^{33}\)

To feed Japan’s bored taste for trinkets of sea-turtle shells, poor Mexicans snare the gentle creatures by the ton, and, hardened to their soft eyes, pile them upside down on flatbed trucks, where, layer upon layer, they die, limbs pleading, of fear, hunger, exposure, exhaustion. To disease ourselves and shorten our lives with tuna salad sandwiches, we mercury our seas, drown thousands of dolphins. To satisfy our gluttony for ever-new housing, fresh paper, meat to kill us, Brazilians and Japanese level rain forests, slaughter thousands of species, drought and overheat our Earth. To save some leaden auto firms, our government disdains our need to quit our oil lust that translates into rape of land, corruption of air, food, water—death to life. But to the greedy, the price seems right.

Law and Economics worships price—its way of allocating benefits and costs, distributing wealth. So, the Law and Economics scholar speaks with consistency and a bland sort of integrity if she says that

\(^{33}\) I mean “price” to cover all its forms. The objects may be power, narcissic satisfaction, privilege, excuse, revenge, recognition—money least.
we needn’t care to recycle oil or plastic or wood, even if the carelessness means squandering, poisoning our Earth, wasting life.

If the market doesn’t care, it isn’t worth it. If it does, it is. That’s that. And the same that’s that about human resources.

Moderno: But if the market doesn’t care, why doesn’t it care?

Anachronis: Put aside the obvious—lethargy, the seductive junk of advertisement. They’re not reasons, just images.

One reason is deep, wide, ignorance, encouraged by entrepreneurs who profit from it, officials, who are, themselves, engined by it (as is America captivated by the contrivances of drug companies and allopathic medicine, by the deadly promise that we can waste anything safely because Western science can fix enough of the surface consequences). Others are character sickness (greed, pathological carelessness . . . ), miseducation (as of a child by deprived and de-priving parentage or by American education’s discouraging of open inquiry, its fostering of intellectual conformity and digital rote learning), cognitive blindness (as from brain nourishment by television, rap, computer games, and instructors and “role models” without creative insight or questioning imagination). Still another is our nation’s creed of cheap result, a creed of work for money, money for money, and ever-mounting acquisition, a creed that locks us to the short term, fixes us on symptom, obliterates, as an abortionist a fetus, its children’s first visions of joy in creative labor and sensitive understanding, of visceral appreciation of the life within and all the life beyond.34

Justice Douglas said even trees have standing. Ship can sue ship and either sue cargo. Trees are life. And we’re no more than life. If law lets people clear-cut noble forests, exterminate their wildlife, I would ask: Why didn’t anyone ask the animals and green things their evaluations of the benefits and costs?

Moderno: Oh, come on. Don’t get tongue-in-cheek.

Anachronis: I’m deadly serious. Our kind isn’t a higher life form. I behold its treatment of other feeling creatures, even of itself, and I fear it lower than the low. Ours is the only species that, without the empathy its nature planned, designs the mass destruction of its own kind, and billions of others, even its own world’s life supports, and not from need, but the preferred ignorance in greed.35

34. No, I’m not opposed to abortion, just greed, depredation, cruelty, waste.
35. Compare D’Amato and Chopra, Whales: Their Emerging Right to Life, 85 AM. J.
The trouble’s a huge psychic mess. I can’t itemize all the ingredients, their relationships, effects. But I identify enough in humanity’s lean away from deep contact and intonation with its biology, and peoples’ pull to distance themselves from the native dynamics of life, away from empathic apprehension of their ties with other people and the rest of their living world.

You saw the trouble in Napoleon, Don Juan, Lucrecia Borgia, George Bush, De Sade, see it in lawyers and officials, abstract government, in drug makers, behaviorists, salesmen, military chiefs of staff, in mothers who won’t breastfeed, fathers who make their sons, in boredom of lovers, in our plangent hunger for an ever-unobtainable “more.” It comes of grave little twists in our beginnings. And the twists grow grim.

B. Alternatives

Anachronis [continuing]: On my second birthday, my aunt Tilly gave me modeling clay. At once, I sat beneath our kitchen table, made many shapes (of what I can’t recall). Where I lived then, kids didn’t have mud.

In tenth grade, I took ceramics: made bowls—with coils, then wheel. My hands remembered Tilly’s present. They loved to wallow in wet earth—its red thick, the slop of it.

Then I found myself creating a head. I thought it was Greek. Later, I kilned it, with glaze. People said it looked like me. That was a surprise. I didn’t know the back of my neck. But the face? I started searching my reflections, each time a different vision. Soon, I began, unconsciously, to comprehend the infinite variance in the same of things, the duality of being.

Oh, I had a few machine-made toys in my time. But my parents were poor and my father a skinflint. So mostly my fun depended on my own invention, just as did the play of ordinary kids in older times, just as does a wolf’s advancing to hunt, to fish, to forage, to commune with its tribe.

In other centuries (somewhere even now), young children made toys just of sticks, vines, dirt, rocks, fashioned games from curiosity (what’s that insect, that leaf?), took pleasure in adventure, from each other. Older children found joy just learning from elders, testing their minds, bodies, senses, sensuality.

INT’L L. 21 (1991)—fine, honest arguments for a rule of empathy for all sentient life.
Maybe common folk didn’t feast us on high art, regale us in invention (though their music’s the soul of Stravinsky and Bartok and their legends the meat of great poetry and drama, though they invented speech and the wheel, though their passion and toil made great men, though great men make war, injustice, corruption). To modern America, earlier folks seem impoverished. Their “poverty” bore riches. Its hands-on simplicity animated vision and the meanings of things.

Joy is simple. Anxiety’s complex. You sublimate only what you learn to wish and not do. I had like poverty, where my good aunt Tilly’s simple gift was infinite magic, taught me to use my hands to make my mind, my imagination, merge vision and symbol, give flesh to ideas in sounds. So I graduated easily from modeling clay to reading, to critical analytic thought, to music composition, organ building, to success in law, poem-making, fiction-writing. Near-always I taught myself, whatever I wanted to learn, worked ferociously at what pulled me to it.

Not just the accomplishment, but the learning, itself, felt delicious, made me want more, as the hungry want bread, the living, sex. The doing was wealth, is wealth.

Moderno: Hey! What’s with the personal nostalgia, as if you’re a song writer reminiscing in a variety show: “And then I wrote . . . .”

Anachronis: Earlier I’d’ve complained I was getting too abstract. But you’re at home in academic impersonality. Look. You need the emotional instruction of human example. I make myself an example because I know myself better than anyone else and my story embraces enough others, of experience, imagination.

Moderno: Okay. We’ll see.

Anachronis: From the beginning, back then in the 40s, my friends and I played elaborate dramas we improvised out. The plots weren’t special—sometimes variations on fairy tales, more often cowboys, Indians, World War II, cops & robbers, Captain Midnight, Sergeant Preston of the Mounted Police . . . . But what we made of them was special. And how we made it!

A block away, in a vacant wooded lot with tiny hills, we built a shack—scrapwood, discarded oil cloth, tar paper, nails left over from row-house projects we scouted miles around . . . . It was a pillbox, or a wickiup or hogan, or a Yukon cave. You climbed its roof and you scaled an Alpine mountain or Italian volcano—or stood on a burial mound, or rode a whale’s back, or walked a pirate’s quarter
deck. Our horses, fighter planes, tanks? We had arms for wings, feet for hooves . . . . But we made more for imagination.

You’d get fruit crates, two a piece, from the A&P, in shifts, staggered so the workers wouldn’t anger. You’d take one crate apart, and get some glue and brads and laminate the slats—make a strong, elastic board, a little more than three feet long. You’d nail the other crate—its opening in—to an end. With slat ties salvaged from the first, you’d form a handle, straight across the top. Then you’d split an old steel roller skate, the kind you fastened to a shoe, and fix the back half backwards to the crate-end of the board and the front half several inches from the rear. With bottle caps and fabric patches, shards of glass and bent can lids, broken marbles and Duco Cement, you’d deck the contraption, fit it to your dreams. You’d finish it with bumpers made of old tire hunks that semi trucks sloughed off.

When it was a warwagon, fighter-plane, or tank, you kneeled one leg on the board, made the other your engine, its foot to work the street the way a steamboat’s paddles work water. You could hide inside its armor, the cavity of the crate, look through gaps between slats, knots you opened into peepholes.

If you needed a mount, you stood up, one foot on the board, the other slapping asphalt—as a real horse hooves the turf when it’s sparking to fight or tethered and itching to gallop . . .

Moderno: Okay. That’s a nice story. But it’s like the groundhog thing. What’s it got to do with the price of eggs?

Anachronis: You’ll have to bear with me. The stories will speak for themselves. And if they don’t tell enough . . . well, nothing else will . . . Hmm. I’m not sure why, but your question turned my thinking to . . . Oh, I know; it was your mentioning price.

At 10, I saw a special cowboy movie. Gene Autry sang and played guitar—riding his horse. I was enraptured. Got myself a job in a hack-and-boarding-stable. Just walked up and talked the boss into it, even though I’d never handled ponies, or worked for money, and didn’t have my parents’ okay. Cleaned stalls, pitched hay, learned to put on tack, became a riding guide. Used my pay to buy a guitar, taught myself the instrument. Evenings, I played Gene Autry on a pinto’s back. Tried, but I still can’t sing.

Somewhere into 13, I had to leave home—the fists and lashings, blood, torn flesh, the terror ripping out of puke and booze. I knew I could do it. I’d had the horse job, learned guitar, helped design and build a shack, had a real fast scooter. I could hide out at the stable. Soon I scrounged an electric instrument, met Vince, real mean on
boogie piano. We picked up rock, and his family took me in. I found a drummer, Vince a tenor sax man, and we played in bars and divey clubs, backed up strippers now and then.

When I neared 16, rock soured. And I learned double bass, played jazz. But the cash came hard. So I had to go back home.

I got to know a man my father knew—a Dr. K. He used to be a concert pianist. But age and syphilis ended that. So he lectured on theory in music school. K gave me harmony and counterpoint, books on how they’re made, forms of composition, Haydn, Bach, showed me treasures in the music wing of Philly’s library. I got a job there—shelving treatises and scores, cataloguing new creations, cellared relics . . .

Soon I landed a spot in the All-City Orchestra, moved up quick to first chair, wrote a fugue and got a scholarship and prize. I learned piano, classical guitar. Studied at the Musical Academy. At 19, published a duet (for violin and harpsichord), then a wind quintet. Joined the Composer’s Forum.

I owed it all to poverty and good aunt Tilly’s clay. Life made sense out of salvage, good as boyhood shacks and makeshift scooters.

Like a light switched off, without a flicker, K died teaching class. He had a good last year—my wise friend, bachelor father.

In many ways my teen years weren’t different from my other early friends’, all children of the forties—radio, books, movies, phonographs, imagination, good talk and music . . . no TV. N’s father was a widower. So N, an only child, mostly tended to himself. The same of R, whose parents worked long hours—from the time he went to kindergarten. Early, B’s life was her responsibility. Her parents felt that love meant letting children make themselves. These kids’ parents weren’t monied. But they were proud of their work, and we knew.

C absorbed languages as the French savor wine, the warm languages, even Rumanian and Romansh. She reveled in hearing the sounds come off her tongue.

At 18, she got invited to the Aspen Festival, built a statue, took first prize. They put it in the center of town. She, too, was on her own—but from her parents’ cool distancings, her mother’s love affair with costly things, her father’s avoidances. C survived in her imagination, and in the things it made.

My senses remember our adventures, as if now. Days into nights, we rapt ourselves in art, poems, music, history, discovered logic, biology, wondered at R’s infatuation with Kant, lavished ourselves in forests, museums. We rode a bronze reindeer who flew us to wild
lands in foreign times. C learned his name, Peer Gynt. We told the others Peer's stories (mind knights, spinaches that hunted lust, stars within planets), and how he made a number system with an apple that multiplied with pears. In twenty years we all stood among the young who brought down Presidents that tried to spend our lives on their wars. Peer Gynt, too.

Yet, later life was mostly normal for all but C and me. R went to Princeton, studied German, philosophy. N became a physician, then a research scientist. B, valedictorian, got a spray of scholarships, went to Amherst, studied literature and math.

C surpassed herself in art. But in the rest, she went every which way, specially in sex . . . .

I took abnormal courses early. From a ninth grade college-bound block to a tenth grade general curriculum with majors in electric shop, mud shop, metal shop, shop math, line drawing, "conversation" Spanish. I aced in truancy—a brilliant record. I had to keep away from home, grow my own way, dive in whatever lured me, build a repertoire in guts and survival, learn the nerve and bone of life. Again I was indebted to Tilly's clay, my home-made scooter, Autry and the hack stable, radio and guitar.

At 22, I trained jumping horses, even a grandson of Man-O-War. I'd seen an ad in the classifieds. Never worked with jumpers. Never seen an English saddle. Telephoned about it. Told my truth. Just my bent on doing got the job.

It was in Valley Forge, before the condos, office buildings, shopping centers, fast food joints. He picked me up in Philly, took me through a blizzard, housed me in the attic of a barn. I had a wood stove, hot plate, bunk, shower, john. I'd read "The Black Stallion." It taught me the way horses learn from love. Ten years I'd been vegetarian, ever since I played with goats and spoke to cows. So I talked to the horses, in French, petted them a lot. I sometimes even slept in their stalls. They gave in kind.

But the owner said my way was slow, showed me speed came from whips. "See. You give it to them at the ankles. Doesn't hurt. Just stirs 'em."


Till 21, my life was mostly music. I was a composer, had a strong career. But I learned our time's obsessed with novelty, not art. My colleagues balked when I stopped inventing avant garde
dodecaphonic stuff, emulated Bach, Josquin, their devotion to craft, passion for beauty. In my sixth semester at the Musical Academy, my Dean insisted I go back to high school, make up science credits—despite I was the school's best student, handled, well, its physics courses. “Our reaccreditation depends upon it.” I cursed, walked out. Never returned.

Moderno: I’m getting confused again—not sure where you’re going. And since I can’t make out your direction, all I can hear is your talking about your life.

C. Seeing the Troubles, Finding the Alternatives

Anachronis: Patience, Modérono. I know you’re not used to learning economics from stories. But life and stories are the only ways to sense. And I was just getting to connections between others and me.

From the Academy I trekked through day labor, building demolition (with my back and a sledge), dirt-farming in Switzerland. From day labor I learned the society and freedom in earnest humility. From demolition I learned hard hands, hard sweat, bone endurance, their meditation, the value they give a cold beer and a clear head.

In Rotterdam—a hostel where somebody stole my wallet—an Aussie said he’d got farm work in Switzerland. “Ain’t much pay, but real good people, and weekends off.”

My first wife was with me. She had a 50-buck traveler’s check. We went to Geneva. People said to ask the cops at Rolle. At headquarters, they obliged us over coffee: “Go up two mountains, past Bugneaux. Look for Le Crozet—big, tan, stone house, its name carved above its front door.”

A soft, bright-eyed lady greeted us, her voice round as her frame was square, vivid in the sun—white hair, thick braids wrapped in rings at her crown, smooth, loose dress, big flowers, rose against a white of fresh cotton, mimicked her cheeks. “Bon jour. Come in. I am Mme. Hess.”

She ushered us through a limestone hall past dark tapestries to a grand dining room, with huge oak beams, immense fireplace. Painted plates and copper cookware decorated marble walls. We sat at a long maple table, on carved, highback chairs. “Would you like tea? You don’t look like farmers. May I see your hands. Hmm! We don’t own much equipment. Use our bodies a lot. See?” Her arms looked stronger than mine—muscles dwarfed my wife’s. Still, her tone and smile, like her hips and breast, were made for mothering. “But stay to sup-
It was the hardest work ever. Seven months. They called it "joli travail"—had no word for "fun." Through their toils, they counted, as children do, the limitless changes in the numberless little things that joined in the making of their lives—the paces of insects, the shapes and times of petals. I learned invention in brand new ways, absorbed it with the huge moon, and goat games, and with cows’ eyes, clear stars, and wild cherries, with the deep green and ancient stones of Les Jura, with the thin clouds of Mt. Blanc’s horizon, south, beyond the granite teeth that rise, gargantuan, from Lac Léman.

Mme. Hess let us share a chalet with another couple. It was 600 feet uphill of Le Crozet. Had a balcony, looked down on Rolle and the lake. We got the top.

One day, milk cows gathered early around the building, thicker than ever, and their bells awakened us before the sun that would cross the water and wander past Bugneaux, up our hill, through the cherry trees we played in, made love beneath.

Twelve of us would take the herd to summer pasture, the high mountain. Most were Hesses and Dorniers, the families that owned the farm. Two others were Spaniards—there to earn better lives for their kids in Andalusia. I’d never seen a cow mount a bull. My wife thought it a lesson.

The Dorniers, old cowherds, smelled rain. Mme. Hess let me choose my gear. I could have picked an old Swiss army coat and thick, canvas hat. I took a new, hooded raincoat, American plastic, rubbery and long, if thin. When we reached the summit, I was soaked and shivering bad. My wife, in the gear I’d declined, was warm and dry. Next day I had mild pneumonia. Mme. Hess and her daughter nursed me with motherhood, old family cures. I recovered well.

A few weeks later, we harvested a field of wild bushes like tumble weed in bloom. It was full of bees. But in a whole day, only one of us got stung. She stepped barefoot where a bee’d alighted. “Cut our lunch onion, quick!” She pressed each half, its inside, to her wound. White ooze drooled out. It was over—as if it hadn’t occurred. She sliced off the used parts, and we still had onion with kippers and bread.

Even the families’ six-year-olds pitched in, and kids from other Cantons came to learn at Le Crozet. The gardening chief, M. Hess, always came to breakfast wearing funny hats, a different one each
time—to start the children’s days with laughter. Except one morning, the first of summer: I found him sitting at the bottom of the kitchen stairs. He looked pensive, maybe sad. His head was bare. “What’s wrong, M. Hess?” “Mon cher jeune homme, the sea is salty to preserve itself.”

The buildings were very old, some centuries. But they were clean, useful, warmly decorated. Flowers everywhere, at every window. A couple of tractors, a bailer, plow, harrow, and such, and two trucks, all maybe twenty years old, or more. The owners, themselves, kept them working, all in fine repair. They ran them with visible pride.

Sunset after sunset, the old M. Dornier sat beneath the main house awning—with hacksaw, emery, gnarled hands. Between sips of tea, he reduced a dead truck’s valves until they’d fit his blue truck’s heads. I can’t remember much they didn’t invent, make, make over, remake, right there, they, the two families, working together, as if one. But I remember well, the senses—sweat, colors, smells—that afternoon we carted the bales of hay to the giant barn on the second mountain.

Everyone was there—kids wrestling in the stuff, women smiling, singing, carting water, coffee, wine, running the equipment, preparing lunch, some, with my wife, working bales among the men. My first time. I wanted it all. So I put a bale on the lift, ran to the ladder, climbed it fast as I could and ran to the open loft door, retrieved the bale and stacked it too—over and over. The older folks laughed, but cheered me on.

At noon, I collapsed, breathless. M. Hess gave me smooth red wine—the best he’d ever made—mussed my hair for the seeds in it, kissed my cheeks, hugged me silly.

My wife made us take the next week off. Our bosses let us when we liked—consideration for accepting measly pay. We had a Simca—Aronde Elisee Super Flash. Just short of the Pyrenees, it threw a connecting rod. The fix took two days. We had to sleep in the car. M. Hess wired us money, on account. But we never got to Barcelona. And we had to sell the Simca because of our debts.

Too soon, my youth and character sabotaged my marriage, forced me back to the States. I had to find my center.

Jon, the organ builder, wore no funny hats. Didn’t have children. Still, he built a magic into organs, ancient magic, out of himself.

For months, I think, I just carried tools, watched him work, questioned him endlessly, the way kids ask everything. Jon liked that.

One day, he handed me a tool and watched, asked me questions. Soon, I was carrying the tools for myself. And then, the first Friday in November, we arrived at Longwood Gardens, the colors and smells of jungles all around the great hall, where Bach’s last work would come to life that night. “His music’s pure. The organ must be perfect. It’s yours, Anachronis. Do it!”

The pay wasn’t great, about sixty bucks a week. But each day I couldn’t wait to get to work. When I got home I felt as if I’d made great love, had the same buoyant completeness, the same open feeling in my chest and throat, the sense I could do anything, beat the devil, even after ten hours’ labor. That was my bounty, and my gift to Jon.... No, also my ear.

“You move this sleeve over its mouth, down to raise the pitch, up to lower it. But you make these taller or shorter—lift or drop the foot, itself a sleeve. Do root octaves first. Then fifths. You can tap the slight ones, on the little lips to their sides. That’s right. Wait till you hear no tremolo. Leave octaves there. Raise fifths barely sharp, just past the beginnings of undulation. Fourths just as flat.... Good! You got it. And you got a beer too. But where did you get that name, Anachronis?”

“You think it’s bad? My father wanted to call me Leopold, after the Arch Duke—of Belgium. Or was it Luxembourg?”

When Jon started out, he knew nothing of wood or metal, history or mechanics, or sound, or music, let alone organs. He’d been orphaned, depended on an old uncle, struck out early on his own.

Back in the forties—Jon 16—a newspaper advertisement took him into mule-work at the Moller Organ plant. He was curious as a pup, devoured the instrument, its history that stretched to panflutes, Aryan hordes, to China and bagpipes, to Chartres, Reims, and Notre Dame, their high polyphony, the gift of Bach. He volunteered his free time to help make parts, to travel with builders, spent nights listening to records of different organs, studying how composers inspired or used them, some like lovers. As he tracked the ways the ancient organs’ timbres mirrored the cultures that made them, he learned Europe’s migrations, the special characters of its peoples.

Soon, the company promoted him apprentice. Early in the fifties, he became its master builder for the Eastern States. But he wanted to
create new kinds of organs. So he started a business of his own.

Jon learned every sort of organ you could find—tracker, electropneumatic . . .—everywhere, here and Europe. He seemed to know and do whatever you needed for any kind of trade—carpentry, tool-making, engineering, metallurgy, music, sculpture, physics, electronics, leatherwork, architecture . . . . You can't get the sense of that until you've been inside the beasts, studied their workings and parts.

Organs fill the walls of huge buildings, great hidden vaults of cathedrals. Making one note takes a right-wood chamber with just-right flow of air pumped in by shifts of rods and cams or complex circuitries that lift a valve or deflate a tiny leather diaphragm and expose a micromerated orifice and send from it a race of wind, perfect-angled over fine-tuned lips of an eloquent mouth precisely placed on a pipe designed and fashioned precisely as Japanese swords or Stradivari Violins. Every good organ's made uniquely for the place and reasons that house it. Making one's giving birth to a special child of nature, a creature of manifest poetry—a savage of music, untrammelled by the wayward mists of words.

Jon's recreation was his workshop. He tested new designs with scale models. His tools and some wine, and joy was complete. Sometimes he wandered forests, getting intimate with the woods he'd use. Like the elder Stradivari.

Always, Stradivari labored dawn to dusk, six days each week, all year, except . . . He took his midday meals in his factory—alone, with his work. His time with the world came at daily suppers with his family . . . . Except that time each year, when he made a pilgrimage, on foot, alone, to the Lombardy forests of pine and beech—north of Bergamo, early spring, when the sap was rising. He searched, tree by tree, for the flesh of his issue.

Some, like my ex-shrink, Dr. H, make paintings of the trees they would know, as if friends to share their homes. Jon and Stradivari made them molecules of their lives, their eternal children, endowed with voices to sing our souls.

Efficiency, market trends—Jon and Stradivari looked on them the way antarctic ice accommodates mosquitos. Their works will survive when the Chicago school is obsolete—unless our race has lost all passion.

One evening, Jon entreated me to go a way I couldn't. I left him the boy who dreamed to be Gene Autry, and cast again to find my work.

I drove cab, cheffed in New York, did social work, learned to
box and be a pool-shark, taught attorneys how to stop their clients' getting drafted. Then went to law school—without an undergrad degree. Did tops, got scholarships, edited the law review. Lived off making arguments for lawyers. Taught them ever since. And all Tilly's clay.

At 39 and 40, worked two schools near Philly, just to learn a special Aikido and finish psychotherapy I'd started in my twenties. As I greeted 42, my shrink commended me to me. But my third wife left—for a punk kid half her age. I made black belt, and pursued her. She returned in a month. I invented romance. Learned I could love, but never knew anything. At 44, I angered at the law's seduction by statistics—the distancing in false precision, the easy injustice. So I taught myself math, published essays on its use in litigation. In ninth grade, I'd had algebra. The teacher's voice was pinched as her face. I stopped attending classes when she wouldn't credit the proofs I designed myself—though she confessed they were true and elegant, though I enjoyed making them. She said I must use standard formulas, preassembled thoughts, because . . . because I had to, she said. She flunked me. Later I learned that Einstein flunked math.

Anachronis: Now, Anachronis, I'm impressed, even touched. I like stories. I even wonder about your search. But . . .

Anachronis: I know, Moderno, you need me to tell you the economic moral. I don't want to tell you, because I need to show you, inside.


You learn self-responsibility, and soft respect. You get an ever-growing wealth of being—riches of memory and possibility that weave themselves lush in an ever-opening of you.

But how can you sense my moral as abstraction? You need contact with feelable events—like my times with Barney V., the steam-fitter I apprenticed with.

Anachronis: Yes, Moderno. More patience! I've told you why. The effect is psychoanalytic, nonlinearily incremental.

Now, about Barney. I met him when Manpower sent me. It was donkey work. But I threw myself into it. He was impressed.

I was 23, near 24. He offered to train me, at a little higher wage, but short of what Manpower got from him.

Barney was a German immigrant, learned steamfitting in Kaiser
Wilhelm’s Navy, fought in World War I. Earned a captain’s license on a four-mast squarerigged man-o-war. Still, at 80, Barney had a viking’s vigor and iron. But he troubled on my surname, its sound, its kind. I told him it was Hebrew. And his face turned dark. You know it’s Greek. But I needed to tell him my father was a Jew.

Later he said the holocaust was false, the Allies’ lie. “Hitler saved Germany, and others were jealous, made up that stuff. If Jews died, it was just in the war, even under American bombs. Like Dresden.”

Barney didn’t hate Jews, just thought they were too rich, and lazy—got money with other people’s labor, with usury, and guile, anything but hard, honest toil. “But you know how to work, Anachronis, how to sweat-out what you learn, what you get for it. Never met a Jew like you . . . . Or . . . maybe I was wrong . . . . Have lunch with me? My house. Got great cheese. Limburger.”

I’d heard about the smell, but felt so honored I vowed to eat it even if it were made of rotten feet. He added dense black bread, sweet and moist, and a chocolate colored beer thick as goat’s milk fresh from the mother.

My memory compared my parents, their hatred of each other, their mutual brutality, contempt. I wondered: “Shall I tell him about her? My fiery Magyar mother. Farm girl come from Hungary, alone, 14, without an English word. Seamstress for her living—every week of the Depression.”

We talked of home-made cheese, old days on sailing ships, times when you got your bock beer drawn into buckets you carried home,

36. Barney was right about the Jews of his ken—within his ken. German Jews were professionals, bankers, musicians, teachers, writers, entrepreneurs—seldom laborers. In Barney’s Germany—before Hitler—the Jewish mind had great respect.

But that wasn’t always so. Early, European Jews tried to be landowners, farmers, artisans, as they’d been in Israel and in their powerful old nation north of the Caucasus, near the Volga Bulgars. But Gentiles wouldn’t let them. Jews had no alternatives but death in Spain, the ghettos of Eastern Europe, or the enterprises and professions of Germany, Italy, the Netherlands, and France.

Even in Barney’s Europe, ghetto Jews, more than half the Jews on the continent, were laborers, did hard, honest work. But Barney didn’t know that, as he didn’t know why German Jews had become what they were.

Maybe Jewish bankers, money-lenders, investors, and industrialists were greedy, and sleazy, as any others. Maybe they were better at greed because they’d been doing money business so much longer. I doubt that, though. When Christians took to the path they’d forced Jews to build, greed had permeated centuries of Gentiles.

Still Barney was right. Greed warped the German Jew, as it had much of Germany—the same Germany that followed Hitler’s greed for mastery of the world.
fresh bread under your arm . . . then the next day’s job.

Not long after, he offered me a piece of his business, said he wished I was his son. We’d stopped work early, and he took me on a special trip—to see an antique tavern in Roxborough. We arrived near 3. The bar was hand tooled oak, and behind it a mirror, carved hickory, two men high. On the walls, a few old country scenes, Sax- on landscapes, I imagined.

“I used to come here all the time, Anachronis. Back then this place was German, every evening full of friends, all good working men, hard workers, honest workers. Pride in their jobs. Don’t come here anymore. But I wanted you to see it. Schwarzes took over. They’re no damned good, care about nothing, take your money and your time and give you trouble in return. They hate to work, try to get away with murder. Killed this neighborhood, ruined this bar. Chased away my friends.”

At 4, the tavern began to fill. Most were black. Barney’s face got grave, twisted. He started to whisper about the men coming in—one by one. The more he spoke, the faster and heavier his talk. I panicked. Told him I couldn’t listen more. “I think the world of you, Barney. But I can’t handle how you feel about these people. Soon enough, we’d start not getting along. I’d rather stop now, remember you as my friend. So I’m gonna have to quit. Can’t apprentice any more . . . .”

**D. Seeing the Alternatives, Learning the Way**

**Anachronis** [continuing]: I was a fool; I know now. If Barney could forget his antisemitism, maybe he could have mended his sense of blacks.

And I was a fool to leave the jumping horses. I didn’t see I had to show my boss patience if I wanted him to teach a horse with love. I should have tried to help him see how more willing are they who work for friendship, how faster they learn, once you earn their devotion. His only failing was his slight whip, anxiety more than cruel greed. Nowadays trainers get hirelings to club the ankles of horses as they clear jumps, to make them take higher, longer arcs. Or they hide iron bars just beyond hurdles. Shin hits bar, and trainer doesn’t have to pay a hand to do the dirty work. Some put nails inside shin guards—pointing inward. When leg hits hurdle, nails drive into bone, maybe kill slowly, with excruciating osteomyelitis. But you get good bucks for better jumpers.

I still think of Barney, often for a person who hasn’t seen him
in thirty years. We learned a lot from each other, because we loved work—for its own sake and the feeling of doing good with something you can love. Joint hard effort makes strong communion, beyond respect.

You should have seen how we were at work’s ends, soot and grease on the wholes of us, sweat almost strong as Barney’s cheese. I was so proud of my work dirt, wore it as a Samurai his armor or a highlander his kilt. I’d always stand all through my train rides home—so people could witness my badge of honor. I’m sure Barney remembered me for feeling that. In a way, I adopted him my father.

Barney’s dead now. I don’t mourn. His life was intense as Modigliani’s wish—to the quick end, sometime after ninety-two. The tragedy’s he’s obsolete. Ships are diesel, trains too, or electric. People regulate their atmosphere’s with heat pumps. Greater speed, more efficient power, with fossil fuels and depredation, or atomic power and radiant poison. Steam’s clean, doesn’t dry you skin, parch your breath, noise-pollute your consciousness.

My ex-relative, E, built his house. He included a huge fireplace, sunken in the parlor floor. It’s face had a fireglass cover, to let your eyes have its romance while it kept from wasting heat. He fed it wood he salvaged from surgeons’ fellings and builders’ levelings, wood he cut, loaded, hauled, and split by himself, for the exercise as much as the thrift. At the fireplace’s rear, he set a radiator. Fires heated both the parlor and the water, which gravity took to other radiators—all through the house. Excess steam ran a generator he rigged. Never used the backup boiler—electric.

Halfway through the house’s first winter, the local power company accused him of tampering with its meter. E’s wife told me. “You should have seen him when he showed their agent his system. He looked as if the first I told him I was pregnant, or when he gave me that Bentley he restored, the one he saved from a crusher.”

Moderno: Okay. I get the point of that stuff. So what else is new? I mean, was everything telling me things just as obvious?

Anachronis: Moderno, if all that “stuff” made just the point you think you get, you needed the lot to get it in the right place: Not your head, but your gut.

Last night my wife and I saw a movie, “Thelma and Louise.” It teaches a lot about perception, learning, wealth, and underutilization. One line fits here.

It could have been cheap sarcasm, like a wisecrack from a standard cop flick. But its beat in the drama’s rhythm, in its fugue of
characters—it's beat gave it blood.

It was a comment by a pudgy, sexless-looking, bureaucratic F.B.I. man—a quip to Thelma's husband, who had made Thelma feel she was an infant slave, who cheated on her, whole nights, despite her lush sensuality and abundant beauty, despite he was weak in work and pathetic in bed and she was tolerant and loyal. This time, Thelma, too, had been away—into the next day, with her friend, Louise, fleeing the law.

Louise killed a man who tried to rape Thelma. The cops suspected, and they were waiting at Thelma's house, hoping she would call. A local cop was telling the husband how to sucker Thelma into talking enough for a trace to find her. He was to say he was worried and missed her, loved her, craved her love, and the feel of her body . . .

The F.B.I. man wore a tonsure and a bland, greyish suit. But his leer could have stripped him to a jock, as if he'd been watching football, imagining he was that swaggering halfback—in the locker room, with the boys. He puffed himself up, and grinned: "Women like that shit!"

I turned to my wife. "Oh, God, I'm so ashamed to be a man. How can you bear us?" I wept. She grasped my hand, wiped my tears, held my head, kissed my eyes.

You can love a Van Eyke, an El Greco, if you've made an oriental rug, built stone walls, tried a line drawing or a scrambled egg and botched it, or bathed yourself in the painter's way, in the tools and engines of its passion—or if you don't seek distraction, or recognition, but being, and doing, with magnesian heat, what has meaning in the simple virtue of sense or effort. If you don't get much pleasure from your ordinary sense or acts, you crave abandon, even from your feelings, which can't be very much, or very good. That problem's spiral, downward, into boredom, stomach-stuffing, shopping sprees, Nintendo games . . . blue movies, liquor, dope . . . or panic in ice.

When Mozart was seven, maybe eight, his father, Leopold, took him to London. One afternoon, when Leopold lay ill, asleep, young Mozart pleased himself by writing a symphony. Still, his days weren't really different from other kids'.

37. I'm sure he wasn't more than 10, and as I see the story in my head, he appears closer to seven than to eight. Of the rest of the story, I'm certain, as I know he wrote his first piece, a piano sonata, when he was six.
Another boy might happy learning how his father made tools, fixed watches, thatched roofs, baled hay. Another day he might play knight defending maids or wrestle his brother in a stable, or lie under stars and wonder—imagining the touch and smell—of rolling in spring grasses with that dark-eyed girl who mystified him. His sister might enjoy weaving, or pirouetting with a broom, remembering love on woven straw. In Mozart’s day, a girl had real infants for dolls. Farmers crafted instruments to play their music, spirit their dance. And city families held recitations, musicales.

That we deify Mozart’s prodigy is only that we’ve made his music a freak. Mendelssohn wrote better earlier. But he had been a Jew, and Mozart’s father made his living selling Amadeus. 38 Like Bach, whom he died admiring over all, Mozart was a very ordinary fellow—wallowed in lust, drank with the boys, humored emperors and kings, to their faces.

Now people buy stereos, often several in a life. They pacify their kids with manufactured toys, TV cartoons, computer games; and Big Bird teaches them a rote of how to read and count, and what to think. They have PC’s to plan their minds, calculators for arithmetic, can’t make or parse a sentence, design a logic, apprehend the meanings of adding and multiplying, or the definition-function of division. Creation is digital.

Last week my wife and I discovered a gripping movie, “I Tre Fratelli” (“Three Brothers”). It opens on an old Sicilian farm, an aged man walking from his house, through an orchard, toward a bus stop—on his way to town. His wife appears—round, modest dress. She points to a rabbit scurrying near, gestures: “Catch it!” He holds it out to her. It is limp in resignation. “Fearing death, it fled our kitchen.” She tells him to let it go. It darts away. They turn to leave, he again for town, she toward their house. But they turn back, for one last look, she swaying slowly as she stands, eyes radiant of lust but playing shy, he, seeming taller, face warm around a slender smile.

38. I say “had been” because his father made his family Lutheran when Felix was beaten for being a Jew. The act made little difference to antisemitism. The Nazis banned Felix’s music. His market and posterity well demonstrated they knew his surname was Jewish. I say “better earlier” because, though both started writing years before their teens, Mendelssohn’s writing was technically more advanced, complex, stronger, more mature. Both lived merely 35 years, created more than most today. Only now musicians are learning the span and depth of Mendelssohn’s work, its prudent power, elegant invention, myriad beauties. The public—the market—stays vastly unaware. Without hearing or appreciating most of Mozart’s work, the public learned to decorate with little plastic busts of Amadeus, next to Beethoven’s, maybe Bach’s—painted antique bronze.
Then, suddenly, she disappears, as if evaporated, her corpse in wake, coffined in their parlor.

Years earlier, their farm still nurturing their family, their sons got bored, went North. They sought excitement, greater destiny. They got turmoil, dread.

One, a jobless union organizer, might assassinate his elder, a labor-judge whose days were sores, whose sleep was nightmare. Their marriages were prey to terror or ruin, but they could neither leave nor mend them.

The third was warden of delinquent boys whose intrigues mocked his theories and ideals. He dreamt of being their Napoleon. He made his seldom love with whores.

The father lived as before, as his father lived, in calm through passion. And his wife romanced him still in memory of feel and smell, in visions from the layered dews of all the ever richer times they gave each other, their times, still—still measured only by the donkey’s brae, the rooster’s crow, the seasons’ moons, the cycles of their husbandries, their simple works, the meters of their love, the callings of their home.

And as the old blind Chief in London’s “Law of Life” became a lesson from his youth, a noble moose, too ancient for his herd, who found rebirth, intrepid, fighting in the jaws of wolves, the father comprehended in his pulse the salt of peace in birth as in spilt blood—the certainty of passing, autumn into cold, the wisdom that his final breath would find eternity in death for life, in life from death. His sons found neither grief nor solace in the offering they journeyed decades, as somnambulists, to hold. They were swallowed in a hunger that ate them hollow but for torment that they seldom dared confront, that seeds the raven who devours sense and empties being of its gift for love, of sympathy, of room for guileless hurt, of joy.

Moderno: That may be a compelling movie, as are your words. But after the emotion settles... well—what about real life, economic life, here and now?

Anachronis: What “now”? Which? What of Shakespeare’s histories, or “MacBeth,” “King Lear,” or, even better, Kurasawa’s “Ran”—or what “The Merchant of Venice” tells of human valuation of human worth, the valuations Shakespeare’s England made of humans not its kind, the valuations of now? Do you really think Shakespeare didn’t understand your law and economics, as Dickens and Kafka knew Coase? Do you think Adam Smith didn’t write fiction?
Can Smith's prescriptions salve the lesions of the three brothers, any more than Lady MacBeth's?

"I Tre Fratelli"? It's very much a part of here and now.

My wife of now, ten years my younger, told me her childhood playmates made go-carts, as I and mine made fruit-crate scooters. Her friends used discarded boards, wood boxes, wheels off outgrown wagons, engines from junkyard mowers. But they were children of the fifties, and they went a different way. Soon traded their invention for packaged ease in space-age plastic.

What happened? You can find the answer many ways. I choose breakfast cereal.

**Modern: Breakfast Cereal? My God, Anachronis. Have you gone off the deep end?**

**Anachronis:** No. In the forties, we had Cheerios, Wheaties, Cream of Wheat, Cream of Rice, Quaker Oats, Puffed Wheat, Puffed Rice, Rice Crispies, Kellogg's Corn Flakes, Nabisco Shredded Wheat, all made of simple, pure whole grains, and we learned about them over radio. We had simple, often home-baked, bread, fertilized eggs of range-fed hens, pancakes and waffles from scratch, and maybe bacon, without fake color or nitrites to make it look fresh, red, when it's not.

Radio left a lot to your imagination, encouraged you to vision of your own, appealed to your story art, the invention in your taste, even through the logic side of your brain. To your favorite cereal, you added milk, maybe fruit, the choice of your design, alas, some sugar—or just straight. The exception was Raisin Bran. But the difference was only raisins, and pretty "organic" (before we needed the term).

When my wife's friends made go-carts, they had television, and Frosted Flakes, then Fruit Loops—their children, Count Chocula, their grandchildren, Undercover Bears, Dino Pebbles (of "The Flintstones"), Slimer and the Real Ghostbusters, Teenage Mutant Ninja Turtles (lots of marshmallow, made of animal fat and hooves), and maybe twenty other kinds of chemically merged, fake fruited, polished, and sugar-coated starch, some just chemicals and sugar-blobs, with preservatives and artificial tastes and colors, mismixed, simulated vitamins. You

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39. Classes of vitamins work right only in natural combination. If you take B₁₂ alone, as a "supplement," your body will spend a proportional store of other B vitamins to accommodate the extra B₁₂. Even if in quasinatural combination, vitamins separated from their natural sources or, worse, synthesized, have eventually unhealthful side effects. Taking vitamins
might think the new names show flare, imagination. But they aren't the kids' inventions, and they're made to distract, even from the concoctions' poisons, and want of good.

But the old cereals didn't vanish, and kids are still satisfied, and better fed, when they eat them, though their market now remains much my generation and a little of my wife's. What explains the commercial success of the cereal proliferation?

Television atrophied our children's vision, stupefied them. It sapped their imagination, as if a dangling trinket that entrances, disassociates the mind, worse than booze, supplanted their needs and tastes with what it sells. Cartoons sold children anything and everything the market could devise, to hawk for greed.

Meanwhile, from the technology that gave us television, emerged the institution of speed. Just as kids ate gimmicky TV promotions, cereals stopped having reality, good substance. As the cereal went, so did pride, and joy, in invention, and thence the worker, now much a waste—both on the job and off, in self and life.

The trouble isn't unemployment—which, alone, doesn't waste human virtues, not among people who've retained their native resilience and capacity to imagine and create. The trouble's that gadgets with motherboards speed us "efficiently" out of the care of our past. My students speedread. I mouth what's on the page, and then again, and again. Before I'm done a sentence, they skim two volumes. I criticize the atoms of the writer's sense. They barely care: A computer will digest it.

A tool and die maker was artist-engineer, like a stone mason, chair caner, organ builder, electroplater, baker, glazer, weaver, steamfitter, boilermaker, knitter, carpenter, seamstress. Electronics and robotics made artisans obsolete. Humans had to race, and standardize, to stay in demand. They learned to be fast, superficial—as life sped away, always nearly out of reach.

Time learned new preciousness, a deviling worth. Breakfast, then

out of season or unfitted to your environment is unhealthful as eating produce out of season or where it doesn't grow. The best arguments are natural.

Consider Eskimos who retain their old ways on remaining unspoiled arctic lands. They don't get scurvy or colds. Their diet gives them very little vitamin C. Their bodies extract as much as they need. They need little, because an acid diet is death on the tundra, else tomatoes and citrus fruits would grow there. Traditional Chinese also rarely get sick, don't die of cancer or cardiovascular disease. They don't ingest things to supplement food or to "protect" their systems. Their diet and way of life fits the nature of their bodies in their environment. Later I'll return to these matters, offer "authority" a bit. See infra notes 43-44 and 54, and related text.
supper, had to come premixed, out of boxes, or frozen blocks one popped into toasters, then microwaves. Radiation was okay, in little doses (never mind how many). TV assured us, and we had to keep on the go. Tranquilizers, pep pills, fabricated vitamins, dope, and antidepressants took over for family, love, good food, the health in calm imagination, satisfying work.

Almost every day I meet this change’s worst disutility and waste—the sloppy, dispassionate, contactless, easily annoyed, and irresponsible performances in nearly every business and professional contact I have. They don’t see or hear. They don’t do or care. Someone else will clean the mess. Few people sue, and one has insurance. The law won’t cure the emotional effects, or handle retribution.

I spend, I think, a quarter of my life designing measures to prevent my suffering the consequences, another quarter cleaning the debris. Is it really different for you, Moderno? Or have you dissociated, numbed yourself? How do you confide in price?

Money, more money, the threat of its loss—these can’t give us pride or competence or honor. If people have nothing to lose but money, they’ll get it falsely. If we lose our empathy and pride, our joy in work, we lose ourselves, and we have nothing to lose.

Price and market can’t help. They barely account. They foster greed, evasion, fraud. Even sanctions don’t work. They fit the empty, the lost. In price we’re all lost.

My computer’s hard disk failed. The cause was negligence in design and installation. The man who sold it to me installed it, with a wrong control card.

When he saw his liability, he reformatted the disk, destroyed the evidence. I lost or must repair and reproofread four years’ work. Some precious details are irretrievable. I’m angry as hell, intend to take everything he owns. But still I’m sad for him—his fear and panic, his want. If only he’d had pride, joy in work, respect for his life . . . . If he can’t be intimate with his responsibility, what else must he lack?

The trouble’s infected our biological lives, our sexual lives . . . .

Moderno: I can’t see the connection. The guy’s a fraud, a crook, destroyed your property. He’s a twit without empathy. But what’s that got to do with sex, and what’s sex got to do with underutilization?

Anachronis: We can count in centuries, millennia, the time of trouble in human sexuality. But at least, throughout, till the television age, we were fairly in touch with the stuff of birth, sustenance, biolo-
gy, sexuality, illness, pain, death.

We didn’t need Freud to show us infants are polymorphous perverse. In oldest times, simple peasants knew, when scholars wouldn’t see because their distancing characters blinded them.

Infants are vacuum cleaners of pleasure, all through their beings. Their bodies are made of diffuse sexuality. And they want more, and more, as locusts want leaves. Support an infant’s search for pleasures, help it channel healthfully its desires, without sacrificing yourself, and you get a dynamo of natural efficiency, a juggernaut of insight, creativity. Even its experience of mind will be pleasure.

So, once upon a time, a child might learn the nature of a bug by comparing butterflies with beetles, cherries, dogs . . . . Now we have our kids just study others’ classifications. That’s efficient. Reinvention’s not—even if it’s the difference between insight and bored moneymaking.

Learning used to mean bettering your grasp of the changes and likenesses in the infinite relations among the faces and workings of all things open to human sense. Now it’s mostly history—drier than the caterpillar made poor Alice.

Yester-year, an infant learned breasts by suckling (and suckling gave it proper food, good energy, immunities, and needed pleasure). A kid learned genitals and piss and shit from watching mother, maybe father, change their younger sister’s or brother’s diapers. When its crib was in its parents’ boudoir, it fathomed, if sublimely, imperfectly, the mysteries of sex.

A child learned endurance in suffering when doctors made house calls, even for major wounds, and ordinary people took the injured to hospitals that weren’t like the Pentagon or computer plants, and grandma or grandpa, maybe Eddie or Sis, even Mom or Pa, lay ill and died in a room down the hall. A child learned power, heat, cold, light, room, board, and preservation, when refrigeration was a man come with pincer-tongs and icetruck, or a root cellar, and your daddy stoked the box with wood or coal, and you air conditioned with a fan and bath, or cool moist towel, or the ecstasy of a breeze in the night, perhaps across the lake, maybe even under stars.

And so an infant grew a child unfolding of awe, through crude desire to sense of otherness and goodness in toil. And so it learned the strengths and meanings of our fragile lives—and empathy, and love.

Now biology’s a text one memorizes. A child’s bottle-fed, in a day-care center, learns its sex from softy porn that falsifies love out
of lust, or from Barbie and Ken, never really anatomically correct. It wonders whether only it must shit or piss. It sees death only faked, an unreality portrayed in movies, on TV. (Oh—Radio left death to imagination, which fed off life.)

Modern medicine's sterilized in white, a mannequin M.D. you wait for endlessly in crowded offices, bland reception rooms in city blocks of hospitals—an inscrutable automaton that brandishes syringes, questionnaires, and other people's hearts and kidneys. Your symptom doesn't fit a pill? A surgeon cuts or takes, and later you're awake. Your health's a computer printout, impertinent as I.Q. tests—unless children are standardized, robotic, and life and death empirically prefabricated, as now they are.

The modern child ever-tires ever-faster of ever-obsolescing toys supplied by feelingless unseens, mechanical hands—the ratchety gadgets, battered dolls that weep and squawk, and video games. It feeds on distraction, swells on greed. Soon its daily appetite gets sated, can't breathe. Soon its time becomes a half-life of vacant hunger and programmed courses through programmed quizzes and exams designed to teach success in programmed lives designed by programmed quizzes and exams designed by feelingless unseens, mechanical minds.

Older educators have seen this disease creep forward, flattening its path as by a glacier—each new class of students less able to question, analyze, even think, each more demanding of injections of other peoples' knowledge, of orthodoxy processed for entry on computer disks or digital brains. Now mind growth terrifies them! They're absorbed only of the vacancy purveyed in advertisers' fashions. Theirs is to buy whatever sells them—clothes, cars, medicine, behavior, vision, attitude, belief, sense of value.

They yield easily to pleasant manipulation, recoil from responsibility, critical thought. Their minds are biases—hard, thin, narrow—blind them to life, warp them away from nature's sense. They were never makers of their experience, never let to find, themselves,

40. Modern medicine's worth some of its diagnostic devices, some orthopedic surgery and missile removals (in some cases of body trauma and birth defect), and maybe, temporarily, some allopathic remedies for a few infections, the kind that invade even naturally healthy organisms, like protozoa that infest both humans and wild birds in savage environments. Otherwise, it's mostly harm, not cure, not just because it poisons us (even with antibiotics) and takes or adulterates parts of our persons, but because it deflects us and our bodies' workings from natural health. And yet its market and its money-making power are immense and growing, faster all the time, as its wisdom makes more ills. Compare infra notes 43-44, and 54, and related text.
their sustenance and joy, ever taught that others are to tool the media of pleasure, the agencies of pain, that distant gods grind out their chances in unparsable rules. Their leaders have despoiled humanity and may destroy life’s Earth. They acquiesce, if only they can get more “more,” they know not what or why. And they are our educated masses! They determine wealth and lead demand!

Our modern poor don’t escape. They lose identity in standard costumes, patterned moves—cool, narcistic, lacking personal meaning, sensual contact, personal grace—and drugs, redundant rap, and worship of the meanest hoodlums, marketed like canned-noise rock.

I don’t know surely why I escaped. Being on my own was not all auspicious. My parents, mostly absent or brutal, destroyed my sister, beat her, raped her, frightened her from society, tuned her to terror and hallucination. My ex-shrink said I’d be worse than dead had I not been born with white energy. The benefit was self-reliance. I can’t count the costs.

Few have escaped. Mozart’s father kept young Amadeus from adventures other boys might have. And Mozart found himself deprived of sensibilities. C’s mother (remember C?)—C’s mother was spare with love, heavy with nouveau-riche propriety and lust for expensive things, hollow occasions (a charity tea, a mah jong game) for exhibiting them, and C’s father, near faceless, a distant absentee slumlord. C cracked up at 31, lost the balance of her life . . . . C! My first love!

At 19, I lived for music and her. When she went to Aspen, she telephoned me. Said she’d become homosexual. That broke my heart, but it was just a foray, short lived. C returned to men—in a frenzy.

But at 26, she submitted to the domination of a Quaker husband. He belittled her mind and talents, frayed her sexuality, beat her body, ran to California with another Quaker’s wife, another pacifist, blond, and 22—C dark, near 30.

C went to a mental ward, for a time. Now she’s celibate, lost in meditation, forgotten of her art—a shell discarded by gluttony.

In my youth, I had a friend—my very closest friend—who collected women, then wasted them. How many hopeful, innocent, wanting to care, to love—he shames now to tell. He used them up as if so many watermelons for summer, or winter whiskeys and beers. They bared their hearts, opened their trusts. He dumped them for new conquests, consigned them to the wastes of his life.

Now he sees their worths, cringes at his acts of his past, can’t forgive his ruthless dispassions, withholdings, unrecognitions, self
from self. He couldn't even be friend.

Oh, he kept in contact, invited them to dinner, even listened to their reveries of sorrow and good—reused them when picks got spare. But he never more than played with them, or kept himself convinced of that, because he feared to reap from them what he suffered through his mother, from his father, and her father. He never wasted food or creativity, only every chance at joining's bounty.

What wealths of love and joy those women offered. What visions, possibilities, what magic stores of feeling and sense. He spent their patiences in errant winds, took cheap and ran. He mourns, in horrid dreams and acid memories, the hurts and disappointments he bestowed on them—and in the end, his self-deprivation.

*Moderno:* My God, Anachronis, you're crying. Who was this friend?

*Anachronis:* None was closer. No one else could be so near.

*Moderno:* What are you saying? As you spoke, I wondered how you could know so much about him, with such empathy . . . .

Wait . . . . Didn't you say, earlier, something about . . . *your* fear of loving women?

*Anachronis:* I thought: If I could tell you this as if another's story, I could keep from weeping, disclosing my pain. I could save you the discomfort you must feel.

I meant no deceit. I'm sorry. I acted only out of apprehension—as in my youth's waste of love I acted out of fright, not betrayal or contempt. Again I'm wrong.

However else I may have hurt my victims, I left their flesh unbruised, their bodies whole. I never cheated, never camouflaged myself in lies, always valued what I could of each's worth, even though I couldn't do them justice. Now, despite my remorse, I may have mocked your trust. (And yet you haven't left!) Ironic, isn't it—how blithely one may wrong, even if one tries to spare an enemy—if any particle of motive is fear or greed. I had greed for your regard. My fear presumed your inhumanity.

*Moderno:* But you should listen to your words—forgive yourself. You didn't defraud them. They weren't mindless, choiceless. You offered, they wanted. They paid the price, and should have expected it.

*Anachronis:* And *that's* the market! It slaughters friend with friend, each day, and generations, renders them insensible. It is a race of anxious fools and used car salesmen—in law school politics as in the treacheries of Richard III, in posturings at cocktail parties and
affairs of state, in Bush’s wars, and drug trade, screaming TV ads, and junk mail, love as smut by 1-900 phone. It buys us dust storms blowing out of greed that swallows forests, turns wolves into pitbulls, infants into toys, food into poison, weather into geothermal scourge, gives us multimillion dollar athletes, death in plastic, choices of annihilation. Pardon all! They do only what they can and must, what their characters command or license. In that way most are honest. But the many are sick. A system built on their propensities, however forthright or compelled, is disease.

And I must feel remorse although the women I seduced seduced themselves—for my complicity, my advantage in their sickness, my revel in the worst of mine. They didn’t have to expect my price. They ought to have been able to trust I wouldn’t use them so, not because they could prevent it, but because my empathy would. They didn’t know what they were buying into. My honesty wasn’t enough—no more than a sale “as is”—with latent defects. Must they have submitted me to psychiatric tests before they let themselves feel feelings my greed cooked up?

The unfair cost of any sale “as is” is that the buyer may not guess the whole of what to test until she suffers the goods, so she has no way to judge the fairness of the price. To say she needn’t purchase is to say the seller has no moral duty to disclose and let the buyer set her price. If he discloses, he sells what he has, not what his buyer imagines, wants to hope. You’d call the buyer victim only of her coveting. But the seller makes her prey of their desires. If she can’t help herself, he can. The question’s why he doesn’t—why he offers her bunco.

I think again of the groundhog chewing carrion, and I remember another, injured on a slender country road that winds through rolling lows and climbs by ponds and over streams, through farms and woodlands near my home, through open country losing ground to suburbs that our market can’t explain but condones. When all this Midwest land was resplendent with hickory and walnut, ash and cedar, maple, sycamore, and oak, groundhogs lived on leaves and twigs and berries they were made for. They don’t have speed to chase down prey, even lizards or mice. Predators’ accomplishments would allot themselves to killer first, then omnivores and buzzards, made for picking rigored flesh from still-moist bone. Groundhogs are unwise to tangle with corpse eaters. Vultures carry strong wings, sharp beaks, harsh talons, matches even for a fox or coon.

But our plunders have decimated scavengers. Our land develop-
ments and highways kill or banish predators, take away the groundhog’s native food. And the crushing blows of cars will mash a corpse to rot on asphalt heat till it’s easy supper for a beast not made to rip up solid flesh.

So woodchuck replaces buzzard in the weirding deserts we’ve made. It cannot sense how vicious are our mounts, so cooler than the wolf, or hound. It hears no blood in their whines and groans, can’t comprehend their bulk and speed that have no feather or pelt. A yearling hasn’t chance to adjust. Its elders lived half lives in holes. To us, they aren’t even meat.

And none of this matters to market or price, or to our millions who drive our roads to shop, to find distraction, or to get more money. Oblivious, they don’t perceive their fate in their mutations of the wild, their depredations’ parallels in their wealth, their selves.

A week ago, my wife, my fourth wife, chastised me. “You’re forgetting a big part of the good old days, most women’s part—marriages of alliance or for labor, or for sex that turns sour as seldom, even grotesque, or for bearing children, more toward drudgery than love, and changing diapers, cleaning toilets after men who miss their marks, washing dishes, scrubbing floors, cooking, serving, unnoticed, degraded, no chance to grow. Maybe for all that’s bad, women have life better now. Whatever else, a dishwasher frees a woman to find herself; and computers love nimble fingers, and minds at home in tiny detail. Nothing’s noble about picking up men’s underwear and scraping dirt out of corners, then typing the palaver of another wife’s drone.”

“But, Mary, suppose a woman has romance with her man, feels wanted, admired, in a marriage of shared love and adventure, good sex. If that woman makes her home immaculate, prepares an exquisite meal, decorates with flowers and music, with sense of afterward in bed, as I do for you, and you for me, isn’t she noble, free?

“Conveniences and C.E.O. jobs don’t give dignity. They take it. In our time, the sexes are equal in anxiety, loss of love, poverty of soul. They can’t be equal in drive, perception, ability, desire. They’re emotions and minds are different as their genitals and shapes of flesh. The trouble’s not the ancient point of marriage, not who hangs the clothes on the line, but how the man and woman see each other, feel about each other, make each other feel. The deeper trouble’s our forgetting whence we come, the primordial reasons why we’re family beasts like aborigines and bushmen, the long frailty of the human child, its need for the breast, and the mother’s need to give it . . . .”
**Moderno:** Whatever the imperatives of primitive peoples and prehistoric Man, I think your wife's right, and her idea maximizes human resource utilization.

**Anachronis:** She was right—but about bent, not time, and surely not progress and the idea of utility, banes of our kind. The farther back, the better, not in years, but sense and mind. She sees that now, longs to bear a *prehistoric* child.

Remember Vince, Moderno, the boogie piano man? Vince was the youngest of fourteen children of a Sicilian family. They lived in a tall brownstone row home, with a small porch. Outside, you couldn't pick it out from all the others on the block, or the block before or after, in that Irish part of town. But when you went in, you saw deep colors—forest green, ruby, the blues of dark seas, and tassels and thick cloth and much heavy polished wood, and photographs of family and a grand piano, and thick furnishings that would hold you soft and warm. And the smells! Garlic and herbs, aziago, provolone, mozzarella, and roasted peppers, and spices, and thick red sauce always bubbling on the stove.

When you entered, you followed your nose, hypnotically, straight to the huge kitchen the father built. And there was the mother, the center. And she would give you fond kisses and a hug that would chase away all the demons of hell and make you her golden child. But she was monarch just as she was well of nurture. She held dominion, as mothers did when Syracuse was not yet Rome's, even as she would had her husband been Caesar.

All her children helped her—cooked, cleaned house, ran errands. The oldest were her captains. She instructed them in her plans; they measured out the tasks among their younger, guided them. The mother was chef—of order as of food.

The father, a mason, small but strong as the rock he worked, fixed what she told him needed fixing, stoked coal, counseled. The youngest children sat on his lap and told him nothing particular, or everything of the moment. The mother, voluptuous, sometimes did too—sometimes smothered his head in her breast. Those times they spoke a language you couldn't know with your mind, even if you knew Italian.

In earlier days, before they had children old enough to help around the house, he often changed diapers, washed or dried dishes . . . . He adored his wife's motherhood, her devotion to family, home, and she worshiped him as she enveloped him, as he lent her his strength. Their example was the children's deepest education.
Dinner was the whole evening. Mother, father, brood, and friends, we seventeen or more, sat around the long kitchen table—food spread before us, more in the oven and on the stove—always many things to sample when and as much as you wanted. The father sat at the head, but the mother was the heart. Even the young had wine, the kind in basketed bottles, some the father made in the cellar. And the tastes and smells and talk and touch and laughter were abundant and robust—all the fun and music anybody needed.

All knew, without the telling: You worked for the home—because of love, not discipline. But Vince did only what he wanted when he didn’t have chores. His parents didn’t run his life; it was his responsibility.

Maybe you’ve read about families in matriarchal cultures, like the Trobriand, the Hopi, Zuni. Those cultures, woman-centered, centered on nurturing and love—they didn’t make wars, ravage their environments, hurt each other over property, greed. Teenage Hopi boys have trouble playing, even comprehending, football. Their native sense is nonviolent, anticompetitive, disposed to mutual aid. Yet, for many centuries, the Hopi prospered, and with respect, among aggressive, patriarchal tribes, fierce as the Apache. They outran horses, offered nothing to resist. They may survive Europeans.

In many ways, Vince’s family was similar, though you might think it patriarchal. Vince’s father had the final say on a few critical things, like family disputes he wasn’t in. And he ruled on certain hard questions: Shall they banish their son of nineteen, because he stole a car, hurt an innocent stranger, brought the law down on the family? But I sensed he held his powers by the mother’s wish or her love’s assent, not by his presumption. I sensed they took all purviews just by dint of faith and practical order.

Mostly Vince’s family stayed to itself and close friends—its home its citadel. But it took me in off the streets, gave me bed and board and clothes, protected me from my father, treated me as one of its own, asked nothing in return. Its passion, kindness, way of life taught me love, honor, loyalty, respect, as I couldn’t understand from my parents’ hard lessons in absence and brutality. I gave the mother my labor as if I were her son.

Remembering now my time in Vince’s home, I realize maybe my greatest failing, my lack of family. I mean my not having the character to make one. Without Vince’s family, I might never have loved—anyone, in any way. I owe his family my retention of a gift
for love. But its example couldn’t help me be a father. My father, my mother, had beat and terrified me out of that—as into my long dread of commitment to a woman.

Husband and wife must be father and mother to each other’s only lover—a truth I knew too late to be the father of my good wife’s child. I learned when I learned beyond mind, in the primordial slime of my self, the location of heaven.

We need to go back to ancient days, before the forties of my childhood, before the source of Vince’s family—beyond centuries, before progress, to a time, of sense and mind that didn’t question the utility of childbirth and awakening, of love and motherhood, of the simple acts of maintenance of life. There we’ll find fulfillment in the joy of being, in the joy of doing, in love’s intimacy, and in astonishment at the wonder of life and our Earth.

A man of that time, a man full in himself, who rejoices in the wealth of his imagination and the work of his flesh—that man will worship his woman, never see her slave. A woman who knows the glory of motherhood, the nobility of the nurturer—that woman’s born fulfilled, can be no man’s mere object or servant.

Women won’t find freedom, happiness, or self by wresting snatches of the power warped men duped themselves and humankind to believe the greatest wealth. Heaven is feeling that comes from inside, from a calm essence of balanced, vibrant self, from reverence for life and Earth and harmony with nature and its seasons, from pleasure in the abundance of beauty, from empathy, the magic of passion, and the genital embrace, from felt love’s giving.41

E. The Choice of Blindness—The Chicago School

Moderno: I think I’m beginning to understand. But I don’t think your points are all that telling. I mean you may be right about the bottom of what’s wrong, and you may be right about what we could have done to avoid getting where we are. But we’re here, in the world we’ve made, and I don’t think we can turn much back. I fear your prescriptions need a time gone forever. Law and Economics may be trouble in an ideal world, but I think it gives us the best we can get in the circumstance and future we seem stuck with.

Anachronis: Maybe so. But that’s up to you. It’s up to everyone, alone, each self inside. The problem’s always been personal,
psychoanalytic if you wish. The question's whether you opt for life, real life, have the wild, calm courage it requires. Life bears pain with joy, and ever death. But the alternative's hell, not just human hell, hell for everything, Earth's hell rising from the hell of human kind.

Because we've lost our heaven in craving after distancing illusion, we see motherhood a low, inglorious, inefficient, underutilizing work. The same is true of the baron's vision of the worth of serfs, the businessman's accounting of an ancient woodland's value, the advertisement writer's sense of intercourse. We condemn a simple mother's place because we loathe her nature, because we've warped our value of our nature, of our place in nature, of the meanings of love and empathy and toil. We condemn each other, ourselves, all life, because we suffer gluttony and greed.

At 27, I was senior counselor for an influential counterculture institution. My boss was Rollo, who argued better than a Jesuit or lawyer, wrote simple, brilliant prose, played keyboard, Bach to Noel Coward, by ear. He used to sing solos in shows and oratorios, had the golden luck to marry Maggie, a cellist, pianist, poet, artist, self-exiled from her past of English aristocracy.

Maggie had a soft, milk skin that stretched translucent over Grecian bone. But her cheeks never needed rouge. Her eyes were sometimes sapphire, sometimes ocean green, her lips bright scarlet. She was the lush of woman in Alice and the mother-child in Mata Hari. "Italian men are better lovers. But I married Rollo anyway, and look: We had twins."

Maggie'd had a proper English schooling. Rollo was self-taught.

Maggie was sumptuous and strong, nobly delicious, though of body unorthodox and features quite too long, too short, not far enough apart. In his youth, Rollo appeared the prince reborn from froghood of midwest propriety. An auto crash contorted his face, took much of his hair. Still, women thought him disarming.

Maggie'd found sensual liberation, intense ecstasy, with her Italian lovers. Yet, even if by accident, Rollo helped Maggie shed the public straits of her tradition.

In Rollo's world, she had to lower gently her stiff upper lip, to learn her self bluntly, a self robust as tarantella sweat on winter roses. They fell in love trading stories "and playing feetsies" underneath a desktop, at the London War-Resistors League.

Juliet and Samantha were barely yearlings when I met them. Maggie had a time, and a good time, breast feeding—till they were two.
We—my second wife and I—spent rivers of days and evenings at their house. We played anagrams, twenty questions, ghost . . . when we weren’t playing made up games with Juliet and Samantha, or making dinners or musicales or reading to each other or cooking and cleaning up.

Sometimes they had guests of stature like Yahudi Menuin’s, or A.S. Neil’s. Mostly Juliet and Samantha played around us or with us, listened to us play, watched us make dinner and clean—when they weren’t too tired and wanting us to tuck them into bed. They were radiant, charmed everyone. But they belonged to themselves, as we did too.

“Now Samantha, that’s my vase, and if you do that, you’ll break it, and you can use your measuring cup instead.”

“I’m sorry, Mommy.”

No one ever told them, or made them feel, they were bad or wrong. “That’s our broom, Mommy. You gave it to us and got a new one.”

“I’m sorry. May I borrow your boom. I need one just that small.”

“Okay Mommy. Can we help? We’re small.”

One evening Maggie and Rollo and a friend were playing a movement of a Haydn trio—for piano, cello, and violin. It was new to Rollo. Maggie played the piano part a couple of times. Then Rollo took over, followed his ear.

Juliet and Samantha always loved our musicales. But they loved this one specially—the violin.

Juliet asked to touch it, a Stradivari. The owner gave it to her. She took it, as a child, into her arms (as Maggie often cradled her) and stroked it (as Maggie must have fondled her when she was born). She tilted her head and put the strings to her ear, as if they would tell her sound, the way a seashell offers sea to hear. She smiled—her face like an opening blossom—and shuffled tightly close to the owner, the old instrument still in her little cradle arms. “Take it back, please. It’s gentle. I don’t want to fall and hurt it.”

Always the twins had played in the parlor when we had our games or readings or musicales, or just chatted our chatters, or the kitchen when we cooked, cleaned up, or ate; and we didn’t care how much they spread their stuff everywhere, so long as they respected our pleasures and things and didn’t leave a dreadful mess when they went to bed. ( Mostly we helped them with the pick-ups, till they were several months into two.)
But when the twins were nearing two, Maggie and Rollo added a partition to their room. Since I'd apprenticed with a carpenter, I designed it, did most of the work. But everybody helped, even the twins, who added questions, hugs, tool searches, giggles . . . . The idea was a T-shape. A third of their room would be a joint-play space, another third Juliet's private land, the third, Samantha's. This partition didn't touch the ceiling. The twins each needed to sense they really weren't ever separated, even when they went to sleep.

“Daddy! Why are we putting up these walls inside our room?”

“Because we know you'll want more space of your own, now, Samantha”

“But, Daddy, you're making our room into litter rooms.”

“That's right. But each of you will have her own place, to be alone even from each other. And the two of you will also have a play place all to yourselves. No one else will ever come here, without your permission. And you don't have to let Juliet in your part, and she doesn't have to let you in hers. The new walls won't touch the ceiling, though. So you can talk to each other when you go to bed but aren't asleep. You can leave your things in the part you share, or keep them in your own, and Juliet can do the same, and no one will ever tell you not to.

“Can we still bring our things into the parlor?”

“Yes, but you'll still have to clean them up.”

“Oh, I knew that, Daddy. And I won't take your things into my little place—unless you let me.”

“And I knew that, Samantha.”

“Will you and Mommy and P.J. and Laura still come see us here, and put us to bed?”

“Oh, yes, Juliet. We hope we never stop being together, until you're all grown up and want to be away.”

Juliet and Samantha always said and did, even ate, just what they liked, however grown-ups might worry about the risk. But they never stopped being careful of others and their spaces and things, just as we were careful of them and theirs. In their way, they were very polite, though no one ever told them to be—or what it was or why they might.

My ex-shrink gave his daughter such honor and love. Once, she started eating cheese, peas, and chocolate pudding, nothing else, for weeks, a month, I think. That was the only time his faith got strained. He was sure she was attracted to the rhyme and alliteration, not the tastes, looks, or smells. He consoled himself on the milk in
the cheese and pudding, and the vitamins and minerals in peas. (I noted that she ate no flesh.) She cut the pudding, and he breathed. She added bread. His ordeal was done.

Mary told me about her grandfather's pigs, the ones he had when she was three. "Grandpa used to let me help him feed them. We gave them vegetables, corn, oats, soybeans... and they had mud, warm winter quarters, and a sort of respect. I started getting close, really liked them. I wanted to know them, like pets. They were smart and nice. Grandpa stopped me, said I had to keep my distance. If I got too close, I'd be hurt, because he'd butcher them some day."

4-H clubs have that purpose—getting kids to think of animals as chattels, prize chattels maybe, but not sentient beings, not individuals, with flesh and feelings like their own, not thinking beings who love, whom kids can love. That takes conditioning.

Kids, left alone about it, really left alone, not subtly schooled to be animal eaters—they go the other way. It happened to Juliet and Samantha. It happened to my third wife, to me. It would have happened to Mary, who'd felt sad and ill about the killings and, later, given the chance, saw the distancing, went the other way.

When children see what Mary saw in her grandpa's pigs, eventually they understand: "Their flesh is like mine. Eating them isn't much different from chewing on mother's arm. They hurt, bleed, scare—just like me. They squeal awfully when they're slaughtered, and when you take one away from its family."

But elders won't let kids have that empathy. Elders learned that distance will keep them. "They must harden to survive. The market commands."

The wrong isn't just the killing at the end. It's the arrogance and cruelty of breeding creatures to be caged, harnessed, castrated, artificially inseminated, shaved, aborted, invaded with bits and spurs, reduced to our stock and machinery, of torturing them to be our tenderest veal, to test our medical avoidances of our own responsibility for disease.

We even excruciate rabbits to prove mascara won't harm women taught to be dissatisfied with themselves as they really are. Do you know why rabbits? Not just because their flesh is much like yours and mine, but because they can't blink, and so they can't stop the burning of the awful substances we test in their eyes. We even tether their hands so they can't rub out the agent of their torture. We give them no anesthetic because we want to "measure" their pain. And their innocent lives are only this, locked in cages, never, never even
in the light of day.

We now farm pigs cruelly as milk-fatted calves and the geese the French nail to boards and force-feed so their livers disease into pâté. I haven’t the stomach to describe the horror of our treatment of infant chickens scheduled for the fast food market. The distancing has worked.

_Moderno:_ But I don’t see how these cruelties—if that’s what they are—spell people’s cruelty to each other, or why we’re cruel if we just slaughter for food. Besides—where’s the underutilization?

_Anachronis:_ When I was 4, and 5, and 6 and still at home, my little dog followed me everywhere, when she wasn’t leading me. She slept with me, guarded me in my adventures, helped me roll in mud, taught me how to play fetch. She was a short-haired terrier, otherwise like Boston Blackie’s, except more smart.

But one day I couldn’t find her. I looked in the yard, called up and down the street, all through my house. I almost couldn’t fall asleep, and woke up screaming after her.

My mother came to my room and took me to the basement. Tippy was back.

“Why is Tippy in the basement?”

“She was late and wet and dirty, woke your father up, and he was angry and put her here.”

Some weeks later I awoke to a foggy morning, and Tippy wasn’t with me. I got up fast and ran downstairs. “Where’s Tippy, Mom?”

“She’s in the basement.”

“But she didn’t run away. We were together all yesterday, and she went to bed with me.”

“Your father put her there. But she’s okay. Come and see.”

“Oh, Mom! Look! She has puppies. Oh, Tippy, Tippy. Can I hold them, Mom?”

“Better ask Tippy.”

The front door opened and slammed shut. We heard pounding footsteps, and a body falling. Then some shuffling, scraping noises. Father was talking.

“... Yeah. That’s right. Thirteen sixty-three Wellington Street. One, small, and four pups.”

I knew he was drunk. But I ran up anyway. “Dad, Dad! Tippy has pups. Come, look!”

Tippy woofed and woofed and ran up after me. My father pushed me aside, grabbed Tippy, and kicked her down the basement stairs, as if he were punting a football. She yelped, and at the bottom
lay unconscious. My mother picked her up and held her to her shocked breast. I could see through my tears and between my father’s hip and the doorjamb. I couldn’t hear anything over my father’s shouts.

“That damned bitch is getting out of here now, and her Goddamned dog brats too. It’s enough to waste my money on feeding her. But I’ll be damned if I’ll go broke tending to her filthy whelps.”

He turned and pushed me aside again, and I slammed into the refrigerator.

“Mother! Mother! What does he mean? What’s he gonna do? Oh Mother! Please help.”

She still had Tippy in her arms. But she looked hard—wasn’t crying. She carried Tippy to her little bed of blankets where her pups lay making tiny, high-pitched sounds I’d never heard before, except from myself, hiding from my father. Then mother ascended, growling, her eyes icy yet on fire, her jaw forward and tight. Wordless, she passed me and went to where my father was, up in their bedroom. I heard the thuds of bodies hitting walls and floors and voices screaming so loudly I couldn’t tell what they were saying. Then silence, maybe for five minutes, until my mother came back to the kitchen, where I stood frozen at the door.

“An ambulance is coming to take Tippy away. And the pups too.”

“Is Tippy hurt bad? Do the pups have to go with her? They’re not hurt.”

“No, Joseph. They’re not going to a hospital. They’re going away forever. The ambulance is from the dog pound. We can’t have Tippy now, or ever again, or her pups. Your father won’t let us. He says he won’t pay for it.”

“But can’t we go see them, play with them there? Oh. Mom, I can’t live without Tippy. I’ll find a way to pay for her—and her pups. You’ll see. Tell Dad. Please, please, Mom, please! Help, Mom, please!”

“No, Joseph. You can’t see them anymore. Your father’s having them put to sleep, forever. There’s nothing I can do.”

I heard my father race down the stairs. The wood quaked under his rage.

“Where’s that bitch. I’ll finish the job right now . . . .”

I heard a small truck pull up to the curb in front of our house. Through the venetian blinds I saw it—long as a pickup, but with an ivory colored enclosure in the back. The enclosure had the appearance
of a refrigeration unit, its doors like those on a butcher's freezer, but much smaller. The driver got out, left the engine running, and came up the concrete steps to our house. My father got a big brown paper bag, and put Tippy and her pups inside. The driver took the bag and put it in the enclosure, and shut its doors. Then he went to the cab. He didn’t enter, but leaned in and did something I couldn’t make out.

I ran to the truck. At first I could hear the pups making their little frightened noises, rapid fire. Then the frequency diminished, till I could hear only silence. The driver got into the cab, shut the door, and drove the truck away.

I stood there for what seemed all night, long after my father passed me on the way to the local tavern.

That summer, my father took a trip, alone, by plane, to Mexico City. I didn’t have a dog again till I was 33. She was a Samoyed, Anya Katya. All the neighbors loved her, all the kids. They invited her into their homes, and played with her, and fed her treats. She loved grapes and broccoli, taught me to play fetch, slept with my wife and me.

One day in the fall of ‘84, I was sick with viral fever. When my wife came home from work, she couldn’t find Anya. I’d been sleeping.

We looked through the neighborhood and beyond, through all the forest. A boy said he’d found a white dog in a thicket near our brook. My wife discovered Anya’s body, still warm, shot once in the chest and once in the brain—close range, high-powered rifle. Anya always waddled up to everyone, and smiled, her plumed tail brushing ‘cross her wide back, she waiting to be petted. But where we lived then, people raise beef, and men with baseball caps drive pickup trucks with rifles set in racks at the rear windows. You often hear shots in the woods.

Anya’s buried under a big old hickory. A black marble stone marks her place. It says: “Anya Katya, Beloved Woo, Dog Child of Anachronis and Amanda, Good Night Sweet Friend.” I still go there to sing to her and weep. I didn’t cry for many, many years after Tippy and her pups were gassed to death. I had to kill my parents first—in my mind, and feelings, in psychotherapy.

Even if they don’t put their kids in 4-H clubs, most parents teach their children distance. They teach them through distance from each other, teach them—brutally or not, by object lesson and example—their irreverence for personal sensibility, irreverence for life.

They say, don’t masturbate or play in the rain, that’s bad. Eat
your lima beans, even if they make you want to puke; they're good for you. Don't get muddy, that's dirty, and dirty's bad. You must go to church, and wear this suit and tie; never mind it's hot, binds your flesh, itches, chokes you, bears no sense or function; show respect for God, who sees you, or you're immoral, and you won't be prepared for business or dining in style. Get up now. Go to bed then. I'm right. Do your arithmetic. Your teacher told you. Learn my wooden discipline, or be no good. But do as I say, not as I do.

They don't just love their kids, as wolf mothers love their pups or a doe her fawn, love them for the innocence that theirs had been when they were new and full of wonder. They don't give their kids themselves, because they've been too distanced from their selves, from each other. They keep their kids at bay, distance their kids from their kids' selves. They husband them, farm them, herd them, cow for stall and bull for stud and fight—or never mind the gender. That way's safer, easier, less feeling responsibility.

Moderno: What? Now you've gone too far. I'm a father, ordinary, middle class. I don't do that to my kids. My sister and neighbors don't, as I can tell. We love them, hug them, sing them to sleep.

Anachronis: And feed them and clothe them and see to their educations, in manners, not just brains. But people hug their horses. Some even sing them to sleep. And bits and harness needn't be leather and steel. People show their horses, show their kids. They race trotters and thoroughbreds, teach their kids competition, train them for the money race. Think about it figuratively. Then see its real psychology and effect.

We—Maggie, Rollo, Laura, and I—never distanced Juliet and Samantha. So they didn't learn distance. We never tried to teach them anything, unless they asked, and never by authority or object lesson—but with example, desired information, or questions.

They made their toys from whatever was around. We helped only if they asked. We gave them information, but only information, not warning, which breeds dread. They made mistakes, they did, but we never said so. If they wished, we'd help them find out what went wrong—take them backwards through their process, help them with questions. We never stopped them, even when we knew they'd get hurt. We wouldn't ever, unless their direction reeked of death or maiming or unbearable pain. We never had to. We took precautions they could never know we took.

But Maggie and Rollo kept almost nothing from them, kept them
from almost nothing—except their special times in bed, and one horror that happened to Maggie. Nudity wasn't taboo. Juliet and Samantha could watch their parents bathe or use a toilet, ask about how they were different or the same, what the differences meant.

Half way into two, Samantha became a flirt. She sat on my lap and wiggled her bottom, petted me lavishly, pretending she was learning my build and features. Or she'd do wiggly little dances, licking her lips, rolling her eyes, smiling seductive smiles.

Juliet grew intensely artistic, mentally curious. More and more she wanted to make and recreate, dissect, find how things are what they do and are. She talked less, often sat alone. But sometimes she'd go to Samantha's bed at night, or Samantha to hers. And their words let us know they explored each other's bodies. Nobody interfered. No one judged.

One day, Samantha got curious what her Mom was doing with a newspaper. "Mommy! Aren't these marks like the marks you and Daddy and Laura and P.J. make in your games?"

"Yes, sweety. And that's our an-a-gram game."

Samantha knew how much we had fun, and she wondered: "Do you have fun with the newspaper? Is it a game?"

Maggie said she did, but in a different way. "Both are things of words, just like what we speak, except the marks, not our mouths, say them."

Samantha asked how the paper's marks talk. Maggie showed her a simple word in a headline, because of its bigger type. Samantha knew the word by sound, and Maggie sounded it out as she pointed to its letters and parts. Samantha wanted more, and Maggie gave it. Samantha soon could read. She wasn't nearly three.

When Juliet found out, she wanted reading too. So both played the reading game with Maggie.

Books followed. Samantha became artistic, much less seductive. Juliet wanted to learn about men, not just Rollo, or me, but all men. We asked her whether all men would act like us. She said she only wondered. "But the newspaper says that some are mean." So we asked what she would do if a man might be uneasy. "I guess I wouldn't play with him or ask him anything—unless he'd be nice, like you, Daddy, and P.J."

The twins started school when they were three—a private school, went half days. They were very different from the other kids. But they were kind and gentle, and, though inquisitive, polite, even if they did and said what they wanted.
Sometimes other kids were jealous, even made fun: old clothes (second hand and hand-me-downs); weird food (stainless bowls of colorful cooking, whole grains, vegetables, salads, fish, no meat); strange language (British tinge, fine grammar, exotic words); whirls of imagination. Juliet and Samantha just said: “I’m sorry.” And they helped the other kids learn better, make pictures, even toys.

They never got in trouble, tested very well, though they often wandered off curriculum. Teacher said: “They’re model children. Need no discipline.”

Maggie was raped. A kid, with knife. She submitted, instantly, without a sound.

She was strong, almost fearless. (Once she frightened senseless when a bat got in the dining room—hid her hair in a hat. “I know they don’t get caught in it. But I imagine, and I’m terrified.”) I never before or again saw her shrink from anything, or act irrationally or hysterically.

She might have been able to handle the kid, despite his knife. But Rollo wasn’t home, and the twins were in their room, and Maggie was scared that the twins might hear, even see, or that she might deprive them of their mother.

The rape ended quickly, and the kid left just as fast. Maggie collected herself, looked in on the twins. “Mommy needs to buy some food. Want to come?” Till Rollo got home, they all did the things of a normal day.

When Rollo arrived, he stayed, and Maggie went to the police. They caught the kid, but the judge let him out on bail. And he returned, this time the twins at school.

Cops took him to a hospital, knife in his chest. Missed his heart, though.

Rollo was a pacifist. He might have died hugging the rapist, swallowing his knife, while Maggie got away. When Rollo learned what Maggie did, he held her close, never questioned her.

After I moved to the Midwest, my four friends migrated to England. Last I heard, the twins were growing fast—size, sense, and head. They’d skipped the second grade and started third. Juliet was playing piano, Samantha, violin. They loved helping Rollo till his gardens. Rollo helped them make a swing.

And I? At 30, I hadn’t grown as much as Juliet and Samantha. My second wife—sweet, loyal, patient, forgiving—divorced me.

I’d left her out of hunger for more—to collect more women. When I sensed my loss, asked to come back, she said I’d have to
return to psychotherapy, and I wouldn’t, though I knew I risked dying unloved. Eleven years would pass before I’d surely feel what matters, tell truth from illusion, learn the insight of guts.

Oh, she, too, had trouble—the falsehoods in her pliant decencies. Her father left her mother for another woman, begged her to take him back, married her a second time. But still he was her lord and child, and she just his mother, not his lover.

All are born Julias and Samanthas. But most acquire poverty of feeling and its sense. Few do good, and well, softly, breathing easy, with joy. Few have a chance at the wealth of owning life. Life!

So, I think we miss too much if we chasten Law and Economics just for modeling efficiency on current spreads of money wealth. The market is a warped, retarded mind, its values sick. It is oblivious to wealth, hell bent on waste. Law and Economics bids we follow market values, coolly, pseudomathematically, further madness with insanity.

Well, I don’t want to die of the market’s cancer, feel the chill of its cruelty in some ego-hungry woman’s fur coat, suffer its support

42. Need I tell you about the torture of animals in traps, how the traps break bones as jaws snap cool steel teeth into them, how the caught die in agony of hunger, exhaustion, and thirst, if they don’t chew off their limbs to escape into another hard death? Need I drag your senses, protesting, into the plight of mink and sable “farmed” for their fur, the torment of their confinement, they creatures of electric energy, metabolisms like cyclones, stuck, from birth to cold slaughter, in cages barely big enough for them to turn around in, or stuffed into earthless, greenless pens crowded with their kind, solitary hunters, frightened only of arrest? Need I force you to ask yourself what justice these horrors find in the vanity of a warped human character discontented with the wonder of owning woman’s skin, more embarrassed by her native eyes than by her cosmetics’ history of rabbits’ vicious torture? See also supra pp. 882-91; infra pp. 895-900.

Think about the demand for medical experiments on animals—how much it depends on human stupidity? Innocent creatures are caged, tortured, and slaughtered so that an ignorant allopathy can find ignorant symptomatic relief for human illnesses and cripplings humans cause for themselves, by smoking and drinking too much booze or risking their bodies for thrills to make up for lack of satisfaction from the essentials of life, with toxic diets, diets sorely inconsistent with human biology, and with drugs allopathy calls medicines. See infra notes 43-44, 51-52. If humans want to abuse themselves, they, not the innocents, ought to suffer the consequences—just as you ought not suffer if I want suicide. Or is our race too immature to be responsible for itself? If it is, then how is it superior?

Even Bentham, father of utilitarians and positivists, said our treatment of animals ought depend not on whether they can reason or talk, but on the question: Can they suffer? JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 311 (1789). Even Kant, a Cartesian who, thinking animals not self conscious, saw them as means to human ends, still understood that “who is cruel to animals becomes hard also in his dealings with men.” KANT, LECTURES ON ETHICS (Infield trans. 1963). And, belying laissez faire economic’s twist of his hypotheses, Darwin’s empathy made cruelty to animal: despicable as slavery. R.W. CLARK, THE SURVIVAL OF CHARLES DARWIN: A BIOGRAPHY OF A MAN AND AN IDEA 76
of allopathic medicine, a monopoly that cheats our masses of affordable hope and natural health, to profit itself, perhaps the biggest industry of the world's most diseased nation.\textsuperscript{43} I don't want my values

\textsuperscript{43} In Germany and Switzerland, parts of France, allopathy hasn't a monopoly. M.D.s often use homeopathic and naturopathic treatments. Holistic medicine is reality.

The last time I was in the French high Alps, my then wife and I began a trek on Mt. Blanc when she hurt her ankle badly. A local M.D. found she had a bad sprain and a tiny, hairline fracture. He prescribed a cane, twice daily application of a homeopathic poultice under an ace bandage wrap, and a nightly therapy of repeated foot-soakings, two minutes in hot salt water, then two minutes in cold, then hot again, then cold . . . . The sprain was cured in three days, the fracture just under two weeks. Allopathic treatment couldn't nearly match that cure, which allopathy calls quackery. Macrobiotics readily cures cancers, cardiovascular disease, hypertension, diabetes, arthritis, immune system disorders . . . and just with simple food and drink. See infra note 44. But if that were widely known, allopathy would be largely obsolete. So macrobiotics, too, must be quackery.

In China, medicine is acupuncture, acupressure (like Shiatsu massage), a few herbs here and there, and, most of all, a simple, natural way of eating and living, a way of a centering dialectic balance. Despite her forever despots, and even her many invaders—the Mongols with sword and power lust, the English with opium and greed—China's a land of singular health. See also infra note 44.

Allopathic medicine and institutions like the Center for Disease Control well know, and sometimes admit, our nation's leadership in cancer and cardiovascular disease. Add others, like diabetes.

Allopathic medicine and government can't build enough hospitals. Health, and medical malpractice, insurance rates add much more than their share to inflation. Longevity increases, but so does the incidence of debilitating disease. Allopathic "cures" are mostly symptom reliefs.

Americans live sick, die sick, depend much on palliatives and artificial supports in between. Probably you'll deny this. Such a life is all you know, and you've been conditioned to believe in it. You can't imagine that millions of China's common people, "primitive," "oppressed," live long and hard, virtually free of disease. Again, see also infra note 44. You can't imagine because our government boxes in, restrains, even punishes, not just with money judgments, fines, injunctions, and delicensings, but with book burnings and prison sentences, people who dissent from allopathic dogma.

You'll find stark example in United States v. Wilhelm Reich Found., 17 F.R.D. 96 (D. Me. 1954), aff'd sub nom. Baker v. United States, 221 F.2d 957 (1st Cir.), cert denied, 350 U.S. 842 (1955). Reich, one of the greatest-ever psychiatrists, psychoanalytic theorists, and natural scientists, died in prison. He refused to comply with an FDA demand that nearly all his works—including preeminent classics, like CHARACTER ANALYSIS (1972) and most of his published papers—be burned and his equipment destroyed. Reich said that law hadn't legitimate prerogative to interfere with scientific research, and that the FDA's methods and purposes were invalid in his case. The FDA said Reich's discovery—cosmic "orgone" energy—was a sex scam, irreproducible, and mislabeled a cure for serious diseases.

But the FDA ran false tests and disregard corrupted evidence. Reich's bioenergetic theories were threats to allopathic medicine. And in those deeply anti-sexual early 50's, Reich advocated sexual freedom even for children and said Americans were sick because they were sexually impaired. See DeMeo, Postscript on the Food and Drug Administration's Evidence Against Wilhelm Reich, 1 PULSE OF THE PLANET 18 (1989); cf.
dictated by a market that, gauged by all the wisdom the West has rejected or never imagined, is sublimely, and dangerously, ignorant.

But back.

As growing distance diminished the image of the groundhog, I found myself transported to a week before, an encounter with another of its kind. Then, too, I was speeding to a class—long the slender country road that wound me through the first three miles of the trip. A vehicle hit it . . . .

*Moderno:* Oh, not again. I know I risk your chiding that I mix metaphors. But you’re beating a dead horse.

*Anachronis:* I value your respect for the deceased, even your cliché about poetic device. But the groundhog story frames my thesis, maybe makes its heart. So humor me a little more.

. . . I stopped. It was alive, barely a yearling. I had to act fast. Any time a car or truck might crest the hill, turn injury to death.

What to do? Hurt, cornered, a woodchuck would maim a predator half again its size. They may be vegetarians, but their teeth can tear trees, their jaws crush bone.

I nudged it with my foot. It’s reaction was weak. It tried to scramble away, but couldn’t. It’s eyes stared nowhere. It’s mouth trembled, bloody. It was in shock. I could handle it safely. I had to get it to a vet. If traffic didn’t finish it, a bored hound would.

The dilemma exposes the deep, grim trouble in Coase’s vision of his cattleman and farmer. I don’t mean just the absurdity of his assumption that the pricing system determines whether crops or cattle are “worth” more and, so, whether farmers’ or cattlemen’s choices should prevail—though that’s quite enough, in a country, even in a hemisphere, that doesn’t understand health.44

*infra* note 63.

Still, allopathy’s thought-monopoly is very much wider and more insidious. Recently a federal court judgment said that Allopathic powers had conspired illegally to keep Chiropractic from marketing legitimate therapies. *Wilk v. American Medical Assoc.*, 895 F.2d 352 (7th Cir. 1990). Yet you can’t put into judicial evidence theories inconsistent with the basic premises and method of allopathy, irrespective of fact or logic, because our law imagines allopathic premises and method are the only ones that can determine a health theory’s soundness.

44. In 1973 and 1975, the Chinese government surveyed 840 million of its subjects in a study of mortality from cancer. Dr. Jun-Shui Chen looked, province to province, at variations in selenium (a trace mineral).

In 1980, his government sent Chen to consult with T. Colin Campbell, at Cornell University. As the two considered the data, they realized they had before them the possibility of an epidemiological study immensely greater than any before, and, perhaps, ever to be available again.

They set up operations in 65 randomly-selected Chinese counties and did food analy-
ses, blood tests, ran interviews to find variables to compare with the incidence of cancer. Oxford University joined the study.

Researchers took samples from 13,000 subjects and did nutritional analyses of thousands of Chinese foods. Conclusions included the finding that a plant-and-grain-centered diet, low in fat, high in complex carbohydrates and fiber, is the most likely to promote good health and reduce the risks of cancer, cardiovascular problems, diabetes, osteoporosis and other diseases that seriously impair life or kill. Animal foods are unhealthful, and we need to get away from eating them. See JUN-SHI CHEN, T. COLIN CAMPBELL, ET. AL., DIET, LIFESTYLES, AND MORTALITY IN CHINA; A STUDY OF THE CHARACTERISTICS OF 65 CHINESE COUNTIES (1990) [herinafter CHEN AND CAMPBELL].

The Chinese population's protein intake is one third less than Americans'. The Chinese's calorie intake is 20% greater, but the average American 25% fatter. The Chinese get only 7% of their protein from animal sources, Americans 70%.

But what the common folk of China don't do, and their way-of-life, also count. They don't much partake of allopathic medicine, its drugs, its surgeries. They still use traditional Chinese medicine, its acupuncture, acupressure, and massage, its natural, herb, grain, and vegetable cures, mostly dietary, but also in the form of poultices, ointments, and baths, even alchemy, which works—as the West is now beginning to rediscover, see PETER TOMKINS AND CHRISTOPHER BIRD, THE SECRET LIFE OF PLANTS 3 (1974); FRITOF CAPRA, THE TAO OF PHYSICS: AN EXPLORATION OF THE PARALLELS BETWEEN MODERN PHYSICS AND EASTERN MYSTICISM (1975). Their lives are slower, calmer, much more family-centered, simpler, more steadily active but less physically stressful, and they enjoy sex freely, unmanipulatively, unpornographically, work with hands-on methods made smooth over centuries' time.

A recent bestseller is Dr. Dean Ornish's work, PROGRAM FOR REVERSING HEART DISEASE (1990). The book talks about cardiovascular diseases allopathic medicine has thought irreversible, hypertension and other kinds that get you open heart surgery or death or another person's heart. His work reports American studies of significant samples. The studies show that a diet like the country Chinese's, together with a similar lifestyle, reverses such disease and even dramatically improves general health. Macrobiotics—the best of Chinese, Zen, and other natural medicines—does it better, because it also cures and prevents most other diseases, while Ornish's method, focused as it is, may make untoward long-term side-effects. See MICHIO KUSHI, ET AL., CANCER AND HEART DISEASE: THE MACROBIOTIC APPROACH TO DEGENERATIVE DISORDERS (Esko rev. ed., 1986); SHERRY A. ROGERS, TIRED OR TOXIC (1990); SHERRY A. ROGERS, YOU ARE WHAT YOU ATE: AN RX FOR THE RESISTANT DISEASES OF THE 21ST CENTURY (1988); MARTHA C. COTTRELL & MICHIO KUSHI, AIDS: THE MACROBIOTIC WAY TO NATURAL IMMUNITY (1989).

Were the West—its science and medicine—not so arrogant, we'd have known these things long ago, simply by looking at, say, Japan before its 19th Century Westernization. The Japanese didn't get heart disease or cancers, or virtually any serious health disorders, except an infrequent stomach cancer caused by millers' using asbestos-rich rock to grind beans and grain to make a staple condiment called miso. The Japanese died mostly of war and its famines, feudalism's cruelties, natural disasters, and old age.

The diet of virtually all Japanese included no meat or milk products, a little fish, a few fertile eggs, lots of whole rice, whole barley, whole millet, whole wheat, some vegetables, legumes, a little seaweed, a very little fruit, ample sea salt (itself, or in condiments like soy sauce, miso, and roasted sesame-and-salt mix), a little sake, a little no-caffeine tea (very little liquid, perhaps 8-16 ounces daily), malt sweeteners made of whole rice and whole barley (very little), and no sugar. All was natural—better than "organic"—everything grown locally and eaten only in season unless naturally "unperishable" (like carrots or onions) or naturally storable (as in root cellars or ovens or after salting, sun drying, or weather-powered freeze drying).
The traditional Chinese diet was much the same, as was the Korean. In many respects—the most biologically important ones—so were those of the Soviet Georgians, the Hunzas, and certain high-mountain Peruvian Indians. One thing in common is harmony with native human biology and the balance of nature, the uncontrolled, unadulterated, unstructured nature that surrounds us even when we in the West think we’ve changed it to fit our own, warped designs.

About salt: Even Western researchers rather recently (a study in Oregon) learned what ought always to have been obvious about the stupidity of the allopathic wisdom on salt. In moderate quantities, salt—natural seasalt or, less good, natural rock salt, unadulterated—doesn’t cause, but helps prevent, cardiovascular disease, because it balances potassium, phosphorus, and certain other expanding substances, activates the parasympathetic nervous system and deactivates the sympathetic nervous system, and supplies critically needed trace minerals. Salt is a problem only if we use too much, eat the wrong things. Kidney disease, though not caused by salt, indicates temporary reduction (not cessation) of salt and water intake, till the disease is turned around.

About the trouble in meat, see VISTARA PARHAM, WHAT’S WRONG WITH EATING MEAT (1981), an elegant little book, and works by Rogers, supra. Macrobiotics proves that cancer, cardiovascular disease, diabetes, and most other killer disorders are effects of animal foods (including many milk products, but not small doses of fish from good water), simple sugars (including fruit sugar, or artificial, but not the glucose in whole grain and vegetables), artificial or extracted ingredients (including food made of only part of grain, like white rice, white flour, wheat germ, oat bran), plants with too much potassium (eggplant, potato, tomato) or native to weather-foreign environments (tropical fruit in temperate climates), too much liquid (amounts Americans drink), and more than a little fat. What doesn’t fit our physiology kills it.

One knowledgeable author offered this view of the Chinese study’s result: “[The Chinese diet] seems to protect humans from cancer. Or is ‘protect’ the right word? Might it not be more accurate to say that such a diet seems natural for the human organism, so that deviations from it are likely to produce problems?” Laural Robertson, The Search for an Optimum Diet, in LAURAL ROBERTSON, LAURAL’S KITCHEN at 345-46 (1986), commenting on manuscript of the Chen & Campbell work supra. Ms. Robertson also suggests, quite rightly, that Western thinking’s big flaw is its search for specifics, rather than a way of healthy life. Id. at 344-53.

Oriental and Western lives differ most in concept of nature and universe. The West’s is particular, empirical, entropic, the Orient’s is universal, dialectical, infinite, eternal. The West worries about vitamins, microbes, atoms, subatomic particles, weather systems, planet systems, solar systems, galaxies, time. Orientals calm themselves with apprehension of the infinite, eternal, balance of universal complements, the yin and yang, the way of Macrobiotics. The difference shows in everything, from childbirth and parenting to business, medicine, and war. Whatever the West has tried to the contrary, the Oriental civilization’s essence, at least seven thousand years old, survives, and keeps on going, slowly strong.

The United States Government this year dumped the “five food groups” notion of healthful diet. It substituted a “food pyramid.” The “pyramid” fits, superficially, the CHEN AND CAMPBELL study’s findings and implications, and Macrobiotics. It tells us to eat cereals and rice more than anything else, to eat vegetables next most frequently, fish next, and to eat meat, dairy products, sweets, and fatty matter only sparingly if at all.

The “pyramid” is an empiricist’s misunderstanding of why the Chinese and Macrobiotic diets work. So it doesn’t tell us not to eat white rice, white flours, or certain vegetables and fruits that have chemical structures inappropriate for humans, especially in temperate climates. It doesn’t account for the seasons. It doesn’t account for the relation of foods to autonomic function. It doesn’t appreciate, say, the relation of mucous overproduction to viral
I mean, too, the arrogance of not thinking to ask the cattle whether they want to be herded, to suffer abortions, to have their offspring tortured to death, to satisfy an insanity’s taste for milk-fat veal, to have their lives taken cruelly at cool, civilized hands, for no cause but to waste good grainland, to serve an acquired desire for bloody flesh, to maintain this country’s world leadership in kidney dysfunction, cardiovascular disease, diabetes, cancers. . . . And so I also mean the insensitivity of disregarding farming’s value to farmer, thence all whom he touches—its value as satisfying, even joyous work, its value in pleasure at harvest, in tasting the lush products of his toil.

I saw the farmer’s pride and pleasure when I worked on that great Swiss farm, four mountains big—in the two extended families who ran it in old ways, worked it intently, by hand. Mary remembered the same about her grandpa. “P.J., a farmer’s heart does flip-flops when seedlings pop up or a calf’s born. Grandpa loved what he raised, nearly as a mother loves her child.”

Maybe her grandpa’s history and conditions made him need to

infection, and so it doesn’t account for the relation of ground grain oxidation to mucous overproduction. It doesn’t consider whether, where, or how to farm, or whether or how to combine or prepare foods, or when, where, or how to eat them, how much of what fluids to drink. It fails to cure old, allopathic misconceptions about salt and fluid intake in relation to the workings of kidney and cardiovascular system; so it lets us continue to take in too little salt and far too much liquid, as if the kidney were a sieve and salt didn’t stimulate parasympathetic nervous response. It fails to appreciate even the necessity of prolonged chewing.

But these are just symptoms of the pyramid’s root flaw. The pyramid doesn’t account for the necessity of living with nature, and the folly of trying change it, even if only by suggesting we eat bran extracted from grain because some study “showed” bran ingestion coincident with cancer rate reduction. (Nature made us granivore-vegetarians, and nature didn’t give us bran, but whole grain, just as nature didn’t give fake, food-unrelated “vitamins” or grapes treated with sulphur produced in petroleum refining process or farm produce steeped in herbicides, pesticides, artificial soil-conditioners, and synthetic fertilizers, and irradiated, and mutated by genetic engineering.)

The pyramid doesn’t account for nature’s yin/yang balance—doesn’t appreciate that the balance is the explanation, a universal, dialectic-holistic explanation, of the virtues of the Chinese and Macrobiotic diets. It will not, because its empiricist architects’ arrogance prevents their imagining that they have fundamentally misconceived their way of perceiving the universe, hence humanity and its biology, despite the pyramid implicitly admits that allopathic medicine has been widely and critically wrong and that “primitive,” “unscientific” oriental thinking has given us the truth about the origins and cures of disease.

Allopathy’s “pyramid” will fail where oriental medicine and the Chinese and Macrobiotic diets continue to succeed. And allopathy won’t understand. It will see only that it “prescribes” what it perceived to be the Chinese way of health. It will run more empirical studies to discover an empirical solution to the inconsistency. The studies will lead to the same kind of mystery about a different particular, because empiricism can’t, as allopathy won’t, see the whole.
cut his loving short, short of letting farming follow empathy. But at least he loved what he did, and tried to temper dispassion with mercy. "Grandpa never let pigs suffer—killed them with a sledge, or a bullet in the brain, before they'd know what was happening. Then everybody, men and women, spent all day with the butchering, let nothing go to waste."

But mercy doesn't mix with dispassion, or it is arrogant. Sledge and bullet do not always kill, and then the slaughter takes up knife, to throat. The flesh emits a blunt, dull pop when the blade punctures, and as it slices down and across, the pig gasps, thrashes, writhes, squeals, as would a human baby, and as its blood squirts and gushes, its pain, and terror, are rampant, and it looks into its slayer's mask, and, bewildered of agony, its eyes beg compassion lost in rock, and cannot sense the murder's why.

Mercy is irrelevant! Who are we to say how pigs shall live and die, or that our twisted lust may take their kin from them screaming? We do not need their flesh. It isn't human food. The pig cannot appreciate the iron joke that its molecules will corrupt to death our many whose jaws delight to rip its flesh.

People like Mary's grandpa didn't slaughter from instinct, or passion. They said: "We're made in God's image. We think, speak, create, have souls. And so the beasts are our dominion. Our nature is to govern nature."

We do have mind—to choose. Why choose violence? If we have souls, why are we arrogant? If we are made in God's image, why are we cruel? If our nature is to govern nature, then nature's suicidal, as must we be. What we do to other life, we shall do to our kind, even ourselves. If we govern nature, we deny it, destroy it.

If you would judge an animal's desert to live or not to suffer, or the level or importance of its pain, you'd judge your fellow's case so. If you reason that "safe" cosmetics gain the market more than agony costs animals, that the benefit absolves your ignoring their pain, if you see a groundhog hurt in a road and you drive by blithely, as if it has no feelings, as if it were refuse, because mercy's inconvenient and you might be late for work—then you will think the same of other parties to your business deals, or your husband or wife, as if about a man you see lying in a street. You're efficient, a conqueror of tender feelings. Your only cost is your humanity, your only wealth.

Mary and I have a garden, work it with our fingers, hoes, shovels, wheelbarrow, rakes, sow it in black peat fed with salvage from
our kitchen where we cook what we grow. We worry about it. Too much sun? Enough rain? We eat every seedling we thin, feel a little sad as we pluck them, stunted, too young to die. I understand thanksgiving now, not for God, but for the Earth, for my chance to add to its abundance, to the lettuce I sacrifice to myself.

These simple works and feelings are our riches. They’re the sustenance that fosters whole well-being, and love. The alternatives—production-line agriculture, chemicaled and processed food, dispassionate efficiency, anything, like programmed thought and sight, that distances from living personal responsibility, from empathy and sense of worth of love and work—the alternatives make poison and waste.

We know of social-Darwinism’s argument for war. It thins our populations, as gardeners their plants—so few may be weak and many prosper. Never mind that war kills the young and strong, if hapless and poor, or takes their limbs and senses.

Government tallies jobless rates. Economists study them. People and work are numbers. Happiness? Efficiency’s the point. Why not a Darwinist’s cure?

Pack the jobless in camps where they won’t be bothers. Pack the street people, too—or help them die. They’re not even counted among the unemployed. If children are trouble, farm them out to foster homes, make them earn their keeps.

*My* foster parents got state money for my room and board and clothes and education. I was one of seven. We wore what we came with, walked miles to school, ate fat back, greens, a turnip here, an onion there, a lot of cheap white bread, an occasional egg.... Afternoons, our wardens made us field hands. They beat me when I wet my bed. I cost them time, work, soap, water. I’d make it up, eat less, work harder, more. They netted profit. Efficiency should applaud. We were dregs—I, 6, the oldest, 10.

*Moderno:* Don’t you think you’re getting a little too dramatic, even for you, *Anachronis*? You must admit your last case is relatively rare.

*Anachronis:* *Think* about the homeless. *Feel* them—here, this very city, throughout America. Add Mexico and Bangladesh, Cambodia and India, Hong Cong and Nicaragua, North Africa, Brazil. Add all the kids whose parents beat or twist them into parents who will bruise and warp *their* children dull and vacant, frightened, hungry, anxious, till they’re prey to booze and drugs.

Think of Ford’s appreciation that the cost of paying wrongful
death awards would be less than that of redesigning gastanks. See the myriad replications every day, more than blunt recognition ought to bear.

Think of the animals in that rain forest as we burn it, even the escaped, and the dolphins in tuna nets—mammals like you. They have flesh, nerve, feelings, intelligence. Feel what they feel.

Oh, and my foster home? A freak?

The creek was high, the falls seemed Niagara. Johnny Scannepicchio hadn’t joined in the dare. He was stiff and shaking, whispered not to go.

Three years had passed since giant Steve Tagge, son of a leader of the German Bundt, called me “sheeny mockie Jew” and slammed a skate into the back of my head, and I pounded him unconscious when I got out of hospital. All my friends, all Christians, had grown. I stayed small, still a Jew, still incompetent when my father was around. But I’d out-jumped everyone in class, some older kids, too.

Flat, polished rocks lined the edge, straight across, except two breaks, big enough to make you leap. The morning had burst with rain, and the rush was fast and slick. Still, I couldn’t let them see me tremble. I had new sneaks. My parents didn’t buy me shoes often, and my toes were mis-shapen. I’d begged my father for these. So I took them off, tied their laces together, hung them around my neck.

The first three steps went easily, then a gap. Bend knees, steady, right-foot lead... now, jump! Okay! Two more easy ones. Here’s the test. Bend knees, steady... Oh, God! You didn’t tie them well enough! Grab! Oh, God. One’s gone. Grab! Grab the other! No! Your falling! God! Grab that rock! Get down! Hold everything—everything you can!

“Joseph!” [He called me Joseph then.] “Joseph!” [I lay in bed, as I did every morning, unable to get up, pretending I could hide, waiting for another of the inevitable.] “What’s this, Joseph? One sneak, hidden in the basement! Where’s the other? Don’t lie to me, you ungrateful brat! I work hard for my money!”

Down fell the sneaker. Down went Joseph’s underpants. Off the bed with Joseph, grabbing hold of anything, anything he could.

Off came the strap. Hard onto Joseph—hard on his butt, across his legs, against his back... and hard all over, and over, and over, and over, again, and again...

“I’ll teach you to waste my money. I’ll teach you to disobey me. I’ll teach you to do things right...”

Where was mother? Mother! Oh God, your sister’s screaming!
Where was God?

I was an antelope, choking in a cheetah's maw. I went numb—remembered the orphanage my parents put me in, the Catholic Society for the Prevention of Cruelty to Children, and the nuns, the "points of light" who ruled that "kinder, gentler America": the one who beat her wards from sleep into unconsciousness (because . . . that's what she did when she was drunk); another who locked Eddie Jeters in a closet, for a day, because he cried when she made him wear old knickers—wool that felt like hemp, made his skin erupt, turn violet and red—and our friends laughed (because they'd never seen such breeches, out of Andy Hardy movies); and that "nurse" who . . . —well . . . enough!

Now I remember the blacks among my dorm mates—stray, orphaned, abandoned in a mold and tapeworm world where they made up the norm. And I hear my parting recognition that they'd never leave that place, even when they did.  

I remember the bitter hopes of poor black ordinary folk imprisoned in the Philly ghettos where I lived eight years of my twenties. Still I hold in sad respect the women who sold their loins because they couldn't find a nice girl's way to feed their children. Still I see their children's earnest innocence bereft of chance at the luxury we teach them to want.

If I returned, now, to their bleak streets, I'd find the tenants as they were, as my surviving kin would find them, casting hope through rising nights of slow panic writ in neon signs. I know the acid they'd feel if I told them of Pareto Optimality—as they sensed what it means to their lives. I feel it for them.

Oh, all of us should know the market failures of the trickle-down regimes of our supply-side Presidents, their responsibility for the "higher" economic problems that upset our major corporations, stock markets, high-rolling entrepreneurs. But those warts don't matter. The lives of ghetto, like billions of this planet's other ordinary lives, do not depend on the experience of those who lavish themselves on the loftiest economic planes. The power changes that affect the rich will seldom alter ordinary peoples' moments, but as illusions

45. Though I'm not "caucasian," but Semite and Magyar, society sees me "white."

Oh, I almost forgot. The orphanage was a good school. Boys, black boys too, those who stayed long enough, learned from the nuns, emulated them, learned power, power in the market place, extortion, deceit . . . . Even the less insightful learned—though just robbery or plain theft.
painted in economists' soothsays and the politician's promise.

"I work hard for my money, support my family. If they can't produce for themselves, sterilize them, put them in jail, get them out of my tax."

"But what if you could be nothing but mean poor, a woman with no relief from hunger and blight, but the migrant fire of young lust? What if passion bore you no alternative. What if swelling with child were your lone hope for creation, for joy in a fruit of your labor, your soil?"

When black ghetto children learn the condition that makes their state, they wonder where's the out from under. But the condition includes conditioning in greed. They think they're poor because they cannot realize the gluttony of the money-rich whose lives pretend to measure human worth. They are poor, and beleaguered, as in siege, because they're conditioned out of other sense of happiness and worth.

Read Albert Schweitzer, his daughter, others who worked with him, their writings on West Africans, the remnants of our flesh trade. You'll see their ancestors had sweet wealth-close family, good society, joy in love and work, contentment being what they were, full of pleasure in breathing, feeling rain and sun, steeping in nature, dancing into ecstasy. We taught them better as we gave them slaves' appreciations of the glutton power of our greed's device. Now they crave what their masters were, as the child absorbs the father.

Above all others, the ghetto blacks' tragedy's grim irony. They learn greed's sight, your sight, Moderno—the crazy vision that money gain's the test of life's quality. Worse, given chance, they'd emulate you. Still, to themselves, blacks aren't people, but blacks. They haven't histories, but black history, wear its diminution as haircuts like uniforms. They imagine this their wealth; and it parcels their utility.

Locked in teeming slums, beyond nowhere, black men abandon family, take up crack cocaine and jail, the only markets our oblivion and greed allow them. Raked clean of self respect, invisible, they fall through the bottom of life, become nightmares of violent greed unmitigated even by a pretense of etiquette or fear of law. Yet are they different from corporate raiders, except their lapse of promise, the lapse's style of learning?

The mother who might have been a wife, is husbanded by dwindling welfare funds, and despair. She weeps as her sons kill each other near old stashes of garbage spilling into filthy streets.

"He was all I had. All my world. Oh, mercy. Please, God. Mer-
Wet salt burns away the grief that swells her eyes. A white cop’s foot flips a boy’s body. She must identify it. Blood washes to the gutter. The night is hot. You can’t smell rain, but the arid scent of raging fear that grinds into resignation. Now she will steal, kill, lie, cheat, whore—anything—to make a better future for the new heart beating in her belly. If only a father! At least she’ll have money. But is she different from a woman who would snare a Donald Trump, except her skin, and her love of her babies?

These warpages—of sense of worth, of the value humans see in humanity, in the rudiments of humanity—these, not inanimate perimeters of neighborhoods and social strata, are the poor black’s true ghettos. And they aren’t just poor blacks’.

General Norman Schwartzkopf, field chief of George Bush’s Gulf of Persia War, was Grand Marshall of the ‘91 Kentucky Derby parade. The turnout was greatest in memory, full of white faces, their hero in their midst, embodiment of new American pride, our home team’s biggest victory, the Super Bowl of foreign wars. They cheered and waved the nation’s flag, as if it were Dixie’s and Robert E. Lee, reborn, had come to town and the South did rise again.

Deprived of self, its realization, our majority have no identity, internal identity. They leach onto any bigger-than-life illusion the fathers of unattainables accord them. They, too, are ghettoed, in apprehension if not space, as near-all are.

Our culture teaches them conformity in ever-more-distracting acquisition, to vacate self, nature, life, to cast for fleeting diversions in a ravenous “more out there” that saps them safe from their grown fear of within. How can they be other than our worst thought of sheep? Few have liberty or encouragement to develop as they, themselves, would. Most inherit the stiflings their elders bore—a creed of compliance, of resignation of insight, of denial of empathy, of indulgence portioned in iced cream. Soon they can’t imagine joyous work, creative work, passionate work, enlightening investigation, liberating dreams, enrapturing love. Soon they can’t imagine!\(^{46}\)

Instead, they learn: This many work in factories, that many on

\(^{46}\) Remember the last century’s gold rushes. People literally killed themselves and others, worked into oblivion, to find some yellow metal that no one can eat, that gives no heat or protection from weather, that doesn’t bring joy or love—but money. Why money? For what? The yellow in the metal, the metal that is yellow? Iron is metal. We can farm, build, and cook with it. The sun is yellow. It gives warmth and life. Gold isn’t creation. Music is.
farms. These shall fight boredom in offices, these torture us in banks and those in courts, and those others in hospitals, schools. Each must ply the proper trade, set by this or that bureaucracy, union contract, licensing administration, owner, boss—and market demand.

Only few—by magic or divine determination, by something lost to comprehension—shall be a Shakespeare, Einstein, Edison, Bach, J.S. Mill. The masses aren’t meant for vision—just compensatory fantasy. Magnates of another race must seize command, and others follow, as sheep the ram and ram the dog and dog the shepherd sensed as whistlings on a hill. And they shall learn identity to herd, and suspicion.

Fewer than few escape or overthrow that learning. Even the powered rich are ghettoed this way. Craving an ungraspable without, they herd after it, not in flocks, but in irresistible direction. And what shall mean the hero but the fawning crowd?

These are the seeds that breed demand! Their dismal issue calculate our wealth, rule its distribution—ghetto by sundry ghetto.

And these are seeds of waste. They grow our human deserts.

More and more, people come and go without marking, in any humanly important way, their presences—unless by joining insensibly the ruin of life. More and more, their days are losing stock-car races, cluttered rummages for some elusive, nameless spice, meal after meal, shelf after shelf.

But Law and Economics doesn’t tally this. If we have more to buy more, Law and Economics is content. Utility and welfare aren’t feeling, why we feel what we feel, why we have and buy. Maybe concrete ghettos spell defects in the working of supply and demand. But ghettos of feeling and mind? They have no economic consequence.

Put aside this vision’s incidental flaws—like its failure to account for the relation of epidemic melancholia and failing markets, underproductivity, faulty output and design. The deep, critical flaw is its failure to see the fundamental infirmity—vast denial of welfare.

Welfare is health and good feeling. Health is natural, not a fix.

47. Firms have begun to recognize the problem—its vast dimensions. So they’ve begun to make provision for “stress management”—because it costs less than the risk of trying to train new recruits who are just as likely to suffer the same antiproducive symptoms. If depression slows productivity, it cuts income. If depression takes people from gainful employment into hospitals or the streets, it reduces buying power. If it blocks incentive to work, it impairs incentive to enjoy the fruits of work, and thence depresses investment and discourages acquisition. Cf. infra note 54.
Good feeling comes from intense, natural, expanding, creative, empathic, loving life—and reverence for life. To Law and Economics, welfare is greed and price.

Last December I realized the poverty of my remaining ghetto: Gather wood; winterize the car lest you be snow-stuck. But you might crash on ice!

I thought of the Indians of the northern plains, their stone-age lives among the seasons, their perennial migrations with the bison and elk. They used no wheels, though they'd seen them when the Spaniards came, three centuries before us. They hadn't real property or geographic nation. But each had personal place, peace in the untamed, and joy in the seasons' passings, counted in flesh and bone, as by the Earth and its waters. They were nature and its life. They needed no distractions. Breath was pleasure, all food glorious, the struggle of survival a dance, like counting coups, or sex, or new birth.

We don't know the millennia they lived or would have lingered so. We know they are unhappy now, as are we and the Earth our gluttony has overrun.

Now, conquered, they, too, share our sickness, our ghetto, the ghetto we make of the world. The problem began when Man—I sense not Woman—first became unsatisfied to be a gatherer, a sharer in nature. Soon Man determined to control nature. And Earth and life became the objects of a hunger for control. It was like the onset of a child's neurosis, when its life begins to measure out in increments of power, not just pleasure and avoidance of pain.

48. One finds a strange parallel in the feudal Japanese. The Portuguese brought guns to Japan in the 15th Century. Soon the island's rifle warfare and firearms technology far surpassed the West's. Europeans studied, tried to replicate the Japanese's methods. They lacked the budo of the Japanese. They failed.

Around 1920, I believe, someone discovered a 16th century Japanese gun, with ammunition, in a vault in the Emperor's palace. It had been hidden from use for about 400 years. Just as it was found (without even a cleaning), it was tested, and it fired perfectly. But between the 16th and late 19th centuries, the Japanese used no guns, appeared not to have them. Why? Several reasons.

One was that the Japanese thought good grace required keeping one's elbows near one's sides. Firing rifles required extending one's elbows out, ungracefully. Another, related, reason was that gun warfare threatened to render obsolete the traditional art and honor of warfare, the budo of the Samurai, and if the Samurai died out, Japanese culture would deteriorate, decay. With guns one can't have the courage, honor, true fealty—even singular physical skill and prowess—that had taken centuries of Samurai tradition to develop. In our century, gun technology did just that.

I believe Indians still curse the wheel. They must curse the depredation it carried, but even more the deprivation implicit in its invention. Compare infra note 60.
Whenever motive shifts from life to its control, the sickness spreads. It levels forests for agriculture far beyond necessity, warps nature's balances. It has metastasized the human kind, ballooned technologies ever better for destroying life and the order of its being, invented sickness and famine nature hadn't known, sanctified and gloried greed till brigands were our lords and war our highest enterprise.  

Ever Man defends his sickness with delusion and projection. Always innocence is victim. 

In our big-city ghettos, "vermin" abound. Try to poison them, slaughter them with traps. They hurt and die, but live on, abound. Try to contain them. And they are greater scourges. Their profusion mirrors human greed—and the ghetto, and the gluttony that wrought it. Kill the greed, and ghetto will vanish, and "vermin" will have no meaning. Align with nature, within and without, and you will free your self from its bondage, its despair of unfulfillment, its fear of life. 

In our house, we don't kill mice, never spiders—even roaches, with wings. Only things that injure us. Gently, we put the others out. Mice are sweet, don't carry rabies. Eventually you get to feel toward bugs and mice as you might toward baby goats or little sheep. Rats don't need our house, don't like the confinement—or the snake who sloughs the skins we find in our basement. Our health and Earth rejoice that we shun pesticides. 

Vermin, like cold, are demons of human mind. Its demons are a cold and rabid scourge to nature's children, her home. The Indians, the land that holds Chicago and Manhattan—they knew no vermin, feared no blizzard, till we came. 

I've made my peace with four-leggeds, worms, and little things that buzz when they fly, or crawl. Still I yearn that autumn when I'll celebrate the coming cold, when I will be winter, the open sky that lets sun blaze on snow. Then, my seasons savage as the winter's spring, I'll crave nothing, but be sufficient in the earth of my self. 

Law and Economics murders peace. Its season is ghetto. It is a demon of mind.  

49. Compare infra note 54 and related text and supra note 27. 

50. I think I agree that judicial relief can't stop "tipping" (the tendency of whites to flee a neighborhood as blacks move closer to its core) and that, therefore, 13th amendment and 43 U.S.C. § 1982 injunctions can't stop neighborhood integration from spreading ghettos. (Courts can enjoin whites to sell to blacks, but they can't enjoin whites not to leave a neighborhood and hate blacks more for the cost.) Ghettos and tipping are proofs that the market
Law and Economics doesn’t ask the *emotional* cost of Breacher’s greedy breach, how the losing M-1 *feels*. That’s irrelevant, unquantifiable.

Maybe that’s okay if M-1 is a big corporation and you distance yourself from the hurts to employees who sweat out plans in reliance on Breacher’s promise, who may have pride in their work, who feel angry, betrayed. Yet, “efficient breach” applies as much to individuals and small, close-held firms. There you may have to struggle to avoid empathy—for the *people* who suffer Breacher’s breach. But theorize, and you’ll find the way. Maybe you’ll convince yourself that you, too, ought to take efficient breaches on your chin, with stiff upper lip, for the good of efficiency.

Getting treated as fungible chattel feels damned bad. If you’re normal, you want retribution when someone has the greed to break a promise just for gain—thinks you aren’t worth good faith if others pay more. But Law and Economics won’t allow the retribution. You get short compensation, eat your losses, choke on your rage.

Welfare is feeling good. Welfare is not the goal of a theory that encourages people to gain at the expense of making others feel bad, unworthy of the primal honor of good faith.

For some time, Law and Economics writing played a lot with problems of information flow and related externalities. It studied imagined cases of “freeloaders” and “holdouts.”

Freeloader refuses a vaccination and its risks and other costs. But she gets its benefits: Everyone else has been vaccinated—before Freeloader could contract the disease.

Holdout hasn’t stated a price for his land. He’s the only neighborhood resident who hasn’t yielded to a city that wants each neighborhood owner to sell it a small parcel so that it can make a public park.

Law and Economics *assumes* the motives are selfish: Freeloader wants all others to bear her costs or pay her way. Holdout wants to exact an exorbitant price for his land.

If you believe in greed, live its cult, you project it nearly everywhere. Why not ask: Has Freeloader a different view of medicine and

doesn’t work. Ghetto leases cost inflated prices because black tenants haven’t much alternative. The reason isn’t money or land value, but color of skin. For the same reason, “white” properties bring inflated prices. When tipping threatens, prices fall fast. The solution’s within, through anarchy, and the hope that life will teach empathy. The ghetto riots of the 60’s made some temporary changes, in attention if not respect. If one lives among blacks in their ghettos, one wonders why they haven’t kept rioting, or waged terror or guerilla war.
health? Does Holdout love his land, its natural beauty and intimate peace that he can't have elsewhere? Might it be the central heritage of his family, a trust he's honor-bound to defend, even to death?

Freeloader's Macrobiotic. To force her to accept vaccination is to invade her integrity and threaten her way of living, her life. It is to impose on her the undue cost of allopathic belief and its children's fearful insistence that she be one of them.

Freeloader's motive isn't greed, but a wish to be left alone in her own sanity. You, like Law and Economics, Modemo, think those motives irrelevant. So are people who think as Freeloader thinks, who may number in hundreds of millions in parts of the world Law and Economics dismisses as unenterprising and behind the times. If, like Freeloader, they live in Law and Economics Land, the law may enjoin them to suffer vaccination. How laissez faire!

Also irrelevant is Holdout's family heritage and his special relation to his land. Right, Modemo? His interests haven't market value, or their fungible, monetizable. Condemn his realty. Pay only "just compensation." That'll teach him—and his kind. If we suffer such behavior, we won't have progress.

But "progress" is sick and deadly, to the whole Earth. Why must Holdout be forced to yield to mass insanity, join in it. That Law and Economics will not see things Holdout's way, doesn't justify our treating him as if an extortionist.

Moderno: But he impairs welfare, the greater utility.

Anachronis: That's a matter of taste. Why yours, not his? Because you have greater numbers on your side? Pope Urban VIII had a following of millions. But we remember him, if we do, because he was wrong, dead wrong, on Galileo.

51. Macrobiotics draws from Taoist, Cha'an, and Zen medicines, holds that vaccinations are poisons—dreadfully "yin"—and their method eventually deadly. They throw one's physiology out of balance, open one to disease more than they seem to prevent infection, which, mostly, one can avoid by being natural. Their use is a symptom of deep warpage, a belief that we're prey to disease, rather than our way of living its cause. Their "need" is a symptom of our errant living and eating. Among peoples who live Macrobiotic principles, life is longer and healthier than among those who follow allopathic learning. Microbial infection is relatively rare. See supra notes 43-44.

52. History and the present are all too full of such cases. See also supra notes 43-44, 48, and related text. Much of human self-waste follows people's being a following—a trouble of loss of identity and mind, of liberty. To follow, or be authority, is to lose both self and empathy. A symptom is our readiness to believe that most our ills are invasions that only magicians, called M.D., can cure. Eastern medicine shows that our diseases mostly are effects of our putting ourselves out of balance, our deviating from the food and behavior that our essential natures require, that our cures are in ourselves, in our aligning with nature, accord-
Moderno: Your argument fits only those who live too long, or seers like Nostradamus. We ordinary mortals, even if educated, experienced, and intelligent, can’t do better than account for discrete events and transactions, at most some few clusters of them over brief, fairly predictable time.

Anachronis: But you do not account. Your indoctrination won’t let you. You deny, here, where denial’s convenient, your elsewhere-reliance on statistics, its claim of power to manage mazes of events. You could, if you wanted, appreciate Freeloader’s medicine for its meaning for you, for its clear, natural benefits we can know now, as humans could, and did, for millennia, without markets, or competition, or greed. But you must give up gluttony. You can, if you wish, see a very different meaning of Holdout’s case, a meaning for discrete, private transactions where a different kind of holdout is near-hero to Law and Economics.

Suppose (as a Posner’s thinking hopes) a buyer (B-1) gives Hadley v. Baxendale notice to her seller (S). Her purpose, she admits, is the advantage of a third-party contract she describes thoroughly. S agrees to “full loss-of-bargain” compensation. The agreement states a formula keyed to B-1’s purpose, not a dollar amount. B-1 agrees to a price that, as S knows but B-1 doesn’t, likely would equal or exceed B-1’s benefit, and so her loss. S had learned that the third party likely will bankrupt before S must perform.

Later, B-2 offers S same price, but doesn’t give Hadley notice. Alternative supply is falling but ample, at small premium. Compensation to B-2 would be low. S could accept B-2’s offer transaction-cost-free (here, a not too silly assumption Law and Economics’s modeling habits press it to allow). S prefers a business relation with B-2. She seems a more reliable income-source, didn’t misread her market. S deprives B-1 to supply B-2. B-2’s keener than S thinks. As she guessed, alternative supply evaporates soon as S takes her offer. S, too, was canny. B-1’s third-party promisor failed.

This is a case of greedy, “rational,” freely negotiated contractual allocation that was positively inefficient—because price to B-1 was excessive in relation to S’s actual compensation obligation and S

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ing with our natural design. A being is its own.

The problem’s not the old’s retrenchment against the new. It’s any entrenched, character-designed blindness to the eternal truths of nature. Compare supra notes 27, 32, 43-44, 51 and related text and text related to note 49 with note 54 infra. That sickness lives wide and high, in arrogance as in fear and greed. See also infra note 60 and surrounding text.
didn’t actually gain from breaching to supply B-2. The reason’s that law and greed (as Law and Economics encourages) have fostered S’s unempathic, ravenous silence.

Had S told B-1 the information, B-1 wouldn’t have bought at S’s price. But S wouldn’t have lowered it. He wouldn’t want to lose if changed conditions or his negligence prevented his performance. So he would have waited for a B-2’s better offer. B-1 would have lost nothing, could have gained, invested elsewhere. S would have profit-ed, with less risk. B-2 would have satisfied superior market demand. Empathy and prudent kindness would have maximized wealth.

Moderno: But how can we expect S to tell B-1 when S can’t be sure of a B-2’s offer?

Anachronis: From the facts, we can deduce that S had ample market, and so a strong expectation of some B-2. S couldn’t anticipate B-2’s failure to give Hadley notice or just what her damages might be. Still, if, as Law and Economics models often presume, S set price rationally for B-1, S likely could set a B-2 contract price that would give S at least the same profit S would get from B-1. And S couldn’t be sure B-1’s third-party promisor would fold. S’s market and position don’t command that S’s “discount rate” be high (that S crave a quick executory asset), especially since supply was shortening. So only rabid greed moved S not to warn B-1.

But Law and Economics tells us S, unlike Holdout, oughtn’t have an obligation to disclose. The information’s B-1’s problem, a trouble of B-1’s intentions and research, not S’s. Each party’s best able to handle her own planning affairs. S isn’t his sister’s keeper, and he wasn’t her “defrauder.” Competition’s social merits depend on profit motive. Holdout bucks competition—the market itself. His is sentimental value, not the “objective” utility of the pricing system, of supply and demand. Holdout’s inefficient, even antisocial, because he’s not greedy, but loyal, and informed by priceless, timeless, essential human values.

The problem of S, B-1, and Holdout—of Law and Economics’s treatment of these cases—is wide and deep. You’re not safe in narrow sight. You need better vision.

F. A Last Resort

Anachronis: All of us would be happier, in the long run, living Holdout’s way—family, land, honor, heritage, loyalty, natural beauty, intimate peace. Holdout’s values gave much to the pleasured, healthy longevity of the Hunsas, traditional Georgians of the Caucasus, Peru’s
Andean Indians, and millions of China's folk. Do our community parks or our intrusive public projects cut our numbers hospitalized, consigned to nursing homes, stuck in mental wards, living in streets, dependent on drug after drug for slim and fleeting hope of bodily health, emotional peace? Does "free-market" economics?

Moderno: Perhaps not. Perhaps, as you say, our market's demand is ill-informed, gluttonous, sick. But those of the good old days, even many primitives—what about them? Medieval Europe ate worse than we—fewer vegetables with their fat, meat, butter—lived shorter, treated each other crueler. People died of rabies, syphilis, diphtheria, famine, horrible plagues. They didn't understand hygiene, didn't bathe. They dumped their slops in their streets.

Anachronis: And we die of new, uglier diseases, suffer longer. Our market enterprise puts poisons in our food—for better shelf life, false color, to supply some taste where technology and greed have taken taste away. Oh, and coffee, cigarettes, hard drugs, toxic medicines, fast foods, transplanted hearts, a hundred kinds of cancer, deficit spending, huge, incomprehensible taxes, runaway credit, inflation in recession, Alzheimer's, Herpes, AIDS, and epidemics of neuroses, schizophrenias, dissociative psychoses, depression, psychic stress. Crueler? How does the Inquisition compare with the firebombing of Dresden, atomic bombing of Hiroshima and Nagasaki, the Holocaust, the CIA and KGB, the tortures and depredations in Cambodia and Viet Nam, the purges under Stalin, our treatment of our Japanese after Pearl Harbor, the plight of our blacks and Hispanics even now?

But trading histories is waste. Your point's timeless if misguided. How can we expect good demand from simple, honest folk if they're badly informed? Feudal Europe wasn't primitive, or much more honest than greedy. It was misled.

The problem's demand. The cure is harmony.

Look not to Europe's heritage, but to Hunzas, traditional Georgians, Peru's Andean Indians, and China's simple folk. They do not want because they don't demand. They live—simply, much as our biology intends and nature prescribes.

Their poverty's their protection. They can't afford the foods that kill, haven't learned anxiety to consume all things, haven't time to worry how to check boredom. Their wealth has been family and toil. They've lived their centuries in personal removal from inventions of greed.

What of invasions and oppressions, parasite autocracies, feudal wars, Red terrors? To China's simple folk these troubles pass as
vagrant quirks, as flood and earthquake fade in the eternal tides and seasons.\textsuperscript{53}

And I? That I may be sea in winter, I have become my life, my sustenance—ever more of what I do. Organic gardening was one beginning. Getting real about right food was another. A third was freedom from others’ tastes, from their opinions of me, thence liberation from narcissism. I had to see a sense returned from eyes of a hovering fish, a gentle interest on its lips, to know the fullest love and yielding faith in well-shared lust, the fullest lust in well-shared love and yielding faith. And most, I had to feel the majesty of making simple—in language, reason, clothing, taxes, house design, love . . . .

One day, making sour dough to bake, I saw that bread works better if you work it yourself, start to end, all by hand. The more I’ve made, the more I’ve learned from every detail. Now I dread the waste of any particle—just as I dread a word’s abuse. Every stir and minute’s waiting, each finger’s motion, each grain of flower—all are precious as the done loaf’s taste, precious as this sentence for its parts and my toil in its bringing. I will grind my own flour with small, hand mill, tooled, as if before machines, of iron, stone, and wood. How much more I will mean. How like this language, all of my construction, nothing ready-made.

Making pottery let me sense the passion medieval masons gave the face of Notre Dame. When I was a musician—composer, transcriber—I learned that Toscanini copied, note by note, the scores and all the parts of every composition he conducted. A performer must retrace the maker’s ardor—if he would wed what it creates. To make a music that will live, a composer must build the instruments, by hand, if only in her head, she must enter the body of an organ, tend its sorrows, tune its many voices, as a mother strokes the temples of her fevered child. To make music, a composer must dissect, rethink, reincarnate, opening by opening, thirty generations of others’ creations. Wealth comes slowly. Greed, its mass production, buys us speed to waste our time, our lives.\textsuperscript{54}

\textsuperscript{53} Compare infra note 54.

About personal removal from inventions of greed: Doubtless some ordinary folk coveted. But that was only incidental, because of China’s strong family structure and family values, and Taoist, Confucian, and Cha’an Buddhist teachings. And, through some hundreds of years before and after the Mongol and Manchu invasions, those teachings and values led government (a highly educated, exam-qualified professional bureaucracy) to maintain an anti-commercial, farm-centered policy.

\textsuperscript{54} Some firms have learned a little of this, begun assigning production away from
assembly lines, to small teams of individuals who will be personally responsible for all
details and finished product. They do better not from fear, but out of pride like a parent's for
a child. But such measures don’t go far enough. You sense why if you value antiques.

The lesson's much bigger, tied to others my stories design to help you feel—the
learning of earlier times, the superlative practicality of sharing, mutual aid, harmony with
nature . . . . About things that matter, unlike science, humanity can't get wiser as it gets
more sophisticated. Last night I saw a television interview with an archaeologist, Professor
Demerest, I believe, of Vanderbilt. The subject was his ongoing dig at a recently discovered
Mayan city in Guatemala. The dig has two purposes: to discover the cause of the rather
sudden, seemingly catastrophic end of Mayan civilization, its astonishing two-millennium
agrarian success in the fragile-soiled and hypersensitive ecology of the American tropical rain
forest; to assist the Guatemalan government's efforts to replicate Mayan agriculture's success
without replicating its sudden failure.

Dr. Demerest told how we used to think Mayans were peaceful farmers—till we
learned Mayan hieroglyphics and discovered Mayan paintings that told a different story, a
story of war, and sacrifice of the conquered. But war was fairly late in Mayan behavior, and
even then, till near the end, it was controlled under rules designed to make it fit the Mayan
scheme of agrarian life.

The Mayan grand-scale success—a success that fed a society of 10,000,000 for 2000
years—grew from the Mayan's lack of greed and their harmony with environment. Mayans
didn't clearcut vast stretches of jungle as do Brazilians, even Mexicans, of today. They
cleared smallish patches, here and there, over hundreds of square miles. After they farmed a
patch for a few years, they abandoned it—gave it back to the jungle—cleared a new patch in
its stead, leaving much forested land between the old patch and the new. They knew that
this was the only way to keep from destroying the fragile, very shallow, jungle soil, and to
maintain favorable climatic and other geophysical conditions in their domain. The soil would
fail if it lacked too long the trees and other life that had made it what it was, sustained its
gossamer fertility. The wild forest's return was critical to the soil's survival, and agriculture's
as well.

Something, we don't yet know quite what, happened to the Mayan psyche, charac-
ter—sometime deep in the Mayan second millennium. Or maybe the problem began in the
psychology of other tribes, in their threatening to infringe on Mayan agriculture's meanderings
through the jungle's terrain, or in their simply coveting Mayan wealth. Whatever it was (the
cause that Demerest's trying to discover), it led to a Mayan campaign of expansion. That
meant regimes of war.

They succeeded at first. But when they built the city that Demerest's investigating, the
tribes they'd conquered, that they thought they'd suppressed, revolted, took over, spilled gal-
rons of Mayan blood. Other uprisings followed. And the Mayans snapped, forgot the ingredi-
ents of their wisdom. They waged unlimited warfare throughout their domain and beyond,
and in the process threw themselves into war with the mother of their sustenance, the jungle
that gave them food and home—and life.

If they continued their patchwork and rotation methods, they'd be too spread out and
each of their farming developments would be isolated from the rest, sorely unprotected from
other tribes' attacks. So they clear cut maybe hundreds of square miles, built barriers and
fortifications throughout. They designed to farm in these clear but easily surveyed and heavily
redoubted regions—to have security, against human invaders, in their agricultural enterprise.

The result was the Mayan's demise, not at the hands of human enemies, but at the
will of nature. Had the Mayans not tried to conquer their neighbors and their mother jungle,
had they shared with their fellows, continued to respect the trees, plants, and animals of the
land, their civilization might have lasted forever, despite the Spanish. For even now, after a
history that lost the Mayan culture before the Spanish conquest began, Guatemala lies vastly
I should have learned this when I studied the “Tragedy of the Commons.” But then I was a lawyer’s lawyer, a Law and Economics lawyer.

Modern: “Tragedy of the Commons”? I haven’t thought about that for some time. Refresh my memory?

Anachronis: I can’t remember who invented it. But the problem’s this: A town has a commons. Everyone can use it at will, any time or way—no limits. Townsfolk graze cows there—at first, one each. But one town member’s greedy. He sees that each use’s cost (opportunity, commons degradation) spreads among all. Say all are 4 and grazing each cow yields a 2-unit income at 1-unit cost. If Greed grazes one cow, he’ll get a 2-unit income at a .25-unit cost. If he grazes two cows, he’ll get a 4-unit income at a .5-unit cost. The more cows he adds, the more his net income increases at the cost of his fellow but nongreedy grazers. The community will bear virtually all the long term ill effects. So, Greed cares little or nought that his use might destroy the commons.

When I was a lawyer’s lawyer, I worshiped cool logic, the glory of mind. And, like you, I believed in Law and Economics. I thought the town should give Greed title, an exclusive, unencumbered fee, in the entire commons. Give it to him—gratis!

If the commons were his, I thought, he’d take good care of it, so much as gluttony and market asked—which, but for externalities, is all that matters. If grazing threatened unprofitable destruction or the market said to change to another use, he’d adjust appropriately, at will, and with greed.

Unfettered, Greed’s behavior would maximize the commons’s market-valued productivity, as unselfish behavior wouldn’t. So, his conduct would increase (much over open-use potential) the commons’s benefit to the whole community, even to the three displaced grazers. Since the ex-grazers and the community will cease bearing costs, they ought to be willing to give him title, free.

Why would Greed take title though his having it would mean not having others bear most cost? Slight as they were, the others’ grazings were costs to Greed. At any time, others might learn from undeveloped, much of her pristine, untouched by Man.

The interviewer asked Professor Demerest whether his prescription to the Guatemalan government was that the future lies in return to the ancient past, before the Mayan empire ruined itself, to the time of the Mayan’s harmony with the forest world. The question clearly was rhetorical. The unspoken answer a vivid “yes.”
him, graze more cows or make more Greed-restricting uses. Someone might stake out an area for fallowness—maybe just to look at virgin grassland. If Greed thought cow grazing profitable in the first instance, he'll think it more so with no limit or cost (his title being a gift and absolute). Q.E.D.

My solution was warped, narcistic! I was infatuated by the seeming cleverness of such argument. So I resisted native senses. I didn't ask: Do we need Greed's works, the costs, the necessary externalities, the hurts and losses that always follow a Greed's consumption of our Earth? Ought we ostracize him, seek community, respect for Earth? Ought we have prerogative to own land, even to graze cows? If other cultures have flourished in sharing, why can't we? If work is joy, it is need greater than receiving, as free giving is pleasure greater than receiving, as loving pleases more than being loved. If work is joy so all give freely, all have abundance.

Greed takes because he can't trust. If you can't trust, you have

55. Land is irreplaceable. You can't manufacture what it was. We aren't gods who can recreate the home that nature made for all life. If any person alters nature's Earth without all others' assent, all human future's agreement, without all life's accord, someone or something must suffer unearned cost, to the alterer's undue benefit. No exceptions! Just the blindness of arrogance. If a use isn't greedy, it is a lesser threat of harmful externality. But none can be sure of its effect. We must always observe our greatest caution. See also infra notes 56 and 60.

56. I won't argue whether Greed might, at any time the market seemed to indicate, cease to invest his factors in the commons land or whether Greed might put the commons land to an utterly destructive but irresistibly profitable use that would enable him to abandon the land with an enormous net gain that would make him a billionaire for life. Either is possible. Either would mean a net, even devastating, loss to the community. But these prospects are just more incidents of the indeterminacy that Part I, The Illusion, covered sufficiently. The critical trouble—the trouble this Part's about—is elsewhere, the elsewhere where my text has returned.

We see many too many modern-day parallels of my warped solution. One is a zoning board's allowing developer after developer to bulldoze flat and barren a deep wood and substitute cheap subdivisions called "Deepwood Estates" or "Wild Acres." Insatiable people, status-hungry people, fashion-driven people, abandoning housing that should have lasted centuries, buy the bland lots, mow grass, do barbecues. When, all too soon, the newness becomes obsolete, we're left with more irretrievable loss of nature, at all life's cost.

Our true wealth has gone the way of the Hopi, Crow, and Cherokee. The Great Law of the Haudenosaunee (Iroquois Confederacy) required that "in every deliberation, we must consider how our decision will affect the next seven generations." Indians didn't distinguish humans from other creatures, except to call some two-leggeds, others four-leggeds. See also infra note 60.

57. Logic can't prove this. It's your experience, or it isn't. If you have it, you know, but still you can appreciate its absence, since no experience is for always, or perfect. If you haven't it, you can't know, and cannot apprehend the loss. See also supra note 27.

58. This ought to be self evident. Even so, you may want argument.
nothing. You're enslaved more surely than if you can't hold property.  

G. The Turning Back, Into Salt

But, maybe you, like Law and Economics, think the Indians prove me wrong. They didn't own land, depended on community and sharing. They used to pray to their Bison kills—that they forgive their felt need of slaughter. And we conquered them. And now they get depressed and drink a lot, or get lost in Wasichu world. Never mind that, untrained, those Indians beat white folks' scores in I.Q. tests. Never mind that whales, with brains much larger than ours, renounced the land for ocean, for warmth of tight community. We slaughter them as we please.

Do you, like Law and Economics, think business is business, and empathy's somewhere else? In Godfather movies, the Dons tell their victims: "Nothing personal; just business." The difference is one of degree. And lack can be worse than death.

Black Elk, holy man of the Oglala, tribe of the Lakota, people of the Great Sioux Nation, survived the massacre at Wounded Knee, lived to 87, died in 1950, on a reservation Congress rumbled from the wide, free land of his youth. In 1932, he authored "Black Elk Speaks"—his life's mirror of our destruction of the wilderness and its Indian nations. It got fine reviews, but flunked among whites, at a loss. Black Elk became a spectacle in an "Indian Pageant" that played at Mt. Rushmore, for tourists. In 1961, someone republished his book, made good profit.

If you trust that another will supply your fulfillment, you will not wrest the favor, but wait. Otherwise you might destroy what you would have, before it could come. (Surely this is fair as efficient, for all.)

If you have no trust, you fear unfulfillment. You take your fill—and more, the more that fear impels. (Surely this is inefficient and unfair, for you and others.)

59. If you can't hold property, you can control no space or resource, not the air you would breathe, not your body or the space it needs, not your life—except if by force. You are at the mercy of others who can—unless you have the greater might. But you may have greater might, and they may have mercy, or insufficient interest.

If you can't trust, you live terror. Nothing's any good. Property is gallows humor.

60. When this century began, Buffalo Bird Woman adopted Reverend Gilbert Livingston Wilson, a graduate of Princeton University Theological Seminary, who had gone to live with her tribe, the Hidatsa Indians, then stuck on a Reservation in North Dakota. Congress had taken much of the land that treaties had promised sacred. By the General Allotment Act of 1887, Congress dictated that Hidatsas give up the communal life they'd lived from time beyond memory. The Act commanded each family farm a separate 160-acre plot. But individual families, alone, couldn't work 160 acres. Congress claimed all unused land—again violat-
Recently, Texaco took billions from the soils of Amazon Ecuador. It left vacant pipes and deserted roads and camps to derange the forest’s balance, and well-holes seething acids to turn water into caustic filth. And green rivers greyed. And fish became poison. And birds and animals fell to disease. And bathers emerged with weeping sores. And a nation of 70,000 Indians dwindled to a few hundred remnants—many sick or addled, their compatriots dead or displaced to swollen cities and alien terrain.

At least our ancestors stayed on the land they stole from the Shawnee and Sioux, and we still use it. But Texaco invaded just to pump the money and run.

An NPR reporter told of his visit. One day, in a hut, he interrogating treaties. Hidatsa culture, its happiness, became an artifact, and the Great White Raven plagued more land.

Buffalo Bird Woman, her brother, Henry Wolf Chief, her husband, Son of Star, and her son, Edward Good Bird, all treated Wilson as family. Edward Good Bird put his tribal reputation at risk for Wilson (as he would for a brother by blood) when he went to town with Wilson and told the tribes’ people that he, Edward Good Bird, had adopted Wilson his brother and would bargain for him—for everything, “just as if for his own family.”

Wilson spent thirteen summers with the tribe. He was there to study them, as specimens of a quaint, relic culture. The Hidatsas had been farmers for millennia, lived in earth homes with domes held up by posts and beams and roofed with willow and grass. Such, too, were the houses white pioneer settlers built all over the high plains West. In a letter to Clark Wissler, then curator of anthropology of the American Museum of Natural History, Wilson said: Edward Good Bird was “good-natured, loyal as steel, generous as he can be under proper handling, and careful and accurate as I can be myself.” Jenny Lawrence, In their Own Words, August 1991 NATURAL HISTORY at 68, 68-71 (emphasis mine).

The Saudis were nomads, lived on others’ learning, spread their version by the sword, took their victims’ wealth in return. Then, for a couple-or-more centuries, the Saudis’ well of riches went dry as Arabia—until oil, the use of which they hadn’t imagined and the getting of which they left to others’ work. But they buy our business and real estate, and we curry them. Now, as then, Saudis have slaves, if only their women, and rule by terror and torture. See, e.g., Nelson v. Saudi Arabia, 923 F.2d 1528 (11th Cir. 1991) (Professor Tony D’Amato counsel for the plaintiff).

The Bushman clans of the Kalahari, see supra note 27, lived in resonant harmony with all their desert world, coveted no other, opened their homes to any and all. From time beyond memory, they killed desert deer with an anesthetic on tips of little arrows that barely sting. A Bushman hunter, on foot, would track the wounded creature for many many miles, till it fell into a sleep unto death, then carried it, on his shoulders, back to his clan. The arrow would be used again and again. Bushman people eat the insides of ostrich eggs through tiny holes in the points of their shells, and use the empties as water canteens. As the Bushman hunter tracked his wounded prey, he planted these canteens in the desert soil, at judicious intervals; and as he returned, under the weight of the carcass, he had water to sustain him.

All of Bushman life was that dreading of waste, just as it revered all living things, harmed virtually nothing, caused barely any pain, none not sorely needed for survival. Like the natives of our ancient north plains, the Bushman always begged forgiveness from the lives he had to take to eat. See also supra notes 2 and 27 and p. 877-82.
viewed an old man, a living curio who earned a little money from tourists, sang medicine chants—of a shaman’s magic words he didn’t understand. In the middle of a tune, he forgot what he was doing, where he was, sank, wordless, to the floor. In a while, he reclaimed his presence, offered more song—for some booze. His grandchild sat in a corner—numb.

The government said it needed Texaco’s money, for social programs: In the end, good would rise from despair, a phoenix for all.

But the Indians lived there thousands of years, wanting never for food or community. And they had health backed up by jungle cures that allopaths admired.

Now Conoco’s telling other Indians its methods are different: its management and owners respect the Indians, their culture, care about their sustenance, their land. The government has given Conoco full license—for money price. Still welfare programs are bankrupt. How fortunate these Indians don’t need them yet.

Red Communism’s not different—just bigger business. Oh, its object’s mostly power, not money. But its dynamic’s the same.

What Kropotkin might have done, Red Communism botched, but not for want of gluttony or scale. Too many cruel and hungry men raped too many millions, tried to choke from them the anxious greed hard centuries had taught—till they’d scarcely more to give.

No state can force mutual aid, just as markets can’t shape wealth with price. Suppose a communism where the proletariat vote on allocation and distribution. Still, we must worry about the quality of demand, as in free markets. Because the proletariat dictates work and wealth, desire will be tragic, as in the market, where demand is schooled too much by ignorance, misguiding character, and the press of Greeds.

[Moderno becomes stiff. His face reddens, becomes clenched. His eyes harden, blink an unintelligible code. He gives short glances to his watch and a door to his right.]

Whatever the regime, not free will or native wish, but the interests of monied power govern demand. Russia should have let its peasants farm their own lives, as if before they suffered nobles and hungered as serfs.61 Their now-remission to the market will only

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61. Mutual aid works in small communities, fails in vast nations. Society can’t impose it. It must come from each person’s feeling. Large societies need system. System works from top down, by design, not by personal beneficence and good faith. Size and mutual aid are inimical. The same of complexity, which is unnecessary in a society of love and trust.
substitute money greed for power lust. The rulers' names will change, and some distribution of rubles. But essential wealth and welfare will be the same.

[Moderno lurches up, leaves, wordless. I wonder a little, decide to write him my final offerings.]

PART III: THE ETIOLOGY

Moderno Conoscenzo
Hotel Pacific
Dear Moderno:

Sorry you left. And surprised. One can't predict what will, and won't, upset people. You withstood my confessions, my tears, absorbed my many stories, but not my pairing a regime you like and another you hate. Or were you embarrassed about the Indians' fate in the world of Western business—an excess straw on your elephant's back?

I wonder how you'll treat our talk, after your annoyance winds down. Maybe you'll brand my offerings anecdotal, unscientific. All is fiction, Moderno—all cases, theories, facts, every product of intellect, even consciousness itself. Empiricism's false at its core—its premise that events repeat and repetition proves its causes. All events are choices of character—emotional choices to see things same or distinct, or related in cause or just coincidence. "Objective" events are slaves of definitions teetering on definitions, through infinities—uncertain, incomplete.

Only feeling is real.

Even our beliefs depend on our beliefs, all infinitely exchangeable, at once both proof and destruction of any and all. You can believe that you believe, but in believing question, irresolvably, and yet sustain your belief and your believing it. To need any of these

Russia ought to break up into small communities. Tyrants thrive in societies of scale, the scale of Yeltsin's Russia, where they can win great power for wide control.

Small, tight communities can abort the incipient tyrannies of would-be lords. If no community would be big or powerful, lords seldom would occur.

A Russia atomized would not be a world power, or a power in world trade. But what if the people were happy?

A Russia of tiny parts would be no threat. And its communities would be safe as Liechtenstein or San Marino. Maybe their safety depends on the world's being as it is, not as it was 80 years ago. So what? It is as it is. It was safer 9,000 years ago.

Small mutual aid societies exist right now—have, somewhere, likely forever, since humankind is, by nature, social and granivorous-vegetarian. See also supra notes 1 and 27.
mechanisms is to deny the validity of each. But if you don’t believe, you can hold nothing truth.

Think of how drivers in an car crash see circumstances and events, then how passengers and bystanders see them. You know the problem. Suppose one driver later injures a friend who was his passenger, and will be her witness. Think of how a jury may agree with none and the judge set aside the verdict. Think of why the judge disagrees. She’s judge, trained in law. How, why, does she become that?

Why is an economist an economist, not a carpenter or poet? Why do sociologists measure feelings with numbers, fit them to curved distributions like Procrustes’ bed? Why do I weep for people you don’t even feel, or feel expendable? Why does a farmer call bottomland rich, thank his God for its dirt and worms, for its rains that ruin coiffures, for its floods that wreck houses, thwart development?

Why think thought real, though none comprehends possibility?

Think of a famous hit man, his whole working life spent on murder. He pulls the trigger. The bullet enters. Body becomes corpse. The cops appear. The hit man confesses—for a deal.

Think again. Before the bullet entered, the body had designed to be dead, of poison, or heart failure. The shooting was superfluous.

Think again. When the cops arrive, no victim’s present. The shooting was hallucination, a flash-back to a long-generic deed, his first murder, suddenly come real again. Hit men are deranged, paranoid, dissociated. This one can break. Later a corpse appears, with the hit man’s trade mark, stolen by another.

But wait! In fact, it wasn’t an hallucination—just the cause. The hit man cracked. Guilt burst, churning. He saw God, and heard him. But it was a devil, who, disguised as Lord of Hosts, seduced the kill as if to rid the world of vermin.

Now see a line. See it a series of points. Pick a point. If a line has one dimension, does the point have none? If so, could many make a line?

Reduce its reference to subatomic space. You’re there, looking out at the point. Now the point’s a blob, of what contours and dimensions you can’t detect, but imagine. Go into its space. Remember the line. Look back. See it is a long, amebic blot, gapped where your point had been.

Find the smallest space. Draw a line from end to end. It is a series of points. Even from the vantage of an atom, the points may
be invisible, the line made of nothing, is nothing. Oh, and if the smallest space, how room even for a line? Are two points a line? Is one? Does the one point fill the space? Then what space? And whose smallest? Suppose everyone’s, even “truth’s.” Beyond atom, all’s blob. What matter’s degree, as if, in a shot, we learned that God is real and his mind the universe?

Einstein was a mystic. St. Augustine gave him $E = mc^2$—fifteen hundred years before, in a confession, of the timelessness of his God who made creation precisely when . . . .

Sorry good Saint. And you, wide-eyed Einstein. If time and creation were the acts of God and God is what God is, then God could not have made the world sooner, or later. Or if the world is God’s creation, it’s God’s belief and God its limit. Then God is a what that nothing in the world can comprehend, and yet the world, God’s belief, is God’s limit. Is anything beyond? The chance is 50-50.

For “God” read “universe,” if you like. The moral stays the same. If the universe turns back on itself, as if a strudel, does time stretch beyond? Is not all within? Is the strudel an infinity’s speck, or be-all and end-all? If we cannot be greater—beyond all around—we can’t ever know.

I showed you, in my paper, that even in the fixed uncertain universe of its operation, Law and Economics theory fails. Fact belies its theory, which can’t constrain results. Its logic founders. The world dwarfs its vision of reality. In the truth of feeling, it’s inept or cruel. It would reduce life to abstraction, dehumanize society, so it can pretend to comprehend them. It is inconsistent and incomplete.

Then why do its followers advocate it, insist its delusions are real, demand that life and stone shall vanish if not agree?

Some indulge because it’s “in,” or tricky flash that makes its sorcerers look good, get well paid. They’re like the business practices their work would support—greedy of ego and purse.

Some—lawyers, captains of industry, finance, trade—embrace it with lordly contempt of “common” folk, as Mussolini championed fascism, and Napoleon empire. They like believing we worship whoever may own both limousine and the chauffeur who pilots it. That you’re rich proves you’re important, of worth. That you’re not rich proves you deserve what you get, and not having what you’ve not. You’re a nuisance if you don’t obey, stop your tongue, rend your feelings.

Some become its devotees because they enjoy reducing humanity
to abstractions to be tinkered with, as computer wizards play with
game theory. They like the distance, the weird abandon of manipu-
lating pseudomathematically our dire interests, as if so many charac-
ters and plots in puppet shows.

Some use it because they want to rid their society of the disarray
that its prolific lesser members make. So, as judges, they might cut
back habeas to open room for important stuff—a business case, a
conflicts problem that lets them show off . . . . Hitler would un-
derstand.63

Some, ironically naïve, like you, Moderno, actually believe that
Law and Economics makes life better. Or they think they merely de-
scribe, do not create, the reasons for our rules and judicial decisions,
though their choice of description reifies in consequence of history
and predictive effect, in exclusion of contrary insight and the different
motives it might seed. They, like you, Moderno, need to grow up, get
a psychoanalyst, become children again, take Zen training, live in
others’ ghettos, suffer their lacks and pains, read poetry, fiction, exis-
tentialist philosophy, and write it, revert to origins, see with feeling,
apprehend the illusion of intellect’s constructs and cerebral knowns.

You think that Law and Economics is a “neutral guide to judg-
ment,” a “candle in the dark” that courts “can rely on for a ray of
enlightenment.” You would excuse its inability to rule all cases be-
cause you think it the least erratic guide to freedom with utility.

But why do you choose its imperfection from the many we can

62. See supra notes 23 and 26.
63. Compare Judge Easterbrook’s conduct in Branion v. Gramly, 855 F.2d 1256 (7th
Cir. 1988), as discussed in Anthony D’Amato, The Ultimate Injustice: When a Court Mis-
states the Facts, 11 CARDozo L. REV. 1323 (1990) and Anthony D’Amato, Rethinking Legal
Education, 74 MARq. L. REV. 1, 30-35 (1990). To what Tony D’Amato says, I should add
that Easterbrook also misstated statistical theory and the burden of proof, though with slick
sleight of hand.

I wonder what motivated Easterbrook. Maybe he wanted to make a precedent that
would keep such “pest” cases out of his lofty court. Maybe he reacted to the petitioner’s
being a black physician who tended civil rights workers who gave Chicago cops hard times
during race riots. Blacks ought to keep in their places (in ghettos or jails, not the medical
profession), ought’n’t bother federal courts. Never mind that the prosecutor admitted he didn’t
prove his case and the petitioner desperately needed a heart transplant he couldn’t get in
prison, where he died soon after Illinois’s governor commuted his sentence because of public
outrage at his treatment by the courts.

Oh, I’ve taught the technicalities of habeas jurisdiction (once liked the stuff).
Technicallity’s part of the trouble: Big cost to the disadvantaged; little benefit to any but
lawyers and snobs who never suffer the dark breaks and rough injustice nice society’s Cal-
vinist economics and its dirtyworkers (cops, bureaucrats, greedy marketers, and creditors . . .
) hand to minorities, the poor, even ordinary folk.
conceive? Why, except your character. Yearning for institutions smooth as clean machines, you would assume away the weaknesses and troubles I have shown you. Law and Economics can’t be neutral. It would maximize existing wealth defined by money and money demand, make judgment choose efficiency over fairness and empathy in justice. Its liberty is license for greed, at the expense of love and joy and life. It is the eye of steel—rapacious gluttony, no tears.

The Greeks believed their Earth was an like an anchor in the center of a system of lights. Their vision imprisoned Europe’s till Copernicus. Now we think we know better, even though we know we’ve not begun to see the cosmos. We theorize about the universe’s limits, its beginnings in time and space, its like ends. We, in the knowing West, can’t imagine the cosmos has no limits. We can’t imagine past the possibilities of our conception—as if little Earths in tidy Greek light-worlds. Law and Economics is like self-centered. It believes its theories chart the human universe, the cosmos of life, insists Earth comply.

We need to bring our economics in from barren measurements of distant lights that mean no sense for us. But we also need to free our senses from the little Earths we’ve dungeoned them in, bring them out to merge with the sense of Earth and its life around us, give them to the fusion that gives us life and gives life worth. We need an economics of empathy, good feeling, benign desire, and joy in work.

[Re-enter Moderno, in a flare, his gaze, flat, blurred, yet metered as a rabbit’s sense of fright before it jaggeds away. He hesitates at his chair, his breath hunting a word that refuses its trap. His head quakes. A ventriloquist yanks him to his seat.]

Anachronis: Oh, you’re back, Moderno. I wrote you a note. Here.

[In the grey dim around the table, Moderno tries to read, as if relieved.]

But wait, Moderno. Remember that groundhog some vehicle had hurt on the country road I take to school? I tricked it into a box I found in the trunk of my car, took it to a near Vet. Now it’s at a private wildlife preserve. The owner, soft lady in her sixties, nurtures it till it can fend again in the untamed wood. The bloody mouth? An oil pan or axle knocked out a tooth, dizzied her a bit. But it was only a back tooth. And the Vet saw her chewing what a woodchuck chews. I see her looking silly.

I paid for its cure but got no profit. Only 20 bucks, though.
Still, the groundhog didn’t thank me. I neglected the market, failed to analyze my behavior’s influence on the relative prices of tobacco and garden produce, even lost work time—forever, if you measure so. I feel real good.

*Moderno:* And Jack Sprat ate no fat.

*Anachronis:* And got another wife, lived happily after.

**PART IV: WILDING THE BEAST—THE WAY FOR LAWYERS**

*Moderno:* That’s it! That’s your deception, Anachronis.

You rail at Law and Economics, but all you’ve been able to do, everything you’ve learned, depended on the liberty in free market society. You could get another wife as you could always get another job, at your will, limited only by your enterprize. So, you shouldn’t care that Law and Economics isn’t perfect. Its value is its championing of liberty, to which perfection is irrelevant.

*Anachronis:* Oh, Moderno, will you never see? You deny all facts that grate against your theory—like the fact that Sweden, socialist Sweden, is free and rich, or that Russia never had communism, or that the apprentice system preceded the Greeks, or that freedom can be perfect, but isn’t liberty, or that the real how and what of wealth are not economic.

My freedom came from *me*, not from any system. Being free is in the character of heart. No one, no power can keep the free from being free. The things worth feeling and learning are ours no matter the society or economics or state.

No system can make people free—just as no system can make happiness or empathy, force mutual aid and make it work. People, one by one, themselves, supply these wealths. No government or force can stop them.

Whether I apprenticed with Barney or worked on a Stalinist farm or labor camp, I would have seen the virtue in loving work—because my character designed to let me open to it. Earlier,\(^64\) you said: “Law and Economics may be trouble in an ideal world, but I think it gives us the best we can get in the circumstances and future we seem stuck with.” My answer’s the same: Maybe so. But, that’s up to everyone, alone, each self inside. The problem and solution are always personal.

The question is: Do you opt for life, real life, have the wild, calm courage it requires, through the pain it bears with joy, and ever

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\(^{64}\) *Supra* page 882.
death? Or will you give and take the alternative—hell? If you resist
the integrity of your feeling self, you can't be free, whatever your
society's institutions—even in anarchy.

Our "free" system brims with repression. Explore, with open
eyes, St. Louis, Cincinnati, Birmingham, New York. See, as you pass
over, the stark borders of their ghettos, the demarcations of depres-
sion and blight, the imprisoning ethers that drug their denizens, their
visions, their tastes. Look all around you anywhere. See how people
treat outsiders, how fear to be alone compels them.

Imagine how your Dean and colleagues would treat you if you
always did and said your truth. See their uniforms, the expected suits
and dresses, proper golf attire, the standard speech, the little niceties,
appropriate coiffures, the sports and market formulas at lunch, like
group-obligatory charities, the fear of separate sense, even if earnest,
well meant.

Look hard at parenting, the proper moldings in our schools,
frightened, lazy, force-of-habit yieldings to authority, and
womankind's condition in our world of men. See the powerful, how
they share and enforce our nation's psychic bondages.

I won't recite the many obvious events of our society's tyran-
nies—like the outrageous demands we suffer for money or job, the
marketing that floods our persons with what we do not know but
determined ignorance and pressed conformity forbid us to question. I
am not free to seek peace on my acres of dense woods and streams.
Year after year, fast-buck developers turn the forest, near and far, into
small-lot, treeless subdivisions called "The Woods at Lake Pointe" or
"Sherwood Estates." And people flock, as if to posh outskirts of
Bigtown, though, yet, the nearest shopping mall or movie house is a
thirty-minute drive away. My streams become polluted, the animals
die or flee, and in the forest's place, perhaps forever, a rash of sterile
shapes in brick and mortar or aluminum siding obsolescing into dregs
of greed. I and posterity and nature can't be party to the contracts,
care nothing for the profit. But we bear the loss.

Much sadder is what lovers do to lovers, friends to friends. In
our divorce rates, boredom, drinking, overweight, and distraction we
see glimpses of the oppression in our facsimiles of love. Friendships?
Just look! Over there. John tells Edna how he put Vincenzo in his
place, and Edna smiles a tight, fake smile, blinks, and nods
"uhuh"—as if she were an oil well pump, the kind like preying man-
tises, that people plant in farms in Illinois. Then Edna betters him,
reports how she impaled on burnished words that catty Joyce in the
These are oppressions of a mammoth state designed by Calvins and Adam Smiths.

My wife and I discovered we could let each other be because we love each other, never mean each other harm. So, an “imperfection”—a clumsy word or deed that, if another’s, would be annoyance or default—will have no consequence. But why and how did we come to this?

Once, within an ancient forest near a little town, a Joe adored his Mary, and a Mary her Joe, and they were wed. On seven modest parcels, three rice fields, four clovered meadows, each encompassed by virgin woods, Joe farmed, without plowing. And he blacksmithed in a shed by a stream beside their house, which neighbors helped them build, as Joe and Mary helped build theirs. Mary sewed and cooked, made rugs and pottery and books. Their home enveloped its own in its history, in colors, textures, shapes, and smells that chronicled their passions.

Any time, amidst the clanging of his anvil or the growing of his crops, Joe might stop his work and go to Mary, stroke her hair and loins as she gave her books illuminations, or color to her pots or rugs, and she would turn to him. Or, driven by the sparkle of his sweat, the power of his toil, she might rest her loom or wheel, lay aside her words or threads, and find him, that they might lie together in a meadow’s grass or on his smithy’s straw. Often, she would take her work to join him in their barn or shed, that their works might feel each other’s presences. And they might pause to wander through their woods till hearth burned dark or supper chilled.

When day was over and evening begun, their home knew musics of their hearts, fresh food that was art, warm company of family and friends, and peace in the excitement of work well done, and love, abundant love. Their children comforted that each would be his Joe or her Mary, as Joe and Mary drew much light from their origins.

Modern: Is it that I don’t see? Or that you never answer my questions? You say: “Be father to Christ.” But I can’t deal with kingdoms of heaven—only with a mangle of a world that needs not promises of salvation, but better measures for letting people earn better livings and for staving off the badder costs we put upon each other.

Anachronis: If you look very hard at what you’ve just said, at your choices of words, Modern, you may see you have begun to see. So I’ll risk your thinking me audacious, and put to answer a
question you may soon ask, if, as I believe I sense, you have begun
to let your feelings guide your sight.

Until your Mary calls you Joe, what can you do? You can tuck
your assumptions up, let them wither into artifacts destined to be
shards.

Teach your students this: Do not suppose your clients are Greeds
wanting you to be the engines of their avarice, or Dishonors wanting
you to keep them safe from the burdens of justice. Do not teach
them to be crooked by offering yourselves as champions of gluttony
and deceit. Do not be presumptuous. Ask what good you can help
them do, what empathy you can help them attain. Help them see
affairs in ways that bring out their humanity. Be wizard of law and
argument, but only that the enemies of justice will be mute in awe
when you tell the simple truth and ask the lords of decision to follow
heart with head.

Do you remember Breacher and M-1, from my paper? Suppose
Breacher’s a man, and your client. To get the advantage of a contract
with M-2, Breacher wants to breach a less profitable contract with M-
1. You could counsel Breacher that the doctrine of efficient breach
will save him from all but Hadley v. Baxendale damages, and that, if
M-2 will pay enough, the right move is to breach. This is the counsel
of greed. It makes you tool of a gluttony that would screw anyone,
even love, just if it can. It makes attorneys paid screwers of their fel-
los, much like paid assassins, flashy, ninjas of law.

Centuries of lawyers have taught the people to expect this, to
ask it, to believe in it. And this presumption makes the ninja counsel
self-secure in amorality. So, they assume their clients come to them
with hardened hearts or out of greed.

But lawyers need not be so. As they and their law have taught
their clients the worst of human motive, they can teach them the
contrary. Even now, nothing, nothing, not any canon of professional
responsibility, not any legal rule, really stops a lawyer from looking
for, and bringing out, the best in clients.

You, Breacher’s lawyer, could observe for your client that the
ultimate point of contracts is social good, that the fair point for the
parties is mutual advantage without external harm. You could advise
Breacher that if he’s inclined to break his promises whenever breach-
ing would net him short-term money profit, eventually he’d lose, that
along the way he’d demoralize and hurt his fellows.

You could talk about alternatives—like Breacher’s telling M-1
about M-2’s offer and asking M-1 what M-1 would do in his
[Breacher’s] place, and, if Breacher still wants M-2’s money, offering M-1 a settlement that would make M-1 close as possible to whole, even give M-1 a piece of Breacher’s deal with M-2. You could observe that treating M-1 kindly and respectfully could avoid causing M-1 to suffer emotional distress and retributory cravings and get Breacher profitable good will, even the profit of Breacher’s own good feeling about himself.

Better, you could help Breacher treat the case empathically, move him to search himself for better senses of wealth—senses that may move Breacher to keep his promise just for honor’s and decency’s sakes. You could ask Breacher to imagine whether breach could mean emotional, if not monetary, loss to both parties or those who rely on them or their deal. You could even tell him that you would perform if you were he, just as you always honor your promise of good counsel.

Suppose, instead, you’re M-1’s lawyer. Breacher’s intransigent. You’ve had no alternative but to sue.

You’ve prayed specific performance, or injunction, or replevin, and fullest loss-of-bargain award, and damages for loss of good will and emotional distress. Breacher’s lawyer says “efficient breach” and moves to dismiss.

You know your pleadings seem bizarre. You must, like all the valiant champions before, make all the pyrotechnic arguments the court might buy. You must get the judge’s credit, her hard attention.65

Only then can you add the moral of the suit, the empathic reason, the quality of heart that begs relief. But then you can! In your heart’s terms, you can ask the judge to feel the importance of keeping promises, feel how it feels to be dumped because another pays more, dumped without regard for feelings or emotional consequences. You can expose the defendant’s motive for what it really is, unempathic, raving greed. You can ask the judge to feel her way through the social and personal lessons relief will reap, to appreciate the good message it will send. You can ask her to sense what empathy and love would spell, to maximize not money profit but feeling’s wealth.

65. See supra note 30 for illustration and examples of technique. Beyond what I offer there, one can craft many other verbalizations, theories, and arguments that will open this field to moral imperatives for relief. No matter. The goal is elsewhere—helping judge to turn from the efficient rule to empathy, to render justice in decency. See also supra notes 27 and 31.
Nothing prevents her acting in accord. No precedent or statute can't be bent to fit her decency, since all are ambiguous, indeterminate. If she must hang her decision technically, on a point of "law," she can explain her willingness in terms of justice and good. If you can do it, so can she.

Nothing prevents you from extending your best nature even farther. Your client is a major corporation. Its product's under limited warranty. A purchaser, another firm or an ordinary consumer, has trouble, but the warranty's expired. You can ask your client to consider treating the cut-off date not as the certain end of responsibility but as the beginning of new discretion, the start of the time for the parties to consider whether, not by terms of operative language but by senses of empathy, the cost ought to be maker's or purchaser's or shared. Oh, the costs of this discretion? If the parties deal from empathy and trust, the benefits will dwarf the costs.66

Your client wants you to assure the legal soundness and facility of its mineral extractions or real estate developments. Explain how you'd solve the puzzles of law. Then ask how many innocents will be hurt, what nature would rule, if she had the chance. Suggest gentler ways to profit. Question greed. "I may get fired," you say. You'd find other work, and you, humanity, and nature will have a better chance at life.

Your client, a buyer, wants to secure maximum Hadley v.

66. I own a Saab 9000 turbo. It began leaking oil at about 35,600 miles. The warranty expired at 36,000. I found the oil filter a bit loose, and I planned to put in a new drain plug ring and a new filter—when I changed oil next (in a couple hundred miles). Before then, an air conditioning problem took the car to a dealer, who looked under the hood but didn't investigate the oil mess. The new filter (which I tightened well) and the new drain plug ring didn't fix the leak. I became busy with work, and didn't take the car to a specialist till after the car had run about 60 miles past 36,000. The specialist said the problem was gasket, which had to have been defective, or made defective, at the moment of installation, when the car was assembled. It cost only about $60. But putting it in would cost about $800.

I phoned Saab's American headquarters. The representative was hard, stood on the warranty's terms, despite my legal points, said "sue me." I called Saab in Sweden, talked to a vice president, an engineer. "I bought a Saab because Saabs aren't mass-produced and I thought the company had pride," I said. Then I told him what I've just told you (no law). I asked for empathy, and said I didn't expect to keep pleading for post-warranty coverage, because I believed the defect was a freak. He phoned Saab's American representative, told him to arrange the repair at Saab's expense. My car's run another 50,000 miles, and I haven't made another complaint. That pleases me. But the engineer's kindness makes me warmly happy. I tell everyone to buy Saabs. I'd like to buy the engineer a beer. Cf. David Charny, Nonlegal Sanctions in Commercial Relationships, 104 HARV. L. REV. 373 (1990) (social pressure & its formalization).
Baxendale damages. But he is wary: If he divulges his whole, true expectation, the seller might raise price.

Suggest that business needn’t be a greedy poker game. Buyers and sellers might disclose all of what they think pertinent and kindly seek their decent mutual benefit. Decent? I mean apprehensive of hurtful external effect.

Talk with seller’s counsel. Try to get her to move her client to a like bent. You and she could encourage your clients to behave the same way with or without lawyers.

In some kinds of cases, any kind of negotiation may seem silly or wasteful. Shall we bare our souls and bargain for mutual benefit when we purchase clothing in elegant department stores? Reluctance is a matter of taste, a symptom of conditioning or character—mostly social training in pretention and embarrassment.

I bargain nicely and fairly in Saks. I don’t get stiffed. The personnel enjoy it—much better than they appreciate telling a corpulent frump that she looks quite delicious in a too-tight, sequined dress.

Oh, the time? People don’t waste it if they’re emotionally honest, secure in desire. They know what they want and what to pay. The frump will waste hours, at a price that shares her need for analysis or liposuction.

Can we afford to trust? The better question is whether we can continue to afford to act as if greed were inevitable. Being open to trust doesn’t mean being foolish. You can presume goodwill will be greeted in kind. Your openness will let you sense timely when you must discard the presumption.

Most are ill, but few are evil. Often, if you treat others as if they’re trustworthy, they hasten to deserve your faith. If you’re sensitive enough to risk it, you’re sensitive enough to feel whether and when to stop risking and defend.

Judges are lawyers’ colleagues, and their clients, and students, as much as their lords. We ought to spend our greatest art to engage their humanity, try to teach and counsel them, compassionately, to appeal to their empathy. We ought to teach our classes the same way.

CONCLUSION

Law and Economics is a theory searching for reality it can’t find. But it is, because of the status of its aficionados, a cold, hard influence in our country’s life, and a bane to many of its ordinary people, and to the Earth and all its living things. Since it doesn’t
work in truth but out of politics and authority, its reason must lie in
the characters that bear its dubious, stark life—a life we should put
out of our misery.

Wealth and welfare are love and love in work, and the freedom
to know them, and simple pride and pleasure, and insight, and guile-
less creativity, and the joy in giving, and empathy, and reverence for
life. These have no price. Price kills them. They wilt in anxiety, die
on greed's demand. We'll never find them in the market, but in our
ancientest days, in the promise of birth and oneness with the nature
around us. There we'll have no lawyers, no economics, but the native
bounties of our kind. Till we find that place, attorneys, don't be
panderers to greed and irresponsibility, but help your clients seek
good feeling and empathic justice.