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THE DISPUTE OVER DISPUTE RESOLUTION:
A STUDY IN THE DIALECTIC OF LAW AND ECONOMICS

ARCHIE M. ZARISKI

A thesis submitted to the Faculty of Graduate Studies
in partial fulfilment of the requirements
for the degree of

MASTER OF LAWS

Graduate Programme in Law
Osgoode Hall Law School
York University
Toronto, Ontario

August, 1990
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by

ARCHIE M. ZARISKI

a thesis submitted to the Faculty of Graduate Studies of York
University in partial fulfillment of the requirements for the degree
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ABSTRACT

It is the thesis of his work that the method of legal decision making in modern eras has been influenced by models of problem solving having their origin in economic theory which have been adopted by business people. It is further suggested that legal institutions have been slow in assimilating these competing paradigms of decision making and consequently a tension has persisted to the present day between the practice of legal institutions and the expectations of the business clientele of the courts arising from their dedication to different techniques of dispute resolution.

This hypothesis is tested by: examining the interaction of legal institutions with those who demanded reform of the British courts in the nineteenth century; investigating the influence of business people on adjudication and arbitration in the United States in the early twentieth century; looking at current theories of decision making in economics and law; and, finally, inquiring into the attitudes of lawyers and business persons in a survey conducted by means of a written questionnaire.

The historical record and theoretical writings in economics
and law are shown to be consistent with the argument advanced. The results of the survey of a selected group of lawyers and business people suggest that such a research tool may also be of value in testing the implications of the thesis. Therefore, replication of the survey with representative samples of the target populations is recommended.

In conclusion, a caution is voiced that traditional methods of legal problem solving should not be abandoned without giving thought to the possibility of their continuing value to society.
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CHAPTER I: INTRODUCTION

Some modern legal scholars have concluded (somewhat to their own surprise) that the legal institutions they have studied embody a potential to shape the lives of those who come in contact with them in sometimes unforeseen ways, and that the law in action cannot always be equated with the result of meeting the demands of organized social interests.¹ The antipathy of capitalists to having their disputes resolved in court is a prime example of the incongruence of what is observed in practice and expectations which arise from an overly deterministic view of legal institutions.

Although the material social influences to which the law is subject have often been examined, there remains some mystery in the way legal institutions operate in semi-autonomy where welcome but unexpected doctrinal or procedural developments occasionally appear. At the same time, legal institutions today are viewed with increasing scepticism both from within the legal community and without. In the realm of legal scholarship the realist contribution has often resulted in

what has been called a nihilist stance from which point of view the improvement of legal institutions is neither advocated nor expected.\textsuperscript{2} Central to the issues raised by legal realism is the task of reconciling subjectivity in legal analysis and decision making with "objective" conceptions of justice. This challenge has not been taken up successfully to date and the realist critique has contributed strongly to an aporetic debate over the legitimacy of legal institutions in liberal society.\textsuperscript{3}

At times, historical dialectical methods which give full credence to the strength of traditions have predominated in Western law. Such an approach is the root of a system of law based on case precedent. In other eras there have been

\textsuperscript{2} See, for example, the analysis of current legal scholarship by Mark Tushnet in "Legal Scholarship: Its Causes and Cure," Yale Law Journal 90 (1981): 1205-1223. (Although Tushnet himself sees an avenue for productive work.)

\textsuperscript{3} Jürgen Habermas has described this tendency in the broader philosophical context as "accusatory negative dialectics." In contrast, his approach is positive and pragmatic: "Once participants enter into argumentation, they cannot avoid supposing, in a reciprocal way, that the conditions for an ideal speech situation have been sufficiently met. And yet they realize that their discourse is never definitively 'purified' of the motives and compulsions that have been filtered out. As little as we can do without the supposition of a purified discourse, we have equally to make do with 'unpurified' discourse." Habermas, "An Alternative Way out of the Philosophy of the Subject: Communicative versus Subject-Centered Reason," in The Philosophical Discourse of Modernity, trans. Frederick Lawrence (Cambridge, Mass.: MIT Press, 1987), 320, 323.
attempts to "rationalize" the law through a process of logical elaboration that often claims to be "scientific" and frequently is allied to movements for codification of legal doctrine while in the thought of modern jurists and social psychologists there is a concern for procedural justice which is related to the attempt to preserve the discursive character of legal processes.

I suggest that a paradigm of dispute resolution incorporating historical dialectic, logical appraisal, and unfettered intersubjective discourse distinguishes legal institutions from other social phenomena such as capitalist markets built upon divergent conceptions of rational decision making. One result of this "semi-autonomy" of legal institutions has been an historical conflict over methods of decision making in the relations between businessmen and the courts. Where commercial interests have mistrusted the conception of rational problem solving in the law they have declined to participate in adjudication, preferring rather processes in which solutions are reached according to another standard of decision making, reflecting a paradigm of rational action drawn from economics.

In this way we can explain the reluctance of people engaged in business, observed for the past two hundred years, to permit
their commercial disputes to be resolved by the ordinary courts. Is not "the rule of law" as it is understood in modern liberal societies commonly thought to provide the necessary foundation for a capitalist economic system? If this is so, why then have the capitalists preferred their own tribunals, private systems of arbitration, and direct negotiation to traditional adjudication?

The answer given here is that the modern (industrial and post-industrial) world of capitalist business has taken as its model of human rationality in situations of conflict something different than has been accepted contemporaneously by the legal institutions of Anglo-American society. The pattern is that a conception of rational action originates in economic thought, is adopted by the business world and then "percolates" into the legal sphere, but usually with a significant time lag, such that the commercial sector is never happy with the current form of dispute resolution provided by legal institutions. In examining this dynamic we will find that the "rational" method of problem solving and decision making as understood by those engaged in business has consistently diverged from the prevailing views of lawyers and judges. The latter eventually come to accept "business rationality" although usually too late to capture the full approval of this clientele who have meanwhile gone on to adopt
new attitudes.

It will be seen that the method of rational business decision making as conceived in the first flourishing of the Industrial Revolution was at odds with an historically based legal method which glorified the rationalization of precedent. Just as the lawyers became aware of this gap between their practice and the expectations of the capitalists they needed as clients, and accordingly moved to reform and codify the commercial law and provide a commercial court, the attitudes of the business class once again changed - compromise became preferable to adjudication.

Thus nineteenth century thought, influenced by classical political economy, in which a mechanical working of the free market economy was assumed, paid little attention to the problem of business risk from the subjective viewpoint of the individual capitalist. As one business commentator has put it:

Here was something new; and, in the extension of this new line of thought [of Adam Smith] in the hands of David Ricardo, John Stuart Mill, and others, business operations came to be viewed as responding passively to the movement of certain potent, impersonal forces. The businessman and all his activities could be ignored. If one businessman did not act as these 'forces' dictated, then another would. The profit motive was omnipresent and omnipotent. Economic forces could be credited with all developments, and business
could be reduced to a secondary position, at least conceptually."

The appearance toward the end of the nineteenth century of marginalist economic theory, however, with its emphasis upon the evaluation of alternatives, prompted a new vision of the entrepreneur as managing the problems caused by uncertainty in the market and a corresponding shift in the paradigm of business decision making, which ultimately spilled over into the field of legal institutions.

This thesis therefore arises out of the situation of business in a more or less competitive capitalist economy: is society justified in placing the responsibility for the resolution of business disputes in the hands of business itself? What basis of knowledge and what motivations will govern such activity? Some answers may be found in an examination of the claim of business, equally with law, to rationality in the mode of interaction of capitalist economic actors and this will entail historical review of economic theory, and an appreciation of modern "business economics," and "decision theory." Attention must also be paid to the record of business people, as it is perceived both by they themselves, and the larger society, for fairness and impartiality in approaching the resolution of

conflicts.

This study will therefore investigate the dispute between the legal institutions of society and the business culture over the proper forum and procedures for resolving business conflicts. I will take as the definition of a "business dispute" one which arises between two or more entities engaged in for-profit enterprise as that is commonly understood in a capitalist economy. Accordingly, I will not deal with "consumer disputes" nor with those involving the regulation of business in the public interest (the field of "administrative law").

I will point out those features of the models or images of rational behaviour in circumstances of uncertainty or conflict which illuminate the contrasting assumptions made by commercial actors and by legal institutions. What are the sources of such ideas held by business people? One alternative, which I will follow, is to examine the writings of economists for clues to the genesis of capitalist rationality. Just as it may be possible to explore the basic assumptions of the legal profession by examining the work of jurisprudential scholars, it may be possible to find the origins of the changing attitudes of entrepreneurs in the propositions and prescriptions of the original "political
economists," the marginalist economists, and, most recently, theorists of business organization and economic psychology. What follows, then is in part what James Boyd White has termed a "rhetorical or cultural analysis" of economics\(^5\) centring on its descriptions of, and prescriptions for human problem solving and decision making.

It is also a history of the interaction of capitalists and the courts since the time of Adam Smith; one that may be characterized in White's words as that of "two cultures in tension."\(^6\) A large part of this tension is, I suggest, bound up with the divergent conceptions of rationality found in economic thought on the one hand and in legal methods of argument and decision making on the other. Decisions imposed by objective and inflexible legal rules became an affront to entrepreneurs skilled in bargaining and rational compromise. Once again the courts failed to live up to expectations as business people demonstrated a preference for the self-government of arbitration. And now that the legal profession and its judicial institutions are accommodating themselves by way of offering informal and non-coercive processes it seems


:\(^6\) White, "Economics and Law: Two Cultures in Tension."
again that they will be found wanting as failing to offer the efficiency and certainty of computerized problem solving.

In conducting this study I will begin by looking first at the change in traditional common law conceptions of decision making induced by the theories of the "classical" economists exemplified by Adam Smith (Chapter II); then consider the thought of the "neo-classical" school, epitomized by Alfred Marshall, and the similarities between the marginalist economic approach and the legal realist movement (Chapter III); then I will examine some currents of contemporary economic and legal thought with particular emphasis on the theories of Herbert A. Simon and the conceptual framework of Jürgen Habermas (Chapter IV). An empirical survey of current attitudes both of business people and lawyers to the various objectives of the legal system of civil adjudication, and alternatives to it, will be the subject of the fifth chapter of the thesis. Results of statistical analysis will be presented and related to some of the issues touched on in earlier chapters. The conclusion follows (Chapter VI).
CHAPTER II: THE NINETEENTH CENTURY TRANSITION FROM THE DIALECTIC OF TRADITION TO THE LOGIC OF FORMAL RATIONALITY

Adjudication based on the common law with its respect for history embodied in precedent was not palatable to the entrepreneurs of Adam Smith's world who looked for solutions to conflicts to issue automatically from smoothly functioning judicial machinery which gave full credit to their "natural" market practices. The codification of elements of commercial law was one method adopted to satisfy these expectations, and the reform of the courts, in both their structure and procedure was another. However, by the time legal institutions reacted, the business world had moved to the more subjective approach to problem solving which accompanied marginal economic analysis.

Now seemingly far removed from issues of legal reform, the abstruse question of the manner in which God's tacit commands are revealed to man formed the intellectual framework in which the importance of logic and capitalist "economic laws" eventually became incorporated into professional attitudes to justice. Adam Smith's theories of the advantages of capitalism became wedded to Bentham's utilitarian vision with the result that Smith's "theory of moral sentiments" was discredited and obscured. John Austin, (1790-1859) emerges as
the jurisprudential legacy to our century.

Adam Smith and Classical Political Economy

It was Adam Smith's achievement in his great work, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published in 1776), to synthesize and in a sense "codify" theories of material accumulation and distribution which became the fundamental analysis of the new system of commercial capitalism which was then taking form in Europe. Smith's treatise is a cornerstone of the intellectual movement termed "political economy," and for good reason: it provides both prognosis in its analysis of capitalistic enterprise and prescription of those policies seen to stimulate economic progress.

The key to Smith's conception of the working of the capitalist economy lies in his conviction that the free pursuit of material self interest on the part of all economic actors (which he termed a state of "perfect liberty"), would by the medium of an unconstrained market provide the maximum of desired goods for consumption. The motivation for economic action, (provided by the human passions), was not the focus of his system, but rather it was the market, a great mechanical concept, which transformed base "desire" into economic
"demand" and "avarice" into "accumulation" of productive capital. This wonderful system of production moreover did its work in a perfectly "natural" way and without any necessity of conscious organization. The "natural price" of goods would, over time, prevail as would the "natural price" of labour.

Smith's vision of the capitalist organization of society has been described as an amalgam of Newton's mechanistic model and Locke's natural law. It is, above all, one of the great simplifying efforts of economic theory. The pre-industrial world which the new entrepreneurs were beginning to change was heavily regulated in its markets and trades in favour of what was conceived as the national interest. Not only colonial trade but domestic production and consumption were thought to be the proper province of government concern. This was the formidable system of mercantilism and Smith's Wealth of Nations became the bible of its opponents. He advocated removing the dead hand of legislative restraint from markets in favour of the "invisible hand" of the Deity, which, ordaining competition, ensured the inevitable progress of modern economic man. A minimum of interference in the actions of busy merchants therefore should be the goal of an

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enlightened government.

Adam Smith rode the crest of the anti-mercantilist wave in politics, and thus was widely read and influential in the business community of his day and for years after his death both at home and abroad. And what sort of world did readers see described in The Wealth of Nations? Firstly, it was subject to few restraints in the nature of human law: the enforcement of contracts and preservation of private property would be the only significant legal interventions necessary for the working of Smith's system of natural liberty. Furthermore, since motive was considered irrelevant in economic affairs, justice could also adopt an objective stance and remain perfectly "natural" in its operation. If it is accepted that merchants and traders, vying in their markets, inevitably promote the common good, then strong weight must obviously be given to the justness of their practices in any conflict with traditional legal customs or rules. A unique business attitude to rational behaviour may therefore be seen in the demands of capitalists to make the law of contract, or of bills of exchange, for example, conform to the "natural"

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habits of the business class. The response of legal institutions can be traced in the effort at legal codification in the century following the publication of *The Wealth of Nations*.

It seems evident that Adam Smith conceived of the law, at least from the point of view of the business person, as a relatively simple, mechanistic production of natural justice in accord with the expectations of the capitalist class. He speaks of the "exact administration of justice," as one of the three duties of the sovereign under his "simple system of natural liberty." Smith seems also to be the father of the efficiency criterion for evaluating the courts: In the course of recommending that judges be paid by litigants or in some fashion other than directly by the sovereign he remarks,

> Where the fees of court are precisely regulated and ascertained, where they are paid all at once, at a certain period of every process, into the hands of a cashier or receiver, to be by him distributed in certain known proportions among different judges after the process is decided, and not till it is decided, there seems to be no more danger of corruption than where such fees are prohibited altogether. Those fees, without occasioning any considerable increase in the expense of a law-suit, might be rendered fully sufficient for defraying the whole expense of justice. By not being paid to the judges till the process was determined, they

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might be some incitement to the diligence of the court in examining and deciding it.  

We glimpse in Smith a vision of the legal system as a great machine, designed in accord with the reasonable expectations of business people concerning the proper conduct of their affairs, the product of which is a standardized commodity called justice. Lawyers form the cogs in this construction, and it seems clear that Smith regarded them as a necessary evil, which in his world was expressed by classifying them among the unproductive classes:

In the same class must be ranked, some both of the gravest and most important, and some of the most frivolous professions: churchmen, lawyers, physicians, men of letters of all kinds; players, buffoons, musicians, opera singers, opera dancers etc. The labour of the meanest of these has a certain value, regulated by the very same principles which regulate that of every sort of labour; and that of the noblest and most useful, produces nothing which could afterwards purchase or procure an equal quantity of labour. Like the declamation of the actor, the harangue of the orator, or the tune of the musician, the work of all of them perishes in the very instant of its production.  

The influence of Adam Smith and his principal successors in the classical tradition, David Ricardo and J. S. Mill, persisted for a century after the appearance of *The Wealth of*  

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5 *The Essential Adam Smith*, 235.
Nations. In tracing this current of economic thought in the interplay of business and legal institutions we a vision of the law as a smoothly working machine producing predictable results at minimum cost. Lawrence Friedman has described what he terms the "two faces of law," and it is clear that his "economic theory" of law has its roots in Smith's conceptions:

The basic idea of the first, or economic theory, is that the legal system is a giant pricing machine. The machine behaves in some ways like the market; in other ways it serves as an alternative to the market, or indeed, as a machine for distorting the pricing mechanisms of the market. When laws grant rights, or impose duties, they make behavior of one sort or another cheaper or more expensive, as the case may be....

The price-rationing theory does not ignore policy choices, but it treats them as exogenous to the legal system. The legal system stands outside the world of morality; it is nothing but an instrument, a machine, totally amoral, just as the market is. It simply translates wishes and demands into prices and supplies.  

In so far as legal institutions failed in practice to accommodate these expectations we find criticisms likening it to an outmoded mechanism to be scrapped with other remnants of pre-capitalist society. It is not surprising that the entrepreneurs also tried their hands at assembling their own dispute settlement machinery where their frustration was too great.

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Nineteenth century law reformers, imbued by the spirit of Adam Smith, and with a growing respect for the commercial classes, were agreed on the object of their criticism. The common enemy was William Blackstone, (1723-1780) described as "upon almost all occasions, the apologist for what he finds established." The fault unanimously found was reliance on "the Wisdom of our Ancestors." For Blackstone, worship at this shrine dictated the principle that "existing precedents and rules must be followed, unless flatly absurd or unjust," and the conclusion that "the law is the perfection of reason, and that what is not reason is not law." To this a critic retorted: "In contemplation of law, there is no medium, it seems, between the perfection of reason and gross absurdity." For the reformers the antidote to this unhealthy satisfaction with the status quo lay in the heritage of Lord Bacon, to whom they looked as if an icon of their faith. Bacon's achievement, to be built upon in the modern project of law reform, was the adoption of a scientific

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10 Blackstone; quoted in [Romilly], "Papers," 226.

11 Id., 227.
approach to the law, encompassed in the inductive method. To this the activists opposed a priori reasoning as an epithet of contempt. However, as has been remarked, "the extremely repetitive and overwhelmingly rhetorical character of methodological debates as such"\(^{12}\) makes it difficult to disentangle the real issues.

It is clear, however, that the nineteenth century attack on tradition struck at the roots of British legal institutions. For hundreds of years the doctrine of precedent and the techniques of analogy and distinction of cases had formed the basis of the common law answer to dispute resolution. The rationality of such a method was accepted and the introduction of logical analysis of legal doctrine and procedure was unsettling. The philosopher Alasdair MacIntyre has examined this phenomenon of the overthrow of a traditional approach to solving life's problems and his conclusions are worth examining in this context.

The Rational World of Alasdair MacIntyre

Alasdair MacIntyre's primary purpose is to explain the genesis

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and contribute to a resolution of the aporias of modern moral discourse but his analysis also has implications for legal reasoning. MacIntyre's method takes the form of an historical account of the principal currents of western philosophical thought, a procedure he considers to be not merely instructive but exemplary. For MacIntyre, the past can never be forgotten in making sense of the present: "We are haunted by the ghosts of dead concepts. The trouble with ghosts is that they do not replace the living satisfactorily and yet do not leave us with an entirely vacant hearth either."¹³ Although not intended by him to refer specifically to legal thought, what more poignant description of the task and the trouble facing the institutions of the law could there be? MacIntyre's solution to the problem of dealing with the legacy of the past is to propose a concept of rational problem solving, which while not relativistic, is thoroughly contextual. His method lies in the elaboration of the idea of a living tradition within which social practices derive meaning and only in the context of which they can be properly understood (and criticized):

We make a social practice intelligible by placing it in some context where the point and purpose of doing things in one way rather than another is exhibited by showing the connection between that social practice and some wider institutional arrangements of which it is a part. So the passing

of a verdict has to be understood in the context of a legal system, and the concept of a home run has to be understood in the context of baseball. When we cannot make a practice intelligible by supplying such a context, there are two possibilities. The first is that we have not been adequately perceptive or understanding in our investigation of that particular social order; the other is that the practice just is, as it stands, unintelligible....One hypothesis which we may advance as a result of coming to the latter conclusion,...is that the practice in question is a survival.¹⁴

In MacIntyre's view, therefore, the meanings of words, no less than social practices are always to be considered in their historical contexts and considered as more or less rational having regard to the "web of beliefs" of the speaker or actor. The criteria of rationality are not simply those beliefs held by the observer for: "Rationality is nobody's property."¹⁵

How then does MacIntyre describe the method of rational decision making in the face of conflicting practices (and meanings)? For him it does not lie in logic alone:

...observance of the laws of logic is only a necessary and not a sufficient condition for rationality - whether theoretical or practical. It is on what has to be added to observance of the


laws of logic to justify ascriptions of rationality - whether to oneself or others, whether to modes of enquiry or to justifications of belief, or to courses of action and their justification - that disagreement arises concerning the fundamental nature of rationality and extends into disagreement over how it is rationally appropriate to proceed in the face of these disagreements.¹⁶

For MacIntyre rational thought entails a dialectical component in which deliberation is conducted with full appreciation of the full cultural context of opposing views, including one's own. This approach is exemplified by MacIntyre in Whose Justice? Which Rationality? in which he traces the roots of Aristotelian philosophy in Platonic thought and the subsequent encounters of the Aristotelian tradition with challenges to its validity, principally from Christianity and modern secular rationalism. The conception of a continuous dialectic of traditions which MacIntyre here recreates is held by him to be the model of rational thought. Thus, in speaking of Aristotle's assimilation of his predecessors' ideas, MacIntyre makes this view clear:

There is therefore no incompatibility between two of my purposes in giving an account of what Aristotle has to teach us about justice and practical reasoning.... The other is to claim that not only are Aristotle's arguments the outcome - the final outcome as he more or less takes them to be, the provisional outcome as I take them to be - of a sequence of thought which begins from Homer,

but that they provide a framework on the basis of which and by means of which later thinkers can extend and continue Aristotle's enquiries in ways which are both unpredictably innovative and genuinely Aristotelian.\(^{17}\)

MacIntyre considers as often essential to rational contestation of traditions the process of translation between languages and the gaining of an appreciation of untranslatable meaning which can result from appropriating a second language as one's own. He also recognizes the possibility of rational defeat of a tradition which manifests itself in the recognition by its adherents of a fundamental inability to make comprehensive sense of reality presented in traditional terms. In emphasizing that one may rationally abandon a tradition MacIntyre seeks to secure for his dialectical approach vitality and relevance in an age characterized by restless scepticism and distrust of tradition. This conception of rationality as requiring historical contextual analysis conducted in an attitude of dialectical openness is one of the important influences on the paradigm of legal decision making.

The test which MacIntyre proposes for the putting aside of traditions is a sense of satisfaction that the new body of thought makes more comprehensive sense of reality than the old

\(^{17}\) Id., 99-100.
approach. If such a standard is considered as an element of rationality in the law, diligent exploration of the context of legal meaning is mandated and a thorough apprehension of the ramifications of competing interpretations is required. These are not easy tasks, however, if pursued, legal thought may become less theoretical and more understandable within the context of its application.

MacIntyre's historical dialectical approach requires a comprehensive view of the entire cultural context of meaning and decision. For instance, MacIntyre contrasts Thomist-Aristotelian philosophy with sophistical approaches concerned with the pursuit of limited interests and finds in them merely a reliance on a type of rhetoric which he considers nonrational persuasion. The method of calculating the satisfaction of desires shared by sophists and utilitarians is a view of rational decision making which the dialectical tradition rejects. However, since it could be expressed in quantitative terms, the utilitarian approach suited the spirit of the Victorian age which looked to a "science" of jurisprudence to parallel the "science" of economics.

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18 Id., 86.
"The Law of England Considered as a Science"  

Lord Brougham, sometime Chancellor of England (1830–1834) and the best known law reformer of his day, was content to rest his philosophy of reform on the simple formula "Knowledge is power; but its natural ally is the friendly power of virtue, with which its dominion is willingly shared."  

Other nineteenth century activists demanded more of theory. Mere practical acquiescence in the demands of commercial society was not enough for many legal reformers. The questioning of established legal institutions and procedure in England which began with the attacks of Jeremy Bentham could make no progress if it were intellectually associated with the ideas which accompanied the anarchy of the revolution in France. What was needed was a plausible, demonstrable, and, above all, rational philosophical foundation as a solid ground for the advocacy of law reform.

Thus it was that the polemical wars of nineteenth century law

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reformers were waged on the field of science, the prize being scientific legitimacy for the study of jurisprudence and the practice of reform:

Certain, however, it is, that it is but an indifferent compliment to the spirit of improvement in its application to this great and paramount department, that whereas in every other branch of art and science, the most rapid strides have been made towards perfection, the science of Jurisprudence (if indeed its present state in this country yet entitles it to that appellation), has hardly been even approaching with any steady or persevering effort to simplify and reduce the whole into a connected and intelligible system.\(^{21}\)

The battle lines were drawn broadly; in the estimation of the lawyers, science could be defined as "that department of human knowledge which depends upon the reasoning faculty," or, "that what engages, systematically or necessarily, the faculty whose office it is to compare, combine, distinguish, and divide, constitutes science."\(^{22}\) Legislation was the chosen instrument of scientific law reform since it was considered that it could provide exact change in substance or procedure not subject to the uncertain influences of "judicial law-making."\(^{23}\)

"Scientific jurisprudence" concerned itself with the opinion


\(^{23}\) See [Romilly], "Papers," 223 passim.
of commercial society both as to substantive and procedural aspects of the law. Early in the century, jurists congratulated themselves on a body of commercial law doctrine, owing much to the efforts of Lord Mansfield, which was thought to "sanction the regulations which, in the practice and course of trade, have been found beneficial," and to be "remarkably simple and harmonious."24 This complacent attitude would change in the course of the following decades and demands would be made for legislative intervention in the law of partnership, bankruptcy, sale of goods, and bills of exchange.25 In tracing the progress of this reform of substantive law, Robert Ferguson has concluded that "the leading proponents of codification subscribed to a conception of legal reasoning which stressed its scientific character and the importance of predicability."26

The utilitarian promise espoused by most Victorian reformers, therefore was certainty and perfection of positive law if only


25 "Our [commercial] laws are at present in a most unsatisfactory state, demanding a complete revision and a systematic exposition," "Commercial Law and Codification," Law Review 16 (1852-1853): 393.

it were founded on the exercise of scientific rationality. Thomas Babington Macaulay, (1800-1859) in a noted essay spoke for those dedicated to the traditional idea of a supervenient moral order in warning of the ill effects of this approach to law-making represented by James Mill's (1773-1836) "Essay on Government":

The fact is, that when men, in treating of things which cannot be circumscribed by precise definitions, adopt this mode of reasoning, when once they begin to talk of power, happiness, misery, pain, pleasure, motives, objects of desire, as they talk of lines and numbers, there is no end to the contradictions and absurdities into which they fall. There is no proposition so monstrously untrue in morals or politics that we will not undertake to prove it, by something which shall sound like a logical demonstration, from admitted principles.... We believe that it is utterly impossible to deduce the science of government from the principles of human nature.27

It was Macaulay's line of thought that Adam Smith, "Professor of Moral Philosophy in the University of Glasgow," had also presented his other, now neglected, great work, The Theory of Moral Sentiments (published in 1759). Here, in a wide ranging

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27 [Thomas Babington Macaulay], "Mill's Essay on Government," *Edinburgh Review* 49 (1829): 168, 185. It seems to have been borne out that the principle of general utility, spoken of in economics as a "social welfare function" has been difficult to articulate and apply; nevertheless economists remain confident that "Like the rabbit in Australia, economics is quickly filling a vacant niche in the intellectual ecology - the absence of mathematical theory and statistical methods in law." Robert Cooter, "Justice at the Confluence of Law and Economics," *Social Justice Research* 1 (1987): 68.
analysis of the feeling of sympathy, anticipating social psychology, he tried to account for his key observation that:

How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.  

Smith's conclusion was that man was endowed with "moral faculties" through the benevolence of God (the same "invisible hand" which prescribed the laws of the market economy) to "superintend all our senses, passions, and appetites, and to judge how far each of them was either to be indulged or restrained." For him it was impertinence to suppose that man could create a just legal order without Divine inspiration in this sense:

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28 Adam Smith, The Theory of Moral Sentiments Part I, Section I, ch. 1, "Of Sympathy:" quoted in The Essential Adam Smith, ed. and with introductory readings by Robert L. Heilbroner, with the assistance of Laurence J. Malone, (New York: Norton, 1986; Norton paperback, 1987), 65. The question of the existence of "genuine altruism" remains an issue in science; in commenting on the denial by sociobiologists of the possibility of such a motive, a reviewer recently wrote: "Perhaps,without being at all cynical, 'genuine altruism' doesn't exist in any form, evolutionary or otherwise. Every time I recycle a pop can, I'm not just acting 'altruistically' but also raising my status in the eyes of potential mates and improving the fitness of my children (and everybody else's as well).... But in a larger sense, without having recourse to divinity or metaphysics, I raise community standards, I improve the quality of life, I set an example that shows how one individual can act to make the world a better place for all children, mine included." Mark Czarnecki, "Sex and Destiny," Saturday Night 105 (April 1990): 64.

29 Smith, Theory, 113.
When by natural principles we are led to advance those ends, which a refined and enlightened reason would recommend to us, we are very apt to impute to that reason, as to their efficient cause, the sentiments and actions by which we advance those ends, and to imagine that to be the wisdom of man, which in reality is the wisdom of God.\textsuperscript{30}

Contrast this view with that of the Benthamites, who, following in the Humean tradition, located the font of justice and the foundation of a rational legal order in the principle of calculable utility:

Jurisprudence is the science of positive law, and as such is the theory of those duties which are capable of being enforced by the public authority. Jurisprudence, so treated, may take its place as one of those inductive sciences in which, by the observation of facts and the use of reason, systems of doctrine have been established which are universally received as truths among thoughtful men....

The Art of Legislation teaches how a multitude of men composing a community may be disposed to pursue that course which is most conducive to the happiness of the entire community by means of motives which are applied by the Legislator.\textsuperscript{31}

What impact did this apparently arcane philosophic debate have on the progress of law reform? It was important to the practical politics of legislation because it was universally recognized that any change must be demonstrated to have a sure foundation in "scientific jurisprudence," and the "science of

\textsuperscript{30} Id., 97-98.

law" must in turn have sound first principles, rationally
defensible. Thus, disagreement over the origin of the
fundamental principles of justice attained practical
significance and invaded the lawyers' professional journals.

Thus, a polemical war was waged by legal scholars of the
utilitarian movement who suspected other reformers of
remaining under the influence of the "misty" and unscientific
belief in a moral sense, for which the dictates of general
utility must be substituted. A teacher at the University of
London, John Austin, undertook to set the science of law on a
proper course in his lectures on the subject of "The Province
of Jurisprudence Determined." Austin, no more an atheist than
Brougham, took pains to acknowledge the commands of God while
preserving the domain of utilitarian theory. This he
attempted to accomplish by answering the question of the
manner in which the unrevealed word of the Deity was
manifested to man, about which he stated:

Now, concerning the nature of the index to the
tacit commands of the Deity, there are three
theories or three hypotheses. First, the pure
hypothesis or theory of general utility; secondly,
the pure hypothesis or theory of a moral sense;
thirdly, a hypothesis or theory mixed or compounded
of the others....

the benevolence of God, with the principle of
general utility, is our only index or guide to his
unrevealed law....
To crush the moral sentiments, is not the scope or
purpose of the true theory of utility. It seeks to impress those sentiments with a just or beneficent direction: to free us of groundless likings, and from the tyranny of senseless antipathies; to fix our love upon the useful, our hate upon the pernicious.\footnote{32}

This manner of reasoning allowed Austin to incorporate the precepts of Adam Smith's political economy into positive law in abstraction from Smith's moral universe in which they were originally embedded.\footnote{33} Thus, Austin elevates ownership of private property, now in the form of capital, to the status of an unqualified right by virtue of its useful function in society:

Without security for property, there were no inducement to save. Without habitual saving on the part of proprietors, there were no accumulation of capital. Without accumulation of capital, there were no fund for the payment of wages, no division of labour, no elaborate and costly machines: there were none of those helps to labour which augment its productive power, and therefore multiply the enjoyments of every individual in the community. Frequent invasions of property would bring the rich to poverty; and, what were a greater evil, would aggravate the poverty of the poor.\footnote{34}


\footnote{33} In an unpublished paper, Andrew Butler has discussed the implication of the divorce of law from morality and the virtues in the context of the "public-private" distinction in liberal philosophies of law: Andrew Butler, "Constitutional Rights and Private Litigation: The Canadian Experience," unpublished paper, Osgoode Hall Law School, Graduate Programme in Law, York University, Ontario, April, 1990.

\footnote{34} Austin, Province. 303.
This instrumentalization of doctrines of the law in support of capitalist economic theory proceeded quickly; the Law Magazine, reviewing the writings of Richard Jones, a Professor of Political Economy, was moved to state less than three decades after Austin's first published lectures:

Some apology may seem at first sight to be required for the discussion of political economy (albeit connected with the name of an eminent jurist) in a legal review. The extensive basis, however, of legal science, connects it closely with that science [political economy] which explains the rise of those rights of person and property which it is the object of the law to conserve. On every side, indeed, the subject of wealth has outlets into the science of jurisprudence. In law, as in political economy, no system can long hold its ground which is at variance with social conditions.\(^{35}\)

If the reformers were generally sanguine about the state of commercial law in England their attitude was, however, was very different toward existing legal procedure and the administration of justice, the complexity and inefficiency of which were generally thought to be unfitting a great commercial nation. Lord Brougham relied on the rather opaque term "natural procedure" (borrowed from Bentham) to convey his

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\(^{35}\) "Literary Remains (consisting of Lectures and Tracts on Political Economy) of the late Rev. Richard Jones," Law Magazine 3rd. ser., 7 (1859): 356-357. It should therefore come as no surprise that modern writers in the law and economics movement have discovered that "If judges explicitly follow principles of justice and implicitly follow economic principles, so that the two types of principles track each other in many common-law disputes, market efficiency must be the content of common-law justice." Cooter, "Justice at the Confluence," 77.
conception of the goal of the rational administration of justice. David Trubek, looking back at this era, has described the impact of what he terms the "classical" legal thought of the nineteenth century on the procedural field of law as producing a conception of "transparent" procedure based on the following tenets:

Procedure was to be the handmaiden of justice, as justice was defined in classical thought. That definition implied that procedure should be a scientific instrument designed to identify the correct principle and determine the true facts. It should ensure that subjects can both invoke known rules in appropriate situations and be sure that these rules are enforced.36

Thus, just as classical economics ignored the subjectivity of economic actors, classical legal thinking took no account of the interaction of participants with legal processes:

By hypothesis, the legal subjects of classical thought came to the law with their goals already determined; the law should either support their claims or reject them. The law should not attempt to change their goals or their reasons for these goals, for to do that would violate the principle of autonomous personhood and the idea that the law serves only to carry out the goals chosen by individuals. Transparent procedure takes the litigants as they come to the court.37

Henry Brougham was one of a group of optimistic Scottish

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37 Ibid.
intelligentsia to whose writing and politicking Victorian British society owes a great deal of its shape. These men shared an intellectual tradition that has been described as "the Scottish theory of commercial society and the middling classes," founded on "a commitment to a belief in the political and human resources of modern society and its capacity to resolve the principal difficulties which it initially faced." What they undertook together was to educate the British public in the sound and optimistic doctrines of classical political economy and promote progressive (but not what was then considered radical) governmental policies. Their collective tool for this purpose was the Edinburgh Review (founded in 1802) to which they all contributed numerous articles. (This periodical has been described as "the first major vehicle for the popularisation of the doctrines of political economy in 19th-century Britain." Their mentor was Dugald Stewart, (1753-1828) philosopher, political economist, and teacher from whom they imbibed the spirit of Adam Smith.

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38 See Fontana, Rethinking the Politics, passim.

39 Id., 145.

40 Derek Roper, Reviewing before the "Edinburgh" - 1788-1802 (London, 1978); quoted in Fontana, Rethinking the Politics 2, n. 3.
In 1817 the *Edinburgh Review* published a laudatory article written by Sir Samuel Romilly concerning Jeremy Bentham's (1748-1832) tracts promoting the codification of the law. The reviewer was convinced that the replacement of judge-made common law by a written code would do much to ameliorate "the difficulties, the expense, the tedious length of litigations, the uncertainty of their issue, and, in many cases, the lamentable delay of decision,"\(^1\) which was said to affect the English justice system. Although the ultimate philosophical stance of the Scottish Enlightenment to which Brougham adhered was opposed to Bentham's doctrine of general utility, the two camps often made common cause in campaigning for specific legal reforms such as codification, or if that were considered too radical, at least consolidation of the laws.\(^2\) The Edinburgh reviewers were determined to do something about the evils recited by Romilly. Due perhaps to the panic created by the excesses of the French Revolution, easy access to the courts of justice (at least for those of "moderate fortune," who we may take to be the "middling classes"), was thought necessary to bolster confidence in established society. To

\(^1\) [Sir Samuel Romilly], "Bentham on Codification," *Edinburgh Review* 29 (November 1817): 222.

ignore this challenge was to court disaster, as the Edinburgh Review pronounced in 1827:

The administration of Justice is the point, at which the Government of a country comes most frequently in contact with the People; and accordingly, when that is skilfully and impartially conducted — and, we must add, with a reasonable degree of cheapness and expedition — content and satisfaction will always appear as the habitual feelings, and disturbance or excess only as occasional disorders...

To tell the people of this country that the Courts of Justice are open to their complaints, and that every man is, in the eye of the law, equal, however true in principle and theory, is so utterly at variance with facts, as to have become, in reality, a cruel and insulting mockery.\(^43\)

Brougham's practice on the Northern Circuit brought him in close contact with the great merchants and industrialists of the area who were to be his lifelong concern and his name soon became associated with the science of political economy in the Smithian tradition as a result of his publishing two tracts, one analyzing the colonial system from an economic perspective,\(^44\) and the other a review of a book on political

\(^{43}\) "The Report made to his Majesty under a Commission, authorizing the Commissioners to make certain Inquiries respecting the Court of Chancery," Edinburgh Review 45 (March 1827): 458-459, 466. Upon introducing his legislation on County Courts in Parliament, Lord Brougham recalled the words of Edmund Burke: "Where there is abuse there ought to be clamour, because it is better to have our slumbers broken by the fire-bell, than to perish amidst the flames in our bed." Brougham, Speeches, 2: 527.

economy, which first appeared in the *Edinburgh Review*. Scholastically analysis of these productions has yielded the assessment that they show "limited talent for theory." Yet Brougham was undoubtedly convinced of the importance of economic principles in the work of improving society and the system of administering justice, and he happened upon an auspicious occasion to demonstrate his belief in the commercial classes. In 1808 he gained Parliamentary attention by pleading at the Bar of the House of Commons the case of northern merchants against executive restriction of trade with America in the course of the war with France. Subsequently, becoming a Member of Parliament himself, he launched a career dedicated to reform based upon a belief in "natural procedure."

In 1828 Brougham issued a broadside against the British justice system. The House of Commons was spectator to one of the notable speeches of its history on February 7, 1828, when Brougham catalogued over a period of six hours an agenda for procedural and court reform, which he later claimed, with much truth, had been largely realized. No more a philosopher of law than of economics, Brougham's challenge to the legal

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46 Fontana, *Rethinking the Politics*, 67.
system was not the product of original thought, but rather was based on his adoption of Bentham's conception of "natural" as contrasted with "technical" procedure. Brougham's formulation of this guiding principle is an early example of the liberal view of procedural justice:

Certainly to encourage all rightful litigation, and check the wrongful; opening wide the doors of our Courts to the honest suitor, and as far as possible to him alone; and favouring only the resistance to unjust demands, - must ever be the great object of the lawgiver, but never can he attain it until he completes the substitution of natural for technical procedure.  

Here then are the "principles" as described by Brougham that he sought to bring to the attention not only of the House, but of the nation (for the speech was quickly printed and circulated): 1. lessen the expense of all proceedings and encourage expedition; 2. abolish any practice which only profits the court and the practitioners; 3. provide all remedies and relief in one court and in one proceeding; 4. reverse the onus of proof in appropriate cases (such as suits on bills of exchange); 5. allow declaratory actions such

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47 Henry Brougham, Letter to Lord Denman, extract printed in Law Review 17 (1852-1853): 148. Brougham's optimism as to the benefits to be derived from improved courts was impressive: "You will find, my Lords, that if the tribunals for the administration of justice be placed on a good footing, the principles of jurisprudence, and the law itself, as applicable to person and property, will be improved in the best and safest way - that of improved experience and gradually improved practice." Hansard Parliamentary Debates, 3rd. ser., ii, (February 22, 1831): 832.
as those to quiet title; and, abolish all obsolete proceedings. The sure result, so promised Brougham, of putting these principles into practice would be to prevent unnecessary litigation, and this was to the great benefit of the public:

Whatever brings the parties to their senses as soon as possible, especially by giving each a clear view of his chance of success or failure, and, above all things, making him well acquainted with his adversary's case at the earliest possible moment, will always be for the interests of justice, of the parties themselves, and indeed, of all but the practitioners. It is the practitioners, generally, that determine how the matter shall proceed, and it may be imagined that their own interests are not the last attended to. The seeming interest of two parties disposed to be litigious, in many cases appears to be different from the interests of justice, although their real interest, if strictly examined, will not unfrequently be found to be the same.

In this speech can be seen the themes which would occupy the law reforming career of Henry Brougham which extended over the following forty years: a concern that courts and lawyers should not obstruct the business of the nation, and a belief that litigation could be avoided or at least short-circuited. It is not hard to see that these views might sometimes bring him into opposition to the Bar, a formidable opponent. What is not apparent from this statement of his principles is that

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49 Id., 61.
they might also on occasion cost him the support of commercial society. One of the most controversial of the proposals contained in the speech of 1828 was abolition of arrest for debt. This Brougham advocated on the grounds that it contributed to competition among tradesmen in giving credit which was neither "honest" nor "praiseworthy" and resulted in higher prices for good customers.\textsuperscript{50} We may see in this analysis the complementarity of economics and morality which was a distinctive feature of the Scottish philosophic tradition to which he belonged.

Two years after the great speech by Brougham the Whigs were indeed in power and he, now Chancellor, reached the pinnacle of influence on the court system. However, acting as both a sitting judge, and member of the cabinet in turbulent political times, (the years of the Reform Bill, 1832) it is no wonder that all the improvements he had called for were not made in the course of the four years he presided in Chancery. Nevertheless, some major reforms were accomplished: the creation of new bankruptcy courts, (in support of which Brougham presented in the House of Lords "a petition of 4,500 persons taken in 2 1/2 days composed of powerful bankers,

\textsuperscript{50} Id., 67.
merchants, solicitors and tradesmen\textsuperscript{51}), the creation of a
commission to consolidate the criminal laws, (which sat until
1845), and the introduction, but not passage of legislation to
create a new system of local courts. This last was a
significant measure since in Brougham's design, this new legal
institution would embody all the best features of "natural
procedure."

The proposal to establish new County Courts (a name borrowed
from the then largely defunct local courts which were feudal
in origin), was a truly revolutionary innovation, providing
streamlined procedure and consequently, according to Brougham,
cheap and speedy justice. Chief among the unique features of
this plan were: the abolition of written pleadings,
empowerment of the judges to act as conciliators (after the
model of continental Courts of Reconcilement), and recognition
of the right of parties to choose the mode of trial, whether
a jury, judge alone or a third party referee or arbitrator.
The jurisdiction of these new local courts initially proposed
by Brougham was to extend to cases in which the amount claimed
did not exceed 100 pounds, then a substantial sum. However,
facing the hostility of the preceding Chancellor, Lord Eldon,
and other Law Lords, the measure never passed Parliament and

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the idea of locally available justice had to wait a dozen years before being acted on.

Henry Brougham's law reforming career was many-faceted and a good number of his causes bore legislative fruit. Much of his later success may be traced to the cooperative efforts of an organized body of activists, - the Society for Promoting the Amendment of the Law (Law Amendment Society), founded in 1844. Lord Brougham often presided at meetings of this group and introduced in the House of Lords Bills prepared by its members. It was said that between 1844 and 1857 Brougham and the Society had been instrumental in securing the enactment of at least 40 statutes and portions of 50 other Acts. The Society had an official publishing organ for the dissemination of its views, The Law Review and by 1852 it consisted of 340 members, most of them lawyers.

Yet the commercial classes were a special object of solicitude of the Law Amendment Society. Of the many projects for reform taken up by this group not a few appealed directly to the interests of business people: simplification of the transfer

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of land, (in order to make of land "an article of commerce," insurance of titles to land, assimilation of the commercial laws of England and Scotland, providing an expedited procedure for suits on bills of exchange, and instituting a cheaper method of administering bankruptcies. Two large public conferences of commercial men and the legal profession were held under its auspices in 1852 and 1857. At the first, the subject of Tribunals of Commerce was raised by the delegates from the Liverpool Chamber of Commerce, which made a strong plea to the Society for relief from the inefficiencies of the existing courts and their procedure:

It is as undeniable as it is intolerable that at this day, in the most civilized country of the world, the centre of trade and commerce, the simplest pecuniary right cannot be recovered, or obligation enforced, except at a cost frequently far exceeding the sum at stake, with a delay and harassment which, in the rapid requirements of business, is often tantamount to a refusal of justice, and with an uncertainty irrespective of either the law or the equity of the case, which too often induces the abandonment of the most undoubted

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57 Id., 385.

right, without even an attempt to recover.\(^{59}\)

The Chamber ascribed this state of affairs to: the centralization of the superior courts in London, the expense of hiring both local and London solicitors, limited sittings outside the capital, the "confessed incompetency of lawyers to deal with questions of accounts, or of the technicalities and usages of mercantile transactions,"\(^{60}\) unnecessary formalities of the courts and the need to employ counsel, and the lack of any mechanism for the official encouragement of settlement. Courts of Reconciliation, unattended by the Bar, were proposed by the commercial interests as the solution to their frustrations, but they were not attractive to the professional members of the Society; commercial society must recognize that there were limits to self-governance. Accordingly, after study by a committee of the Society, a resolution was brought forward declaring the inexpediency of establishing Tribunals of Commerce, but also piously stating "That it is nevertheless important by other means to afford increased facilities for the speedy and economical settlement of commercial disputes."\(^{61}\) The "other means" were to include improving the

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60 Ibid.
law of arbitration, extending the jurisdiction of the County Courts which had by then been established, increasing the sittings of the superior courts, and allowing judges to call on expert assistance. No doubt Lord Brougham was disappointed by the narrowness of this response.

When the complaint of slow and expensive justice was raised again at the mercantile law conference of 1857 the lawyers responded by suggesting that ancient local courts with plenary jurisdiction could be reactivated in which mercantile men could sit with the judge. Once, that is, their sole deficiency was provided for: "resident and competent judges, and a power of executing their decrees."\(^{62}\)

In 1864 the Law Amendment Society amalgamated with the National Association for the Promotion of Social Science, which has been described as of central importance to Victorian society in its heyday.\(^{63}\) The Social Science Association was more catholic in its membership than the Society: Jurisprudence was the subject of but one of the five departments into which the Association was initially


organized, the others being Education, Public Health, Punishment and Reformation, and Social Economy. With a larger proportion of non-lawyers participating in its affairs, it is not surprising that mercantile interests were better able to prevail against professional prejudices in the Association's work of reform. This is demonstrated in the treatment afforded the perennial request for local tribunals with unlimited monetary jurisdiction. It is reported that this proposal was recommended by the Jurisprudence Department,\textsuperscript{64} but it met with the usual scathing response from the Bar at large: "The main point as against the localisation of Courts is that in proportion as you localise the administration of law, you lessen justice. Local law and bad law are convertible terms."\textsuperscript{65}

The Social Science Association, this hegemony of social reformers dedicated to a unified science of society, lasted until 1885. In the remarks of the head of its Jurisprudence Department in 1874 may be seen some of the roots of its collapse; a growing conservatism marked the new attitude toward law reform:

\textsuperscript{64} "The Fallacy of Local Tribunals," \textit{Law Journal} 3 (1868): 633-635.

\textsuperscript{65} Id., 634.
It is too late in the day in this country at least for even the most sanguine of judicial reformers to attempt to construct from essential principles a new system of jurisprudence, or, as Bentham did with great acumen and power, to deduce a new code from abstract views of general utility....Even the least defensible and most questionable laws are not unfrequently so bound round the fabric of society that they cannot with wisdom or safety be removed.66

Further, in this address we can see as well a weakening, if not abandonment, of the concept of a unified science of society and the recognition of emerging professional disciplines seeking to explain and mould humanity according to their own exclusive perspectives.67 Thus, even in the minds of its followers, the science of jurisprudence no longer reigned autonomous and supreme over the affairs of men; economic science had acquired a new, independent authority:

Although it rests on some broad principles, which are true at times, and under all conditions, yet apart from its operation on ordinary life, law has no empire. It is a science in so far as it beats in unison with the pulses of society, otherwise it is only a name....

Controversies remain which I do not now stop to solve, or even to consider; but, affecting as they do a relation [employment] which is the broad basis on which national


67 Thomas L. Haskell has described this process in the context of the United States in The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority (Urbana, Ill.: University of Illinois Press, 1977).
prosperity is built, they well deserve earnest and kind consideration. But these are more economical than juridical questions. Their ultimate solution must rest in the good sense, prudence, and sagacity of those chiefly concerned. There are economical laws which are superior to any which are written in the Statute Book, and which are never violated with impunity. As in the material world we are told that every exercise of force operates in a corresponding diminution of power, so in the relations of capital and labour, everything which tends to diminish the security for the employment of capital finds its compensation, and that compensating element is sure to strike the weaker in the end.\textsuperscript{68}

Efforts on behalf of cheap and speedy justice for the merchant class continued to the end of the nineteenth century, although Tribunals of Commerce were rejected once more in the course of deliberations leading to the reorganization of the courts by the Judicature Acts of 1873 and 1875.\textsuperscript{69} In 1895, however, the new High Court was persuaded to promulgate special rules for the disposal of "commercial causes" which included dispensing with technical rules, limiting or avoiding pleadings, and providing for the securing an order of the court "for the speedy determination, in accordance with existing rules, of the questions really in controversy between

\textsuperscript{68} Moncrieff, "Address," 968, 978-979.

\textsuperscript{69} See Harry W. Arthurs, "Without the Law:"
the parties."\textsuperscript{70} It may have seemed, to those who remembered his efforts, that Lord Brougham's tireless advocacy of "natural procedure" was rewarded with a long reserved, but ultimately favourable judgment.

The system of pleading in early nineteenth century British common law courts was, in the eyes of the utilitarians, a "mischievous mess."\textsuperscript{71} It did not partake of any of the true elements of logic which ought to be its guide, and as a later commentator wrote:

\begin{quote}
The Common Law system of procedure is based upon pleading, which is a dialectical as opposed to a rational process; that is, one in which the parties dispute in writing, rather than state the facts of their respective cases in a simple natural way. They dispute by means of the affirmation and negation of mixed propositions or conclusions, always more or less complex, and often exceedingly complicated and indeed obscure.\textsuperscript{72}
\end{quote}

Consequently the surest way to advance justice was to require

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\item\textsuperscript{70} Anthony D. Colman, \textit{The Practice and Procedure of the Commercial Court} (London: Lloyd's of London Press, 1986), 4 passim.
\item\textsuperscript{71} "Principles and Practice of Pleading," \textit{Law Magazine} 1 (1828): 2.
\item\textsuperscript{72} W. F. Finlason, "Illustrations of our Judicial System, Part V.," \textit{Law Magazine} n.s., 2 (1873): 504. In order to remedy the "inefficiency" of this procedure the author advocated a power in the judge, at an early stage of the action, to determine the proper procedure to be followed, such as entrusting technical issues of fact to an expert referee or "mercantile tribunal."
\end{enumerate}
both parties to appear "in the very first instance" in the presence of the judge, there to orally present statements of fact upon which the judge would immediately rule as to their legal consequence or not, thereby defining, or instantly disposing of the issues.\textsuperscript{73} To be workable, it seemed, such a system must be accompanied by a comprehensive code of laws so as to address every fact situation that might arise, and this was accordingly recommended as well. Critics of this reform proposal rested their opposition on the difficulty of enacting a perfect code and the supposed efficiency of leaving pleading to the parties without the necessary involvement of a judge.\textsuperscript{74} In a direct appeal to commercial society, it was suggested as incontrovertible that "in a highly civilized state, where commercial transactions are numerous and complicated, the fact of persons coming into court without any previous authentic information as to the complaint or answer - in other words, without pleadings - would lead to intolerable fraud, oppression, uncertainty, and expense."\textsuperscript{75}

Yet there was reform in the rules of pleading and in the system of forms of action which, by the end of the century,

\textsuperscript{73} "Principles and Practice of Pleading," 6.

\textsuperscript{74} Id., 7, 10.

resulted in the basics of the rules of procedure as we know them today. Although the lawyers congratulated themselves on thus cleaning their own house, it was remarked that the client did not seem to have sufficiently appreciated the effort.\footnote{76}

There is no doubt that great changes were made in the procedure of the British courts and the administration of justice in the middle years of the nineteenth century. It is harder to see the influence of a coherent philosophy of procedure at work.\footnote{77} Further, neither utilitarianism or the traditional humanism typified by Brougham seemed able to satisfy all the desires of commercial society for inexpensive and efficient resolution of its disputes. Thus, in commenting on the system of courts as it stood in 1873, a contributor to the Law Magazine remarked that common law procedure remained "artificial, ineffectual, and dilatory."\footnote{78} A solution was to give the courts the power "at the opening of an action, to

\footnote{76} "The reforms indeed in pleading, wrought by these remarkable statutes now under consideration, are not even yet fully appreciated by the public, but they are among the very few changes entitled to the name of reform." Id., 254.

\footnote{77} The nearest approach to a definition of what "natural procedure" entailed was the following: "bringing the parties as speedily as possible to confront each other, and state their several cases intelligibly and plainly." "Tribunals of Commerce. - Natural Procedure," Law Review 15 (1851-1852): 96-97.

make it compulsory to the proper course of procedure, be it arbitration, special case, or whatever it may be."79 The pragmatic attitude demonstrated here foreshadows the modern willingness to experiment with procedures of commercial dispute resolution.80

If it did not prove possible to standardize a dispute resolution procedure acceptable to nineteenth century commercial society perhaps the difficulty did not lie in the client but rather in the profession. As the writer in the Quarterly Review commented in discussing the Supreme Court of Judicature Act, 1873:

> There are principles of procedure no less than principles of law; and no one, perhaps, is more in danger of losing sight of sound methods of investigating truth than the lawyer, who has spent his life in investigating it by one - and that

79 W.F. Finlason, "Illustrations of Our Judicial System, Part III," Law Magazine n.s., 2 (1873): 336. This approach might be aphorized as "ask not what you must do for your procedure, but rather what your procedure must do for you."

80 "The lesson from the successful use of hybrid dispute resolution techniques (footnote omitted) suggests that creativity and innovation will often produce better results than rigid adherence to a prescribed method of dispute resolution. It also suggests that a better understanding of the issues in dispute will help the parties choose the appropriate process for the resolution of those issues." D. Paul Emond, "Alternative Dispute Resolution: A Conceptual Overview," in Commercial Dispute Resolution: Alternatives to Litigation, ed. D. Paul Emond (Aurora, Ont.: Canada Law Book, 1989), 23.
perhaps a very defective - method. 81

The author went on to propose what he believed to be the maxims of a procedure designed to ensure that an emphasis on professional skill did not overwhelm the "investigation of truth:" early disclosure of the crux of the dispute, statements of facts of both parties in "plain concise English, unfettered by any technical rules," issues of fact to be agreed upon by the parties or settled by the court, the court to determine whether issues of fact to be tried by a judge and jury or judge alone, questions of fact to be tried by oral testimony or affidavits as the court may direct, legal issues to be determined by a single judge at first instance, subject to appeal to a multi-judge court, and, finally, prohibition of delegation of judicial duties to any inferior officer. 82

This list displays the working of a healthy scepticism of the technicalities and "web of mystery," often spun by lawyers around the administration of the law.

The nineteenth century saw the new capitalists, as consumers of legal services, making their preferences felt, - for binding dispute resolution that was quick, close to home, non-

82 Id., 235 passim.
technical (in legal matters), expert, and inexpensive. Other alternatives to better courts such as arbitration were often ineffective due to the revocability of a submission to arbitration at common law (until the decision of the House of Lords in *Scott v. Avery*\(^3\)). It was also found that parties did not often invoke the optional unlimited pecuniary jurisdiction conferred on the new County Courts which required consent prior to action.\(^4\)

\(^3\) (1856) 5 H.L. 811. This decision, in which Lord Brougham concurred, rejected the argument that to compel a party to finish an arbitration which had been contracted for before taking the matter to court was contrary to public policy. The *Arbitration Act* of 1889 (52 & 53 Vict. c. 49) was the next major step taken in support of private arbitrations and it became the model for much twentieth century legislation.

\(^4\) A conference was convened in 1853 by the Liverpool Chamber of Commerce "to consider the state of Mercantile Law, and the Judicial System of the United Kingdom," at which the following resolution, *inter alia*, was proposed:

4. That the leading grievances under which the trading classes, especially in the provinces, suffer, are mainly connected with the administration of law, and may be classed under the following heads:

1. The want of a summary, economical, and authoritative mode of settling disputes, arising out of the absence of permanent local tribunals, possessing complete jurisdiction and compulsory powers, to which access can always and immediately be had.

2. The irritating, because unnecessary, expenditure attaching to the present system exemplified in the necessity of conducting ai\^ preliminary proceedings through the Metropolitan Courts, the retention of technical pleadings and forms of action, and the rules of etiquette among professional gentlemen in respect of fees and the employment of counsel.

3. The withholding of equitable jurisdiction from
The lawyers saw the danger posed to their incomes by the example of cheap law in the County Courts:

If the bulk of the consumers of any article is displeased or dissatisfied with the article supplied, they will endeavour to avoid the using it, and resort to it as a matter of necessity. Is the state of the law in this country such as to induce clients to employ the professional men who practise it? That is the question. Law is not agreeable in any shape; yet it is a necessary evil....It is, therefore, the interest of the lawyer - to say nothing of his duty - to render the resort to law reasonably cheap and speedy, for otherwise the client will submit to wrong as to the lesser evil;\textsuperscript{85}

The emergency, it was concluded, was created by a substantial transfer of commercial disputes to the new courts,\textsuperscript{86} and led the ordinary Law Courts, thereby disqualifying them from administering entire justice, and not unfrequently driving into another and distant Court.

4. The want of commercial (men as) as Judges, in cases where mercantile usage and experience is concerned.

In commenting favourably on this initiative the Law Review remarked, "the union of the commercial classes with the law-reforming portion of the legal profession, assures not only the success, but the practical character of the movement. "Postscript. The Assimilation and Reform of the Commercial Law," Law Review 18 (1853-1854): 209.


\textsuperscript{86} "The transfer of no inconsiderable portion of mercantile suits from the Superior to the County Courts, will necessitate a still further attention to those points of commercial law and practice which are now become at least of doubly frequent occurrence, and on which information and comment are proportionately requisite." "To Our Readers," Law
to the appointment of another commission to examine the process in the superior courts. What resulted from this renewed professional soul searching was the **Common Law Procedure Acts** of 1852 and 1854, legislation which imported many of the procedural innovations made in the County Courts into the practice at Westminster Hall.\(^87\) Lawyers breathed, if not a sigh of relief, at least one of respite:

The Common Law Procedure Act has brought additional business to the courts of Westminster Hall, the number of writs issued has increased, and the public are balancing the advantages of an effective, comparatively inexpensive, and moderately quick decision in the old courts, against the expense and difficulty of procuring payment after judgment obtained in the County Courts.\(^88\)

One of the most frequent complaints concerning the County Courts was the imposition of substantial fees payable to the court - these were attacked by reformers as unjustifiable "law taxes" (Bentham's phrase). It is reported that in 1851 fees in the amount of 272,000\(\text{\pounds}\) were levied when the sums recovered by judgments were 815,000\(\text{\pounds}\) and the amounts paid


into court without judgment stood at 100,000l. It appears that these fees exceeded by far those payable in the superior courts, and it is difficult to avoid the conclusion that this was another way of protecting the traditional litigation forums (and of raising revenue from the commercial classes).

The County Courts, constituted with limited pecuniary jurisdiction, did not address the concerns of merchants with larger claims, for whom speedy, local justice largely remained a dream. After a number of years of operation, a parliamentary commission was appointed to investigate the working of the new system, before which a Liverpool County Court judge testified "I am quite certain, at present that a great number of actions, principally connected with mercantile


90 Lord Brougham contrasted fees collected of 270,000l. in the County Courts and 50,000l. in the superior. "Extract of Letter from Lord Brougham to Lord Denman," *Law Review* 21 (1854-1855): 76.

affairs, are not tried solely because there is no tribunal to which ready access can be had."

The judge illustrated his criticism with the case of an action accruing against a ship captain, who may leave port, along with all the witnesses, before he can be brought to trial on the superior court circuit. As a remedy, the editors of the Law Review proposed extending "materially" the monetary jurisdiction of the local tribunals and establishing an ex parte procedure in cases of "peculiar urgency."

It was partly as a result of the inadequacy of the County Courts to meet their needs that the commercial class of the great towns looked to the establishment of tribunals of commerce. The response of the legal profession to this demand, as previously noted, was not enthusiastic, and the energies of reforming lawyers were directed more to advocating improvements (largely unsuccessful), to the local tribunals. By 1871 a commentator would be moved to

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94 See the report of the recommendations of the Social Science Association under the title of "The Fallacy of Local Tribunals," Law Journal 3 (1868): 633-635; and the report of a paper read before the same Association at Leeds, in 1871, quoted in "Local Courts, and the Bounds of their
describe justice as administered in the County Courts as "slip-shod rough-and-ready," 95 (owing to the exclusion there of the Bar). He went on to state:

The result of our present judicial system is, that all classes, and more particularly commercial men, prefer almost any course to that of open litigation;...Yet differences will arise every day, and to escape the horrors of legal proceedings, private references, any rough-and-ready mode is resorted to, to settle the questions in dispute....We have availed ourselves of the opportunity on many occasions to take the opinion of leading men in the City on these questions; their reply is unanimous. 'We do not know,' say these men, 'where the remedy may be found, all we know is the evil exists; practically the courts of this country afford no relief to the trader.' 96

the lawyers were unenthusiastic at best, and hostile at their worst to "rough-and-ready" solutions proposed by the commercial classes, the latter were accordingly further impelled to attempt their own experiments in dispute resolution. These alternatives took several forms. In some cases it proved possible to agree on the submission of large disputes to the local courts. Thus, a County Court judge reported in 1852:

It is well known that suitors have, in many cases, submitted disputes involving affairs of magnitude

\footnote{95}{"The Reform of the Procedure of the English Courts," \textit{Law Magazine} 3rd. ser., 31 (1871): 85.}

\footnote{96}{Ibid.}
to the decision of a Judge of the County Courts, by means of a kind of 'amicable suit,' nominally instituted for a small amount, but brought to trial on an understanding (binding in honour), that the decision was to govern the rights involved. 97

Cases of "considerable importance, counsel being engaged in them, and intricate points of law mooted" were numbered among those tried at Birmingham, for instance. 98

Enterprising local authorities also responded to the demand of commercial society for the efficient administration of justice. Ancient local courts of record, of unlimited pecuniary jurisdiction, had existed in London and many towns and were looked to in the nineteenth century as particularly fitted for commercial disputes. It was reported that "the Tolsey Court at Bristol has always been associated with the commercial prosperity of the city," 99 and that in the Passage Court at Liverpool many of the cases were "of great importance." 100 Perhaps the most successful of these local institutions was the Mayor's Court in London. In the middle


100 Ibid.
of the century it opened its doors to all legal practitioners (previously having been limited to a select few) and its practical advantages quickly attracted attention, being described as "simpler procedure, lower fees, less costs, and greater rapidity in obtaining trial of causes." ¹⁰¹

Despite the challenges to their traditional role and practice, the continued opposition by the legal profession generally to enlargement of the County Courts, to the introduction of tribunals controlled by commercial interests themselves, and to attempts to provide mechanisms for settlement prior to litigation betrays the true attitude of the majority of Victorian lawyers:

It is idle to suppose that the public will be content with any but the best law, if it can be procured without ruinous expense. Considerable expense must, and always will be incurred in the prosecution of any contested right. It is a mistake to apply the favourite principle of the day, the procurement of everything at the cheapest possible rate, to the administration of justice. A reasonable diminution of cost is what suitors are clearly entitled to, but they will sooner or later discover that, beyond this point, any cutting down of expense will be productive of positive loss. ¹⁰²

It seems, therefore, that classical economics had a

¹⁰¹ "Amalgamation of the City Courts," Law Magazine n.s., 2 (1873): 14. The author of the article went on to note that the Judicature Commission proposed to abolish this court, thereby "[taking] away from business men in the City the only court they would use."

significant impact on the legal system of nineteenth century England. Not the least of its contributions was the introduction of the criterion of efficiency into legal affairs which encouraged the business community to seek certainty in dispute resolution at a reasonable cost. Through demands of the new, confident commercial interests the influence of political economy also had the effect of largely remaking the legal profession from an elite class in a traditional society into an economic grouping of suppliers in the market for legal services. If capitalists felt compelled to admit that law and lawyers were a necessary evil, lawyers in turn were forced to recognize that business people were, if not an evil, then at least a vulgar necessity.

Perhaps the most lasting legacy of the nineteenth century attempt to put the spirit of political economy into practice in legal institutions could be said to be the introduction of the criteria of formal or syllogistic logic into the law. Legal rationality became synonymous with conscious construction of legal doctrine and procedures to assist the orderly development of capitalist society. The foremost chronicler of this development, Max Weber, appeared in the early years of the twentieth century and his analysis is worthy of note.
Logic, Rationality and Law in the Thought of Max Weber

Max Weber was concerned to describe and explain what he took to be the unsurpassed rationality of western capitalist society in most of its institutions, but principally in the fields of law, economic organization and bureaucratic administration. For Weber, the codified law of modern European states, owing much to Roman civil law, was the apotheosis of an ideal of rationality which he termed "formal:"

... the formal qualities of the law emerge as follows: arising in primitive legal procedure from a combination of magically conditioned formalism and irrationality conditioned by revelation, they proceed to increasingly specialized judicial and logical rationality and systematization, passing through a stage of theocratically or patrimonially conditioned substantive and informal expediency. Finally they assume, at least from an external viewpoint, an increasingly logical sublimation and deductive rigor and develop an increasingly rational technique in procedure.103

Weber, like the Victorian law reformers, was devoted to the "objective" values of science which he saw as residing in a conceptual framework, application of logic, and the

experimental method. It is therefore not surprising that he conceived of the law in similar positivistic terms as the utilitarians:

Consider jurisprudence. It establishes what is valid according to the rules of juristic thought, which is partly bound by logically compelling and partly by conventionally given schemata. Juridical thought holds when certain legal rules and certain methods of interpretation are recognized as binding.  

As is demonstrated in his method of constructing ideal types of social interactions and systems against which hypotheses of the rationalization of society were to be tested, Weber clearly believed that a conceptual approach to law was to be preferred. For him the principal elements of such a method are a striving for freedom from internal contradiction, generality, and systematization. Accordingly, the ideal

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105 Id., 144.


107 Rheinstein, Max Weber on Law, 11.

108 Id., 62.
type of legal reasoning was described by Weber as resting on the following postulates:

...first, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal propositions, or must, at least, be treated as if it were such a gapless system; (footnote omitted) fourth, that whatever cannot be 'construed' legally in rational terms is also legally irrelevant; fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof.\(^{109}\)

Weber saw the unique value in law which was logically deduced from basic concepts as being the calculable predictability of the results of decision making and the coherence of legal concepts applied across broad areas of human action. This consequence of the "formal" qualities of modern law was particularly valuable in capitalist western economies with a need for confident reliance on a legal system under which fortunes were hazarded in commerce: "The universal predominance of the market consociation requires on the one hand a legal system the functioning of which is calculable in accordance with rational rules."\(^{110}\) In this vein Weber could, with only a touch of humour, describe the judicial

\(^{109}\) Id., 64.

\(^{110}\) Id., 40.
process as potentially automated:

The conception of the modern judge as an automaton into which the files and the costs are thrown in order that it may spill forth the verdict at the bottom along with the reasons, read mechanically from codified paragraphs - this conception is angrily rejected, perhaps because a certain approximation to this type is implied by a consistent bureaucratization of justice. 111

Legal rationality viewed in terms of its logic results in a powerful conceptual system in which theoretically any possible issue may be analyzed and resolved, a "gapless law." Such an approach acknowledges no practical limits to syllogistic reason to the extent that the world must be entirely recast in the forms of basic legal concepts and their deduced progeny. What cannot be so derived simply does not exist. In speaking of the development of modern European law from Roman sources Weber could say:

Now there was created what the Roman jurists had so obviously lacked, viz., the purely systematic categories, such as 'legal transaction' or 'declaration of intention,' (footnote omitted) for which ancient jurisprudence did not even have names. Above all, the proposition that what the jurist cannot conceive has no legal existence now acquired practical significance. 112

Such devotion to the demands of logic, however, has its costs, as Weber recognized. Despite his praise he retained an

112 Rheinstein, Max Weber on Law, 277.
ambivalent attitude to the processes of rationalization which he saw in modern capitalism, bureaucracy, and law. The inescapable price to be paid for "calculability" is a suppression of creativity - the ability to synthesize new legal forms and relationships. As Weber acknowledged, his rational society leads to "mechanized petrification" and "specialists without spirit, sensualists without heart."113 The flaws in a conception of the law in which logic is the vital force were, Weber thought, also evident to the commercial interests which generally stood to gain the most from formally rational law. Capitalists were at the mercy of the legal elites - lawyers and judges whose logic at times ignores or defies reality:

The force of the purely logical legal doctrines let loose, and a legal practice dominated by it, can considerably reduce the role played by considerations of practical needs in the formation of the law. It took some effort, for instance, to prevent the incorporation into the German Civil Code of the principle that a lease is terminated by the sale of the land.114

Weber's conception of legal rationality, while a powerful one, thus seems incomplete in application to the practical tasks of legal institutions pressed by demands for new syntheses of past forms. Weber concedes a requirement for the invention of

114 Rheinstein, Max Weber on Law, 205.
now legal techniques but considers such activity to fall within the province of the "law prophet" who does not act formally rationally. The deficit of "formal" rationality in the law can be stated no better than in Weber's own words:

However, both as a result of the abstract total structure of the legal system and the axiomatic nature of many provisions, legal thinking has not been stimulated to a truly constructive elaboration of legal institutions in their pragmatic interrelations.\textsuperscript{115}

Although flawed, the conception of logical formal rationality in the law is clearly a strong one and appeals to our basic desires for predictable order and logical consistency of thought. There will always be a place for logical method in any paradigm of legal decision making.

\textsuperscript{115} Id., 286.
CHAPTER III: THE MARGINALIST AND REALIST REVOLUTIONS:
SUBJECTIVISM IN ECONOMICS AND LAW

Remember that pugnacity, vindictiveness, ill temper, impatience, carelessness, short-sightedness, arrogance, eagerness to take undue advantage and insistence on unethical principles are all provocative of litigation. Even if these instincts are inherent in human nature they may be controlled by an impartial consideration of the facts and a proper exercise of the reasoning powers. N.Y. State Chamber of Commerce, Rules for the Prevention of Unnecessary Litigation, (1916)

This exhortation to the most powerful group of business people in the America of their day shows a new awareness of the relationship between business disputes and legal institutions. A new emphasis on the individual element in business decision making, and the force of personal emotions and biases, proclaims a departure from unreflective reliance on mechanistic, impartial economic laws which was the heritage of Adam Smith. And, as before, a new attitude on the part of commercial men to the business world was accompanied by a change in their demands upon legal institutions for dispute resolution. By emphasizing "impartial consideration of the facts" and "proper exercise of the reasoning powers" by business people themselves, this approach encouraged the commercial community to believe that disputes could be resolved without costly and time consuming examination of legal principle in traditional adjudication. It was, in
effect, a prescription for negotiation and informal arbitration of business disputes.

Insight into the nature of this change in attitude among business persons may be gained through the conceptualization of Wilhelm Aubert, who speaks of the relationship between "dyadic" and "triadic" situations and the alternative techniques of negotiation and adjudication. For Aubert, the dyad offers the challenge and the opportunity for competing interests to adjust themselves to a new *modus vivendi* while the triad, which imports a third party into the conflict, seems to lead to a normative-deductive method of problem solving.

If, therefore, the market is conceived of as a logical mechanism which dictates prices and quantities, with no regard for individual decision making, it may also be seen as the "third party" in a triad including buyer and seller. Thus, in Aubert's words, "a market price may solve conflicts in a way that is reminiscent of law,..."¹ For those conflicts which the market cannot solve it becomes reasonable for commercial interests to look to the mechanism of the law to act in

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similar fashion:

The needs of the parties, their wishes for the future, cease to be relevant to the solution, or at least they become less significant. Whether the solution harmonizes two contrasting sets of needs and plans for the future is no longer a primary consideration. The problem has become objective in the sense that a solution can be reached by an outsider who knows the rules of evidence and is able to perform logical manipulations within a normative structure. By comparing the available facts with the norms, he can reach a verdict.²

If, however, the conflicting parties are convinced of their own ability to settle matters in a dyadic environment, they will recognize only a limited role for third parties. In Aubert's terminology, such a dispute remains one of conflict of interests and is not transformed into a normative debate, with the result that: "As long as an interest conflict remains pure, no outsider, no third person can arrive at a conclusion on his own. A solution entails the adjustment of needs on both sides."³ Late in the nineteenth century such a point of view became pervasive in the business community and had significant repercussions on its relationships with the courts.

What was the genesis of this new spirit which recognized the value of compromise and minimized the importance of applying

² Id., 101-102.
³ Id., 102.
legal concepts with rigorous logic? As with the emergence of classical political economy, with its effects on the attitudes of the commercial classes of the nineteenth century, this new spirit of self-determination on the part of capitalists in conflict may be traced to a revolution in economic thought. In the later years of the Victorian era a new approach to economic theory began to infuse business thought, and it became the dominant paradigm of capitalist economics until well into the twentieth century. This intellectual revolution may be examined in the work of one of its most prominent leaders in the common law world, Alfred Marshall.

Neo-classical Economics - Alfred Marshall

Whereas Adam Smith ranks as one of the great simplifiers of previously diffuse economic doctrine, it may truly be said that Alfred Marshall did not shrink from, and indeed embraced complexity in the analysis of business behaviour. In acknowledging his debt to Antoine Cournot, a French economist, Marshall stated:

He [Cournot] taught that it is necessary to face the difficulty of regarding the various elements of an economic problem, - not as determining one another in a chain of causation, A determining B, B determining C, and so on - but as all mutually determining one another. Nature's action is complex: and nothing is gained in the long run by pretending that it is simple, and trying to
describe it in a series of elementary propositions.⁴

A Cambridge don who gave his inaugural lecture in 1885 (the year of the founding of the American Economic Association), Marshall was well trained in mathematics and dedicated himself to the improvement of economics as a science using that discipline as an important tool. Yet he was determined to maintain a close connection with the business community and consigned the detailed mathematical treatments in his opus Principles of Economics (first published in 1890), to notes and appendices, presumably to attract the lay reader.

It is clear that Marshall's economic world was much more complex and indeterminate than Smith's and therefore the resolution of a problem could not be viewed as a merely mechanical process:

Even among the most careful thinkers there will always remain differences of opinion as to the exact places in which some at least of the lines of definition should be drawn. The questions at issue must in general be solved by judgments as to the practical convenience of different courses; and, such judgments cannot always be established or overthrown by scientific reasoning: there must remain a margin of debatable ground. But there is no such margin in the analysis itself: if two people differ with regard to that, they cannot both be right. And the progress of the science may be expected gradually to establish this analysis on an

The clues to Marshall's response to the challenge of defining and solving multivariate economic problems are contained in this passage. Firstly, he advocated a system of analysis which could largely be quantified and yield mathematical solutions; secondly, he placed great reliance on the abilities of business people (in their role as managers of capital) to use their practical wisdom to arrive at efficient arrangements.

Marshall's economic system was based on three fundamental conceptions: 1. the method of partial analysis of segregated industries, treating all external influences as constant; 2. the principle of marginal utility; and, 3. the principle of substitution.

Partial analysis entails the examination of a sector of an economy, or a particular commodity, while making broad assumptions about the surrounding economic environment. As Marshall explains:

The forces to be dealt with are however so numerous, that it is best to take a few at a time; and to work out a number of partial solutions as auxiliaries to our main study. Thus we begin by isolating the primary relations of supply, demand

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5 Id., 53.
and price in regard to a particular commodity. We reduce to inaction all other forces by the phrase "other things being equal": we do not suppose that they are inert, but for the time we ignore their activity. This scientific device is a great deal older than science: it is the method by which, consciously or unconsciously, sensible men have dealt from time immemorial with every difficult problem of ordinary life.\footnote{Id., xiv.}

Thus did the apparently innocuous phrase \textit{ceteris paribus} enter the mainstream of economic and business thought. No doubt Marshall was alive to the necessity of emphasizing the partial nature of problem solving upon this foundation and of never losing sight of the "main study;" but there is equally no doubt that many of his readers were not.

The second great feature of what has been termed "neo-classical" economic analysis is the principle of marginal utility. In contrast to the elegantly simplified theoretical approach of Adam Smith, who was content to allow the "law" of supply and demand to insensibly influence markets towards their natural long run levels of price and quantity, later nineteenth century economists such as Marshall took a more searching look at this process. They concluded that economic analysis must dissect the meaning of utility and thus arrive at a more subtle explanation of business behaviour. Whereas Smith's model had treated demand for factors of production and
commodities objectively, the new approach described it subjectively. Business decision making came to be seen as involving fine individual adjustments at the margin of the relative value of economic goods having regard to all alternate avenues of expenditure. Marshall formulates this idea as follows:

That part of the thing which he is only just induced to purchase may be called his marginal purchase, because he is on the margin of doubt whether it is worth his while to incur the outlay required to obtain it. And the utility of his marginal purchase may be called the marginal utility of the thing to him....
The marginal utility of a thing to anyone diminishes with every increase in the amount of it he already has (footnote omitted)....

There is however an implicit condition in this law which should be made clear. It is that we do not suppose time to be allowed for any alteration in the character or tastes of the man himself. 7

This approach to describing economic behaviour has been described as a "psychological" one 8 and may result in an increased emphasis on subjective business decision making with or without losing sight of Marshall's caveat as to the changeable nature of actual desires.

The final major element in the neo-classical system of

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7 Id., 93-94.

economic analysis is the concept of substitutability. No doubt influenced by the presence of a greater variety of products and processes of production than could be visualized in the initial stages of industrialization, economists such as Marshall emphasized the factor of choice among alternatives as central to economic problem solving. In Marshall's words:

In the modern world nearly all the means of production pass through the hands of employers and other business men, who specialize themselves in organizing the economic forces of the population. Each of them chooses in every case those factors of production which seem best for his purpose. And the sum of the prices which he pays for those factors which he uses is, as a rule, less than the sum of the prices which he would have to pay for any other set of factors which could be substituted for them: for, whenever it appears that this is not the case, he will, as a rule, set to work to substitute the less expensive arrangement or process (footnote omitted). 9

The principle of substitutability, it has been said, established bargaining as legitimate behaviour in economic relations after the long dominance of "automatic" market processes presupposed by classic economic analysis. 10 Taking this together with the high evaluation of the abilities of managerial capitalists made by Marshall and other neo-classical analysts, there appears a climate of thought conducive to the resolution of business disputes by the


10 Finkelstein and Thimm, Economists and Society, 173.
techniques of negotiation and compromise.

Marshall recognized that in a well developed industrial society, knowledge is power - and he therefore classed it as an important constituent of economic capital.\footnote{11} Furthermore, he saw that it was the managerial group who made the most of this power and were thus deserving of great respect:

Moreover those general faculties, which are characteristic of the modern business man, increase in importance as the scale of business increases. It is they which mark him out as a leader of men; and which enable him to go straight to the kernel of the practical problems with which he has to deal, to see almost instinctively the relative proportions of things, to conceive wise and far-reaching policies, and to carry them out calmly and resolutely (footnote omitted).\footnote{12}

The theoretical world of neo-classical economics is therefore predominantly one of microeconomic analysis, a study of the business behaviour of the units of the economy - firms and consumers. It embodies a vision of maximum economic satisfaction achieved by the "haggling and bargaining" of practically wise technocrats. This may be said to be the genesis of a view of the legal system as a \textit{market} in which justice is arrived at as a result of the balancing of competing marginal utilities. Twentieth century business

\footnotetext{11}{Marshall, \textit{Principles of Economics}, 138.}
\footnotetext{12}{Id., 606.}
managers found support in this approach for the conclusion that the courts could not be depended on to advance the pragmatic solutions which contributed to economic progress. The mathematical language in which neo-classical analysis could be cast contributed to its prestige but could not disguise the inherent limitations of the solutions which it offered, based as they were on severe limiting assumptions. Marshall himself recognized this: economics had nothing to say concerning the quality of manufactured goods,\(^ {13}\) fluctuation of time was always a complicating factor,\(^ {14}\) and no one possessed "perfect knowledge of the state of the market."\(^ {15}\) Nevertheless, Marshall's famous scissors composed of the blades of utility and cost of production, by which economic value was determined,\(^ {16}\) was considered by many to be preferable to the sword of justice for the resolution of business disputes. The history of commercial arbitration is the history of the economic scissors put to work on the fabric of the law.

Arbitration and the Law - The American Experience

\(^ {13}\) Id., 545.
\(^ {14}\) Id., 109.
\(^ {15}\) Id., 540.
\(^ {16}\) Id., 348.
The debate between business people and lawyers over the proper method of resolving business disputes which was begun in England in the nineteenth century has been continued in America in the twentieth, and has largely come to dominate the international discussion of alternatives for resolving such disputes. For much of the time this dispute over dispute resolution has revolved around the proper place of commercial arbitration in the settlement of business disputes. Prior to the enactment of the British legislation regulating arbitration which became the prototype for similar initiatives throughout the common law world,\(^{17}\) the American Bar Association went on record as supporting a model Bill to establish federal Courts of Arbitration, which would serve also as "courts of conciliation."\(^{18}\) The lawyers thought such courts might appeal to organized labour in their disputes with management, but that most litigants would prefer traditional civil procedure:

The uncertainties of arbitration are such that both suitors and lawyers generally prefer to trust to the ordinary course of law. This, though often slow, is generally sure, and the opportunities for review, while they are necessarily a cause of delay, often serve to correct what would otherwise

\(^{17}\) The Arbitration Act 52 & 53 Vict. 49, (1889).

be plain injustice.  

The draft Bill recommended by the ABA in 1886 allowed arbitrators to seek the guidance of the regular courts on matters of law and provided for subsequent "correction" of the award "to make it conform to the Constitution or laws of the United States." Legislation such as this does not seem to present much of a threat to the traditional system of civil justice, however it appears that nothing came of the Bill, and the subject of arbitration was not raised again in this prominent forum for over thirty years.

Arbitration, however, was not forgotten by the business community. Speaking before the Chicago Bar Association in 1916, Justice Louis Brandeis remarked:

Both business men and working-men have given further evidence of their distrust of the courts and of lawyers by their efforts to establish non-legal tribunals or commissions to exercise functions which are judicial (even where not legal) in their nature, and by their insistence that the commissions shall be manned with business and working-men instead of lawyers. And business men have been active in devising other means of escape from the domain of the courts, as is evidenced by the widespread tendency to arbitrate controversies

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through committees of business organizations.  

To Brandeis, and undoubtedly to his audience, this trend was quite wrong-headed. In his criticism of the move to avoid lawyers and judges, he articulated what would become one of the key issues facing the business community in its quest for self-governance in the twentieth century — the test of honesty:

The remedy so sought is not adequate, and may prove a mischievous one. What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task. And, indeed, the task of fitting the lawyer and the judge to perform adequately the functions of harmonizing law with life is a task far easier of accomplishment than that of endowing men, who lack legal training, with the necessary qualifications.

The training of the practicing lawyer is that best adapted to develop men not only for the exercise of strictly judicial functions, but also for the exercise of administrative functions, quasi-judicial in character. It breeds a certain virile, compelling quality, which tends to make the possessor proof against the influence of either fear or favor. It is this quality to which the prevailing high standard of honesty among our judges is due.

Yet the eminent judge was not so blind as to see no faults in the legal profession. For their task of "harmonizing law with

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22 Ibid.
life" lawyers had something to learn, namely "the necessary knowledge of economic and social science" without which the lawyer "is very apt to become a public enemy." Brandeis thus also touched upon the other significant theme running through the modern debate over the claim of business to rule itself - possession of the necessary knowledge, and "wisdom" to judge rightly.

The conflicting points of view of the legal and business communities were made explicit several years after Brandeis' address at the 1923 meeting of the Academy of Political Science in New York City. The subject under consideration was "Law and Justice" and the question was posed whether commercial arbitration might contribute to reducing delays in the legal system. The affirmative speaker was convinced that the business person, with special knowledge of the subject under dispute, was in a position to render "absolute justice:")

There are after all only three elements necessary in any judge, or juror, or arbitrator - integrity, intelligence and knowledge of the issue. And knowledge is not the least important because I don't care how honest a man is, how intelligent he is, if he hasn't knowledge of the issue, he can not pass upon it justly or intelligently. 24


Harlan F. Stone, then Dean of Columbia University Law School, and shortly to become a Justice of the United States Supreme Court, was not convinced by this argument:

Arbitrators are not always wise and just; they usually have less experience and less skill than judges in the art of investigating controversies and ascertaining the truth; they are certainly less subject to control and review than courts when the judges of courts do misconduct themselves.

To say that such cases [involving complicated facts or difficult points of law] can be or will be better dealt with by untrained arbitrators who have had no experience in the examination of witnesses and in analyzing and sifting facts and who are not subject to any kind of judicial control or review, is to ignore the teachings of experience and to deny the value in the field of litigation at least of training, experience and expert knowledge.\(^{25}\)

The gauntlet was thrown down by legal institutions in England as well. Perhaps as a result of the partial codification of the law of arbitration by the British Act of 1889, it is reported that this form of dispute resolution flourished in London in the early years of the twentieth century.\(^{26}\) The British statute, like the one proposed by the American Bar Association in 1886, reserves the right of the court to intervene on a point of law if requested by a party to the


arbitration. In 1922 the English Court of Appeal was faced with the issue whether to uphold a contractual provision that all questions of fact and law were to be decided exclusively by the arbitrators. The court unanimously decided that this constituted an "ouster of the jurisdiction" of the court, was contrary to public policy, and therefore void.\textsuperscript{27} A final and binding decision by such a tribunal, where "distinctly unusual" interpretations of commercial law might be urged would not be permitted:

Among commercial men what are commonly called commercial arbitrations are undoubtedly and deservedly popular. That they will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association. To release real and effective control over commercial arbitration is to allow the arbitrator, or the Arbitration Tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law.\textsuperscript{25}

The court went on to observe that nevertheless, pursuant to the contract of the parties, an arbitral award remained a condition precedent to recovery at law and therefore the

\textsuperscript{27} Czarnikow v. Roth, Schmidt and Company [1922] 2 K.B. 478 (C.A.).

\textsuperscript{25} Id., 484.
disputants would be required to attend before the court and the arbitrators before final resolution of the matter.

Norms of the law were not, in the eyes of the British court, to be supplanted by the views of business people. As a contemporary resolution of the American Bar Association declared:

That the Association adopt a resolution as a fundamental proposition that the law merchant should be brought into harmony with the actual usages, customs and practices of business, provided the same are (1) ethical and (2) desirable in the public interest. 29

Ethics and the public interest, of course, were to be determined by legal institutions. Any other method of decision would be considered as "outside the law." The thrust of this criticism was that in the absence of a compelling, autonomous, theory of business decision-making which might prove acceptable to the public, the business culture lacked the perceived competency to finally resolve their own disputes. The development of "business science" in America may be seen in part as an attempt to supply such a theoretical framework which would justify a claim to self-governance by the business community.

Business people also recognized the other challenge to their authority, the accusation of moral deficiency:

...there is a great temptation to fall into a cynical and unsocial attitude toward the business man. It is easy to find apparent foundation for the charges that the business man can find the means of defending himself when guilty of illegal acts, that a long purse is sufficient guarantee of immunity from either prosecution or punishment, and that sufficiently astute counsel can commonly be discovered to enable the business man to evade the spirit of the law while complying with the letter of the statute. The worst critics commonly admit that he keeps "within the law." Their charge is really that he is insincere as well as being actually guilty of wrong-doing.  

Such a description of the predicament of the business community led the commentator to question whether "modification of the business practice" or "modification of the laws" was more desirable in the public interest, with an implication that lawyers themselves were not always to be trusted with the custody of the public interest. His conclusion was that the stigma of being just inside the law could be lifted by professionalising the practice of business: "General observance of a professional standard would ultimately exert a profound influence on public opinion."

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31 Id., 265.

32 Id., 267.
Professionalism in business was to become an ongoing subject of serious reflection in the American business community.

Mr. Cohen and General MacChesney - Arbitration and its Opponents in the United States

Julius Henry Cohen was a prominent New York City lawyer and a strong proponent of commercial arbitration. He wrote a book on the history of arbitration and its relation to the law with the avowed attempt to convince the courts and the public that contracts to arbitrate should be made enforceable and that business people could be trusted to resolve their own disputes.\(^{33}\) Cohen became an influential member of the American Bar Association Committee on Commerce, Trade and Commercial Law, which, in 1922 recommended draft legislation to enact a federal law legitimizing arbitration in interstate disputes and other areas subject to federal jurisdiction. This proposal differed from the English model in that it provided for the arbitral award to be final both on issues of fact and law.\(^{34}\) At the same time the committee proposed draft legislation in the same terms to be enacted by all


states. The proposal for a federal law was accepted at an annual meeting of the Association in 1923 and the members of the committee undertook strenuous efforts to have it enacted by Congress.

In the opinion of the ABA committee, arbitration of commercial disputes had much to recommend it. Chief among the advantages were said to be the following: the standards of commercial ethics would be raised, litigation would be reduced, business disputes could be settled expeditiously and economically, and congestion in the courts would be eased.\textsuperscript{35} This legislation, with minor changes, was enacted\textsuperscript{36} and remains in all material respects United States federal law. The companion legislation, in the form of a draft state law, was, however referred by the ABA to the Commissioners on Uniform State Laws who held annual meetings just prior to those of the bar association.

After two years deliberation, in 1924, the Uniformity Commissioners, represented by General MacChesney, attempted to report their disagreement with the form of the federal law to


the ABA at its annual meeting. They were stopped cold. Mr. Cohen, reminding the gathering of a rule requiring the publication of such matters to the members at least 30 days in advance of the meeting, raised the point of order that this had not been done and the report could not be received. No matter that it was known by all that the Commissioners themselves had just finished their annual meeting at which the matter was considered, and that the rule had never been applied to them in the past. The point of order was upheld and the report set over for a year (by which time the federal law had been passed). We are thus treated to the spectacle of the champion of informal procedure relying on the letter of procedural rules to avoid a possible compromise of his plans.

Almost unbelievably, the same point was made in the following year, when the Commissioners tabled an identical report. This time, in spite of the rule, their recommendation was approved, but only after a standing count was demanded by Cohen.\footnote{Proceedings, Report of the American Bar Association 50 (1925): 161-162.} And so the Association committed itself to one form of arbitration federally and quite a different one for intrastate disputes, for the uniform state law was much more like the English Arbitration Act and preserved the jurisdiction of the
courts on points of law. The reasoning of the Commissioners in support of their position is worthy of note.

"The Committee [of the Commissioners] were unanimous in the belief that it was unwise to recommend to this country the passage of any act which made it possible for a man to practically sign away his rights."\(^{38}\) Such was the conclusion with which the representatives of 30 states agreed, (Massachusetts, New Jersey, New York, Pennsylvania, and Wisconsin dissented). Prominent among the concerns expressed over "ouusting the jurisdiction of the courts" were these: the legislation was not restricted to disputes between businesses and provision for arbitration might be imported into many contracts of adhesion for "all the great commodities of life" without the express knowledge of the consumer; arbitrators would be "uneducated in law, unversed in the traditions of the profession, unfamiliar with the doctrines that go into the law;"\(^{39}\) the tendency would be to centralize the resolution of disputes by providing for arbitrations to be held in the great commercial centres; and arbitration should only be used "where

\(^{38}\) Handbook of the National Conference of Commissioners on Uniform State Laws 1925: 63.

\(^{39}\) Id., 78.
the parties are dealing on a parity." The conclusion may be drawn that if the state legislation proposed by the ABA (which had already been enacted in similar form in New York and New Jersey) had truly restricted itself to business disputes the Uniformity Commissioners may have approved it. Yet they might have come to regret even this concession. One of the proponents of an unrestricted jurisdiction for arbitrators was a state commissioner from Massachusetts who reported to his colleagues the experience of the motion picture industry in America as related by the head of its trade organization:

He said that in his industry the last two years they had settled something over two or three thousand cases by arbitration entirely to the satisfaction of all the parties and without any delay or expense. That was a good piece of business, showing that the idea of arbitration as a means of settling disputes is growing.

It appears that it was a "good piece of business" indeed but only for some of the parties concerned: in 1929 the United States government filed a suit against movie distributors and their industry associations alleging:

...that the so-called arbitration system in the motion picture industry primarily is a system for the collection under duress or threat of duress of debts due to distributors from exhibitors...and

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41 Handbook of the National Conference, 66-67.
that the system departs widely from the usual principles of commercial arbitration in that the procedure and principles of law requisite to the decision are prescribed and the enforcement of the decision is controlled by the dominant factor in the industry, the distributors.\footnote{42}

This suit was successful at the trial level and the judge declared that the contract containing the contested arbitration clause was illegal, "both at common law and under the Sherman [antitrust] Act."\footnote{43} Robert Bonn, in his later study of arbitration in the textile industry, also reached the conclusion that the system functioned as a collection device with the outcomes usually favouring one sector of the trade.\footnote{44}

Despite such setbacks, arbitration has continued as a strong alternative method of resolving business disputes in the United States and many other countries. Since its founding in 1926, the American Arbitration Association has continued to encourage and facilitate this alternative to litigation.\footnote{45}


\footnote{43} Id., 656.

\footnote{44} See Robert L. Bonn, Commercial Arbitration: A Study in the Regulation of Interorganizational Conflict (Ann Arbor, Mich.: University Microfilms, 1971).

recent years, another organization, The Center for Public Resources, composed of many larger American corporations has also promoted non-administered arbitration of business disputes.\textsuperscript{46}

"The Carthaginian Creed"

Just as legal institutions have faced intense criticism in this century arising out of a new appreciation of the personal elements in legal decision making, the ongoing issue of fairness on the part of business people seeking self-governance has been crucial for the legitimacy of their claim. It should also be obvious that for business disputes to be effectively resolved by business people the participants themselves must have confidence in the fairness of the process and the tribunal.

In 1961 the \textit{Harvard Business Review} published an article entitled "How Ethical Are Businessmen?" which described the results of a survey sent to 5,000 of its readers, of whom 1,700 (34\%) responded. According to the reporter, the primary intent of the poll was to find out whether modern American

business executives still adhered to the creed of conduct which the ancient historian Polybius had ascribed to Carthage: "At Carthage, nothing which results in profit is regarded as disgraceful." The results were troubling: asked about the "average" executive's behaviour (in order to more accurately measure reality) large numbers responded that questionable practices were to be expected (from others); taking away those who "did not know," "four out of five executives giving an opinion affirm the presence in their industry of practices which are generally accepted and are also unethical!" In recommending that formal codes of ethics for business be drawn up, the study concluded on an optimistic note, stating that a desire for change was apparent and would come from "courageous top-management."

This survey is but one example of the periodic soul-searching of American executives over the place of ethics in business. From the beginning, the question of the honesty and fairness of the business person has been tied to the issue of professionalism in business management. In 1914 Justice Louis Brandeis published a book in support of the idea of the

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48 "How Ethical Are Businessmen?" 160.
professionalization of business in which he defined the criteria of professionalism:

...first, the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill; second, an occupation which is pursued largely for others and not merely for one's self; third, the amount of financial return is not the accepted measure of success. 49

Writing in the Harvard Business Review a few years later, a commentator remarked:

...what would have been regarded a generation or two ago as mere business practice is today condemned. The standards set up for business have, however, first been set up by business men themselves....Popular misunderstanding probably will continue until business men have realized and acknowledged that modern conditions are making business a recognized profession. General observance of a professional standard would ultimately exert a profound influence on public opinion. 50

A concern for the link between ethics and professionalism in business has continued throughout the twentieth century: "All professionalization, however, implies increasing obligations and competence in the complex disentanglement of right from wrong; the problem of telling one from the other carries with


it no release from responsibility."  

Several schools of thought can be seen in the ongoing debate within the business community over the role of ethics in commercial matters. One, placing its faith in the Christian tradition in our society, sees ethics in business as the corollary of a virtuous individual character, and the role of the executive as that of a steward of capital to be employed in the public interest:

Especially during the past quarter-century has business come to display a marked sense of public responsibility, a sense of stewardship, which is in part a consequence of the development of professional management but more fundamentally a reflection of the pervasive influence of Christian ethics.  

Another approach frankly adopts the "Carthaginian creed" as being in the public interest. For these observers, business is not a profession, cannot be a profession, and "should not attempt to 'pass' as a profession." In the eyes of modern "Carthaginians," the promises of capitalist economics are all the justification the business world needs for its activities:

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The dualistic principle must be accepted wholeheartedly in relation to economic organization if the kind of civilization we call free is to exist. Business must be separated from 'charity,' meaning all personal considerations. The principle of business-is-business is on a par with justice-is-blind, though both must sometimes be seasoned with mercy. Moral obligations to persons in consequences of special relationships is the general principle of feudalism and is anachronistic and disruptive in a commercial or enterprise economy.54

Supporters of this approach to problems of ethics in business see an executive as one who is able to compromise and withhold divulging all of the truth he sees,55 and who rests comfortably in the thought that business has the character of a poker game with its own special ethos.56 A hostile reaction was elicited when an article analogizing business and poker was published in the Harvard Business Review and one reader was moved to respond as follows:

If the players in Mr. Carr's poker game shoot it out among themselves and thereby endanger the lives of the people living next door, someone is going to


call the police and break up the game for good. 57

To this criticism the author responded that he could not agree more, and that business should certainly avoid practices which invited reprisals by the law. 58 One is nevertheless left wondering what procedure could be agreed upon for resolving disputes among the card sharks other than brute economic force. The "Carthaginian creed," it appears remains alive today: "conscience" has recently been defined in a business publication as "the inner voice that tells us someone may be looking." 59

The third of the schools of thought concerning ethics in business is of the belief that strict ethical practices are warranted by considerations of "enlightened self-interest" since they lead to long-term commercial success:

...the law and the policeman will never create high professional standards. This is a task too big for the codifier. Fortunately men are proud of the institution they create or control. Trained and far-sighted self-interest will dictate to any such man who understands the problem that the established business which desires long-time


58 Id., 170.

success shall act in socially sound ways.\textsuperscript{60}

As a result of appealing to the long term vision of the business manager it was supposed that the larger corporations, with a more "institutional" attitude would be the natural leaders in ethical practices:

The big national corporation in its natural development inevitably tends to higher ethical standards, to more of a feeling of trusteeship, for the community and for the employee, as well as for the security holder.\ldots Moreover the big corporation generally emphasizes stability and permanence, rather than immediate profits, with the result that its policies are considered with reference to longer time elements, thus bringing in more factors of social significance.\textsuperscript{61}

The survey of business executives in 1961 found that 99\% believed that "sound ethics is good business in the long run,"\textsuperscript{62} and this result was duplicated when a similar survey was conducted for comparison in 1977.\textsuperscript{63}

Several new looks at cooperation and altruism in business have

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\textsuperscript{62} Baumhart, "How Ethical Are Businessmen?" 10.

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been taken recently and it is too early to judge their effect on management practice and thought. Without denying the essential basis of self-interest, some recent observers have attempted to explain through economic analysis market behaviour which appears to be the result of standards of "fairness" rather than of profit maximization:

A conservative revision of the standard theory will retain the model of the profit-maximizing firm and alter only the model of the transactors with which the firm must deal by endowing them with explicit rules for the judgment of fairness and with a willingness to reject unfair transactions and to discriminate against unfair firms....A more radical revision of the standard model would incorporate a preference for fairness in the objective function of at least some firms.64

Robert Frank, in a fashion reminiscent of the Adam Smith of The Theory of Moral Sentiments, has explored the implications of accepting the emotions as objective fact, and as not irrelevant to economic behavior.65 The "Carthaginian creed" however, seems to remain the dominant paradigm governing business interaction, and a significant hurdle for those who


desire fair and impartial self-government by business people.

"The Oldest of the Arts, and the Newest of the Professions"

An acceptable group ethic is not the only prerequisite for a valid claim to professionalism; there must be "a basis of principles capable of being philosophically ascertained and academically taught...." It was apparently the favourable prospect of formulating such a theoretical analysis of business action that led the President of Harvard University, to declare in 1921 that business administration was "the oldest of the arts, and the newest of the professions." To develop a professional expertise in management was the goal of the university schools of business which proliferated in the first 25 years of the twentieth century. In the eyes of the early leaders of this new discipline, the primary challenge was to move beyond mere "rules of thumb:"

Unless we admit that rules of thumb, the limited experience of the executives in each individual business, and the general sentiment of the street, are the sole possible guides for executive decisions of major importance, it is pertinent to inquire how the representative practises of business men generally may be made available as


broader foundation for such decisions, and how a proper theory of business is to be obtained.\textsuperscript{68}

If business people are to be entrusted with resolving their own conflicts, it is pertinent to inquire as to the principles on which such decisions are to be based. A broad reference to "fairness" and "generally accepted business practices" does not seem sufficiently well defined to sustain public support, let alone the confidence of legal institutions. The challenge to the business community, therefore, is to generate a plausible and trustworthy paradigm of business decision making which is as fully "rational" as the legal theory which will be applied in default of an acceptable alternative. The responsibility for meeting this challenge in the twentieth century has fallen to the class of business managers who have supplanted owner-entrepreneurs as the dominant force in capitalist economies.

In the course of the modern attempt to formulate a rational business theory, it was recognized that marginalist economic analysis was often unhelpful or irrelevant:

On the other hand, the manufacturer is rarely interested in economics except as he may be irritated by a difference of opinion on some national issue, or as he feels that they may overlook the essentials of some practical operating

problem, for example in labor relations. He finds little in the work of the economist which he understands and less than he can apply in his own business. The economist has not carried his work near enough to the executive problems of the manufacturer to make it readily available.\textsuperscript{69}

The essential problem was recognized as the outmoded conception of economic theory that industry was a "vast maze of machines" rather than "a complex form of human association."\textsuperscript{70} This insight is echoed by those sociologists who have proposed an analysis of organizations as facing two constraints on action: the "objective rationality" of resource allocation in their internal operations\textsuperscript{71} and the

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\textsuperscript{69} Donham, "Essential Groundwork," 3.


\textsuperscript{71} Two commentators have recently described this conception as a "paradigm" of rational choice: "In the broad definition of rationality, economists are referring to a paradigm rather than to any particular theory....This paradigm, expounded in many textbooks and treatises, supposes that the individual decision maker has a utility function whose arguments are defined as alternative uses of the resources with which he or she is endowed. The quantities of these resources are interpreted as constraints on the possible choices available to the decision maker, so that rational behavior consists of determining the set of resource quantities to be devoted to each of the possible uses as the solution to a constrained maximization problem. Robin M. Hogarth and Melvin W. Reder, "Editors' Comments: Perspectives from Economics and Psychology," in The Behavioral Foundations of Economic Theory: Proceedings of a Conference at the University of Chicago 13-15 October 1985, ed. Robin M. Hogarth and Melvin W. Reder, Journal of Business 59 (Supplement, 1986): S186.
uncertainty and "irrationality" which is encountered in relations with other firms and customers. As Robert Bonn notes, the sociologist Talcott Parsons contributed a valuable conceptual analysis of the responsibility of the "managerial" level in business to mediate between the organization and the external situation, and the importance of the relationships of any organization to "the 'lateral' elements of the society with which they have to deal."  

The Impact of Subjectivism on Legal Institutions - The American Realists

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. 

So wrote Oliver Wendell Holmes in 1921, and this prediction was echoed by many of the realist legal scholars who dominated

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American legal thought in the first half of the twentieth century. For instance, Karl Llewellyn, one of this movement's foremost spokesmen, addressed the annual meeting of the American Economic Association in 1924 and stated:

"Among the major trends of the social sciences today is the urge toward integration of their various branches (footnote omitted). Lawyers, in particular, have been turning to economics for light on the nature and function of law....The jurist is protesting against the dogma of his fathers that law is unchanging, eternal, discoverable always by deduction. Only recently has he come to see it as a thing in flux, and made discovery of non-legal factors which condition its growth and action."\(^{75}\)

One of the principal of these "dogmas" which the realists were not able to accept concerned the judicial decision making process, and which Llewellyn described as the "traditional fiction that judges never make, but only find the law, which causes many to innovate only when they can by dialectics convince their readers, and even themselves, that their innovation is in truth a logical deduction from a preexisting rule."\(^{76}\)

Therefore, if a revolution in thought in the business community was precipitated by the recognition of subjective

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\(^{76}\) Id., 670.
elements in economic rationality, a similar revolution in legal thinking occurred with the rejection of belief in "mechanistic" legal decision making dependent only on "scientific" logic. The American realist movement in legal thought can therefore be seen as following the marginalist economic impulse to subjectify rational behaviour but in the field of legal decision making. "Adjustment" of competing social interests rather than strict application of legal principles became accepted as appropriate for the resolution of business disputes in part through the work of the realist scholars:

At law one man is right, the other wrong. What road is open to a court to find a working rule? Here is the arbitrator's opportunity. He can recognize that both are partly wrong; that working justice comes of sacrificing rights. His task is not compensating wrongs which are past and dead, but the shaping of rights to make them work in the live sentient future. He is a governor of a going concern which he must not disrupt.\footnote{Id., 675.}

"For this reason the common objection that arbitration tends to a mere splitting of the difference does not seem to me weighty. That tendency is the practice of the merely impartial, uninformed arbitrator; not of the arbitrator with technical background. And decision too closely according to past precedent is exactly what arbitration is to avoid.

Another American realist, Jerome Frank, adopted an approach similar to that of Alfred Marshall in proposing a "partial
analysis" based upon psychology of what he considered the irrationality of a belief in the certainty of the law. Like Llewellyn, he did not shy away from the thought that the law could perform an arbitral function:

The judge, at his best, is an arbitrator, a 'sound man' who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. He does not merely 'find' or invent some generalized rule which he 'applies' to the facts presented to him.  

The dissatisfaction of twentieth century legal thought with the "scientific" approach of the Victorians was aptly encapsulated by the psychologist and Yale Law School lecturer, E.S. Robinson:

William James, in speaking of the science of the middle nineteenth century, once said that the scientists thought that God was a logician and that his logic was the logic of a university professor. The legal scholar has typically assumed that the social forces that make the law are logical ideas and that their logic is that of the professor of law.

The realist movement therefore repudiated a view of the court as, in the words of Roscoe Pound, an "automaton," or "judicial

78 Jerome Frank, Law and the Modern Mind (New York: Brentano's, 1930), 12.
79 Id., 157.
slot machine;"\textsuperscript{81} on the contrary, they acknowledged an "intuitive" element in legal decision making and the conclusion that there can never be for judges "a code to define the manner of their judging."\textsuperscript{82} Although legal scholars attempted to arrive at a more expansive definition of the method and bounds of judicial decision making,\textsuperscript{83} it should not be surprising that the business community would not indefinitely put its faith in a legal process about the essential nature of which even the lawyers continued to disagree.

\textsuperscript{81} Roscoe Pound, \textit{The Spirit of the Common Law} (Boston: Marshall Jones, 1921), 170.


\textsuperscript{83} See, for example, Benjamin N. Cardozo, \textit{The Nature of the Judicial Process}, (New Haven: Yale University Press, 1921).
CHAPTER IV: CURRENT THEORIES OF ECONOMIC AND LEGAL DECISION MAKING

One reaction to the lack of practical guidance in marginalist economic theory for business managers was for them to rely on statistical analysis of business action in an attempt to draw out some general principles of decision making:

In the field of science applications are termed engineering sciences or industrial chemistry, while in business management they seem to be reflected in what might be termed controls. Just as in the case of scientific work the results are shown in numbers, so in the field of business both the standards and the controls are statistical in character.¹

The influence of quantitative analysis in theories of business management has continued strong to the present day,² but has not met with enthusiasm in the legal community.³ The most prominent theme, however, in the modern quest for a "business science" has been the need for a theory of decision making under uncertainty and in dynamic environments. This search


led theorists of management to conclude both that what was needed was "a more specific criterion of economic rationality, fitting the problem of the firm in a fluctuating world," and that "the theory of the firm, properly developed, can tell us most of what we need to know of the theory of decision-making."

Herbert A. Simon and the Theory of Bounded Rationality

Herbert Simon, although trained in the neo-classical economic tradition and a Nobel prize winner in economics (1978), is one of that discipline's most outspoken critics. Building on Marshall's vision of the importance of organization and information in human problem solving, Simon has also had considerable impact in the fields of business management, economic psychology and the study of artificial intelligence.

In Simon's estimation, the fundamental flaw in neo-classical analysis both at the macroeconomic level of national trends and forces and the microeconomic level of business firms is its adherence to the "principle of unreality" as it has been

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described by one of its leading exponents, Milton Friedman.\textsuperscript{5}

The error, in Simon's view, consists in basing sophisticated mathematical analysis on gross simplifications of economic reality and of how human beings typically act. In the sphere of problem solving this "unreality" for Simon takes the form of an assumption of high achievements of rationality:

... the economists attribute to economic man a preposterously omniscient rationality. Economic man has a complete and consistent system of preferences that allows him to choose among the alternatives open to him; he is always completely aware of what these alternatives are; there are no limits on the complexity of the computations he can perform in order to determine which alternatives are best; probability calculations are neither frightening nor mysterious to him. Within the past generation, in its extension to competitive game situations and to decision-making under uncertainty, this body of theory has reached a state of Thomistic refinement having great intellectual and esthetic appeal but little discernible relation to the actual or possible behavior of flesh-and-blood human beings.\textsuperscript{6}

Simon further notes that even with its simplifying assumptions, neo-classical analysis is often unable to provide determinate solutions to economic questions - in conditions of market oligopoly for instance, Marshall's "haggling and bargaining" may result in any one of a number of ultimate


economic states. As a scientific researcher committed to a behaviourist approach this offends Simon and accordingly he proposes a new framework for the analysis of economic action based upon the principle he terms "bounded rationality" and describes as follows:

The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world - or even for a reasonable approximation to such objective rationality.\footnotemark[7]

A further key element in Simon's view of rational action is an appreciation of the cost of gathering information and formulating alternative courses of conduct, both processes largely ignored in marginal analysis. Simon's solution is to substitute the concept of "satisficing" for that of optimization which was the ultimate goal of action in the neoclassical economic world. Economic man, acting under Simon's precepts, first defines a range of acceptable solutions and the maximum resources to be devoted to their attainment and then halts his quest for his economic goal at the point of realization of the first satisfactory result. According to Simon, therefore, human decision making proceeds most rationally by the use of heuristics rather than by attempting the exact calculation of future consequences. Cognitive

\footnotetext[7]{Herbert A. Simon, Models of Man (New York: John Wiley & Sons, 1957), 198.}
psychology, according to Simon, would, moreover, discover those practical heuristics of which human beings make most profitable use.

In Simon's world, the organization is essential to human rationality as it filters and processes information for his attention: "The rational individual is, and must be, an organized and institutionalized individual."\(^8\) This represents a distinct shift away from the atomistic world of neoclassical analysis but it also contains a disturbing element which may be seen in Simon's further candid observation that, "The organization member acquires knowledge, skill, and identifications or loyalties that enable him to make decisions, by himself, as the organization would like him to decide."\(^9\)

Herbert Simon is also convinced that the heuristic processes used in human problem solving may by quantified and duplicated sufficiently to allow the construction of a genuinely intelligent "machine" in the form of a computer program.\(^10\)

\(^8\) Simon, *Administrative Behavior*, 102.

\(^9\) Id., 103.

This conviction is based upon his belief that our thought processes are essentially simple in form and few in number and that the observed complexity of human behaviour results from the need to cope with an extremely complex environment. Simon's favourite metaphor is that of the ant on the beach whose path appears difficult of description but in truth represents merely the outcome of the interaction of a few basic instincts with an environment strewn with unpredictable obstacles. For Simon, the future is clear:

Computers have been programmed to design motors, to write music, to play checkers and chess, to discover proofs for mathematical theorems, to form concepts, to solve the missionaries and cannibals puzzle, to learn, to recognize patterns, to select a portfolio of stocks for a trust fund, to balance an assembly line, and to execute a number of other complex problem-solving tasks. Moreover, a number of these programs have been demonstrated to parallel or simulate, in considerable detail, the processes that humans use to solve the same kinds of problems. We are beginning to have, for the first time, a detailed, testable, and partially tested theory of human thinking processes. We can now begin to say what it is that a man is doing when he is "exercising judgment," "abstracting," using intuition," or thinking creatively." Even "ahah!" experiences have been simulated on computers and

portions of the legal community. One relatively well-known example in Canada is the "Nervous Shock Advisor" developed to simulate weighing of cases under the tortious laws governing nervous shock. Its creator, J.C. Smith, holds out the hope that machines may be programmed to match the flexible conceptualising of the human mind: see J.C. Smith, "Can Expert Systems Resolve Hard Cases?" unpublished paper.
the mechanism underlying them explained.\textsuperscript{11}

The business world has now had the benefit of computer-assisted problem solving for forty years\textsuperscript{12} and it is to be expected that the use of decision making software programs will continue to increase.\textsuperscript{13} "Expert systems," computer programs that attempt to deploy accumulated professional knowledge and heuristic approaches to the analysis and solution of problems, are already well established in medicine and engineering and are under development for legal use.\textsuperscript{14} Herbert Simon's influence on economic and business thought is only likely to grow.

\textsuperscript{11} Herbert A. Simon, Models of Bounded Rationality, vol. 2, Behavioral Economics and Business Organization (Cambridge, Mass.: MIT Press, 1982), 102. "Program trading" (stock market transactions directed by computer programs), is a current example of the implications of this vision.


\textsuperscript{13} Allen Newell, a colleague of Herbert Simon, is reported to have addressed the 11th International Joint Conference on Artificial Intelligence and remarked, "Robotics, natural-language understanding and other technologies are sufficiently robust,... to support intelligent systems that can explore the world and interact independently with human beings." See "Wires That Think," Scientific American, November, 1989, 20.

Conceptions of rational decision making in today's business environment therefore seem to be returning to a deterministic model such as appeared in the natural laws of classical economic theory, only in place of human "machinery" there will be substituted heuristic software operating in conditions of bounded rationality. The modern business manager may increasingly look to his computer for answers to his legal questions rather than engaging in the time consuming (and inconclusive) processes of negotiation, bargaining and compromise. Once again business interests will pursue a vision of rationality which legal institutions have not yet embodied. However, if Herbert Simon's view prevails, the law will not remain far behind:

As the science of information processing continues to develop, it will not be as easy to sequester it from the main stream of managerial activity (or human social activity) as it was to isolate the physical sciences and their associated technologies. Information processing is at the heart of executive activity, indeed at the heart of all social interaction. More and more we are finding occasion to use terms like "information," "thinking," "memory," and "decision making" with twentieth-century precision. The language of the scientific culture occupies more and more of the domain previously reserved to the common culture.\(^\text{15}\)

"Rules of Thumb" - There and Back Again

The early efforts of academic schools of business in America were largely directed to formulating a principled approach to the problem of business decision making. This desire, similar to that which inspired lawyers active in the "codification" movement, took as its model the scientific method with its logical, mathematical rules. One of the forerunners of a "science of business" was the "scientific management" movement which looked to engineering as a framework for business administration. In science, it was thought, there was no room for ad hoc explanations, for "rules of thumb" derived from business case studies which did not yield abstract theories of rational business thinking. Yet today we find a professor of business administration defending the role of "intuition" in decision making and recommending to senior managers that they should "pay attention to the simple rules of thumb - heuristics - that you have developed over the years. These can help you bypass many levels of painstaking analysis." Another commentator, writing about the prospect of "artificial intelligence" as an aid to business described the diagnostic decisions made by doctors and engineers as follows:

16 See Sheldon, "The Development of Scientific Management." Today we would probably call such efforts "ergonomics."

These decisions are far too complex to be exhaustively described by tables or rote procedures, yet they seem to be made, not by any analysis from first principles, but by the application of a large collection of rules of thumb that are well described by situation-action rules.18

Clearly, the concept of rational decision making in the business community is undergoing further change today.

It was early recognized by teachers of business theory that logic was not the only key to understanding the world. One lecturer at the Harvard School of Business Administration stated that there was little of logic in human conversation, and a lot of emotion. What was needed, in his opinion was "a conceptual scheme of conversations between men."19 Another teacher stated:

A vigorous, self-regulating society is not a logical thing; it is an affair of feelings, attitudes, loyalties, and customs. It is, in fact, dependent upon social wisdom in action rather than on logical understanding.20

The goal, according to this view, was expressed in the words of an early writer on organization theory (and mentor of

Herbert Simon), Chester Barnard: "a wisdom greater than our knowledge." Legal thinking has also progressed from a single-minded focus on the value of tradition, or dogmatic faith in logical analysis of principle to encompass a recognition of the creative role of active participation of disputants in the elaboration and application of legal norms. This trend may be seen in the emphasis on the study of "procedural justice" both by lawyers and social psychologists and has been given a conceptual framework by the German sociologist Jürgen Habermas.

Habermas's Discursive Rationality

Habermas's chief project is the elaboration of a conceptual scheme sufficient for the analysis of modern western society from a sociological standpoint. His ultimate goal is to examine critically the claims of rationality which have been made for our age by those such as Weber and to elucidate the principles of justice to which we should give our loyalty. This program is advanced in what Habermas terms a "formal-pragmatic" fashion by drawing on the results of empirical study as the basis from which his concepts are formally defined. The research on which Habermas relies is largely

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21 Ibid.
taken from the fields of linguistics and developmental psychology (principally Piaget). Analyzing this body of knowledge he has concluded that the essential relation between the individual and society is what might be termed a symbiotic one in which the individuation of the self and the perpetuation and recreation of the institutions of society proceed interdependently.

Language plays a key role in Habermas' s vision for he states that it is only via such a medium that the individual comes to recognize himself and others and to take his place in the moral community by participating in reasoned discourse. Language, by its very structure, requires the development of a capacity to "objectify" oneself and thus to participate in society as a responsible moral actor:

The performative attitude that ego and alter adopt when they act communicatively with one another is bound up with the presupposition that the other can take a 'yes' or 'no' position on the offer contained in one's own speech act. Ego cannot relinquish this scope for freedom even when he is, so to speak, obeying social roles; for the linguistic structure of a relation between responsible actors is built into the internalized pattern of behaviour itself. Thus in the socialization process an 'I' emerges.

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22 One corollary of such an approach has been noted by Volker Olbrich: "Normative statements,...for which no good reason can be given, are not intelligible." Volker Olbrich, "Justification Patterns in Moral Philosophy: A Metaethical Inquiry," unpublished paper, Osgoode Hall Law School, Graduate Programme in Law, York University, Ontario, December, 1989.
equiprimordially with the 'me,' and the 
individuating effect of socialization processes 
results from this double structure.23

For Habermas linguistically mediated interaction is of the 
essence of humanity and provides the only acceptable basis for 
the ascertainment of truth and justice:

Discourse can be understood as that form of 
communication that is removed from contexts of 
experience and action and whose structure assures 
us: that the bracketed validity claims of 
assertions, recommendations, or warnings are the 
exclusive object of discussion; that participants, 
themes and contributions are not restricted except 
with reference to the goal of testing the validity 
claims in questions; that no force except that of 
the better argument is exercised; and that, as a 
result, all motives except that of the cooperative 
search for truth are excluded....The discursively 
formed will may be called 'rational' because the 
formal properties of discourse and of the 
deliberative situation sufficiently guarantee that 
a consensus can arise only through appropriately 
interpreted, generalizable interests, by which I 
mean needs that can be communicatively shared.24

This approach has been termed a "consensus theory of truth"25 
and is clearly relevant to the institutions of the law in

23 Jürgen Habermas, The Theory of Communicative 
A Critique of Functionalist Reason (Boston: Beacon Press, 
1987), 59.

24 Jürgen Habermas, Legitimation Crisis, trans. and 
with an Introduction by Thomas McCarthy (Boston: Beacon Press, 
1975), 107-108.

25 Thomas McCarthy, Introduction to Habermas, 
Legitimation Crisis, xv.
which discourse is a defining feature.

Habermas utilizes practical discourse as the pragmatic foundation for his concept of "communicative action" which he defines as the pursuit of an individual's goals through securing the cooperation of his fellow citizens by means of an understanding arrived at discursively. The protection and promotion of communicative action from which consensus will arise is, for Habermas, the test of a rational society: "Reaching understanding seems to be intrinsic to human language as its telos." 26

Yet Habermas has difficulty in accepting that the processes of the law embody communicative action. He distinguishes between "communicative" action and "strategic" action which he defines as the pursuit of goals "through influencing the decisions of others in a way calculated on success." 27 It was only after some hesitation that Habermas conceded that legal institutions might provide a forum for unforced discourse:

Legal proceedings and the working out of compromises can serve as examples of argumentation organized as disputatio; scientific and moral discussions, as well as art criticism can serve as


27 Id., 195.
examples of argumentation set up as a process of reaching agreement. In fact, however, the models of conflict and consensus do not stand side by side as forms of organization with equal rights. Negotiating compromises does not at all serve to redeem validity claims in a strictly discursive manner, but rather to harmonize nongeneralizable interests on the basis of balanced positions of power. Arguments in a court of law (like other kinds of judicial discussions, for example, judiciary deliberation, examination of legal tenets, commentaries on the law, and so forth) are distinguished from general practical discourses through being bound to existing law, as well as through the special restrictions of an order of legal proceedings that takes into account the need for an authorized decision and the orientation to success of the contesting parties.\footnote{28}

*Because of this I earlier regarded court proceedings as a form of strategic action....I have since been persuaded by Robert Alexy that juridical argumentation in all its institutional varieties has to be conceived of as a special case of practical discourse...

It may be that Habermas's scepticism concerning the opportunity for practical discourse within legal institutions was influenced by his background in the codified German legal system which presents less obvious avenues for judicial change of legal norms.

Having thus constructed a model of rational action in society, Habermas proceeds to place it within a theoretical construct

of reality (again derived pragmatically) that is composed of
the elements of "lifeworld" and "system." The lifeworld
consists of all that knowledge and contextual background
surrounding every person which is "always already" there
although not made explicit until action requires that some of
it be drawn upon and thereby manifested (and thus which may be
understood as a stock of "cultural resources"). Language is
the means by which this accumulated knowledge is debated,
 Improved and passed on to future generations. "System," on
the other hand, consists of all those formally organized
domains of action, including institutions, which arise out of
the persistent coordination of individual action over time
(and thus which may be viewed as "tools of social
integration"). In the system "steering media" such as money
or power, not language, may (and in modern societies
increasingly do) fill the role of organizing and perpetuating
agents.

In the context of this model of social reality, Habermas views
the challenge of creating a good (just) life in the modern
world as a continuing struggle to avoid what he terms the
"colonization" of the lifeworld. By this he means the
replacement of language (and thus communicative action) by the
media of money and power as the vital media of social
relations.
What implications are there for legal institutions in Habermas' analysis? Chief among them is his conclusion that the law occupies a unique place as falling within the domain of both lifeworld and system. As the embodiment of many social norms, it serves a role as a constituent of the lifeworld in which legal rules ought to be subject to discursive debate. On the other hand, in its capacity as an organizing agent for diverse material interests, law in the modern state takes on the aspect of a steering medium such as money and becomes "uncoupled" from the lifeworld:

As long as the law functions as a complex medium bound up with money and power, it extends to formally organized domains of action that, as such, are directly constituted in the forms of bourgeois formal law. By contrast, legal institutions have no constitutive power, but only a regulative function. They are embedded in a broader political, cultural, and social context; they stand in a continuum with moral norms and are superimposed on communicatively structured areas of action.  

In Habermas' terms the task of the legal critic then becomes that of ensuring that those domains of action and knowledge which depend upon the organization of interests through communicative action do not become systematized by force of law acting as a nonrational steering medium no different than money or power.

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29 Habermas, Lifeworld, 366.
Habermas's conception of communicative reason arises from his conviction of the existence of a reflective subjectivity rooted in the very structure of language that makes man capable of entering into dialogues directed to understanding:

Thus, a procedural concept of rationality can be worked out in terms of the interdependence of various forms of argumentation, that is to say, with the help of a pragmatic logic of argumentation. This concept is richer than that of purposive rationality, which is tailored to the cognitive-instrumental dimension, because it integrates the moral-practical as well as the aesthetic-expressive domains; it is an explicitation of the rational potential built into the validity basis of speech. This communicative rationality recalls older ideas of logos, inasmuch as it brings along with it the connotations of a noncoercively unifying, consensus-building force of a discourse in which the participants overcome their at first subjectively biased views in favour of a rationally motivated agreement. Communicative reason is expressed in a decentered understanding of the world.30

The theory of communicative action evolved by Habermas leads to the conclusion that intersubjective understanding may only be reached if all the cultural resources of the "lifeworld" are accessible for use in discourse; and that knowledge localized in "expert cultures" is not to be preferred to the rationality of "everyday consciousness."31 In application in legal institutions, Habermas's concept of rationality demands responsiveness to the reasoned demands of all litigants and an

31 Id., 355.
unashamed judicial subjectivity that is nonetheless rational.

In language strikingly similar to Habermas, Lon Fuller has described adjudication as a unique form of social ordering dedicated to giving "formal and institutional expression to the influence of reasoned argument in human affairs." 32 Further, in drawing a distinction between legal thought and the processes of empirical induction and logical implication Fuller states:

There is, I submit, a third area of rational discourse...where men seek to trace out and articulate the implications of shared purposes. The intellectual activity that takes place in this area resembles logical deduction, but it also differs in important respects from it. In logical deduction, the greater the clarity of the premise, the more secure will be the deduction. In the process I have in mind the discussion often proceeds most helpfully when the purposes, which serve as 'premises' or starting points, are stated generally and are held in intellectual contact with other related or competing purposes. The end result is not a mere demonstration of what follows from a given purpose but a reorganization and clarification of the purposes that constituted the starting point of inquiry. 33

David Richards has also proposed a model of the exercise of legal judgment which incorporates requirements of what he terms "theoretical reconstruction," a process similar to

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33 Id., 381.
MacIntyre's scrutiny of tradition, and "critical self-consciousness" reminiscent of Habermas's understanding of rational subjectivity.34

The Influence of Psychology on Economics, Business and Legal Decision Making

Other keys to wisdom in economics and business have been provided by psychology, a discipline that has recently yielded much to students of business.35 The economist J.R. Commons described a business transaction as an application of "negotiational psychology" and the environment in which it occurs as "irrational:"

It is not a rational state of society that determines action; it is a marvellously irrational and complex set of expectations that confronts the participants in transactions. And it is a situation that changes from day to day and century to century. Within this changing complexity and uncertain futurity they must act now.36


E.S. Robinson set the stage for psychological analysis of legal decision making when he wrote:

The degree to which a mental operation is inferential is actually only one of the factors that enter into what the psychologist has commonly meant by 'reasoning.' There are also involved the degree to which the problem is defined by the thinker, the number and kind of solutions he proposes, the degree to which he is able to reject ideas that are merely plausible, the degree to which the values dominating the thinking are of the kind called logical.  

Some psychological concepts which have accordingly been adopted for use in studying business and legal problems are the dichotomy between "structured" and "unstructured" decisions, and the role of "framing" problems in decision making; attention has also been paid to the dangers inherent in various deficiencies in normal human cognitive

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Etzioni: "This new approach - in fact a very old approach in modern dress - understands that executives must often proceed with only partial information, which, moreover, they have had no time to fully process or analyze. I call this model 'humble decision making.'" Amitai Etzioni, "Humble Decision Making," Harvard Business Review 67 (1989): 122.

37 Robinson, Law and the Lawyers, 137.


processes identified by psychology.\textsuperscript{40} Already, an attempt has been made to apply psychological knowledge to decisions involving legal matters: the business executive has been warned not to relinquish strategic control of a lawsuit to lawyers who are prone to overconfidence in their judgments of the probabilities of success.\textsuperscript{41}

Perhaps the most significant insight which has been gained from this interaction of economics, business, and behavioural psychology has been an appreciation of the many facets of "rationality" in human affairs:

\begin{quote}
Our own prescription is to recognize that both economics and psychology provide different metaphors for studying complex phenomena. However, whereas each metaphor illuminates some aspects of decision making, it is necessarily limited. Thus more can be gained by viewing the world from the perspective of multiple metaphors. In addition, since the phenomena of concern are complex, we believe it would be foolish to abandon either approach. Indeed, in the division of labor that is necessary to make scientific progress, much can be gained by adhering to the 'law of comparative advantage.'\textsuperscript{42}
\end{quote}


Already a trend may be seen of the application of psychological insights to legal institutions. The work of Thibaut and Walker affords a good example. Early in their investigations of "procedural justice" they discovered that the adversarial model of dispute resolution procedure was not the equal of an "inquisitorial" one in bringing forth objectively all the available evidence. In other words, a system which gives more control over the presentation of evidence to a third party intervenor is more likely to determine the truth of factual matters in dispute and to appeal to those disputing parties such as today's business people who value "objective" accuracy in decision making.

These insights have, perhaps unconsciously, been applied in the creation of new forms of traditional legal institutions which have become popular with the business community, such as "private courts." Such alternatives to public adjudication originated in California and have proliferated in a number


44 For a review of the procedure, see Barlow F. Christensen, "Private Justice: California's General Reference Procedure," American Bar Foundation Research Journal 1982: 79-
of American States. Many variations of them attempt to combine the best elements of "procedural" and "substantive" justice by allowing the parties a great measure of control over the process, yet, also give the third party decision maker more power to intervene in evidential issues than is normal to courts. For instance, The Private Court, operating in Toronto, provides by its rules that the neutral may "require the parties at their own expense to produce demonstrative aids necessary to understand the issues."\(^45\) Similarly, the rules of the Private Adjudication Center at Duke University state that "nothing contained in these rules shall require the tribunal to hear irrelevant or cumulative evidence and it may, at any time, inform the parties that it has heard sufficient evidence on a give issue."\(^46\) Finally, in its rules for the non-administered arbitration of business disputes, a process which can approximate private judging, the Center for Public Resources gives the tribunal the discretion to "require the parties to produce evidence in addition to


\(^{45}\) Rule 11(4).

that initially offered." 

The last half of the twentieth century has thus witnessed a "cross-fertilization" of ideas of rational decision making in law, economics, and psychology from which a more unified theory of "plural rationality" incorporating elements of traditional framing of conflicts, logical analysis of the consequences of decisions, and due regard for the "life stories" of disputants may arise. At the present time, however, it seems that legal institutions continue to grapple with the issue of human subjectivity in decision making while the business world is learning to use new "scientific" tools with which to resolve conflict and pursue the goals of certainty and predictability in legal relations.

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CHAPTER V:  THE DISPUTE RESOLUTION SURVEY

Introduction

What are the attitudes and expectations of the business people and lawyers of today towards the courts? Are there widely held views of the nature and purpose of the legal system that distinguish these two interacting groups which would warrant describing them as two cultures? The answer suggested here is that a divergence of opinion continues to exist between legal professionals and the business community concerning the role of the courts in dealing with disputes and that it arises from differing conceptions of rational problem solving typically adopted by each.

The legal profession has passed through a storm of criticism of its model of judicial decision making by American realist scholars of the twentieth century and the impact on lawyers' thought was lasting. One enduring result of this critique (which mirrored the "subjectivism" of marginal economic theory) was to shake permanently lawyers' faith in the determinacy of answers to legal problems. Acknowledgment, even if grudging, by lawyers of this flaw in the logical-deductive method, was, however, welcomed by business people who had come to believe that "formal rationality" in the law
did not serve their purposes and goals and that more informal processes such as arbitration were preferable.¹ For instance, a 1937 study of commercial arbitration observed that "arbitration is a regular procedure is [sic] more than four hundred trade associations and business organizations," and that in a poll of lawyers a large majority were favourable to arbitration.²

Thus, although the turmoil of the realist revolution in law is now over, the legal profession has been profoundly changed.³ The dominant response of Anglo-American lawyers in the latter part of the twentieth century to the realist challenge has

¹ Christine Harrington has described this as the "Progressive" era in court reform. See Christine B. Harrington, Shadow Justice: The Ideology and Institutionalization of Alternatives to Court (Westport, Conn.: Greenwood Press, 1985).

² Jacob Klein, The Practice of Commercial Arbitration in Business Disputes, (Ann Arbor, Mich.: University Microfilms International, 1990): 247, 205. Not all lawyers approved, however, and the author noted their objections, two of which were: "Lawyers like to think of the law as an exact science. Although they admit that it is not, they feel the need for fixed principles in the guidance of human conduct,..." and, "No method as yet has been discovered of eliminating the one barrier of the ideal administration of justice, the matter of background and of subjective approach to a decision. A judge is more likely to consider testimony objectively than is an arbitrator." Klein, Practice, 210, 211.

been described as the "legal process" approach. As a result of the discrediting of the "objective" values of logical consistency, predictability, and uniformity of law, I suggest the contemporary attitude of legal professionals has evolved toward a view that may be described as emphasizing "subjective" values, a concern for "process" over "outcome."

One of the formative influences on this approach to the role of courts in society was Lon Fuller, who in his widely quoted article "The Forms and Limits of Adjudication" declared that "the 'essence' of adjudication lies in the mode of participation it accords to the affected party." As Austin Sarat notes, the legal process approach has "tried to shift the focus of legal argument from substantive rights and legal doctrine to the characteristics of legal institutions and legal processes."

A good example of what is suggested here to be the present attitude of most lawyers toward the litigation process is the


5 Fuller, "The Forms and Limits of Adjudication," Harvard Law Review 92 (1978): 365. Fuller made it clear that he disagreed with the Humean approach to rationality - it did not consist for Fuller only in empirical determination of fact or the use of logic: see "Forms and Limits," 379-381.

6 Sarat, "The 'New Formalism'," 703.
alternative dispute resolution ("ADR") movement. Endorsed by high authority in legal systems from Chief Justices to Attorneys-General, ADR appears to be on the leading edge of legal professional development. Barbara Yngvesson has described a leading theme of the ADR movement as the possibility of arriving at "a psychologically (and economically) satisfying process of mutual adjustment,"7 (which recalls Marshall's "haggling and bargaining" of the market as seen by marginalist economics), and the value of settlement as opposed to adjudication is emphasized by its proponents.8 Marc Galanter has recently surveyed the extensive modern legal literature concerning settlement and negotiation and concluded that "settlement has gained acceptance as something that courts, as well as others, legitimately strive to produce."9


8 Not all lawyers are convinced by ADR's claims. See for example Owen M. Fiss, "Against Settlement," Yale Law Journal 93 (1984): 1073-1090, in which he appears to adhere to the older values of "objective" justice.

9 Marc Galanter, "The Quality of Settlements," Journal of Conflict Resolution, 1988: 55-84. Galanter describes the prevailing legal culture as one of "litigotiation," by which he means "a single process of strategic maneuver and bargaining in the (actual or threatened) presence of the adjudicative forum," and he cites as one piece of evidence of the current legitimacy of settlement a provision of the draft American Bar Association Model Rules of Professional Conduct.
One consequence of the "processual" view of justice is that the criteria of sound procedure are subjective in nature; in other words, the question often becomes one of whether the process is deemed to be "fair" and "satisfying" to the parties engaged in it. Thus, in the ADR movement a consensus appears to be forming around the idea of "appropriate process" by which is meant the tailoring of the dispute processing mechanism to essential qualities recognized in different types of conflict situation and characteristics of disputing parties. As Professor Paul Emond suggests, "...an appropriate role for the ADR movement is to assist the parties to dissect disputes... and then attempt to relate the dispute or a part of the dispute to the most appropriate, or suitable, dispute resolution process." Typing these generic social situations and agreeing on the structure and process last for

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(not, however, eventually enacted) to the effect that "although litigation is wholly legitimate as a means of resolving controversy, a fairly negotiated settlement generally yields a better conclusion." Galanter, "Quality," 57, 82.


each, has, however, proved difficult. Some experimental research in psychology has pointed the way toward a theory which would encompass matching problem and process, but little account has been taken of the perceptions of legal actors in conflict resolution.

It is therefore the hypothesis of the dispute resolution survey reported on here that the present attitudes of lawyers toward adjudication are characterized by: (a) an emphasis on subjective, procedural values; (b) rejection of the logical-deductive method of achieving objectively "correct" solutions to legal problems which epitomized nineteenth century legal thought; and (c) a more flexible approach to the use of alternative means of resolving disputes rather than a blanket

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13 The work of Thibaut and Walker is the most advanced in this field. See, for example, John Thibaut and Laurens Walker, "A Theory of Procedure," California Law Review 66 (1966): 541-566.

14 Such studies as have been undertaken usually restrict themselves to measurement of the "satisfaction" of lawyers and their clients with a process and from that to drawing conclusions concerning its perceived "legitimacy." See, for example, Christopher Simoni, Michael B. Wise, and Michael Finigan, "Litigant and Attorney Attitudes Toward Court-Annexed Arbitration: An Empirical Study," Santa Clara Law Review 28 (1988): 543-579.
reliance on authoritative decision making, and a willingness to compromise claims.

The cast of thought of the lawyer of today is reflected in a recent comment on "the purposes of dispute resolution:"

However imperfect, truth - as a goal - is primarily result oriented. It concerns the substance of a decision rather than the process used in reaching it. Perhaps because of the impossibility of validating the accuracy of fact-finding or a decision, we are more often content to seek justice in the process of dispute resolution than in the result. The assumption is that a just process will yield a just result....

Embedded in the constitutional concept of due process of law, and of primary concern to lawyers, is the striving for a just process of decisionmaking. The expectation that a potential litigant will receive a fair trial is important in the voluntary acceptance of the rule of law. Our legal system would collapse if troops had to be called out to enforce all, or even a sizable portion of, court judgments. While losing litigants may not be happy with the result in their individual cases, they at least should be satisfied that the process of decision was fair.\(^5\)

Lawyers may have become convinced of the futility of a search for objective "truth" in the facts or law surrounding disputes; it is one of the purposes of the dispute resolution survey to investigate whether business people today share that attitude or are demanding "substantive" rather than merely

"procedural" justice. The influence of behaviourist economics (seen in the work of Herbert Simon), the use of quantitative analysis in business problem solving and a growing managerial reliance on computerized "expert systems" and "decision support systems" all combine to make this a plausible development.

Once more, "objective" values of truth and logic have become important to the business community as new methods and technology have transformed decision making in organizations. As a commentator remarked as early as 1957 concerning the attitude of the modern business manager:

He sees the decision-making job growing increasingly complex and even technical in nature, and he recognizes the economic and social influences that are combining to bring about this change - influences stemming from a society that has come to be strongly marked by public administration of the conditions within which private business operates, an external economic environment in which the most prominent characteristic is dynamic change, and an internal organizational necessity for making planning horizons distant as levels of fixed costs rise.\(^\text{16}\)

The techniques of problem solving in business are becoming ever more systematized via the computer: "Once expertise is outside someone's head, more people can work at refining it, and as it is fine-tuned, problem solving moves from art to

science." Thus, a recent survey revealed that four of the "big eight" accounting firms used the quantitative technique known as "decision tree analysis" in providing support to litigators. The author went on to predict that the use of computer programs in legal contexts "will accelerate sharply in the near future as the computer gains increasing recognition as a tool for legal analysis and decision making." In a similar vein, business scholars have likened arbitral decision making to research in economics and other social sciences, and have expressed the hope that recognition and emphasis of the similarities may "change the common perception of arbitration as an amorphous art to a process which has scientific value."

There seems to be good reason, therefore, to suppose that today's business community expects legal institutions to react with scientific objectivity to the disputes that are presented


19 Id., 139.

to them for resolution.

The attitudes of the business community today to the objectives of adjudication should therefore be characterized by: (a) an emphasis on objective criteria of decision, such as "truth;" (b) reliance on scientific methods of problem solving involving logic; and, (c) respect for "expertise" in decision making. Some support for this hypothesis may be seen in the recurrent complaint of lack of "certainty" in judicial decision making, and the preference often shown for arbitrators or judges with expertise in the subject matter of the conflict. The tendency for "private judging," which is often aimed at the business community, to place greater control over fact-finding in the hands of the third party and so advance the aim of "accuracy" in resolution of disputes has already been noted above.

In the foregoing pages I have tried to discern the present

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21 "The choice of a judge is a particularly important advantage in complex cases. The judge dealt out by the luck of the draw in superior court might not understand convoluted accounting or arcane computer terminology. But a rent-a-judge can be selected for his track record in cases involving those issues. Robert C. Hinckley, a Santa Clara attorney specializing in computer law, says the wave of the future will be two- or three-person mediation teams serving as judges in complex disputes involving science and technology. 'You can get a judge and an engineer to advise the judge, and away you go,' says Hinckley..." Mark Thompson, "Rented Justice," California Lawyer March 1988: 44.
views of the role of courts held by legal professionals and business people as they arise out of an ongoing dialectic in modern capitalist society since the time of Adam Smith. How are these postulated attitudes and values to be explored? Knowledge concerning the ideas held by these groups in society concerning adjudication and its alternatives may be gained in a variety of ways including examining the possible sources of values and attitudes such as the curricula of education in law and business, accumulating anecdotal evidence through biographies and reflective philosophical statements, or, more directly, by asking people to express their views on these subjects. One modern technique for investigating the attitudes and opinions of defined groups is the administration of an oral or written questionnaire to a representative sample of the population under study. If such a survey is conducted according to procedures found by the social sciences to be reliable the responses to it may be considered as good evidence of widely held attitudes and beliefs in the target groups. The dispute resolution survey developed and administered by the author is an exploration of the value of a survey in illuminating attitudes and beliefs regarding the relationship between law and dispute resolution held today by legal and business actors.

If such knowledge can be gained it would also be of assistance
in efforts to reform the present system of disposition of
disputes which must take into account the attitudes of
stakeholders such as lawyers and their most important clients,
business people, to traditional adjudication if change is to
be brought about.22

Although there have been large scale empirical studies of
civil adjudication and alternatives to it such as the Civil
Litigation Research Project ("CLR"P") funded by the United
States Government,23 little work has been done in surveying
possible differences in the values, attitudes and preferences
of lawyers and members of the business community as they
relate to the process of civil adjudication of disputes and

22 "As long as lawyers and law students continue to
view litigation as the paradigm of dispute resolution, the
burdens on our civil litigation system will continue to
grow....one of the practical difficulties that we confront is
that our professional culture is not as yet terribly
sympathetic to models other than court adjudication and
consequently does not recommend these models to clients even
where they now exist." Hon. Ian G. Scott, "The Government
Perspective," in Canadian Bar Association - Ontario,
Continuing Legal Education Alternative Dispute Resolution:
What's All the Fuss and Where Is It Going? (Toronto: Canadian

23 For an examination of the methodologies of this
project and reports on some preliminary results, see the
articles collected in the Special Issue on Dispute Processing
and Civil Litigation, Law & Society Review 15 no. 3-4 (1980-
the role of law and the courts in conflict resolution. To investigate one possible means of determining whether there is today a real difference between attitudes to conflict resolution held by lawyers and their business clients is the basic aim of this dispute resolution survey.

Review of Literature

Vilhelm Aubert has formulated a model of the legal decision-making process which distinguishes it from the methods of scientific prediction. He has also proposed a conceptual categorization of dispute types as being either examples of "competition" or "dissensus." Implicit in his treatment of the interrelation of these ideas is the suggestion that

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conflicts involving "competition" (concerning the distribution of scarce resources,) will be increasingly decided by methods approximating those of scientific decision-making such as economic theory and analysis. Speaking particularly of the international scene, he says:

The most popular models of the future world are rarely legal utopias; most of them are "systems" derived, with more or less rigor, from more or less tenable empirical premises. It looks as if this international development has bypassed the legal stage in man's attempt to furnish predictability and has plunged right into the stage where predictions, and the flickers of hope and trust, are derived from science. But there is nothing in the development within modern states which suggests that law is superfluous, only that it is increasingly insufficient to furnish on its own the kind of predictability in social life which is needed if conflicts are to be avoided or, if not avoided, solved.\(^{27}\)

This interplay between ideas of "competitive" or economic disputes and conflicts incorporating "dissensus," or differences of principle, between "scientific" as opposed to "legal" decision-making forms part of the conceptual framework of the dispute resolution survey and this thesis.

Richard Abel pursued a similar line of thought in formulating an approach toward a theory of dispute institutions in

\(^{27}\) Aubert, "Courts and Conflict Resolution," 50.
society.\textsuperscript{28} He suggested a number of hypotheses arising out of his concepts such as, that commonly occurring relationships in society should generate preferences in the participants about the way their disputes should be handled,\textsuperscript{29} and, that conflicts arising in relations of status (rather than contract) or which involve deep emotional commitments may be associated with unique choices of disputing processes.\textsuperscript{30} Richard Lempert has also identified an agenda of questions for empirical research among which he includes: "What role do factors such as age, sex, race, occupation, prior experience with the law, etc., play in causing people to define problems as legal?" and "What are people's beliefs, expectations, and attitudes about the legal system?"\textsuperscript{31} The dispute resolution survey was designed to try to answer some of these questions.

Austin Sarat, however, has also raised the question "How useful are sample surveys as devices for describing legal

\begin{itemize}
\item \textsuperscript{29} Id., 289.
\item \textsuperscript{30} Id., 294.
\end{itemize}
culture?" His answer is that they are valuable, but limited in their ability to assess a pattern of values the significance of which lies in their stability in basic form over a substantial time. In other words, a "culture" can be said to exist only if the relevant opinions and beliefs of the group studied persist, perhaps through generations, and are at least not merely fleeting. One solution to this difficulty is appropriate replication of a survey over a significant span of time.

There have been some limited empirical studies probing the values, beliefs and attitudes of samples of lawyers and non-lawyers as they relate to the courts and alternative dispute processing mechanisms. In 1965 the American Management Association published a study of attitudes toward commercial arbitration which incorporated the results of questionnaires administered to lawyers, arbitrators and business people. The authors found that "the principal criterion for deciding to use arbitration was the nature of the matter in dispute. Of the respondents, 57 percent stated that they chose


arbitration when the dispute was mainly over facts." Business people were reported to value the services of arbitrators who had some expertise in the commercial environment in which the dispute arose; lawyers believed most often that arbitration was desirable because of the increased speed of resolution, the arbitrator's expertise, and the economy of the proceedings. Finally, the researchers concluded that lawyers valued precedent (and therefore criticized its absence in the field of arbitration) for its use in predicting results. Some of these findings will be tested in the dispute resolution survey.

Two other studies seem to point in the same direction in describing public attitudes toward the merits of using judges in dispute resolution. The Insurance Information Institute commissioned a survey of the beliefs and attitudes of the public and business people in relation to various issues arising out of litigation involving insurance. It was found that the most common reasons for preferring the

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34 Id., 46.
35 Id., 51.
36 Id., 122.
determination of tortious damages by a judge rather than a jury were that the judge "has more knowledge/understanding" or was "more experienced/better qualified." The most common secondary reasons for preferring a judge involved attributions of "fairness" to such a third party. The results of the insurance case study appear to be replicated in a recent study of perceptions of procedural fairness in institutional decision-making. The author reports that courts, when compared with local legislatures, are more often perceived as institutions that make decisions "only after they assemble all the relevant information on an issue," and secondly that they "can be counted on to make decisions in a fair way." This research again supports the view that judges are often thought of as superior fact-finders, with access to "all the relevant information."

Finally, Sally Engle Merry and Susan S. Silbey have recently challenged some common presuppositions concerning the motives of those who resort to the courts and the circumstances in

38 Id., 30-31. These findings seem to support the suggestion that the courts have, in some settings, a reputation for "expertise" which is not to be expected from a lay jury.


40 Id., 484.
which they feel impelled to do so or to adopt other strategies in dealing with conflict. In particular, their study of three neighbourhoods led them to the conclusion that "the decision to turn to official third parties is situationally and morally constrained. The person who does take a personal dispute to court is flaunting general standards about virtuous behavior." Thus, in connection with the "personal" disputes which they studied, these researchers found that "moral evaluations" of the appropriateness of going to court outweighed "instrumental evaluations" concerning the effectiveness of the legal system in dealing with conflict. This finding warns us not to overlook broader "cultural norms" which can, it seems, influence attitudes toward the appropriateness of litigation and which may be present even in business disputes where purely instrumental action is expected.

Research Design

The design of the dispute resolution survey was primarily intended to elucidate significant variations between the

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42 Id., 172.
values, attitudes and beliefs of lawyers and business persons concerning traditional civil adjudication and its more common alternatives—negotiation, mediation, arbitration, and acceptance (often termed "lumping"). It was hypothesized that business people would demonstrate a more consistent emphasis on "objective" values in conflict resolution such as truth-seeking, use of logical method, and deference to expert evidence in contrast to legal professionals who were supposed to be dedicated to "subjective" values such as an emphasis on reasoned argument and the encouragement of compromise and settlement. It was postulated that the origin of such variations lies in the socialization of individuals into "legal" or "business" sub-cultures.

In addition, the influence of personal factors such as gender was thought to warrant consideration as a competing explanation for observed differences in values, attitudes and beliefs. Questions have been raised as to whether females are perhaps more accepting of negotiation and compromise in dealing with disputes and therefore may relate differently than males to these alternatives in potentially litigious situations. Such speculations reflect a contrary thesis to

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that proposed here, which is that occupational sub-cultures are the dominant influences on attitudes toward dispute resolution processes rather than personal differences such as gender.

Thus, the dependent variables (reflecting the predictions of preferences made above) incorporated in the dispute resolution survey were expressions of the attitudes, values and beliefs of the respondents concerning adjudication and its alternatives. Independent variables selected (reflecting the hypothesized genesis of the observed preferences) were the occupation of the respondent, "experience with the litigation process, and gender. By attempting to assess attitudes toward formal litigation together with several alternatives, the author's survey has a wider aim than those of the American Management Association and the Insurance Information Institute discussed above, which confined themselves either to one alternative process (arbitration) or solely with attitudes to litigation (insurance cases). The dispute resolution survey described here is thus designed to

"Respondents were asked to choose from eight self descriptions, four of which indicated participation in the business world and four, legal occupations. For purpose of analysis, the business and legal categories were amalgamated into two variables to examine the responses of "business persons," and "lawyers." See the questionnaire, Appendix, page 191."
contribute to an increased understanding of the acceptability to lawyers and their business clients of many commonly debated alternative dispute resolution processes and the relation of these attitudes to their perceptions of the nature of various conflicts. It is also intended to investigate prominent features of the legal and business cultures in terms of the values attached to formal litigation and so contribute to understanding the long standing and ongoing debate between these groups over the role of law and courts in industrial and post-industrial capitalist society.

Data Collection

The dispute resolution survey was conducted by written questionnaire of fourteen questions (see Appendix). An experimental approach was adopted to framing the first series of questions (1 to 9). These were directed to uncovering preferences for various dispute resolution processes (and lumping), by placing choices of courses of action in the context of hypothetical situations. Realism in the contexts presented was aimed at and consequently the descriptions draw on the author's experience of disputes commonly encountered in the practice of law and several conflict situations posed for discussion in Goldberg, Green, and Sander's text in alternate
dispute resolution.⁴⁵ The questions were framed so as to be salient to business people by placing most of the situations in a business setting, and by asking the respondents to assume the role of the depicted employee or manager in describing their preferences. A preliminary version of the survey instrument was distributed to a small group of graduate students in law for completion and comment. Some changes in the subject matter and wording of questions 1 to 9 were made as a result of their responses.

It was postulated as flowing from the thesis advanced here that today legal professionals, at least within the common law tradition, and business people within capitalist economies would hold different attitudes and beliefs toward legal decision making practices and institutions. Further, arising out of the "lag effect" in shifts of theoretical conceptions of decision making discussed in the preceding chapters, such attitudes should be characterized by their affinity to distinct, historical eras in economic and legal thought.

Thus, the appropriate target populations for a survey would encompass all lawyers throughout the common law world and all business people participating in economies which could be

described as "capitalist." The limited resources at the
disposal of the author dictated that such a large scale
investigation could not be mounted and it was decided to focus
on the North American subpopulations of these groups. Even
then practical considerations made it necessary to proceed on
the basis of an exploration of the feasibility of using survey
technique to accumulate relevant evidence rather than attempt
a statistically valid test of the implications of the thesis.

Therefore, several routes were taken to administer the survey
which, it was thought, might prove to be practical means of
access to the target North American populations. In Canada
the membership of the Canadian Bar Association represents a
large majority of the country's lawyers. Within this
organization there are local interest groups ("sections")
oriented to specific areas of practice including civil
litigation and business law. In the author's view, the
members of these sections in particular might be more likely
to respond to a survey of the type proposed. Accordingly, the
chairpersons of the business law and civil litigation sections
organized in Toronto, Edmonton, and Calgary were asked to
distribute the questionnaire by mail to their section members.
The Toronto correspondents were not enthusiastic concerning
the request, however the section chairs in Edmonton and
Calgary agreed to cooperate. As a result, approximately 350 questionnaires were mailed by the Canadian Bar Association to Calgary lawyers, and 125 to Edmonton practitioners. (The numbers reflect the fact that the largest section contacted was the Calgary business law group.) As another interest group likely to respond, the American Arbitration Association was also contacted and agreed to distribute 25 copies of the questionnaire to lawyers who had acted as arbitrators for that organization. Only 4 responses, however, were received from this mailing. A small number of responses (3) were obtained from questionnaires given to law students at Osgoode Hall Law School. Forty seven questionnaires (approximately a 10% response rate) were returned by Calgary and Edmonton lawyers.

The survey instrument was also sent by mail with a covering letter to 200 business people randomly selected from the Membership Directory of the Edmonton Chamber of Commerce. Sixty three questionnaires (approximately 30%) were returned by this group. Finally, the author arranged to administer the questionnaire at a regular meeting of a Toronto area service club at which 26 responses were collected from 32 persons present. The members of this organization were thought to have the same characteristics as those belonging to the Chamber of Commerce. For most groups contacted the response rates were low and the data collected do not justify the
application of statistical analytic techniques. The best response was achieved through the administration of the questionnaire in person to a group (the service club meeting) however it should also be noted that no follow-up either by mail or telephone was attempted of those who were contacted through the post. These observations should be taken into account in planning a replication of the survey.

In addition, particularly the group of lawyers contacted to participate in the survey cannot be regarded as a statistically representative sample of the target population of the study. This fact limited the scope of analysis upon, and conclusions which might be drawn from the data collected, but, it is thought, nevertheless allowed the author to gain an impression of the value of such a survey in the investigation of the questions raised in this thesis.

Few problems were encountered in recording the responses received. Some respondents noted on their questionnaires that the factual situations presented in questions 1 to 9 did not convey sufficient information to guide their choices, but most answered these questions nevertheless. Some respondents chose as the most important objective of the civil litigation system (the concluding part of question 14) one which they did not rank as the most important among the group of three in which
it was included in the first part of the question. Such responses are puzzling and no explanation has been generated for them. The data collected was tabulated by computer utilizing the SPSSX software program.

The Sample

Of the 50 responses received from lawyers, 52% categorized themselves as a "business lawyer, private practice," 30% as a "litigation lawyer, private practice," 12% as "in-house corporate counsel," and the remaining 6% as a "law student." Of the lawyer respondents, 32% were female and 68% male. The majority of business respondents (57.3%) described themselves as "owner-managers," the next largest group were "top managers" (25.8%), followed by "middle managers" (16.9%). Of the business group, only 10.2% were female.

Few of the lawyers had "no experience" of the civil litigation system (6%) as contrasted with the business group, 29.2% of whom reported not having participated in civil adjudication in any capacity. A majority of the lawyers (62%) had been involved in civil lawsuits or civil trials on six or more occasions while approximately the same proportion of business respondents reported such experience on one to five occasions. Almost all of the respondents were Canadians with only four
responses received from the American lawyer–arbitrators.

Description of Indexes

One way to investigate whether subjects of a survey show consistent preferences or attitudes is to construct indexes to which their responses can be related. An index reflects similar choices or responses to a number of different questions. Thus, if several hypothetical situations permit the choice of a mediator, an index can be constructed which measures the frequency (and strength) of an individual respondent's preference for such a procedure, and this measure can then be related to his or her membership in a group or other personal characteristics.

It was decided to analyze questions 1 to 9 of the survey (the hypothetical conflict situations followed by alternative responses) using indexes. The index scores for each respondent were then related to their occupation, experience of adjudication, and gender.

Construction of the indexes was by way of computerized summation of the measure of agreement or disagreement shown by respondents to the various alternatives presented in questions 1 to 9. In designing the indexes several alternatives
presented were omitted since they revealed little disagreement among all respondents (or significant levels of indecision).\footnote{These items were: 1.3 (overwhelming disagreement); 2.2 (disagreement); 2.3 (disagreement); 3.1 (agreement); 3.4 (disagreement); 5.1 (disagreement); 5.2 (agreement); 5.3 (disagree and undecided); 5.4 (agree); 6.2 (disagree and undecided); 7.2 (agree and undecided); and 9.4 (disagree).}

Indexes created were:

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Alternatives included</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Mediator&quot;</td>
<td>Preference for mediator</td>
<td>1.2, 3.2, 9.3</td>
</tr>
<tr>
<td>&quot;Negotiator&quot;</td>
<td>Prefer to negotiate</td>
<td>2.1, 4.2, 6.4</td>
</tr>
<tr>
<td>&quot;Litigato&quot;</td>
<td>Tendency to litigate</td>
<td>4.1, 7.3, 9.2</td>
</tr>
<tr>
<td>&quot;Problem-solver&quot;</td>
<td>Seeks &quot;creative&quot; solutions</td>
<td>2.4, 3.3, 4.4</td>
</tr>
<tr>
<td>&quot;Non-contentious&quot;</td>
<td>Avoids litigation</td>
<td>1.5, 2.5, 6.1</td>
</tr>
</tbody>
</table>

The use of such indexes should aid in seeking evidence relevant to the question whether preferences for alternative dispute resolution processes may be associated with occupational or gender groupings. Their reliability may be tested using statistical techniques where these may be properly employed. Although the data collected by the author did not warrant such analysis it should be reported that the
test incorporated in the SPSSX program when applied to the responses received did not show the described indexes to be statistically reliable.

Basic Results

Over 80% of all respondents indicated that the civil legal system of adjudication plays a "fairly," "very," or "extremely" important role in resolving conflicts in the area of business relationships.47 However, the lawyer and business groups differed considerably in their rankings of the four sets of objectives of the civil legal system of court adjudication which were presented in question 14 (see Table 1). The most notable divergences in ranking related to assessments of the relative importance of the goals of truth seeking and timeliness of decision making. For the lawyers, "arriving at the truth" was thought by a plurality (slightly over 40%) to be least important when compared with deciding cases based on legal principle and encouraging settlement of claims. Fifty six per cent (56.3%) of the business respondents, however, ranked truth-seeking as most important

47 The mean response for question 13.1 (business relationships) was 3.37 where 5 represents "extremely important." (The values shown in the questionnaire were re coded for the purpose of statistical analysis as: 1=5, 2=4, 3=3, 4=2, 5=1, and 6=0.)
of the three. Similarly, while the largest number of lawyers (47.9%) ranked "decide cases in a reasonable time" as the least important goal of adjudication compared with predictability and providing guidance for the future, almost seventy per cent (69.8%) of the business persons considered it as most important. Majorities of both lawyer (58.3%) and business (64.4%) respondents rated "use past cases to guide decisions" as least important of the three goals in its group. Finally, in the rankings of the last set presented the lawyers displayed a concern for procedure by putting public scrutiny of the courts in first place while the business people rated the use of experts in decision making most highly and thus it seems placed an emphasis on objective accuracy of result.

Table 1: Ranking of Goals of the Civil Adjudication System Within Four Sets

<table>
<thead>
<tr>
<th>Lawyer Ranking</th>
<th>Business Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decide cases based on legal principle.............</td>
<td>2</td>
</tr>
<tr>
<td>Encourage settlement of claims.....................</td>
<td>1</td>
</tr>
<tr>
<td>Arrive at the truth..................................</td>
<td>3</td>
</tr>
<tr>
<td>Employ logic in decision making....................</td>
<td>2</td>
</tr>
<tr>
<td>Use past cases to guide decisions...................</td>
<td>3</td>
</tr>
<tr>
<td>Allow full discussion of opposing arguments........</td>
<td>1</td>
</tr>
<tr>
<td>Decide cases in a reasonable time....................</td>
<td>3</td>
</tr>
<tr>
<td>Provide a predictable result........................</td>
<td>2</td>
</tr>
<tr>
<td>Give guidance in planning future actions............</td>
<td>1</td>
</tr>
<tr>
<td>Be open to public view................................</td>
<td>1</td>
</tr>
<tr>
<td>Schedule proceedings to suit parties................</td>
<td>3</td>
</tr>
<tr>
<td>Use experts where needed for decision...............</td>
<td>2</td>
</tr>
</tbody>
</table>
"Encourage settlement of claims" was the objective chosen by the largest group of lawyers (27.1%) as the single most important goal of the civil litigation system from among the twelve alternatives presented (see Table 2). A slightly smaller number, 22.9%, chose "decide cases based on legal principle" as the most important goal for them. There was a high level of divergence among lawyers as to the second most important goal, with a small plurality (16.7%) favouring full discussion of opposing arguments (see Table 3).
Table 2: Lawyers' Most Important Objective of Adjudication

<table>
<thead>
<tr>
<th>Objective</th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cum Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle</td>
<td>11</td>
<td>22.0</td>
<td>22.9</td>
<td></td>
</tr>
<tr>
<td>Settlement</td>
<td>13</td>
<td>26.0</td>
<td>27.1</td>
<td>50.0</td>
</tr>
<tr>
<td>Truth</td>
<td>9</td>
<td>18.0</td>
<td>18.8</td>
<td>68.8</td>
</tr>
<tr>
<td>Logic</td>
<td>3</td>
<td>6.0</td>
<td>6.3</td>
<td>75.0</td>
</tr>
<tr>
<td>Precedent</td>
<td>1</td>
<td>2.0</td>
<td>2.1</td>
<td>77.1</td>
</tr>
<tr>
<td>Debate</td>
<td>2</td>
<td>4.0</td>
<td>4.2</td>
<td>81.3</td>
</tr>
<tr>
<td>Prediction</td>
<td>3</td>
<td>6.0</td>
<td>6.3</td>
<td>87.5</td>
</tr>
<tr>
<td>Guidance</td>
<td>5</td>
<td>10.0</td>
<td>10.4</td>
<td>97.9</td>
</tr>
<tr>
<td>Scrutiny</td>
<td>1</td>
<td>2.0</td>
<td>2.1</td>
<td>100.0</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>4.0</td>
<td></td>
<td>Missing</td>
</tr>
<tr>
<td>Total</td>
<td>50</td>
<td>100.0</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>

* Note: Objectives are listed in the order in which they are presented in the questionnaire.
Table 3: Lawyers' Second Most Important Objective of Adjudication

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Percent</th>
<th>Cum Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRINCIPLE</td>
<td>4</td>
<td>8.0</td>
<td>8.3</td>
<td>8.3</td>
</tr>
<tr>
<td>SETTLEMENT</td>
<td>6</td>
<td>12.0</td>
<td>12.5</td>
<td>20.8</td>
</tr>
<tr>
<td>TRUTH</td>
<td>4</td>
<td>8.0</td>
<td>8.3</td>
<td>29.2</td>
</tr>
<tr>
<td>LOGIC</td>
<td>7</td>
<td>14.0</td>
<td>14.6</td>
<td>45.6</td>
</tr>
<tr>
<td>DEBATE</td>
<td>8</td>
<td>16.0</td>
<td>16.7</td>
<td>60.4</td>
</tr>
<tr>
<td>SPEED</td>
<td>4</td>
<td>8.0</td>
<td>8.3</td>
<td>68.6</td>
</tr>
<tr>
<td>PREDICTION</td>
<td>7</td>
<td>14.0</td>
<td>14.6</td>
<td>83.3</td>
</tr>
<tr>
<td>GUIDANCE</td>
<td>5</td>
<td>10.0</td>
<td>10.4</td>
<td>93.8</td>
</tr>
<tr>
<td>SCRUTINY</td>
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<td>4.0</td>
<td>4.2</td>
<td>97.9</td>
</tr>
<tr>
<td>EXPERTISE</td>
<td>1</td>
<td>2.0</td>
<td>2.1</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Total: 50 100.0 100.0

* Note: Objectives are listed in the order in which they are presented in the questionnaire.
For the largest number of business persons (39.3%), arriving at the truth was the most important goal of civil adjudication (see Table 4). Almost twenty three per cent of these respondents chose "employ logic in decision making" as the second most important goal with lesser numbers split among speed in decision making and encouraging settlement (see Table 5).

If sufficient proportions (usually considered to be 60%) of properly representative samples of the target populations had responded to such a survey statistical analysis of the resulting data would have been justified (including application of the chi-square test). Such techniques would assist the researcher in determining whether there are significant linkages between rankings of the objectives of civil litigation and the occupations of the respondents.

48 The chi-square test of significance compares the observed frequencies of two variables and their expected frequency if they are unrelated to each other. Results of this test are usually reported in three numbers: the first, the raw chi-square result ($x^2$), the second, the degrees of freedom, or number of categories of possible response (df), and finally the calculation of probability ($p$) which indicates the likelihood of the observed frequencies occurring by chance - the smaller the probability number, the more likely there is a connection between the variables. Social science convention attributes reliable significance only to chi-square results in which the probability ($p$) is less than one in twenty ($p<.05$).
Table 4: Business Persons' Most Important Objective of Adjudication*

<table>
<thead>
<tr>
<th>Objective</th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cum Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle</td>
<td>9</td>
<td>10.1</td>
<td>10.7</td>
<td>10.7</td>
</tr>
<tr>
<td>Settlement</td>
<td>19</td>
<td>21.3</td>
<td>22.6</td>
<td>33.3</td>
</tr>
<tr>
<td>Truth</td>
<td>33</td>
<td>37.1</td>
<td>39.3</td>
<td>72.6</td>
</tr>
<tr>
<td>Logic</td>
<td>10</td>
<td>11.2</td>
<td>11.9</td>
<td>84.5</td>
</tr>
<tr>
<td>Precedent</td>
<td>1</td>
<td>1.1</td>
<td>1.2</td>
<td>85.7</td>
</tr>
<tr>
<td>Debate</td>
<td>4</td>
<td>4.5</td>
<td>4.8</td>
<td>90.5</td>
</tr>
<tr>
<td>Speed</td>
<td>2</td>
<td>2.2</td>
<td>2.4</td>
<td>92.9</td>
</tr>
<tr>
<td>Prediction</td>
<td>1</td>
<td>1.1</td>
<td>1.2</td>
<td>94.0</td>
</tr>
<tr>
<td>Guidance</td>
<td>3</td>
<td>3.4</td>
<td>3.6</td>
<td>97.6</td>
</tr>
<tr>
<td>Expertise</td>
<td>2</td>
<td>2.2</td>
<td>2.4</td>
<td>100.0</td>
</tr>
<tr>
<td>Missing</td>
<td>5</td>
<td>5.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>89</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

I

**Principle**

**Settlement**

**Truth**

**Logic**

**Precedent**

**Debate**

**Speed**

**Prediction**

**Guidance**

**Expertise**

---

0 8 16 24 32 40

Frequency

---

* Note: Objectives are listed in the order in which they are presented in the questionnaire.
Table 5: Business Persons' Second Most Important Objective of Adjudication

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cum Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRINCIPLE</td>
<td>5</td>
<td>5.6</td>
<td>6.0</td>
</tr>
<tr>
<td>SETTLEMENT</td>
<td>12</td>
<td>13.5</td>
<td>14.5</td>
</tr>
<tr>
<td>TRUTH</td>
<td>11</td>
<td>12.4</td>
<td>13.3</td>
</tr>
<tr>
<td>LOGIC</td>
<td>19</td>
<td>21.3</td>
<td>22.9</td>
</tr>
<tr>
<td>DEBATE</td>
<td>7</td>
<td>7.9</td>
<td>8.4</td>
</tr>
<tr>
<td>SPEED</td>
<td>14</td>
<td>15.7</td>
<td>16.9</td>
</tr>
<tr>
<td>PREDICTION</td>
<td>2</td>
<td>2.2</td>
<td>2.4</td>
</tr>
<tr>
<td>GUIDANCE</td>
<td>5</td>
<td>5.6</td>
<td>6.0</td>
</tr>
<tr>
<td>SCRUTINY</td>
<td>3</td>
<td>3.4</td>
<td>3.6</td>
</tr>
<tr>
<td>EXPERTISE</td>
<td>5</td>
<td>5.6</td>
<td>6.0</td>
</tr>
<tr>
<td>Missing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>89</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

* Note: Objectives are listed in the order in which they are presented in the questionnaire.
Investigation of possible relationships between gender and the index categories using statistical analysis would also help to uncover any significant linkages among these variables. It is worthy of note that while 35.8% of the men surveyed chose the goal of arriving at the truth as the most important for the litigation system, less than half that proportion of women did so (16.7%). The same percentage (16.7%) of females chose full discussion of opposing arguments as the most important objective for them, while this ranked first for only 1.8% of the male respondents. These results have some bearing on the question whether attitudes toward adjudication and preferences for alternatives to it are strongly influenced by gender, and the author's hypothesis that cultural influences associated with occupation are a more important determinant.

The responses to question 2, however, which involved the most highly charged situation in which men and women were in conflict (possible sexual harassment), raise the interesting possibility of complex interaction between the influences of gender and occupation. Female lawyers surveyed were more inclined than male lawyers to favour "a serious private chat" (alternative 2.1) with the fellow-employee concerning his conduct. However, the same pattern was not apparent in the responses of the business people, where almost 43% of the females "strongly disagreed" with this course of action, a
response echoing that of the males in this occupational group. Due to the limitations of the data collected little significance can be attached to this observation other than to suggest it warrants further investigation. Examination of the responses to the other alternative courses of action presented in question 2 appeared to show no marked gender influence.

Evaluation

It is now possible to comment on the data collected in relation to the hypothesis that lawyers and business people display different attitudes toward litigation and its alternatives which are reflective of the occupational subcultures which surround them. The differences between the respondent lawyers and business people in their ranking of alternative goals of the civil litigation system have already been noted above (Tables 1 to 5). Examination of the index results, however, did not reveal any strong differentiation between these occupational groups except in the category "noncontentious" in which the business persons scored higher. The lawyers' mean score on this index was 6.28 while the business persons' was 7.79 (the highest score observed was 12). This finding is worthy of note, but hardly surprising, and does not reveal much about the expectations of the courts held by the two groups of respondents except perhaps a
generalized antipathy to them on the part of business people.

As has been noted above in describing the construction of the index categories, a number of the alternatives presented in questions 1 to 9 of the questionnaire elicited large "undecided" responses. This was the case for some of those hypotheticals which were expected to most clearly illuminate the values and attitudes of the respondents. For instance, there were large numbers of both business (21.4%) and lawyer (32.0%) respondents who were "undecided" about using a computer program (question 7.1) to decide the value of property in a matrimonial dispute. Almost equal numbers of business people (32.1%) and lawyers (32.0%) either agreed or strongly agreed with this alternative, although it should be reported that of the remainder of respondents more of the business group (46.4%) disagreed or strongly disagreed with the alternative than was the case with the lawyers (36%). In response to the next item in the questionnaire, proposing an expert valuator to resolve the controversy, almost identical numbers of the two groups (88%) either agreed or strongly agreed, and the numbers of undecided responses were small.

On the other hand, although again the number of undecided responses was high for both groups (over 20%), the remaining responses to question 4.3 (which offered the alternative of
promoting ambitious employees who might leave and enter into competition) reveal that a higher proportion of the lawyers agreed with this approach. Separate consideration of the responses to question 5.2 was also suggestive of a difference in the thinking of the occupational groups. The lawyers were more inclined to question the cost of seeking injunctive relief from the courts than were the business people. A similar finding was made with respect to question 6.4 which presented the possibility of negotiating with a former employee who was now in competition with his past employer. It appeared the lawyers were more inclined to favour this approach and the result was the same whether the undecided responses were included, or disregarded. These results are consistent with the view that lawyers are more pragmatic regarding legal rights and inclined to compromise in situations of legal conflict than commonly may have been thought.

The problem, however, remains of explaining large proportions of undecided responses. An answer advanced by the author reflects on the questionnaire design. It is that asking respondents to assume the roles of disputants portrayed in the hypothetical situations meant the lawyers were required to adopt what would normally be the "client's point of view" while business persons were not required to make such a
drastic change in perspective. In other words, the lawyers were being asked not to give their legal advice, but to take up the role of disputing party, and this may well have led to a good deal of hesitation and indecision on their part. Such an explanation may point to the need for separate survey instruments to be designed for the two groups, yet focusing on the same hypothetical conflicts.

Further difficulty was encountered in devising questions which might reveal differences between occupational groups (or females and males) in their preferences for some of the common alternatives to litigation. As noted above, trial analysis of the data collected in relation to the indexes seemed to indicate a lack of reliability of these constructs in defining categories of respondent such as "mediator" and "negotiator." It therefore remains an open question whether people may discriminate in their choice of dispute resolution process according to their individual evaluations of salient elements of the conflict situation. Discovering the key factors governing such choices must be left to another time.

The results reported on here, taken on the whole, are considered to support the view that a survey of a representative sample of lawyers and business people may shed light on the attitudes and beliefs held by each group toward
the legal resolution of conflict.

The hypothesis that business people look to the legal system for objective "justice" based on the uncovering of truth and for decision making which emphasizes the use of logic seems to remain plausible in the light of the limited data collected. This is an attitude which may be described as "scientific" and is consistent with a disposition to welcome "expert" assistance in responding to conflict.

On the other hand, it seems that the lawyer respondents expressed a higher regard for "subjective" elements in the legal process such as the possibility of negotiated settlement, and a reference for the dialectic of argument rather than "scientific" truth-seeking as a method to resolve conflict.

Discussion

The dispute resolution survey seems to be a useful research tool for investigating aspects of the "legal" and "business" sub-cultures. A survey by means of a questionnaire is capable of generating valuable evidence bearing on the existence of relatively well-defined values, beliefs, and attitudes toward the traditional legal system of dispute resolution and
alternative processes. Aubert's suggestion that at the present time the "scientific" model of decision making appears to be ascendant for some sector of society (business persons) seems to ring true. However, if judges continue to be valued for their "expertise" in addressing all the relevant facts relating to conflicts as found in earlier research,\(^49\) then traditional adjudication does not appear to be in jeopardy of abandonment. Further, it seems possible that attitudes concerning the role of law in dispute resolution are not strongly affected by characteristics such as gender except perhaps in unusually salient situations.

The question whether "legal" or "business" sub-cultures include any consistent preferences for adjudication or its alternatives in recurrent disputing situations may, it seems, only be answered by the use of a different experimental technique or perhaps by analysis of records of the disputing paths taken in a variety of conflicts.

Concluding Remarks

The results of the dispute resolution survey conducted by the author point toward the feasibility and usefulness of direct

\(^{49}\) See Gallup, *Attitudes*, and Gibson, "Understanding."
measurement of the values, attitudes, and beliefs of lawyers and their business clients concerning processes of dispute resolution. Further research using this technique should contribute to a better understanding of the perceived role of law and courts in our society.

It became clear during the course of this research that the attempt to speak to two very different groups of respondents involved some sacrifice of clarity in language. For instance, the term "civil legal system of court adjudication" used in questions 13 and 14 of the survey instrument was intended as a broad description of the process of civil litigation, but may have been more narrowly understood by some respondents. Also, as has been noted, asking lawyers to make choices as principals rather than as agents may have been confusing to them. Refinement of the questionnaire, taking these observations into account, and replication of the survey with representative samples of the business and legal populations is recommended.
CHAPTER VI: CONCLUSION

The historical record sketched in Chapters II, III, and IV supports the thesis advanced here that the paradigm of dispute resolution in law has, from time to time been influenced by competing models of problem solving generated in the field of economics and brought to bear on the law through the demands of disputing business people. The results of the dispute resolution survey reported on in Chapter V corroborate the suggestion that a tension continues to exist between the expectations of business and legal actors concerning the legal system of civil adjudication. As a consequence, further change in legal institutions in response to present demands of this influential clientele is to be expected.

Legal decisions are increasingly liable to be viewed as "technical in nature," but the argument is made here that valuable elements of the paradigm of legal decision making ought not to be discarded in favor of allegedly objective "expertise" in problem solving. For instance, Alasdair MacIntyre's view of the role and value of traditions and continuing dialectic between them has a bearing on legal analysis which once counted this as the only legitimate method of analysis of legal problems. As MacIntyre has shown, traditional approaches to the solution of social conflict draw
heavily on "narrative" which is another description of legal precedent. The value in this accumulated history has been well put by Howard Fields:

Narrative may be thought of as stories which society tells about itself at any given moment in time. On a more tangible level, narrative may be considered the basis of the shared expectations each member of a culture has about life within society. As narrative makes itself apparent in society, it often emerges as "custom." It is precisely these stories about shared expectations which are the force behind law, both in formal and informal legal processes.

Narrative affects the shape which law takes in a society. In fact, no matter how hard rational humans try to logically interpret and enforce law, we are inextricably tied to the parameters established by societal narrative.\(^1\)

The approach to problem solving via historical categories of legal concepts may offer the best "heuristic" available to humanity in "framing" problems which are "ill-structured." It may not prove possible to simulate this technique in machines despite the optimism and efforts of those such as Herbert Simon.\(^2\)


\(^2\) For an assessment of the impact of the effect of "framing" of decisions on conceptions of "rationality" in economics, see Amos Tversky and Daniel Kahneman, "Rational Choice and the Framing of Decisions," in The Behavioral Foundations of Economic Theory: Proceedings of a Conference at
The role of logic in legal dispute resolution has been assured by the influence of science on all facets of human endeavour, yet it cannot be considered as sufficient in itself. As the philosopher John Dewey cautioned when commenting on Holmes's statement that "the life of the law has not been logic; it has been experience" -

...there are different logics in use. One of these, the one which had greatest historic currency and exercised greatest influence on legal decisions, is that of the syllogism. To this logic the strictures of Justice Holmes apply in full force. For it purports to be a logic of rigid demonstration, not of search and discovery. It claims to be a logic of fixed forms, rather than of methods of reaching intelligent decisions in concrete situations, or of methods employed in adjusting disputed issues in behalf of the public and enduring interest.

Economists have become aware of the importance of recent psychological research into decision making and this knowledge

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3 For instance, researchers in the field of artificial intelligence and law have concluded that "although logic is a component of most legal arguments, it fails to provide a natural framework for representing the overall processes of legal analysis and argumentation. Donald H. Berman and Carole D. Hafner, "Indeterminacy: A Challenge to Logic-based Models of Legal Reasoning," Yearbook of Law Computers and Technology, 3 (1987): 1.

is making itself felt in the business world. However, perceptive observers caution against the adoption of a monolithic model of rational problem solving:

Our own prescription is to recognize that both economics and psychology provide different metaphors for studying complex phenomena. However, whereas each metaphor illuminates some aspects of decision making, it is necessarily limited. Thus more can be gained by viewing the world from the perspective of multiple metaphors. To this I add that we should not lose sight of the metaphors embodied in traditional legal methods of decision making. Nevertheless, if legal institutions are to retain the regard of the public for "reaching intelligent decisions" they must make use of all available techniques of problem solving while not rejecting the subjectivity through which human needs and desires can be communicated and understood. Legal professionals, therefore, must critically evaluate a renewed demand for objective "justice" which may reflect a view of decision making unique to those "steering media" of money and power of which Habermas warns us.

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6 Hogarth and Reder, "Editors' Comments," S201.
Competition from a modern "mechanistic" paradigm of rational problem solving was recognized as early as 1964 by Julius Stone:

Growing behaviouralist techniques and enthusiasms will require from lawyers both receptiveness of what is useful, and also caution, firmness, and patience in pointing out those dangers to legal institutions which non-lawyers may overlook in the drive to bring quantitative methods and devices to bear upon them.  

Another legal scholar has described the question posed by the modern tension between legal institutions and material forces in society in terms of Habermas's concepts:

Thus the central problem in upholding the rationality of life is to organize the law in such a way that it acquires the institutional means to introduce forms of moral reasoning into the spheres regulated by power and money. Law must develop institutional forms that bind systemic processes to the mechanism of legal reasoning.

Finally, speaking of the influence of economics on law, Thomas Heller also warned the legal profession against too great a reliance on economic methods:

The proper use of economics can proceed only within an ongoing process of moral reappraisal. Lawyers must be prepared to play a specialized role in framing and expressing moral arguments beyond the

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competence or pretense of economic theory....

If the reconstruction of a non-discretionary legal order leads toward the philosophy of objective values and the formation of collective norms, there is good reason to fear.\(^9\)

The challenge, then as seen by the author, is to preserve a semi-autonomous field of reasoning for legal institutions within which they may serve general, and not merely particularistic, human interests.

APPENDIX: DISPUTE RESOLUTION SURVEY QUESTIONNAIRE

DISPUTE RESOLUTION SURVEY

PLEASE RETURN TO:

A. M. Zariiski
Osgoode Hall Law School
York University
4700 Keele Street
North York, Ontario
M3J 1P3

or FAX:
(416) 736-5736

PART I: CONFLICT SITUATIONS

Please indicate your measure of agreement or disagreement with each of the possibilities following the situations described below by CIRCLING A NUMBER from 1 to 5.

1. One day Sally, the office manager, discovered that the company car had been dented and scraped on the side where Harry, another employee, usually parked and she thought she could see traces of paint that seemed to match the colour of Harry's vehicle. When she questioned Harry he denied he had damaged the car. The estimated cost of repair is $2,600.00.

   Strongly Agree  Agree  Undecided  Disagree  Strongly Disagree
   1.............2........3.............4.............5

1.1 Sally should take her concern to the company president and ask him to talk to Harry.

1.2 Sally should ask her boss to arrange a meeting between Harry and her and assist them in finding some solution.

1.3 A lawsuit by the company seems to be the only course open.

1.4 After having the car examined by a collision expert she should again confront Harry with the evidence.

1.5 Since she has no definite proof, she should have the car repaired and forget her suspicions.

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2. At the office Christmas party, after a few drinks, everyone was encouraged to make traditional use of the mistletoe. Alice, a salesperson, was given a kiss by Henry, another employee, and she feels it was overly long and not encouraged on her part.

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2.1 Alice should have a serious private chat with Henry.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2.2 Alice should speak to the staff lawyer and lay a complaint.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2.3 The Human Rights Commission is the place for Alice to take her concern.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2.4 The office manager should be asked to put an anti-harassment information program into effect.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2.5 Alice should ignore it unless something else occurs on Henry's part.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

3. Fred and June sell the same product line for a manufacturer. They work at adjacent desks. On several occasions recently Fred has telephoned some prospective customers to make appointments and found that June has already spoken to them. He also has noted that some of the notes in his desk drawer have been rearranged. Fred believes June has been poaching his prospects.

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3.1 Fred should get a lock on his desk.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3.2 The branch manager should be asked to mediate between them.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3.3 Fred should suggest to June that they form a selling team.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3.4 Fred should advise the branch manager he will resign unless disciplinary action is taken.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1..................2........3........4........5</td>
</tr>
</tbody>
</table>
4. Shirley and Phil are quite successful in sales and are seriously
considering leaving the company where they work to open their own firm
distributing competing products. Their boss is aware of this and wonders
what to do.

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

4.1 The company should prepare for legal proceedings
to stop solicitation of customers by
the two. 1 2 3 4 5

4.2 Their boss should try and talk
them out of any plans to contact
customers. 1 2 3 4 5

4.3 Their boss should consider
offering to promote the
two. 1 2 3 4 5

4.4 The company should consider the value of
an independent distributor and negotiate with
them. 1 2 3 4 5

5. Larry, a salesperson, leaves his employer and goes to work for a
competing manufacturer at a much higher salary. His former manager suspects
he will be trying to lure the company's customers away. The manager
therefore consults the company's staff lawyer who indicates it may be
difficult to prevent this because the court will first have to decide what
is "reasonable" in the circumstances. The company then hires a well-known
lawyer in private practice who assures the manager it will be straightforward
to get an injunction to stop Larry. The manager should:

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

5.1 Fire the staff
lawyer. 1 2 3 4 5

5.2 Ask the outside lawyer
the cost of proceeding
in court. 1 2 3 4 5

5.3 Write to his friend in the government and
suggest a new law to take care of such
situations. 1 2 3 4 5

5.4 Ask for a meeting with
Larry to discuss his
intentions. 1 2 3 4 5
6. Larry leaves as in 5 above and the manager decides to sue for an injunction. The company loses before the first judge but the outside lawyer indicates the Appeal Court may be willing to consider a change in the existing legal principles in such a case and create a new precedent. The manager should:

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree</td>
<td>1.</td>
<td>2.</td>
</tr>
</tbody>
</table>

6.1 Give up and get on with business.
6.2 Go for an appeal.
6.3 Get another opinion.
6.4 Try to negotiate with Larry.
6.5 Fire the outside lawyer.

7. An employee, Al, goes through a divorce where a dispute arises over the value of his interest in the company's employee share purchase plan for the purpose of division of property with his wife. (The company is private and the shares are not listed on any stock exchange.) Do you agree with the following proposals to solve this problem?

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree</td>
<td>1.</td>
<td>2.</td>
</tr>
</tbody>
</table>

7.1 Using a computer program put out by a national accounting firm to calculate a figure.
7.2 Jointly hiring an expert valuator and accepting the expert's conclusion.
7.3 Taking the matter to trial in court.
7.4 Settling on a value half way between the estimates of Al and his wife.
8. The company which employs Jill and Bob is sold to a foreign corporation which terminates their employment. The new owners propose the following alternatives to deal with their claims for compensation for wrongful dismissal. What would you think of them if you were Jill or Bob?

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

8.1 Submitting to the decision of a local respected arbitrator with no experience in employment law.  
8.2 Proceeding with a lawsuit.  
8.3 Agreeing to arbitration by a noted university professor of labour law who has no arbitration experience.  
8.4 Hiring a recently retired judge to hear and decide the claims in private.

9. Nancy's father, a widower, dies and by his will the shares in his company (90% of the voting stock being the bulk of his estate) are given equally to her father's "companion" and a notorious evangelist. Nancy (who has 10% of the voting shares) is convinced that there was pressure on her father to make both these gifts when he executed his last will in the hospital and considers challenging its legality. Until the question of the validity of the will is decided the management of the company is in doubt and many necessary business decisions are being postponed. What do you think of the following possible courses of action open to Nancy?

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>Undecided</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

9.1 Accepting the evangelist's offer to be bought out over time in exchange for giving her immediate management control.  
9.2 Proceeding with a lawsuit over the will.  
9.3 Agreeing to allow a family friend to mediate between the three parties.  
9.4 Taking the story to the newspapers in order to discredit the evangelist and embarrass the "companion".
PART IX: GENERAL QUESTIONS

10. Which best describes your present status? (CIRCLE ONE ONLY)

- Business person, owner-manager
- Business person, middle management
- Business person, top management
- Business lawyer, private practice
- Litigation lawyer, private practice
- In-house corporate counsel
- Business administration student
- Law student

11. What is your gender? (CIRCLE ONE CODE)

- Female
- Male

12. What personal experience do you have of a civil lawsuit, or civil trial, whether as a party, a witness, representing a party, or as a mere observer? (CIRCLE ONE CODE)

- No experience
- 1 - 5 occasions
- 6 or more occasions

13. How important a role do you think the civil legal system of court adjudication plays in resolving conflicts which may arise in the following areas? (CIRCLE ONE CODE)

<table>
<thead>
<tr>
<th>Area</th>
<th>Extremely Important</th>
<th>Very Important</th>
<th>Fairly Important</th>
<th>Slightly Important</th>
<th>Not At All Important</th>
<th>Not Sure</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.1 Business relations</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>13.2 Families</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>13.3 Consumer purchases</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>13.4 Environmental</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>13.5 Employment</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>13.6 Education</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>13.7 Car accidents</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
</tbody>
</table>
14. The civil legal system of court adjudication attempts to fulfil a variety of objectives. Please indicate your assessment of the relative importance of the following goals by ordering each set of three using the numbers 1, 2, and 3 where these numbers stand for the following:

1... the most important objective of the three
2... the next most important objective
3... the least important objective of the three

<table>
<thead>
<tr>
<th>14.1</th>
<th>Decide cases based on legal principle...........</th>
<th>14.2</th>
<th>Encourage settlement of claims................</th>
<th>14.3</th>
<th>Arrive at the truth..........................</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.4</td>
<td>Employ logic in decision making..................</td>
<td>14.5</td>
<td>Use past cases to guide decisions.............</td>
<td>14.6</td>
<td>Allow full discussion of opposing arguments..</td>
</tr>
<tr>
<td>14.7</td>
<td>Decide cases in a reasonable time...............</td>
<td>14.8</td>
<td>Provide a predictable result...................</td>
<td>14.9</td>
<td>Give guidance in planning future actions.....</td>
</tr>
<tr>
<td>14.10</td>
<td>Be open to public view................................</td>
<td>14.11</td>
<td>Schedule proceedings to suit parties..........</td>
<td>14.12</td>
<td>Use experts where needed for decision..........</td>
</tr>
</tbody>
</table>

Looking back on all of the objectives listed above, which do you think are the two most important? (FILL IN TWO NUMBERS FROM ABOVE LIST)

The most important objective is: 14.____
The second most important objective is: 14.____

THANK YOU FOR YOUR COOPERATION!
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